

Environmental effects real, Conservancy says

BY ANNE ADAMS • STAFF WRITER

RICHMOND — The Nature Conservancy, in its quest for environmental protection, has been involved in Highland New Wind Development's case as a formal respondent.

Following evidence presented by the company before the State Corporation Commission, TNC filed an extensive brief outlining its position as supported by experts that HNWD's project presents real risk to endangered species, and those risks should be minimized and monitored, at the expense of the company.

"This is a unique case — the first of its kind in Virginia ... There have been extensive public hearings, and the very comprehensive record is replete with testimony, studies, reports, and other documentary evidence," wrote TNC attorney Wiley F. Mitchell. "Viewed in its entirety, the record points unequivocally to the conclusion that the operation of the wind turbines at the location proposed by the applicant, in the absence of the imposition of mitigating conditions, poses a serious and unacceptably high risk of mortality to bats, including at least two species listed as endangered, and perhaps to certain species of birds and raptors."

If the SCC approves a state permit for the project, Mitchell noted, the risks should be clearly defined and minimized by conditions placed on the permit.

"When properly sited, the use of wind turbines to generate electricity can be a pollution-free, environmentally friendly alternative to the burning of fossil fuels, and when such projects can be constructed and operated under conditions that do not seriously jeopardize wildlife or otherwise damage the environment, the Conservancy will support them. As this case will illustrate, however, the Conservancy's support of the use of wind energy is tempered by its determination to insure that the environmental advantages of wind energy are carefully balanced against the potential threat wind energy projects frequently pose to birds, bats, and other wildlife," he said.

"Because this is the first wind energy case the commission has considered, and in the words of the applicant's attorney is 'unlike most, if not all, prior utility projects processed by the commission,' it is certain to become a bellwether for similar applications likely to be filed in the future ... As a party with absolutely no financial interest in the outcome of the present case, the Conservancy has participated in this case for the sole purpose of assisting the commission in identifying and addressing the important environmental issues, and in developing the protocols necessary to deal effectively with those issues, not only in the present case, but also in the wind energy cases to follow."

TNC listed a number of points it believes the commission should consider:

- The project will not advance competition or economic development in Virginia, and without conditions attached to protect wildlife, approving a permit would be contrary to the public interest.
- Unless strong mitigating conditions are imposed this project will have serious and permanent environmental consequences to both indigenous and migratory wildlife.
- The most serious environmental impacts can be identified and rectified by requiring post-construction monitoring designed to determine the extent and nature of the risk.
- It is reasonable and consistent with the law to require HNWD to bear the cost of mitigating the risk his operations have created.

Economic effects

TNC, like the SCC staff, pointed to the testimony of Mark Carsley, an SCC research analysis, about the potential economic benefits of the project. "After giving extensive consideration all of the potential economic benefits that the construction and operation of this project is expected to have in Highland County, Mr. Carsley concluded: The primary positive economic development benefit to the commonwealth ... appears to be the additional real property tax revenue that Highland County will collect from HNWD if the project is ultimately completed," the conservancy said.

Carsley's conclusions, TNC noted, were that the benefits of construction would be short-term only.

The conservancy concluded there was not evidence the utility would have a favorable impact statewide on the sale of electricity. "In fact, there is no reasonable basis to believe that any of the electric energy generated at the Highland facility would be sold to Virginia consumers, much less that it would be sold to Virginia consumers at competitive prices.

“The responsibility for the cost of monitoring the operation of the facility ... is clearly that of the applicant.”

The Nature Conservancy

Effect on the public interest

The operation of the facility, TNC said, "is nearly certain to cause severe and permanent damage to Virginia wildlife, primarily indigenous and migratory bats. The unrestricted operation of the Highland facility will create a substantial risk that several threatened or endangered species of wildlife will be killed or injured. The operation of the Highland facility will have no demonstrable impact on the goal of fostering competition in the sale of electric power in Virginia. The operation of the Highland facility will not result in significant economic development in Virginia. It is highly unlikely that any of the power generated at the Highland facility will be sold in Virginia, or that Virginia consumers will receive any benefit from its operation. The environmental benefits accruing from the generation of electricity by wind, to the extent they exist, will accrue almost exclusively to the citizens of states other than Virginia.

"The Conservancy respectfully requests that in considering whether this project is in the public interest or, in the words of the statute, is 'not contrary' to the public interest, the commission should balance the very real threat the project poses to Virginia wildlife against the absence of any discernible benefit to the commonwealth, its citizens, or its environment. Unless the commission imposes conditions on the operation of the Highland facility which will eliminate the serious threat the project poses to wildlife, or reduce the threat to acceptable levels, the commission is likely to find it difficult to conclude that approval of the facility is in the public interest."

TNC pointed to the testimony of state and federal agencies reviewing environmental risks, all of whom have urged caution. "Considered in their entirety, the comments of (the Department of Environmental Quality and the Department of Game and Inland Fisheries) reflect a serious concern over the impact the Highland project will have on wildlife, including birds, bats, raptors, and several endangered or threatened species known to frequent the project area," Mitchell said.

