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State of California
DEPARTMENT OF JUSTICE



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October 10, 2014

Sandra Rivera
Assistant Planning Director
Alameda County Community Development Agency
224 West Winton Ave., Room 111
Hayward, California 94544

Scientific Review Committee, c/o Sandra Rivera
Altamont Pass Wind Resource Area
Alameda County Community Development Agency
224 West Winton Ave., Room 111
Hayward, California 94544

RE: Application by Altamont Winds Inc. for Extension of Conditional Use Permits

Dear Assistant Director Rivera and Scientific Review Committee Members:

We are writing in response to the County of Alameda's Notice of Preparation of a supplemental environmental impact report (EIR) for Altamont Winds Inc.'s (AWI's) application to extend the terms of its conditional use permits to operate its old generation wind turbines at the Altamont Pass Wind Resource Area (Altamont Pass) for three more years, from 2015 to 2018. As you are aware, just last year, at AWI's request, the County amended AWI's use permits to require AWI to shut down all of its old turbines by December 31, 2015, instead of September 30, 2018 as required under AWI's previous permits. In exchange, the County deleted the provisions under AWI's previous permits requiring AWI to shut down and remove its old turbines in progressive phases between now and 2018. AWI now seeks to re-extend the term of its permits to December 31, 2018, but this time without the requirements for phased removal of the old turbines between now and 2018.

The Attorney General's Office objects to AWI's proposal on a number of grounds. First, AWI's permit extension proposal will create serious inequities for other turbine operators at Altamont Pass and will undercut the development of environmentally-responsible wind energy there. As two recent County environmental impact reports indicate, the other turbine operators at Altamont Pass (Next Era Energy Resources, EDF Renewable Energy and Ogin Inc.) are making substantial efforts to expeditiously remove and replace their outdated turbines with upgraded, modern turbines ("repower"). (See ICF International, *Altamont Pass Wind Resource Area Repowering Draft Program EIR*, June 2014 and *Sand Hill Wind Project Final EIR*, March 2014.) Next Era, in particular, is obligated pursuant to a 2010 agreement between the Attorney

General's Office, Next Era, several Bay Area chapters of the Audubon Society, and Californians for Renewable Energy (hereinafter "Next Era Agreement") to either repower or permanently shut down their old turbines by the end of next year. These other companies' current efforts to replace their old generation turbines indicates that repowering is economically feasible and achievable. As an additional benefit, we understand that the modern turbines are far more energy efficient and can generate substantially more energy per turbine than the old generation turbines, even those with the same rated capacity. Thus, while repowering requires an initial substantial capital investment, the resulting increases in a project's efficiency and output, along with its reduced operating and maintenance costs, makes economic sense in the long run. AWI, however, is seeking to obtain an unfair competitive advantage over the other operators at Altamont Pass by attempting to avoid these important repowering investments in order to achieve greater short-term financial gain..

The Next Era Agreement sets the bar for responsible wind operation at Altamont Pass. This agreement requires Next Era to make commercially reasonable efforts to repower all of its old turbines at Altamont Pass in up to three phases by September 30, 2015. Next Era also agreed to site the new turbines in the most bird- and bat-friendly locations, based on the best available science. A key feature of the agreement is that if Next Era is not able to timely obtain all applicable permits for replacing its turbines, it nevertheless must permanently shut down all of its old turbines by November 1, 2015. Next Era also agreed to pay approximately \$2.5 million as a mitigation fee (\$10,500 per megawatt of repowered, installed capacity) to compensate for any ongoing raptor deaths. This mitigation fee is to be divided equally between scientific research on the effects of wind turbines on birds and bats and the preservation of raptor habitat or other conservation efforts. In exchange, the Attorney General's Office and environmental signatories agreed not to challenge the Next Era repowering projects, and agreed to a release of liability for Next Era for any previous and subsequent bird deaths.

The County's approval of AWI's permit extension request would create an uneven playing field, rewarding the company that has done the least to modernize and minimize the environmental effects of its operations at Altamont Pass, and unfairly penalizing the company that has taken the most significant steps to do so. Not only does AWI propose to operate its old turbines for three years longer than Next Era, it proposes to do so without adequate mitigation and on highly inequitable terms. For example, AWI only proposes to pay a \$525 per megawatt mitigation fee, without any explanation or justification – as opposed to Next Era's \$10,500 per megawatt fee. AWI also proposes to remove existing mitigation measures (such as power pole retrofitting) and replace them with untested mitigation measures, such as blade painting. AWI further proposes wholly inadequate monitoring requirements that are much weaker than those contained within the Next Era Agreement.

