

**RESOLUTION NO. Z-10-25 OF
THE EAST COUNTY BOARD OF ZONING ADJUSTMENTS
ADOPTED AT THE HEARING OF MARCH 10, 2011**

RESOLUTION TO AMEND 25 CONDITIONAL USE PERMITS PREVIOUSLY APPROVED BY RESOLUTION R-2005-453 OF THE ALAMEDA COUNTY BOARD OF SUPERVISORS, AND ONE CONDITIONAL USE PERMIT PREVIOUSLY APPROVED BY RESOLUTION Z-06-04 OF THE EAST COUNTY BOARD OF ZONING ADJUSTMENTS, ALSO PURSUANT TO RESOLUTION R-2007-111 OF THE ALAMEDA COUNTY BOARD OF SUPERVISORS, TO ADOPT AN ADAPTIVE MANAGEMENT PLAN FOR REDUCING AVIAN MORTALITY WHILE PROVIDING FOR THE MAINTENANCE AND CONTINUED OPERATIONS OF EXISTING WIND TURBINES IN THE ALTAMONT PASS WIND RESOURCES AREA (APWRA) OF ALAMEDA COUNTY, SAID CONDITIONAL USE PERMITS AS FOLLOWS:

- C-8161, Seawest Power Resources LLC/Pombo (2.89 megawatt windfarm of 38 turbines, APN: 099B-7750-006-00);**
- C-8201, Seawest Power Resources, LLC/Griffith & Brockman, (3.38 megawatt windfarm of 52 turbines, APNs: 099B-7875-001-02, 099B-7875-001-03)**
- C-8203, Seawest Power Resources, LLC/Arnaudo & Castello (8.52-megawatt windfarm of 131 turbines, APNs: 099B-7500-003-01, 099B-7600-001-01);**
- C-8233, Altamont Infrastructure Company/Elliott (2.6-megawatt windfarm of 26 turbines, APN: 099B-6125-004-00);**
- C-8234, Altamont Infrastructure Company/Ralph Properties II, (2.4 megawatt windfarm of 27 turbines, APN: 099A-1790-001-00);**
- C-8235, Altamont Infrastructure Company/Corbett (6.1-megawatt windfarm of 40 turbines, APNs: 099A-1785-001-13; 099B-5650-001-04);**
- C-8237, Altamont Infrastructure Company/Valhalla Enterprises (13.6-megawatt windfarm of 136 turbines, APNs: 099B-5610-001-00 and 099B 6075 003 00);**
- C-8238, Altamont Infrastructure Company/Ralph Properties II (23.8 megawatt windfarm of 238 turbines, APNs: 099B-7375-001-07; 099B-7300-001-05 and 099B-6325-001-03);**
- C-8239, Altamont Infrastructure Company/Jackson (3.0-megawatt windfarm of 30 turbines, APN: 099B-6125-005-00);**
- C-8241, Altamont Infrastructure Company/Walker Family Trust (23.8-megawatt windfarm of 238 turbines, APNs: 099B-6100-002-10; 099B-6100-002-11; 099B-6100-003-01; 099B-6100-003-11; and 099B-6100-003-13);**
- C-8244, Altamont Infrastructure Company/ Marie Gomes Farms (17.5 megawatt windfarm of 175 turbines, APNs: 099B-1795-001-00; 099A-1790-002-00 and 099B-6425-002-03);**
- C-8023, Seawest Power Resources, LLC/Johnston (2.4-megawatt windfarm of 30 turbines, APN: 099B-6325-001-04);**
- C-8031, Altamont Power Company/Corbett (6.83-megawatt windfarm of 59 turbines, APNs: 099B-6425-002-04; 099B-6500-002-01, currently under ownership of Altamont Landfill – Waste Management Inc, 099B-6300-004-01);**
- C-8037 Altamont Infrastructure Company/Pombo (6.5-megawatt windfarm of 65 turbines), APNs: 099B-6300-002-01; 099B-6300-002-02; 099B-6325-002-03; 099B-6325-002-04; and 099B-6325-001-06);**

