STATE OF NORTH CAROLINA

COUNTY OF PERQUIMANS

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
15 EHR 07012

STEPHEN E. OWENS and JILLANNE G. BADAWI, Petitioners, v. N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF ENERGY MINERAL AND LAND RESOURCES, Respondent, and WEYERHAEUSER COMPANY, Respondent-Intervenor, and PASQUOTANK COUNTY, Respondent-Intervenor.	**FINAL DECISION** **SUMMARY JUDGMENT FOR RESPONDENT**

PROCEDURAL BACKGROUND

This matter is before the undersigned Administrative Law Judge on the parties' Cross-Motions for Summary Judgment. This contested case involves Petitioner's appeal of the March 18, 2015 determination by Respondent Department of Environmental Quality ("DEQ"), Division of Energy, Mineral, and Land Resources ("DEMLR") that Iberdrola Renewables' Desert Wind Project is not subject to the permitting provisions of N.C. Gen. Stat. §§ 143-215.115, *et seq*.

The undersigned has considered the motions, the supporting memoranda and responses filed by the parties, the arguments presented by all parties at the April 13, 2016 hearing on this matter, the applicable statutes and North Carolina Session Law, relevant legal precedent, and the entire record in this case. On June 15, 2016, the undersigned issued an Order Granting Summary Judgment for Respondent, because:

> Respondent acted properly in determining that the Iberdrola Renewables' Desert Wind Project is not subject to the permitting provisions of N.C. Gen. Stat. § 143-215.115 through -215.226 ("The Wind Act"). The plain language of N.C. Gen. Stat. § 143-215.115, including Session Law 2013-51, s. 2 ("the Grandfather

> Clause") exempted the Desert Wind Project from The Wind Act's permitting requirements. . . .
>
> Even if the language of The Wind Act and the Grandfather Clause are construed to be ambiguous, the purpose of the Grandfather Clause, the circumstances surrounding The Wind Act's enactment, and the structure and language of The Wind Act show that the N.C. General Assembly intended for the Desert Wind Project to be exempt from The Wind Act, notwithstanding the minor changes to the Desert Wind Project after the May 21, 2013 effective date of The Wind Act.

(June 15, 2016 Order)

APPEARANCES

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ISSUE

Did Respondent properly determine that, pursuant to N.C. Session Law 2013-51, sec. 2, the Desert Wind Project is exempt from the permitting requirements of N.C. Gen. Stat. §§ 143-215.115, *et seq*.?

UNDISPUTED FACTS

N.C. Gen. Stat. § 150B-34(e) authorizes an administrative law judge to grant Summary Judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, "that disposes of all issues in a contested case." A decision granting summary judgment "need not include findings

of fact or conclusions of law," except as determined by the administrative law judge. Under that authority, the undersigned hereby finds the following undisputed facts are relevant to the summary disposition of this contested case:

1. Petitioners Stephen E. Owens and Jillanne G. Badawi own property near the Desert Wind Project, and appealed Respondent's determination on September 25, 2015 by filing a petition for a contested case hearing.

2. Respondent-Intervenor Weyerhaeuser Company ("Weyerhaeuser") leases land for the project to Iberdrola Renewables, and intervened in this case in support of Respondent's determination. Pasquotank County, which has entered into an economic development agreement with Iberdrola Renewables, also intervened in support of Respondent's determination, with its intervention limited in scope to the proper interpretation and construction of Session Law 2013-51.

3. On or before 2013, the U.S. Department of Defense's ("DOD") was concerned when another wind energy project developer leased site for wind turbines directly in military training paths used by Seymour Johnson Air Force Base for low altitude flight training. DOD's concerns with that project and with future wind energy projects in North Carolina caused the N.C. Department of Environment and Natural Resources ("NCDENR") and the North Carolina General Assembly to draft the Wind Act to give NCDENR authority to review the proposed siting of wind energy projects based on considerations of potential environmental and military impacts.

4. On May 17, 2013, the North Carolina General Assembly enacted Session Law 2013-51 ("S.L. 2013-51" or "Wind Act"), creating a new wind energy permitting program under which developers of future wind energy projects in North Carolina are required to apply for and receive permits to build and operate wind energy facilities. *See* An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, Ch. 51, 2013 N.C. Sess. Law 51 (codified at N.C. Gen. Stat. §§ 143-215.115, *et seq*.).

