

Wind debate hangs on property rights, Blagg says

BY ANNE ADAMS • STAFF WRITER

MONTEREY — Now entering its fourth year of discussion on the topic, Highland County is no closer to deciding whether to approve a wind energy facility atop Allegheny Mountain. Last Thursday, supervisors held a work session to further explore the pros and cons of the 39-megawatt utility proposed by Henry T. “Mac” McBride and his company, Highland New Wind Development LLC.

Last August, HNWD applied for a zoning amendment and conditional use permit to construct and operate 18-20 turbines, at about 400 feet in height, at two sites on the McBride family’s 4,000-acre property bordering West Virginia.

Supervisor Lee Blagg said he’s convinced the whole issue of whether to permit the plant comes down to property rights, and the question, “Where do your rights stop and mine start?”

“That’s the bottom line. If we use some of the criticism I hear to say no on this thing, there will never be anything built in Highland County again, from a sheep shed on down.”

Blagg asked county attorney Melissa Dowd about her previous statement that “just because I don’t want to see it” is not reason enough to deny the permit.

Dowd clarified her point for Blagg, saying that it’s true the board can’t make its decision on personal feelings, but that the impact on viewshed can be part of the decision. “Viewshed is a much broader issue,” she said, explaining its impact on tourism and potential property buyers. “It is a factor,” she added. “Though in my opinion not a deciding factor.”

Supervisor Robin Sullenberger said, “Far more people have said to me, what they say, is that this is more a land rights issue and this man should be able to do what he wants with his property.” However, he added, those people do not finish the line of thinking, which should include “as long as it doesn’t have a detrimental effect on neighbors and the well-being of the county. It all goes directly to our tradition of ownership.”

Dowd reminded the board it has already taken a stance on property rights by adopting a zoning ordinance in 1981. “You already put regulations on one man’s ability to do things,” she said. “That’s what makes us a step different from Pendleton County. We regulate poultry facilities; we protect farms with 200-foot setbacks. This board has already made some

very critical decisions (on land use),” she said.

“We’ve got to look at, in what way can this benefit the county,” added board chairman Jerry Rexrode. “If you want it (wind energy), where do you want it? There’s places in Highland County for it. If you don’t want it, say so in your ordinance. The zoning ordinance is designed for control.”

Potential tax revenue

Supervisors are still trying to figure out potential tax revenue the county could receive from the utility. Recently, Sen. Emmett Hanger brought two pieces of legislation to the short session of the General Assembly. One requests a committee to study wind energy possibilities in Virginia. The other suggests an addition in power facility taxation that would mean wind plants would be taxed at a rate roughly equal to \$3,000 per megawatt capacity. This bill was requested by McBride, and according to supervisors, the county was not consulted before it was submitted.

For HNWD’s utility, the bill would result in about \$117,000 per year for Highland County. But that is by no means a solid estimate, officials say.

“I told Mr. McBride I’d like to see more than \$3,000 (per megawatt),” Rexrode said this week.

Board members believe the legislation is designed to benefit Highland with a stable revenue stream, though they do not agree on what amount would finally be negotiated. “I think they were attempting to make this something to our advantage,” Sullenberger said Tuesday. “They want to legislatively assure Highland, or any jurisdiction, would receive a sustainable tax revenue, and make sure there weren’t agreements in place that could be overridden later on.”

Highland supervisors said they were not sure whether Hanger’s bill would take the place of what the State Corporation Commission might estimate in terms of revenue from taxation, but county administrator Roberta Lambert says the annual \$117,000 would be instead of what SCC estimates based on the agency’s existing equation for electric plants.

A few months ago, the SCC gave the county its basic formula for assessing the value of utilities. For an estimated \$60 million project, that would come to \$248,000 annually in county tax revenue, compared to the \$117,000 suggested by Hanger’s legislation.

In each case, the SCC would be respon-

sible for setting the value of the project.

“We haven’t discussed this,” Sullenberger said. “This proposal was put together by Highland New Wind, as opposed to us (the county), and we still need a lot of clarification on it. I think they only meant to assure continuity, but we need to clarify the intent. They put a number in there that we consider negotiable. If you look across the country, that amount is near the low end of a broad range. We wouldn’t anticipate (accepting that). We’d rather be closer to the average than at the bottom end.”

At Thursday’s meeting, Rexrode said, “Some of the public think there’s no revenue out there (to be gained from the project), and indeed there are,” Rexrode said. The county has contacted other states with wind energy facilities; some get tax revenue, some do not. “There is mechanisms we can use to collect. We have that here. If someone doesn’t pay their taxes in three years, we sell his place,” Rexrode explained.

New height regulations

As they agreed, supervisors reviewed a change in Highland’s zoning language written by Dowd. The new version of the section on height would eliminate the old section and replace it with regulations stating that any structure exceeding current height limits may be permitted by conditional use permit issued by the governing body. County height limits are 35 feet everywhere; and 60 feet for auxiliary buildings in agricultural zones. The governing body would be the Monterey Town Council within town limits, and the board of supervisors everywhere else.

