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. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF ENERGY, MINERAL AND LAND RESOURCES Respondent.	MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

NOW COME Petitioners, Stephen E. Owens and Jillanne G. Badawi, by and through the undersigned counsel, and file this Memorandum of Law in Opposition to Respondent's Motion to Dismiss.

PROCEDURAL HISTORY & STATEMENT OF FACTS

On September 25, 2015, Steve Owens and Jillanne Badawi – husband and wife – filed a petition for a contested case hearing with the Office of Administrative Hearings. In their petition, they alleged that they were aggrieved by the Respondent's April 29, 2015 letter to Iberdrola Renewables. Specifically, petitioners alleged that this letter constituted an *ultra vires* act and deprived Petitioners of the protections of the legislatively-enacted wind permitting process of Session Law 2013-51. *See* An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, ch. 51, 2013 N.C. Sess. Laws 51 (codified at N.C. Gen. Stat. §§ 143-215.115, et seq.) Hereinafter, Petitioners refer to this law as the "Wind Energy Act."

Petitioners' case centers on what was then called the "Desert Wind Project," and is now called the "Amazon Wind Farm East." This development, first conceived of in 2011 and reinvented in 2014, is a product of Atlantic Wind, a subsidiary of Iberdrola Renewables. Under federal law, and for each of the 151 tall structures that made up its original plan for the Desert Wind Project, Iberdrola was required to obtain Federal Aviation Administration ("FAA") determinations that the tall structures posed no hazard to civil aviation. On June 29, 2011, the FAA issued 151 "Determinations of No Hazard to Air Navigation" for Iberdrola's original Desert Wind Project plan. These determinations expired on December 29, 2012.

On May 17, 2013, the North Carolina General Assembly enacted the aforementioned Wind Energy Act. The Act, by its own terms, applies only to wind energy facilities that have not received a written "Determination of No Hazard to Air Navigation" issued by the Federal Aviation Administration (FAA) on or before that date. If Iberdrola had then constructed the facilities for which it had received no hazard determinations in 2012, the project would unquestionably not fall within the parameters of the Wind Energy Act, as that project had received the requisite Determinations of No Hazard to Air Navigation from the FAA. The Wind Energy Act does not require the FAA determination to be active or unexpired, but simply to have been received prior to the Wind Energy Act's effective date of May 17, 2013.

But Iberdrola abandoned the facilities for which it had previously received "no hazard" determinations. Instead, it plans to construct a different set of facilities, as evidenced by the 2014 applications for "no hazard" determinations that the corporation submitted to the FAA. The turbines at issue in the 2014 applications were of different sizes and were constructed in different locations. As this iteration of the Desert Wind Project did not receive FAA "no hazard"

determinations prior to the effective date of the Wind Energy Act, it is therefore subject to the Act's requirements.

Respondent reviewed this information, and reached the conclusion that the Desert Wind Facility, in its 2014 form, was clearly subject to the requirements of the Wind Energy Act, including but not limited to a permitting process, an environmental impact assessment, and opportunities for members of the community, like Petitioners, to be involved in the permitting and siting process. On March 18, 2015, Respondent issued a letter stating that because the 2014 version of the Desert Wind Project had not received FAA "no hazard" determinations prior to the effective date of the Wind Energy Act, the Desert Wind Project was subject to the requirements of the Act.

On April 29, 2015, little more than a month after issuing its original letter, Respondent issued a second letter completely contradicting its statements in March of 2015. Rather than being subject to the requirements of the Wind Energy Act, Respondent stated that Iberdrola's 2014 Desert Wind Project does *not* fall within the purview of the Act. Respondent made an affirmative statement of law that the Wind Energy Act does not apply to Iberdrola, and went so far to say that "the fact that individual turbines within the Desert Wind Project have both increased in height and changed coordinate locations from Ibedrola's June 2011 FAA issued determinations" does not bring the Desert Wind Project within the requirements of the Act. (Rsp't's April 29 Letter to Iberdrola Renewables). It is logically impossible that both Respondent's March 18 and April 29 letters contain correct statements of law, and it is clear on the face of the law that the second letter is in error.

It is unclear what happened in the period between Respondent's March and April letters. And while this petition does not focus on this point, it is worth noting Respondent's admission

that its April 29 letter "reflected Atlantic Wind's desired reading of the [Wind Energy Act]." (Rsp't's Mem. Supp. Mot. Dismiss 5). The Wind Energy Act was not enacted for the benefit of Atlantic Wind. Rather, it was enacted for the purpose of providing North Carolinians with protections against improperly constructed and/or sited wind energy facilities, as discussed further on pp. 12-13, *infra*.

