

Keeler Obenshain PC

JOHN W. FLORA
Attorney at Law

jflora@kolawfirm.com
Direct: (540) 437-3111

90 North Main Street, Suite 201
Post Office Box 1287
Harrisonburg, Virginia 22803

Phone: (540) 437-3100
Facsimile: (540) 437-3101
www.kolawfirm.com

April 27, 2006

Mr. Michael Murphy
Director of Environmental Enhancement
Department of Environmental Quality
629 E. Main St., 6th Floor
Richmond, VA 23219

Re: Highland New Wind Development, LLC Application for Approval
to Construct, Own and Operate an Electric Generation Facility in
Highland County, Virginia
PUE-2005-00101

Dear Mr. Murphy:

The purpose for this letter, first and foremost, is to request that DEQ lift its suspension of the environmental review, and complete its review, for the reasons set forth below. Specific requests for action on your part are highlighted in bold print for your convenience.

Second, at the end of this letter is a section that discusses the positive environmental aspects of the Applicant's Project. Each of the primary reviewing agencies focuses on the constituent group that it represents. DHR represents historic sites. VDGIF represents the "species" such as squirrels, birds and bats. DCR represents conservation resources, both places and "species."

One agency, and it probably should be DEQ, should represent the "environment" as a whole and be an advocate for all renewable energy projects in Virginia, and particularly those that do not pollute the air or water, like the Applicant's Project. For the reasons set forth below, we request that DEQ include the positive environmental aspects of this Project, along with the expressed concerns of the reviewing agencies, when it submits its report to the SCC.

STATE CORPORATION COMMISSION
RECEIVED

APR 28 2006

Office of General Counsel

Viewshed Issues

Viewshed concerns have been the source of most of the opposition to this Project over the past four years. Viewshed was hotly debated during the Highland County Conditional Use Permit process.

The Applicant:

Guided many “viewings” of the Project Site for Highland County Officials to address viewshed concerns.

Proffered the conditions that were revised and accepted by the Highland County Board of Supervisors. Those conditions are set forth in the July 14, 2005 resolution, which was filed with the Applicant’s SCC Application and is part of the SCC record. As you can see, the viewshed mitigation measures include height limitations, set back conditions and other measures like color, screening, size, lighting and buried electric lines.

VDGIF, DCR and DHR:

VDGIF requested a visual impact to the Virginia Birding and Wildlife Trail and regional socioeconomic impact.

DHR requested a viewshed analysis to determine where the turbines would be seen.

DHR suggested that the claim that the turbines would not be visible from the parking lot at Camp Allegheny is unsubstantiated with photo-simulation and also stated that the potential impacts to the extensive earthworks and other well-preserved components of this Camp are not addressed.

DCR stated that the Application does not address the scenic and recreational impacts of the Project. An analysis of the viewshed from Laurel Fork, a potential Virginia Scenic River, is not provided and is necessary for complete review. Also, an analysis of the viewshed from Route 250, a potential Virginia Scenic Byway, is not provided and is needed for complete review.

Applicant’s Position:

The Applicant concedes that despite all the mitigation measures proffered and accepted by the Highland County Board of Supervisors, the wind turbines will be seen. However, the location is “as good as it gets” because it is remote and located in the only location with Class V winds in Highland County already “marred” by a highway and a transmission line. More specifically:

- The 20-mile ridgeline border viewshed between Highland County and Pocahontas County is “marred” by only two highway crossings, Route 84 and Route 250.
- The 20-mile ridgeline border viewshed is “marred” by only one transmission line, which parallels Route 250, both of which bisect the Applicant’s wind farm Project Site.
- There are only three permanent residents within a three-mile viewshed area of the Project.
- The closest resident is about $\frac{3}{4}$ of a mile from the closest turbine.
- Of the four major highway sections driving out from Monterey to the east on Route 250, to the west on Route 250, to the south on Route 220 and to the north on Route 220, the least traveled, by far, is west on Route 250, which is also the only one of the four sections not designated as scenic.

