



BOARD OF SUPERVISORS
AGENDA LETTER

Agenda Number:

Clerk of the Board of Supervisors
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101
(805) 568-2240

Department Name: Planning and Development
Department No.: 053
For Agenda Of: October 3, 2023
Placement: Departmental
Estimated Time: 1 hour
Continued Item: No
If Yes, date from: N/A
Vote Required: Majority

TO: Board of Supervisors
FROM: Department Lisa Plowman, Director, Planning & Development
Director(s) (805) 568-2086
Contact Info: John Zorovich, Deputy Director, Energy & Minerals Division
(805) 568-2519
SUBJECT: Appeal of the Planning Commission Approval of the Revision to Permit Condition No. 38, MM BIO-16 (Golden Eagle Take Permit) for the Strauss Wind Energy Project (Case No. 23RVP-00031), Third and Fourth Supervisorial Districts

County Counsel Concurrence

As to form: Yes

Other Concurrence: N/A

Auditor-Controller Concurrence

As to form: N/A

Recommended Actions:

Staff recommends that the Board uphold the appeal, and deny the project by taking the following actions:

- a) Uphold the appeal, Case No. 23APL-00034;
- b) Make the required findings for denial of the project, Case No. 23RVP-00031 (Attachment A);
- c) Determine that the denial of the project is exempt from CEQA pursuant to State CEQA Guidelines Section 15270(a) (Attachment B); and
- d) Deny the project, Case No. 23RVP-00031.

Alternatively, the Board could deny the appeal and approve the project by taking the following actions:

- a) Deny the appeal, Case No. 23APL-00034;
- b) Make the required findings for approval of the project, Case No. 23RVP-00031, including the CEQA findings (Attachment C);
- c) After considering the Addendum dated September 30, 2023 (Attachment E), together with the previously adopted Environmental Impact Report 18EIR-00000-00011 (Attachment 6 of the

September 19, 2023 Set Hearing Board Agenda Letter), determine that, as reflected in the CEQA findings, no subsequent Environmental Impact Report or Negative Declaration shall be prepared for this project; and

- d) Grant *de novo* approval of the project, Case No. 23RVP-00031, subject to the Conditions of Approval (Attachment D).

Summary Text:

This Board Agenda Letter details the appeal of Case No. 23RVP-00031 that would revise the Strauss Wind Energy Project (SWEP) Conditional Use Permit No. 16CUP-00000-00031 Condition No. 38 concerning golden eagle (*Aquila chrysaetos*) take authorization from the U.S. Fish and Wildlife Service (USFWS). The Planning Commission approved a permit revision to require the Applicant/Operator, Strauss Wind Energy LLC (Strauss), an affiliate of BayWa r.e. Wind, LLC, to show that an Incidental Take Permit (ITP) application is determined complete by the USFWS, rather than an ITP be issued, or intended to be issued, or not needed, prior to commencing operation of the SWEP. The Planning Commission found that the revision was consistent with the requirements of the California Environmental Quality Act (CEQA). The Santa Barbara County Coalition of Labor, Agriculture & Business (COLAB) appealed the Planning Commission’s decision on the grounds that the approval is in direct conflict with CEQA and the California Endangered Species Act (CESA), and based on favoritism for the Applicant/Operator. While Staff does not agree with all the issues raised on appeal, Staff is recommending that the appeal be granted and that the project to modify Condition No. 38 be denied.

Background:

The SWEP, Case No. 16CUP-00000-00031, was approved by the Board of Supervisors in January 2020 for the construction and operation of up to 29 wind turbine generators and ancillary equipment located in the coastal hills southwest of the City of Lompoc. Strauss completed substantial construction of the SWEP, and is planning for the upcoming start of operations.

Condition No. 38 of the SWEP Conditional Use Permit (CUP) requires, in part, that Strauss obtain an ITP from the USFWS prior to operation, or provide the County with a letter from USFWS stating that an ITP is expected to be issued, or is not necessary. The Condition was adopted as one of several feasible mitigation measures identified in the Final Supplemental Environmental Impact Report (FSEIR, No. 18EIR-00000-00001) in order to reduce potential significant impacts to golden eagles to the maximum extent feasible. Potential impacts to golden eagles were identified as a Class I (Significant and Unavoidable) impact in the FSEIR. Multiple Conditions of the CUP serve to first minimize and/or avoid impacts to golden eagles, and Condition No. 38 was adopted, in part, to ensure that compensatory mitigation measures for any unavoidable golden eagle take would be implemented through the ITP. Compensatory mitigation is defined as the restoration, establishment, enhancement, or preservation of a habitat or species for the purpose of offsetting unavoidable adverse impacts.