Petitioners seek (1) a ruling from this Court finding the April 29, 2015 letter in error and not in accord with the law such that it aggrieves Petitioners and (2) an order from this Court requiring Respondent to retract its illegal letter of April 29, 2015, which constituted an action in violation of the Administrative Procedure Act and the Wind Energy Act. Respondent has moved to dismiss the Petition and submitted a memorandum in support of that motion. Petitioners now submit this memorandum explaining why their petition should properly survive Respondent's motion to dismiss based on the arguments made below.

ARGUMENT

This Court properly has subject matter jurisdiction over the petition because it is timely. The Petitioners never received proper notice of Respondent's action, and therefore the 60-day time period of G.S. 150B-23(f) did not run against them. Not only is this in line with North Carolina case law, but any other interpretation would allow Respondent to be able to determine who has standing to sue it, contravening the purpose of the Administrative Procedure Act.

This Court further has proper subject matter jurisdiction over the petition because Petitioners' claims are redressable by this Court. Respondent's implementation of the Wind Energy Act is not exempted from the contested case provisions of the Administrative Procedure Act. Further, this Court is capable of providing Petitioners with relief by ruling that the Respondent has acted in violation of G.S. 150B-23(a).

Petitioners have stated a claim upon which relief can be granted. Petitioners have properly alleged that Respondent has violated multiple provisions of the Administrative Procedure Act, the Wind Energy Act, and other statutes, and that these violations aggrieve Petitioners as defined in G.S. 150B-23(a). Respondent erroneously argues that it is not in any way bound by the provisions of the Wind Energy Act, and that its April 29 letter constitutes "inaction" that is not within the jurisdiction of this Court. Both contentions are without merit. Further, Respondent's motion to dismiss oversimplifies and mischaracterizes Petitioners alleged grievances. Petitioners have further stated a claim upon which relief can be granted in that they have alleged sufficient facts in support of their claim that Respondent engaged in an *ultra vires* act.

Finally, Petitioners note that Respondent has enumerated several legal actions previously or concurrently filed by people other than Petitioners against Respondent. Petitioners contend that these actions have no effect on their rights or this case.

I. THIS COURT PROPERLY HAS SUBJECT MATTER JURISDICTION OVER THE PETITION

a. The Petition is timely.

Respondent argues that Petitioners did not submit their petition to this Court in a timely fashion, and that the petition therefore must be dismissed for lack of subject matter jurisdiction. This argument is without merit. Respondent is correct in stating that "[i]n order for OAH to have jurisdiction over [a] petitioner's appeal... [the] petitioner is required to follow the statutory requirements outlined in [the General Statutes] for commencing a contested case." Nailing v. UNC-CH, 117 N.C. App. 318, 324, disc. review denied, 339 N.C. 614 (1995). Respondent is also correct that the time limitation for the filing of a contested case petition begins when notice is

given of the agency decision to all persons aggrieved "who are known to the agency." N.C. Gen. Stat. § 150B-23(f). However, Respondent is incorrect in its contention that this Court lacks subject matter jurisdiction. Rather, this Court has subject matter jurisdiction because (1) the 60-day limitation cannot properly be held to run against Petitioners until they receive the statutorily-required notice of the agency action, and (2) Respondent's proposed reading of the statute would frustrate the purpose of the Administrative Procedure Act by allowing Respondent to decide in advance who does and does not have standing to bring suit against it.

1. Petitioners received no notice of Respondent's action, and therefore the 60-day limitation of G.S. 150B-23(f) did not run against Petitioners.

Respondent admits that Petitioners were *not known* to the agency, and therefore did not receive notice of its agency decision. (Rsp't's Mem. Supp. Mot. Dismiss 5). But Respondent alleges that *because* Petitioners were not known to the agency, the time period for Petitioners to file a contested case petition began when Respondent gave notice of its decision to those people who *were* known to the agency. Id.

N.C. Gen. Stat. § 150B-23(f) does indeed provide that the time limitation to file a contested case petition begins "when notice is given of the agency decision to all persons aggrieved who are known to the agency." The question is whether this time limitation runs against *all* persons, or *only* those who receive notice of the agency's decision. Luckily, both basic principles of statutory interpretation and decisions of our state's appellate courts provide a clear answer.

