

REEL IMAGE

RICHARD WINNIE, County Counsel

**THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA,
STATE OF CALIFORNIA**

On motion of Supervisor Haggerty
Seconded by Supervisor Miley

and approved by the following vote:

Ayes: Supervisors Haggerty, Miley, Carson, Lai-Bitker

Noes: Steele

Excused or Absent: none

**THE FOLLOWING RESOLUTION WAS ADOPTED SEPTEMBER 22, 2005:
NUMBER R-2005-453**

**RESOLUTION DENYING IN PART AND GRANTING IN PART THE APPEAL OF
JEFF MILLER FOR THE CENTER FOR BIOLOGICAL DIVERSITY (CBD) AND
MICHAEL BOYD FOR CALIFORNIANS FOR RENEWABLE ENERGY, INC. (CARE),
OF THE EAST COUNTY BOARD OF ZONING ADJUSTMENTS DECISION ON
NOVEMBER 13, 2003 TO CONDITIONALLY APPROVE 14 CONDITIONAL USE
PERMITS FOR THE MAINTENANCE AND CONTINUED OPERATIONS OF
EXISTING WIND TURBINES IN THE ALTAMONT PASS WIND RESOURCES AREA
(APWRA) OF ALAMEDA COUNTY – APPLICATIONS OF:
SEAWEST POWER RESOURCES LLC/POMBO, C-8161 (2.89-megawatt windfarm of 38
turbines, APN: 099B-7750-006-00);
WINDWORKS INC./MULQUEENEY, C-8191 (4.0-megawatt windfarm of 16 turbines,
APN: 099B-7910-001-01);
SEAWEST POWER RESOURCES, LLC/GRIFFITH & BROCKMAN, C-8201
(3.38-megawatt windfarm of 52 turbines, APNs: 099B-7875-001-02, 099B-7875-001-03)
SEAWEST POWER RESOURCES, LLC/ARNAUDO & CASTELLO, C-8203 (8.52-
megawatt windfarm of 131 turbines, APNs: 099B-7500-003-01, 099B-7600-001-01);
ALTAMONT INFRASTRUCTURE COMPANY/ELLIOTT, C-8233 (2.6-megawatt
windfarm of 26 turbines, APN: 099B-6125-004-00);
ALTAMONT INFRASTRUCTURE COMPANY/RALPH PROPERTIES II, C-8234
(2.4-megawatt windfarm of 27 turbines, APN: 099A-1790-001-00);
ALTAMONT INFRASTRUCTURE COMPANY/CORBETT, C-8235 (6.1-megawatt
windfarm of 40 turbines, APN: 099A-1785-001-13);
ALTAMONT INFRASTRUCTURE COMPANY/DUNTON, C-8236 (3.4-megawatt
windfarm of 34 turbines, APN: 099B-5658-001-00);
ALTAMONT INFRASTRUCTURE COMPANY/VALHALLA ENTERPRISES, C-8237
(13.6-megawatt windfarm of 136 turbines, APNs: 099B-5610-001-00 and
099B-6075-003-00);**

ALTAMONT INFRASTRUCTURE COMPANY/RALPH PROPERTIES II, C-8238
(23.8-megawatt windfarm of 238 turbines, APNs: 099B-7375-001-07; 099B-7300-001-05 and
099B-325-001-03);

ALTAMONT INFRASTRUCTURE COMPANY/JACKSON, C-8239 (3.0-megawatt
windfarm of 30 turbines, APN: 099B-6125-005-00);

ALTAMONT INFRASTRUCTURE COMPANY/WALKER FAMILY TRUST, C-8241
(23.8-megawatt windfarm of 238 turbines, APNs: 099B-6100-002-10; 099B-6100-002-11;
099B-6100-003-01 and 099B-6100-003-11);

ALTAMONT INFRASTRUCTURE COMPANY/MARIE GOMES FARMS, C-8242
(17.5-megawatt windfarm of 175 turbines, APNs: 099B-6150-002-07; 099B-6150-003-00 and
099B-6150-004-10); and

ALTAMONT INFRASTRUCTURE COMPANY/MARIE GOMES FARMS, C-8244
(17.5-megawatt windfarm of 175 turbines, APNs: 099B-1795-001-00; 099A-1790-002-00
and 099B-6425-002-03)

AND

**DENYING IN PART AND GRANTING IN PART THE APPEAL OF JEFF MILLER
FOR THE CENTER FOR BIOLOGICAL DIVERSITY (CBD), MICHAEL BOYD FOR
CALIFORNIANS FOR RENEWABLE ENERGY, INC. (CARE), AND THE GOLDEN
GATE AUDUBON SOCIETY (GGAS), OF THE EAST COUNTY BOARD OF ZONING
ADJUSTMENTS DECISION ON JANUARY 29, 2004 TO CONDITIONALLY APPROVE
15 CONDITIONAL USE PERMITS FOR THE MAINTENANCE AND CONTINUED
OPERATIONS OF EXISTING WIND TURBINES IN THE ALTAMONT PASS WIND
RESOURCES AREA (APWRA) OF ALAMEDA COUNTY – APPLICATIONS OF:
SEAWEST POWER RESOURCES, LLC/JOHNSTON, C-8023 (2.4-megawatt windfarm
of 30 turbines, APN: 099B-6325-001-04)**

ALTAMONT POWER COMPANY/CORBETT, C-8031 (9.99-megawatt windfarm of 80
turbines – less 21 turbines representing 3.16 megawatts of capacity since removed, and less
12 turbines representing 1.37 megawatts of capacity on one parcel sold and in operation
under C-8231, with a resulting net 5.46-megawatt windfarm of 47 turbines, APNs:
099B-1810-001-00; 099B-1770-002-01; 099B-1770-002-02 and 099B-1770-002-03;

ALTAMONT INFRASTRUCTURE COMPANY/FRICK, C-8036 (0.7-megawatt windfarm
of 7 turbines, APN: 099B-5680-015-00);

ALTAMONT INFRASTRUCTURE COMPANY/POMBO, C-8037 (6.5-megawatt
windfarm of 65 turbines), APNs: 099B-6300002-01; 099B-6300-002-02; 099B-6325-002-03;
099B-6325-002-04; and 099B-6325-001-06);

ALTAMONT INFRASTRUCTURE COMPANY/ROONEY, C-8134 (3.1-megawatt
windfarm of 31 turbines, APN: 099B-6125-002-00);

**ALTAMONT INFRASTRUCTURE COMPANY/CONTRA COSTA WATER DISTRICT,
C-8136** (0.17-megawatt windfarm of 17 turbines, APN: 099B-6100-002-07);

ALTAMONT INFRASTRUCTURE COMPANY/MULQUEENEY, C-8137 (70.0-megawatt
windfarm of 697 turbines, APNs: 099A-1800-002-03; 99A-1800-002-04; 99B 7890-002-04;
99B-7890-002-05; 99B-7900-001-05; 99B-7900-001-07; 99B-7910-001-01; 99B-7925-001-03;
99B-7925-001-04; 99B-7925-002-04; 99B-7925-002-05; 99B-7975-001-00; 99B-7980-001-00;

**99B-7985-001-03; 99B-7985-001-04; 99B-7985-001-05; 99B-7985-001-06; and
99B-8050-001-00);**
ALTAMONT INFRASTRUCTURE COMPANY/WILDLANDS, INC., C-8173,
(0.9-megawatt windfarm of 9 turbines, APN: 099B-7890-001-03);
SEAWEST POWER RESOURCES, LLC/RALPH PROPERTIES II, C-8182
(8.23-megawatt windfarm of 182 turbines, APN: 099B-6325-001-03);
ALTAMONT POWER COMPANY/ELWORTHY, C-8224 (52.89-megawatt windfarm of
383 turbines – less 92 turbines representing 14.97 megawatts of capacity since removed,
with a resulting net 37.92-megawatt windfarm of 291 turbines, APNs: 099B-6130-002-00;
099B-6130-003-00; 099B-6175-001-01 and 099B-6175-002-03);
ALTAMONT INFRASTRUCTURE COMPANY/GUO & LIN, C-8225, (3.1-megawatt
windfarm of 10 turbines, APN: 099B-5650-002-01);
ALTAMONT INFRASTRUCTURE CO./ALTAMONT LANDFILL – WASTE
MANAGEMENT INC., C-8231 (25.4-megawatt windfarm of 248 turbines – plus 12
turbines representing 1.37 megawatts of capacity on one parcel purchased from Corbett –
originally to be operated under C-8031, with a resulting net 26.77-megawatt windfarm,
APNs: 099B-6062-003-00; 099B-6062-005-00; 099B-6225-001-00; 099B-6250-001-00; and
099B-6275-001-01; – added 12 turbines on 99B-6300-004-01);
ALTAMONT INFRASTRUCTURE COMPANY/EGAN, C-8232 (5.0-megawatt windfarm
of 50 turbines, APN: 099B-6125-003-00);
ALTAMONT INFRASTRUCTURE COMPANY/HANSEN, C-8240 (1.2-megawatt
windfarm of 12 turbines, APN: 099B-5650-002-04);
ENXCO, INC./ PATTERSON PASS FARMS-FIELDS, C-8263, (21.8-megawatt windfarm
of 336 turbines, APNs: 099A-1800-001-00; 099A-1800-002-01 and 099B-7985-001-02).