In May 2023, Strauss submitted an application to the County to revise Condition No. 38 to propose that prior to operation, Strauss demonstrate that an ITP application be determined complete by the USFWS

rather than an ITP be issued, or intended to be issued, or not needed. Strauss also proposes the following additional requirements prior to operation, which are intended to bolster the existing Conditions of Approval: 1) provide a “Letter of Commitment” to maintain an active ITP application and comply with federal compensatory mitigation requirements; 2) provide a signed contract between Strauss and a contractor to implement the required Adaptive Management Plan; and 3) complete the installation of required bird surveillance technology. The purpose of modifying Condition 38 is to allow Strauss to commence SWEP operations in the fall of 2023, prior to ITP issuance which is expected to take a year or more according to USFWS staff.

The project was first heard by the Planning Commission on July 12, 2023. Staff recommended denial of the project, stating that: 1) Strauss’ failure to submit a timely ITP application did not constitute a “legitimate reason” under CEQA for modifying an adopted mitigation measure; 2) that the revised Condition would cause uncertainty and delay in federally required mitigation measures; and 3) that the revised Condition would result in a less binding and less enforceable Condition of Approval. However, the Planning Commission identified various legitimate reasons to approve the revised condition in compliance with CEQA, requested that Staff add supplemental monitoring and reporting requirements to the Conditions to ensure impacts remained mitigated to the maximum extent feasible, and requested that Staff return with Findings for Approval and revised Conditions of Approval.

The project returned to the Planning Commission on August 9, 2023 with the Commission’s requested changes. In response to additional public comments, the Planning Commission approved the requested modifications to Condition 38 with further revisions to: Condition No. 1 (*Project Description*) for Strauss to make a payment of \$30,000 to a County-approved raptor rehabilitation center for each documented golden eagle take that occurs prior to ITP issuance, if any; Condition No. 38 (*Bird and Bat Conservation Strategy*) to add a requirement to also obtain a state ITP from the California Department of Fish and Wildlife (CDFW) under the new California Senate Bill 147 which allows CDFW to issue take permits for fully protected species including the golden eagle; and Condition No. 40 (*Bird/Bat Mortality Study*) to increase eagle carcass searches to weekly from every two weeks.

On August 21, 2023, COLAB filed an appeal of the Planning Commission’s action (Case No. 23APL-00034), which is now before your Board for consideration. COLAB’s appeal issues and staff’s responses are provided below. Staff does not support all of the appeal issues, however recommends denial of the revision as it would result in a less protective measure for eagles, and a less binding and less enforceable Condition 38. Note that if the Board of Supervisors upholds staff’s recommendation and denies the revised Condition, the Planning Commission’s requested changes would not be effectuated, and 16CUP-00000-00031 would remain as currently approved.

The record for this request was provided in the Set Hearing Board Agenda Letter dated September 6, 2023 included herein by reference, and includes the Appeal Letter dated August 16, 2023, the Planning Commission Action Letter dated August 11, 2023, the Planning Commission Staff Memo dated August 1, 2023, the Planning Commission Staff Report dated July 3, 2023, public comment letters from the July and August Planning Commission hearings, a link to FSEIR No. 18EIR-00000-00001, and the Facilitation Report.

Appeal Issues and Staff Responses

1. The project substitutes no mitigation for eagle take in place of the ITP.

The appellant states that the revised Condition does not substitute any other mitigation measures for golden eagle take in place of Strauss' existing obligation to obtain an ITP prior to operation. The applicant states that the County outsources mitigation of golden eagle take to the USFWS, and requiring the SWEP to obtain an ITP prior to operation is the only appropriate way of ensuring impacts are correctly assessed by the regulatory agency with the expertise to do so.

