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Supervisor and President Keith Carson
Supervisor Gail Steele
Supervisor Scott Haggerty
Supervisor Alice Lai-Bitker
Supervisor Nate Miley
Clerk, Board of Supervisors

Alameda County Board of Supervisors
Alameda County Administration Building
1221 Oak Street
Oakland, CA 94612

VIA FAX AND EMAIL

Re: Altamont Pass Wind Turbine Permit Appeals, CUP Nos. C-8161, C-8191, C-8201, C-8203, C-8233, C-8234, C-8235, C-8236, C-8237, C-8238, C-8239, C-8241, C-8242, C-8244, C-8023, C-8031, C-8036, C-8037, C-8134, C-8136, C-8137, C-8173, C-8182, C-8216, C-8224, C-8225, C-8231, C-8232, C-8240, & C-8263
File No. 19650

Dear Honorable Supervisors:

Appellants Center for Biological Diversity (CBD), Californians for Renewable Energy (CARE), and Golden Gate Audubon Society submit the following response to the draft proposed permit conditions released by the Alameda County Planning Department on Friday, September 16, 2005.

The appellants continue to advocate the proposed permit conditions they previously submitted to the Board before the July 7, 2005 hearing, and incorporate herein by reference and reaffirm their previous letters and communications stating their positions on the issues in their appeals. The appellants' proposed conditions are fully consistent with those advocated by Attorney General Lockyer in his July 6, 2005 letter to the Board.

By contrast, the Planning Department's draft conditions are the product of a flawed process, beginning with the failure to prepare an Environmental Impact Report contrary to CEQA, which requires environmental review prior to approving a project, especially when there is significant new information. These flaws have continued with the failure to require the permittees to submit any financial data that would justify their wholly unsupported claims of financial hardship, the only argument the permittees have put forward for their refusal to make larger and more rapid reductions in avian mortality, even though those unsupported claims are the sole basis for the Board's decision not to require greater reductions in avian mortality.

There are substantial differences between the Planning Department's draft permit conditions and those proposed by the appellants and the Attorney General. The most significant of these is in the magnitude of permanent and seasonal shutdowns to require.

The Board should act to immediately reduce existing avian mortality by 50% as the appellants and the Attorney General advocate by:

- a) adopting the full 3.5 month winter shutdown immediately, rather than phasing it in over five years, as currently proposed; and
- b) permanently shutting down Tiers 1 through 3 of the high-risk turbines immediately, rather than shutting down only Tiers 1 and 2 and phasing in this more limited shutdown over five years.

As demonstrated by the financial analysis submitted by the appellants to the Board before the July 7 hearing and by the Attorney General's analysis, these are affordable, achievable measures that should result in an immediate 50% reduction in mortality. The permittees have never produced any evidence to contest or rebut the appellants' financial analysis.

By contrast, the permanent and seasonal shutdowns proposed in the draft permit conditions are significantly weaker, and even after they are fully implemented will not achieve a 50% reduction in raptor kills at Altamont Pass.

Nor do the draft permit conditions take account of the financial windfall the permittees are receiving because they have escaped from having to comply with any permit conditions during the 22-month period from November 2003 to September 2005 while the appeals have been pending. At the July 7, 2005 hearing, the attorney for the permittees, Ms. Carlsen, estimated that compliance with the draft conditions will cost the permittees from \$3.7 million to \$5 million annually. This means that during the 22 months in which the appeals have been pending, the permittees have by their own account saved from \$6.7 million to \$9.1 million in permit compliance costs.

DEFECTS IN THE PLANNING DEPARTMENT'S DRAFT CONDITIONS

Even when considered on their own merits, the Planning Department's draft conditions have significant defects and ambiguities and do not fully reflect the Board's directions in its July 7 resolution.

- 1. Seasonal Shutdown: The draft conditions must be clarified to implement the 3.5 month seasonal shutdown over five years as directed by the Board.**

In item 5 of its July 7 resolution, the Board directed that there be "winter shutdowns of 2 months for every turbine immediately. This will escalate each year to reach a 3.5 month winter shutdown . . . by the end of the fifth year." Under the draft conditions, however, the 3.5 month shutdown is not set forth until the sixth year, rather than by the fifth year as the Board directed. Attach. G, "Years Six Through Eight," No. 3. The draft conditions should be changed to achieve the 3.5 month winter shutdown in the fifth year. We understand from talking to Andrew Young of the Planning Department staff that this is a typographical error that the Planning Department intends to correct before the September 22 hearing.

