



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 & Development
Department No.: 053
For Agenda Of: December 16, 2008
Placement: Departmental
Estimated Time: 2 hours
Continued Item: Yes
If Yes, date from: November 4, 2008
Vote Required: Majority

TO: Board of Supervisors

FROM: Department John Baker, Assistant CEO and Director, Planning & Development
Director(s) (805) 568-2085
Contact Info: Douglas Anthony, Deputy Director, Energy Division (805) 568-2046
William Dillon, Deputy County Counsel (805) 568-2959

SUBJECT: **CDFG Appeal** (Case No. 08APL-00000-00035) of County Planning Commission approval of the Lompoc Wind Energy Project (Case No. 06CUP-00000-00009; 08VAR-00000-00003). Third Supervisorial District.

County Counsel Concurrence

As to form: Yes

Auditor-Controller Concurrence

As to form: N/A

Other Concurrence: N/A

Recommended Actions:

That the Board of Supervisors:

1. Deny the CDFG Appeal, Case No. 08APL-00000-00035.
2. Certify that the Lompoc Wind Energy Project Environmental Impact Report (August 2008) (06EIR-00000-00004; SCH #2006071008) reflects the independent judgment of the Board, has been completed in compliance with the California Environmental Quality Act (CEQA), and is adequate for the Lompoc Wind Energy Project.
3. Adopt the required findings for the project, including CEQA findings, attached to the Planning Commission Action Letter dated October 7, 2008, included as Attachment C to this Board Letter, including modifications to findings specified in Attachment D to this Board Letter, and including any modifications made by the Board in the public hearing.
4. Grant approval of Conditional Use Permit 08CUP-00000-00009 and Variance 08VAR-00000-00003, subject to the conditions of approval specified in the Planning Commission Action Letter and attachments dated October 7, 2008, included as Attachment C to this Board Letter, including modifications to permit conditions specified in Attachment D to this Board Letter, and including any modifications made by the Board in the public hearing.

Summary Text:

A. Proposed Project

The proposed project is a request for a Conditional Use Permit (CUP) and a Variance to allow construction and operation of a wind energy generation facility on approximately 2,950 acres of private property zoned AG-II-100, southwest of the City of Lompoc. The project layout and location of the Appellant's residence are shown in Figure 1. The CUP is requested pursuant to Section 35.82.060 of the County's Land Use and Development Code. The Variance from setback regulations is to allow placing wind turbines one turbine blade length instead of the overall turbine height from certain property lines.

Pacific Renewable Energy Generation, a subsidiary of Acciona Wind Energy USA, proposes to install and operate up to 65 wind turbine generators (WTGs), each of which would produce up to 1.5 megawatts of electricity and stand up to 397 feet tall. The proposed project includes a 5,000 square foot operations and maintenance building, a project substation, gravel access roads, and power lines to tie-in to the PG&E electrical grid system. A detailed project description is provided in Section 5.4 of the Planning Commission staff report (Attachment E) and Section 2.0 of the project EIR.

