

**RESOLUTION NO. Z-13-36 OF
THE EAST COUNTY BOARD OF ZONING ADJUSTMENTS
ADOPTED AT THE HEARING OF JUL 7 18, 2013
CONCERNING PLN2011-00102**

WHEREAS, ALTAMONT WINDS INC. AND WINDWORKS INC. have filed an application to amend the conditions on 16 conditional use permits originally approved by Resolution R-2005-453 of the Alameda County Board of Supervisors, and by Resolutions Z-06-03 and Z-06-04 of the East County Board of Zoning Adjustments, 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-8036, Altamont Infrastructure Company/Frick & Costa, APN: 099B-5680-015-00;

C-8037, Altamont Infrastructure Company/Pombo, APNs: 099B-6300-002-01, 099B 6300-002-02, 099B-6325-002-03, 099B-6325-002-04 and 099B-6425-001-06;

C-8134, Altamont Infrastructure Company/Rooney, APN: 099B-6125-002-00;

C-8137, Altamont Infrastructure Company/Mulqueeney, 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 7925-002-04, 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-8191, WindWorks Inc./Mulqueeney, APN: 099B-7910-001-01;

C-8216, WindWorks Inc./Alameda County Waste Management Authority, APN: 099A-1810-001-00;

C-8232, Altamont Infrastructure Company/Guichard (formerly Egan), APN: 099B 6125-003-00;

C-8233, Altamont Infrastructure Company/Elliott, APN: 099B-6125-004-00;

C-8235, Altamont Infrastructure Company/Corbett, APNs: 099A-1785-001-14 and 099B-5650-001-04;

C-8236, Altamont Infrastructure Company/Dunton, APN: 099B-5680-001-00;

C-8237, Altamont Infrastructure Company/DeVincenzi (formerly Valhalla Enterprises), APNs: 099B 5610 001-00 and 099B-6075-003-00;

C 8238, Altamont Infrastructure Company/Ralph Properties II, APNs: 099B 7375 001-07, 099B-7300-001-05 and 099B-6325-001-03;

C-8241, Altamont Infrastructure Company/Walker Family Trust, APNs: 099B 6100 002-10, 099B-6100-002-11, 099B-6100-003-10, 099B 6100 003 11, and 099B-6100-003-15;

C-8242, Altamont Infrastructure Company/Marie Gomes Farms, APNs: 099B 6150 002-07, 099B-6150-003-00 and 099B-6150-004-10;

C-8243, Altamont Infrastructure Co./Alameda County Waste Management Authority: 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; and

C-8244, Altamont Infrastructure Company/Marie Gomes Farms, APNs: 099A-1795-001-00, 099A-1790-002-00 and 099B-6425-002-03.

WHEREAS, on September 22, 2005 the Alameda County Board of Supervisors approved Resolution Number R-2005-453, on appeal 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, including one permit (C-8191) held by WindWorks, Inc. (as an operating partner of Altamont Winds, Inc.), thirteen (13) permits held by Altamont Infrastructure Company LLC (a management company which does not own individual turbines) on behalf of Altamont Winds, Inc. and three other companies (SeaWest Power Resources, LLC, Altamont Power, LLC {a subsidiary of FPL Group, Inc. and ESI Energy LLC} and enXco., Inc., collectively the Wind Power Companies) that own turbines (or “beneficially own”), 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, respectively approving two 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, but made subject to the same conditions therein by Resolutions Z-06-03 and Z-06-04; and

WHEREAS, Resolutions R-2005-453, Z-06-03 and Z-06-04, among other conditions, established an Avian Wildlife Protection Program and Schedule (AWPPS, Condition 7), with detailed requirements established in Exhibit G to reduce avian mortality by removing turbines identified as hazardous to avian wildlife, removing derelict turbines, shutting down turbines during winter months when bird use increases, and for the purpose of implementing the repowering program, permanently removing 10% of the existing turbines by September 30, 2009, an additional 25% by September 30, 2013, an additional 50% of the original turbines by September 30, 2015, and the remaining 15% of turbines by September 30, 2018; and

WHEREAS, Resolutions R-2005-453, Z-06-03 and Z-06-04 also required the Permittee to sponsor preparation of an Environmental Impact Report (EIR) to evaluate the environmental effects of the repowering program, the phased removal of turbines and existing operations (Condition 8); and

WHEREAS, in 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 to set aside Resolutions R-2005-453, and subsequently Z-06-03 and Z-06-04 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 agreed to participate in mediation and negotiations which led to a Settlement