Recitals

WHEREAS, the foregoing 29 applications (the “Windfarm Permit Extensions”) were submitted to Alameda County by applicants Altamont Infrastructure Co., Altamont Power Co., EnXco Inc., Seawest Power Resources LLC, and Windworks Inc. between May 2002 and November 2003, which requested extension (and consolidation) of 46 use permits to operate private wind energy generation facilities on various parcels in the approximately 40,000-acre Alameda County portion of the Altamont Pass Wind Resource Area, all but two of which were originally approved between April 15, 1981 and August 10, 1988, for 20-year terms with reviews in five-year increments, the other two of which were approved on March 31, 1993; and

WHEREAS, the site is designated by the Alameda County Zoning Ordinance as “A” Agriculture, where privately owned wind-electric generators are permitted as conditional uses if approved by the board of zoning adjustments, under the procedures provided for in the Zoning Ordinance (17.54.130) and consistent with the intent and purpose of the Agriculture District, which is to promote implementation of general plan land use proposals for agricultural and other nonurban uses, to conserve and protect existing agricultural uses, and to provide space for and encourage such uses in places where more intensive development is not desirable or necessary for the general welfare; and

WHEREAS, the parcel(s) are designated “Large Parcel Agriculture” by the East County Area Plan adopted by the Board of Supervisors on May 5, 1994 and as amended through May 2002 as part of the Alameda County General Plan, which requires a minimum parcel size of 160 acres and permits among other uses, a variety of agricultural uses, support services, visitor-serving commercial uses, public and quasi-public uses, waste management facilities, and wind-farms and related support facilities, and contains a map of a Wind Resource Area and numerous policies that include allowing continued operation, new development, redevelopment, and expansion of existing and planned windfarm facilities within the limits of environmental constraints; and

WHEREAS, the East County Board of Zoning Adjustments held a hearing on November 11, 2003 to consider 18 applications for conditional use permits to allow continued use and operation of wind energy production facilities, including Conditional Use Permits C-8161, C-8191, C-8201, C-8203, C-8233, C-8234, C-8235, C-8236, C-8237, C-8238, C-8239, C-8241, C-8242, and C-8244, and took consideration of the Staff Analysis prepared by the Planning Department which addressed the conformity of the permit extensions to the specific policies and programs of the East County Area Plan, and the exemption of the permit extensions from the requirements of the California Environmental Quality Act (CEQA, 1970 as amended) under CEQA Guidelines Section 15301, Class 1, which applies to “the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features involving negligible or no expansion of use beyond that existing at the time of the lead agency’s [CEQA] determination” and example b, “existing facilities of both investor and publicly-owned utilities used to provide electric power...”; and

WHEREAS, it satisfactorily appears from affidavits on file that proper notice of said public hearing was given in all respects as required by law; and

WHEREAS, the Applicants, including the facility operators and some of the owners of property on which the facilities would operate, appeared at the public hearing and presented testimony in support of approving the permit extensions; and

WHEREAS, Jeff Miller of the Center for Biological Diversity, and Mike Boyd of Californians for Renewable Energy appeared at the public hearing and presented testimony recommending denial of the permit extensions on the grounds that an environmental impact report pursuant to the California Environmental Quality Act should be prepared prior to any action by the County to approve the applications and that better mitigation measures were needed to address the illegal taking of protected bird species; and

WHEREAS, the East County Board of Zoning Adjustments, having taken public testimony at said hearing, and based on the Board’s determination that the permits would conform to the General Plan, that the permits would be exempt from CEQA, and that a combination of conditions that had been added during prior five-year reviews relating to fire prevention and suppression, avian protection measures, bonding, etc., and new conditions prohibiting any substantial changes to existing facilities without appropriate project review, a requirement for

cooperation with the County to resolve operational issues and mitigation of impacts through a proposed Wind Power Working Group, requirements for participation in scientific research and avian mitigation studies, and implementation of appropriate measures based on those studies, would together support the findings made by the Board that:

1. The use is required by the public need in that wind energy production in the Altamont Pass Wind Resource Area (APWRA) represents a major source of renewable energy, or enough energy to supply about 150,000 households per year, and which is important in that while it constitutes only about 1 percent of California's total energy production, it has less variable costs than other energy sources, can assist in meeting peak summer energy demand, is non-polluting, and does not use fossil fuels or large amounts of water. To produce the same amount of energy as provided by the APWRA, a fossil fuel-burning production plant would generate over 250,000 tons of carbon dioxide (CO₂), nearly 700 tons of sulphur dioxide (SO₂), and over 650 tons of nitrogen oxides (Nox) per year. Wind power plants use only 1/500 as much water as thermal power plants, mainly for maintenance washing of blades. In addition, wind power provides over 100 full time jobs in Alameda County, and contributes substantial property, income, and business taxes in Alameda County each year.
2. The use is properly related to other land uses and transportation and service facilities in the vicinity, in that: a) the subject wind turbines are installed in areas that have been developed with wind power projects since the mid-1980's; b) the area is identified by the State and the County as an important Wind Resource Area, and has been improved with infrastructure necessary to support the numerous existing windpower projects, such as maintenance areas, access roads, and substations; c) Other land uses in the area primarily include grazing and open hillsides, rural residential settlements in certain areas, Brushy Peak Regional Preserve, Vasco Caves Regional Preserve, and the Altamont Landfill, some of which uses were developed after the original installation of the wind turbines; d) although some residents may object to the visual, noise, or other effects of the turbines, the County has determined that the wind energy projects are in compliance with the conditions of approval and are an acceptable use in the area; and e) the relationship between the wind turbines and the homes, parks and landfill would not change as a result of extending the use permits for existing turbine facilities;
3. The use, if permitted, under all the circumstances and conditions of this particular case, would not materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood, in that: a) the subject turbines have been sited according to the County's standard setbacks; b) proper maintenance and operation efforts are in effect to ensure the safe operation of the turbines; c) fire control and security measures are in place to protect the public and local property; d) fire prevention and suppression efforts are a standard

condition of approval for the permits; e) the wind energy companies have substantially complied with the prior provisions in cooperation with the responsible fire departments to minimize fires and injuries; f) the wind power plants do not substantially hinder the continued use of the project sites and surrounding land for cattle grazing as the primary property use; g) access roads developed for the wind farms provide improved access to the grazing lands; and h) land owners benefit from the lease payments made by wind power companies, which further supports grazing operations; and other improvements, such as roadways, railroads, electrical substations and landfills are not adversely affected by the presence of wind turbines and the associated infrastructure; and

4. The use will not be contrary to the character or performance standards established for the District in which it is to be located, in that the projects are located in the A (Agriculture) zoning district, which has as its stated intent: “to promote implementation of General Plan land use policies for agriculture and other non-urban uses; to conserve and protect existing agricultural uses; and to provide space for and encourage such uses in places where more intensive development is not desirable or necessary for the general welfare” and that the permit extensions would be consistent with this intent because the development of wind power projects is encouraged by the general plan in the WRA, the projects remove minimal land from agricultural production, and the uses are appropriately located in non-urban areas and serve the public welfare.

WHEREAS, on the basis of the above findings the East County Board of Zoning Adjustments on November 13, 2003 approved Conditional Use Permits C-8161, C-8191, C-8201, C-8203, C-8233, C-8234, C-8235, C-8236, C-8237, C-8238, C-8239, C-8241, C-8242, and C-8244 (“the first set of permit approvals”), and continued C-8182, C-8216, C-8232 and C-8240 for administrative purposes to a subsequent hearing on December 11, 2003; and

WHEREAS, on November 17, 2003, within the five-day period following the approval of the permit extensions, as required by the California Environmental Quality Act following an agency’s determination, the County filed a Notice of Exemption and Environmental Declaration with the Alameda County Clerk and the California Office of Planning and Research (State Clearinghouse) for Conditional Use Permits C-8161, C-8191, C-8201, C-8203, C-8233, C-8234, C-8235, C-8236, C-8237, C-8238, C-8239, C-8241, C-8242, and C-8244; and

WHEREAS, on November 19, 2003, within a ten-day period following the approval of the permit extensions, as permitted by the Alameda County General Code, Jeff Miller of the Center for Biological Diversity, and Mike Boyd of Californians for Renewable Energy appealed the decision of the East County Board of Zoning Adjustments to approve Conditional Use Permits Extensions C-8161, C-8191, C-8201, C-8203, C-8233, C-8234, C-8235, C-8236, C-8237, C-8238, C-8239, C-8241, C-8242 and C-8244 (“the first appeal”), because the Appellants claimed that the Board prejudicially abused its discretion principally by the following:

- 1) Failing to require the preparation of an environmental impact report as required by the California Environmental Quality Act (CEQA), because the County determination that the permit extensions would be exempt from the requirements of CEQA is invalid because CEQA prevents an exemption from being used for any activity for which there exists a reasonable possibility that significant environmental impacts will result due to unusual circumstances, such as that the Altamont Pass area forms a part of a migratory bird route and that there have been increasingly substantial cumulative impacts on migratory bird species that are protected by the Bald and Golden Eagle Protection Act, Endangered Species Act, and Migratory Bird Treaty Act, with estimates of 22,000 to 44,000 birds killed in the past 20 years (or 10,000 to 20,000 birds by another estimate over the same period);
- 2) That the approved conditions did not impose a limited permit term, thereby authorizing a continuing cumulative increase in avian species mortality and therefore an increased environmental impact;
- 3) That the Board should have revoked the use permits on the basis that they were obtained illegally without adequate review at the time of their original approval regarding the reasonably foreseeable impacts of the wind energy operations on migratory bird species;
- 4) That Conditional Use Permits C-8235, C-8234, C-8237, C-8241, C-8244, C-8238, C-8203, and C-8023 expired prior to the hearing by the Board and therefore cannot legally be extended;
- 5) That many or all of the facilities that were in operation under the prior use permits were operating in violation of the conditions, a specific example of which was the introduction of rodent control without appropriate environmental review under CEQA;
- 6) That the imposition of new conditions on the use permit extensions to address impacts on bird deaths is in itself an acknowledgement that the permit extensions will have significant impacts on avian wildlife;
- 7) That the project is inconsistent with the policies of the Alameda County General Plan (East County Area Plan, or ECAP) under Policies 157, 159 and 160 (currently numbered 169, 171 and 172 under the ECAP as amended through May, 2002), which respectively direct the County to allow windfarm facilities within the limits of environmental constraints, work with energy-related industry, agencies and experts on technology and environmental safeguards, and to establish a mitigation program to minimize the impacts of turbine operations on bird populations, and that the conditions imposed under the permit extensions would be ineffective in putting substantive protection measures or management programs in place to achieve the objectives of these Policies; and
- 8) The use permit extensions will strongly associate wind energy with adverse effects on migratory bird species and thereby give wind energy a “black eye” and less favorable comparison with fossil fuel-based energy plants;

For the above reasons the Appellants requested that the appeal be granted and the use permits revoked and a full environmental review be completed under the requirements of CEQA; and

WHEREAS, the letter from said Appellants referenced an expert comment letter dated November 10, 2003 prepared by BioResource Consultants on behalf of the Appellants prior to the hearing on the conditional use permit extensions, which the Appellants requested be included in the administrative record and on which basis the Board of Zoning Adjustments was requested to take consideration of prior to its approval of the conditional use permit extensions, and which states: 1) that substantial new information has been developed during the period of the prior permits including 20 scientific research papers and reports which are requested to be made part of the administrative record; 2) that the new information had led to several new mitigation measures to reduce avian mortality and observations of their effectiveness; 3) that the rodent control being practiced exacerbates the avian mortality problem; 4) that BioResource Consultants had recorded 1,189 bird fatalities at over 4,000 turbines in the APWRA over a five-year period which they estimate represent about 50% percent of the actual number of bird fatalities due to bird carcasses scavenged by animals or removed by wind energy facility personnel, or injured birds that died outside the search radius, and in turn calculate a minimum of 1,081 bird deaths per year extrapolated to 22,000 to 44,000 birds killed per year in the APWRA over the past 20 year period, including 400 to 800 golden eagles, 2,980 to 5,960 red-tailed hawks, and 2,700 to 5,400 burrowing owls; 5) that the Wildlife Reporting and Response System (WRRS) used by the industry reports only one-eighth of the actual numbers of birds found to have been killed in the APWRA; 6) that perch guards and artificial perches are ineffective; and 7) that 12 mitigation measures have been suggested or proposed by BioResource Consultants at prior meetings including but not limited to ceasing all rodent control operations, reducing lateral and vertical edges near tower laydown areas, allowing grasses and other vegetation to grow near towers to improve cover for small mammals, and relocating isolated turbines and those in canyons to clusters of turbines outside of canyons; and

WHEREAS, the East County Board of Zoning Adjustments held a hearing on December 11, 2003 to consider 15 applications for conditional use permits to allow continued use and operation of wind energy production facilities, including Conditional Use Permits C-8023, C-8031, C-8036, C-8037, C-8134, C-8136, C-8137, C-8173, C-8182, C-8224, C-8225, C-8231, C-8232, C-8240 and C-8263, and took consideration of the Staff Analysis prepared by the Planning Department which addressed the conformity of the permit extensions to the specific policies and programs of the East County Area Plan, and the exemption of the permit extensions from the requirements of the California Environmental Quality Act (CEQA, 1970 as amended) under CEQA Guidelines Section 15301, Class 1, as previously provided to the Board; and

WHEREAS, Jeff Miller of the Center for Biological Diversity, and Mike Boyd of Californians for Renewable Energy appeared at the public hearing and presented testimony recommending that all comments and the appeal of the previously approved use permit extensions be included in the record of the proceeding, recommending continuance of the permits until an environmental impact review or report is prepared pursuant to the California Environmental Quality Act or the appeal of the previously approved use permit extensions has been heard, recommending a technical advisory committee to implement mitigation measures based on recent studies with leadership provided by the California Department of Fish and Game and/or the U.S. Fish and Wildlife Service; and

WHEREAS, the Applicants, including the facility operators and some of the owners of property on which the facilities would operate, appeared at the public hearing and presented testimony in support of approving the permit extensions; and

WHEREAS, the East County Board of Zoning Adjustments, having taken public testimony at said hearing, found that development of a technical advisory committee over the following three to six months would be an appropriate means of implementing a range of mitigation measures to address ongoing avian mortality in the APWRA, and that revising the language provided for in the draft conditions regarding the proposed Wind Power Working Group (draft condition #10) in advance of a subsequent hearing was necessary, the Board unanimously voted to continue the matter to January 15, 2004; and

WHEREAS, on January 12, 2004, the Center for Biological Diversity, Plaintiff filed a lawsuit in U.S. District Court, Northern District of California, Case No. C-04-0312-CW as a complaint for violations of California Business and Professional Code Sections 17200 et seq., 17500 et seq.; Lanham Act, 15 U.S.C. § 1125; Unjust Enrichment, against: FPL Group, Inc.; FPL Energy, LLC; ESI Bay Area GP, Inc.; ESI Bay Area, Inc.; Neg Micon A/S; GREP Bay Area Holdings, LLC; Green Ridge Power LLC; and Altamont Power LLC, defendants (“windfarm operators”), specifically that the defendants, as the operators of wind energy facilities in the APWRA including those within Alameda County which are the subject of the use permit extensions, have killed thousands of birds including Golden Eagles, Red-tailed Hawks, American Kestrels, owls and other protected birds in violation of federal and state laws, and in violation of the cited sections of state and federal code have made false statements regarding compliance and environmental stewardship, request declaratory, injunctive and restitutionary relief to remedy said violations and prevent future violations; and

WHEREAS, the East County Board of Zoning Adjustments held a re-hearing on January 15, 2004 of applications for conditional use permits under consideration at its hearing on December 11, 2003, took consideration of the Staff Analysis prepared by the Planning Department which proposed a revised condition #10 regarding the Working Group; and

WHEREAS, the East County Board of Zoning Adjustments, having taken public testimony at said hearing, including a request by the Center for Biological Diversity to continue the matter in light of the above-referenced lawsuit filed three days prior to the hearing and its potential if any effect on the subject applications, comments by a representative of one of the applicants regarding upcoming meetings with various parties, finding that the proposed language for condition #10 required further study, and in order to honor the request by the Center for Biological Diversity for a continuance, the Board continued the matter to January 29, 2004; and

WHEREAS, the East County Board of Zoning Adjustments held a re-hearing on January 29, 2004 to consider the 15 applications for conditional use permits to allow continued use and operation of wind energy production facilities, as were previously under consideration on December 11, 2003 and January 15, 2004, took consideration of the Staff Analysis prepared by the Planning Department which proposed revisions to Condition #10 to better meet Board

direction, specify its advisory role in identifying mitigation measures, and its obligations for reporting to the Board; and

WHEREAS, Planning Staff recommended to the Board of Zoning Adjustments that the permits expire in twenty (20) years consistent with the prior conditions, with ongoing five-year reviews; and

WHEREAS, Jeff Miller of the Center for Biological Diversity appeared at the public hearing requesting assurances that comments from the hearing by the Board on November 13, 2003 were incorporated into the record, and presented testimony that an environmental impact report pursuant to the California Environmental Quality Act should be prepared prior to any action by the Board to approve the applications, and Richard Wiebe also representing the Center for Biological Diversity appeared at the public hearing to request the matter be continued for 60 days pending the release of a major study by Dr. Carl Thelander with new data, analyses and mitigation measures; and

WHEREAS, the East County Board of Zoning Adjustments, having taken public testimony at said hearing, and based on the Board's determination that the permits would conform to the General Plan, that the permits would be exempt from CEQA, and that a combination of conditions that had been added during prior five-year reviews relating to fire prevention and suppression, avian protection measures, bonding, etc., and new conditions prohibiting any substantial changes to existing facilities without appropriate project review, requirements for participation in scientific research and avian mitigation studies, and implementation of appropriate measures based on those studies, the institution of a Wind Power Working Group, composed of persons representing the County, the Applicants, CARE, CBD, CBD's legal representative, property owners, the state Department of Fish and Game and the U.S. Fish and Wildlife Service, to assist the County in addressing operational issues and identifying appropriate measures to reduce avian mortality, certain changes to the text of Condition #10 as set forth in the Minutes of the hearing, and with the addition of a condition terminating the permits after a twenty-year term, would together support the findings made by the Board that, consistent with its findings and supporting evidence made for the permit extensions approved on November 13, 2003: 1) the use is required by the public need; 2) the use is properly related to other land uses and transportation and service facilities in the vicinity; 3) the use, if permitted, under all the circumstances and conditions of this particular case, would not materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood; and 4) the use will not be contrary to the character or performance standards established for the A (Agriculture) District in which it is to be located;

