

FILED

STATE OF NORTH CAROLINA
COUNTY OF PERQUIMANS

2015 NOV 7 2 PM 4: 14

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EHR 07012

OFFICE OF ADMIN HEARINGS

STEPHEN E. OWENS and JILLANNE G.)
BADAWI)
Petitioners,)
v.)
NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENTAL QUALITY)
Respondent.)

PETITIONERS'
PREHEARING STATEMENT

NOW COME Petitioners, Stephen Owens and Jillanne Badawi, by and through their attorney, Elliot Engstrom, and file this Prehearing Statement pursuant to the Order signed by the Honorable Melissa Owens Lassiter, Administrative Law Judge, on October 6, 2015.

The paragraphs of this Prehearing Statement correspond to those of the October 6, 2015 Order. Petitioners reserve the right to amend this Prehearing Statement as this matter progresses.

1. The Issues To Be Resolved: This matter involves an April 2015 letter sent by Respondent to Iberdrola Renewables stating that Iberdrola's Desert Wind Project is not subject to North Carolina's wind energy facility permitting process. This April 2015 letter contradicted an earlier March 2015 letter declaring that the Desert Wind Project was subject to North Carolina's wind energy facility permitting process. The issue to be resolved is whether Respondent's determination that the Desert Wind Project is not subject to the permitting provisions of N.C.G.S. 143-215.115 thru 215.226 was an *ultra vires* act, and therefore void.
2. A Brief Statement of Facts and Reasons Supporting the Party's Position on Each Matter in Dispute: In 2011, Atlantic Wind, a subsidiary of Iberdrola Renewables, proposed construction of a wind energy facility in Perquimans and Pasquotank Counties. Iberdrola obtained FAA determinations stating that the 151 tall structures comprising the facility posed

no hazard to civil aviation. Those determinations expired on December 29, 2012. On June 27, 2014, Iberdrola made substantial changes to the proposed project, and thereafter submitted new applications to the FAA for determinations of no hazard to air navigation.

On May 17, 2013, after the expiration of the 2012 FAA determinations, but before Iberdrola made changes to its proposed project in June of 2014, the North Carolina General Assembly enacted a statute requiring anyone building a wind energy facility or expanding such a facility to obtain a permit from Respondent.

Iberdrola submitted information regarding changes to the proposed Desert Wind facility to Respondent. Respondent reviewed this information, and in March of 2015 issued a letter informing Iberdrola that the project was subject to North Carolina's new wind energy facility permitting process (which included an environmental impact study). One month later, Respondent issued a second letter that indicated it had "renewed its review of the Act" and declared that the Desert Wind Project is not subject to permitting.

Respondent's second letter was not within its authority to issue. The language of N.C.G.S. §§ 143-215.115 thru 215.226 is clear – the requirements of the Act apply to new wind energy facilities or wind energy facility expansions that have not received an FAA "no hazard determination" before the effective date of the Act – May 17, 2013. Iberdrola made substantial changes to its proposed project in 2014. It is therefore a new project, or, in the alternative, an expansion of a proposed facility.

Petitioners, who are adjacent property owners to the land upon which the facility is currently being constructed, are aggrieved by Respondent's *ultra vires* act because the purpose of N.C.G.S. 143-215.115 thru 215.226 was to protect: (1) the interest of the military, (2) the environment, and (3) nearby residents and others who may be exposed to unknown

health impacts, and who may suffer diminished enjoyment and value of their property. Failure to require Iberdrola to go through the permitting process deprives Petitioners of statutorily-enacted protections from which they otherwise would have benefitted. In other words, the question is not whether Respondent made a “good” decision, but whether Respondent made a decision that it was allowed to make. As an executive agency, Respondent has discretion as to how to implement the law, but it cannot simply opt to not implement a portion of the General Statutes.

The permitting process not only will provide Petitioners and Respondent the information necessary to review the requisite permit under the Act; it will also provide Petitioners procedural relief from any arbitrary and capricious behavior by Respondent and expose any environmental dangers through the required environmental impact study. The *ultra vires* act eliminated the protections the Act is intended to provide to North Carolina citizens and specifically to nearby residents such as Petitioners. This aggrieves Petitioners, and they can be made whole only by an order of this Court requiring Respondent to comply with the permitting procedures established under the Act.

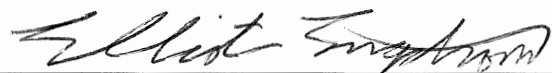
3. The Statutes, Rules and Legal Precedents Involved: Relevant statutes and rules include:
 - An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, N.C.G.S. §§ 143-215.115 thru 215.226.
 - Article 7 of the Executive Organization Act of 1973, N.C.G.S. §§ 143B-275 thru 344.60.
4. Proposed Witnesses: Petitioners may call the following persons to testify as witnesses in this contested case:

- Brad Atkinson, Chief, Energy Section of the Division of Energy, Mineral and Land Resources, N.C. Department of Environmental Quality.
- Donald R. van der Vaart, Secretary, N.C. Department of Environmental Quality.

Additionally, Petitioners may call as a witness any person familiar with the facts of this case, as well as any person named as a witness by any other party. Petitioners reserve the right to supplement this list as they prepare for hearing in this matter.

5. Discovery: As of this writing, Petitioners have not yet received a Scheduling Order in this case. Petitioners shall proceed with discovery as the Order dictates, or provide a reasonable alternative proposed schedule for discovery.
6. Hearing Date and Location: Assuming all witnesses are available for hearing, and barring any unforeseen need to extend the deadlines for completion of discovery, Petitioners anticipate that they will be ready for hearing by any reasonable date set in the discretion of the Court. Petitioners understand that the hearing will be held in Hertford, North Carolina.
7. Not applicable.
8. Estimated Length of Hearing: Petitioners estimate that the hearing will take one (1) day to complete.
9. Other Special Considerations: As of this writing, Petitioners have no special considerations of which this Court should take notice.

Respectfully submitted this the 2nd day of November, 2015.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PREHEARING STATEMENT was served on all parties by depositing true copies thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

Asher Spiller
NC Department of Justice
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001
Counsel for Respondent

This the 2nd day of November, 2015.



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