Agreement among the petitioners, the County, and three companies (the “Settling Companies”) that own turbines in the APWRA but not including Altamont Winds, Inc. (the “Non-Settling Company”), with the objective of achieving a 50 percent reduction in the mortality rates of four avian raptor species (American kestrel, burrowing owl, golden eagle and red-tailed hawk) by November 1, 2009, adding a conservation planning component to the approved CUPs in consultation with the California Department of Fish and Game (CDFG, recently renamed the Department of Fish and Wildlife or CDFW) regarding such a component and enabling other programs and contingency adaptive management measures; and

WHEREAS, on January 11, 2007 the Alameda County Board of Supervisors adopted Resolution R-2007-111, which authorized the County’s participation in the Settlement Agreement and amended the CUPs, thereby replacing Exhibit G (Avian Wildlife Protection Program and Schedule) of the prior Resolution R-2005-453, with Exhibit G-2 for the turbines beneficially owned by the Settling Companies (the “Applicable Turbines”), and Exhibit G-2 for turbines beneficially owned by the Non-Settling Company (Altamont Winds, Inc.) which for all intents and purposes was identical to the original Exhibit G, and made other changes to the conditions of approval of the prior Resolutions for the Applicable Turbines of the Settling Companies, including eliminating the requirement for an EIR to be prepared on the specified schedule and certain requirements related to relocation of identified Tier 1 and Tier 2 hazardous turbines; and

WHEREAS, Condition 24 of Resolution R-2005-453, Resolution Z-06-03 and Resolution Z-06-04 each require the Planning Director to set the CUPs for review after the third and eighth year anniversary of their approvals (2008 and 2013 respectively) for the purpose of modifying any conditions imposed therein or to add conditions that may be required to guarantee the continuance of the affirmative findings contained in Resolution R-2005-453, including the imposition of new requirements regarding wind turbine operations and equipment on the premises subject to the CUPs, or appropriate guarantees to be filed to ensure compliance with conditions in the Resolutions, with the requirement that any such modified or added condition shall be of the same force and effect as if originally imposed; and

WHEREAS, the County held the third year anniversary review in abeyance due to AWI’s participation through a Memorandum of Understanding in November 2008 committing AWI to participate in Natural Communities Conservation Plan (NCCP) pursuant to section 2801, et seq. of the California Fish and Game Code or similar agreement approved by the CDFG, and which would require preparation of an Environmental Impact Report (EIR) pursuant to CEQA and an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) – a combined NCCP/HCP EIR/EIS; and

WHEREAS, Altamont Winds, Inc. applied in 2011 to modify its sixteen (16) use permits by eliminating selected requirements of Exhibit G-2 of Resolution R-2007-111 for the remaining life of the permit (years six through eight and years nine through thirteen: October

2010 to September 2018) and require termination of the CUPs on December 31, 2015, or more specifically:

- a) Eliminate the requirement for the annual 3½-month winter season shutdown, from November 1 of each year to the following February 15;
- b) Eliminate the requirement for repowering or permanent shutdown of an additional twenty-five (25) percent of currently operating turbines (10 percent of its turbines having been permanently shut down by September of 2009);
- c) Replace the requirement for repowering or permanent shutdown of an additional fifty (50) percent of operating turbines by September 2015 with a requirement that 100 percent of all originally approved turbines be permanently shut down on December 31, 2015; and
- d) Add a requirement that the County consider the human health, wildlife and climate benefits of wind power generated in the APWRA when making regulatory and use permit decisions;

WHEREAS, the Planning Department determined that the proposed permit modifications would result in potentially significant adverse environmental impacts and therefore be a project subject to the California Environmental Quality Act (CEQA), and that completion of an Environmental Impact Report (EIR) would serve to comply with Condition 8 of Resolution R-2005-453 (and Condition 8 of Resolution R-2007-111); and

WHEREAS, a Draft EIR was completed in March 2013, and a Final EIR was completed on July 5, 2013, which indicated that the permit modifications would result in significant and unavoidable adverse impacts on avian wildlife species including golden eagle and other focal raptor species as described in Resolution Z-13-35 adopted by the Board on July 18, 2013; and

WHEREAS, the Planning Department submitted a Staff Report to the East County Board of Zoning Adjustments summarizing the facts and circumstances of the permit modifications and eighth-year review of the subject Conditional Use Permits that evaluated the proposed permit modifications as a project for the purposes of CEQA and has prepared a separate Draft Resolution to certify that the Final EIR has been completed in compliance with CEQA, that the Planning Department has presented the Final EIR to the East County Board of Zoning Adjustments as the decision-making body with responsibility both for certifying the EIR as in compliance with CEQA and for approving the proposed permit modifications; and

WHEREAS, the Staff Report described a Planning staff analysis comparing the highest rates of mortality (and calculated results per megawatt, or MW) for the four focal species between the existing schedule for turbine decommissioning through 2018 (the baseline or No