The requirements of N.C. Gen. Stat. § 150B-23(f) are clearly meant to facilitate the assertion of rights against administrative agencies. The statute requires that the notice sent by an

agency to those harmed by an agency decision must "set forth the agency action, and…inform the persons of the right, the procedure, and the time limit to file a contested case petition." N.C. Gen. Stat. § 150B-23(f).

Where the Court of Appeals found that a group of petitioners had failed to file their petition within the 60-day statutory limitation, the Court was careful to state that this was because "petitioners failed to file their petition for a contested case hearing within 60 days after *they received* notice of the agency decision." House of Raeford Farms, Inc. v. State ex rel. Envtl. Mgmt. Comm'n, 112 N.C. App. 228, 232, 435 S.E.2d 106, 109 (1993), rev'd on other grounds, 338 N.C. 262, 449 S.E.2d 453 (1994)(emphasis added). The House of Raeford Farms court made this statement mere paragraphs after declaring that the language of the 60-day limitation "leaves no room for judicial construction because it clearly provides that a petition must be filed within the 60-day limitation." House of Raeford Farms, 112 N.C. App. at 230. The court, therefore, read the statute as requiring a petitioner to file their petition within 60 days after *they received* notice of the agency decision, and considered this to be the a plain reading of N.C. Gen. Stat. § 150B-23(f). On appeal, the North Carolina Supreme Court reversed the decision, but only on the grounds that the Court of Appeals had taken too rigid – not too loose – of an interpretation of the 60-day requirement to file a petition. House of Raeford Farms, Inc. v. State ex rel. Envtl. Mgmt. Comm'n., 338 N.C. 262 (1994).

Whereas Respondent failed to give Petitioners – landowners located directly adjacent to the wind facility at issue – notice of its April 29 decision, it would be improper to now allow Respondent to turn around and use its own failure as a shield to protect itself from suit.

2. Respondent's proposed reading of G.S. 150B-23(f) allows Respondent to decide who has standing to sue it, contravening the purpose of the Administrative Procedure Act.

Respondent's argument essentially goes that it did not consider there to be any potential "persons aggrieved" by its actions other than Iberdrola, and that because Respondent – in its own judgment – did not know of any other "persons aggrieved," the notice it sent to Iberdrola on April 29 was sufficient to start the 60-day time period in G.S. 150B-23(f) ticking as to *all* persons.

Respondent is a sophisticated state agency. As such, it certainly knew that there were landowners, like Petitioners, who would be affected by its April 29 letter. When Respondent argues that "the only party whose interests the agency *knew* would be directly affected by its decision was Atlantic Wind," it means to say that the only party that it would have considered a "person aggrieved" under the APA was Atlantic Wind. (Rsp't's Mem. Supp. Mot. Dismiss 5). But whether a Petitioner is properly considered a "person aggrieved" is a question to be decided by a court of competent jurisdiction, not the state agency who has allegedly done the aggrieving. Further, the Wind Energy Act clearly establishes a permitting process that includes public participation. Respondent could not be blind to the fact that those members of the public most likely to be aggrieved by its actions would be those who suffer from an inability to participate in a permitting process that Respondent itself had previously indicated would be necessary.

Respondent further argues that it cannot be expected to ascertain the identity of "all members of the public who might possibly be aggrieved by its correspondence with a single company." (Rsp't's Mem. Supp. Mot. Dismiss 5). On the contrary, Respondent absolutely *can* be expected to ascertain the identity of those who, like Petitioners, live directly next to a wind

energy facility on which respondent does a 180-degree regulatory about-face in the span of little over a month, particularly in light of Respondent's statutory duty to "provide for the...public health through the...administration of environmental health programs." N.C. Gen. Stat. § 143B-279.2(1b).

At issue in this case is whether Respondent has taken an action that aggrieves Petitioners. To allow Respondent to use its own determination that Petitioners and other landowners were not aggrieved by its April 29 letter as a shield would essentially allow it to render itself immune from suit by anyone that Respondent *itself* did not consider aggrieved at the time it took its disputed action. Such a reading not only renders G.S. 150B-23(f) essentially meaningless, but further contravenes the House of Raeford Farms court's understanding that the 60-day limitation begins running against a petitioner when they receive individual notice of an agency's decision. For these reasons, the Petition as filed is timely.

b. Petitioners' claims are redressable by this Court.

