STATE OF NORTH CAROLINA COUNTY OF PERQUIMANS	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 15 EHR 07012

STEPHEN E. OWENS and JILLIANNE G. BADAWI, Petitioners, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF ENERGY, MINERAL AND LAND RESOURCES Respondent, WEYERHAEUSER COMPANY, Respondent-Intervenor, and PASQUOTANK COUNTY, Respondent-Intervenor.	**RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

NOW COMES Respondent, North Carolina Department of Environmental Quality ("NCDEQ"),[1] Division of Energy, Mineral and Land Resources ("Division"),[2] by and through the undersigned counsel, pursuant to 26 N.C.A.C. 03.0101 and Rule 56 of the North Carolina Rules of Civil Procedure, and files this Memorandum of Law in Support of its Motion for Summary Judgment filed contemporaneously herewith.

INTRODUCTION

On May 17, 2013, the North Carolina General Assembly enacted Session Law 2013-51

[1] The North Carolina Department of Environment and Natural Resources has been renamed the North Carolina Department of Environmental Quality effective September 18, 2015.
[2] In November 2015, the Energy Section of the Division, which is tasked with administration of the Wind Act, was moved to the Office of the Secretary of NCDEQ.

("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. Laws 51 (codified at N.C. Gen. Stat. §§ 143-215.115, et seq.), attached hereto as **Exhibit A**. S.L. 2013-51 by its own terms applies only to wind energy facilities that had not already received a written "Determination of No Hazard to Air Navigation" ("DNH") from the Federal Aviation Administration ("FAA") at the time the law became effective. *See* S.L. 2013-51, sec. 2 ("Section 2" or "Grandfather Clause").

Iberdrola Renewables ("Iberdrola") and its wholly owned subsidiary Atlantic Wind, LLC ("Atlantic Wind") had been developing its Desert Wind Project ("Project") for several years prior to the May 17, 2013 passage of S.L. 2013-51. Based on information provided to the Division by Iberdrola, and relying on a plain reading of the Wind Act, the Division sent correspondence to Iberdrola on April 29, 2015 ("April 29 Letter"), stating that the Project was not subject to the permitting provisions of S.L. 2013-51, attached hereto as **Exhibit B**. Iberdrola commenced construction on July 14, 2015, having obtained approvals from federal, state, and local governments.

This case constitutes the latest in a series of legal challenges filed by various individuals represented by the same organization regarding the Desert Wind Project.[3] One hundred and

[3] On May 22, 2015, James L. Ownley, filed a contested case petition challenging the April 29 Letter and seeking to enjoin construction of the Desert Wind Project. Judge J. Randolph Ward denied Ownley's request for restraining order, and on July 27, 2015, Ownley filed a Notice of Voluntary Dismissal after receiving Respondent's motion to dismiss. On May 11, 2015, John Woodard, filed a contested case petition also challenging Respondent's April 29 Letter and seeking to enjoin construction of the Project. This Court dismissed that petition on August 28, 2015, holding that Woodard had failed to state a claim upon which relief could be granted and "failed to establish that he has suffered an injury to his legal rights to justify his demand to an administrative hearing." Final Order and Order of Dismissal at 5-6, *Woodard v. NCDENR*, 15 EHR 03522 (N.C.O.A.H., Aug. 28, 2015) (Lassiter). Instead of

fifty days after Respondent sent the April 29 Letter and seventy-four days after construction began on the Desert Wind Project, Petitioners Stephen E. Owens and Stephanie G. Badawi ("Petitioners") filed this action challenging the Division's determination, claiming that the Project had undergone an expansion when the proposed dimensions and coordinate locations of its Wind Turbines were adjusted prior to construction.