Staff Response. 16CUP-00000-00031 contains various Conditions of Approval to first minimize and/or avoid potential impacts to golden eagles including: Condition No. 9 for ongoing worker education programs; Condition No. 37 for the installation of bird surveillance technology; Condition No. 39 for bird behavioral studies; Condition No. 40 for bird and bat mortality studies; Condition No. 41 for the removal of carrion; and Condition No. 42 for the implementation of a comprehensive Adaptive Management Plan that requires Strauss to stop certain operations if a pre-determined amount of eagles are killed. These mitigation measures were developed as part of the FSEIR to substantially lessen the severity of impacts to golden eagles; however the potential for take during operations remains. Through the ITP, the USFWS may impose additional minimization and avoidance measures on the SWEP, and would impose compensatory mitigation requirements on Strauss for any eagle take that occurred. Therefore, the requirement under Condition No. 38 to obtain an ITP prior to operation was adopted to guarantee that any federally-required avoidance and minimization measures and/or compensatory mitigation would be in place prior to any potential impact occurring.

With the revised Condition, Strauss remains obligated to obtain an ITP for the SWEP. However, if Strauss commenced operations and the take of golden eagles occurred prior to ITP issuance, there would be no compensatory mitigation required for that take through the ITP process. The USFWS only imposes compensatory mitigation payments prospectively for take that occurs after the ITP is issued. Take of a golden eagle without an ITP is considered a violation of the Eagle Act, which may result in fines and/or imprisonment as enforced through the USFWS. Any monetary restitution for unpermitted take prior to ITP issuance would be imposed by the USFWS through potential prosecution of that unpermitted take.

To address this, during the August 9, 2023 hearing, the Planning Commission approved additional revisions to Condition No. 1 (*Project Description*) for Strauss to make a payment of \$30,000 to a County-approved raptor rehabilitation center per documented eagle take that occurred prior to ITP issuance. This amount was based on public comments referencing a penalty amount issued to a separate wind energy company for violating the Eagle Act. However, this voluntary payment would not replace any minimization and mitigation measures required by the ITP, which would be based on existing laws and processes and may be more stringent for the protection of and mitigation for golden eagle take.

2. The Finding of Overriding Considerations is invalid.

The appellant states that without the requirement to obtain an ITP prior to operation, the Finding of Overriding Considerations is invalid and approving the Condition revision would expose the County to legal challenges.

Staff Response. The Board of Supervisors found that the Significant and Unavoidable impacts of the SWEP were acceptable when weighed against certain overriding social, technical, economic, legal, and other considerations pursuant to CEQA Guidelines Sections 15043, 15092, and 15093. These overriding considerations remain valid for the Condition revision, as potential impacts to golden eagles remain Significant and Unavoidable under CEQA.

CEQA requires that lead agencies impose feasible mitigation measures in order to substantially lessen or avoid the significant adverse impacts of a project. Under CEQA “feasible” means “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors” (Pub. Res. Code § 21061.1.). Once a mitigation measure has been adopted, any subsequent deletion or revision of that measure must be supported by a legitimate reason, such as that the mitigation measure is now infeasible, ill-advised, impracticable, or unworkable. As discussed in more detail in Appeal Issue No. 3 below, as part of the revision approval, the Planning Commission found that the requirement that Strauss obtain an ITP prior to operation, or obtain a letter from the USFWS stating that an ITP was either expected to be issued or not needed, was no longer feasible due to the lengthy timeframe for ITP issuance, USFWS’s policy of not issuing pre-determination letters, and the urgency to commence SWEP operations. The Commission also found that through the implementation of existing conditions (especially Condition No. 42, *Bird and Bat Adaptive Management Plan*), supplemental monitoring and reporting requirements, and additional revisions to Conditions No. 1, 38, and 40, impacts to golden eagles remained mitigated to the maximum extent feasible.

The CEQA determinations are summarized in the attached Addendum to FSEIR No. 18EIR-00000-00001, which supports a Finding that the Statement of Overriding Considerations remains valid for the Condition revision, and that following approval of the revisions, potential impacts to golden eagles remain mitigated to the maximum extent feasible. (State CEQA Guidelines § 15091.)

3. Project approval is in violation of CEQA.

The appellant states that the County may only modify an adopted mitigation measure for legitimate reasons, and that courts have generally only identified the infeasibility of a mitigation measure as a legitimate reason to do so under CEQA. The appellant further states that a supplemental EIR is required to support a finding of infeasibility before the mitigation measure may be modified.