Petitioners' claims are redressable by this Court for two reasons. First, Petitioners' case is properly before this Court. Second, this Court is capable of providing Petitioners with relief.

1. Petitioners' case is properly before this Court.

The Administrative Procedure Act's contested case provisions apply to "all agencies and all proceedings not expressly exempted from the Chapter." N.C. Gen. Stat. § 150B-1(e). In the list of agencies and departments exempted from the APA's contested case provisions, Respondent is only mentioned insofar as its compliance with the procedural safeguards mandated by the Education of the Handicapped Act Amendments of 1986. N.C. Gen. Stat. § 150BN-1(e)(1). Respondent's implementation of the Wind Energy Act is *not* exempted from the APA's contested case provisions.

The North Carolina Court of Appeals confirmed this common-sense reading of the statute when applying the APA to Respondent in N. Buncombe Ass'n of Concerned Citizens, Inc. v. Rhodes, 100 N.C. App. 24 (1990). There, the court was presented with the question of whether a group of plaintiffs had properly challenged the defendant North Carolina Department of Natural Resources and Community Development – Respondent's predecessor – issuing a mining permit to Vulcan Materials Company, Inc. to operate a crushed stone quarry without requiring the company to submit to an environmental impact assessment.

In Rhodes, the Court held that "[Respondent] is not among those agencies which the APA specifically exempts from its provisions." Rhodes, 100 N.C. App. at 28. The Court further found that the statute at issue in that case did not "exclude [Respondent] or persons aggrieved by its decisions from the operations of the APA." Id. Likewise, the Wind Energy Act does not excuse Respondent or Petitioners from the operation of the APA.

In their petition and prehearing statement, Petitioners make clear that one type of relief they seek is "compliance with the permitting procedures established under the Act." (Pet'rs' Statement of the Case 3). In other words, they seek, among other things, a ruling from this Court that Respondent failed to act "as required by law," and that this failure "substantially prejudiced [Petitioners'] rights." N.C. Gen. Stat. § 150B-23(5). This is why the contested case provisions exist – so that a person "may commence an administrative proceeding to determine the person's rights, duties, or privileges." N.C. Gen. Stat. § 150B-22. Petitioners' case is therefore properly before this Court.

2. This Court is capable of providing Petitioners with relief.

In order to have standing, it must be likely that Petitioners' injury will be redressed by a favorable decision of this Court. *See* Marriott v. Chatham Cty., 187 N.C. App. 491, 494 (2007).

Petitioners satisfy this requirement of standing, and therefore this Court has subject matter jurisdiction, because the actions of Respondent have harmed Petitioners and this Court is capable of redressing that harm.

Petitioners do not allege that Respondent's failure to *order* Iberdrola to seek a permit is the harm at issue. The harm at issue is the illegal issuance of the April 29, 2015 letter by Respondent – or rather, the harm was Respondent's illegally informing Iberdrola that it is not subject to the requirements of the Wind Energy Act.

Had that letter not been issued, Petitioners would be in a very different situation than they are today. The rights and duties of all parties would be as they were in March of 2015, with Iberdrola having to go through the statutorily-enacted permitting process. Petitioners would have been able to participate in the "permit preapplication site evaluation meeting" required by N.C. Gen. Stat. § 143-215.117(c). Petitioners further would have been able to participate in the scoping meeting required by N.C. Gen. Stat. § 143-215.118. Finally, Petitioners could have participated in the public hearing mandated by N.C. Gen. Stat. § 143-215.119(f). These are real, concrete benefits which Petitioners have been denied by an action of Respondent. The question for this Court is whether, in taking this action, Respondent has "substantially prejudiced 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), (a)(1)-5)

Should this Court rule that, in issuing its April 29 letter, Respondent "substantially prejudiced [Petitioners'] 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," Respondent would be required to retract its letter. Were this to

happen, Iberdrola would be required to seek a permit, and Petitioners would be able to participate in that process, a demonstrably better situation than they are in today. For this reason, this Court is capable of granting Petitioners relief.

II. PETITIONERS STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

a. Petitioners have properly alleged that Respondent acted in violation of multiple provisions of the APA, the Wind Energy Act, and other statutes.