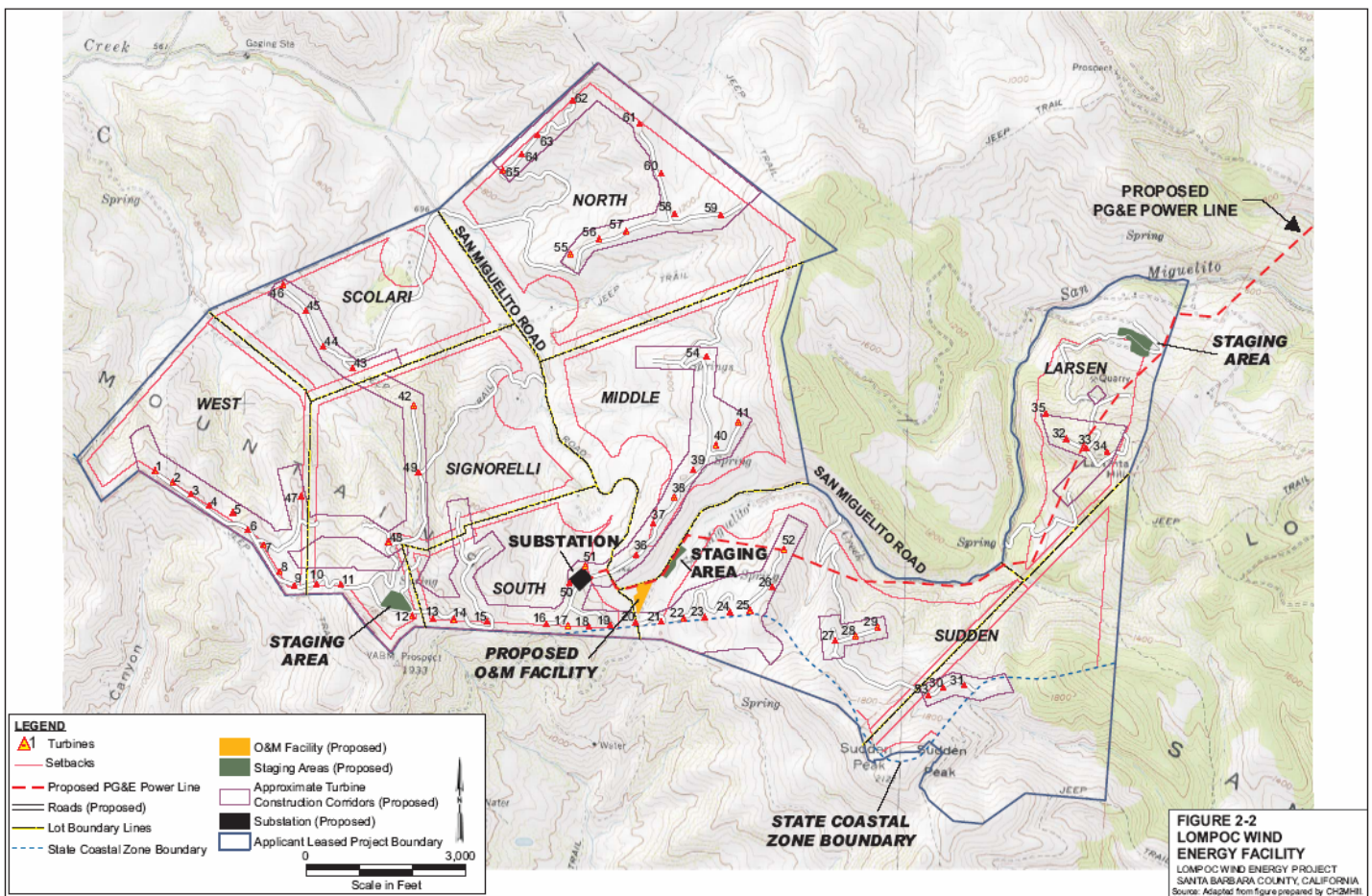


Figure 1: Tentative LWEP Layout

B. Background

The Appellant, the California Department of Fish and Game (CDFG), raised its concerns in written comments on the draft EIR (September 11, 2007) and submitted additional written comments on the project (September 25, 2008) for the Planning Commission Hearing on September 30, 2008. A CDFG representative attended the Planning Commission hearing but did not speak.

C. Appeal Points

Issue I: Adhering to and Implementing the Wind Energy Guidelines is Critical to Meet the Disclosure and Mitigation Requirements under CEQA.

Response A: The Wind Energy Guidelines¹ are voluntary, not mandatory.

The Wind Energy Guidelines (“Guidelines”) clearly state, in several places that they are voluntary and that adherence to them does not ensure compliance with local, state, or federal statutes or regulations. The Disclaimer at the beginning of the Guidelines document explicitly states their voluntary nature, and also clearly states that failure to follow them does not “*necessarily imply a violation of CEQA.*” as follows (emphases added):

DISCLAIMER

The Energy Commission, Department of Fish and Game, the State of California, its employees, contractors, and subcontractors make no warrant, express or implied, and assume no legal liability for the information in this report; nor does any party represent that the uses of this information will not infringe upon privately owned rights. This report has been approved by the California Energy Commission and endorsed by the California Department of Fish and Game as voluntary guidance. The recommendations and protocols discussed in this report are intended to be suggestions for local permitting agencies to use at their discretion. These guidelines are strictly voluntary and are not intended to implement, replace, duplicate, interpret, amend, or supplement any current statute or regulation. Adherence to these guidelines does not ensure compliance with any local, state, or federal statute or regulation nor does failure to follow these guidelines necessarily imply a violation of CEQA. [Guidelines, front matter]

The Executive Summary, p. E-1, of the Guidelines states (emphasis added):

The recommendations and protocols discussed in these voluntary *Guidelines* are suggestions for local permitting agencies to use at their discretion, and as a resource for other parties involved in the permitting process. Local governments are encouraged to integrate the recommended study methods described in the *Guidelines* with biological resource information and research unique to their region. [Guidelines, p. E-1]

The Resolution by the California Energy Commission Resolution adopting the Guidelines on September 26, 2007, states, in part (emphasis added):

¹ *California Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development.* California Energy Commission and California Department of Fish and Game. 2007. Commission Final Report. CEC-700-2007-008-CMF.

