

BOARD OF BINGHAM COUNTY COMMISSIONERS

REASON & DECISION

In regards to: The Appeal of Arco Wind LLC's (c/o NorthRenew Energy, LLC) Decision by the Planning & Zoning Commission for Commercial Wind Turbines, for a Conditional Use Permit.

Board of County Commissioners Meeting Date: July 12, 2022.

Appellant's: Steve Henderson and Nancy Hampton.

The Board finds that the record is comprised of:

1. Exhibits to the Board's Appeal Hearing Staff Report:
 - CC-1: Staff Report- Board of County Commissioners
 - CC-2: Notice of Appeal- filed by Steve Henderson and Nancy Hampton
 - S-19: Planning & Zoning Reason & Decision- May 9, 2022
 - S-21: Planning & Zoning Minutes- April 13, 2022
2. Exhibits to the Planning & Zoning Commission Staff Report:
 - S-1: Staff Report- Planning & Zoning Commission
 - A-1: Application for Conditional Use Permit
 - A-2: Applicant's Narrative
 - A-3: Applicant's Site Plan
 - A-4: Lease Agreements
 - A-5: Draft Decommissioning Plan
 - A-6: Site Characterization Study
 - A-7: Preliminary Hydrology Study
 - A-8: Wetland Delineation Report
 - A-9: Notice & Shadow Impact Analysis
 - A-10: Baseline Biological Report
 - A-11: Wind Power Geo Planner Communication Tower Study
 - A-12: Wind & Climate Data Study
 - S-2: Parcel Map
 - S-3: Zoning Map
 - S-4: Comprehensive Plan Map
 - S-5: Flood Plain Map
 - S-6: Aerial Map
 - S-7: Subdivision Map
 - S-8: Area of Impact Map
 - S-9: School District Map
 - S-10: Utilities Map
 - S-11: Nitrate Priority Map
 - S-12: Irrigation Company Map
 - S-13: Google Imagery
 - S-14: Notice of Posting Affidavit
 - S-15: Site Photos

- S-16 Affidavit of Publication; Bingham News Chronicle
- S-17 Government Agency Notice Affidavit and Notice of Hearing
- S-18 Property Owners Notice Affidavit and Notice of Hearing

3. Written Testimony Received Prior to the Planning & Zoning Commissions Public Hearing

- T-1 Sheriff Craig Rowland
- T-2 Bingham County Surveyor
- T-3 Bingham County Public Works
- T-4 Department of Environmental Quality
- T-5 Idaho Fish & Game
- T-6 Groveland Water & Sewer District
- T-7 John Irving (neutral and/or opposition)
- T-8 Kathy & Bill Koester, in opposition
- T-9 Tony Appelhans, in opposition
- T-10 Brenda Pace, in opposition
- T-11 James Reynolds, in opposition
- T-12 James Reynolds, in opposition
- T-13 Nancy Hampton, in opposition
- T-14 Kara Denning, in opposition
- T-15 Randy Harris, in opposition
- T-16 Shauna Robinson, in opposition
- T-17 Charles & Julie Wemple, in opposition
- T-18 Suzy Henrikson, in opposition
- T-19 Tony Appelhans, in opposition
- T-20 Gretchen Vanek, in opposition
- T-21 Steve Henderson, in opposition
- T-22 Alicia Becker, in opposition
- T-23 Sharon Plager, in opposition
- T-24 Suzann Henrikson, in opposition
- T-25 Robert Nitschke, in opposition
- T-26 Brenda Pace, in opposition
- T-27 Tim & Wendy Brockish, in opposition
- T-28 Nancy Hampton, in opposition
- T-29 David Pace, in opposition

4. All Information and Testimony presented at the Planning & Zoning Commissions Public Hearing on April 13, 2022:

- T-30 Applicant Garth Klimchuk
- T-31 Applicant Mark Green
- T-32 Applicants Consultant David Coleman
- T-33 Brad Foster, in favor
- T-34 Bruce Wilding, in favor

- T-35 Brenda Pace, in opposition
- T-36 Lael Suzann Henrikson, in opposition
- T-37 Diana Dino Lowrey, in opposition
- T-37A Photograph of magazine from Lowrey testimony
- T-38 David Pace, in opposition
- T-39 Carolyn Smith, in opposition
- T-40 Applicant Rebuttal Consultant Micha Wood (via Zoom)
- T-41 Applicant Rebuttal Consultant Rigden Glaab (via Zoom)

BASIS FOR APPEAL: The Appellant stated the following:

1. Inadequate time for public review/comment.

The Appellants stated the Planning & Zoning Commissions Public Hearing was set for April 13, 2022 and they received written notice of the Application on March 22, 2022 (as supported by the Property Owners Mailing Affidavit, Exhibit S-18). Within the Property Owners Notice, it states “refer to our (P&Z) website to see the order of the meeting and for more information on the Application.” Further, the notice follows Bingham County Code and allows unlimited comment up to 8 days prior to the hearing, after which is limited to 2 pages. The Appellants state by the time the Staff Report was provided to the public on the website, there was insufficient time to review the 700 pages and submit comments limited to 2 pages.