Petitioners cannot overcome a plain reading of the Wind Act which confirms that the Wind Act's Grandfather Clause applies to the Desert Wind Project because 1) the Project had received FAA determinations prior to the Wind Act's effective date and 2) the insubstantial change in the Project's proposed infrastructure did not constitute an expansion as a matter of law. The Division's interpretation is not only consistent with the plain language of the statute, but also with the intent of the General Assembly, which sought to avoid imposing duplicative and costly requirements on projects like Iberdrola's. Finally, to the extent the Wind Act's Grandfather Clause is at all ambiguous, the Division's reasonable interpretation is entitled to deference.

STATEMENT OF FACTS

I. The Desert Wind Project Was Four Years in Development When the Legislature Passed House Bill 484.

In 2009 Iberdrola began planning, permitting and development of the Desert Wind Project. *See* Affidavit of Craig Poff, dated April 6, 2015 ("Poff Aff.") ¶ 9, attached hereto as **Exhibit M**. The Project is projected to include 150 wind turbines and associated infrastructure in Perquimans and Pasquotank Counties and generate 300 megawatts (MW) of renewable

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appealing that decision to Superior Court in Pasquotank County in accordance with the Administrative Procedure Act, *see* N.C. Gen. Stat. 150B-45, on October 12, 2015 Woodard filed a complaint in Superior Court of Wake County, raising claims under Article I § 6 of the North Carolina Constitution (the Separation of Powers Clause) and the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq*, once again challenging the April 29 Letter and seeking injunctive relief. That case is now pending in Superior Court.

energy. *See, e.g.*, Certificate of Public Convenience and Necessity Issued by the N.C. Utilities Commission pp 1, 3, attached hereto as **Exhibit J**. While the Desert Wind Project is the first of its kind to commence construction in North Carolina, similar wind projects in North Carolina have stalled in the early phases of development due to interference with U.S. Military operations in the State. *See* Affidavit of A. Bradley Ives ("Ives Aff.") ¶ 6, attached hereto as **Exhibit C**. The General Assembly passed the Wind Act to avoid such conflicts by giving the Division authority to oversee the siting of wind energy projects and facilitate coordination with the U.S. Military, local governments, and other regulatory agencies. *Id*. ¶¶ 7-8.

However, to avoid imposing duplicative and costly requirements on projects that were far along in the development process, the General Assembly included a Grandfather Clause in the Wind Act. *Id.* ¶ 8. 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.

S.L. 2013-51, sec. 2. 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. When the Wind Act became law, the Desert Wind Project was the *only* facility in North Carolina that had received DNHs from the FAA, Ex. M, Poff Aff. ¶ 16, and, therefore, the only project that could have qualified for grandfathered status. As of May 17, 2013, Iberdrola had:

- secured DNHs from the FAA for 166 proposed wind turbines in Pasquotank and Perquimans Counties on June 29, 2011, one of which is attached hereto as **Exhibit D**;

- obtained DNH extensions from the FAA for 150 wind turbines in Pasquotank and Perquimans Counties on November 21, 2012, one of which is attached hereto as **Exhibit U**;

- entered into an economic development agreement with Pasquotank County on April 26, 2011, attached hereto as **Exhibit E**;

- entered into an economic development agreement with Perquimans County on April 25, 2011, attached hereto as **Exhibit F**;

- obtained a conditional use permit ("CUP") from the Board of Commissioners of Pasquotank County on July 12, 2011, attached hereto as **Exhibit G;**

- obtained a CUP from the Board of Commissioners of Perquimans County on July 20, 2011, attached hereto as **Exhibit H**;

- obtained a Water Quality Certification under section 401 of the Clean Water Act from the North Carolina Division of Water Quality (now the Division of Water Resources) on January 19, 2012, attached hereto as **Exhibit I**;

- obtained a Certificate of Public Convenience and Necessity from the North Carolina Utilities Commission ("NCUC") for the Desert Wind Project on May 3, 2011, *see* Ex. J**;**

- obtained a Certificate of Environmental Compatibility and Public Convenience and Necessity from the NCUC on August 1, 2011 for construction of a transmission line to connect the Desert Wind Project with the Virginia Electric and Power Company, attached hereto as **Exhibit K**; and

- obtained Letter from the North Carolina Division of Coastal Management on March 5, 2012, conditionally concurring that the Desert Wind Project is consistent with North Carolina's coastal management program, attached hereto as **Attachment 1** to Affidavit of Douglas Huggett ("Huggett Aff")**;**

- entered into property agreements with landowners to site the wind facilities on landowners' property, one of which is attached hereto as **Exhibit L**.