A viewshed analysis was considered but not required during the conditional permit approval process by the Highland County Board of Supervisors (see the Board’s Resolution and Report filed with the SCC Application). As you have seen in your visit to the site, a viewshed analysis is not a good use of resources when compared with the need to spend considerable resources on some of the wildlife issues particularly “bat” issues.

There is no federal permit required or federal funding for this Project. There is no permit required from the Commonwealth other than the SCC permit. With 19 different turbine sites (according to the viewshed consultants, the costs of a viewshed analysis for multiple sites is higher than the cost of a traditional cell tower type survey), the remoteness of the location, the lack of structures in the vicinity, and the fact that this particular site is already marred by State Route 250 and the transmission line, the Applicant does not believe a viewshed analysis is helpful or necessary.

In all candor and fairness, it should not be the position of the Commonwealth, that every concern of every agency or individual staff person within each agency (such as the “potential” that a stream would someday become a “scenic river”) should automatically become a recommended demand for action by an Applicant. Yes, this is the first wind farm in Virginia, but not by any means in this country or the world. More importantly, at the SCC there is a recognition that smaller projects (under 50 megawatts) should enjoy a streamlined process and the Applicant believes that should be appropriate as well for DEQ.

Finally, VA Code § 56-46.1 and § 56-580D limit the SCC's role, with regard to local issues considered and determined by the local Board of Supervisors and thus DEQ's role in this matter, primarily to the review of the wildlife issues, particularly birds and bats discussed below. Specifically, §§56-46.1 and 56-580D state:

In order to avoid duplication of governmental activities, any valid permit or approval required for an electric generating plant and associated facilities issued or granted by a federal, state or local governmental entity charged by law with responsibility for issuing permits or approvals regulating environmental impact and mitigation of adverse environmental impact or for other specific public interest issues such as building codes, transportation plans, and public safety, whether such permit or approval is prior to or after the Commission's decision, shall be deemed to satisfy the requirements of this section with respect to all matters that (i) are governed by the permit or approval or (ii) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval, and the Commission shall impose no additional conditions with respect to such matters.

Viewshed was thoroughly addressed by the Highland County Board of Supervisors and should not be addressed again in this process.

Camp Allegheny. The parking lot and historical marker with one picnic table is located about 2.5 miles from the closest wind turbine on Tamarack. The Campsite is accessed by dirt road full of potholes that in a normal winter is impassable due to snow and ice. It is in the Monongahela National Forest and is completely wooded until you leave the parking area and proceed by foot or by car along the field, which is the site itself. The attached pictures were taken last summer and show the access road and the parking lot (strewn with trash). In the winter without leaves on the trees you will not be able to look back and see any turbines when standing in the parking area and reviewing the site. As you stand by the historical marker at the site, and look at the old turnpike and the earthworks, you are looking directly away from the turbines.

If you proceed to the cannon location and the earthworks about ½ mile from the parking lot, which is not easily accessible by car, and there is no walking trail, you could possibly see the top of one or two of the turbines from that spot about three miles away. From there, you can also look to the west and see the satellite dishes at Greenbank, approximately 6 miles away.

In short, this is not Gettysburg. Very few people visit the site and even fewer venture over to the cannon site. For those who do, they will see wind turbines in

April 27, 2006

Page 5

the background. The attached website from the Monongahela National Forest, does not list Camp Allegheny in its section on "Special Places on our Forest."

Laurel Fork and Route 250. Attached are the photo simulations that the Applicant first used during the Highland County Board of Supervisors conditional use permit approval process. The first picture is taken from Route 250 on Monterey Mountain from the turnoff on the west side as you head west toward Red Oak. If you look close you can see the wind turbines. This is the first place on Route 250 that you will be able to see the turbines and during the summer when most tourists visit Highland County the view from Route 250 will most often be blocked with tree foliage.

The second picture is taken from Route 250 (which at this location is part of the Virginia Birding and Wildlife Trail, a network of thousands of miles of roads in Virginia) about halfway between the two sites on Red Oak and Tamarack. As you can see, the turbines are quite visible. On Route 250 where the Laurel Fork crosses, the Red Oak turbines will be within 3000 feet and quite visible.

Viewshed Conclusion and Request:

If VDGIF, DHR and DCR persist in their requests for a viewshed analysis, the Applicant requests that DEQ delete that request from its report to the SCC.