2. Lack of (or failure to include) review/comment by State, Federal, and other Pertinent Agencies. The Appellants state numerous mentions of “extensive collaboration with Federal and State and local departments on conservation and environmental studies” and pertinent studies or plans that were “in progress” or “on-going” were made by the Applicant during the Public Hearing and in the Application. The major agencies cited by the Appellants include BLM, IDFG, FAA, INL, USFWS, and the State of Idaho. Also, USFWS, DOE (or the INL) and the FAA do not appear on either list of agencies that were notified.

3. Many important details pertinent to public, private and county interests for a project this large and complex are missing and many questions from the Planning & Zoning Commissioners were met with “that comes later” or that is “in progress” or “in negotiation”.

(A). A major aspect of the project (Solar) is presented in the Application but not addressed.

(B) Power purchasing contracts and turbine sales agreements are pending.

(C) Important details for aspects of decommissioning and disposal included in the application are preliminary and incomplete.

(D) The Application includes no details for transporting components to the site, potential alteration of existing or construction of new roads, and impacts to Highway 20 as a result of construction activities.

Board’s discussion and review of Appellant’s basis for Appeal:

1. Inadequate time for public review/comment.

Staff commented that Bingham County Code does not require the posting or publishing of Staff Reports to the public in advance of a Public Hearing. However, Staff publishes the Staff Reports and all testimony received prior to the Public Hearing as soon as the Government Agency deadline for comment (14 days prior to the Public Hearing) has passed. This usually occurs 7-10 days prior to the Public Hearing, depending on the County Webmaster’s availability. The Application is subject to Record Request and the Appellants could have requested the information in advance of the Public Hearing. Additionally, although comment is limited to 2 pages eight days before the Public Hearing, public (verbal) testimony at the Public Hearing was not limited. Ms. Hampton did submit written testimony (T-13 dated April 5, 2022 consisting of 6 pages and again on April 11, 2022 consisting of 2 pages) as well as Mr. Henderson (T-21, dated April 12, 2022 consisting of 2 pages) however she nor Mr. Henderson requested additional time for comment or testified at the Public Hearing. From review of the Minutes and Decision, the Commission conditioned approval of the Application based on testimony and concerns presented in the record and from the verbal public testimony presented at the Public Hearing.

Commissioner Bair stated he has reviewed the record provided and it appears that all requirements listed within the Planning & Zoning Ordinance were followed and asked Director Olsen for confirmation. Director Olsen stated that was correct and explained that notice was provided to all property owners within one mile of the subject property and several outside of one mile as the boundaries extend into Bonneville County. Within the packet there are two Affidavit of Mailings, one for Bingham County residents and one for Bonneville County residents to document the same. Director Olsen stated for these types of Applications, Bingham County Code requires a larger radius for notification. Typical notice is 300 feet from a project site and for wind turbines, it is a minimum of one mile.

2. Lack of (or failure to include) review/comment by State, Federal, and other Pertinent Agencies.

Staff commented that the list of Government Agencies includes the BLM (both the Pocatello and Idaho Falls Offices), Idaho Fish and Wildlife, and Idaho Department of Lands (although this agency was not mentioned by the Appellants) See Exhibit S-17. The INL is outside of the project area 1-mile radius; the lands within the 1-mile radius are owned by the BLM.

Idaho Fish and Game did respond with a Government Agency Comment (see Exhibit T-5) stating “Idaho Department of Fish and Game staff, along with the Idaho Governor's Offices of Species Conservation (OSC) and Energy and Mineral Resources (OEMR), have been and will continue working closely with NorthRenew Energy and their consultants to

develop the Bird and Bat Conservation Strategy for the proposed project. Provided by Becky Johnson, Idaho Department of Fish and Game Environmental Staff Biologist.