As indicated above, the FAA issued DNHs to Iberdrola on June 29, 2011 for 166 wind turbines. Ex. M, Poff Aff. ¶ 23. The DNHs were valid for eighteen months, expiring on December 29, 2012, unless extended or construction commenced. *See, e.g.*, Ex. D. Iberdrola filed Notices for an extension of 150 of the 166 initial DNHs, and on November 21, 2012, the

FAA extended these DNHs for an additional eighteen months. Ex. M, Poff Aff. ¶ 25; *see, e.g.*, Ex. U. The 150 extended DNHs were to expire on May 21, 2014. Ex. M, Poff Aff. ¶ 25; *see, e.g.*, Ex. U.

On May 17, 2013, the Wind Act became law and the Grandfather Clause took effect.

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. Ex. M, Poff Aff. ¶ 34. 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. Ex. M, Poff Aff. ¶ 35.

On November 5, 2014, Iberdrola entered into an agreement with the Department of Defense ("DoD") and the Department of the Navy at the conclusion of approximately three years of studies regarding potential impacts of the Desert Wind project on radar, attached hereto as **Exhibit N**. 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." Ex. N § 2(A). The agreement provided that the coordinate locations of the Project's turbines could change by plus or minus 100 feet in longitude or latitude. *Id.*

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. Ex. M, Poff Aff. ¶ 36. Forty-six wind turbines have active Notices still pending before the FAA. Ex. M, Poff Aff. ¶ 37.

Iberdrola has had active or pending DNHs before the FAA for the Desert Wind Project continuously since June 29, 2011.

II. DEMLR Notifies Iberdrola of Wind Act Applicability and Requests Additional Information

On March 18, 2015, Brad Atkinson, Energy Section Chief for NCDEQ, sent a letter (the "March 18 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." A true and accurate copy of this letter is attached hereto as **Exhibit O**.

On March 26, 2015, Mr. Atkinson sent Mr. Poff a subsequent letter inviting Iberdrola to submit additional information to demonstrate that the Desert Wind Project did not require a state wind energy permit. The letter stated, "Once your response is received, we will expeditiously reevaluate the permit applicability." A true and accurate copy of this letter is attached hereto as **Exhibit P**.

III. DEMLR Determines That the Grandfather Clause Applies to the Desert Wind Project.

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. A true and accurate copy of this letter is attached hereto as **Exhibit Q.**

As indicated in its March 26 Letter, 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. *See* Ex. B; Davis Aff. ¶ 10. The Division also considered that the heights of the wind turbines had increased slightly and that the coordinate locations of some turbines had shifted. *See* Ex. B; Davis Aff. ¶ 10. However, the Division determined that the change in projected turbine heights and in coordinate locations of some turbines did not implicate the permitting provisions of the Act. *See* Ex. B; Davis Aff. ¶ 10.

Therefore on April 29, 2015, Brad Atkinson sent a third letter to Craig Poff revising the Division's prior determination. The letter stated,

> 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.

Ex. B. Having received the April 29 Letter, Iberdrola broke ground on July 14, 2015, and the Desert Wind Project has been under construction for more than eight months. Davis Aff. ¶ 11.

STANDARD OF REVIEW

I. Summary Judgment Standard of Review

Summary judgment is proper under Rule 56 of the North Carolina Rules of Civil Procedure if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56. The purpose of summary judgment is to bring litigation to an expeditious and efficient decision on the merits "where only a question of law on the indisputable facts is in controversy." *McNair v. Boyette*, 282 N.C. 230, 234-35, 192 S.E.2d 457, 460 (1972).