The new draft regulations state the governing body may require fire safety measures or cross-section drawings as part of any application. The governing body, or the county zoning administrator, may require additional information from an applicant at the time of application or any time during the permit application process.

Also, it states, as a condition of any permit granted, the applicant shall state under oath “that he has complied with all applicable federal and state standards, laws and regulations set forth by any agencies with the authority to regulate the proposed structure of facility.”

The draft states that as a condition of a granted permit, applicants would agree to hold harmless the county and its agents “from any and all liability arising as a consequence of the development, construction, maintenance,

or removal of the proposed structure.”

“Obviously we’ve been through many versions of this,” said Sullenberger. “And this is the latest draft, tweaked as late as today (Thursday). But it’s not necessarily the final version. Our intent is to get something on the table for the planning commission to set for public hearing.”

Officials explained the changes were in line with neighboring counties on height requirements and in keeping control through the local governing bodies. However, Sullenberger said he did not believe height should be the overriding factor in considering HNWD’s application. “All merits of projects need to be considered and that’s what we intend to do with this.”

Rexrode noted the ordinance would not specify any one type of structure. “We know we’re going to have additional cell towers,” he said. “This (language) can regulate anything like that.”

Dowd said the change “doesn’t do anything to this applicant.” HNWD will not have to make another application for its project. “This is a benign proposal,” she said. “There is nothing in here the board didn’t already have the authority to require.”

The other issue Dowd said supervisors felt strongly about is that the burden should be on an applicant to meet federal and state regulations, whatever they may be or however they apply to any projects. It should not be up to the board to act as “policemen” to figure out what’s required, she said. “The applicant will state under oath that they have met those regulations, making it their full, legal responsibility. It takes the burden where it should be.”

IDA to review wind issue

The board asked Highland County’s Industrial Development Authority to weigh in on the project. IDA members attending Thursday’s meeting agreed to call the authority together and review the board’s questions. “It is industrial development,” Rexrode stressed. “And we’d like some input from ya’ll on a couple of things.”

IDA chairman Dave Smith asked whether McBride’s proposal through legislation of \$3,000 a megawatt would be in addition to the \$248,000 in revenue estimated by the SCC. “No, it would be one of the two,” Rexrode said.

Sullenberger said much about the potential revenue is negotiable, but there are a lot of unknowns. The board has sent a letter to the Attorney General’s office asking for an opinion on whether any tax revenue stream could be sustained.

Smith asked supervisors whether they had weighed in on Hanger’s legislation.

“What we have made clear is that there will be a review of them,” Sullenberger said. “Sen. Hanger has no intention of railroading this bill through.” However, he emphasized, the state’s General Assembly is often under the influence of lobbyists and is “not always driven by things that are best for the localities.”

Smith told the board the IDA needed to come up to speed on the issues. “We can bring facts back to the board,” he said. “And we’ll look at this bill.” He requested a list of questions and suggestions. “We’ll be glad to call a meeting,” he said.

Sullenberger noted McBride and his agents had been “very forthright.” HNWD is completely aware of tax revenue issues “though that doesn’t mean we’re on the same page,” he said. “But they have expressed a willingness to negotiate and they are to be commended for that. There is no effort on their part to avoid this issue.”

Unresolved questions

Sullenberger had a long list of questions about the project. He asked McBride, who was in attendance, about the following issues, and McBride agreed to respond to any written questions from the board:

■ The SCC requirement for a Certificate of Public Necessity and Convenience — All Virginia localities must be approved by the SCC to qualify for this certificate to operate. The application process includes several levels of review, coordinated by a number of state and federal agencies. “I’m a little disappointed there doesn’t seem to be a lot of clarity,” Sullenberger said. “This is a new issue for them (wind energy) but we need to push that button a little harder.” Lambert read aloud from the list of requirements at the SCC (see sidebar). “That’s a pretty extensive list,” Rexrode added.

Lambert said the SCC would probably classify HNWD’s project as an electric generation facility, “but there will be no absolute determination without an application.”

One of the questions is whether HNWD can apply for its certificate through the SCC without Highland’s board approval of the permit. Lambert said HNWD could apply, according to her information from the SCC, even if its application locally is still pending. “(A local permit) is not a necessity,” she explained.

■ Conditions the board could place on a conditional use permit — Sullenberger wondered how extensive the county’s list of conditions attached to a permit could be. “Can we request any requirements as extensive as we wish them to be?”

Dowd said yes, and in granting a permit, the board is obligated to consider any issues it

determines are in the public’s interest. “You can make requirements prior to granting the permit, or make the permit contingent upon meeting the requirements. You can do it both ways,” she said. Also, the board can put contingencies attached to a permit with a time frame, a deadline, attached. Dowd described it as a chicken-and-egg problem. HNWD would not want to spend millions meeting board requirements without assurance the permit would eventually be granted, and the board would not want to grant the permit without assurance those requirements would be met. “And (providing a time frame) may be where the balance is,” she said. “If a conditional use permit is granted with contingencies, the governing body has not made the process impossible for any applicant to go through.” Furthermore, she told the board, “You have already asked the applicant (for some things) and I know some were not acceptable to them. You can ask the applicant for that now, or at the time of the public hearing on the conditional use permit, or go with what you’ve got and attach contingencies.”