5. Iberdrola Renewables ("Iberdrola") and its wholly-owned subsidiary Atlantic Wind, LLC ("Atlantic Wind") had been developing the Desert Wind Project, a 300 megawatt wind energy facility, for several years before the May 17, 2013 passage of S.L. 2013-51. As of May 17, 2013, Iberdrola had:

- secured Determinations of No Hazard to Air Navigation ("DNHs") from the Federal Aviation Administration ("FAA") for 166 proposed wind turbines in Pasquotank and Perquimans Counties;

- obtained DNH extensions from the FAA for 150 wind turbines in Pasquotank and Perquimans Counties;

- entered into an economic development agreement with Pasquotank County;

- entered into an economic development agreement with Perquimans County;

- obtained a conditional use permit ("CUP") from the Board of Commissioners of Pasquotank County**;**

- obtained a CUP from the Board of Commissioners of Perquimans County;

- obtained a Water Quality Certification under section 401 of the Clean Water Act from the North Carolina Division of Water Quality;

- obtained a Certificate of Public Convenience and Necessity from the North Carolina Utilities Commission ("NCUC");

- obtained a Certificate of Environmental Compatibility and Public Convenience and Necessity from the NCUC for construction of a transmission line to connect the Desert Wind Project with the Virginia Electric and Power Company;

- obtained a letter from the North Carolina Division of Coastal Management on March 5, 2012 ("Consistency Determination"), determining that the Desert Wind Project is consistent with North Carolina's coastal management program; and

- entered into various property agreements with landowners to site turbines and supporting infrastructure for the Desert Wind Project on landowners' property.

6. NCDENR agreed with DOD that it would be unfair to subject the Desert Wind Project to the proposed wind energy permitting program, so NCDENR and the General Assembly negotiated a provision of the Wind Act (Section 2) to specifically exclude the Desert Wind Project from the statutory permitting program.

7. When the Wind Act became law, the Desert Wind Project was the only facility in North Carolina that had received DNHs from the FAA.

8. DNHs are issued by the FAA in response to the filing of an FAA Form 7460 Notice of Proposed Construction or Alteration ("Notice") if the FAA determines that the proposed construction or alteration poses no hazard to air navigation, among other considerations. *See* 49 U.S.C. § 44718; 14 C.F.R. § 77.31.

9. On June 29, 2011, the FAA issued DNHs to Iberdrola for 166 wind turbines. The DNHs were valid for eighteen months, expiring on December 29, 2012, unless extended or construction commenced. Iberdrola filed Notices for an extension of 150 of the 166 initial DNHs.

On November 21, 2012, the FAA extended these DNHs for an additional eighteen months, with an expiration date of May 21, 2014.

10. On February 20, 2014, Iberdrola filed Notices with the FAA for 150 wind turbines with the same locations and maximum tip heights as specified in the 150 DNHs that the FAA issued in 2011 and extended in 2012.

11. On June 27, 2014, to accommodate the use of a more efficient turbine model, Iberdrola filed a second set of Notices for 150 wind turbines with a maximum tip height of 499 feet above ground level ("AGL"), an increase of thirteen feet (less than three percent) from the 486 foot AGL maximum tip height in the previously-issued DNHs. On December 2, 2014, in response to Iberdrola's FAA Notices filed on June 27, 2014, Iberdrola received DNHs from the FAA for 104 wind turbines with a 499 foot above ground maximum tip height.

12. On November 5, 2014, Iberdrola entered into an agreement with the DOD and the U.S. Department of the Navy at the conclusion of approximately three years of studies regarding potential impacts of the Desert Wind Project on radar. By its own terms, the agreement was "structured to enable Iberdrola Renewables and Atlantic Wind to *proceed immediately* with the construction and operation of the Wind Project." The agreement provided that the coordinate locations of the Project's turbines could change by plus or minus 100 feet in longitude or latitude.

13. On March 18, 2015, Brad Atkinson, Energy Section Chief for DEQ, sent a letter to Craig Poff, Director of Business Development for Iberdrola Renewables, stating, "DENR has determined that Iberdrola's Desert Winds Project is subject to the State's wind energy facility permitting process."