Respondent contends that Petitioners fail to state a claim upon which relief can be granted because Respondent has not violated any duty to Petitioners. Respondent's argument essentially goes that (1) Respondent is not obliged to carry out the permitting procedures of the Wind Energy Act and (2) Respondent's April 29 letter should be characterized as "inaction" that does not create a cause of action for Petitioners. Respondent is incorrect on both counts. Further, Respondent mischaracterizes Petitioners' arguments, and while the "straw man" version of Petitioners' grievances might not be sufficient to survive a motion to dismiss, Petitioners' actual petition has stated multiple claims that are cognizable under North Carolina law.

1. Respondent is obliged to carry out the permitting procedures of the Wind Energy Act, and even if it were not its April 29 letter still aggrieves Petitioners

The Executive Organization Act of 1973 charges Respondent with the duty to "provide for the protection of the environment and public health through…the administration of environmental health programs." N.C. Gen. Stat. § 143B-279.2(1b). Were Respondent's interpretation of the Wind Energy Act as being completely discretionary to be adopted by this Court, both N.C. Gen. Stat. § 143B-279.2(1b) and the provisions of the Wind Energy Act – in

addition to an untold number of environmental regulations – would be rendered essentially meaningless. Legislative intent must be ascertained by "such *indicia* as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished...and other like means." State v. Louali, 215 N.C. App. 176, 180 (2011).

Under Respondent's preferred interpretation of the Wind Energy Act, Respondent has no duty to *ever* implement its provisions – not just in Petitioners' case, but in any case past, present, or future. This despite the fact that the General Assembly enacted the Wind Energy Act to "to establish a permitting program for the siting and operation of wind energy facilities." 2013 North Carolina Laws S.L. 2013-51 (H.B. 484). The purpose of the statute is to "establish a permitting program" for wind energy facilities. But "the law as it prevailed before the statute" would be essentially unchanged by the Wind Energy Act under Respondent's preferred interpretation of the Act. Further, where "the end to be accomplished" is the increased regulation of wind energy facilities, the most plain and logical reading of the Wind Energy Act is that it charges Respondent with a duty to implement its provisions.

Petitioners contend that Respondent has a duty to enforce the provisions of the Wind Energy Act. But even absent this duty, Respondent's actions have still aggrieved Petitioners. Had the April 29 letter not issued and Iberdrola failed to seek a permit, they would be subject to enforcement for that failure. Respondent claims that enforcement is discretionary, but even if this were true, it would not undermine Iberdrola's duty. Petitioners would have multiple legal and political options if Iberdrola failed to seek a permit, regardless of whether Respondent took an enforcement action. Respondent's actions have therefore substantially prejudiced the

Petitioners' rights, regardless of whether enforcement of the Wind Energy Act would ultimately be discretionary.

2. The April 29 letter is not properly described as "inaction," but was rather an impermissible action by Respondent that aggrieved Petitioners.

Respondent takes issue with the fact that Petitioners are contesting its alleged "inaction," and cites case law to the effect that "[i]naction can constitute 'action' sufficient to trigger jurisdiction in OAH" only when "there is an obligation to act." North Carolina State Bd. of Educ. v. North Carolina Learns, Inc., 751 S.E.2d 625, 634 (N.C. Ct. App. 2013) review denied, 762 S.E.2d 209 (N.C. 2014). Specifically, Respondent points to a case where the State Board of Education did not respond to a charter school application, and the court held that this failure to respond was of no consequence because the State Board could not be penalized for such "inaction." Petitioners' argument that the Wind Energy Act charges Respondent with an affirmative obligation to act notwithstanding, Respondent is incorrect in characterizing its own April 29 letter as "inaction."

Respondent took it upon itself to send a letter to Iberdrola Renewables informing the corporation that it is not subject to the requirements of the Wind Energy Act. This letter deprived Petitioners of statutory protections. "Inaction" does not do to Petitioners what the actions of Respondent have done – namely, to set a wind energy developer free on adjacent land with no regard for statutorily enacted protections from which Petitioners otherwise would have benefitted. Indeed, the "inaction" in North Carolina Learns was of an entirely different character, where the State Board had ceased granting permits for virtual charter schools. The proper analogy in the present case would be if Iberdrola were to submit a permit application to

Respondent, and Respondent were simply not to act on the permit. Had the State Board of Education in North Carolina Learns reached out to Charter Schools and told them that they were no longer subject to the state's statutorily-enacted permitting process, the case would be closer to being on point.