Further, Bingham County Code Section 10-1-4: Applicability, states “this Title applies to the development and use of all lands within the unincorporated area of Bingham County, Idaho, except those portions of tribal land within the exterior boundaries of the Fort Hall Indian Reservation which Bingham County does not have jurisdiction to regulate due to Federal law. All persons, entities and government units, including their political subdivision, shall comply with this title unless specifically exempted by State or Federal law. In the interpretation and application of this title, the provisions contained herein are declared to be minimum requirements. Nothing in this title shall eliminate the need to conform to appropriate State or Federal regulations or the need to obtain any other required permits.” The Appellants are correct, the Applicants must adhere to all State and Federal regulations and obtain the required permits from said agencies. The Applicants testified to Code Section 10-7-44(B)(5) in that “The Project initiated its Aeronautical Study of the initial turbine layout in September 2020. The Project has continued to correspond with the FAA to advance this study and anticipated the completion of the initial phase of the assessment in Q1 2022.” Additionally, in the Applicants response to Code Section 10-7-44(D)(8) “Evidence of notification of the FAA, United States Fish and Wildlife Services, Department of Environmental Quality, and the appropriate Fire Departments will be submitted to the County Planning and Development Department along with the Project Building Permit Application. (See also Application pages 44-46 and A-2.) With regard to the comments from the Department of Environmental Quality (Exhibit T-4), the comments were provided in the event the County did not have an Ordinance regulating Wind Turbines and were offered as considerations.

Given the testimony, the Planning & Zoning Commission found the Applicants are working with the mentioned Agencies to procure the required permitting for the project and further, Bingham County Planning & Development will require said permitting and approval prior to issuing a building permit.

Commissioner Bair asked Director Olsen if it is unusual to not have State, Federal or other Agency permits at the time of CUP approval or do they need to only be completed before issuing a Building Permit. Director Olsen explained with the number of State and Federal Agencies involved, Applicants are required to work with in procuring separate permits, many of those Agencies want to know where things are at on the local level within the permitting process therefore it is preliminary to receive permitting or approval from agencies on a project (that is yet to be approved within the County). She further explained it would be customary to receive those items if an approval for a Conditional Use Permit were awarded to the Applicants, which would give them the entitlement to proceed with the permitting agencies. Again, Director Olsen confirmed that all permitting must be completed before a Building Permit is issued.

3. Many important details pertinent to public, private and County interested for a project this large and complex are missing and many questions from the Planning & Zoning Commissioners were met with “that comes later” or that is “in progress” or “in negotiation”.

(A) A major aspect of the project (Solar) is presented in the Application but not addressed. Staff referred the Board to Section 1.1 of the Application wherein it states “Solar development is planned to occur in a later phase of the project and is not a part of this Application”.

(B) Power purchasing contracts and turbine sales agreements are pending. Staff informed the Board that Power Purchasing Contracts and Turbine Sale Agreements are purported to be pending as the project was being requested for approval. These items are not required as part of the Conditional Use Permit Application.

(C) Important details for aspects of decommissioning and disposal included in the application are preliminary and incomplete. Staff referred to Mr. Green’s (Applicant) testimony that the team will refine and finalize the Decommissioning Plan based upon the final project configuration, which will occur prior to the submission for a building permit and be monitored for compliance by Planning & Development.

(D) The Application includes no details for transporting components to the site, potential alteration of existing or construction of new roads, and impacts to Highway 20 as a result of construction activities. Staff referred the Board to Section 7.4 of the Application where access is described. Highway 20 is under the jurisdiction of the State of Idaho (who also received notice of the Application but did not provide a comment.) Additionally, Bingham County Public Works Director provided written comment (see **Exhibit T-3**) wherein he has no concerns with the Application as the existing road being used for access is not a County road.

Discussion regarding Appeal argument number included Commissioner Bair who asked if there were any requirements within County Ordinance to build roads that will connect towers, to County standards. Director Olsen stated there was not and most typically the roads to wind turbines are undeveloped or simply a dirt road. Although, the roads would be built to a standard to withstand any type of fire safety requirements for equipment, as well as the vehicles that are transporting turbines do require a certain load strength in order to drive on. At the conclusion of the wind turbine project, decommissioning would include removing of that asphalt and bringing everything back to the green space/current space as is now.

Chairman Manwaring asked Director Olsen how the Applicant’s would work with the Shoshone Bannock Tribes as they would more than likely ask for a site plan in the event work is being done and human remains are located. Director Olsen explained there have been discussions between the Shoshone Bannock Tribes and the Arco Wind team pertaining to if there are sites of sensitivity for the Tribes. Within the protocols being prepared, there is a process set forth for the anticipated discovery of historic property and

further details that if they find something that appears to be older than fifty years, that all work within 100 feet would stop, the discovery site would be secured and there is a list that the Tribes and the Applicants are putting together of qualified professional archeologists with the expertise in cultural history of the region and of these Tribes. The list will be agreed upon by both parties and those individuals would essentially be "on call" if something were located. The parties would involve the SHPO, the Idaho State Historic Preservation Office if there were significance to that artifact. The parties also have a separate policy if human remains were to be found, which is similar but identified as a separate item. Therefore, it does appear that the Applicant is working with the Shoshone Bannock Tribes, to meet the requirements of that condition.