14. On March 26, 2015, Mr. Atkinson sent Mr. Poff a subsequent letter inviting Iberdrola to submit additional information to demonstrate that the Desert W ind Project did not require a state wind energy permit. The letter stated, "[o]nce your response is received, we will expeditiously reevaluate the permit applicability." On April 2, 2015, counsel for Iberdrola sent a response letter to DEQ providing up-to-date information regarding (1) the status of the DNHs for the Desert Wind Project, (2) changes to the project boundary from the date of the Wind Act's enactment, and (3) modifications to the wind turbine specifications from the date of the enactment.

15. Upon receiving this information, DEQ reevaluated the applicability of the Wind Act to the Desert Wind Project. DEQ considered that the Desert Wind Project had DNHs in place when the Wind Act became effective; the geographical area of the project had not increased since the effective date of the Wind Act; and the number of wind turbines planned for the project had actually decreased. The Division also considered that the heights of the wind turbines had increased slightly, and that the coordinate locations of some turbines had changed slightly by less than plus or minus 100-feet in longitude or latitude. The Division determined that the change in projected turbine height and in coordinate locations of some turbines did not implicate the permitting provisions of the Act.

16. On April 29, 2015, Brad Atkinson sent a letter to Craig Poff stating:

> DENR has renewed its review of the Act and has determined that Iberdrola's Desert Wind Project is not subject to permitting provisions of the Act based on a plain reading of the Act. This is true because the FAA issued determinations to Iberdrola, for its Desert Wind Project, on June 29, 2011, prior to the Act becoming law, despite the fact that these FAA issued determinations subsequently expired on May 21, 2014. Likewise, the fact that individual turbines within the Desert Wind Project have both increased in heights and changed coordinate locations from Iberdrola's June 2011 FAA issued determinations does not implicate the permitting provisions of the Act.

CONCLUSIONS OF LAW

1. The N.C. Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C. Gen. Stat. §150B-23 et seq., and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law contain Findings of Fact, they should be so considered without regard to the given labels.

2. Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [the moving party] is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). A material fact is one that may "affect the result of the action." *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 116 (2011). A "genuine issue" about a material fact must be "supported by substantial evidence." *DeWitt v. Eveready Battery Co., Inc.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). "Substantial evidence" is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' and means 'more than a scintilla or a permissible inference.'" *Id.* (citations omitted).

3. The North Carolina Administrative Procedure Act ("APA") provides the applicable standard for reviewing state agency decisions. This Court must determine whether the petitioner has shown that the agency deprived the petitioner of property, ordered the petitioner to pay a fine or civil penalty, or otherwise substantially prejudiced the petitioner's rights and:

> (1) Exceeded its authority or jurisdiction;
> (2) Acted erroneously;
> (3) Failed to use proper procedure;
> (4) Acted arbitrarily or capriciously; or
> (5) Failed to act as required by law or rule.

N.C. Gen. Stat. 150B-23(a).

4. In *Strickland v. Hedrick*, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008) (quoting *Leete v. County of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995)), the Court noted that in deciding cases under the APA:

> [i]t is well settled that absent evidence to the contrary, it will always be presumed 'that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.'

The presumption of good faith "'places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence." *Id.*

5. Courts are further required to accord deference to an agency's interpretation of the statutes it is authorized to administer. Indeed, "even when reviewing a case de novo, courts recognize the long-standing tradition of according deference to the agency's interpretation." *County of Durham v. North Carolina Dep't of Env't. & Natural Res*., 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998), *disc. rev. denied*, 350 N.C. 92, 528 S.E.2d 361 (1999) (citations omitted); *see also Total Renal Care of N.C., LLC v. North Carolina Dept. of Health and Human Services,* ___ N.C. App. ___, 776 S.E.2d 322, 324 (2015) (stating that courts must defer to the agency's interpretation of a statute "as long as the agency's interpretation is reasonable and based on a permissible construction of the statute.")

The plain language of the Wind Act exempts the Desert Wind Project from the statute's permitting requirements.

6. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citations omitted). "'When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.'" *Id.* (quoting *Lemons v. Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 688, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988)).