Project conditions) and the proposed project ending in 2015 (with mitigations identified in the EIR, including the winter season shutdown), which indicated a relatively small increment of species killed under Project conditions compared to No Project conditions, and furthermore that the Draft EIR contained similar comparisons between Project and No Project conditions but which indicated a greater increment of Project-related mortality over baseline conditions, based on expectations of faster turbine decommissioning under No Project conditions than are required, thereby indicating that actual Project-related mortality over baseline conditions could be lower than identified in the Draft EIR, and that the Final EIR provided supplemental information based on the required decommissioning schedule showing a smaller such increment; and

WHEREAS, the Staff Report further indicated that removal of the highest risk Hazardous Rated Turbines (HRTs) owned by AWI (including 14 turbines ranked 9.5 and 10 under the HRT system) would reduce the number of focal species killed over the lifetime of the Project, combined with retention of the winter season shutdown, to a level that would be highly comparable to No Project conditions; and

WHEREAS, this Board did hold a public hearing on the proposed permit modifications and Eighth-Year Review of the Conditional Use Permits at the hour of 12:00 p.m. on Thursday, the eighteenth day of July, 2013 in the City of Pleasanton Council Chambers, 200 Old Bernal Avenue, Pleasanton, California; and

WHEREAS, upon consideration of the effects of removal of the fourteen (14) HRT-ranked-turbines ranked 9.5 and 10.0, calculations which had been updated prior to the hearing, the Board determined that a condition requiring the removal of such turbines and thereby reducing the total number of permitted turbines (828) by 14 (to 814) would result in a level of projected avian mortality under the project (based on lifetime MWs generated from October 1, 2013 to October 31, 2015, as conditioned or based on Alternative 1 as defined in the EIR) that would be comparable to the lifetime of No Project (October 1, 2013 to September 30, 2018, with phased decommissioning); 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 East County Board of Zoning Adjustments approved Resolution Z-13-35 on July 18, 2013 to certify that the Final EIR has been completed in compliance with CEQA, that the Final EIR was presented to the Board and reviewed and considered the information contained in the Final EIR, that the Final EIR reflects the independent judgment of the Board; and

WHEREAS, Resolution Z-13-35 incorporates Exhibit A (Written Findings of Significant Effects), Exhibit B (Mitigation Monitoring and Reporting Program) and Exhibit C (Statement of Overriding Considerations), each of which are required by State and Local CEQA Guidelines; and

WHEREAS, East County Board of Zoning Adjustments has determined that approval of the project as conditioned herein, including the implementation of the Mitigation Monitoring and Reporting Program attached to Resolution Z-13-35 as Exhibit B would provide for all of the significant effects on the environment to have been eliminated or substantially lessened where feasible, as indicated in the Written Findings of Significant Effects attached to Resolution Z-13-35 as Exhibit A, and that there are remaining significant effects on the environment found to be unavoidable which are acceptable due to overriding concerns as indicated in the Statement of Overriding Considerations attached to Resolution Z-13-35 as Exhibit C; and

WHEREAS, adoption of 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 and the amendments herein, 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 are managed in such a way as to serve the goals and objectives of the Alameda County General Plan, and to fully respond to the greatest extent feasible the ongoing but unintentional death of protected 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 herein are necessary to affirm the findings of Resolutions R-2005-453, Z-06-03, Z-06-04 and R-2007-111 that continued operation of the existing wind energy facilities, including those facilities beneficially owned either partly or wholly by Altamont Winds, Inc. 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 conditions on the subject Conditional Use Permits held in separate files in the offices of the Community Development Agency, Planning Department, 224 West Winton, Rm. 111, Hayward, CA, 94544), subject to the following conditions:

1. Avian Wildlife Protection Program & Schedule: By exercise of the amended Permits, the Permittee agrees to the continued implementation of **Exhibit G-2**, Avian Wildlife Protection Program & Schedule (AWPPS), attached to Resolution R-2007-111, with the following changes using strikeout and underlined new text:

YEARS SIX THROUGH EIGHT – OCTOBER 2010 TO SEPTEMBER 2013

4. ~~By March 31, 2012 (the middle of the seventh year) the Permittee(s) shall have initiated applications for repowering of an additional twenty five (25) percent of their currently existing individually owned turbines (which may include Tier 1, Tier 2 or other turbines removed in accord with the Program if not already replaced by repowering projects) such that a total of 35 percent of the Permittee's individually owned, existing turbines approved for operation as of September 22, 2005 will be permanently removed. Permanent removal of currently existing (non-repowered) turbines will be considered to constitute compliance with this measure as the first step in repowering and is not necessarily dependent upon approval of the new conditional use permit and construction of the new turbines.~~
5. ~~By September 30, 2013, barring delays by state or federal agencies, action by the Planning Director, or other factors outside of the Permittees' control, and subject to a new conditional use permit and a development agreement under similar terms to repowering projects in the prior two years, the Permittee(s) shall have ceased operation and permanently removed an additional 25 percent of their individually owned existing turbines in preparation for installation of the replacement, repowered turbines.~~