WHEREAS, these guidelines may be voluntarily used by local permitting agencies and are not intended to implement, replace, duplicate, interpret, amend, or supplement any current statute or regulation, and

WHEREAS, the Energy Commission's legal office has considered the application of the California Environmental Quality Act (CEQA) to the approval of the Guidelines and opined that the approval of these guidelines is exempt from CEQA because it is not a "project" subject to CEQA pursuant to Title 14, California Code of Regulations, section 15378 (b)(2) in that it deals with the continuation of administrative activities in the form of voluntary protocols and tools that may be followed at the discretion of local permitting agencies, and... [State of California, State Energy Resources Conservation and Development Commission, Resolution dated September 26, 2008]

In other words, the Guidelines were exempted from CEQA, based on a representation that they are voluntary and "may be followed at the discretion of local permitting agencies." Any action to apply the Guidelines as mandatory would require due process adoption.

Response B: The Guidelines are not a CEQA requirement.

The Guidelines clearly explain that they are not intended to create a standard for CEQA adequacy. In addition to the Disclaimer quoted above, the Guidelines state:

California Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development does not duplicate or supersede CEQA, the California Endangered Species Act statutes or other legal requirements. This document does not alter a lead agency's obligations under CEQA, nor does it mandate or limit the types of studies, mitigation, or alternatives that an agency may decide to require. [Guidelines, p. E-2]

The Guidelines does not provide recommendations about deciding the CEQA status of a proposed wind energy project or whether an EIR or negative declaration is appropriate for particular categories of project. Lead agencies need to make such decisions for each project based on their own judgment, experience, and interpretation of CEQA Guidelines. [Guidelines, p. 32]

Response C: The Guidelines allow flexibility in local implementation.

The Wind Energy Guidelines do provide helpful recommendations and protocols for bird and bat surveys appropriate for wind energy projects during environmental review. The project EIR incorporated many of the recommended study methods with site-specific surveys. Importantly, however, the Guidelines are not rigid and allow for flexibility in implementation. Though the Guidelines recommend survey protocols, they do not preclude alternate methods. In fact, they encourage adaptations to accommodate local considerations.² For example:

Information in the Guidelines was specifically designed to be flexible to accommodate local and regional concerns, and the recommended protocols may need to be adjusted to accommodate unique, site-specific conditions. The protocols in the document 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. [Guidelines, p. E-2]

² Flexibility of the guidelines is reiterated in a letter to from the Energy Commission to County Planning Directors (12/4/07) introducing the Guidelines, which states: "The methods described in the Guidelines are suggestions for local permitting agencies to use at their discretion. These recommendations offer guidance that can be applied statewide, and are not specific to particular regions or counties in California. We therefore encourage you to integrate regional information and local studies with the study methods described in the Guidelines."

Accordingly, the project EIR also incorporated other scientifically credible regional approaches consistent with the Guidelines. For example, methods used for the Lompoc Wind Energy Project surveys included line transects, diurnal raptor surveys, and single-point counts of raptors (and other birds). The diurnal raptor surveys focused on collecting information on numbers and activities of diurnal raptors, as some of these species are known to be susceptible to collisions with wind turbines, particularly while migrating or foraging. The surveys collected much of the same information collected in bird use count (BUC) protocols recommended in the Guidelines, such as bird activity, estimated height above ground, and whether the individual bird is migrating at the project site or not. The surveys used line transects of unequal distances and times on each of the five main ridge systems on the proposed project site, with raptor observations standardized to the number observed per kilometer. The line transects are limited distance transects with recorded observations restricted to each of the five ridges to reduce concerns associated with repeat counts of birds moving between ridges.

As noted in the Planning Commission staff report, not all of the bird and bat studies recommended in the Guidelines can be completed within the statutory CEQA time limits,³ unless a developer commences detailed biological studies long before applying for a permit. In fact, processing of the LWEP permit applications and development of the Guidelines occurred at nearly the same time: Work on the Guidelines was initiated by the CEC in May 2006 and the Guidelines were finalized in October 2007. Work on the LWEP EIR began in late June 2006 and the Draft EIR was released for public review in July 2007. The County could not meet CEQA timelines for EIR completion and at the same time also conduct every study as recommended in the Guidelines. However, the variety of studies and their site-specific nature conducted by both the Applicant and the EIR contractor provide detailed information sufficient to characterize the bird and bat populations at the site, and to provide a scientifically sound basis for drawing conclusions regarding the level of likely impacts to these populations from the LWEP.

Issue II: Information Presented to the County in the EIR is Based on Surveys that [d]o Not Adequately Describe Existing Environmental Conditions or, More Importantly, the Significant Project-Related Impacts to Trust Resources.

Response: The EIR is adequate under CEQA.