In addition, the proposal will have significant and unavoidable effects on birds and bats, including golden eagles, which are designated as a "fully protected species" under the California Fish and Game Code. (See ICF International, *Draft EIR, Modifications to Existing (Year 2005) Conditional Use Permits, Altamont Winds, Inc.*, March 2013 (hereafter "AWI EIR"), p. 4-16;

Cal. Fish & G. Code, § 3511.) The AWI EIR (prepared for AWI's previous permit modification request) indicates that continuing to operate the old turbines through 2018 would result in the deaths of approximately 1,653-1,804 more birds, including 11-15 more golden eagles, per year than under AWI's permits as amended last year. (AWI EIR, Tables 4-2 and 4-3, pp. 4-9, 4-20.) Such a level of bird mortality is unacceptable, particularly at a time when all companies operating in the Alameda County portion of Altamont Pass, except AWI, are actively pursuing repowering proposals.

All evidence indicates that repowering can significantly reduce the operational effects of wind turbines on key raptor species, including golden eagles. (See ICF International, M101 - *Altamont Pass Wind Resource Area Bird Fatality Study*, June 2014, p. 4-4 (“[c]omparison of fatality rates at the three operating groups comprised of repowered turbines to fatality rates at older-generation turbines indicates a significant reduction in collision risk and total fatalities per megawatt of rated capacity for all four focal species. These results suggest that avian fatalities could be reduced in areas where modern, high-capacity turbines are deployed in place of older-generation turbines.) The first year monitoring report for Next Era's first repowering project pursuant to the Next Era Agreement (the Vasco Winds Project in Contra Costa County), shows that during its first year of operation, this project reduced raptor deaths overall by 65%, and golden eagle deaths by up to 97%, from the number of deaths caused by the older turbines previously operating at that site. (See *Final 2012-2013 Annual Report Avian and Bat Monitoring Project, Vasco Winds LLC*, Sept. 2013, p. 47.)

Finally, the County should be aware of the rule in California that a permittee “is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or by failing to challenge its validity, and [has] accepted the benefits afforded by the permit.” (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510.) In such circumstances, the permittee waives his right to object to the permit condition, and “is bound by the limitation.” (*Ibid.*; see also *Rosasco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642, 654 (landowner barred from challenging transferrable development credit condition in Coastal Commission permit after complying with condition); *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1484 (property owners' acceptance of mitigation fee condition precluded later challenge to that fee).) “Generally, a property owner may only challenge an allegedly unreasonable permit condition by refusing to comply with the condition and bringing a mandate action to have the condition invalid.” (*Lynch v. California Coastal Comm.* (2014) 229 Cal.App.4th 658, 177 Cal.Rptr.3d 654, 658.) This “rule stems from the equitable maxim, ‘He who takes the benefit must bear the burden.’” (*Ibid.*)

In *County of Imperial v. McDougal*, the County of Imperial issued a conditional use permit allowing a landowner to sell water from its property, on condition that the water could be sold only for use within the county. The landowner accepted and did not challenge the permit but the landowner's successor in interest (McDougal) subsequently violated the permit condition. The county brought an action against McDougal to enjoin him from selling water in violation of

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the permit. The California Supreme Court held that, because the landowner's predecessor in interest failed to challenge the permit condition prohibiting the sale of water outside the county, both he and his successor in interest had waived the right to later object to that condition. (*County of Imperial, supra*, 19 Cal.3d at p. 510.) "Thus," the Court held, "McDougal is estopped to assert that the prohibition in the . . . permit against the sale of water for use outside the county is invalid, and he is bound by the limitation." (*Ibid.*)

Similarly here, AWI applied for, and last year the County Board of Zoning Adjustments granted, permit amendments to AWI. These amendments allowed AWI to avoid the obligations under its previous permits for interim, phased removal of the old turbines, including but not limited to the requirement to remove 25% of its original 920 turbines by September 30, 2013. (See AWI EIR, p. 2-1.) As a condition of the County's elimination of these phased removal requirements, AWI agreed to remove all of its old turbines by 2015, three years earlier than was required under its previous permits. AWI has obtained, and is continuing to obtain, significant benefits from this permit. AWI did not appeal the permit decision to the Board of Supervisors or challenge it in court. Consequently, under the reasoning of *McDougal* and its progeny, AWI is barred from collaterally attacking the condition to remove its old turbines by the end of 2015 in a subsequent permit application.

The Attorney General's Office urges the County to carefully consider the environmental, equitable and other implications of allowing AWI's turbines to operate through 2018, and to fully evaluate the environmental impacts of such operation in the supplemental EIR, before acting on AWI's latest permit amendment request.

Sincerely,



Tara L. Mueller
Deputy Attorney General
For KAMALA D. HARRIS
Attorney General

cc: Heather Littlejohn, Alameda County Counsel's Office
Ryan McGraw, General Counsel, Altamont Winds