YEARS NINE THROUGH THIRTEEN – OCTOBER 2013 TO SEPTEMBER 2018

3. ~~From November 1 of each year to the following February 15 (the maximum period of the 3 ½ month shutdown) or for a different 3-½-month minimum period also based on monitoring results as in prior years, the Permittee shall cease operations of 100 percent of their turbines. for approximately ½ of the existing (non-repowered) turbines. From November 15 until February 28 of each year, or for a different 3 ½ month minimum period also based on monitoring results as in prior years, the Permittee(s) shall cease operations of the other half of the turbines (also consistent with the maximum period of the 3 ½ month shutdown).~~
4. By October 31, 2013, the Permittee shall permanently shut down all turbines on sites with a ranking of 9.5 and 10.0 under the Hazardous Rated Turbine (HRT) evaluation system adopted by the Scientific Review Committee (14 turbines), and shall report by letter to the Planning Director to confirm the shutdown by October 31, 2013. Turbine nacelles may be relocated to other turbine sites with an HRT ranking of 9.0 or lower. Turbine towers on such HRT sites shall be removed by October 31, 2014. Subject to state and federal review and compliance with the Mitigation Monitoring and Reporting Program as provided for in Exhibit B for Resolution Z-13-35, all 14 HRT turbine sites shall be fully decommissioned (cleared of equipment and foundations) at the time other turbines owned by the Permittee are fully decommissioned. By March 31, 2015 (the middle of the tenth

~~year), the Permittee(s) shall have initiated applications for repowering of an additional fifty (50) percent of their currently existing individually owned turbines (which may include any turbines or turbine capacity previously removed that has not been replaced by repowering projects), such that a total of 85 percent of the Permittee's individually owned, existing turbines approved for operation as of September 22, 2005 will be permanently removed.~~

- ~~5. By September 30, 2015, barring delays by state or federal agencies, action by the Planning Director, or other factors outside of the Permittees' control, and subject to a new conditional use permit and a development agreement under similar terms to repowering projects in the prior ten years, the Permittee(s) shall have ceased operation and permanently removed an additional 50 percent of their individually owned existing turbines in preparation for installation of the replacement, repowered turbines.~~
2. Mitigation Monitoring and Reporting Program: In all the remaining years of the Permits the owner of the turbines as the Permittee shall implement and cooperate with Alameda County and its agencies to ensure implementation of all mitigation measures identified in the Mitigation Monitoring and Reporting Program attached as Exhibit B to Resolution Z-13-35.
3. 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 these permits were 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(s) 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(s) 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 these permits 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.

4. Noise Enforcement Deposits: The Permittee(s) shall, as a condition of the continued operation of the Facility as approved under these Permits, maintain a \$2,000.00 cash deposit for use in the investigation and evaluation of a noise complaint as provided in Condition 3 herein above. If all or any part of said cash deposit is depleted by such activities, the Permittee(s) shall restore the balance of the deposit to the original \$2,000.00. In the course of the review of these permits on the eight anniversary of their issuance, if warranted by the record, the requirement of this \$2,000.00 deposit may be deleted and funds paid by the Permittee(s) may be returned to the Permittee(s).
5. Indemnity: The Permittee shall defend, indemnify and hold harmless Alameda County or its agents, officers or employees from any claim, action or proceeding against Alameda County, or its agents, officers or employees to attach, set aside, void, or annul these amendments to the Conditional Use Permits, the County's findings and determinations under the California Environmental Quality Act ("CEQA"), or any combination thereof. Such indemnification shall include, but not be limited to, attorneys' fees and costs incurred by Alameda County, with counsel selected by Alameda County. The County shall promptly notify the Permittee of any such challenge.
6. Expiration: This permit shall expire on October 31, 2015, one month after its 10th (tenth) anniversary. The Permittee(s) shall have no express or implied right to operate existing turbines under these Permits after October 31, 2015.

Pursuant to Section 17-52.050 of the Alameda County Zoning Ordinance each 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.

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If implemented, each said Conditional Use Permit shall terminate on October 31, 2015~~September 22, 2018~~, and shall remain revocable for cause in accordance with Section 17-54.030 of the Alameda County Zoning Ordinance.

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