The LWEP EIR concluded that the likelihood of mortalities to birds and bats as a result of the proposed project is a Class I, significant and unavoidable, impact. The EIR analyses supporting this conclusion are extensive and adequate to describe the existing environmental conditions, as these are based on information gathered by qualified experts at the site using accepted protocols to identify bird and bat species and estimate populations at the site.

Site-specific avian surveys were conducted as part of the initial environmental review to supplement literature and database searches and professional contacts. The work was performed by Tom Olson, a qualified, local wildlife biologist, and was augmented and peer reviewed by qualified biologists of the Draft EIR preparers (CH2M HILL). These surveys are described in Section 3.5.1.4 of the Final EIR and are included in Appendix B of the Final EIR, *Biological Surveys and Analysis*. The initial surveys are summarized in Appendix F of this Board Letter.

³ Public Resources Code §21151.5; County of Santa Barbara Guidelines for Implementation of the California Environmental Quality Act of 1970, As Amended, Article VIII, Section 2.

Several public and agency comments pointed out inadequacies in the Draft EIR. Supplemental studies were conducted in response to the comments, including those from CDFG, and to remedy weaknesses in the biological baseline information, analysis and mitigation measures. The reports were peer reviewed by qualified biologists of the Final EIR preparers. Based on their professional judgment, factual information from the studies was incorporated into the Biological Resources Section of the Final EIR (Sec. 3.5).⁴ The studies are summarized in Appendix 1 of this Board Letter. The primary purpose of the supplemental studies was to strengthen the EIR biological baseline information in order to better assess the severity of impacts to birds and bats. The results of these studies, notably a radar study of nocturnal bird migration, confirmed the conclusions of the prior studies regarding the potential environmental impacts, meaning that the impacts are expected to be significant, but not exceptionally severe or catastrophic. Following release of the Final EIR, the County received a letter from CDFG that disputed the adequacy of the pre-construction bird and bat surveys and the mitigation measures for impacts to birds and bats. This information was provided to the Planning Commission in the Final EIR [§3.5.6.3] and summarized both in the Planning Commission staff report [p.21 et seq.] and at the Planning Commission hearing on September 30, 2008.

Sapphos Environmental, on behalf of the Applicant, is conducting additional, ongoing bird and bat studies on the project site. These studies are voluntary and not required for CEQA review, as the baseline information in the EIR has been determined by the County to be adequate. The proposed Conditional Use Permit that will take effect following final project approval, requires an avian monitoring program, which “should follow the recommendations of the CEC Guidelines (2007), insofar as feasible without causing delays to the project construction schedule or start of operations” (Condition BIO-16.a). Two studies nearing completion include an avian fall migration survey and a spring/fall bat survey. The survey data are currently being analyzed by Sapphos. The reports for these studies are expected to be completed prior to the scheduled December 16 appeal hearing.

Additionally, the Planning Commission required Permit Condition BIO-16, which requires the Applicant to track bird and bat mortalities and implement an adaptive management program that mitigates impacts to the extent feasible. The Applicant must conduct this program under oversight of the County, which will work in consultation with CDFG. Certain appropriate project modifications (including turbine curtailment or shutdowns) are identified in the event specified threshold levels of mortality are reached during project operations. The studies conducted for the proposed project, and the continuing studies and other mitigation measures adopted by the Planning Commission in approving the project, fully reflect the spirit and intent of the Wind Energy Guidelines, and do so according to accepted scientific protocols and in accordance with CEQA requirements [including requirements of CEQA Guidelines §§15126, 15126.2, 15126.4]. Additional data collection simply to comply with each recommendation of the Wind Energy Guidelines is not likely to result in a different conclusion in the EIR (Class I impact) regarding the likely severity of bird and bat mortalities if the project is implemented, nor would a more effective adaptive mitigation strategy be likely to result from additional pre-permitting studies. Furthermore, CEQA Guidelines state that:

“... reviewers should be aware that the adequacy of an EIR is determined in terms of what is reasonably feasible, in light of factors such as the magnitude of the project at issue, the severity of its likely environmental impacts, and the geographic scope of the project. CEQA does not require

⁴ Inferences and opinions presented in studies funded directly by the Applicant were not relied upon in the EIR. The County’s EIR consultants (Aspen Environmental Group and biological subconsultants SAIC) were directed to critically review all materials provided by the Applicant’s biological consultants to ensure objectivity of the EIR analysis.

a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors.” [CEQA Guidelines §15204(a)]

