



*Protecting endangered species and wild places through science, policy, education, and environmental law.*

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January 28, 2004

TO: County of Alameda  
East County Board of Zoning Adjustments  
224 West Winton Avenue, Room 111  
Hayward, CA 94544

Darryl Gray, Assistant Planning Director  
Alameda County Planning Department  
224 West Winton Avenue, Room 111  
Hayward, CA 94544

**Re: CUP Nos. 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**

## **INTRODUCTION**

The Center for Biological Diversity (CBD) submits these supplemental comments as an addition to comments previously submitted in connection with the permitting of wind power in the Altamont Pass Wind Resource Area (APWRA). Under separate cover, CBD has submitted a number of recent scientific studies for inclusion in the record. CBD also requests that the administrative record be deemed to incorporate all of the comment letters and all other matters of record received in connection with permits C-8161, C-8182, C-8191, C-8201, C-8203, C-7853, C-7854, C-8216, C-8232, C-8233, C-8234, C-8235, C-8236, C-8237, C-8238, C-8239, C-8240, C-8241, C-8242, & C-8244, including those of CBD, CARE, the United States Fish and Wildlife Service, the California Department of Fish and Game, the California Energy Commission, the East Bay Regional Park District, and BioResource Consultants, and that the record be deemed to incorporate all of the studies set forth or referenced in the BioResource Consultants letter of November 10, 2003.

The CBD is a nonprofit environmental organization with over 9,000 members, dedicated to the protection of native species and their habitats. The CBD works to

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San Francisco Bay Area Office  
370 Grand Avenue, Suite 5 • Oakland, CA • 94610  
PHONE: (510) 625-0136 • FAX: (510) 663-0272  
[www.biologicaldiversity.org](http://www.biologicaldiversity.org)

protect and restore natural ecosystems and imperiled species through science, education, policy, and environmental law. The CBD has a strong interest in protecting imperiled raptor populations subject to mortality at the APWRA.

## **COMMENTS**

Twenty years ago, Alameda County committed an egregious environmental blunder by issuing permits for thousands of wind turbines at Altamont Pass without conducting an environmental impact report, contrary to its obligations under the California Environmental Quality Act (CEQA). It is undisputed that those wind turbines are killing more than 500 eagles, hawks, owls, and other raptors every year. These massive raptor kills violate California and federal wildlife laws, including criminal provisions of those laws. These violations include California Fish and Game Code sections 2000, 3503.5, 3511, 3513, 3800, 12000, California Code of Regulations sections 472, 509; title 16 United States Code section 668 (the Bald Eagle and Golden Eagle Protection Act); title 16 United States Code section 703 (the Migratory Bird Treaty Act); and title 50 Code of Federal Regulations sections 10.13, 21.11, 22.11.

It is also undisputed that during the past twenty years the wind power industry has implemented no effective mitigation measures to save a single bird from death, and no turbine has ever been shut down because of the bird deaths it has caused.

Alameda County is now poised to repeat its past mistakes by issuing new conditional use permits en masse for all existing wind turbines at Altamont Pass, again without performing the necessary environmental review mandated by CEQA and without requiring any effective mitigation or remediation measures. Nor has the County undertaken any case-by-case examination of the bird kills caused by each individual turbine it is permitting, notwithstanding evidence that bird kill rates vary dramatically among different turbines. Moreover, the County proposes to compound its original error by making the new permits ones of unlimited duration, rather than for a fixed term, and thereby cause the errors of the past to persist indefinitely into the future.

The proposal to issue new conditional use permits in perpetuity for existing turbines without any meaningful mitigation or remediation requirements, and without any environmental analysis whatsoever, is a policy that is legally, scientifically, and ecologically bankrupt, and will embroil the County in litigation for years to come. Given the large body of new research on bird kills at Altamont Pass that has been published in the past six years, there is no reasonable explanation for the County's refusal to follow the counsel of the United States Fish and Wildlife Service, the California Department of Fish and Game, and the California Energy Commission and delay issuing new permits

until the County has performed an adequate environmental analysis and has imposed necessary mitigation and remediation conditions.

Most disturbing, however, is the County's unconscionable refusal to await the imminent publication of the results of the California Energy Commission's massive scientific study of bird kills by wind turbines in the Altamont Pass Wind Resource Area and the mitigation recommendations that the Commission will make as a result of that study. The County's insistence on railroading these new permits through before the publication of the California Energy Commission study and the formulation of the Commission's recommendations is baffling and irrational, and can have no other purpose than to shield the wind power industry from the necessary mitigation and remediation measures that the Commission will soon recommend. In doing so, Alameda County becomes an accomplice to the rampant illegal conduct of the wind power industry.

