

December 11, 2008

Salud Carbajal, Chairman of the Board
Santa Barbara County Board of Supervisors
105 East Anapamu Street, 4th Floor
Santa Barbara, CA 93101

Re: Response to California Department of Fish and Game Appeal



Dear Mr. Carbajal:

On behalf of Acciona Energy, we are submitting the following comments in response to the California Department of Fish and Game's (CDFG) October 10, 2008 appeal of the County Planning Commission's approval of the Lompoc Wind Energy Project (CDFG Appeal). We appreciate the opportunity to respond to this appeal. Acciona values the County's efforts in conducting a thorough environmental review, and fully supports the County Planning Commission's unanimous decision to certify the Final Environmental Impact Report (FEIR) and approve the Conditional Use Permit (CUP) and Variance for the project. Acciona is confident that the issues raised in the CDFG Appeal have been addressed and therefore looks forward to installing and operating this important renewable energy project.

A. **Strict compliance with the California Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development is not required under the California Environmental Quality Act.**

CDFG asserts that full compliance with the *California Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development* (CEC Guidelines) is necessary to comply with disclosure and mitigation requirements under the California Environmental Quality Act (CEQA). CDFG Appeal, page 1. The CEC Guidelines were developed to "encourage the development of wind energy in the state while minimizing and mitigating harm to birds and bats." California Energy Commission and California Department of Fish and Game, *CEC Guidelines* (2007), page E-1. As discussed below, the biological investigations that have been conducted conform to the CEC Guidelines, and even if they do not, such strict conformity is not required to comply with CEQA.

1. **The biological investigations conformed to the CEC Guidelines.**

The recommendations and protocols contained within the CEC Guidelines are "suggestions for local permitting agencies to use at their discretion." *Id.* While it is the CEC Guidelines' objective to "provide information and protocols for assessing, evaluating, and determining the level of project effects on bird and bat species, and to develop and recommend impact avoidance, minimization, and

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mitigation measures,” the Guidelines were “specifically designed to be flexible to accommodate local and regional concerns” and the protocols are “adaptable to address the specifics of each site such as frequency and type of bird and bat use, terrain, and availability of scientifically accepted data from nearby sources.” *Id.* at pages E1-E2.

It is important to note that the Draft Environmental Impact Report (DEIR) for the project was published on July 17, 2007, and that the CEC Guidelines were not published until October 23, 2007. Thus, there remains some question as to whether the CEC Guidelines have any applicability to this project. Nevertheless, in response to CDFG’s September 11, 2007 DEIR comment letter, which referenced the soon-to-be-issued CEC Guidelines, Acciona retained the services of Sapphos Environmental, Inc. (Sapphos) to perform additional biological investigations. As discussed below, these investigations were designed to conform to the CEC Guidelines. However, as provided for in the Guidelines, the investigations varied to “accommodate local...concerns” and to “address the specifics of [the] site.” Where the biological investigations varied from the CEC Guidelines, scientifically-acceptable bird survey protocols were followed. Moreover, the Before-After/Control-Impact (BACI) Study (FEIR Mitigation Measure BIO-16a) and the Bird/Bat Mortality Study (FEIR Mitigation Measure BIO-16b) would follow the methodology set forth in the CEC Guidelines. *See* FEIR page 3.5-105.

Therefore, although the biological investigations did not precisely mirror the survey methods and protocols set forth in the CEC Guidelines, they nonetheless conformed to the CEC Guidelines because where the methods varied, the investigations were conducted according to scientifically-acceptable survey protocols.

2. Even if the biological investigations do not strictly conform to the CEC Guidelines, they nonetheless provide substantial evidence to support the EIR’s conclusions under CEQA.

Even if the biological investigations did not strictly conform with the CEC Guidelines, full conformance with the CEC Guidelines is not necessary to comply with CEQA. “CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required.” *Gray v. County of Madera*, No. F053661 (5th Dist. Oct. 24, 2008), *citing Association of Irrigated Residents v. County of Madera* (5th Dist. 2003) 107 Cal.App.4th 1383, 1396. In addition, the CEC Guidelines specifically state that they do not “mandate or limit the types of studies, mitigation, or alternatives that an agency may decide to require,” *id.* at page E2, and the disclaimer contained at the beginning of the CEC Guidelines states that the Guidelines are intended as “voluntary guidance” and that “failure to follow [them] does [not] necessarily imply a violation of CEQA.”

