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August 7, 2023

By email only dvillalo@co.santa-barbara.ca.us

County of Santa Barbara Planning Commission
123 East Anapamu Street
Santa Barbara, CA 93101

Re: August 9, 2023, Standard Agenda Item 2 (23RVP-00031)

Dear Planning Commissioners,

We are writing on behalf of the Santa Barbara County Coalition of Labor, Agriculture & Business (COLAB) to oppose the modification of Condition #38 of BayWa r.e.'s conditional use permit for the Strauss Wind Energy Project.

COLAB is the first and only Santa Barbara County coalition to bridge the gap between the Northern and Southern portions of our County, and successfully bring together organized labor, agriculture and business. COLAB boasts over 1000 members from throughout Santa Barbara County. It is an organization that has a profound affect on curbing the growth of county government as well as improving the regulatory climate. It has helped businesses big and small to survive by demanding our elected officials consider the impact to businesses and taxpayers for virtually everything they do. We have also insisted that local county government follow Federal and State law versus leaving it to county staff or leaders to create their own laws.

It is in this last role that COLAB opposes modifying BayWa r.e.'s obligation to obtain an Incidental Take Permit from the US Fish and Wildlife Service before operating the Strauss Wind Energy Project. State and federal wildlife laws are exacting in their requirements on businesses both large and small, on homeowners, farmers, and other landowners, and on local governments and their taxpayers and other constituents. COLAB advocates for reasonable application of these laws, and for **even handed** application of them.

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It is beyond credulity that any small business, farmer, homeowner, or other ordinary permit applicant, who had simply **neglected to apply** for a sister agency permit required as a condition of a county permit, would get a favorable decision from the county to defer (with no new deadline!) the county requirement and allow the project to go forward without it.

We agree with the Santa Barbara Audubon Society's July 2, 2023, letter that doing so in this case (for an international energy company at that) would set a very bad precedent. One important aspect of that precedent is the obvious appearance of favoritism and disrespect for the rule of law when it is inconvenient to the preferences of County leaders. The message this action will send to the County's thousands of small business owners and employees and landowners who are not well enough connected to get special favorable treatment will undermine the credibility of County leaders as well as the laws that get enforced unevenly.

In addition to being bad government and bad policy to preferentially excuse BayWa r.e. from complying with the Bald and Golden Eagle Protection Act, the contemplated action is illegal and cannot be approved without exposing the County to liability.

The proposed modification of Condition #38 substitutes no mitigation for golden eagle take in place of the existing obligation that BayWa r.e. obtain an ITP from the US Fish and Wildlife Service. The EIR for this project identifies take of golden eagles by the project as a significant impact requiring mitigation, and permit condition #38 accomplishes that mitigation by requiring the applicant to apply for and obtain a federal ITP for golden eagles. The application and resulting review will more concretely assess the likely scope of take and prescribe adequate and enforceable mitigation for that take. As disclosed in your July 3, 2023, staff report on this issue, the adoption of this mitigation measure was part of the basis for the County's subsequent finding of overriding concerns to proceed with the project despite any remaining unmitigated harm to golden eagles and other wildlife. Without this mitigation measure, the finding

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of overriding concerns is invalid, and formally removing the mitigation measure would expose that finding to legal challenge as the result of the proposed action.

There is no question that the mitigation measure included in existing Condition 38 is feasible. We are unaware of any objection to it raised by the applicant at the time the EIR was certified, and the project approved with this mitigation measure, in January of 2020. Any litigation to challenge the feasibility of this measure would be long since untimely.

In its place, BayWa r.e. offers only to (a) comply with other permit conditions that it already has to comply with anyway, and (b) to pursue an application for a federal ITP while keeping the County posted on the progress. In place of a deadline certain (i.e. "before project operation") the County now proposes **no** deadline. Instead, there will be updates every two years into the indefinite future. This amounts to entirely waiving Condition 38 in practice for the indefinite future.