- C-8134, Altamont Infrastructure Company/Rooney (3.1-megawatt windfarm of 31 turbines, APN: 099B-6125-002-00);**
- C-8136, Altamont Infrastructure Company/Contra Costa Water District (0.17-megawatt windfarm of 17 turbines, APN: 099B-6100-002-07);**
- C-8137, Altamont Infrastructure Company/Mulqueeney (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);**
- C-8173, Altamont Infrastructure Company/Wildlands, Inc. (0.9 megawatt windfarm of 9 turbines, APN: 099B-7890-001-03);**
- C-8182 Seawest Power Resources, LLC/Ralph Properties II (8.23 megawatt windfarm of 182 turbines, APN: 099B-6325-001-03);**
- C-8224, Altamont Power Company/Elworthy, (37.92-megawatt windfarm of 291 turbines, APNs: 099B-6130-002-00; 099B-6130-003-00; 099B-6175-001-01, 099B-6175-002-03, 099B-6200-001-00, 099B-6300-001-01; 099B-6325-003-00, 099B-7375-001-01 and 099B-7375-001-04);**
- C-8225, Altamont Infrastructure Company/Guo & Lin (3.1-megawatt windfarm of 10 turbines, APN: 099B-5650-002-01);**
- C-8231, Altamont Infrastructure Co./Waste Management Inc. (25.4-megawatt windfarm of 248 turbines, APNs: 099B-6062-003-00; 099B-6062-005-00; 099B-6225-001-00; 099B-6250-001-00; and 099B-6275-001-01);**
- C-8232, Altamont Infrastructure Company/Egan (5.0 megawatt windfarm of 50 turbines, APN: 099B-6125-003-00);**
- C-8240, Altamont Infrastructure Company/Hansen (1.2-megawatt windfarm of 12 turbines, APN: 099B-5650-002-04);**
- C-8263, ENXCO, Inc./ Patterson Pass Farms (21.8-megawatt windfarm of 336 turbines, APNs: 099A-1800-001-00; 099A-1800-002-01 and 099B-7985-001-02);**
- C-8243, Altamont Infrastructure Company/Alameda County Waste Management Authority (41.6-megawatt windfarm of 404 turbines, APNs: 099A-1700-002-01, 099A-1770-002-02, 99A-1770-002-03, 099A-1780-001-04, 099A-1790-003-00 and 099A-1810-001-00, not previously subject to Resolution Number R-2005-453); and**
- C-8243, Altamont Infrastructure Company/Alameda County Waste Management Authority (41.6-megawatt windfarm of 404 turbines, APNs: 099A-1770-002-01, 099A-1770-002-02, 099A-1770-002-03, 099A-1780-001-04, 099A-1790-003-00 and 099A-1810-001-00, subject to Resolution Number Z-06-04).**

WHEREAS, on September 22, 2005 the Alameda County Board of Supervisors approved Resolution Number R-2005-453, denying in part and granting in part the appeals 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 decisions on November 13, 2003 and January 29, 2004 to

conditionally approve a total of 29 conditional use permits (CUPs) for the maintenance and continued operations of existing wind turbines, said permits to be held by five different operating entities, including: Altamont Infrastructure Company LLC (a management company only which does not own individual turbines); SeaWest Power Resources, LLC; Altamont Power, LLC (a subsidiary of FPL Group, Inc. and ESI Energy LLC); Windworks Inc. (also operating as Altamont Winds, Inc. or AWI); and enXco., Inc., (collectively the Wind Power Companies) in the Altamont Pass Wind Resource Area (APWRA) of Alameda County, thereby approving with findings included that the CUPs, including those CUPs listed above, were exempt from the California Environmental Quality Act (CEQA), and with conditions modified from the original Board of Zoning Adjustments decisions, said Resolution and conditions are incorporated herein by reference (hereinafter the "Permit Extensions"); and

WHEREAS, on January 12, 2006 the East County Board of Zoning Adjustments adopted Resolutions Z-06-03 and Z-06-04, having made required findings including that the CUPs were categorically exempt from the California Environmental Quality Act ("CEQA"), respectively approved Conditional Use Permits, C-8216 and C-8243, allowing continued operation of existing turbines by Windworks, Inc. (C-8216), and Altamont Infrastructure Company LLC (C-8243), on separate sites in the APWRA, said use permits having not been included in Resolution R-2005-453, and on January 20, 2006 GGAS and CARE appealed their approval to the County Board of Supervisors; and