In *Gray*, the petitioner argued that the EIR failed to adequately analyze impacts to the tiger salamander because the County failed to follow the study protocols suggested by the

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joint CDFG-USFWS *Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the Tiger Salamander*. The court disagreed and held that “CEQA [did not] require[] the County to follow the study protocols suggested by the *Interim Guidance*” and that “the biological surveys that were carried out were sufficient to constitute substantial evidence to support the finding that there would be no significant impacts on the [tiger salamander].” *Id.*

As with CDFG’s *Interim Guidance in Gray*, conducting every test and performing all recommended research in the CEC Guidelines is not required under CEQA because the other biological surveys that were performed (discussed below) constitute the substantial evidence necessary to support the Planning Commission’s findings with respect to impacts to birds and bats. Furthermore, the CEC Guidelines themselves disclaim that “failure to follow [them] does [not] necessarily imply a violation of CEQA.”

B. Bird and bat surveys were conducted in accordance with standard avian survey methods.

The CDFG Appeal states that its estimates of bird and bat use at the project site are significantly higher than the estimates provided in the FEIR and presented at the September 30, 2008 Planning Commission hearing. Specifically, CDFG states that the number of birds and bats at the site would be greater than estimated because 1) the survey data did not include resident species and birds observed during winter surveys, 2) the survey data did not include the fall migration survey data, and 3) only one week of acoustic monitoring for bats was performed when the CEC Guidelines recommend a full year of acoustic monitoring both at ground level and at the elevation of operation of the turbines. CDFG Appeal, pages 2-3.

As discussed above, strict conformance with the CEC Guidelines is not required under CEQA. Regardless, as more fully discussed in the Planning Department’s Board of Supervisors Agenda Letter responding to the CDFG Appeal, the studies conducted in support of the FEIR were sufficiently extensive and adequate to describe the existing environmental conditions. Such studies included 1) spring, summer, and fall surveys conducted in 2002, 2) spring and summer surveys conducted in 2005, 3) fall surveys conducted in 2006, 4) winter avian point count surveys conducted in 2006, 5) an inferred baseline and impact analysis conducted in 2008, 6) a habitat suitability for sensitive bat species study conducted in 2008, 7) winter season avian pre-construction surveys conducted in 2008, and 8) spring migration pre-construction avian surveys conducted in 2008. All surveys were conducted by qualified experts in accordance with accepted protocols for identifying bird and bat species and estimate populations. Therefore, the surveys that were conducted for birds and bats were adequate under CEQA.

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C. Impacts to birds and bats have been mitigated to the extent feasible.

The CDFG Appeal asserts that the FEIR did not contain “potentially feasible mitigation measures” to address significant and unavoidable impacts to birds and bats that could result from collisions with wind turbine generators (WTGs), including 1) compensatory replacement habitat mitigation, and 2) formation of a technical advisory committee (TAC) to direct the adaptive management and mitigation program. CDFG Appeal, page 3. Extensive mitigation was identified in the FEIR and in the Planning Commission’s conditions of approval to address the project’s significant impacts to birds and bats.

1. Compensatory habitat mitigation is not feasible mitigation.

The CDFG Appeal states that compensatory habitat replacement mitigation is feasible mitigation and should be implemented as part of the project because 1) there are nearby habitats that could compensate for onsite impacts to birds and bats that would not require habitat enhancement that would attract more birds and bats to the projects site, 2) there is precedent for the application of compensatory mitigation as standard mitigation practice, and 3) compensatory mitigation is financially feasible through cost sharing with partners. CDFG Appeal, page 3. The CDFG Appeal also states that compensatory mitigation is recommended by the Santa Barbara County Environmental Thresholds and Guidelines Manual as an approach to reduce biological impacts. *Id.* at pages 3-4. As discussed below, compensatory habitat mitigation is not feasible and would in fact be unconstitutional to impose as a condition on the project.

a. The Planning Commission’s findings support its conclusion that compensatory habitat replacement mitigation is infeasible.

A public agency must “mitigate or avoid...significant effects...of [a] project[]...whenever it is feasible to do so.” Pub. Resources Code § 21002, subd. (b). However, “[i]f economic, social, or other conditions make it infeasible to mitigate...[a] significant effect[]..., the project may nonetheless be carried out or approved at the discretion of a public agency...” Pub. Resources Code, § 21002, subd. (c). In deciding whether changes to a project are feasible to reduce or avoid significant environmental effects, a public agency must consider “economic and social factors...together with technological and environmental factors.” CEQA Guidelines, § 15131, subd. (c). An analysis of every imaginable mitigation measure is not required; rather “CEQA is concerned with *feasible* means of reducing environmental effects.” *Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School District* (2d Dist. 1994) 24 Cal. App. 4th 826, 841 (italics in original).