Staff Response. Under CEQA, modifications to an adopted mitigation measure must be supported by a legitimate reason for the change based on substantial evidence (such as that the mitigation measure is now

infeasible, ill-advised, impracticable, or unworkable), and such modification cannot result in a new or more severe environmental impact. During the July 12, 2023 hearing, the Planning Commission identified various economic, environmental, social, and technological factors to support the finding that the extensive delay Strauss now faces in obtaining an ITP, as well as the unavailability of alternatives (such as obtaining a letter from USFWS indicating that the permit is expected to be issued or not needed), now render the original mitigation measure infeasible and unworkable. These factors include: 1) the ability to provide proof of concept for wind energy projects on the California coast; 2) the ability for Strauss to deliver on their sales contract; 3) the avoidance of possible degradation of equipment; 4) the immediate availability of renewable energy; 5) the potential for SWEP to replace other power sources in the state, including fossil fuels and nuclear power; 6) support for California's climate goals; and 7) the support for the County's Energy and Climate Action Plan. The Planning Commission also found that the Condition revision provides no less protection for golden eagles, as comprehensive avoidance and minimization measures remain in place, and that the potential impacts remain mitigated to the maximum extent feasible through the additionally approved monitoring and reporting requirements and voluntary pre-ITP take payments.

However, Staff recommends denial of the Condition revision, as it provides less protection for golden eagles by allowing the SWEP to commence operations prior to ITP issuance. As described in Appeal Issue No. 1 above, the Condition revision does not assure full compensatory mitigation for any golden eagle take that might occur prior to ITP issuance. Strauss's voluntary payment of \$30,000 per documented eagle take would not replace mitigation measures required by the ITP, which may be more stringent for the protection of and mitigation for golden eagle take. Furthermore, Staff believes that to the extent that the original mitigation measure is now infeasible or unworkable, such infeasibility is the result of Strauss's failure to timely apply for an ITP, and Staff does not recommend approving a revision to the Conditions of Approval on that basis.

Addressing the appellant's argument regarding infeasibility, during the August 2023 hearing, the Planning Commission found that it was no longer feasible to obtain the ITP prior to operation without significantly delaying SWEP operations, and thereby delaying or potentially foregoing the benefits of the SWEP outlined above. The Commission also found that a letter from the USFWS stating that the ITP is expected to be issued is no longer feasible, as Strauss requested such a letter from the USFWS and was informed the USFWS does not issue pre-determination letters. Lastly, the Commission found that a letter from the USFWS stating that an ITP is not required is also not feasible, as Strauss remains committed to obtaining an ITP and adhering to the terms of its conditions. Strauss does not propose to delete the adopted mitigation measure, but instead proposes to modify it, including bolstering other related mitigation measures intended to reduce potential adverse impacts to golden eagles. The County retains discretion in determining whether the revised portions of the mitigation measure are now infeasible or unworkable under present circumstances.

Addressing the appellant's argument that a Supplemental EIR is required, revisions to existing mitigation measures do not necessarily require a Supplemental EIR. Because FSEIR 18-EIR-00000-00001 was

adopted for the SWEP, CEQA Guidelines § 15162 states that no subsequent EIR or Negative Declaration shall be prepared unless one or more of the following have occurred: 1) substantial changes are proposed in the project which will require major revisions to the Supplemental EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; 2) substantial changes will occur with respect to the circumstances under which the project is undertaken which will require major revisions to the Supplemental EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or 3) new information of substantial importance which was not known and could not have been known at the time the previous Supplemental EIR was certified as complete has become available. The proposed revisions would not result in any physical changes to the SWEP, and there are no changed circumstances that would trigger the above occurrences. No new significant environmental effects, or a substantial increase in the severity of previously identified significant effects under 18EIR-00000-00001 have been found. Under the revised Condition, potential impacts to golden eagles would remain Significant and Unavoidable under CEQA, which is the same as the originally approved SWEP. Because none of the conditions in CEQA Guidelines §15162 have occurred, no subsequent EIR is required. Staff has prepared an Addendum to FSEIR 18EIR-00000-00001, which summarizes the proposed revisions and sets forth the determination under CEQA that the revision is supported by a legitimate reason and that impacts to golden eagles remain mitigated to the maximum extent feasible.

4. Approval is an open-ended waiver of Condition No. 38.

The appellant states that the approval of the Condition revision allows for an open-ended waiver by not requiring a deadline for Strauss to obtain an ITP.

