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DEPARTMENT OF JUSTICE



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Alameda County Board of Supervisors
1221 Oak Street, Suite 536
Oakland, CA 94612

RE: Appeal by the Californians for Renewable Energy, Inc., the Center for Biological Diversity and the Golden Gate Audubon Society Regarding the Conditional Use Permits for the Maintenance and Operations of Existing Wind Turbines in the Altamont Pass Wind Resources Area

Dear Honorable Board Members:

We submit the following comments for your consideration in determining whether, and on what conditions, to renew the conditional use permits (CUPs) for the wind turbines currently operating in the Alameda County region of the Altamont Pass Wind Resources Area (APWRA). We appreciate your efforts to ensure that the CUPs, if renewed, will be conditioned to reduce the ongoing bird mortalities at the APWRA.

At issue are the steps government should take to balance protection of bird species, particularly raptors, and energy production. Scientific research sponsored by the California Energy Commission (CEC) has shown that the APWRA turbines kill between 1,766-4,721 birds annually. Of that number, between 881-1,300 are raptors such as golden eagles, hawks, falcons and owls. Since the project began operation, the CEC estimates that between 17,000-26,000 raptors have been killed by the turbines. The APWRA is an important raptor area because it has high densities of breeding populations, and is both a bird wintering area and a major migratory route. To date, the wind companies have implemented few mitigation measures to reduce these ongoing bird mortalities. Yet, there are ways technically and economically to continue to operate the turbines and at the same time significantly reduce their impacts.

As background, our office and the Alameda County District Attorney's Office became involved in these issues at the invitation of Judge Ronald Sabraw of the Alameda County Superior Court in relation to a suit filed by one of the appellants, *Center for Biological Diversity v. FPL Group*, Case No. RG04183113. As part of our investigation to decide whether to intervene in that lawsuit, we met with the appellants, Chris Bazar of the Alameda County Planning Department, and twice with representatives of the wind companies. We have been closely coordinating this effort with the U.S. Attorney's Office and the Alameda County District

Attorney's Office. We also have consulted with an expert studying avian mortality at the APWRA, Shawn Smallwood, as well as staff at the CEC, Linda Spiegel, and staff at the California Department of Fish and Game and the U.S. Fish and Wildlife Service. From the outset, it became clear that the current operation of the turbines at the APWRA presents a significant problem with extremely high levels of bird mortality. After our most recent meeting with the wind companies on June 23, 2005, we have determined that the current proposal from the wind companies in the working group process does not do enough to reduce bird mortalities, and is deficient in a number of respects, as outlined below.

The wind companies propose to reduce avian mortality by certain percentages in the first three years (25% in year one, 30% in year two, and 35% in year three), through implementation of a partial winter shutdown and a permanent shutdown of 2% of the high risk turbines (about 100 turbines). Not only are these low target goals, but the measures proposed by the companies to accomplish the goals lack scientifically-sound study designs to ensure reliable bird mortality data.

The companies also have proposed to monitor only some of the turbines repowered to date to determine whether to repower additional turbines beginning in year four. The companies will only "consider" the removal of high risk turbines in developing repowering projects. In year four, if they do not repower, they will aim for a 40% in reduction of bird mortalities in year four and a 45% in reduction in year five, again low target goals. The companies will await the completion of the County's environmental impact report (EIR) to identify off-site mitigation, as well as other specific measures to mitigate avian mortality. As indicated in their February 2005 plan, all performance standards, goals and mitigation measures can be changed, and the wind companies can "opt out" of the plan due to an unacceptable financial hardship. Monitoring is contingent on the companies obtaining CEC funding. The companies have retrofitted some electrical lines, and will consider retrofitting additional lines only when problems arise. They will move the derelict turbines and the rock piles, but it is unclear when this will occur.

