

Wind site neighbors serve notice to board

MONTEREY — Attorney James Jennings Jr. sent a letter to Highland supervisors this week explaining his clients' intent to file a civil suit if the board grants a permit to Highland New Wind Development for its proposed wind energy utility on Allegheny Mountain.

Jennings represents Ralph Swecker, the Goodall Family Partnership, and Gregory A. Warnock, all of whom own property near the proposed site.

The letter fulfills the Endangered Species Act requirement that anyone seeking injunctive relief must give 60 days' notice to the Department of Interior.

"Woods Rogers, PLC and John C. Singleton, Esq. represent and hereby give this Notice as required by the Endangered Species Act ... by and through this letter, the foregoing individuals and Partnership, give notice ... of their intent to commence a civil suit against the Highland County Board of Supervisors to enjoin them from approving and issuing a permit to Highland New Wind Development, LLC for the proposed wind farm in Highland County, Virginia because the construction and operation of the wind farm will result in a taking under the ESA in violation of (federal statutes)," the letter states.

Jennings' clients contend the proposed project will "destroy the natural beauty of Highland County's ridges thereby interfering with the reasonable use and enjoyment of the land by neighboring landowners and other residents of Highland County, cause irreparable damage to the unique and fragile surrounding environment including the illegal 'taking' of endangered species and migratory birds and will result in excessive stormwater and sediment run off creating a nuisance to neighboring land owners. Because of the highly sensitive nature of the proposed location for this wind farm, it is imperative that the foregoing issues be studied and addressed prior to the board of supervisor's decision on whether to grant the permit."

The letter outlines some of those concerns as follows:

- Nuisance — "The unquestioned strength of Highland County is its natural beauty," the letter reads. "This beauty is derived in part from the unbroken and undeveloped ridge lines including the ridges atop Allegheny Mountain, Red Oak Knob and Bear Mountain. Many of the residents of Highland County purchased their property and/or have decided to remain in Highland County because of its viewshed. The decision to grant a permit to HNWD for the purposes of developing a wind farm on

the top of these ridgelines would destroy one of the primary sources of enjoyment that residents of Highland County derive from their land.

"In addition, the excavation and removal of trees and other vegetation in creating the required roadways and clearings for the towers and support structures will lead to stormwater and sediment runoff onto neighboring properties. To date these erosion issues have not been sufficiently addressed by the developer."

Jennings points to case law from Virginia Supreme Court decisions that have "repeatedly stated that the citizens of Virginia are entitled to the use and enjoyment of their land ... The phrase 'use and enjoyment of land' has been interpreted broadly by the Virginia Courts. The Virginia Supreme Court has stated that the term 'comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land, which inevitably involves an element of personal tastes and sensibilities, is often as important to a person as freedom from physical interruption with use of the land itself.' ... The construction of 400 foot or higher wind turbines on the top of the ridge lines clearly interferes with the Highland County residents' enjoyment of their land. Moreover, any runoff, noise or debris from the wind farm could also constitute a nuisance. Because of the lack of any meaningful studies by the developer or governmental agencies the long term effects of the wind farm are unknown."

- Endangered Species Act — Jennings notes that part of the ESA "prohibits any person from 'taking' an endangered species ... The term 'take' is defined broadly to include 'harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect.' ... The U.S. Fish and Wildlife Service has further defined 'harm' to include 'significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.'"

Further, Jennings explains, "The (USFWS) has defined 'harass' to include 'an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.'

U.S. Fish and Wildlife may issue a permit allowing the taking of a listed species, Jennings

says, "where such taking is 'incidental to, and not the purpose of, carrying out of an otherwise lawful activity.'"

An applicant seeking such a permit must submit a detailed conservation plan, Jennings states. That plan must include: the impacts of the proposed taking; procedures the applicant will use to mitigate, monitor, and minimize such impacts; an explanation of why there are no feasible alternatives to the proposed taking; and information establishing that sufficient funding exists to implement the plan, he says.