In short, the EIR was prepared in conformance with the legally mandated CEQA statutes and well-established CEQA guidelines, while taking into consideration, as appropriate, the voluntary Wind Energy Guidelines, which were brought forth expressly as suggestions for local governments to use at their discretion, and which are largely untested.⁵ Again, the Guidelines themselves declare that they do not “duplicate or supersede CEQA, the California Endangered Species Act statutes or other legal requirements. This document does not alter a lead agency’s obligations under CEQA, nor does it mandate or limit the types of studies, mitigation, or alternatives that an agency may decide to require.” [Guidelines, p. E-2]

CDFG states in their appeal that the studies conducted for the project do not adequately describe the significant project-related impacts. CDFG also states that by not adhering strictly to the guidelines the EIR likely understates the nature and extent of significant project impacts (see Issue I). These statements imply that strict adherence to the Wind Energy Guidelines would result in reliable predictions of impacts to birds and bats, whereas the studies that were conducted would not. This is incorrect and misleading. The Guidelines do not (at least in their current form) provide scientifically verified methods for predicting bird or bat fatalities for proposed wind projects.

Our point here is not that the Guidelines are without value for studying proposed wind project sites. They do offer helpful suggestions on study methodologies for evaluating bird and bat activity. However, what they do not do is offer sound methods for predicting impacts to birds and bats from wind turbine operation. Reliable risk assessment methods may be developed in the future, based on information collected through application of the Guidelines to many wind energy projects around the State. However, it is incorrect to suggest that not adhering strictly to the Guidelines will understate impacts or result in inadequate mitigation, because neither adherence to the Guidelines nor non-adherence to them will provide reliable estimates of impacts. Reliable predictions for new projects outside of already-developed wind resource areas are not currently attainable, given the current state of the science.⁶ The

⁵ The number and range of critical comments in the record of proceedings for development and adoption of the Guidelines, including testimony at the California Energy Commission’s adoption hearing 9/26/07, attest that there is substantial disagreement and controversy on the appropriateness of the Guidelines as adopted and of their possible consequences. See: http://www.energy.ca.gov/windguidelines/documents/public_comments and http://www.energy.ca.gov/business_meetings/2007_transcripts/2007-09-26_TRANSCRIPT.PDF

⁶ The current state of the science and limited capability to predict bird and bat mortality at proposed wind projects are evidenced in many recent reports, including: California Energy Commission, *A Roadmap for PIER Research on Methods to Assess and Mitigate Impacts of Wind Energy Development on Birds and Bats in California*, October 2008, CEC-500-2008-076; California Energy Commission, *Avian/Wind Statistical Peer Review Project*, December 2006, EC-500-2006-114; National Research Council, *Environmental Impacts of Wind-Energy Projects*, National Academies Press, 2007; and National Wind Coordinating Committee, *Mitigation Toolbox*, May 2007.

The Guidelines themselves state that most bird and bat data from pre-permitting studies are poorly correlated with operational mortality. For example: “...researchers should be aware that with the current state of knowledge about bat-wind turbine interactions, a fundamental gap exists regarding links between pre-permitting assessments and operations fatalities.” (p.55); “considerable variation and uncertainty exist on the optimal protocols for using acoustic monitoring devices, radar, and other techniques to evaluate species composition, relative abundance, flight height, and trajectory of nocturnal migrating birds.” (p.51); “Bird use data for songbirds does not reflect the same clear correlation of bird use to bird fatalities as does raptor use data.” (p.124); Correlation of raptor use and fatalities is statistically problematic – See cautionary note on p. 123 of the Guidelines; also, see comment letters from Santa Barbara County staff to the California Energy Commission (8/9/07 and 9/24/07) at http://www.energy.ca.gov/windguidelines/documents/public_comments .

best that can be achieved is a general indication of potential risk. The bird and bat studies conducted for the EIR are adequate to characterize the activity of birds and bats in the project area, and provide a solid foundation for the conclusion that sensitive and protected species are likely to be killed during operations, resulting in a significant impact (Class I).

Issue III: Significant Project-Related Impacts on Trust Resources are Not Mitigated to the Extent Feasible as Required by CEQA.

The EIR determined that potential bird and bat mortalities resulting from collisions of birds and bats with wind turbines are a Class I, significant and unavoidable, impact (Impact BIO-10). CDFG alleges that formation of a Technical Advisory Committee (TAC) and compensatory habitat replacement are two “feasible mitigation measures that would minimize the impacts of the proposed project to a level below significance.”⁷

Response: Neither a TAC nor compensatory habitat replacement is warranted or necessary.

TAC: The Appellant states:

“implementation of the TAC would allow interested parties to assess the operations of the LWEP and develop an adaptive management approach to operations.”⁸

and recommends that the TAC

“... be composed of representatives of the Department, 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/interest group.”⁹

The Appellant also requests that it have an opportunity for input to the County’s selection of a biological resources consultant to conduct bird and bat strike mortality surveys during project operations.