■ The Federal Aviation Administration — Sullenberger asked about FAA regulations and whether the project could interfere with the Evers Military Operations Area, where fighter pilots train by flying at low altitudes. He said the county has been told by HNWD there would not be a problem with flight patterns, but “I’d like us to request that in writing from the applicant. They have said we could be assured (the project) is not going to be an issue, but we need a clear statement on that.”

■ Green Bank’s National Radio Astronomy Observatory — The observatory in Green Bank, W.Va. consists of an array of giant satellites that “listen” in space, and this area is considered a “quiet zone” for that purpose. Sullenberger said the county has contacted the facility and been told it doesn’t believe the 400-foot turbines would interfere, “but that doesn’t give us a clearly defined answer,” he said. Lambert explained the observatory would want to know the wind plant’s equipment was governed by the Federal Communications Commission. It would consider the turbines as “unintentional emitters” and that in general, interference would be unlikely unless there were anomalies in the mountainous landscape. Until the final location for the turbines is determined, however, the observatory cannot say for sure there will not be a problem. Once it knows where the turbines will be, observatory personnel can conduct tests.

■ Height — Sullenberger said one of the biggest issues surrounding the wind plant is the “extreme height,” something which “came out so profoundly publicly,” he said. “I would like to ask the applicant what the effect would

be if we were to put the height restriction at say, 250 feet or 200 feet ... what would be the impact on this project?" Sullenberger says he's had a variety of opinions from wind energy sources on this issue.

■ **Bat mortality** — Supervisors said they knew there were a lot of studies surrounding the effects of turbines on the bat population, and that in some localities, a moratorium on new projects is in place until further research can be completed. "We've been told by the industry, and Mr. McBride, that that's being worked on. But we need to ask for that in writing," Sullenberger said.

■ **Site plan** — Sullenberger said he'd heard a number of questions and a fair amount of criticism because the site plan was not well-defined or specific. He said the issue was clear to him when he stood in Penn and Leslie Goodall's yard back this summer when a group toured the area on Allegheny Mountain surrounding the project site. The Goodalls' view was in direct line of one of the turbine groupings, but no one was exactly sure where they would be seen. "There's no clear way to know where they'd be, and it's difficult to visualize the impact on individual property owners when you're not sure," Sullenberger said. The board hopes there is a way to determine that impact, though it did not refer to any specific study it could require. "I've physically stopped on Shenandoah Mountain and tried to figure out whether I can see them," Sullenberger added.

"You can request a simulation from various parts of the county," Dowd suggested. "That is required in a number of ordinances for cell towers. It's not unheard of."

■ **Clear-cutting** — Rexrode asked McBride whether any property would be clear-cut for the project. McBride said, "We do not anticipate clear-cutting anything. Maybe just a few junk trees on Tamarack."

■ **Local purchase of power** — McBride said to the best of his knowledge, there could be a way Highland residents could purchase renewable power. "We'd just as soon have Highland County's money as anybody's," he said. But Sullenberger made clear if that were true, it would only consist of "paper transactions," and not the actual power produced by HNWD's project here.

■ **The Nature Conservancy and the Valley Conservation Council** — The board had contacted both of these organizations for their opinions on McBride's proposal. Sullenberger said the conservancy had not taken a strong position yet, but is monitoring the situation, as is the VCC. The VCC, he noted, "tends to be a model for how to do things the right way. In an educational, not confrontational, way."

Tuesday, Sullenberger said the board would

release its list of questions to HNWD publicly once they've been written. "They are not formulated yet. We need to structure them in a way that assures we'll get a clear answer," he said. He said he'd already thought of another issue he'd like addressed: Obsolescence. Sullenberger said the wind industry is evolving rapidly, and he would like to understand how quickly it could make any current towers obsolete. "We don't have a finite list (of questions) yet. We're focusing on topics."

Rexrode said he would probably have even more questions after the public hearing on the permit request. "We're going to have to have work sessions," he said. "But I'd like most of these answered by the (time of the) public hearing."

What happens next?

Monday, Rexrode reiterated the need for Highlanders to decide whether they want wind energy facilities within the county's borders. "What Highland has to decide is whether it wants wind energy at all when it comes to a vote," he said.

The board has agreed it must address the issue as a whole in its comprehensive plan no matter what is ultimately decided with HNWD's application. It is possible the board could approve this project, and then eventually decide to adopt a county-wide ordinance that does not allow industrial wind development at all. If that turns out to be the case, Rexrode said, "then we'd be stuck with one — from McBride. But we could vote no on this, I really don't know. We have to look at the time factors. The man has an application there and we have to be open-minded enough to look at everything — revenue, land use. I cannot answer you where the board's going to go with this, but we are gathering a lot of information."

Supervisors meet in joint session with the Highland County Planning Commission and Monterey Town Council Thursday, Jan. 27 at 7:30 p.m. to review the new draft height regulations. It is likely at that time a public hearing on the language will be scheduled. Supervisors have not rescheduled a public hearing on HNWD's conditional use permit request, and are unlikely to do so before new height regulations are adopted.