The proposed modifications provide **no** mitigation for any golden eagle take that occurs between now and the years-in-the-future someday when BayWa r.e. may finally get an ITP. While the action is characterized as a modification of the permit condition, it is in effect an open-ended waiver of the condition. And the **only** reason for even thinking about modifying the already adopted condition that an ITP be obtained before operation is that the operator of a large complex energy generation project with multiple regulatory authorities and responsibilities ... neglected to apply for it for the last three years. One has to wonder what else this operator may have neglected to do.

CEQA Violations

The County may only modify an adopted CEQA mitigation measure for legitimate reasons. The courts have generally only identified **infeasibility** of a mitigation measure as a "legitimate reason" to modify it, and require a supplemental EIR to support the finding of infeasibility before the mitigation measure may be modified. *See generally Lincoln Place Tenants Assoc. v. City of Los Angeles*, 130 Cal.App.4th 1491, 1509 (2005).

Here, none of the reasons proposed by the Planning Commission in its last hearing and dutifully reported back by the staff in the August 1, 2023, staff report remotely serve as "legitimate reasons." Nothing in the staff report even tries to explain how any of the offered reasons renders existing Condition #38 infeasible. All of them were more or less true and accurate three and a half years ago when the County approved the permit with Condition 38 included. There are no changed circumstances in the environment, or in the significant impacts of the project as approved, or in the legal obligation to mitigate those impacts through all feasible measures, or in the necessary actions to mitigate those impacts.

There is a logic to existing Condition 38. The County is not expert in assessing and mitigating golden eagle take. But is aware that take will be a significant impact on the environment and so must be mitigated to the extent feasible. Requiring the project to obtain a federal ITP before operating is the appropriate way of ensuring the impacts are more concretely assessed, by an agency with expertise to do so, and that mitigation is put in place (again, prescribed by those with expertise) before any of the take occurs.

Putting this more basically, the County's EIR and permit for the SWEP entirely "outsources" mitigation of golden eagle take to the US Fish and Wildlife Service. That "outsourcing" is appropriate in this instance, but it is still the case that the **only mitigation measure** in the permit for golden eagle take is the obligation to obtain an incidental take permit from the US Fish and Wildlife Service. Without that measure as adopted, there is no mitigation for golden eagle take in the permit.

The County has not imposed any other measure that directly mitigates the significant impact of golden eagle take, and decided in January 2020 that the necessary approach was to require mitigation be in place, through federal ITP permitting, before the impacts occur. Again, the federal ITP is the **only** direct mitigation for golden eagle take in the EIR or the permit. There is no replacement mitigation in the proposed modification of the permit. What there is instead is years of reports on how it is going with a permit process that may eventually (the modifications impose no obligation to ever get an incidental take permit) establish some mitigation.

Since there are no changed conditions, the County has no basis to find either that the existing mitigation measure is no longer feasible or that it is no longer required due to some other mitigation that takes its place. The only reason this is being considered at all is that the applicant did not bother to apply for the permit until a few months ago, after knowing for more than three years that it would be required before operation.

But this failure by the project operator does not render the existing condition infeasible. Indeed, the fact that the operator is offering to make a plausible effort to get a federal ITP sometime in the future demonstrates that it remains feasible. Otherwise, BayWa r.e. would be suggesting some substitute mitigation measure, or trying to make the case that mitigation is not necessary.

None of the reasons to modify the condition proffered in the August 1 staff report provide any evidence that the existing condition is no longer feasible. At very best they intimate that there is a financial cost to the project of complying with the existing measure. But that alone has nothing to do with feasibility. There is no evidence in the record of what the cost of compliance is, and how that differs from when the condition was first imposed. See generally *Uphold Our Heritage v. Town of Woodside*, 147 Cal.App.4th 587 (2007). "The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially **infeasible**. What is required is evidence that the *additional* costs or lost profitability are sufficiently severe as to **render** it impractical to proceed with the **project**." *Citizens of Goleta Valley v. Board of Supervisors*, 197 Cal.App.3d 1167, 1181 (1988) (emphasis added).