Commissioner Bair referred to Bingham County Ordinance Section 10-8-3(4) of the Conditional Use Permit criteria wherein it states "the use shall not be hazardous, or disturbing to existing or future uses; nor involve uses, activities, processes, materials, equipment and conditions of operation that will be detrimental to persons, property, or the general welfare of the public by reason of excessive production of traffic, noise, fumes, odors and other pollutant." Commissioner Bair stated that part of the testimony received was concern regarding dust or fire protection and asked Director Olsen if there was a dust or fire mitigation plan filed, to which she stated that she does not recall that specifically. Director Olsen stated the closest turbine would be one mile from the highway. Therefore, she is not certain as to what length a dust abatement would be required as a lot of the site activity would be quite a ways away from the highway.

Chairman Manwaring stated in his review of the Staff Report, there were several concerns addressed, specifically working with the Shoshone Bannock Tribes regarding artifacts that may be located. He stated that Director Olsen confirmed that the Applicant is working with the Shoshone Bannock Tribes to be sure there is a policy in place if there are artifacts located.

Chairman Manwaring asked Director Olsen if the Idaho National Laboratory (INL) was within the notification boundary, to which she stated they are not within that boundary and therefore, were not notified as the land within 1-mile is owned by BLM.

Chairman Manwaring addressed the concern submitted in regards to birds and bats, wherein Idaho Fish and Game was notified as a Government Agency and the Applicant is working with Idaho Fish and Game in moving forward with the project. Director Olsen referred to T-5, testimony from Becky Johnson, Environmental Staff Biologist with the Idaho Fish and Game, who stated she will continue to work with the Applicant's during the duration of the project. With regards to the FAA, the Board may recall on a prior wind project, notice was received identifying that each turbine has its own FAA Application and approves for the site and each one is permitted individually. Those notices come to the Board of County Commissioners and in turn provided to Planning and Development but have not yet been received. These documents should be received before issuing a Building Permit to acknowledge that each turbine has been approved by the FAA.

Director Olsen added that the Applicant did request and received two Conditional Use Permits within the last two years for two meteorological towers, which would provide studies of the wind for the area. With that information, it assisted in determining if this specific area is an appropriate site for wind production, which was determined it was and have moved to the second phase on County level permitting.

There were no further concerns or discussion by the Board.

DECISION

Commissioner Bair moved to conditionally uphold the decision of the Planning & Zoning Commission and approve the request from Arco Wind, LLC and Northwest Energy, LLC, to construct and operate up to 39 commercial wind turbines and associated infrastructure located on approximately 5,352 acres of land zoned "N/A" Natural Resources, as described in the Application materials as supplemented with additional information in the Staff Report, in accordance with the requirements of Bingham County Code Title 10 "Zoning Regulations" and subject to all applicable laws and regulations with the following conditions:

1. Obtain a Take Permit from the US Fish and Wildlife; and
2. In the event an archaeological artifact is located, the Developer will allow a reasonable amount of time for the Shoshone-Bannock Tribe to review and the parties will work together to procure or protect the archeological findings on Government land; and
3. (New Condition) To Obtain a fire and dust mitigation plan.

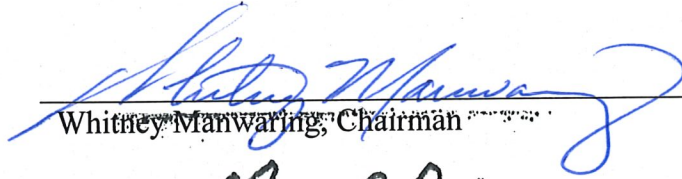
Chairman Manwaring seconded. Both Commissioners voted in favor. The motion carried. Commissioner Lewis was absent.

Commissioner Bair moved to close the Conditional Use Permit Appeal Hearing. Chairman Manwaring seconded. Both Commissioners voted in favor. The motion carried.

Upon denial or approval of a Conditional Use Permit with adverse conditions, the Applicant may request a regulatory takings analysis as per Idaho Code Section 67-8003. An affected person aggrieved by a final decision concerning matters identified in Section 67-6521(1)(a), Idaho Code, may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by Chapter 52, Title 67, Idaho Code.

Dates this 23 day of August 2022.

**Board of Bingham County Commissioners
Bingham County, Idaho**


Whitney Manwaring, Chairman


Mark Bair, Commissioner


Jessica Lewis, Commissioner