VDGIF Issues

Upon receipt of the March 1, 2006 letter from DEQ to the SCC, the Applicant requested its avian expert, Dr. Paul Kerlinger and its bat expert, Dr. Scott Reynolds, to review the comments and recommendations pertaining to birds and bats set forth in the letter. Their responses, corresponding to the numbers used in DEQ's March 1 letter are attached.

The Applicant then engaged both experts to travel to Virginia to meet with interested agency individuals for a "bat" meeting on March 24th held at the VDGIF office in Verona, and a "bird" meeting on April 6th in Richmond at the VDGIF office. Both meetings lasted over two hours and provided an opportunity for the Applicant's experts to summarize their remaining pre-construction survey work. The proposals, which are attached, were provided to the meeting participants in advance. Time was provided to ask any and all questions about bird and bat issues and both pre and post construction studies. A US Fish and Wildlife Service representative attended the "bird" meeting and DCR representatives attended both meetings, in addition to representatives from VDGIF and your representative.

Each of the Applicant's experts were asked to, and have provided some supplemental information, which is attached.

Summary of "Bird" Concerns

The Applicant:

Engaged one of the leading "avian" consulting firms in the country, Curry & Kerlinger, LLC, who focus on wind turbines and communication tower concerns. Consistent with industry standards that have developed over the past decade, an avian risk assessment was prepared and submitted.

Engaged one of the few firms in the country, ABR, Inc., that conducts radar studies to conduct a fall radar study, which has been submitted.

Engaged Curry & Kerlinger, LLC to review and provide an analysis of the radar study, an analysis of the effect of FAA lights on birds, and an analysis of the effect of FAA lights on bats, which have been submitted.

Accepted Curry & Kerlinger, LLC's recommendation after the avian risk assessment was completed, to conduct a spring breeding bird survey.

Engaged Dr. Paul Kerlinger to respond to VDGIF comments, attend the meeting in Richmond and provide supplemental information as a result of some of the questions posed at the meeting.

VDGIF:

Critiqued in some detail the submitted reports in writing and during the meeting.

Continued to insist on a spring radar study and a winter raptor survey.

Applicant's Position:

Avian concerns related to wind turbines are new to VDGIF, but not to much of the rest of the world. Since one of the first large scale wind farms was built in this country twenty years ago in Altamont Pass, California, and significant bird kills, particularly raptors, occurred, hundreds of avian studies and assessments have been undertaken and published. Attached is an article summarizing the post Altamont avian/wind turbine progress.

Wind turbines, according to the Applicant's expert, on average across the country including in the east, the Allegheny Front and the Appalachian Region, kill five birds per year per turbine. The office building you work in probably kills more than five

birds per year. Please refer to Dr. Kerlinger's comments in response to concern number 8 in Exhibit 1 pertaining to the cumulative impacts.

The "bird" work paid for by the Applicant including the time spent by its lawyers on this process has already cost in excess of \$300,000. The two additional studies requested, a radar study and a winter raptor survey, will cost in excess of \$150,000.

The Applicant and its avian experts, even if the two additional studies were free, do not believe those two studies will add any additional valuable information for the following reasons:

1. The Spring Radar Study. The Applicant's expert, Dr. Kerlinger, does not believe a spring radar study will result in a conclusion any different than the fall study report or any of the other 15 or so studies conducted in the east over the past several years.

These studies were designed and used to counter the theory posed by opponents to wind projects that birds migrate along ridgelines. All of the studies prove otherwise. The only other significant conclusion reached by conducting these studies is that night migrants generally fly at elevations in excess of the turbine height of 400 feet. Attached is a compilation of the conclusions reached from available radar studies conducted last year in the eastern United States.

2. Winter Raptor Survey. Again, the Applicant's expert, as expressed in his response to concern number 9 in Exhibit 1, does not believe the requested survey is necessary for the reasons provided.

Bird Conclusion and Request

The Applicant requests that DEQ report the disagreement between VDGIF and the Applicant as to the necessity to conduct a spring radar study and a winter raptor survey, and after expert testimony is presented at the SCC Public Hearing, allow the SCC to decide.