In our view, this proposal does not go far enough in mitigating the serious ongoing impacts of these operations. Relying on the best available science resulting from years of study sponsored by the CEC and others, we have concluded that the mitigation measures proposed in the CEC's August 2004 consultant report and the Smallwood and Spiegel January and June 2005 assessments present the best opportunity to reduce avian mortality, while at the same allowing for the continued economic viability of the production of wind energy at the APWRA.¹ Specifically, we recommend inclusion of the following as conditions to the permit, which we have previously communicated to the wind companies:

1. Beginning in year one, permanently shut down the turbines in Tiers 1-3 (as

¹We base our statement of economic viability upon a review of publicly-available documents in the absence of the companies providing financial information, which we have requested several times.

identified in the June 2005 Smallwood and Spiegel assessment) which are the worst offending turbines (this amounts to about 300 turbines). In combination with this, seasonally shut down 100% of the existing turbines in the winter months (November 15 to February 28) in all years. This period is at a time of high bird use but low energy demand. Based on an assessment by Smallwood, these shutdowns will achieve an estimated 50% reduction in raptor mortality, but will impact power production by only 17.5%.

2. The EIR, which is to be finalized by the end of year three, should assess the environmental impacts of both repowering and the existing facilities. A range of mitigation measures should be explored in addition to repowering, especially considering that if repowering occurs it will be phased in over the remaining ten years of the permits.
3. In year four, repower by removing high risk turbines or implement further mitigation measures to achieve an 85% reduction in mortality by year six.
4. Beginning immediately, implement other measures identified in the CEC August 2004 report to the extent that they have not already been adopted. These include: retrofitting all electrical lines, removing derelict turbines, and relocating rock piles away from the turbines.
5. Immediately implement off-site mitigation. The off-site mitigation must be sufficient to compensate for past harm as well as for future mortality associated with the existing and repowered turbines. Off-site mitigation could be achieved through purchase of easements to protect bird habitat for breeding and foraging, to compensate for the bird mortality that has gone unchecked for the last twenty years.
6. The wind companies should be required to pay for a neutral expert, to be selected by the County, to sit on the scientific review panel and monitoring team and to advise the County.
7. Monitoring, to be funded by the wind companies, should be required in all years and should consist of a statistically-defensible design that can reliably detect changes.
8. Finally, there should be no opt-out provisions in the permit.

We also have some concerns about the County's compliance with the California Environmental Quality Act (CEQA). We understand that the County is not preparing an EIR concurrent with the proposed renewal of the CUPs, but rather that it will prepare an EIR over the next three years. Since the impacts of the existing facilities at the APWRA have not previously

been analyzed and circulated for public review and comment in a prior EIR, we have some concerns about this approach. However, if the proposed EIR analyzes both the impacts of repowering and the impacts from the existing wind turbines and other facilities, with a goal of identifying a range of potential alternative mitigation measures to address all of those impacts, this would go a long way towards alleviating our concerns.

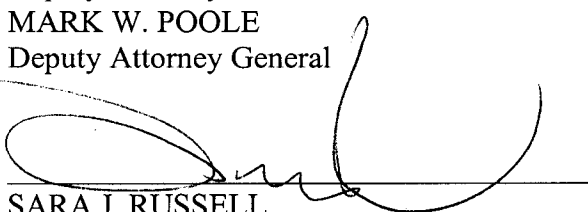
Finally, we have some concerns that the decision to issue the CUPs may be made without the benefit of even basic financial data reflecting the various wind companies' assertions of inability to pay for mitigation. We have been informed that this financial information has not been provided to the County. As part of our ongoing investigation of this matter, we have requested audited financial statements, financial filings with government regulators and other financial information on several occasions. However, to date no such information has been provided. Our concern is that the County may approve the CUPs and require less mitigation than that proposed by the CEC August 2004 report and the subsequent assessments by Smallwood and Spiegel, based on unsupported assertions of economic infeasibility, and without any opportunity to review evidence of each company's ability to pay. Our own review of publicly-available information indicates that a 17.5% loss in energy production due to implementation of the measures described above should not create a significant financial hardship for the wind companies.

In summary, the ongoing harm to protected bird species at the APWRA is serious and unacceptable. While we support the development of wind energy, wind production must be pursued in a manner that minimizes bird loss. Fortunately, significant reductions in avian mortality can be achieved in an economically-feasible manner. However, these measures must be implemented immediately to significantly reduce the ongoing impacts of the continued operation of the APWRA on bird populations. Because the APWRA is the largest of its kind in the world, what happens here could set an important precedent for how these issues are addressed elsewhere in California and the United States. We appreciate your efforts to address these difficult issues, and the opportunity to express our views.

Sincerely,

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TARA L. MUELLER
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By:


SARA J. RUSSELL
Supervising Deputy Attorney General

cc: Chris Bazar, Alameda County Planning Director
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