Summary judgment is not a "disfavored procedural shortcut"; rather it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). "A motion for summary judgment 'shall be' granted 'if the pleadings, depositions, answers to the 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 any party is entitled to judgment as a matter of law.'" *Estate of Williams v. Pasquotank County Parks & Rec. Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). Thus the granting of a motion for summary judgment is mandated if the moving party shows that there is no genuine issue of material fact. N.C. Gen. Stat. § 1A-1, Rule 56(c).

An issue is material "if its resolution would prevent the party against whom it is resolved from prevailing." *Bone Int'l, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981) (quotation marks omitted). When ruling on a summary judgment motion, a court must view the evidence "in the light most favorable to the nonmoving party." *Richardson v. Bank of Am., N.A.*, 182 N.C. App. 531, 539, 643 S.E.2d 410, 416, *appeal dismissed*, 362 N.C. 227 (2007).

When the parties have submitted cross-motions for summary judgment, courts may consider the parties to have conceded that there are no disputed issues of material fact. *See Kessler v. Shimp*, 181 N.C.App. 753, 756, 640 S.E.2d 822, 824 (2007). In such cases, the question before the Court is whether either party is entitled to judgment as a matter of law. *Id.*

II. Review of Agency Decision under the North Carolina Administrative Procedure Act.

The North Carolina Administrative Procedure Act ("NCAPA") entitles state agencies to a presumption of good faith. The NCAPA states that "[t]he administrative law judge shall decide

[each] case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a). Under the NCAPA, "[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.'" *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 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.*

Furthermore, "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). Agencies' interpretation of the statutes and rules they were created to administer is entitled to judicial deference "[as] long as the agency's interpretation is reasonable and based on a permissible construction" of the applicable law and is not clearly erroneous. *Cashwell v. Dep't of State Treasurer, Ret. Sys. Div.*, 196 N.C. App. 80, 89, 675 S.E.2d 73, 78 (2009) (quotation marks omitted).

Substantively, a petitioner can only prevail on a claim under NCAPA if the petitioner meets its burden of proving that the respondent agency

> has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights *and* that the agency (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) (emphasis added). Arbitrary or capricious conduct is conduct that "is patently in bad faith," or so "whimsical" as to reflect "a lack of fair and careful consideration" or a failure to indicate "any course of reasoning and the exercise of judgment." *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 16, 565 S.E.2d 9, 19 (2002) (quotation marks omitted).

ARGUMENT

I. Under the Plain Language of Section 2 of the Wind Act, the Desert Wind Project Is Exempt From the Act's Permitting Requirements.

As the North Carolina Supreme Court has recognized on numerous occasions, "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)).

The Wind Act's Grandfather Clause is clear and unambiguous. It provides that a wind energy facility or expansion with "a written 'Determination of No Hazard to Air Navigation'" in place prior to the effective date of the Wind Act does not have to go through the permitting process. S.L. 2013-51, sec. 2. Despite the undisputed fact that the Desert Wind Project had 166 DNHs in place before the statute's effective date, Petitioners insist that the Division must require Iberdrola to apply for a permit under the Wind Act due to minor adjustments to the proposed dimensions and coordinate locations of its wind turbines. The plain language of the Act leaves no room for Petitioners' strained reading.

A. Iberdrola Received DNHs Prior to the Effective Date of the Wind Act.

The Wind Act's Grandfather Clause provides that the Act "only applies to those wind energy facilities . . . that have not received *a* written 'Determination of No Hazard to Air Navigation' from the Federal Aviation Administration." S.L. 2013-51, sec. 2 (emphasis added). According to the definitions section of the Wind Act, "wind energy facility" refers not to individual turbines but rather to a project *as a whole*. It is therefore irrelevant whether Iberdrola received new DNHs for turbines after the Act became effective. 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). By defining wind energy facility "cumulatively" as the combination of the above mentioned structures, the statute makes clear that it is a project, and not each individual turbine, that matters for purposes of the Grandfather Clause.