There is no justification for Alameda County's disregard of its obligations under state and federal law and its unseemly haste to rush these permits through in a brazen attempt to immunize the wind power industry from any meaningful mitigation and remediation requirements. In particular, the County's proposed action here is illegal and irresponsible for the following reasons:

1. **The Categorical Exemption Is Illegal.** As the California Supreme Court has held, "an activity that may have a significant effect on the environment cannot be categorically exempt." *Mountain Lion Foundation v. Fish & Game Comm'n*, 16 Cal. 4th 105, 124 (1997). The official CEQA Guidelines reinforce this rule: "Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment . . ." Title 14 Cal. Code Reg. § 15300.2, subd. (c) (CEQA Guidelines). There is no doubt that if these permits are granted the wind turbines of the Altamont Pass Wind Resource Area will cause significant environmental effects, as the numerous scientific studies referenced above demonstrate. Killing over 500 raptors a year is a significant environmental effect under any definition of that term.

Nor can the County rely on any categorical exemption for these permits, given its illegal failure to prepare an EIR at the time these wind turbines were first issued permits. The premise of the categorical exemption for existing facilities is that the environmental consequences of the facilities were thoroughly and properly examined at the time they were first constructed, a premise that is false in this case. The wind turbines that are the subject of these conditional use permits have *never* been subject to the EIR process.

In addition, because the original permits were for a fixed duration, upon their expiration the right to operate the wind turbines ceases. The turbines thereupon revert to their original unpermitted state. For CEQA purposes, the baseline condition, i.e., the “no-project alternative” or status quo against which the County’s proposed issuance of new permits must be measured, is turbines without any existing right to operate. Any issuance of new permits for future operation of the wind turbines will cause significant environmental effects.

Moreover, the cumulative impacts of the series of permits for wind power that Alameda County proposes to issue at this time are significant, and also disqualify the permits from any categorical exemption. “Cumulative Impact. All [categorical] exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.” Title 14 Cal. Code Reg. § 15300.2, subd. (c) (CEQA Guidelines).

Nor is the 1998 EIR “Repowering A Portion of the Altamont Pass Wind Resource Area” any substitute for the environmental analysis required by CEQA that the County has failed to perform here. The 1998 EIR was limited to examining the effects and alternatives of three specific repowering projects. The EIR did not perform the necessary examination that CEQA requires of the effects and alternatives to the issuance of the new permits for existing turbines at issue here. And, in any event, as the studies noted above demonstrated, the 1998 EIR is woefully out of date regarding scientific knowledge. Moreover, it failed to require any meaningful mitigation or remediation measures.

**2. The Decision To Make The New Permits Permanent And Of Unlimited Duration Is Indefensible.** Because the previous permits were for a fixed term of years, they created no vested rights and preserved the County’s power to refuse to renew the permits at the end of their term or to require additional mitigation or other conditions as the price of renewal. In its rush to immunize the wind power industry from any meaningful mitigation and remediation requirements in the future, however, the County now proposes to make the permits permanent and of unlimited duration. In doing so, the County is surrendering its future power to impose mitigation and remediation conditions on the industry.

It is nothing short of irrational to reward an industry with a 20-year history of wildlife law violations with a permanent license to continue their illegal practices. Any new permits, in addition to imposing meaningful mitigation and

remediation, should be issued for a very short period of time, and certainly no more than three years, so that as the state of the art of mitigation evolves, new mitigation measures can be incorporated in those permit conditions. The proposed five-year review procedure is an inadequate mechanism that gives the County little leverage, and little motivation, to impose new mitigation and remediation conditions.

The raptors that are being killed by the wind turbines that are the subject of these permit applications do not belong to Alameda County, but to the people of California as a whole (Cal. Fish & Game Code, § 1600). The evidence in the record shows that the wind turbines permitted by Alameda County are depleting raptor populations not just locally but regionally. Alameda County must now assume responsibility for the unlawful raptor killing and resulting environmental damage it has permitted to continue unabated for the past twenty years, and must comply with CEQA and not issue any new wind turbine permits until it has performed a comprehensive analysis of the environmental effects and alternatives, and until it has developed and imposed meaningful mitigation and remediation requirements.

Sincerely,

Jeff Miller  
Bay Area Wildlands Coordinator  
Center for Biological Diversity