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December 31, 2014

Sandra Rivera
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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 submit this letter on the draft supplemental environmental impact report (DSEIR) 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. This letter supplements our previous comment letter, dated October 10, 2014, on the County of Alameda's (County's) Notice of Preparation of the DSEIR (attached).

Introduction

As our previous letter states, the Attorney General opposes the issuance of a permit extension to AWI because it will create serious inequities for other turbine operators and will undercut current efforts to repower the old turbines and develop more environmentally-responsible wind energy at Altamont Pass. The new generation turbines are not only more energy efficient and can generate more energy per megawatt of rated turbine capacity, but also result in far fewer annual bird deaths.¹ As the County's Final Program Environmental Impact

¹ See Resolution No. Z-14-38 of the East County Board of Zoning Adjustments Adopted at the Hearing of Nov. 12, 2014 Certifying the PEIR, p. 1; Staff Report to East County Board of Zoning Adjustments for Altamont Pass Wind Resources Area Repowering, Nov. 12, 2014, pp. 5-
(continued...)

Report for Altamont Pass Wind Resources Area Repowering, dated October 2014 (hereafter “PEIR”) and the resolution certifying that EIR indicate, replacing the old turbines with new turbines is a feasible alternative to continuing to operate the old turbines.²

After reviewing the DSEIR, the Attorney General’s Office reiterates its opposition to continued operation of the old generation AWI turbines. The DSEIR fails to provide substantial evidence to support the statement of overriding considerations that the County must adopt if it determines to approve the permit application. Additionally, the DSEIR is legally inadequate in a number of significant respects.

Statements of Overriding Considerations under CEQA

Under the California Environmental Quality Act (CEQA), a lead agency generally cannot approve a proposed project “if there are feasible alternatives or feasible mitigation measures which would substantially lessen the significant environmental effects of” the project. (Pub. Res. Code § 21002.) However, a lead agency may find that one or more of a project’s significant environmental effects are unavoidable because the mitigation measures or project alternatives identified in the final EIR are infeasible. (Pub. Res. Code §§ 21002, 21002.1(c), 21081(a)(3); 14 Cal. Code Regs. § 15091(a)(3).) In this event, the lead agency may approve the project only if it adopts a “statement of overriding considerations” – supported by substantial evidence in the record – finding that “the specific economic, legal, social technological or other benefits, including region-wide or statewide environmental benefits” of the project “outweigh the unavoidable adverse environmental effects” and that the project is “otherwise permissible under applicable laws and regulations.” (Pub. Res. Code §§ 21002, 21002.1(c), 21081(b); 14 Cal. Code Regs. § 15093(a).) (Pub. Res. Code § 21081.5; 14 Cal. Code Regs. §§ 15021(d), 15091(b), 15093(b).)

The County Legally Cannot Adopt a Statement of Overriding Considerations for the AWI Permit Extension

The DSEIR concludes that the effects of continued operation of the old generation AWI turbines on avian resources would be significant and unavoidable. (DSEIR, pp. 28-31.) Accordingly, in order to approve the project, the County must adopt a statement of overriding considerations, finding that the benefits of continued operation of the old generation turbines outweigh the significant and unavoidable environmental effects of these turbines. (Pub. Res. Code §§ 21002.1(c), 21081(b); 14 Cal. Code Regs. § 15093(a).) The County legally will not be

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6; Public Notice of Availability of a Draft Program Environmental Impact Report: Altamont Pass Wind Resources Area Repowering, p. 1; PEIR, pp. ES-5, ES-6, 2-2.

² See also Resolutions Z-14-39 and Z-14-40, approving the Golden Hills I and Patterson Pass repowering projects, adopted on November 12, 2014.

able to adopt a statement of overriding considerations, however, because there is no substantial evidence in the DSEIR or elsewhere in the record to support it.

Specifically, the County has already made a contradictory finding, when approving the Altamont Pass Repowering Program, that repowering the Altamont Pass with new generation turbines, rather than allowing the continued operation of old generation turbines, would “*best balance* the advancement of wind technology, while also reducing the unavoidable impacts on protected or special-status avian wildlife species, including golden eagles and other raptors, to the lowest acceptable level.” (Exhibit C to Resolution No. Z-14-38, Nov. 12, 2014, Altamont Pass Wind Resources Area Repowering Statement of Overriding Considerations, p. 4, emphasis added.) In light of this finding, it would be an abuse of discretion for the County now to make a directly contrary finding that the purported benefits of continued operation of the old generation turbines outweigh the significant and unavoidable environmental effects of these turbines. (See *Uphold Our Heritage v. Town of Woodside*, 147 Cal.App.4th 587, 603 (2007) [holding that lead agency abused its discretion in adopting statement of overriding considerations where record did not support the finding that other less damaging alternatives were infeasible].)

In addition, a statement of overriding considerations must be based on an accurate analysis of the full extent of the environmental effects of a project, to enable the lead agency to fairly weigh whether the disadvantages of these adverse environmental effects in fact are outweighed by the project’s other benefits. (Pub. Res. Code § 21081(b); 14 Cal. Code Regs. § 15093(a); see *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79-80.) Here, the County cannot rely on the analysis in the DSEIR to adopt a statement of overriding considerations because the DSEIR, for the reasons outlined below, does not adequately and completely evaluate the nature and extent of the impacts on avian resources of continuing to operate the old turbines.