The Grandfather Clause requires that a wind energy facility have a DNH prior to May 17, 2013. It is undisputed that the Desert Wind Project had more than "*a* written Determination of No Hazard to Air Navigation"; it had received 166 DNHs prior to the Wind Act's effective date.

B. The Desert Wind Project Is Not a "Wind Energy Facility Expansion" as a Matter of Law.

Notwithstanding the fact that the number of the proposed turbines and the geographic area of the Desert Wind Project have actually *decreased* since the Wind Act became law, Petitioners claim that the Project underwent an expansion due to a change in the maximum tip height of its wind turbines and the coordinate locations of some turbines. Petitioners once again ignore the plain language of the statute to suit their claims.

It is true that the Wind Act's Grandfather Cause applies not only to wind energy "facilities" but also to wind energy facility "expansions" that had not received a DNH as of the effective date of the statute. As an initial matter, the term "expansion" contemplates changes to an existing facility. Here, construction had not commenced when the wind act became law. What existed was a project plan that by necessity required various adjustments to the technical specifications included in the plan.

Furthermore, to adopt Petitioners' desired reading of the statute, the Court must read words out of the Wind Act's definition of "wind energy facility expansion." That definition provides that a "wind energy facility expansion" means "any activity that (1) adds or *substantially* modifies turbines or transmission facilities, including increasing the height of such equipment, over that which was initially *permitted* or (ii) increases the footprint of the wind energy facility over that which was initially *permitted*." N.C. Gen. Stat. § 143-215.115(3) (emphasis added). The Desert Wind Project was never "permitted" under the Wind Act – in fact, it was excluded from permitting requirements because it had DNHs in place on May 17, 2013. Thus, the marginal and, indeed, *insubstantial* increase in the maximum tip height of the Project's wind turbines cannot constitute a wind energy facility expansion as a matter of law.

In addition, it is undisputed that the geographical footprint of the Desert Wind Project has not increased in size since the FAA issued the initial 166 DNHs on June 29, 2011. *See* Ex. Q p 3 & attachment (map showing change in project from 166 turbine plan to 150 turbine plan); *see also* 166 turbine map, 150 turbine map, and 104 turbine map, attached hereto as **Exhibits R-T.** It is also undisputed that the number of turbines projected for the Project has *decreased* from 166

turbines to 150 turbines. The Project has not expanded; if anything, it has decreased in size. Ex. Q p 1.

The plain language of the statute thus leaves no room for interpretation: the Division properly determined that the Desert Wind Project was not subject to the Wind Act's permitting process. Yet even if the Court concludes that the terms of the Grandfather Clause are ambiguous, legislative intent resolves this ambiguity in favor of the Division.

II. If the Plain Language of the Act Is Ambiguous, the Legislature's Intent Not to Impose Costly and Duplicative Requirements on Wind Projects that had Already Obtained Federal, State, and Local Regulatory Approvals Must Govern.

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. However, when the language of a statute is ambiguous, [North Carolina courts] will determine the purpose of the statute and the intent of the legislature in its enactment.

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). Thus, when the language of the statute leaves room for interpretation, Courts must look to "the spirit of the act and what the act seeks to accomplish." *Coastal Ready–Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980).

Here, the purpose of the Wind Act's Grandfather Clause was to avoid imposing costly and duplicative requirements on projects for which impacts to military operations and the environment had been adequately studied and considered by federal, state and local regulators. *See* Ex. C, Ives Aff. The Grandfather Clause also served to protect the existing rights of parties such as Iberdrola, whose projects were poised for construction and operation when the Wind Act was passed. As our Supreme Court has recognized, "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." *State ex rel. Utilities Comm'n v. Fleming*, 235 N.C. 660, 668, 71 S.E.2d 41, 47 (1952).

Requiring Iberdrola to go through the permitting process under the Act would be costly and, in many ways, duplicative. The documents submitted to the Division by Iberdrola demonstrate that as of the effective date of the Wind Act, Iberdrola had made a tremendous investment in obtaining regulatory approvals from federal, state, and local governments. Indeed, Iberdrola has already accomplished the tasks that the Act requires new projects to undertake.