WHEREAS, on the basis of the above findings the East County Board of Zoning Adjustments on November 13, 2003 approved Conditional Use Permits C-8023, C-8031, C-8036, C-8037, C-8134, C-8136, C-8137, C-8173, C-8182, C-8224, C-8225, C-8231, C-8232, C-8240, and C-8263 ("the second set of permit approvals"), and continued C-8216 for administrative purposes to its next meeting on February 26, 2004; and

WHEREAS, on February 5, 2004, this Board of Supervisors continued the first appeal (of CARE and the CBD of Conditional Use Permits C-8023, C-8031, C-8036, C-8037, C-8134, C-8136, C-8137, C-8173, C-8182, C-8224, C-8225, C-8231, C-8232, C-8240, and C-8263) to March 4, 2004; and

WHEREAS, on February 6, 2004, within a ten-day period following the approval of the permit extensions, as permitted by the Alameda County General Code, Jeff Miller of the Center for Biological Diversity (CBD), Mike Boyd of Californians for Renewable Energy (CARE), and the Golden Gate Audubon Society (GGAS) appealed the decision of the East County Board of Zoning Adjustments to approve Conditional Use Permits C-8023, C-8031, C-8036, C-8037, C-8134, C-8136, C-8137, C-8173, C-8182, C-8224, C-8225, C-8231, C-8232, C-8240, and C-8263 (“the second appeal”), incorporating as a part of the appeal all prior comments and attachments submitted by CBD, CARE, the United States Fish and Wildlife Service, the California Department of Fish and Game, the California Energy Commission, the East Bay Regional Park District, and BioResource Consultants, including comments attached to the appeal, and setting forth its assertion that the Board prejudicially abused its discretion and violated the law by:

- 1) Issuing new permits for 20-year terms without environmental review, mitigation requirements, or waiting for a major pending report to be published by the California Energy Commission;
- 2) Improperly characterizing the new use permits as extensions of use permits where a certain number of the permits had expired prior to the Board’s action;
- 3) Approving the use permit extensions instead of revoking them for cause due to the absence of adequate environmental review of the reasonably foreseeable impacts of the original projects on migratory bird species as required by CEQA;
- 4) Approving the use of a categorical exemption for the use permit extensions because the activity may have a significant impact on the environment, specifically the death of over 500 raptor species of birds per year due to both collisions with towers, blades and infrastructure and electrocutions on power lines, where mitigation measures are currently available and must be instituted before lawfully approving the permits, where adverse aesthetic impacts on a scenic highway, Interstate 580, will result, where an environmental impact report (EIR) has not been prepared at any time, as required for use of a categorical exemption for existing facilities, where cumulative impacts of the bird deaths over time exclude the permit extensions from being determined to be categorically exempt, and where the previously adopted EIR on the repowering of a portion of the APWRA (published in August 1998 by Alameda County) does not apply to the existing turbine facilities for which the subject permits were approved;
- 5) Approving the continued operation of the most lethal individual turbines, approximately 1 percent of all the turbines, that are associated with unusually high rates of raptor deaths, when requiring these turbines to be shut down immediately could achieve an immediate and dramatic reduction in raptor mortality;

- 6) Approving the continued operation of the facilities without requirements for implementing available techniques and technologies for reducing bird deaths due to electrocution;
- 7) Approving the continued operation of the facilities for 20-year terms with five-year reviews that are inadequate, whereas shorter terms of three years would be a more effective means of imposing mitigation measures and remediation; and
- 8) Approving the continued operation of the facilities in conflict with the policies of the Alameda County General Plan (East County Area Plan, or ECAP) under Policies 157, 159 and 160 (currently numbered 169, 171 and 172 under the ECAP as amended through May, 2002), under the same terms as expressed in the prior appeal; and

WHEREAS, on March 4, 2004, this Board of Supervisors continued the first appeal (of CARE and the CBD) to April 1, 2004; subsequently to July 1, 2004; subsequently to September 2, 2004; subsequently to September 10, 2004; and subsequently to November 4, 2004, each time on the recommendation of Planning Department staff; and

WHEREAS, the County convened the first meeting of the Wind Power Working Group (WPWG) on June 16, 2004, for the purpose of setting an agenda, scheduling future meetings, sharing initial information, and developing information needed for a hearing of the two appeals by the Board of Supervisors at its September planning meeting, at which representatives of the Permittees reported on ongoing work by BioResource Consultants (Carl G. Thelander and K. Shawn Smallwood) in cooperation with the California Energy Commission (CEC) and the U.S. Fish and Wildlife Service (USFWS), which had not yet resulted in publication of the major report and mitigation model anticipated by all the parties, but had focused attention on a select number of measures, and at which the parties discussed a wide range of topics but primarily related to different strategies for reducing avian mortality and/or research into such strategies; and

WHEREAS, on August 9, 2004, the CEC published the major report, "Developing Methods to Reduce Bird Mortality in the Altamont Pass Wind Resource Area" by K. Shawn Smallwood and Carl G. Thelander of BioResource Consultants, which recommended eight measures as a first priority, another five measures for experimental investigation, and cessation of certain strategies previously used or considered, as well as improving the means by which bird deaths are reported; and

WHEREAS, on August 11, 2004, the CBD withdrew its lawsuit (Case No. C-04-0312-CW) against the windfarm operators pending mediation and negotiation between the operators and CBD in expectation that County administrative proceedings could result in substantive remedies to the allegations of the lawsuit through the wide scale implementation of measures identified by the CEC's 2004 report; and

WHEREAS, the WPWG met again on August 19, 2004 to discuss the CEC report by BioResource Consultants, and to announce the postponement of the Board of Supervisors' hearing of the appeals to November 5, 2004, the development of adaptive management strategies for use by the Permittees and their biological resource management researchers (WEST, Inc.); and

WHEREAS, the WPWG met again on October 14, 2004 to discuss how the Study Plan for the Adaptive Management Plan (AMP) would incorporate the key recommendations in the CEC's August 2004 report while providing for a high degree of testing and monitoring to observe the relative benefit of each measure, possible procedures for reconsideration of the matters by the East County Board of Zoning Adjustments, and the Board of Supervisors' hearing of the appeals on November 5, 2004; and

WHEREAS, on November 1, 2004 the CBD filed a new lawsuit against the windfarm operators on similar but expanded grounds as the prior lawsuit (Case No. C-04-0312-CW), because the draft Study Plan for the AMP would not provide for effective implementation of the CEC's August 2004 recommendations, especially for off-site mitigation in the form of conservation easements over areas that may be identified as valuable raptor habitat, and that the operators had improperly obtained extension of their permits without fully complying with CEQA; and

WHEREAS, a legal representative of the Applicants submitted a letter to the Board of Supervisors dated November 1, 2004 affirming the County Planning Department staff's position that the use permit extensions are exempt from CEQA, that the use permit extensions provide the County with the ability to impose new conditions to address avian mortality in the APWRA, that the use permit extensions provide for appropriate means of developing and implementing measures to protect the environment and avian habitat in the APWRA, and that the appeals by the CBD, CARE and GGAS should be denied; and

WHEREAS, this Board of Supervisors held a hearing on both appeals on November 4, 2004, at which time the Board took public testimony from the Appellants, Permittees, landowners, other organizations and the public, and voted four to one to continue the matter to December 2, 2004, due to pending review by the U.S. Fish and Wildlife Service (USFWS), the state Department of Fish and Game (CDFG), and the California Energy Commission (CEC) of the Draft Study Plan for the AMP, after which time the consultants for the Permittees (WEST, Inc.) and BioResource Consultants, would meet to address those comments and finalize the AMP before making it public, and at such time that the WPWG could meet again to develop a consensus on a strategy for the East County Board of Zoning Adjustments to implement the AMP as quickly as possible, and therefore finding that the County staff should work diligently to implement the recommendations of the CEC's August 2004 report and that the WPWG should continue its work and be as inclusive as possible; and

WHEREAS, a legal representative of the Appellants submitted a letter to this Board of Supervisors dated November 9, 2004 proposing an "action plan" of eight proposed steps by which the County could comply with the requirements of CEQA "to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided" and avoid a lawsuit by the Appellants in relationship to the County's prior CEQA determinations, such steps to include limiting the permits to a term of 36 months, universal implementation of measures identified in the CEC's August 2004 report, requiring the Permittees to achieve a 40 percent reduction in raptor mortality within 24 months, implement independent monitoring procedures,

and that the County require preparation of an EIR in three years time upon expiration of the permits, to consider a full range of alternatives including repowering (replacing older turbines with proportionally fewer and larger turbines and with siting criteria to minimize wildlife impacts), reduction or elimination of wind energy facilities in the APWRA; and