Further, a statement of overriding considerations is “necessarily invalid” if an EIR and other evidence in the record does not support the conclusion that other alternatives are infeasible. (*Uphold Our Heritage*, 147 Cal.App.4th at 603.) The DSEIR fails to evaluate any other alternatives besides the No Project Alternative, even though the County has already determined in the PEIR and associated documents that repowering Altamont Pass with new generation turbines is an entirely feasible alternative for meeting all of the project’s stated objectives, including cost-effectively meeting regional energy needs, providing a reliable source of renewable energy, and reducing regional greenhouse gas emissions. (See Resolution No. Z-14-38, p. 1; Staff Report to East County Board of Zoning Adjustments for Altamont Pass Wind Resources Area Repowering, Nov. 12, 2014, pp. 5-6; PEIR, pp. ES-5, ES-6, 2-2; Public Notice of Availability of Draft PEIR, p. 1.) Thus, the County cannot rely on the DSEIR to make the necessary predicate finding that no other alternative, including repowering, is feasible. (Pub. Res. Code §§ 21002, 21081(a)(3); 14 Cal. Code Regs. § 15091(a)(3); *California Native Plant Socy. v. City of Santa Cruz*, 177 Cal.App.4th 957, 982, 1002 (2009) [record must contain

substantial evidence to support a finding that the rejected alternatives and mitigation measures are “truly infeasible”).³

The DSEIR Is Legally Inadequate to Support Project Approval

In addition to failing to support the required findings of overriding consideration, the DSEIR is legally insufficient to support the County’s approval of the project in a number of other significant respects.

First, the DSEIR’s impact analysis fails to analyze adequately the full scope and extent of the significant and unavoidable environmental effects of allowing the old turbines to continue operating for three more years. Specifically, among other inadequacies, the DSEIR’s impact analysis:

- 1) Fails properly to calculate avian fatality rates by omitting the most recent data from 2011 and 2012, cherry-picking prior years in which bird deaths were lower than other years, and using artificially low installed capacity figures (see *Altamont Pass Wind Resource Bird Fatality Study, Bird Years 2005-2012*, ICF International, June 2014; cf. DSEIR, pp. 28-32);
- 2) Fails adequately to describe the methodology used to determine impacts to birds, including how the effects of the winter seasonal shutdown, proposed turbine asset exchange and removal of high risk turbines were accounted for and how the adjusted fatality rates and total fatalities in the charts were derived (*id.*, pp. 3, 25, 27-32);
- 3) Does not identify a proper baseline against which to properly measure the impacts (*id.*, pp. 27, 32);
- 4) Understates the project’s impacts by comparing the impacts of the currently proposed project against the impacts of a previously proposed project which the County never approved -- instead of the reduced-impact project that the County actually approved (*id.*, p. 32); and
- 5) Fails to address any impacts of ongoing turbine operations on bat species, a major omission.

³ The County also will need to reverse its previous finding in certifying the previous 2013 AWI EIR that Alternative 3 (which is now the proposed project) was “considered infeasible” for “meeting the project objectives and minimizing significant impacts on special status avian wildlife.” (Ex. A to Resolution No. Z-13-35 of the East County Board of Zoning Adjustments, July 18, 2013, p. 15.)

Second, the DSEIR's mitigation measures are inadequate, unenforceable and uncertain. For example, the DSEIR completely fails to specify which mitigation measures will be employed, beyond the seasonal shutdown, to reduce impacts to other bird species other than golden eagle. (DSEIR, pp. 5-6, 36-37). Even the primary mitigation measure for golden eagle impacts (power pole retrofitting) is vague, unclear and difficult to enforce and apply. (*Id.*, pp. 5-6, 34-35). There also is no evidence that retrofitting power poles will actually mitigate for golden eagle fatalities caused by AWI's old turbines. The DSEIR then provides a menu of additional poorly-defined, inadequate and unenforceable mitigation measures, but does not require AWI to implement any of them. (*Id.*, pp. 36-37).⁴

Third, the project objectives are inaccurate and misleading. The project objectives purport to allow AWI to continue operating its old turbines only until repowering "is timely and economically viable" and only if it cannot repower them due to "circumstances beyond AWI's control." (DSEIR, pp. 21, 23.) These provisions are vague and open-ended, and provide no guidance for when such repowering will occur. (*Id.*, p. 21). In marked contrast, the agreement between Next Era and the Attorney General requires it to shut down its old turbines by November 1, 2015 and remove such turbines by March 15, 2016. Under the open-ended language in the DSEIR, however, it is virtually guaranteed that AWI will not repower and will continue to operate the old turbines through 2018. Furthermore, given the County's findings in certifying the PEIR discussed above, continued operation of AWI's old turbines for three more years cannot possibly meet the "additional" project objective of maintaining wind energy "in a manner that represents sound stewardship of the area's wildlife and natural habitats . . . to protect the unique and special status avian species that occupy the area." (*Id.*)

Conclusion

For all the foregoing reasons, and the reasons outlined in our October 10, 2014 letter, the Attorney General's Office strongly urges the County not to certify the SEIR and to deny AWI's application for a permit extension to operate old generation turbines for three more years. We thank the County for its consideration of our comments.

⁴ For example, we note that recent correspondence from the Director of the University of California, Davis' raptor rehabilitation center indicates that the \$580/raptor figure used to estimate the costs of rehabilitating one raptor is in error. (See DSEIR, p. 37; Letter from Michelle Hawkins, Director, U.C. Davis California Raptor Center, Dec. 7, 2014.)

Ms. Sandra Rivera
SRC Committee Members
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Sincerely,



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Deputy Attorney General
For KAMALA D. HARRIS
Attorney General

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