Staff Response. With the Condition revision, an ITP would no longer be required prior to operation; however Strauss would still be required to obtain an ITP and provide the County with a Letter of Commitment to maintain an active ITP application with the USFWS. Strauss would also be required to report on the status of the ITP to Planning and Development Staff every six months, and if the ITP is not obtained within two years, Strauss would be required to provide an update to the Planning Commission in a public hearing. If Strauss withdraws their application, or fails to obtain an ITP, they would be in violation of their CUP and subject to investigation, stop work, legal action, and/or penalty fees in accordance with LUDC Section 35.108 (*Enforcement and Penalties*). Further, any deviations from the approved project description would be reviewed and decided upon by the County through a formal permit review process.

5. Approval is in violation of CESA.

The appellant states that the County must impose a California State ITP requirement on the SWEP due to the recent July 10, 2023 revision to the California Fish and Game Code Section 2018.15, which authorizes CDFW to issue ITPs for fully protected species. The appellant further states that failing to impose a state ITP would expose the County to citizen suit liability under CESA.

Staff Response. California Senate Bill (SB) 147 was approved by the Governor on July 10, 2023 and authorizes CDFW to issue ITPs for CESA-listed fully protected species. Prior to SB 147, ITPs were only issued for CESA-listed endangered and threatened species. SB 147 requires CDFW to develop a plan by July 1, 2024 that assesses the population of golden eagles, and requires CDFW to inform the State Legislature of the implementation of the state-wide ITP program by July 1, 2025. Strauss is subject to this law, and would be required by CDFW to obtain a state ITP. However, the state process is new, and is likely to take longer than the federal process as CDFW develops the staffing and structure necessary to implement these requirements. During the August 2023 Planning Commission Hearing, and in response to public comments, the Planning Commission approved a revision to Condition No. 38 to state that Strauss shall also commit to obtaining a state ITP through the CDFW. If the Board of Supervisors upholds staff's recommendation and denies the Condition revision, this change to the permit would not be effectuated and the CUP would remain as currently approved; however Strauss would remain subject to state laws to obtain an ITP through the CDFW.

6. Approval exposes the County and Operator to liability.

The appellant states that the Planning Commission's approval of the project exposes the County and Strauss to liability under both the Eagle Act and CESA, as commencement of the SWEP would be the direct and immediate cause of any golden eagle take.

Staff Response. If SWEP operations resulted in an eagle take prior to ITP issuance, Strauss would be in violation of state and federal laws and subject to enforcement (e.g. fines and/or imprisonment) through the USFWS and/or the CDFW. As specified in the USFWS's 2013 "Land-Based Wind Energy Guidelines", USFWS "*focuses its resources on investigating and prosecuting those who take migratory birds without identifying and implementing reasonable and effective measures to avoid the take*". As described in this Board Agenda Letter, the SWEP has been designed and conditioned to avoid and minimize impacts to golden eagles to the maximum extent feasible. Further, as illustrated by the USFWS's recently-approved ITP for the High Plains and McFadden Ridge I Wind Energy Project, which followed the unpermitted take of seven golden eagles and three bald eagles, USFWS enforcement actions focused on malfeasant operators, not the permitting agencies that approved the project following comprehensive environmental review. Staff disagrees that the County's approval of the Condition revision would be considered by the USFWS a direct cause of any potential golden eagle take caused by Strauss's operation of the SWEP.

Fiscal and Facilities Impacts:

Budgeted: Yes

The costs to process the appeal were borne by the Applicant through the payment of processing fees. Funding for this project is budgeted in the Planning and Development's Permitting Budget Program on page D-310 of the County of Santa Barbara Fiscal Year 2023-24 Adopted Budget.

Special Instructions:

The Planning and Development Department will satisfy all noticing requirements. The Clerk of the Board shall forward the minute order to Planning and Development Department Hearing Support staff, to the attention of David Villalobos (dvillalo@countyofsb.org).

Attachments:

- A. Findings for Denial
- B. CEQA Notice of Exemption
- C. Findings for Approval
- D. Conditions of Approval
- E. Addendum to 18EIR-00000-00001

Authored by:

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Energy, Minerals & Compliance Division
Planning and Development Department

ATTACHMENT A
FINDINGS FOR DENIAL

ATTACHMENT B
CEQA NOTICE OF EXEMPTION

ATTACHMENT C
FINDINGS FOR APPROVAL

ATTACHMENT D
CONDITIONS OF APPROVAL

ATTACHMENT E
ADDENDUM TO 18EIR-00000-00001