WHEREAS, on December 2, 2004 this Board of Supervisors continued both appeals to January 6, 2005, and subsequently to March 3, 2005 on the recommendation of Planning Department staff due to expectations that further meetings of the WPWG could result in an AMP which would provide for effective implementation of measures identified in the CEC's August 2004 report; and

WHEREAS, the WPWG met again on December 3, 2004, on January 7, 2005, January 21, 2005, February 3, 2005 February 16, 2005, and March 29, 2005, which resulted in extensive discussions of revisions to the AMP which would more effectively implement the measures identified by the CEC's August 2004 report, and in subsequent reports published by the CEC in December 2004 and January 2005 that provided additional information and recommendations related to its August 2004 report; and

WHEREAS, this Board of Supervisors held a hearing on the appeal on March 3, 2005, at which time the Board took public testimony from the Appellants, Permittees, landowners, other organizations and the public, and voted to continue the matter to May 5, 2005, due to evidence of progress on an AMP that could be supported by all the parties, but ongoing disagreement regarding methodologies for identifying "high risk" locations from which turbines would be removed, selection and extent of application of other measures aimed at reducing avian mortality, differing expectations on the potential for reducing avian mortality by a set percentage while retaining operational viability, the issue of off-site mitigation through acquisition of easements for habitat preservation, as well as how technical review of the AMP would occur with representation from all parties; and

WHEREAS, on May 5, 2005 this Board of Supervisors continued both appeals to May 26, 2005, and subsequently to July 7, 2005 on the recommendation of Planning Department staff due to expectations that meetings of a sub-group of the WPWG could result in a resolution of the key issues and provide for effective implementation of measures identified in the CEC's August 2004 report; and

WHEREAS, the California State Attorney General's office submitted comments dated July 6, 2005 stating that the AMP has deficient objectives for reductions in avian mortality over three to five years are, lacks scientifically-sound study designs for adequate monitoring, and allows companies to opt out due to claims of financial hardship, reasons for which the Attorney General's Office recommended eight specific steps to reduce avian mortality while retaining the economic viability of wind energy production in the APWRA, including: 1.a) permanent shut-downs of the approximately 300 turbines identified as Tiers 1-3 (most hazardous turbines); 1.b) seasonal shutdown of all turbines from November 15 to February 28 in all years; 2) completion of an EIR in three years time to address the environmental effects of both the repowering program and existing facilities; 3) repowering of high-risk turbines or other measures to achieve

85% reduction in mortality by the sixth year; 4) immediate implementation of other measures identified in the CEC's August 2004 report; 5) immediate implementation of off-site mitigation such as through the purchase of conservation easements to protect breeding and foraging habitat; 6) financial sponsorship of a neutral expert selected by the County as a member of a scientific review panel and monitoring team; 7) require statistically-defensible monitoring to reliably detect changes in avian mortality; and 8) disallow companies from opting out of participation in the foregoing steps; and

WHEREAS, this Board of Supervisors held a hearing on the appeal on July 7, 2005, at which time the Board took public testimony from the Appellants, Permittees, landowners, other organizations and the public, and then passed a resolution to incorporate nine specific conditions into the prior draft conditions, including:

1. Immediate formation of a scientific review committee – balanced, independent technical experts appointed by Alameda County with expertise in avian issues and windmills. This group should consist of 3-5 people and should be carefully composed to ensure a full range of stakeholder input. The windmill companies will pay for any cost of this committee.
2. Begin an intensive monitoring program immediately. To be conducted by consultants hired and managed by the County and funded by the windmill companies. This should add to the data necessary for the EIR process.
3. Begin a repowering program that requires each company to repower 10% of their windmills by year 4, 35% by year 8, 85% by year 10 and 100% by the 13 and final year. All windmills in these permits will then be repowered or simply removed. Any delays will have to be approved by the County and only for reasons beyond the company's control (for example waiting for a State agency permit).
4. Develop an EIR that will include but not be limited to enabling repowering and studying the existing facilities, studying new wind technology, studying siting in the Altamont as a whole, assembling all data from all sources and reviewing offsite mitigation and how it can be used to encourage reductions in avian mortality.
5. Require existing turbines to shut down those identified as the most dangerous 2% of the turbines immediately and winter shutdowns of 2 months for every turbine immediately. This will escalate each year to reach a 3 ½ month winter shutdown and the removal of all tier 2 turbines in the short term by the end of the fifth year.
6. Establish an off-site mitigation program established after the EIR is adopted, so it can be studied and best utilized within Alameda County where the impacts occur.
7. Post-EIR, consider other and more aggressive methods to be added to the permits for the existing turbines in years 6-13.
8. Have no opt out language for financial hardship.
9. Implement immediately other identified CEC measures such as retrofitting all electrical lines, removing derelict turbines and relocating rock piles away from turbines.

The foregoing to be incorporated into a final set of conditions to be brought to the Board for approval on September 22, 2005; and

WHEREAS, this Board did hold a public hearing on the appeal of said Conditional Use Permit extensions at the hour of 9:00 a.m. on Thursday, the twenty-second day of September 2005, in the Supervisors' Meeting Room, Alameda County Administration Building, Fifth Floor, 1221 Oak Street, Oakland; and

WHEREAS, it satisfactorily appears from affidavits on file that proper notice of said public hearing was given in all respects as required by law; and

WHEREAS, the Planning Department summarized the facts of this appeal in a letter to the Board of Supervisors in which staff recommended that the appeal be denied in part and granted in part in that the conditions require a comprehensive environmental impact report to be prepared within a three-year time period based on neutral observations by an independent monitoring consultant, subject to review by a Scientific Review Committee, and require implementation of substantive measures to reduce the numbers of birds killed in the APWRA, especially raptors; and

WHEREAS, Planning Staff provided the Board at the hearing with copies of comments submitted by the Appellants and the Applicants in response to the letter to the Board of Supervisors, and with Analyses of the Comments, which incorporated comments ranging from requests that the permits be revoked outright to requests to modify the language of specific conditions, to relatively minor corrections, additions or date changes in the conditions or the related attachments, and

WHEREAS, the Appellants appeared at the public hearing and presented testimony in support of granting the appeal; and

WHEREAS, the Applicants appeared at said public hearing and presented testimony in support of denying the appeal; and

WHEREAS, testimony submitted at the public hearings and other information in the public record have been considered by the Board of Supervisors prior to this action;

WHEREAS, this Board of Supervisors has reviewed the environmental analysis prepared for the permit extensions, public comments thereto, County Staff Reports pertaining to the project, all conditions and attachments prepared for the permit extensions, all evidence reviewed at the duly noticed public hearings for the permit extensions, all of which are herein incorporated by reference into this Resolution; and

WHEREAS, the programs, requirements, procedures, legal and financial commitments and all other specifications as set forth in the conditions of approval for the use permit extensions are found to be necessary for the public health and safety and as a necessary prerequisite to ensure that the existing wind energy facilities, while exempt from environmental review as the ongoing maintenance of existing public energy utility structures, are managed in

such a way as to serve the goals and objectives of the Alameda County General Plan, and to aggressively respond to the greatest extent feasible the ongoing but unintentional death of various species of raptors and other birds in the Altamont Pass area, while also maintaining sustainable levels of wind energy production as a renewable, non-polluting source of energy; and

WHEREAS, this Board of Supervisors has reviewed and considered the entire administrative record, including but not limited to the determination of County Planning staff that the extensions of the conditional use permits are exempt from the requirements of the California Environmental Quality Act, the comments of local, state and federal agencies, private organizations and individuals, exhibits and attachments; and

WHEREAS, the Board of Supervisors did hear and consider all said reports, recommendations and testimony as hereinabove set forth;

NOW THEREFORE BE IT RESOLVED, that this Board of Supervisors does hereby find the following with respect to the subject appeals and subject projects:

1. That the recitals above are accurate and are hereby adopted as findings of this Board of Supervisors; and
2. That the extension of the conditional use permits, subject to the adopted conditions of approval and specified attachments, and site plans in **Exhibit A**, is consistent with the East County Area Plan, a component of the Alameda County General Plan as amended, in that the area is designated therein for Large Parcel Agriculture and the activities authorized under the use permit will be undertaken pursuant to and in conformity with said General Plan land use designation and policies related to windfarms; and
3. That the subject properties are suitable for continued operation of the wind energy production facilities, as the use is a conditionally permitted use in the "A" (Agriculture) District zoning for the site; and
4. That the conditional use permit extensions have been reviewed in accordance with the provisions of the California Environmental Quality Act and have been found to be exempt under CEQA Guidelines Section 15301, Class 1, which applies to "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features involving negligible or no expansion of use beyond that existing at the time of the lead agency's [CEQA] determination" because the project consists only of the extension of previously-approved and implemented Conditional Use Permits ("CUPs"), allowing the existing wind farms' continued operations with no expansion or other substantial changes to the physical facilities, operations, or land, such that when measured against existing conditions, the extension of the windfarm CUPs would not result in any new or different significant impacts, and though it is widely accepted that the existing windfarm facilities adversely affect avian populations, the issuance of a permit renewal or extension does not result in a physical change causing any new significant impacts; furthermore, that in view

of comments on record by project applicants and community groups monitoring the windfarm facilities' impacts on avian species ("advocacy groups") that information currently available on the impacts is incomplete, that additional study is required, and that while not required under CEQA, preparation of an EIR shall be required as a condition of approval within three years to evaluate windfarm operations and a program of repowering, or more specifically to evaluate impacts based on protocols developed by recognized researchers and under the guidance of a Scientific Review Committee, in order to provide the County and the public with an opportunity to review the impacts of the windfarm operations and impose appropriate conditions on operations to mitigate any identified impacts; and furthermore that a Notice of Exemption was prepared and filed with the County Clerk and the State Clearinghouse, both at the time of the original approval by the East County Board of Zoning Adjustments and upon the partial denial and partial granting of the appeal, the latter of which is attached hereto as **Exhibit B**; and