7. According to the plain language of Section 2 of the Wind Act, the statute applies *only* to wind energy facilities or expansions that had not already received a written DNH from the FAA the time the law became effective. *See* S.L. 2013-51, sec. 2 ("Section 2" or "Grandfather Clause"). Specifically, Section 2 of the Wind Act provides:

> Section 2. This act is effective when it becomes law and applies only to those wind energy facilities or wind energy facility expansions that have not received a written "Determination of No Hazard to Air Navigation" issued by the Federal Aviation Administration on or before that date.

8. It is undisputed that the Desert Wind Project had received "a written Determination of No Hazard to Air Navigation" prior to May 17, 2013. It received 166 DNHs on June 29, 2011, and received extensions on 150 DNHs on November 21, 2012. Therefore, under the plain language of the Grandfather Clause, the Desert Wind Project is exempted from the Wind Act's permitting requirements.

9. Petitioners made various arguments, each in the alternative, challenging this straightforward reading of the statutory text. First, Petitioners contend that minor adjustments to

the specifications of the Desert Wind Project's wind turbines caused the Desert Wind Project to become a "new" wind energy facility for purposes of applying the Grandfather Clause. They alternatively argue that each individual turbine constitutes a separate Wind Energy Facility for purposes of applying the Grandfather Clause. Neither reading is supported by the plain language of the statute.

10. According to the definitions section of the Wind Act, the term "wind energy facility" refers to a project as a whole. The Wind Act defines "wind energy facility" as:

> the turbines, accessory buildings, transmission facilities, and any other equipment necessary for the operation of the facility that *cumulatively*, with any other wind energy facility whose turbines are located within one-half mile of one another, have a rated capacity of one megawatt or more of energy.

N.C. Gen. Stat. § 143-215.115(2) (emphasis added). By defining wind energy facility "cumulatively" as the combination of the above-mentioned structures, the statute makes clear that it is a project as whole that matters for purposes of the Grandfather Clause.

11. Petitioners alternatively contend that the Desert Wind Project should be considered a "wind energy facility expansion," notwithstanding the fact that the number of turbines and the overall size of the project's geographic footprint have decreased since the Wind Act's enactment. Again, Petitioners' argument is not supported by the plain language of the statute, which defines "Wind Energy Facility Expansion" as a "substantial" change to turbines or a facility's geographic footprint "beyond that which was initially permitted." Petitioners' argument fails for two reasons.

a. First, the Desert Wind Project was never "permitted" under the Wind Act; in fact, it was excluded from permitting requirements, because the Project had DNHs in place on May 17, 2013. Therefore, the Project, cannot meet the definition for "expansion" set forth in N.C. Gen. Stat. § 143-215.115(2).

b. Second, the term "expansion" as used in the Wind Act plainly contemplates changes to a permitted project, and not minor adjustments to a project plan for a proposed wind energy facility.

12. The Grandfather Clause requires *only* that a wind energy facility have received a DNH before May 17, 2013 to quality for exemption. In this case, it is undisputed that the Desert Wind Project had "a written Determination of No Hazard to Air Navigation" as of May 17, 2013. Therefore, the plain language of the N.C. Gen. Stat. §§ 143-215.115 and the Grandfather Clause of the Wind Act exempted the Desert Wind Project from the Wind Act's permitting requirements.

13. The purpose and structure of the Wind Act and the circumstances surrounding its enactment demonstrate that Respondent's determination is consistent with legislative intent.

14. When the plain language of a statute is clear and unambiguous, "courts must give effect to the plain meaning of the statute and judicial construction of legislative intent is not required." *N. Carolina Dep't of Correction v. N. Carolina Med. Bd.,* 363 N.C. 189, 201, 675

S.E.2d 641, 649 (2009) (citations omitted). Only when the language of a statute is ambiguous will North Carolina Courts consider "the purpose of the statute and the intent of the legislature in its enactment" when determining the proper construction of the statute. *Id*. In such cases courts must look to "the spirit of the act and what the act seeks to accomplish" and also to the harm that the act seeks to avoid. *Coastal Ready–Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980); *In re Hardy*, 294 N.C. 90, 96, 240 S.E.2d 367, 372 (1978)

15. Because the plain language of the Wind Act resolves this matter, consideration of legislative intent is not required here. However, even if the language of the Wind Act and the Grandfather Clause are construed to be ambiguous, the purpose of the Grandfather Clause, the circumstances surrounding the Wind Act's enactment, and the structure and language of the Wind Act show that the N.C. General Assembly intended the Desert Wind Project to be exempt from the Wind Act, notwithstanding the minor changes to the Desert Wind Project after the May 21, 2013 effective date of the Wind Act.