If factual questions exist as to whether and to what extent the actions of Respondent have harmed Petitioners, those questions are properly decided at a contested case hearing and not on a motion to dismiss. But there can be no question that a regulatory agency taking the affirmative step of sending a letter to a corporation exempting it from environmental protections does not constitute "inaction" of the type considered by the Court of Appeals in Respondent's principal case on the topic.

3. Respondent oversimplifies and mischaracterizes Petitioners' petition as alleging only one type of wrong, when in fact Petitioners allege five.

Respondent puts at the core of its argument the idea that Petitioners "primary grievance is that Respondent 'failed to act as required by law,'" and that "because the agency error alleged in the Petition is that the agency failed to act as required by law, and Petitioners fail to point to any statutory provision requiring the agency to act, the Petition fails to state a claim upon which relief can be granted." (Rsp't's Mem. Supp. Mot. Dismiss 8, 10). This grossly misconstrues both Petitioners' grievances and the Administrative Procedure Act. Petitioner has alleged that Respondent committed all five wrongs listed in N.C. Gen. Stat. § 150B-23(a)(1-5) not merely because Petitioners' counsel checked all five boxes for the sake of checking all five boxes, but because *Respondent committed all five wrongs*. Barring a finding by this Court that the facts

alleged in the Petition cannot possibly amount to a substantial prejudice to Petitioners' rights and *any* of these five wrongs, Petitioners' case properly survives a motion to dismiss.

b. Petitioners have alleged facts supporting their claim that Respondent engaged in an *ultra vires* act.

An *ultra vires* act is one that is beyond the power of an agency. Petitioners use the term *ultra vires* to allege that the April 29 letter was beyond the scope of Respondent's jurisdiction as described in N.C. Gen. Stat. § 150B-23(a)(1). Thus, Petitioners have alleged that Respondent has engaged in an *ultra vires* act.

An analogous situation would be if the North Carolina Attorney General were to inform Iberdrola that it would not be subjected to the consumer protection provisions of the Unfair and Deceptive Trade Practices Act. Such an action would frustrate legislatively enacted protections and exceed the authority of the Attorney General.

Respondent claims "state agencies routinely give guidance to the regulated community regarding the application of the laws they administer." (Rsp't's Mem. Supp. Mot. Dismiss 11). But it is telling that Respondent cites *no* statute or case law granting it the power to inform a private corporation that it is exempt from the requirements of a legislatively enacted regulation. To the extent that there is a question as to whether or to what extent Respondent exceeded its jurisdiction in violation of the Administrative Procedure Act, that question is properly determined at a contested case hearing where this Court can be beneficiary to a full hearing on the merits, or alternatively on a summary judgment motion, but not on a motion to dismiss.

III. LEGAL ACTIONS OTHER THAN PETITIONERS' HAVE NO IMPACT ON THIS CASE

In the "Procedural History & Statement of Facts" section of Respondent's Memorandum of Law in Support of Motion to Dismiss, Respondent provides a list of legal actions previously or concurrently filed by people other than Petitioners against Respondent. The purpose of this list is somewhat of a mystery to Petitioners. Respondent has provided no law in support of the idea – or even argued – that these cases have any legal effect on Petitioners' claims. To the extent that Respondent comments on the fact that Petitioners have the same *pro bono* legal counsel as others who are seeking to vindicate their rights in North Carolina's courts, it would seem Respondent is perhaps trying to argue that Petitioners or their counsel are doing something that negatively impact Petitioners' case or is otherwise impermissible. However, Respondent has advanced no law or argument in favor of this position, nor can they. To the extent that Respondent argues that Petitioners' use of the same *pro bono* counsel as others should negatively impact their case, Petitioners contend that this argument is without merit.

CONCLUSION

For the foregoing reasons, Respondent's motion to dismiss should be denied in its entirety.

Respectfully submitted this the 19th day of November, 2015

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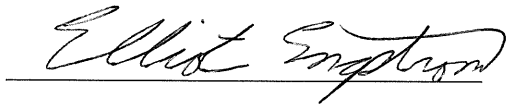
*Admitted to practice in this case by the Oct. 28, 2015 order of this Court granting *pro hac vice* admission.

CERTIFICATE OF SERVICE

I certify that the attached MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS has been served on the Respondent by depositing a copy with the United States Postal Service with sufficient postage, addressed to:

Served on: Asher Spiller
North Carolina Department of Justice
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001
Counsel for Respondent

This the 19th day of November, 2015.

By: 

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