5. That the use is required by the public need in that wind energy production in the Altamont Pass Wind Resource Area (APWRA) represents a major source of renewable energy, or enough energy to supply about 150,000 households per year, and which is important in that while it constitutes only about 1 percent of California's total energy production, it has less variable costs than other energy sources, can assist in meeting peak summer energy demand, is non-polluting, and does not use fossil fuels or large amounts of water. To produce the same amount of energy as provided by the APWRA, a fossil fuel-burning production plant would generate over 250,000 tons of carbon dioxide (CO₂), nearly 700 tons of sulphur dioxide (SO₂), and over 650 tons of nitrogen oxides (Nox) per year. Wind power plants use only 1/500 as much water as thermal power plants, mainly for maintenance washing of blades. In addition, wind power provides over 100 full time jobs in Alameda County, and contributes substantial property, income, and business taxes in Alameda County each year; and.
6. The use is properly related to other land uses and transportation and service facilities in the vicinity, in that: a) the subject wind turbines are installed in areas that have been developed with wind power projects since the mid-1980's; b) the area is identified by the State and the County as an important Wind Resource Area, and has been improved with infrastructure necessary to support the numerous existing windpower projects, such as maintenance areas, access roads, and substations; c) Other land uses in the area primarily include grazing and open hillsides, rural residential settlements in certain areas, Brushy Peak Regional Preserve, Vasco Caves Regional Preserve, and the Altamont Landfill, some of which uses were developed after the original installation of the wind turbines; d) although some residents may object to the visual, noise, or other effects of the turbines, the County has determined that the wind energy projects are in compliance with the conditions of approval and are an acceptable use in the area; and e) the relationship between the wind turbines and the homes, parks and landfill would not change as a result of extending the use permits for existing turbine facilities; and
7. The use, if permitted, under all the circumstances and conditions of this particular case, would not materially affect adversely the health or safety of persons residing or working

in the vicinity, or be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood, in that: a) the subject turbines have been sited according to the County's standard setbacks; b) proper maintenance and operation efforts are in effect to ensure the safe operation of the turbines; c) fire control and security measures are in place to protect the public and local property; d) fire prevention and suppression efforts are a standard condition of approval for the permits; e) the wind energy companies have substantially complied with the prior provisions in cooperation with the responsible fire departments to minimize fires and injuries; f) the wind power plants do not substantially hinder the continued use of the project sites and surrounding land for cattle grazing as the primary property use; g) access roads developed for the wind farms provide improved access to the grazing lands; and h) land owners benefit from the lease payments made by wind power companies, which further supports grazing operations; and other improvements, such as roadways, railroads, electrical substations and landfills are not adversely affected by the presence of wind turbines and the associated infrastructure; and

8. The use will not be contrary to the character or performance standards established for the District in which it is to be located, in that the projects are located in the A (Agriculture) zoning district, which has as its stated intent: "to promote implementation of General Plan land use policies for agriculture and other non-urban uses; to conserve and protect existing agricultural uses; and to provide space for and encourage such uses in places where more intensive development is not desirable or necessary for the general welfare" and that the permit extensions would be consistent with this intent because the development of wind power projects is encouraged by the general plan in the WRA, the projects remove minimal land from agricultural production, and the uses are appropriately located in non-urban areas and serve the public welfare; and
9. That the appeals by the Center for Biological Diversity, Californians for Renewable Energy and the Golden Gate Audubon Society have certain merits, and in consideration of such comments, the Board denies the appeals in part while granting other portions of the appeals by imposing specific requirements set forth in the conditions, including but not limited to:
 - a. With respect to the comment in the first appeal by CBD and CARE that the approved conditions did not impose a limited permit term, and in the second appeal by CBD, CARE and GGAS that approving the facilities with 20-year terms with five-year reviews would be inadequate compared to shorter terms of three years, the Board has revised the conditions to provide for expiration of all permits in 13 years, and requires preparation of an EIR in three years time that will address both existing turbines and the repowering program;
 - b. With respect to the comment in the second appeal by CBD, CARE and GGAS that approving the continued operation of approximately 1 percent of all the turbines, identified by the CEC-sponsored researchers as Tier-1 turbines that are associated with an unusually high rates of raptor deaths, the conditions as revised by the Board

- require the immediate shutdown of all Tier 1 turbines, or approximately 2 percent of all turbines, and other steps to reduce avian mortality;
- c. With respect to the comment in the second appeal that approving the continued operation of the facilities without requirements for implementing available techniques and technologies for reducing bird deaths due to electrocution, the revised conditions require the immediate implementation of techniques identified in the CEC's August 2004 report;
 - d. With respect to the comment in the first appeal that the use permit extensions will strongly associate wind energy with adverse effects on migratory bird species and thereby give wind energy a "black eye" and less favorable comparison with fossil fuel-based energy plants, the Board has revised the conditions to require the operators to carry out substantial measures to reduce avian mortality, a program to repower the APWRA, and other steps are intended to associate wind energy with environmental stewardship as well as an economically viable source of sustainable energy; and
10. On the basis of these findings and based on substantial evidence in the entire administrative record, any and all appeals of the approval of the conditional use permit extensions are hereby substantially denied but in part granted as set forth above, and the East County Board of Zoning Adjustments approval is upheld, subject to the revised conditions of approval;

BE IT FURTHER RESOLVED that the Alameda County Board of Supervisors does hereby approve the Conditional Use Permits as modified by the conditions and attachments labeled as **Exhibit "A"** (Table of Use Permits and Site Plans), **Exhibit "C"** (Altamont Pass Windfarm Fire Requirements), **Exhibit "D"** (APWRA Scientific Review Committee), **Exhibit "E"** (Wind Power Working Group), **Exhibit "F"** (Wind Resource Area Permits, Permittees, Owners And Rated Output) and **Exhibit "G"** (Avian Wildlife Protection Program and Schedule), on file with the Alameda County Planning Department, thus denying the appeal in part while granting other portions of the appeal, subject to the following conditions:

1. No Substantial Change in Existing Facility: This Conditional Use Permit ("CUP") is approved to permit the continued operation of an existing, operating wind energy facility ("Facility"), subject to the conditions specified herein for the designated period of time, and in accordance with **Exhibit A.1**, a table which identifies each Facility as currently permitted and located and each Facility's original CUP number, and in accordance with **Exhibit A.2**, an individual site plan of each Facility on file with the County Planning Department. As used herein, "Facility" shall include all wind turbines and towers, substations, transformers and both communication and power collection systems authorized under the original CUP to the extent they were installed pursuant to the original CUP and are under control, operations and/or maintenance as of the date of the application for this CUP extension. The Facility, thus defined, shall continue to be controlled, operated and maintained under this CUP extension without substantial change from the Facility description. Any substantial change in the physical layout or equipment

of the Facility, as would constitute a definitive departure from the permitted Facility description except as required by the conditions set forth herein, is subject to the review and approval of Alameda County.

2. Insurance: A Comprehensive General Liability insurance policy in the minimum amount of \$1,000,000 and in the form prescribed in the document "STANDARD WINDFARM INSURANCE REQUIREMENTS, ALAMEDA COUNTY PLANNING DEPARTMENT, SEPTEMBER 22, 2005," shall be maintained during the term of this permit. Evidence of such coverage shall be provided to the County within 20 business days following approval of this Conditional Use Permit.
3. Hold Harmless Agreement: By exercise of this Conditional Use Permit, the Permittee agrees to defend, indemnify and hold harmless the County of Alameda, its officers, employees, agents and assigns for any and all liability caused by negligent or wrongful acts of the Permittee arising out of the exercise of this Conditional Use Permit, and to pay all claims, damages, judgments, legal costs, adjuster fees, and attorney fees incurred by the County related thereto.
4. Restoration Bond: The Permittee shall post a bond or provide an equivalent financial instrument to ensure an adequate sum of money (the specific amount to be determined by the Planning Director with input from the Scientific Review Committee by December 31, 2005), is available to guarantee reclamation of abandoned facilities and restoration of properties to pre-installation conditions, in the event of failure by the Permittee to implement the terms of the conditions herein except as determined by the Planning Director for reasons outside of the Permittee's reasonable control or ability to foresee.
5. Scientific Review Committee: Within 30 days of the granting of this Permit, the Alameda County Board of Supervisors shall appoint five individuals to form the Altamont Pass Wind Resource Area Scientific Review Committee (SRC). The SRC shall serve as a balanced and independent panel of technical experts with appropriate scientific knowledge of and experience with avian safety and wind energy issues. Each of the following major stakeholder groups will have one individual member of the SRC selected to represent their perspective: 1) the County of Alameda; 2) the Permittee(s); 3) the environmental community (e.g., Center for Biological Diversity, Californians for Renewable Energy, Inc., Golden Gate Audubon Society, Sierra Club, or other similar group); 4) a California state resource agency; and 5) a federal resource agency. In the event only one state or federal resource agency nominates a qualified representative, the remaining representative shall be appointed by the Board of Supervisors to represent the public-at-large.