Based on Staff’s recommendations, the Planning Commission adopted an adaptive management approach to wind farm operations in Condition Bio-16, *Bird and Bat Monitoring and Adaptive Management Plan* (see Planning Commission staff report, p. 23). This condition of approval is designed to mitigate significant impacts to birds and bats to the extent feasible. The Plan requires monitoring studies of bird activity and fatalities at the site during operations and identifies mitigation measures, including potential shutdown of wind turbines, to be implemented if specific mortality thresholds are reached. Condition Bio-16 also requires that: “*In reviewing and approving the final plan and applying the required measures, the County will consult with CDFG and USFWS, as appropriate.*” Thus, CDFG is afforded the opportunity to provide input to the County on implementation of the Monitoring and Adaptive Management Plan and to make recommendations on qualified biological resources consultants to conduct the required surveys.

In addition, at the Planning Commission’s September 30, 2008 hearing, staff addressed the TAC issue and advised the Commission that the County routinely manages its own mitigation monitoring

⁷ Aggrieved Party Statement, p. 4, last paragraph.

⁸ Aggrieved Party Statement, p. 4, first full paragraph.

⁹ Aggrieved Party Statement, p. 4, first full paragraph.

programs,¹⁰ in consultation with other affected agencies, interest groups, and the public, as necessary. Staff also advised the Commission that workshops can be held periodically as requested by the Commission and would be inclusive of affected agencies and the public as well, and not limited only to select members of a TAC. In fact, the Planning Commission's standard agenda includes a slot for Divisional Briefings that in the past was routinely used during construction of oil and gas and other large projects to keep the County and the public informed of progress regarding projects of wide-spread interest. These briefings can be scheduled in advance and include input from any affected entity, including other agencies and the public.

A TAC does not constitute mitigation under CEQA.¹¹ Rather, it is an approach recommended by CDFG for providing input to the County relating to implementation of mitigation measures. The County will consult with CDFG and obtain outside expert technical advice as needed to ensure the mitigation program is properly implemented. Formation of a TAC is unnecessary to accomplish mitigation, would impose an unnecessary burden on the project proponent, and could lead to confusion over the County's decision-making authority over the mitigation program.¹²

Compensatory habitat replacement: CDFG argues that the required mitigation for significant impacts to birds and bats is deficient, and that "*Compensatory mitigation, in the form of replacement habitat, constitutes feasible mitigation and should be acquired, enhanced or preserved.*" In both the "Aggrieved Party Statement" and the EIR comment letter¹³ attached to it, the Appellant refers specifically to the impacts to birds and bats resulting from collisions with wind turbines, which the EIR found to be a significant, Class I impact (Impact BIO-10). The EIR determined that displacement of birds and bats due to wind turbine operations (or "loss of aerial habitat") would be an adverse, but less than significant, Class III impact (Impact BIO-12). This determination, which the appeal does not dispute, is based in part on the relatively minor loss of habitat compared to the abundance of similar habitat at the project site and in the vicinity.¹⁴ It is important to note that the appeal seeks compensatory habitat replacement as mitigation for bird and bat deaths, not for loss of habitat.

Based on Staff's recommendations the Planning Commission rejected offsite conservation easements as mitigation for potential bird and bat fatalities. Finding for Approval 1.4 (p. 2) states:

"Offsite conservation easements or habitat enhancements must be located sufficiently far away from the wind farm that they do not attract birds to the vicinity. The nexus between bird/bat fatalities at the project site and distant, offsite habitat conservation easements or enhancement measures is very weak, particularly given the abundance of similar habitat throughout the

¹⁰ Mitigation monitoring is carried out by the County for projects under its jurisdiction as lead CEQA agency, pursuant to CEQA Guidelines §15097. Mitigation measures for this project will be implemented under an Environmental Quality Assurance Program (EQAP), as required by Permit Condition Rules-2.

¹¹ See CEQA Guidelines §15370.

¹² CEQA Guidelines §15097.

¹³ Edmund Pert (CDFG) September 25, 2008 letter to John Day (P&D).