In addition, the permit conditions should transition from the initial 2 month shutdown of year one to the 3.5 month shutdown of year five by progressively adding an additional 11 days of shutdown each year. They do not currently do so.

In addition, the draft permit conditions state that starting in year three the seasonal shutdown can be ". . . for a different period if agreed to by the SRC . . ." This is ambiguous and should be clarified to make clear that the SRC can modify at most the start date but not the duration of the shutdown

period, e.g. “. . . or starting on a different date but with the same duration of shutdown if agreed to by the SRC . . .”

- 2. Permanent Shutdown: The draft conditions must be clarified to properly identify the 2% high-risk turbines subject to immediate shutdown.**

Item 5 of the Board’s July 7 resolution requires “existing turbines to shut down those identified as the most dangerous 2% of the turbines immediately.” This amounts to approximately 100+ turbines. The draft conditions, however, require shutdown of only the CEC-identified “Tier 1” turbines. Attach. G, “Year One,” at No. 1. There are, however, only 54 turbines in Tier 1 of the June 2005 CEC assessment, far less than 2% of the turbines. To achieve a 2% immediate shutdown requires shutting down all the Tier 1 turbines and approximately half of the Tier 2 turbines immediately. The draft conditions should be modified to reflect this.

- 3. Permanent Shutdown: Contrary to the Board’s direction, the draft conditions allow the permittees to relocate rather than permanently shut down the Tier 1 and Tier 2 turbines.**

In item 5 of the Board’s July 7 resolution, the Board required the permittees to “shut down those identified as the most dangerous 2% of the turbines immediately . . . and the removal of all tier 2 turbines . . . by the end of the fifth year.” The draft conditions, however, authorize these high-risk turbines to be relocated rather than shut down. Attach. B, No. 17 (at p. 6). This condition should be eliminated to conform to the Board’s July 7 resolution. Given the minimal number of Tier 1 and Tier 2 turbines required to be shut down permanently, there is no justification for allowing them to be relocated rather than shut down. Moreover, the draft conditions would allow relocation of high-risk turbines to locations that were equally high in risk (i.e., any location that “would not result in increased risk”), thus achieve no mortality reduction benefit at all from the relocation.

- 4. Repowering: The draft conditions should make clear that a permittee’s refusal to accept contract terms offered by PG&E, or other business decisions, are not “reasons beyond the company’s control” that excuse them from complying with the 4-year, 8-year, and 10-year repowering shutdown requirements.**

In item 3 of the Board’s July 7 resolution, the Board set forth its repowering schedule and provided that “Any delays will have to be

approved by the County and only for reasons beyond the company's control (for example waiting for a State agency permit)."

The permittees are broadly interpreting this language to include business decisions and factors within their control. In an August 2005 adaptive management plan they submitted to the U.S. Fish and Wildlife Service, the permittees describe "extraordinary circumstances" that would excuse them from complying with the repowering schedule adopted by this Board as including "inability to secure power purchase agreements or financing." The permittees should not be able to delay repowering and continue operating existing turbines schedule for shutdown if they decide for business reasons not to accept the terms of a power purchase agreement offered by PG&E or financing or other contractual terms offered by some other third party. Otherwise, the permittees could simply decide that repowering was not in their financial interest and operate all their existing turbines for the full 13 years. The draft conditions should be modified to make clear that only governmental action that prevents repowering, and not business decisions by the permittees or others, are "reasons beyond the company's control" that would potentially excuse a company from shutting down 10% of its turbines in year 4, an additional 25% in year 8, and an additional 50% in year 10.

In addition, the draft conditions authorize the Planning Director to make exceptions to the repowering schedule to allow continued operation of turbines scheduled for repowering shutdown. Attach. G, "Years Four & Five," at No. 6. Any such exception is a major change to the permit conditions and should not be within the discretion of the Planning Director. Instead, only this Board should be authorized to grant extensions of the repowering schedule and allow continued operations of turbines that this Board has directed to be shut down under the repowering program.

5. Repowering: Removal of derelict turbines should not count towards meeting the percentage reduction requirements of the repowering schedule.

The repowering program adopted by the Board in item 3 of the July 7 resolution requires the shutdown of 10% of turbines in year 4, an additional 25% in year 8, and an additional 50% in year 10. The draft conditions, however, would allow the permittees to count derelict turbines towards their repowering percentage shutdown requirements: It provides that the turbines counted in the repowering shutdowns "may include derelict or other turbines permanently removed since January 1, 2004." Attach. G,

“Years Four & Five,” No. 5. This should be corrected and the draft conditions should be modified to read that only “other operating turbines permanently removed since January 1, 2004” count towards the repowering shutdown requirements in years 4, 8 and 10.