As a general matter, the Wind Act accomplishes the following public policy goals: 1) assessment of impacts on military operations and air navigation; 2) assessment of environmental impacts; 3) public notice and opportunity for comment; and 4) financial assurance from developers for the decommissioning of renewable energy infrastructure. 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; obtained a 401 water quality certification from the Division of Water Resources, obtained a Certificate of Public Convenience and Necessity from NCUC; received a letter from the Division of Coastal Management concurring that the Project would be consistent with the State's coastal management program; and entered into property agreements with landowners to site the wind facilities on landowners' property. *See supra* p 5. A closer examination of these benchmarks demonstrates that, for the Desert Wind Project, the Wind Act's permitting requirements would impose unnecessary costs without furthering statutory goals.

Military Impacts

As discussed above, one purpose of the Wind Act was to allow the Division to oversee coordination between private renewable energy developers and representatives of the United States Military in North Carolina. Ex. C, Ives Aff. ¶¶ 6-8. To that end, several provisions of the Wind Act speak to impacts on military installations in North Carolina. *See, e.g.*, N.C. Gen. Stat. §§ 143-215.117(c), 118(b), .119(a), & .119(c). In this case, DoD, along with the Governor's and DEQ's respective military liaisons, concurred that the Desert Wind Project should not be subject to the permitting process. Ex. C, Ives Aff. ¶ 8. In fact, DoD *requested* that the Desert Wind Project be exempted from the permitting process since it had already been through significant scrutiny by DoD, the FAA, and other agencies. *Id.*

Indeed, DoD, the Department of Navy, and Iberdrola have all proceeded under the understanding that the Desert Wind Project would not be required to go through the Wind Act's permitting process. In the fall of 2014, Iberdrola entered into an agreement with DoD and the Department of the Navy at the conclusion of approximately three years of studies regarding potential impacts of the Desert Wind project on military radar. *See* Ex. N. The Agreement provided that Iberdrola and Atlantic Wind were authorized "to *proceed immediately* with the construction and operation of the Wind Project." Ex. N § 2(A) (emphasis added). To now require Iberdrola to conduct, for example, "a preliminary evaluation" to determine if the facility poses a serious risks to "military training routes," N.C. Gen. Stat. § 143-215.117, would be a redundant waste of time and resources.

Environmental Impacts

Another purpose of the Wind Act is to coordinate review of environmental impacts resulting from wind energy projects. *See, e.g.*, N.C. Gen. Stat. §§ 143-215.117(a), .117(b)(4), .119(a)(10). The environmental impacts of Desert Wind Project have been exhaustively studied and addressed by Iberdrola, and reviewed by local, state and federal regulators.

On January 19, 2012, Iberdrola obtained a Water Quality Certification under Section 401 of the Clean Water Act from the Division of Water Resources. *See* Ex. I. Before issuing the 401 Water Quality Certification the Division of Water Resources was required to assess the cumulative impacts of the project on water quality, and determine, if necessary, whether practical alternatives exist that would mitigate any potential environmental impacts. *See* 15A NCAC 02H .0506(a)(1) & (4).

On September 6, 2011, Iberdrola submitted a consistency certification to the North Carolina Division of Coastal Management certifying that the proposed project would be consistent with the North Carolina Coastal Management Program. *See* Huggett Aff., Attachment 1. On March 5, 2012, the Division of Coastal Management issued a letter conditionally concurring with Iberdrola's certification. *Id*; 15 C.F.R. 930.4 (conditional concurrence letters). That letter required Iberdrola to comply with various conditions designed to minimize the Project's adverse impacts on the environment. Included among these conditions was a "Post Construction Fatality Monitoring" program to examine the post construction effects of the Desert Wind Project on avian and bat mortality. Huggett Aff., Attachment 1 p 3. The program was required to incorporate standards approved by the Wildlife Resources Commission, including the implementation of a three-year tundra swan survey and assessment of effects of the project on tundra swans. *Id.*