TNC noted the agencies made several recommendations, including two years of pre-construction monitoring at the project site, and three years of monitoring after the utility was built. Evidence shows the utility "will kill large numbers of bats, and that the mortality rate will exceed many times over the limits unanimously recommended by the state and federal agencies directly responsible for the protection of wildlife," Mitchell wrote. "Although the risk to birds and raptors does not appear to be as severe, the exact dimensions of that risk cannot be accurately determined on the basis of the facts in the record. If the commission approves this project, it is therefore imperative that it impose mandatory conditions to eliminate or minimize the risk to wildlife."

Mitigation possible?

TNC says nearly all parties in this case agree the "most clearly defined threat to wildlife is the obvious and essentially unchallenged risk of mortality to bats," Mitchell said. "Unfortunately, the wildlife experts who have testified in the case have been unable to identify any deterrent, whether mechanical, chemical, acoustical, luminary, or otherwise, that has proven to be effective in reducing the risk of mortality to bats."

Therefore, he concluded, monitoring bat deaths is a must, and "... it should then be possible to implement operational protocols which would eliminate or substantially reduce the level of fatalities."

TNC believes there are times when the turbines would pose no threat to bats — like operating during daylight hours.

Also, it noted, bats either hibernate or migrate away from the area in winter, and are not typically active there between April 1 and Nov. 1. "Unrestricted operation of the

facility during this five-month period should pose no threat to bats," the brief explained.

Other times of the year, when they are more active, and therefore more vulnerable, are at night when wind speeds are lower. "Turning off the turbines at night between April and November when wind speeds are below 6 meters per second would likely eliminate most turbine related bat fatalities."

Who pays?

The Nature Conservancy said HNWD should bear the costs of monitoring. "It is manifestly fair to require someone whose financially motivated activities create, or threaten to create, environmental risk to pay the full cost of identifying and mitigating that risk. This is true with respect across the spectrum of environment damage. The person whose activity causes the injury is required to pay the cost of repair, or cleanup, or replacement. In this very case, the construction of the power lines which will connect the wind turbines to nearby transmission lines threatened damage to Laurel Fork. (HNWD) was required by the responsible state agency to incur considerable expense in reconfiguring the way the lines were tunneled under the stream, but there was no suggestion that the cost should be borne by the commonwealth," TNC stated.

"Similarly, the applicant has spent considerable sums for acoustical studies, radar surveys, breeding bird inventories, and in employing nationally known experts to analyze data and literature, all directed toward the objective of identifying and, where necessary, mitigating environmental risk. The applicant has not suggested, and is not likely to do so, that someone else should be required to pay all or some of these costs. Under any rationale, the responsibility for the cost of monitoring the operation of the facility constructed by the applicant, for the sole purpose of determining the extent of the environmental loss it will inflict, and of taking the steps reasonably necessary to avoid future losses, is clearly that of the applicant."

TNC added it was hard to address whether the project monitoring costs would "jeopardize the financial viability of the Highland project without being able to talk in detail about that portion of the evidence which is subject to a confidentiality agreement, but the evidence on hand showed it would not. It is the position of the Conservancy that the costs incurred in the mitigation or remediation of environmental problems caused by the project are as much a part of the overall project costs as the cost of buying and installing the turbines, or of paying consultants, or of preventing erosion. If the inclusion of those costs in the budget for the project threatens its viability, the application should be rejected."

What should SCC do?

The Nature Conservancy believes the SCC's decision in this case "is certain to receive the focused attention ... of anyone else who has an interest in constructing and operating a wind energy project in Virginia. For better or for worse, the decision in this case will provide the guidelines for the wind energy cases which are almost certain to follow. It is therefore of particular importance that the commission define those guidelines with clarity and precision," Mitchell wrote. "It seems obvious to the Conservancy that environmental issues, which include the visual and aesthetic impacts of wind turbines, are, and are likely to continue to be, predominant in the commission's consideration of this and future wind energy applications ... It is how the commission deals with those issues, and how it defines and allocates the responsibility for resolving those it deems significant, that is of critical importance."

TNC urges the SCC to carefully consider the environmental impacts the project is likely to cause. "If the commission determines that the facility will cause, or is likely to cause, a significant adverse environmental impact, the commission will impose conditions on the construction and operation of the facility which will, to the extent practicable, mitigate or remedy the adverse impacts."

Further, the developer should pay for the costs attached to those impacts. "In the present case, (HNWD) has resisted the suggestion that it should be responsible for paying the full cost of identifying and mitigating the very real environmental impact this project will have on certain species of wildlife. The commission's decision should leave no doubt with respect to where that responsibility lies. In preparing their financial analysis of project costs, future applicants should be made unambiguously aware of their obligation to include the full cost of remediating any adverse environmental impact the project causes," said TNC.