It is also worth noting that when the permit was approved in January 2020, it was only *estimated* that the ITP could be obtained in 1-3 years. While probably a solid estimate, the time that it would take to obtain the permit was not a factor in whether it was feasible. BayWa r.e. was never guaranteed a start date, at which the ITP obligation would lapse or be deferred if not already completed.

The only issue is delay (of the project's making) in commencing operation because of BayWa r.e.'s failure to competently file an application on a timely basis. The mitigation measure remains feasible, but now the project operator's lack of competence renders the measure inconvenient. We are hard pressed to find any legal authority that allows a local government to modify an adopted CEQA mitigation measure on the sole basis that it exceeds the project operator's competence to timely perform, and will therefore impose opportunity costs on the operator to finally comply. Lack of effort to comply with a mitigation measure cannot serve as a legitimate reason to modify the measure. If it were otherwise, every developer in California would "forget to file" for necessary but inconvenient state and federal permits on which local governments routinely condition land use approvals. To pretend otherwise is to re-imagine CEQA as the California Environmental Quality Suggestion, with mitigation of known significant environmental impacts left to developer discretion. A hyperbolic assessment perhaps, but certainly for the well connected and politically preferred, this will certainly be the result.

CESA Issues

Golden eagles are a California fully protected species. Until very recently, there was no way to obtain a state permit for incidental take of fully protected species. But as of July 10, 2023, new Fish and Game Code section 2018.15 authorizes California Fish and Wildlife to issue incidental take permits for fully protected species to wind energy projects. See SB 147 (2023); Fish & Game Code § 2018.15(b)(4).

As a result of this newly available state permitting process, the County must impose a state ITP requirement on the project if it is modifying Condition 38. Failure to do so would expose the County to citizen suit liability under CESA as well as CEQA.

Finally, the County's authorization of operation of the SWEP without an ITP would expose the County as well as the operator to take liability under the Eagle Protection Act and CESA. Not only would the proposed modification of Condition 38 be a "but for" cause of any take of golden eagles at the project, but it would proximately cause that take. See *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). There is a direct and

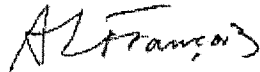
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unmediated link between the requested modification of Condition 38 and operation of the wind turbines at the project, which would be the immediate cause of any take. It is not speculative or unforeseeable that allowing the turbines to operate will cause take. That take is foreseeable and likely is, after all, why it was addressed in the EIR and why a federal ITP is required as a mitigation measure in existing Condition 38.

Thank you for considering these comments. If you have any questions or need additional information I can be reached at the above phone number or email address.

Sincerely,

BRISCOE IVESTER & BAZEL LLP



Tony Francois
Partner

On behalf of Santa Barbara Coalition of
Labor, Agriculture & Business

TF:

cc: COLAB

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August 17, 2023

By FedEx Delivery

County of Santa Barbara
North County Planning Center
Planning & Development, Development Review Division
624 West Foster Road
Santa Maria, CA 93455
ATTN: Planning (Strauss Wind LLC, 23RVP-00031)

Re: Appeal to Board of Supervisors from
Planning Commission August 9, 2023, Decision in 23RVP-00031

Dear County Supervisors and Staff,

This letter, on behalf of the Santa Barbara County Coalition of Labor, Agriculture & Business (COLAB), accompanies our appeal to the Board of Supervisors from the Planning Commission's August 9, 2023, decision to modify Condition #38 of Strauss Wind, LLC/BayWa r.e.'s conditional use permit for the Strauss Wind Energy Project (SWEP).

We are also enclosing a copy of our August 7, 2023, comment letter to the Planning Commission, which lays out the key factual and legal arguments against the modification under CEQA and the California Endangered Species Act. These arguments are all applicable in this appeal. We note the following additional points that were raised during the Planning Commission hearing as additional grounds for this appeal.

CEQA Violations

In addition to the CEQA arguments raised in our August 7 letter and during the August 9 hearing (by COLAB executive director Andy Caldwell and the undersigned), we note that as to the "on the fly" modifications to the permit (including carcass searches and

penalties for eagle takes), added during the hearing to the staff recommended modifications, there is no evidence in the record to support any conclusion that the approved permit modifications replicate to any extent what the US Fish and Wildlife Service would have required in an incidental take permit following what the County originally found was a necessary assessment of available mitigation measures that only US Fish and Wildlife was competent to carry out.