6. Repowering: Removal of Tier 1 and Tier 2 turbines should not double-count towards meeting the percentage reduction requirements of the repowering schedule.

The draft conditions also allow the permittees to double-count removal of the Tier 1 and Tier 2 turbines; first as compliance with the permanent shutdown requirement and then again as compliance with the repowering program shutdown of 10% of turbines in year 4, an additional 25% in year 8, and an additional 50% in year 10. Attach. G, “Years Four & Five,” No. 5 (10% requirement “may include the Tier 1 and Tier 2 turbines removed through the fourth year”); “Years Six Through Eight,” No. 4 (same); “Years Nine Through Thirteen,” (same). The permanent shutdown and the repowering program shutdown are separate requirements in the Board’s July 7 resolution. Turbines shut down for purposes of the permanent shutdown should not be double-credited for purposes of the repowering program.

7. Off-site Mitigation: Contrary to the Board’s direction, the draft conditions have changed the “off-site mitigation” requirement into an “on-site/off-site mitigation” requirement.

In item 6 of the Board’s July 7 resolution, the Board directed that the permits “Establish an off site mitigation program.” The draft conditions, however, have significantly changed this requirement to an “on-site/off-site mitigation program” that may include “on-site portions of properties leased by the Permittee(s).” This threatens to make the off-site mitigation requirement, which is already nebulous, completely meaningless by allowing the permittees to claim as mitigation habitat the very land where their raptor-killing turbines are located, and to do so at no additional expense since they are already leasing the land. Clearly, the areas where turbines are located are not favorable raptor habitat but habitat that is dangerous for raptors. It cannot compensate or mitigate for the avian mortality that will continue because it will do nothing to increase the existing raptor populations.

8. Other Issues:

- a) The draft conditions for the Scientific Review Committee (Attach. D) propose one member from either a state or federal agency. Because the state government and federal government have separate jurisdictions over the raptors and other birds the permittees are killing, there should be both a state representative and a federal representative on the SRC.
- b) The proposed repowering program should be conditional upon the EIR conclusively demonstrating, through validated monitoring data from the current repowering projects in Alameda and Contra Costa Counties, that repowering will significantly reduce avian mortality.
- c) The draft conditions exclude new turbines installed as part of repowering projects from the winter season shutdown requirement. Attach. G, “Years Four & Five,” No. 2; “Years Six Through Eight,” No. 3; “Years Nine Through Thirteen,” No. 3. This is an issue that should properly be examined during the EIR, which will be looking at the avian mortality caused by new turbines and at all possible mitigation measures to reduce mortality caused by new turbines, including seasonal shutdowns. A decision as to whether to exclude new turbines from the winter seasonal shutdown should be part of the EIR and should only be based on data showing that new turbines pose substantially less risk to birds.
- d) The retrofitting of electrical power poles and power lines to prevent bird electrocutions, compliant with APLIC (Attach. G, “Year One,” No. 2), should specify that all electrical power poles and power lines need to be APLIC compliant within 180 days of the permit approval. The Permittees have consistently interpreted this requirement as applying only to riser poles and some “problem” corner poles.
- e) The “Expiration” provision in the Conditions of Approval (Attach. B, No. 27 (at p. 8)) should also state that “The permittee has no express or implied right to operate the existing wind turbines after September 22, 2018.”
- f) There are significant typographical errors and omissions in the provisions of Attachment G describing the seasonal shutdown in years two, four, five, six through eight, and nine through thirteen. Attach. G, “Years Two & Three,” No. 1 (year in second sentence should be 2007, not 2006); “Years Four & Five” No. 2 (years in second sentence should be 2008 and 2009, not 2009 and 2010),

(additional paragraph is needed in this section describing implementation of 3.5 month shutdown in year five); “Years Six Through Eight,” No. 3 (in second sentence, year 2009 should be deleted); “Years Nine Through Thirteen,” No. 3 (in second sentence years 2008 and 2009 should be deleted), No. 4 (“thirteenth” should be “tenth”), No. 6 (“tenth” should be “thirteenth”). We have communicated these to the Planning Department, but they need to be corrected before the permits can be approved.

Sincerely,

s/

Richard R. Wiebe