WHEREAS, on or about October 31, 2005 a coalition of five regional Audubon groups (Golden Gate Audubon Society, Ohlone Audubon Society, Mount Diablo Audubon Society, Santa Clara Valley Audubon Society and Marin Audubon Society, collectively Audubon) and CARE petitioned the Alameda County Superior Court for a writ of mandate (Case Nos. RG05239552 and RG05239790, hereinafter collectively referred to as the "Action") to set aside Resolution R-2005-453 on various grounds, including that such action violated the County's General Code and CEQA, whereupon Audubon, CARE, the County and the Wind Power Companies (the "Parties" to the Action; the Wind Power Companies being Real Parties in Interest) agreed to participate in mediation and negotiations to resolve the dispute, with particular focus on adding a conservation planning component to the approved CUPs and consultations with representatives of the California Department of Fish and Game (CDFG) regarding such a component; and

WHEREAS, on January 11, 2007, three Wind Power Companies (the Settling Companies), including: 1) ESI Bay Area GP, Inc., ESI Altamont Acquisitions, Inc. on behalf of Green Ridge Power, LLC, and ESI Tehachapi Acquisitions on behalf of Altamont Power, LLC. (collectively "ESI"); 2) enXco, Inc.; and 3) SeaWest Power Resources, LLC, together with Audubon and CARE, entered into a settlement agreement ("Settlement Agreement") that resolved the Action, and Resolution 2007-111 of the County Board of Supervisors modified the CUPs for the Settling Companies consistent with the terms of the Settlement Agreement; and

WHEREAS, Altamont Winds, Inc. ("AWI"), which obtained approval for wind energy turbine uses of four CUPs under the Board of Supervisors' Resolution R-2005-453 and

one CUP under the East County Board of Zoning Adjustments' Resolution Z-06-03, did not participate in the Settlement Agreement and therefore is not subject to the terms and conditions of Resolution R-2007-111 but remains subject to the terms and conditions of Resolutions R-2005-453 and Z-06-03; and

WHEREAS, Resolution R-2007-111 that formalized the Settlement Agreement stated that the Settling Companies shall achieve a 50% reduction in raptor mortality by November 1, 2009, using a baseline of thirteen hundred (1,300) deaths per year of all raptor species from which the reduction shall be measured, and that to determine the percentage reduction four specific raptor species shall be evaluated, including Golden Eagle, Burrowing Owl, American Kestrel, and Red-Tailed Hawk, using field monitoring data collected in accordance with the CUPs and scaling factors for searcher efficiency and scavenging as approved by the Scientific Review Committee (SRC) established by Resolution R-2005-453, and furthermore that if such scaling factors exceeded 2.5 times the number of actual observed mortalities, the Settling Companies, Audubon and the County, in consultation with the SRC, along with any other individuals or entities that the Wind Power Companies, Audubon and the County agree to, shall meet and confer to re-determine a mutually acceptable alternative baseline for determining raptor mortality and/or reduction percentage in raptor mortality that would serve to initiate adaptive management measures; and

WHEREAS, the Settlement Agreement states that adaptive management measures will be implemented if a 50% reduction in raptor mortality is not achieved by November 1, 2009, that such management measures will be prioritized by the SRC, and evaluate management measures that have not reduced raptor mortality at the expense of energy production, after analyzing field monitoring data. The SRC shall use its best efforts to achieve prioritization of management efforts by June 1, 2009. By August 1, 2009, Wind Power Companies and Audubon will propose an adaptive management plan to the SRC/County for review pursuant to Condition 5 of the CUP if a 50% reduction in raptor mortality has not previously been achieved and is not projected to be achieved by November 1, 2009. The adaptive management plan will be designed to achieve a 50% reduction in raptor mortality with the least impact on energy production, and may include the elimination or reduction of seasonal shutdowns. The SRC shall act (pursuant to Condition 5 of the CUPs, as necessary) on the adaptive management plan for the Applicable Turbines by November 1, 2009." (Settlement Agreement, § 3(c)(ii) and (iii)); and

WHEREAS, in December 2009, the monitoring team issued a draft report that analyzed the field monitoring data as contemplated by section 3(c)(i) of the Settlement Agreement, entitled "Altamont Pass Wind Resource Area Bird Fatality Study" (the "draft Monitoring Report"). Given that the draft Monitoring Report was not issued until December 2009, it was impossible to comply with the timing of the milestones contemplated by section 3(c) to develop an adaptive management plan, if necessary; and