¹⁴ Lost aerial habitat is estimated to be approximately 187 acres, or 6.3 percent of the total aerial habitat (2,950 acres) available to bird and bat species on the project site. According to the applicable CEQA threshold, the lost habitat would be significant if it would substantially fragment, eliminate, or otherwise disrupt foraging areas and/or access to food sources, or substantially limit or fragment range and movement. The expected reduction in aerial habitat as a result of the LWEP is a minor change, given the amount of similar habitat in the project vicinity. (See EIR Section 3.5.7.3, Impact BIO-12). Reasons for not requiring conservation easements or habitat enhancement to mitigate loss of aerial habitat are summarized in the Planning Commission Staff Report (p.25).

project vicinity and region.” [Finding 1.4, Findings for Approval, Planning Commission Staff Report, Attachment A, p.3]

The Planning Commission Staff Report states:

Reasons for not requiring easements for potential fatalities of protected birds:

- 1) There is little if any nexus between bird or bat fatalities at the site and distant conservation lands or easements. This is particularly true because the protected species that might be killed do not have known nests on the project site.
 - 2) There is no natural or agreed-upon way to establish the acreage or characteristics of conservation lands that would compensate the take of a protected species. Hence, the mitigation measure would be arbitrary.
 - 3) Conservation easements might not be economically feasible, depending on an arbitrary determination of habitat replacement area.
- [Planning Commission Staff Report, p.25]

With respect to point (1) above, it is unclear how habitat replacement could effectively mitigate for bird or bat fatalities, regardless of distance from the project site, given that similar habitat is abundant nearby and in the region. Such habitat is protected from most kinds of development by the County’s protective Ridgeline/Hillside zoning code and land use policies. The situation here is very different from habitat replacement to mitigate impacts to native grasslands or wetlands, where those habitats are in short supply or threatened by development in the foreseeable future. The appeal does not provide a logical connection between the potential impacts and proposed mitigation, nor does it offer evidence to show that habitat replacement would actually compensate for potential fatalities in this particular case.

Finding 1.4 quoted above deserves further clarification. It makes little sense to locate an easement near a wind farm with the intent of mitigating impacts to species at risk, because proximity to the wind farm would place them at increased risk from turbine strikes, as compared to a more distant site. That being said, the main point of Finding 1.4 is that the effectiveness of conservation easements as mitigation for this project is doubtful, given the abundance and protected status of similar habitat throughout the project vicinity and region. To clarify the intended emphasis, staff recommends that the finding be modified as follows:

“Offsite conservation easements or habitat enhancements must be located sufficiently far away from the wind farm that ~~they do not attract birds to the vicinity~~ birds or bats breeding or foraging in the protected habitat are not at risk from wind turbines. The nexus between bird/bat fatalities at the project site and ~~distant~~, offsite habitat conservation easements or enhancement measures is very weak, ~~particularly~~ given the abundance of similar habitat throughout the project vicinity and region and restrictions on development of such land in County Land Use and Development Code and Comprehensive Plan policies.”

This revised finding is included in Attachment D *Recommended Modifications to Lompoc Wind Energy Project Permit Conditions*.

Regarding point (2) above, the Appellant offered three examples of compensatory mitigation in their September 2008 comments¹⁵ on the final EIR. In these examples, the size of the easement for the proposed project could be either 1,086 acres (“ratio-based”) or 5,000 acres (“biologically-based”), or would be determined by a technical advisory committee (TAC) from a “target area” of about 100 square miles between Gaviota State Park and Point Conception (“comparable wind energy facility mitigation”).¹⁶ Two months later, CDFG outlined three more examples of conservation land acquisitions or easements, which it suggested could mitigate Lompoc Wind Energy Project avian impacts to a less-than-significant level.¹⁷ The areas specified ranged from 241 acres (with unspecified habitat enhancements) to 500 acres. According to CDFG staff, a CDFG internal working group on wind project impacts is working on but has not yet formulated an appropriate mitigation formula.¹⁸ This state of affairs is reflected in the above wide range of approaches. Absent a clear basis and rationale for establishing the area of replacement habitat, a requirement for compensatory mitigation would be difficult to justify. Furthermore, CEQA requires that mitigation measures be in rough proportion to impacts. For the County to impose a habitat replacement measure as a mitigation measure, the relation between bird and bat deaths and replacement habitat area would have to be established clearly enough to pass the rough proportionality test.

Regarding point (3) above, the estimated cost of acquiring a conservation easement in comparable habitat range from approximately \$2,500 to over \$8,000 per acre. Conservation lands most suitable for effective mitigation are those threatened by development, and such lands generally command the highest prices. Thus, the costs of easements are unknown and potentially infeasible.

D. Planning Commission Action

The County Planning Commission approved the LWEP by a vote of 5-0 at their special hearing of September 30, 2008. The Commission’s decision was appealed to the Board of Supervisors on October 10, 2008. One other appeal of the Commission’s decision was filed by George and Cheryl Bedford. The Planning Commission’s October 7, 2008 action letter with findings and conditions of approval, and the Planning Commission staff report are included herein as Attachments C and E, respectively.