The SRC shall represent but collectively balance the fundamental interests and input of all stakeholders, and shall be responsible for developing scientifically-supported strategies to reduce injury and mortality to avian wildlife associated with wind turbine operations in the Alameda County portion of the APWRA, including existing and future repowering projects, through the implementation of those strategies, especially those set

forth under Condition 7 below (the Avian Wildlife Protection Program & Schedule, or AWPPS). The membership, objectives, specific and formal responsibilities for work and for reporting shall be as set forth in **Exhibit D**.

The SRC shall also assist in technical evaluation of the scope and determinations of an Environmental Impact Report to be completed in accordance with the schedule set forth in Condition 7 (AWPPS). The SRC should utilize an approach under which there is a continual cycle of assessment, design, implementation, monitoring, evaluation, adjustment and re-assessment of strategies, except where experimentation on this basis is deemed by the SRC to be in conflict with the overall program of strategies and schedule set forth under Condition 7 below.

The SRC shall provide its recommendations to the Planning Director for the implementation of specific strategies to reduce avian mortality, and the conduct of research and monitoring activities. On the basis of recommendations by the SRC, the Planning Director shall have the authority to impose new conditions on this Permit to address avian safety and other environmental and operational issues, and to establish and manage the budget of the SRC for monitoring and research costs. Such new conditions will be within the general scope set forth by this Permit and its conditions, including the AWPPS. Minor, non-substantive changes to timing or implementation may be imposed directly by the Planning Director, whereas major substantive, material or considerable changes to the conditions shall be subject to a public hearing after notice as provided for in the initial hearing.

The Planning Director's decisions may be appealed to the Board of Zoning Adjustments, or a rehearing may be set by the Planning Director, on an annual basis after notice as provided for in the initial hearing, for the purpose of modifying such decisions or adding conditions that may be required to guarantee the continuance of the affirmative findings contained herein. By exercise of this Permit, the Permittee agrees to contribute funds for the budget of the SRC in proportion to the rated megawatt (MW) capacity of the facility as listed in **Exhibit F**, adjusted annually for turbines permanently removed under the requirements of these conditions.

6. Monitoring by County Consultant(s): Within 30 days of the granting of this Permit, the County of Alameda shall issue a request for proposals by qualified professional consultants to conduct intensive, scientifically-rigorous and independent monitoring of avian injury and mortality in the Alameda County portion of the APWRA, including existing and future repowering projects, as a neutral third party. The selected biological resource monitoring consultant ("County consultant") shall be responsible for using appropriate protocols and methodologies to enumerate and describe the relevant circumstances and apparent causes of bird injuries and deaths (e.g., location and pattern of turbines, avian behavior, environmental conditions, etc.), conduct other research objectives to be established by the SRC and/or the Planning Director, and to assemble such data for use by the SRC. The consultant shall provide monthly reports on observed avian injuries and deaths and other wildlife conditions to the SRC, the Planning Director,

the U.S. Fish and Wildlife Service (FWS), and the California Department of Fish and Game (DFG).

The Planning Director shall have the authority to designate a consultant for this purpose on a temporary basis for up to 180 days following the grant of this Permit. The consultant may be retained for guidance regarding the scope and preparation of an Environmental Impact Report (EIR) consistent with the Program Schedule. Permittee shall agree to provide full facility site access to the designated consultant or associated personnel, and shall be responsible for reporting to the consultant any avian injury or fatality on the facility site discovered by its own personnel. By exercise of this Permit, the Permittee agrees to contribute funds for the budget of the consultant selected by the Planning Director, in proportion to the rated MW capacity of the facility as listed in **Exhibit F**, adjusted annually. A generalized annual budget for the County consultant shall be established by the Planning Director, but reimbursement for consultant and staff time and expenses shall take place on a time-and-materials basis.

7. Avian Wildlife Protection Program & Schedule: By exercise of this Permit, the Permittee(s) agree to the implementation of the Avian Wildlife Protection Program & Schedule (AWPPS) in broad terms as set forth in **Exhibit G**. The Permittee shall implement the Program Schedule to the satisfaction of the Planning Director, and may not continue turbine operations without such satisfaction on the grounds or claims of financial hardship. By exercise of this Permit, the Permittee agrees to bear all costs of implementing the Program carried out by the Permittee's own staff or contractors, and to contribute all needed funds to the County to implement County-initiated portions of the Program Schedule (including both consultant and County staff expenses), in proportion to the rated MW capacity of the facility as listed in **Exhibit F**, adjusted annually. If at any such time the Permittee ceases to participate in the Program or per these conditions is deemed to be non-cooperative by the Planning Director, the Permittee, upon a duly-noticed hearing for revocation of the Permit, shall be responsible for restoring or otherwise reclaiming the facility site(s) to pre-project conditions, or shall forfeit the Reclamation Bond referenced above as Condition 4.
8. Environmental Impact Report: Beginning in the second year, the Permittee(s), in cooperation with the County, will sponsor the preparation of an Environmental Impact Report (EIR) for the purpose of evaluating the environmental impacts of the repowering program and the continued operation of existing turbine facilities (and progressive removal under the repowering program).. Using state-of-the-art scientific investigations, reports prepared by the County consultant, and data from all other sources, the EIR will assess the environmental impacts of the repowering program (including both specific proposals and the overall repowering program set forth herein), the continued operation of existing turbine facilities, and the effectiveness of the various strategies to reduce and minimize avian mortality and other adverse impacts on wildlife (such as new wind turbine technology, site-specific measures, grazing management, etc.). The EIR will seek to verify and validate current assumptions regarding the benefit of repowering as a means of substantially and significantly reducing the amount of avian injury and mortality

resulting from most existing types of turbines, and identify appropriate means of ensuring that repowered turbines have the lowest possible rate of avian mortality. The EIR shall also study siting in the Altamont as a whole, and may also address how to provide incentives for an increased rate of repowering, including expanding areas where wind power facilities may be permitted. By exercise of this Permit, the Permittee agrees to contribute funds for all costs associated with the EIR, in proportion to the rated MW capacity of the Facility as listed in **Exhibit F**, adjusted annually.

9. Preliminary On-Site/Off-Site Habitat Mitigation Implementation Program: Beginning in the first year, the Planning Director, with input from the SRC and the County consultant, shall develop a program that the Permittee(s) shall fund and otherwise participate in, to provide for protection and enhancement of the habitat of raptors and other wildlife through conservation easements or other means on suitable properties to compensate for avian mortality and injury effects that remain unaffected by the Avian Wildlife Protection Program and Schedule (AWPPS). The properties on which habitat enhancement is provided should be within Alameda County to the greatest extent possible, and the selection of properties and administration of the program shall be based on the recommendations of the SRC. The Mitigation Implementation Program will require the SRC to investigate formulae, criteria, techniques and costs of conservation easements or similar strategies to be carried out by the Permittee(s). Any properties selected for use in carrying out this program, including on-site portions of properties leased by the Permittee(s) must be appropriately separated from active windfarm turbine fields, represent viable, favorable raptor habitat, and have significant potential to protect and enhance raptor habitat as determined by the SRC.
10. Wind Power Working Group: To maintain communication between the SRC and the major stakeholders, the Planning Director shall convene the previously established Wind Power Working Group at least two times per year to receive reports on progress on compliance with the conditions herein. The Working Group will be an informal panel of interested persons representing the Permittee(s), landowners, environmental groups, government agencies, special interest groups and the public, and may make informal recommendations to the Planning Director regarding the implementation of the conditions listed herein and new conditions recommended by the SRC. The current members of the Working Group are provided in **Exhibit E**.
11. Permittee-Sponsored Research: The Permittee(s) are encouraged to continue research regarding strategies to reduce bird deaths and injuries at their own discretion, for consideration and potential incorporation into the broader AWPPS upon the recommendations of the SRC.
12. Injured Bird Protocols: In the event either the County consultant or Permittee personnel discover an injured bird with a special species status (e.g., golden eagle, red-tailed hawk, burrowing owl, American kestrel, peregrine falcon, etc.), such personnel shall also be responsible for contacting either the DFG or the nearest qualified wildlife rehabilitation

center or specialist as approved by the FWS, within 3 hours of discovery to provide immediate veterinary care.