WHEREAS, the draft Monitoring Report asserts the following conclusions: "(1) There is little or no evidence of a 50% reduction in raptor fatalities in the APWRA. (2) There is

little or no evidence that the 2005-2009 seasonal shutdown has significantly reduced raptor fatalities in the APWRA. (3) There is substantial evidence that repowering of the APWRA with larger modern turbines would substantially, if not significantly, reduce the number of raptors killed per megawatt of power produced at the APWRA"; and

WHEREAS, on January 13 and 14, 2010, SRC meetings took place at which the SRC discussed the draft Monitoring Report (the "January 2010 SRC Meetings"). The SRC provided comments and criticisms to the draft Monitoring Report and required that a further draft Monitoring Report be submitted to them for further comments and suggestions before a final Monitoring Report is issued; and

WHEREAS, at the January 2010 SRC Meetings, the SRC agreed with the draft Monitoring Report's conclusion that "[t]here is little or no evidence of a 50% reduction in raptor fatalities in the APWRA." Accordingly, the SRC unanimously put forth its prioritization of management measures to achieve a 50% reduction in raptor mortality as follows: (1) Repowering, including careful siting; (2) High Risk Turbine Removals; (3) Seasonal Shutdown; (4) Burrowing Owl Behavioral Study; and (5) Research on Adjustment Factors.

WHEREAS, on February 3, 2010, the County sent the Parties a letter with an enclosed memorandum. The letter states, "On January 13, 2010, the Scientific Review Committee (SRC) expressed their unanimous opinion that the Wind Power Companies had not achieved a 50% reduction in raptor mortality... [and] [b]ecause the 50% goal was not achieved by November 1, 2009, the implementation of adaptive management is required." The enclosed memorandum further states, "[T]he County hereby modifies the conditional use permits adaptive management timelines to require the settling Wind Power Companies and Audubon to propose an adaptive management plan to the SRC/County by March 15, 2010 and for the SRC to act on the adaptive management plan for the Applicable Turbines by June 15, 2010."

WHEREAS, on February 4, 2010, the County sent the Parties an e-mail, which attached ESI's August 24, 2009 letter, that states, "The County wishes to convene a meeting or series of meetings among the settling Wind Companies, Audubon, the County and Care [sic] to 'meet and confer to re-determine a mutually acceptable baseline for determining raptor mortality and/or reduction percentage in raptor mortality.'" As noted in Mr. Ergas' letter of August 24, 2009 ..., these discussions are permitted by Section 3(a) of the Settlement Agreement. [¶] It is our hope to advance the tentative discussions on this topic that have begun among the parties in the Fall of 2009. Recent discussions of the ...SRC... have only emphasized the need to establish a new metric for measuring progress toward minimizing avian mortality in the APWRA."

WHEREAS, the Wind Power Companies, Audubon, and CARE made a good faith effort to try to agree to an adaptive management plan, however, after reaching an impasse in their negotiations of a joint plan, on March 15, 2010 the Wind Power Companies and Audubon/CARE did submit to the County/SRC separate Adaptive Management Plan Proposals. After the submission of their separate Proposals, the Parties continued their efforts to negotiate a joint adaptive management plan.

WHEREAS, in response to a request to the SRC from the Parties made for the purposes of identifying high risk turbines for removal pursuant to the SRC's prioritized list of management measures, on March 8-10, 15 and 17, 2010, two members of the SRC conducted field surveys and assigned hazardous turbine rankings to 2,648 previously unranked turbines in the APWRA (the "2010 HRT Rankings").

WHEREAS, given the Parties continuing inability to reach consensus and the necessity of acting on an adaptive management plan by June 15, 2010, after considering the separate Plans submitted by Audubon/CARE and the Wind Power Companies, the County developed a County Adaptive Management Plan Proposal (the "County Plan").

WHEREAS, at the April 2010 SRC in-person meeting, the County submitted the Audubon/CARE Plan, the Wind Power Companies' Plan and the County Plan to the SRC for review pursuant to Condition 5 of the CUPs for the Applicable Turbines.