While the mitigation conditions proposed by CDFG *could* certainly further reduce the significance of identified impacts, consistent with CEQA Guidelines § 15131, subd. (c), if the County considers economic and other conditions along with the environmental effects of the project, it could determine that such additional measures are not feasible. As stated in the County Planning Commission’s adopted findings, the mitigation measures identified in the FEIR provide reactive

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options to reduce future bird and bat mortality. As discussed in the Planning Commission's findings, compensatory habitat replacement is infeasible because 1) such habitat must be located sufficiently far away from the wind farm so as not to attract birds to the vicinity and 2) the nexus between bird and bat mortality at the project site and off-site habitat conservation is weak. Since the Planning Commission hearing, County Planning Staff has recommended that this finding be modified to clarify that "proximity to [a] wind farm would place [bird and bat species] at increased risk from turbine strikes, as compared to a more distant site."

The CDFG Appeal first asserts that nearby habitats are available as compensatory mitigation and that habitat enhancement would not be required so as to attract additional birds to the project site. As discussed above, the effectiveness of compensatory mitigation that involves nearby habitats is doubtful given that such nearby sites could actually increase the risk of turbine strikes to birds and bats.

Next the CDFG Appeal states that there is precedent for the application of compensatory mitigation as a standard mitigation practice, and that compensatory mitigation would be financially feasible through a cost sharing agreement with other partners. However, as discussed in the Planning Commission's findings, even if such compensation is standard mitigation practice, and even if it would be financially feasible through a cost sharing agreement, the Planning Commission determined, and Acciona agrees, that conservation easements are nonetheless infeasible in this instance because the nexus between bird and bat mortality at the project site and off-site habitat conservation is so weak.

In deciding whether mitigation is feasible, considerable deference is given to the "sound discretion of...local officials and their constituents who are responsible for such decisions." See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576. Additionally, because courts lack the "resources...[and] the scientific expertise to engage in such analysis," they do not weigh conflicting evidence to determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated, and therefore, may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 393. Thus, a Board of Supervisors' findings that conservation easements are not feasible due to social, economic, and other conditions discussed above would likely be upheld by a reviewing court.

b. Requiring habitat conservation easements would violate constitutional requirements.

Perhaps most importantly, mitigation requiring Acciona to fund such conservation easements is infeasible because it would violate constitutional requirements, and thus would violate CEQA. "Mitigation measures must be consistent with all applicable constitutional requirements." CEQA Guidelines, § 15126.4, subd. (a)(4). An essential "nexus," or connection between a required mitigation measure and a legitimate governmental interest must exist before the mitigation can be

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imposed.” *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); CEQA Guidelines, § 15126.4, subd. (a)(4)(A). Additionally, “[t]he mitigation measure must be ‘roughly proportional’ to the impacts of the project. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); CEQA Guidelines, § 15126.4, subd. (a)(4)(B).

As discussed in the Staff Report to the Planning Commission as well as the Planning Commission’s findings, with regard to easements to mitigate for loss of areal habitat, there is no clear or specific link between distant conservation lands and project habitat loss, and thus, requiring a conservation easement as mitigation for project habitat loss would violate the constitutional principles set forth in *Nollan*. Moreover, acquisition costs for conservation easements would not be commensurate with the minor scale (areal habitat loss would affect only about 6 percent of the project area) of the habitat loss impacts, and thus, mitigation for project habitat loss with a conservation easement would violate the constitutional principles set forth in *Dolan*.

With regard to easements to mitigate for potential fatalities to protected birds, again, requiring Acciona to fund a permanent conservation easement would violate the constitutional principles set forth in *Nollan*. As discussed in the Staff Report to the Planning Commission and the Planning Commission’s findings, there is little, if any, nexus between bird and bat fatalities at the project site and distant conservation lands or easements, particularly because protected species that may be killed at the project site do not have known active nests on the project site. Moreover, as clarified in Staff’s recommended modified finding and corresponding discussion in its letter to the Board of Supervisors, conservation easements for nearby lands could place birds and bats at an increased risk from turbine strike. Therefore, similar to distant off-site conservation easements, there would be little, if any, nexus between bird and bat fatalities at the project site and nearby conservation lands or easements.

c. The mitigation approach in the FEIR is consistent with the County’s Environmental Thresholds and Guidelines.

The CDFG Appeal alleges that failure to provide mitigation requiring conservation easements conflicts with the County’s Environmental Thresholds and Guidelines (County Guidelines). It should first be noted that the document provides a set of guidelines that are to be implemented as appropriate to each project. In setting forth general mitigation guidelines for biological impacts, it provides a mitigation hierarchy, which is a list of “general approaches to reducing biological impacts...presented in the order of their effectiveness.” County Guidelines, page 32. The mitigation hierarchy recommends mitigation by avoidance, then onsite mitigation, and then offsite mitigation. *Id.* at pages 31-32. As discussed above, for the proposed project, the Planning Commission found, and Acciona agrees, that off-site mitigation is inappropriate for the impacts to bird and bats. The County Guidelines provide a general approach to mitigating biological impacts, but leave discretion with the County with regard to the specifics of mitigation implementation. More importantly, the FEIR provides a mitigation approach consistent with the County Guidelines in that it seeks to mitigate impacts to birds and bats through avoidance, which is the mitigation method identified as the most effective approach. FEIR Mitigation Measure BIO-16d requires

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implementation of an adaptive management program which, as discussed above, provides for reactive options that may reduce future mortality, including possible limited curtailment of operations. See FEIR pages 3.5-106 through 3.5-110. Therefore, the FEIR is consistent with the County Guidelines.