13. Archaeological Resources: Recommendations contained in the project-specific archaeological study, or any prior studies applicable to the project site, shall be adhered to, and cultural resource conditions of approval applicable from prior conditional use permits shall remain in effect. In addition, the applicant shall inform all operations and maintenance personnel of the possibility of finding archaeological resources (e.g., artifacts). If during operations and maintenance such resources are encountered, all work shall be halted within a 30-meter radius of the findings and a qualified archaeologist retained to ascertain the nature of the discovery. Recovery or protection procedures recommended by the archaeologist and approved by the Planning Director shall be implemented.
14. Windfarm Fire Requirements: The Permittee shall be responsible for continual compliance with the Altamont Pass Windfarm Fire Safety Requirements, as set forth in **Exhibit C**.
15. Notification of Occurrence: The Permittee shall notify the County Planning Director of any tower collapse, blade throw, fire, or injury to a worker within the windfarm within five (5) days of such occurrence. The County Planning Director shall be responsible for notifying any other appropriate County officials.
16. Inoperative Equipment: Any windfarm not in compliance with the criteria below will be subject to Section 15.04.370 et seq. of the Alameda County Ordinance Code relating to abandoned wind turbines, except as modified herein.
 - a. A wind turbine or windfarm shall be deemed abandoned for the purposes of this condition if either of the following occurs:
 1. The windfarm has not produced electricity in one year and there is no demonstrated plan, satisfactory to the Planning Director, to restore the equipment to a productive operating condition; or
 2. It can be established that more than 50% of the turbines are actively being removed or are in disrepair and there is no demonstrated plan, satisfactory to the Planning Director, to restore the equipment to a productive operating condition.
 - b. Upon determination by the Planning Director that either of the above criteria is present on the property, the Planning Director shall give notice to the Permittee.
 - c. Within a reasonable time after the date of the notice by the Planning Director, the Permittee shall either (1) restore any inoperable or abandoned wind turbine to operating condition; or (2) restore the site of such turbine to its preconstruction condition. However, in the event a building permit is required for either action described above, the Permittee shall satisfy this subsection by applying for such building permit within a reasonable time after the date of the notice, and completing

the activities which are the subject of the building permit within a reasonable time after the issuance of said permit.

- d. If the Permittee does not comply with subsection (c), above, the County shall, in its discretion, take any legal steps necessary, including the use of deposit funds that have been collected, to restore the turbine site to its preconstruction condition.
17. Relocated Turbines: In the event that the Permittee requests to relocate any Tier 1 or Tier 2 turbines to other locations, the siting proposal shall be submitted to both the SRC and Planning Director for review and approval, subject to affirmative findings that the new siting would not result in increased risk of avian mortality and injury.
 18. Public Works Improvement Plan: Any new grading of the site for turbine relocation requiring a new Improvement Plan by the Director of Public Works shall be submitted for review and approval by Alameda County Flood Control and Water Conservation District or the Alameda County Public Works Agency as appropriate in accordance with standard engineering practice and grading guidelines, and subject to review and approval by the SRC.
 19. Visual Screening: Any new staging areas used by the Permittee for maintenance or turbine removal or relocation shall be visually protected, where feasible, either by the terrain or another form of screening, from local residential areas, local roads, and recreation areas subject to approval by the Planning Director.
 20. Coordination with CDFFP: The Permittee shall continue to maintain coordination with the California Department of Forestry and Fire Protection in conjunction with the County Fire Department to monitor the project site during maintenance and turbine removal as determined necessary by those agencies and in compliance with the Fire Safety Requirements.
 21. Noise Standards: Wind turbines shall be operated so as to not exceed the County's noise standard of 55 dBA (Ldn) or 70 dBC (Ldn) as measured in both cases at the exterior of any dwelling unit. If the dwelling unit is on land under lease from the Permittee, the applicable standard shall be 65 dBA (Ldn) and 70 dbC (Ldn).
 22. Noise Complaints: In the event a reasonable complaint is received by the Building Official alleging the presence of sound levels from a wind turbine or windfarm exceeding 55 dBA (Ldn) at a dwelling that was existing at the time this permit was issued (or 65 dBA (Ldn) if the dwelling is on land under lease for a windfarm), or 70 dBC (Ldn) as measured at the exterior of the dwelling:
 - a. The Building Official shall report this matter to the Permittee and to the Planning Director and upon receipt of such report, this matter shall be brought to hearing pursuant to Section 17.54.650 and may be considered as provided by Section 17.54.030 of the Alameda County Ordinance Code; and
 - b. Upon receipt of the report of the Building Official, the Planning Director shall commission a qualified firm to make a site specific study and furnish a report and

- recommendation on the circumstances, if any, which would render the project in conformance with all applicable noise conditions; the report shall also include a recommendation to the Board of Zoning Adjustments who will make the final determination as to whether subsection (d) shall be imposed.
- c. For a minimum 30-day period from the date of notification, at the time and place as may be agreed upon by the parties involved, Permittee shall attempt in good faith to negotiate a resolution of this matter with the party making the allegation; any such resolution shall be reported to the Planning Director in a timely manner; and
 - d. Following the review period as provided under subsection (c) and until the conclusion of the revocation procedures as provided by Section 17.54.030, up to one fourth of the wind turbines authorized by this permit to be constructed or maintained that are in closest proximity to the dwelling of the party making the allegation, shall be made inoperative.

Methods for measuring and reporting acoustic emissions from wind turbines and windfarms shall be equal to or exceed the minimum standards for precision described in AWEA Standard, AWEA 2.1 - 1989 titled *Procedures for the Measurement and Reporting of Acoustic Emissions from Wind Turbine Generation Systems (WTGS) Volume I: First Tier*.

The Planning Director, in consultation with the Alameda County Environmental Health Services Agency, shall establish criteria for noise samples and measurement parameters such as the duration of data collection, time of day, wind speed, atmospheric conditions and direction as set forth in the Wyle Research Report.

23. Noise Enforcement Deposits: The Permittee shall as condition of the continued operation of the Facility as approved under this Permit maintain a \$2,000.00 cash deposit for use in the investigation and evaluation of a noise complaint as provided in Condition 22 herein above. If all or any part of said cash deposit is depleted by such activities, the Permittee shall restore the balance of the deposit to the original \$2,000.00. In the course of the review of this permit on the third anniversary of its issuance, if warranted by the record, the requirement of this \$2,000.00 deposit may be deleted and funds paid by the Permittee may be returned to the Permittee.
24. Three-Year Review: Sixty (60) calendar days prior to or after the third annual anniversary of this approval, the Planning Director shall, after notice as provided for in the initial hearing, set this matter for hearing for the purpose of modifying any conditions previously imposed, or addition of conditions that may be required to guarantee the continuance of the affirmative findings contained herein. This consideration may include the imposition of new requirements regarding wind turbine operations and equipment on the premises subject to this Permit, or appropriate guarantees to be filed to ensure compliance with conditions herein. Such alterations to said conditions may also be as a result of the EIR prepared to address the repowering of the APWRA, which is intended to be completed coterminously with this Three-Year Review. Any condition modified or added

shall be of the same force and effect as if originally imposed. Review costs shall be borne by the applicant.

25. Eight-Year Review: Sixty (60) calendar days prior to or after the eighth annual anniversary of this approval, the Planning Director shall, after notice as provided for in the initial hearing, set this matter for hearing for the purpose of modifying any conditions previously imposed, or addition of conditions that may be required to guarantee the continuance of the affirmative findings contained herein. Any condition modified or added shall be of the same force and effect as if originally imposed. Review costs shall be borne by the applicant.
26. Recordation of Use: The Permittee shall reference wind power or associated development on all leases or easements entered into in the APWRA subsequent to the issuance of this permit, and, wherever possible, shall record such leases and easements and provide proof of such recordation to the County.
27. Expiration: This permit shall expire on September 22, 2018, on its 13th (thirteenth) anniversary. The Permittee(s) shall have no express or implied right to operate existing turbines under this Permit after September 22, 2018.

Pursuant to Section 17-52.050 of the Alameda County Zoning Ordinance said Conditional Use Permit shall be implemented within a term of three (3) years of its issuance or it shall be of no force or effect.

Exhibits:

- Exhibit A.1: Table of Use Permit Numbers, APNs, Original Permit Numbers and Map Key
- Exhibit A.2: Site Plan of Each Extended Conditional Use Permit
- Exhibit B: Notice of Exemption
- Exhibit C: Altamont Pass Windfarm Fire Requirements
- Exhibit D: APWRA Scientific Review Committee (Purpose, Tasks, Membership, etc.)
- Exhibit E: Wind Power Working Group
- Exhibit F: Wind Resource Area Permits, Permittees, Owners and Rated Output
- Exhibit G: Avian Wildlife Protection Program and Schedule (AWPPS)

THE FOREGOING was **PASSED** and **ADOPTED** by a majority vote of the Alameda County Board of Supervisors this **22nd** day of **September, 2005**, to wit:

AYES: **Supervisors Haggerty, Carson, Miley, Lai-Bitker**

NOES: **Supervisors Steele**

EXCUSED: **none**

PRESIDENT, BOARD OF SUPERVISORS

ATTEST:
Crystal K. Hishida, Clerk

Board of Supervisors

By: _____

Deputy

File: _____

Agenda No: _____

Document No: **R-2005-453**



I certify that the foregoing is a correct copy of a Resolution adopted by the Board of Supervisors, Alameda County, State of California

ATTEST:
CRYSTAL K. HISHIDA, Clerk
Board of Supervisors

By: _____