WHEREAS, on April 29 and 30, 2010, the SRC provided comments on the adaptive management plan proposals. The County revised its draft Plan to reflect the comments provided by the SRC. The terms and conditions of the revised County Plan are as provided in Exhibit A; 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, this Board did hold a public hearing on the proposed amendments to the 24 Conditional Use Permits at the hour of 1:30 p.m. on Thursday, the twenty-eighth day of October 2010 in the City of Pleasanton Council Chambers, 200 Old Bernal Avenue, Pleasanton, California; and

WHEREAS, the Planning Department submitted a Staff Report to the East County Board of Zoning Adjustments summarizing the facts and circumstances of the proposed Adaptive Management Program; and

WHEREAS, it is necessary and appropriate as part of this amendment to the CUPs to modify the conditional use permits as they apply to the Settling Companies; and

WHEREAS, adoption of the Adaptive Management Program and all other specifications as set forth in the conditions of approval for the use permit extensions and the amendments herein, which correspond generally to the Settlement Agreement and Resolution R-2007-111, including a revised Condition 7 and related "**Exhibit G-1.a (Addendum)**, Adaptive Management Plan" attached hereto and incorporated by reference, is found to be necessary for the public health and safety and as a necessary prerequisite to ensure that all of the existing wind energy facilities, while exempt from environmental review as the ongoing maintenance of existing investor-owned energy utility structures (per CEQA Guidelines, Section 15301, Class 1 (example b)), are managed in such a way as to serve the goals and objectives of the Alameda

County General Plan, and to aggressively and fully respond to the greatest extent feasible the ongoing but unintentional death of certain 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, the amendments and conditions herein, including all the programs, requirements, procedures, legal and financial commitments and all other specifications as set forth in the Settlement Agreement (Resolution R-2007-36) and Resolution R-2007-111 are necessary to affirm the findings of Resolutions R-2005-453 and Z-06-03 that continued operation of the existing wind energy facilities (not including those facilities beneficially owned either partly or wholly by AWI, the Non-Settling Party), is required by the public need, properly related to other land uses and facilities in the vicinity, will not materially affect adversely the health and safety of persons or property, will not be materially detrimental to the public welfare or public improvements in the vicinity, and will not be contrary to character or performance standards for the "A" Agriculture District in which they are located; and

WHEREAS, the East County Board of Zoning Adjustments did hear and consider all said reports, recommendations and testimony as hereinabove set forth;

NOW THEREFORE BE IT RESOLVED, that this East County Board of Zoning Adjustments does hereby amend Condition 7 and related **Exhibit G-1** of the Conditional Use Permits approved by Board of Supervisors' Resolution No. R-2005-453 and Condition 7 of Conditional Use Permits C-8216 and related **Exhibit G-1** approved by the East County Board of Zoning Adjustments' Resolution Nos. Z-06-03, said Condition hereby modified as follows:

7. Settling Companies Avian Wildlife Protection Program & Schedule / Adaptive Management Plan: By exercise of this Permit, the Permittee(s) agree to the implementation of the Settling Companies Adaptive Management Plan (County AMP) as set forth in **Exhibit G-1.a**, including but not limited to proportionate financial contributions and participation in the drafting and adoption of the amended Planning Agreement for development of a NCCP/HCP EIR/EIS for the Alameda County portion of the APWRA. The Permittee(s) shall implement the Program Schedule and the County AMP 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 these Permits, the Permittee(s) agree to bear all costs of implementing the AMP 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 County AMP (including both consultant and County staff expenses), in proportion to the rated MW capacity of the facility as listed in Exhibit F of Resolution R-2005-453, adjusted annually. Should any one or more Permittee fail to comply with both **Exhibit G-1** and/or **Exhibit G-1.a**, said Permittee(s), upon a duly-noticed hearing for revocation of the applicable Permit(s), shall be responsible for restoring or otherwise reclaiming the facility site(s) to pre-project conditions.

RESOLUTION NO. 11-25
THE EAST COUNTY BOARD OF ZONING ADJUSTMENTS
MARCH 10, 2011
PAGE 8

THE FOREGOING was **PASSED** and **ADOPTED** by the following vote of the Alameda County East Board of Zoning Adjustments this 10th day of March 2011, to wit:

Motion by Harvey, seconded by Goff

AYES: Gosselin, Harvey, and Goff

NOES: None

EXCUSED:

**EAST COUNTY BOARD OF ZONING ADJUSTMENTS
ALAMEDA COUNTY PLANNING DEPARTMENT**