2. Formation of a technical advisory committee to review avian mortality is unnecessary because the FEIR includes mitigation that requires implementation of an adaptive management plan.

The CDFG Appeal also states that formation of a TAC should be included as mitigation to reduce significant impacts to birds and bats. As proposed by CDFG, the TAC would “review and assess the results of the proposed Bird/Bat Mortality Study (FEIR Mitigation Measure BIO-16b) and...advise the County on appropriate mitigation measures and their implementation” and recommends that the TAC be comprised of “representatives of CDFG, U.S. Fish and Wildlife Service, the National Audubon Society, the lead biologist for the mortality study, the project owner or operator, the County, and a representative from the local community....” CDFG Appeal, page 4.

Rather than requiring the formation of a TAC, FEIR Mitigation Measure BIO-16d requires implementation of an adaptive management program (AMP). The requirements and ultimate goals of the adaptive management program are very similar to those that CDFG seeks to accomplish by the formation of a TAC. Just as a TAC would respond to results from the Bird/Bat Mortality Study, the AMP would be “activated in the event that bird or bat mortality exceeds specified threshold levels” which are described in detail on FEIR page 3.5-108. See FEIR page 3.5-106. The AMP is designed to provide “a structured framework to guide response [to bird and bat mortality] in case project operations result in excessive mortality that was unforeseeable at the time of...project approval.” *Id.* As described more fully in the FEIR, the AMP sets forth specified threshold criteria to assist in guiding an appropriate response to future impacts to birds and bats. Once Level 1 thresholds are reached, the project operator would be required to “notify the County within 24 hours and...[notify] CDFG and USFWS,” and to implement other appropriate measures such as increased survey frequencies and initiation of supplemental field observations. FEIR page 3.5-107. Once Level 2 thresholds are reached, the project operator would be required to notify the County, CDFG, and USFWS. In response, the County, in consultation with CDFG, would consider and require implementation of specified measures. *Id.* Because the AMP is structured to involve CDFG to ensure that appropriate mitigation relative to future impacts to birds and bats is implemented, the AMP serves the same purpose as a TAC would, and therefore, formation of a TAC would be unnecessary and would result in duplicative efforts.

D. CDFG input regarding selection of a biological resources consultant to conduct bird and bat strike mortality surveys in connection with operation of the project is welcome.

The CDFG Appeal also requests that the County Board of Supervisors provide a condition of approval that would ensure that CDFG be given the opportunity to provide input regarding the County’s selection of a biological resources consultant to conduct bird and bat strike mortality



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surveys in connection with operation of the proposed project. CDFG Appeal, page 4. The Mitigation Monitoring Plan, which is contained in FEIR Appendix D, provides that the County *or* CDFG would be the party responsible for verifying that FEIR Mitigation Measure BIO-16b, bird/bat mortality study, is implemented. Specifically, the Mitigation Monitoring Plan provides that the County or CDFG must review and approve the survey methodology for the bird/bat mortality survey. Additionally, as stated on FEIR page 3.5-108, the County must approve the Monitoring and Adaptive Management Plan provided for in Mitigation Measure BIO-16 *in consultation with CDFG*. As the monitoring plan must be approved in consultation with CDFG, it is implicit that CDFG's input would be sought in connection with the County's selection of a biological resources consultant to conduct the mortality surveys. However, as Acciona has no objection to CDFG's participation in the selection of the biological consultant to conduct the bird and bat mortality study as set forth in FEIR Mitigation Measure BIO-16b, Acciona would have no objection if the County Board of Supervisors desired to ensure CDFG's participation in such a selection by amending the language in the FEIR.

Acciona appreciates the opportunity to address the issues raised in the CDFG's appeal of the Planning Commission's approval of the Lompoc Wind Energy Project and hopes that these responses have provided clarification to allay any concerns the appeal may have raised. Again, Acciona appreciates the County's efforts in conducting a thorough environmental review of the project and looks forward to constructing and operating this clean renewable energy project.

Very truly yours,

S. Wayne Rosenbaum

cc: John Day, Santa Barbara County Planning Department