Summary of "Bat" Concerns

The Applicant:

Engaged one of the leading "bat" consulting firms in the country, North East Ecological Service, to focus on wind turbine concerns. Consistent with other projects being developed in the Allegheny Front, a bat assessment was prepared and submitted.

Accepted North East Ecological Services recommendation after the bat assessment, to conduct spring, summer and fall pre-construction studies.

Engaged North East Ecological Services to respond to VDGIF comments, attend the meeting in Verona and provide supplemental information as a result of some of the questions posed at the meeting.

VDGIF:

Critiqued in some detail the “bat” assessment, in writing and during the meeting.

Continued to insist on radar monitoring for bats and more acoustic monitoring than planned, together with two years of pre-construction studies, instead of one.

Applicant’s Position

Bat concerns, unlike avian concerns, were not on anyone’s radar screen until 2003, when a significant bat kill occurred at the Mountaineer Wind Farm in West Virginia. Since that time, bat experts and consultants have been working hard to understand the import of the concern and develop testing, deterrent and mitigation techniques. In short, this is not a mature field of study compared to the avian field.

The Applicant concedes that bat behavior needs more study and prefers to spend its time and resources primarily on this issue, since on balance and in its opinion, the other issues being addressed are not serious issues that should prevent or delay the development of the Applicant’s Project.

The Applicant engaged one of the leading experts in the field after interviewing and discussing “bat” issues with several consultants. Northeast Ecological Services, like Curry & Kerlinger, LLC, provide the added advantage of having worked on and are working on other wind farm projects in the Allegheny Front. Wind developers in the Allegheny Front are working together and sharing information to understand better the “bat” behavior.

The Applicant, relying on its expert, does not believe radar bat monitoring is useful. Radar is not yet sophisticated enough to distinguish between birds, bats and insects; it reports targets. More information is always better than less information, but on balance, the Applicant believes that acoustic monitoring using one “meteorological” tower on each ridge is a sufficient acoustic sample. The Applicant’s expert reports that the coverage/sampling space being tested on this 38 megawatt Project exceeds the industry average. It is interesting to note, that VDGIF would prefer that the Applicant use at least one more, taller (80 meters instead of 40) “meteorological” tower for acoustic

monitoring. Dr. Kerlinger reports that the guide wires required for "meteorological" towers, like communication towers, are much more dangerous to birds, than wind turbines.

The Applicant prefers to spend the \$65,000 cost of a second year of acoustic studies on post-construction work. Post construction survey work is obviously a more reliable means of ascertaining the environment impact and when done right, is expensive.

"Bat" Conclusion and Request

The Applicant requests that DEQ report the disagreement between VDGIF and the Applicant as to the necessity to conduct a spring radar study and a winter raptor survey, and after expert testimony is presented at the SCC Public Hearing, allow the SCC to decide.

Other

Northern Flying Squirrels:

This endangered species was documented on the McBride property over 10 years ago. Opponents voiced concern about the squirrels as soon as plans for this Project were made public in 2002. The Applicant engaged Dr. Edwin Michaels, whose findings of no squirrels or appropriate habitat on the 217 acre Project Site has been submitted. The McBrides own over 4,000 acres. Approximately 217 acres are being used by the Applicant, owned by the McBrides, for this Project. The location of the squirrels identified over 10 years ago is over ½ mile away from the Project Site.

The Applicant is not planning to study squirrels any further and there is no pending request for more information on this matter.

The Rock Vole:

Interestingly, this endangered species was reported, very near the squirrel vicinity, by a trespassing (the Property is posted) Professor last October. Again this sighting occurred over ½ mile from the Project Site.

The Applicant is not planning to study the rock vole any further and there is no pending request for more information on this matter.

Water Shrew:

By directionally drilling under the Laurel Fork stream and its two unnamed tributaries and any adjacent wetlands, there will be no disturbance to this species.

The Applicant is not planning to study the water shrew any further and there is no pending request for more information on this matter.

Laurel Fork:

Again, by directionally drilling, there will be no direct impact to the stream.

The Applicant is not planning to study the Laurel Fork any further and there is no pending request for more information on this matter.