16. The purpose of the Wind Act's Grandfather Clause is self-evident. By exempting projects that have received DNHs from the FAA, the Wind Act ensures that wind energy projects that had already invested significant resources in development, including obtaining regulatory approvals, would not be subjected to an unforeseen and potentially costly permitting process. *See, e.g., State ex rel. Utilities Comm'n v. Fleming*, 235 N.C. 660, 668, 71 S.E.2d 41, 47 (1952) ("the purpose of a grandfather clause is to protect and preserve bona fide rights existing at the time of the passage of the legislation which contains such clause"). Respondent's interpretation is reasonable and consistent with this purpose.

17. Respondent's interpretation is also consistent with the goals that the Wind Act seeks to achieve: 1) minimizing impacts to military operations and air navigation, *see*, N.C. Gen. Stat. §§ 143-215.117(c), -215.118(b), -215.119(a), & -215.119(c); 2) minimizing environmental impacts, s*ee* N.C. Gen. Stat. §§ 143-215.117(a), -215.117(b)(4), -215.119(a)(10); 3) providing public notice and opportunity for comment, *see* N.C. Gen. Stat. § 143-215.119(e); and 4) obtaining financial assurance from developers for the decommissioning of renewable energy infrastructure, *see* N.C. Gen. Stat. 143-215.121.

18. As of May 22, 2013, Iberdrola had secured DNHs for 166 turbines from the FAA; entered into economic development agreements with and obtained conditional use permits from Perquimans and Pasquotank Counties requiring *inter alia* consideration of environmental impacts and compliance with financial assurance obligations; obtained a 401 water quality certification from the Division of Water Resources; obtained a Certificate of Public Convenience and Necessity from NCUC; received a Consistency Determination from the Division of Coastal Management imposing various conditions for environmental protection; held three public hearings in Pasquotank and Perquimans Counties; and entered into property agreements with landowners to site the wind facilities and supporting infrastructure on landowners' property. Iberdrola has since entered into an agreement with the US Department of Defense and the US Department of Navy authorizing Iberdrola to commence construction on the Desert Wind Project immediately. Requiring Iberdrola to go through the permitting process would frustrate the legislature's purpose in enacting the Grandfather Clause, and promote the very harm the legislature sought to avoid.

19. Respondent's interpretation is further supported by the circumstances surrounding the enactment of the statute. Clearly, as of May 17, 2013, Iberdrola was the only project that could have fallen within the purview of the Grandfather Clause. Under Petitioners' desired reading of the statute, Section 2 will have no application whatsoever to any wind facility in the State.

20. Finally, Respondent's interpretation is supported by the structure of the Wind Act. The Act allows for changes to a proposed wind energy facility's plans during the application phase of a permit without requiring the applicant to submit a new application, *i.e.* the statute does not treat changes to a project plan as creating a new facility or expansion warranting a new permit application. *See* N.C. Gen. Stat. § 143-215.119(d) (recognizing that there may be "supplements, changes, or amendments to the permit application"); N.C. Gen. Stat. § 143-215.120(c) (discussing consideration of a reconfigured project).

21. Respondent's determination that the Desert Wind Project is not subject to the Wind Act's permitting requirements is thus consistent with the purpose of the Wind Act's Grandfather Clause and the Wind Act as a whole.

22. Respondent therefore did not exceed its authority or jurisdiction, did not act erroneously, did not fail to use proper procedure, did not act arbitrarily or capriciously, and did not fail to act as required by law or rule.

FINAL DECISION BY SUMMARY JUDGMENT

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **GRANTS** summary judgment to Respondent and Respondent-Intervenors.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**.

In conformity with 26 N.C.A.C. 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**.

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial

Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 4th day of October, 2016.

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Melissa Owens Lassiter
Administrative Law Judge