

USF&WS says wind project needs study

BY ANNE ADAMS • STAFF WRITER

MONTEREY — Birds and bats are a big deal to the U.S. Fish and Wildlife Service, and the federal agency urges Highland New Wind Development to conduct studies before and after it constructs a 38-megawatt industrial wind energy facility on Allegheny Mountain.

The service sent a letter to Highland New Wind Development last week with strong recommendations for mitigating or avoiding impacts to wildlife, especially those protected by federal law as endangered or threatened.

The letter was addressed to HNWD owner H.T. “Mac” McBride from USFWS’s Virginia Field Office supervisor Karen Mayne, and copied to Rick Perry of its law enforcement division in Richmond; Highland County officials; and attorney James Jennings with Woods Rogers in Roanoke. Jennings represents Highland landowners who have filed a notice of their intent to sue the county for approving HNWD’s project.

“I read this as a response to our intent to sue,” Jennings said Tuesday. The letter, couple with the recently released report from the General Accountability Office, isn’t a coincidence, he said. “There’s obviously a connection. The connection isn’t discernible, but there’s now a keen interest” in wind energy facilities coming from state and federal agencies now, he said. Jennings notes with interest the letter was sent to the USFWS law enforcement office in Virginia. “This letter tells us not to file suit yet,” he added. “But it does tell Mr. McBride what to do.”

At this point, HNWD has not applied for a certificate it needs from Virginia’s State Corporation Commission. Nor has the company violated any federal regulations protecting wildlife. What the letter does, Jennings said, is “tell these guys, you’ve got to get a permit” if the company believes endangered species will be affected.

USFWS’s letter advises McBride that regardless of whether his company pursues federal grant money for the commercial facility (which it had done a couple of years ago), it must still comply with all federal and state wildlife laws. Federally listed species have been documented in Highland County, and might be found at the project site, the service said. Those include the Virginia northern flying squirrel, the Indiana bat, the Virginia big-eared bat, and the bald eagle (see sidebar).

USFWS biologist Kim Marbain said Wednesday the service “originally provided

comments on this project to the U.S. Department of Agriculture when Mr. McBride was pursuing a loan through them. We wanted to inform Mr. McBride that our comments remain the same even though he is no longer pursuing this loan. We also wanted to inform the state agencies of our comments since they are currently reviewing Mr. McBride’s application to the State Corporation Commission.”

Jenning said, “I think what this letter tells Highland New Wind is that they have a significant issue with wildlife, here are the federal statutes with which you must comply, and we recommend you get in touch with us.” HNWD could “run afoul” of these laws easily, he added. “They’re not telling (McBride) what he’s required to do but they are telling him what the laws are ... It’s not a checkmate. There are a lot of things (he) can do. This letter tells me the USFWS is keenly interested in this issue.”

Essentially, Jennings says, that leaves his clients waiting and watching on the environmental front. “The letter is pretty clear. It’s short of confrontational, but they’re (USFWS) obviously paying attention and they have the jurisdictional strength ... This is a very responsible response. It’s all we can ask,” he said.

In her letter, Mayne reminded McBride the service has interim guidelines on how to avoid or minimize negative impacts to wildlife. “We encourage you to review these guidelines ... Based on the limited information currently available to us, this project has the potential to adversely affect federally listed species, and other resident and migratory wildlife. The service has recommended, and continues to recommend, that the project sponsor evaluate the potential effects ...”

Mayne said HNWD should review “all available data and literature relevant to this site” and identify potential impacts as a result of collisions with turbines, including the effects on raptors, passerines and bats “as well as cumulative effects ... The physical disturbance, direct loss, and fragmentation of grassland and forest habitat should also be included in the evaluation,” she wrote.

As defined by the National Environmental Policy Act, cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively

significant actions taking place over a period of time, according to USFWS.

“A cumulative impacts analysis would involve looking at the effects of all wind turbine farms on these species in a particular geographic area, for example, astern ridgetops,” Marbain explained this week.

In order to assess collision hazards, spatial and temporal uses of the airspace by birds and bats need to be defined during a multi-year period, which can be accomplished with radar, acoustic or infrared technology to collect data on ridgetops and side slopes day and night, season to season, and year to year, Mayne explained in her letter. Visual observation can supplement remote sensing work and “would likely be necessary to ground truth the data for individual species.”

USFWS says surveying techniques are evolving and HNWD should “work closely” with the service to develop a study design before conducting any studies. Monitoring methods before construction should be coordinated with the service, state agencies and researchers, Mayne said. “Survey results should be submitted to us for review and comment, along with proposed project-specific avoidance and minimization methods.”

USFWS also recommends studies after construction and during turbine operation, saying bat and bird mortality monitoring be done for at least three years.

The letter mentions a report by the Bats and Wind Energy Cooperative, which conducted studies at the Mountaineer project in Tucker County, W.Va. and the Meyersdale project in Somerset County, Pa. “We encourage you to reference this report and incorporate design and operational recommendations into your project to avoid or minimize bat mortality,” Mayne wrote.