The original CEQA materials and findings on permit term 38 emphasized the County's *lack of expertise* in this area and necessary dependence on the US Fish and Wildlife Service to fully mitigate this impact. But the Planning Commission rested its decision to waive the requirement that SWEP obtain an ITP before beginning operations on its opinion that now, somehow, the County is a *superior* protector of golden eagles and that the federal agency is really not that protective of the species. There is no evidence in the record for this conclusion, and there is no evidence in the record for any conclusion that the modifications to the SWEP permit provide anything like equivalent mitigation for golden eagle take, or that golden eagle take remains mitigated to the full extent feasible under the modified permit term.

As explained in our August 7 letter, the proper procedure under clear case law is a supplemental EIR. The arguments made by SWEP's counsel to the Planning Commission are not applicable, because they only apply to whether a supplemental EIR is required *before* project approval. The authorities cited in our August 7 letter establish that after project approval, in order to modify an already approved mitigation measure, a supplemental EIR is required, and that the County must establish that the existing mitigation measure is no longer required (which nobody has argued) or no longer feasible (for which there is no evidence in the record).

The bottom line remains that the ITP remains feasible, and is now merely inconvenient to the SWEP operators who neglected to apply for it (no effort was made to explain this negligence at any public step of the modification process). Since the mitigation measure remains feasible, then the County has not established legally sufficient reasons to waive

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the measure, and has not undertaken the appropriate CEQA process to assess whether and how to modify it.

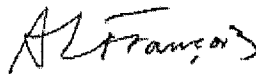
CESA Issues

County staff and the SWEP operator conceded at the Planning Commission hearing that the new state ITP for golden eagles will be applicable to the project, and only objected that California Fish and Wildlife does not have the permitting program up and running yet, and is not sure when it will be. That is not an adequate basis to excuse the project from obtaining the permit as it becomes available, as a condition of the permit modification that has been requested.

Thank you for considering these comments. If you have any questions or need additional information, I can be reached at the above phone number or email address.

Sincerely,

BRISCOE IVESTER & BAZEL LLP



Tony Francois
Partner

On behalf of Santa Barbara Coalition of
Labor, Agriculture & Business

TF:

cc: COLAB

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Currently, information for Limited Liability Partnerships (e.g. law firms, architecture firms, engineering firms, public accountancy firms, and land survey firms), General Partnerships, and other entity types are **not contained** in the California Business Search. If you wish to obtain information about LLPs and GPs, submit a Business Entities Order paper form to request copies of filings for these entity types. Note: This search is not intended to serve as a name reservation search. To reserve an entity name, select Forms on the left panel and select Entity Name Reservation ? Corporation, LLC, LP.

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A Basic search can be performed using an entity name or entity number. When conducting a search by an entity number, where applicable, **remove "C"** from the entity number. Note, a **basic search** will search **only ACTIVE entities** (Corporations, Limited Liability Companies, Limited Partnerships, Cooperatives, Name Reservations, Foreign Name Reservations, Unincorporated Common Interest Developments, and Out of State Associations). The basic search performs a contains ?keyword? search. The Advanced search allows for a ?starts with? filter. To search entities that have a status other than active or to refine search criteria, use the **Advanced** search feature.

Advanced Search

An Advanced search is required when

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COALITION OF LABOR,
AGRICULTURE & BUSINESS OF
SANTA BARBARA COUNTY
(1816104)



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Formed In	CALIFORNIA
Entity Type	Nonprofit Corporation - CA - Mutual Benefit
Principal Address	616 HIGH MEADOW DRIVE NIPOMO, CA 93444
Mailing Address	PO BOX 7523 SANTA MARIA, CA 93456
Statement of Info Due Date	02/28/2022
Agent	Individual JAMES ANDREW CALDWELL 616 HIGH MEADOW DRIVE NIPOMO, CA 93444



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