Without a take permit, a developer who undertakes activities that result in the take of an endangered species may be subject to criminal and civil federal enforcement actions, as well as civil actions by non-governmental citizens, Jennings says.

"Importantly, a governmental body such as the Highland County Board of Supervisors can be enjoined from 'taking' endangered species even when the actual taking is done by a third party such as HNWD. When a governmental body 'allow[s] or authorize[s] acts that exact a taking and that, but for the permitting process, could not take place' then it may be liable under Section 9 of the ESA," he wrote.

HNWD's project, they contend, will result in the taking of at least three endangered species: the Virginia Northern Flying squirrel; Virginia Big-Eared bat; and the Indiana bat. "It is well documented that these three endangered species are living in or around the proposed wind farm site," the letter states.

Jennings spells out a variety of agencies and studies surrounding the species involved. "The extent of the harmful effects of wind farms on bat populations is just now being realized," he states further. "Recent studies on the Mountaineer Wind Energy Center in West Virginia shows that bat collisions with the turbines is a much larger problem than first anticipated and, in fact, maybe the single largest effect on wildlife in the Appalachian region. It is estimated that between 2,000-4,000 bats were killed at that site in the first year of operation ... It is possible that with further study the turbines could be constructed in a manner that eliminates or significantly reduces this dramatic impact. It is imperative that these studies be performed now and not after construction has already begun."

"Finally, the Environmental Working Group of the Virginia Wind Energy Collaborative recently published its Landscape Classification System in which it identified certain areas in Virginia that are unsuitable for

wind farm development or for which environmental assessments should be required. Among the areas identified as unsuitable are locations with known occurrences of federal and state endangered species such as the proposed site in Highland County. The area that includes the proposed project site was also flagged for potential use conflict. This category includes those areas known to support sensitive biological or recreational resources or those areas necessitating formal or legal administrative review by a managing agency. The proposed project site was included in this category because of its designation as Eco-regional Portfolio Site by The Nature Conservancy.”

• Migratory Bird Treaty Act — The Migratory Bird Treaty Act says it’s unlawful to take or kill any migratory bird, Jennings explains. “Unlike the ESA, the Migratory Bird Treaty Act does not have a provision permitting incidental takes. Thus, any killing or taking of a migratory bird is illegal and subjects the operator to potential penalties.

“The ridges of the Allegheny Mountains experience a significant amount of travel by migratory birds. Not surprisingly, it is the nocturnal migrants that are at the greatest risk from the turbines. One study in nearby Eastern West Virginia during the fall migration in 2003 found that nearly 300,000 nocturnal migrant birds and bats flew low enough over a proposed wind farm site to collide with the turbines ... Again, the research available to date, strongly indicates that more comprehensive and thorough studies need to be performed on the target site before the process should proceed further.

The letter concludes, “The foregoing is not meant to be an exhaustive list of issues, but it does illustrate that the HNWD’s proposed project is riddled with problems. The project will forever alter the natural beauty of Highland County and potentially create a nuisance to the neighboring land owners. Moreover, it is highly likely that the proposed project will result in an illegal ‘taking’ of endangered species which, as discussed above, subjects the board of supervisors to liability under the ESA. The only way to avoid liability is for the developer to apply for an incidental take permit ... To date, this has not been done, but should be, at a minimum, a requirement of the board of supervisors before they are willing to consider this permit applicant. Finally, there is a probability that the proposed site is on a significant migratory bird route and thus it will probably result in the taking of federally protected migratory birds.

“Clearly, this project is in need of specific and thorough studies before the board can fully understand the impact of the project. If the

board of supervisors proceeds and authorizes the project, our client will be forced to consider all possible options including pursuing the ESA action.”

Jennings’ clients will wait 60 days to hear from the Department of Interior as to whether it will take over the permitting proceedings.