E. Recommended Modification to Permit Conditions – Indemnification

The proposed permit specifically states that it does not authorize the “take” or “harassment” of any species protected under the California or Federal Endangered Species Acts. Additionally, after preparation of an extensive EIR, Staff has proposed project conditions to provide the maximum mitigation feasible for avian protection. No specific impact to an endangered species has been predicted;

¹⁵ Edmund Pert (CDFG) September 25, 2008 letter to John Day (P&D), pp. 4-5.

¹⁶ This last example is modeled after the Hatchet Ridge Project in Shasta County. There, the project applicant agreed to provide an unspecified acreage to enhance breeding of sandhill cranes, contribute \$100,000 to a conservation program for preservation and enhancement of bald eagle breeding habitat, and endow a secondary compensation fund for habitat protection and enhancement (and related purposes), to be funded at \$1,000 per megawatt of project wind energy generating capacity. According to Shasta County’s Department of Resource Management, CDFG reached an agreement with the project applicant on the bird and bat mitigation measures prior to completion of the EIR, and the agreement was incorporated into the EIR without significant modification by the County or its EIR consultants.

¹⁷ Scott Flint for Kevin Hunting (CDFG) November 26, 2008 letter to Kevin Martin (Acciona), p. 3.

¹⁸ Martin Potter (CDFG) in phone call July 9, 2008, with John Day (P&D staff); and in a conference call July 30, 2008 among CDFG staff (Martin Potter, Betty Courtney, and Sean Carlson) and Santa Barbara County P&D staff (Doug Anthony, Kevin Drude, and John Day).

however, due to the uncertainty of the science and methodology for predicting impacts to birds from wind turbines, Staff has concluded there is a risk of such impacts and has therefore recommended findings that conclude the avian impacts are Class I and, further, has proposed the adoption of statements of overriding consideration. This finding and the adoption of a statement of overriding consideration is recommended in an abundance of caution.

Under these facts, the County should not be liable under either the federal or State Endangered Species Act. It should be noted, however, that several court cases have held a municipality can be liable under the Endangered Species Act, 42 U.S.C. section 1501 et seq. for taking a regulatory action that will foreseeably cause a “take” of an endangered species. The law in this area is not well settled; hence, it is difficult to predict liability with certainty under the ESA. Therefore, County Counsel recommends a condition be added to the permit that requires the permit holder to indemnify County for any potential liability under either the federal or State ESA. The County has previously required indemnification for projects that might arguably cause a “take” of an endangered species, (e.g., Cervantes SFD and Grading Permit, Case No. 01LUP-00000-00935, April 2003). The proposed condition for the Lompoc Wind Energy project is set forth in Attachment D.

Fiscal and Facilities Impacts:

Budgeted: Yes

Fiscal Analysis:

Narrative: There are no facilities or staffing impacts to the County. The costs of this appeal are partially funded by the \$443 appeal fee paid by the Appellant per the Planning and Development Department Fee Schedule in effect on the date the appeal was filed (Resolution 08-022 adopted by the Board of Supervisors on January 22, 2008, and effective 60 days thereafter). The fee was collected from the Appellant. Remaining costs of the appeal are funded by the Applicant, Pacific Renewable Energy Generation, pursuant to the Planning and Development Department’s Land Development Fee Schedule, Section IX. Fees paid by alternative energy project applicants are budgeted in the Permitting and Compliance Program of the Energy Division on page D-313 of the budget for Fiscal Year 2008-2009.

Special Instructions:

P&D Hearing Support Staff shall publish legal notice in the Lompoc Record and Santa Barbara Daily Sound. Energy Division staff shall complete the mailed noticing requirements for the project at least ten (10) days prior to the December 16, 2008 hearing.

The Clerk of the Board will forward a copy of the Minute Order to Planning and Development, Attention David Villalobos, Hearing Support Staff and John Day, Planner.

Energy Division staff will notify interested parties of the Board of Supervisors’ final action.

Attachments:

- A. CDFG Appeal to Board of Supervisors dated October 10, 2008.
- B. LWEP Final Environmental Impact Report, August 2008 (*provided under separate cover*).
- C. Planning Commission Action Letter with Attachments dated October 7, 2008.

- D. Recommended modifications to Lompoc Wind Energy Project permit conditions and findings.
- E. Planning Commission Staff Report dated September 17, 2008 with Attachments.
- F. Summary of Avian and Bat Studies Conducted for EIR

Authored by:

John Day, Planner (805) 568-2045.

cc: Case Files: 06CUP-00000-00009; 08VAR-00000-00003

Records Management

Appellant: California Dept. of Fish & Game, 4949 Viewridge Ave., San Diego, CA 92123, Attn: Ed Pert.

Applicant: K. Harley McDonald, Pacific Renewable Energy Generation, 420 Stevens Ave., Ste. 240,
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