USFWS said monitoring reports during and after construction should be “submitted to us within 30 days of the end of the monitoring period,” Mayne said. “This office and the Region 5 division of law enforcement are to be notified within 48 hours should any birds protected under the MBTA or species protected under the ESA be found dead or injured as a direct or indirect result of the implementation of this project. Notification should include the date, time, and location of the carcass, and any other pertinent information.”

Wednesday said recent studies of wind turbine sites have documented mortality of bats and birds and, therefore, to avoid impacts to these species, “studies are needed to determine

the causes of these mortalities at each site. Site-specific studies are needed to determine what the local conditions are and what may be unique about a particular site," she said.

Mayne's letter concluded, "We are concerned about the potential risk that construction and operation of the Highland New Wind Development facility may pose to bat and bird species residing and migrating through western Virginia, and the resultant cumulative impacts that could occur following operation of this and any additional wind power facilities on the ridge tops in the Eastern United States. Again we strongly recommend that a multi-year, pre-construction study be conducted at the proposed project site ... The service looks forward to working with you to evaluate these issues."

McBride's attorney John Flora told state agency officials recently HNWD had hired a private research company to conduct studies on the project site geared toward gauging avian species in the area.

Marbain said USFWS wasn't aware of the studies. "Mr. McBride has not informed nor provided the service with a study plan, therefore, we cannot comment on the specifics of it," she said.

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Federal protection laws at play

MONTEREY — U.S. Fish and Wildlife Services outlined the endangered, threatened or protected species it expects Highland New Wind Development to avoid impacting with its wind energy project.

In her letter to HNWD owner H.T. "Mac" McBride, USFWS supervisor Karen Mayne described species that could be at stake, and what federal laws protect them.

USFWS biologist Kim Marbain explained why protecting species was so important. "This question was addressed and summarized by Congress in the Endangered Species Act of 1973," she said Wednesday. "The act states that 'these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.' Species do not exist in isolation," she added. "They are part of a complex network. The removal of a single species can affect many other species. Many of our native species are valuable indicators of environmental quality. When species start to decline, it may be a warning that there is a problem in our environment."

Flying squirrel

The flying squirrel, Mayne said in her letter to McBride, has been documented in the vicinity of McBride's project. "In Virginia, all records for this species are at elevations above 3,000 feet. Habitat fragmentation, destruction, or alteration has been identified as a threat to this species." The service recommends suitable habitat for the squirrel be surveyed and mapped in areas at or adjacent to the wind tower sites.

Bats

Both the Indiana and Virginia big-eared bats are federally listed endangered species and have been documented in three caves about 14, 15, and 17 miles from the project area, Mayne explained. While bat mortality at wind turbine sites has been documented during late summer and early fall migration and inclement weather, she said, the potential for adverse effects at HNWD's site is unknown. "However, data from nearby wind turbine sites indicate that there is a high likelihood that bats will be adversely affected by wind turbine sites ... We recommend that bats be monitored concurrently with migratory birds when conducting pre- and post-construction monitoring of wind power projects," Mayne said.

Bald eagles

Mayne explained bald and golden eagles are known to migrate through this area. While the

golden eagle is not listed as endangered, it is protected by the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act of 1940, which prohibit taking bald or golden eagles or their nests or eggs.

The term "taking" as defined by federal regulations means "to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb."

The Endangered Species Act makes it illegal for a person to "take" any endangered or threatened species without a special exemption. Under the act, harming such species means significantly modifying or degrading habitat resulting in death or injury by "significantly impairing essential behavior patterns such as breeding, feeding or sheltering."

"Harass" refers to actions that "create the likelihood of injury" to species by disrupting normal behavior.

There are civil and criminal penalties for those convicted of violations, Mayne explains.

There are two procedures by which the "taking" of such species can be authorized:

1) If a federal agency is involved with permitting, funding or carrying out a project, then a formal consultation between that agency and USFWS is required, resulting in a biological opinion addressing the effects on endangered species which may authorize a limited level of a "take."

2) If a federal agency is not involved in a project, a permit may be obtained by a private landowner or corporation. The service can issue a permit after a "satisfactory habitat conservation plan."

"Please be aware that there is no mechanism for authorizing incidental take 'after-the-fact'," Mayne told McBride.

All native migratory birds are protected under the Migratory Bird Treaty Act, making it illegal to hunt, take, kill, sell or receive any birds, nests, or eggs. While the act does not allow unauthorized "taking," says Mayne, "we recognize that some birds may be killed at structures such as wind turbines even if all reasonable measures to avoid it are implemented."

Marbain explained that a knowing violation of the Endangered Species Act or the Migratory Bird Treaty Act (MBTA) that results in a criminal conviction is a misdemeanor. Penalty for the ESA violation is up to \$100,000 fine for an individual and or up to one year in prison and up to \$200,000 fine for an organization. MBTA violation is up to \$5,000 fine and or up to six months in prison.