On September 17, 2013, Iberdrola obtained an Individual Wetlands Permit under Section 404 of the Clean Water Act from the United States Army Corps of Engineers. *See* Huggett Aff., Attachment 3. To obtain a 404 Permit, Iberdrola was required to undergo consultation with the North Carolina Wildlife Resources Commission and to identify the least environmentally damaging practicable alternative. 40 C.F.R. § 230.10. The U.S. Army Corps of Engineers is prohibited from granting a 404 permit if the permitted activity "Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of . . . a critical habitat under the Endangered Species Act." *Id.*

Iberdrola also obtained approvals from NCUC that required a demonstration of environmental compatibility. These approvals included a Certificate of Public Convenience and Necessity, which found that "Atlantic Wind has been in Communication with numerous state and federal agencies, and no substantial environmental issues have been identified." Ex. J. p 4. As part of the NCUC application process, the Desert Wind Project was reviewed through the Environmental Review Clearinghouse, which included review by North Carolina's environmental agencies. Iberdrola also 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. *See* Ex. K.

Iberdrola was also required to assess environmental impacts in connection with its applications for conditional use permits ("CUPs") in Pasquotank and Perquimans Counties. Both counties required Iberdrola to conduct preconstruction analyses of impacts to avian wildlife and

migratory birds, in particular, and to coordinate with the United States Fish and Wildlife Service to further evaluate these impacts. Ex. G § III(39)-(40); Ex. H III(40)-(41).

The CUPs also required Iberdrola to extensively evaluate the potential effects of the Project on the human environment. These requirements led Iberdrola to commission acoustical and shadow flicker analyses in connection with the Project. The CUPs further required Iberdrola to remain in compliance with the towns' zoning ordinances for wind farms which impose restrictions on audible sound emitted by the Project as well as shadow flicker impacts. Ex. G § III (13)-(14); Ex. H § III (13)-(14). Finally, both CUPs contained factual findings that the Desert Wind Project provided buffers between its wind turbine sites and occupied residential dwellings that would minimize the visual and noise impact of the project. *See* Ex. G § III(63); Ex. H § III(64).

Public Hearing

Another goal of the Wind Act's permitting regime is to ensure that the public receives adequate notice and an opportunity to comment on the siting of proposed wind energy facilities. The Wind Act therefore requires public hearings to be held in the Counties where the facility is proposed. N.C. Gen. Stat. § 143-215.119(e). In addition to the various "notice and comment" periods associated with Iberdrola's permits from state regulators, no fewer than three public hearing have been held in connection with the Desert Wind Project in Perquimans and Pasquotank Counties, including a hearing in Pasquotank County on March 10, 2011, hosted by the NCUC; a hearing in Pasquotank County on June 7, 2011, hosted by the Pasquotank County Commissioners; and a hearing in Perquimans County on June 8, 2011, hosted by the Perquimans

County Commissioners. *See, e.g.*, Exs. G, H, & J. The statutory goal of providing public notice and opportunity to comment and participate has been satisfied.

Financial Assurance

The Wind Act also contains a provision requiring the permittee to provide assurance that adequate funds will be available to decommission the project and reclaim the property. N.C. Gen. Stat. 143-215.121. The same requirements have been adopted by Perquimans and Pasquotank Counties. Each county has adopted changes to its zoning ordinance that require the owner of a wind energy facility to provide a bond or irrevocable letter of credit to cover the costs of infrastructure removal, less equipment salvage value. *See* ex. E p 2; ex. F p 2.

In sum, the Division's determination that the Desert Wind Project falls within the Wind Act's Grandfather Clause is not only supported by a plain reading of the statute, but is also consistent with the spirit of the Wind Act and the purpose of the Grandfather Clause. The Wind Act will no doubt serve as a useful mechanism to coordinate and centralize the regulatory review of proposed wind energy projects in the State going forward. However, forcing the Desert Wind Project to obtain a permit would only serve to impose costly and in many ways duplicative requirements on Iberdrola that the Grandfather Clause was intended to avoid.