Viewshed:

The visual impact to the Virginia Bird and Wildlife Trail and regional socioeconomic impact was addressed above.

DHR Issues

The Applicant responded to the requests of DHR for further information in its attached March 8th letter, submitting its preliminary site plan and then by phone calls and e-mail. No further requests or comments have been received. The Applicant assumes that the minimal ground disturbing activity on the Project Site, which has been and will continue to be a cow pasture, has allayed concerns about the need for an archeological survey.

The Applicant in 2003 and again in 2005, paid DHR's costs to conduct an archive search to identify historic resources in the vicinity. The turbines will not be seen from any of the three reported sites, which is obvious to those that have visited the area. The Applicant believes that for this Project, located in one of the most remote parts of the Commonwealth, nothing further should be required.

If DHR persists in its request for an architectural survey and/or an archaeological survey, the Applicant requests that DEQ delete those requests from its report to the SCC.

DCR Issues

DCR expressed concern for and requested an inventory of 5 butterflies, 3 stream animals, the squirrel, rock vole and a variety of birds and bats. The squirrel, rock vole, birds and bats have already been addressed.

The Applicant engaged Malcolm Pirnie to help address these concerns. Laurel Fork will not be disturbed because directional drilling is being utilized and there will be no direct impact to the stream or wildlife therein. The butterflies listed, according to Dr. Roble with VDGIF are not likely to be present on the Project Site because it is a cow pasture, not a natural meadow. Therefore, the Applicant does not believe additional survey or inventory work is warranted.

If DCR persists in its requests for more information, the Applicant respectfully requests that DEQ delete the request from its report to the SCC.

DMME Issue

The Applicant engaged Malcolm Pirnie to obtain the public geological information pertaining to the Project, which has been done, and the required additional information is attached.

U.S. Army Corp of Engineers

James Brogden with the U.S. Army Corp of Engineers and Eric Mallard with the Valley Regional Office of DEQ reviewed the wetland delineation, the proposed stream crossings and the Project Site on Tuesday, April 11, 2006. Their verbal determination, which will soon be followed up in writing, is that no permit will be required for the stream crossings for the electric transmission line, which is part of the Project. Therefore, there is no federal jurisdiction for this Project.

Environmental Positives

Virginia supports renewable energy as evidenced by the Virginia Energy Choice website sponsored by the State Corporation Commission and the recently enacted Virginia Energy Plan. The SCC's Virginia Energy Choice website points out, "the benefit of electricity produced from renewable sources is that they produce less severe environmental impacts than traditional energy sources." The Virginia Energy Plan recognizes the value of wind generators as a substitute for fossil fuel generators and will encourage wind generation in the Commonwealth.

There is nothing in Virginia law that requires that an environmental review be restricted to negative impacts to the exclusion of the positive impacts of any

April 27, 2006

Page 12

project on the environment. Global warming, acid rain and coal mining are all significant environmental problems exacerbated by the ever-increasing need to provide electricity with fossil fuel. Wind generated electricity does not add to these problems. The attached information from the American Wind Energy Association is an excellent summary of the positive attributes of wind energy as compared to all other electric generating facilities.

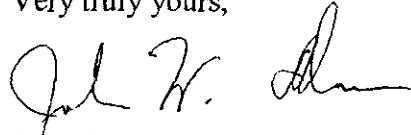
One of the issues in the environmental impact review field has been the demand by regulatory agencies for cumulative reviews of air quality, water quality and now birds and bats. What about the positive cumulative impact of wind energy? No agency has asked for this information, but it is available. Attached are two recent studies prepared by the Resource Systems Group, Inc. that document the air emission savings from the use of wind farms. This type of study could be the foundation for a cumulative impact analysis.

The Applicant respectfully requests that DEQ provide information in its report to the SCC with regard to the positive environmental impact of the Applicant's Project.

Conclusion

Again, for the reasons mentioned above, the Applicant respectfully requests that DEQ lift its suspension and issue its report to the SCC as soon as possible.

Very truly yours,



John W. Flora

cc: Wayne M. Smith, Esquire
Richard D. Gary, Esquire
Henry T. McBride, Jr.

Enclosures
JWF/mga/93917