Finally, Iberdrola was the only project that could have fallen within the purview of the Grandfather Clause at the time of the Wind Act's enactment. Under Petitioners' desired reading of the statute, Section 2 will have no application whatsoever to any wind facility in the State. There could be no greater contravention of legislative intent then to render the Grandfather Clause of the Wind Act a nullity. Yet that is precisely what Petitioners invite this Court to do.

III. The Agency's Determination Is Entitled to Deference.

Even if the Court determines that neither the plain language of the Wind Act's Grandfather Clause nor the legislature's intent resolves this matter, proper deference to the Division's reasonable interpretation of the Wind Act requires judgment as a matter of law in favor of the Division.

As noted above, "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). Such deference is accorded to an agency's interpretation of the statutes it administers "[as] long as the agency's interpretation is reasonable and based on a permissible construction" of the applicable law and is not clearly erroneous. *Cashwell v. Dep't of State Treasurer, Ret. Sys. Div.*, 196 N.C. App. 80, 89, 675 S.E.2d 73, 78 (2009) (quotation marks omitted).

This well-established principle of law has been applied specifically in the context of a state agency's interpretation of a grandfather clause. In *Koltis v. N. Carolina Dep't of Human Res., Div. of Facility Servs., Certificate of Need Section*, the North Carolina Court of Appeals upheld the decision of the Department of Human Resources that the petitioner was "exempt from obtaining a certificate of need because they had entered into binding legal contracts to develop and offer a health service as contemplated by the grandfather clause of Senate Bill 10." 125 N.C. App. 268, 273, 480 S.E.2d 702, 705 (1997). An intervening Health Care Facility argued against the Department's interpretation of the statute, specifically the Department's conclusion that the Petitioner's pre-existing contracts were "to develop and offer health service." The Court deferred to the agency's interpretation stating:

While we recognize that the agency's interpretation of the grandfather clause of

> Senate Bill 10 is subject to review by this Court, "the construction adopted by those who execute and administer the law in question is relevant and may be considered. Such construction is entitled to "great consideration," or to "due consideration." It is said to be "strongly persuasive," or even "prima facie correct."

Id. (quoting *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973)).

In the present case, DEQ first notified Iberdrola that it believed the Desert Wind Project was subject to the State's wind energy facility permitting process, and then, by follow-up letter, invited Iberdrola to submit additional information to demonstrate otherwise. *See* Exs. O & P. Upon receipt of additional information from Iberdrola, *see* Ex. Q, the Division reevaluated the applicability of the Wind Act to the Desert Wind Project. *See* Ex. B. The Division 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. *Id.*; Davis Aff. ¶ 10. The Division also considered that the heights of the wind turbines had increased slightly over those originally proposed and that the coordinate locations of some turbines had shifted since the original proposal. Ex. B; Davis Aff. ¶ 10. However, the Division determined that the change in projected turbine heights and in coordinate locations of some turbines did not implicate the permitting provisions of the Act. Ex. B; Davis Aff. ¶ 10.

As evidenced by the record in this case, the Division took a deliberate and careful approach in interpreting and applying Section 2 of the Wind Act to the Desert Wind Project. In light of the undisputed facts, DEQ's interpretation was reasonable and based on a permissible construction of a statute it was created to administer, and thus should be accorded deference.

CONCLUSION

The Division's determination that Section 2 of the Wind Act applies to the Desert Wind Project was not contrary to law. Nor was it arbitrary or capricious. For the foregoing reasons, this Court should grant the Division's Motion for Summary Judgment.

Respectfully submitted this is the 24th day of March, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT has been served on Petitioner and Respondent-Intervenors by depositing a copy of the same in an official depository of the United States Mail, first class, postage prepaid, and addressed to Petitioner's and Respondent-Intervenors' counsel of record as follows:

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This the 24th day of March, 2016.

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