

STATE OF NORTH CAROLINA  
COUNTY OF PERQUIMANS

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 EHR 07012

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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. )

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**RESPONDENT’S RESPONSE  
TO PETITIONERS’ MOTION  
FOR SUMMARY JUDGMENT**

NOW COMES Respondent, North Carolina Department of Environmental Quality (“DEQ”),<sup>1</sup> Division of Energy, Mineral and Land Resources (“Division”),<sup>2</sup> 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 Response to Petitioners’ Motion for Summary Judgment.

**INTRODUCTION**

When the General Assembly enacted Session Law 2013-51 (“Wind Act”) on May 13, 2013, Iberdrola Renewables (“Iberdrola”) had invested four years into the planning and

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<sup>1</sup> The North Carolina Department of Environment and Natural Resources has been renamed the North Carolina Department of Environmental Quality effective September 18, 2015.

<sup>2</sup> 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.

permitting of its Desert Wind Project (“Project”). The Project had been developed in consultation with various local, state, and federal agencies, including the United States Department of Defense and Department of Navy. It was the subject of numerous contractual agreements with landowners and municipalities including Respondent-Intervenor Weyerhaeuser Company and Respondent-Intervenor Pasquotank County.

When the General Assembly passed the Wind Act, it sought to avoid imposing duplicative requirements on projects already far along in development. The General Assembly therefore included a grandfather clause, Section 2 of the Wind Act (“Grandfather Clause”), which provides that wind energy facilities which had “received a written ‘Determination of No Hazard to Air Navigation’ issued by the Federal Aviation Administration on or before” the Wind Act’s effective date, would not be required to go through the permitting process.

In their motion for summary judgment and supporting memorandum, Petitioners concede that the Desert Wind Project received 166 written Determinations of No Hazard to Air Navigation (“DNHs”) from the Federal Aviation Administration (“FAA”) prior to the effective date of the Wind Act. Petitioners’ Memorandum in Support of Petitioners’ Motion for Summary Judgment (“Pet’rs’ Mem.”) p 3. This fact in and of itself demonstrates that the Desert Wind Project is exempt from the permitting requirements of the Wind Act. Petitioners further do not contend that the Desert Wind Project has ever expanded existing infrastructure. Indeed, Iberdrola never enlarged existing turbines. It never added new turbines or transmission infrastructure. *See* Respondent’s Memorandum in Support of Respondent’s Motion for Summary Judgment (“Resp’t’s Mem.”), Exs. R-Q.

These same facts and a plain reading of the Wind Act led DEQ to determine that the

Wind Act's Grandfather Clause applied to the Desert Wind Project. DEQ transmitted that determination by letter to Iberdrola on April 29, 2015 ("April 29 Letter").

Petitioners concede all this, yet maintain that by sending its April 29 letter DEQ failed to act in accordance with law; exceeded its authority or jurisdiction; acted erroneously; and acted arbitrarily and capriciously. Ignoring the plain language of the Wind Act and employing a creative and misleading interpretation of the facts, Petitioners' ask the Court to reach the following false and self-contradictory conclusions:

- that the Desert Wind Project is not one facility but in fact one hundred and four separate and distinct wind energy facilities;
- that Iberdrola had one wind energy facility in 2013 that was exempt from the Wind Act's permitting process, but that Iberdrola abandoned that facility in favor of a second wind energy facility—*albeit one that is subject to the same local, state and federal permits, the same lease agreements, and the same economic development agreements, is located on the same property, and is owned by the same company*; and
- that minor adjustments to the Project's technical specifications constituted a wind energy facility expansion.

Petitioners' arguments are contrary to the plain language of the Wind Act. DEQ acted in accordance with the letter of the law; it did not exceed its authority; it did not act erroneously; it did not fail to use proper procedure; and its decision was neither arbitrary nor capricious. Petitioners' motion for summary judgment must be denied, and summary judgment should be granted in DEQ's favor.

## ARGUMENT

### I. DEQ DID NOT FAIL TO ACT AS REQUIRED BY LAW OR RULE WHEN IT INTERPRETED THE WIND ACT IN ACCORDANCE WITH ITS PLAIN LANGUAGE.

#### a. The Desert Wind Project Is One Facility, Not a “Set of Facilities.”

In Petitioners’ memorandum, Petitioners refer to the Desert Wind Project as not one but several facilities. Petitioners state, for example, “If Iberdrola had . . . constructed the *facilities* for which it had received no hazard determinations in 2012, the project would unquestionably not fall within the purview of the Wind Energy Act.” Pet’rs’ Mem. p 3. Petitioners state that Iberdrola “abandoned construction of the *facilities* for which it had previously received ‘no hazard’ determinations” and is “currently constructing a different *set of facilities.*” Pet’rs’ Mem. p 3; *see also id.* p 8 (referring to the DNHs Iberdrola received for 104 “wind facilities”); *id.* (referring to the “forty-six wind facilities” Iberdrola intends to construct); *id.* (stating that Iberdrola “abandoned its opportunity to construct wind facilities”). Petitioners ask the Court to view the Desert Wind Project as consisting of multiple wind energy facilities, each of which must individually satisfy the requirements of the Wind Act’s Grandfather Clause. However, the plain language of the Wind Act precludes Petitioners’ desired reading.<sup>3</sup>

The Wind Act defines “wind energy facility” “cumulatively” as a combination of wind towers and supporting infrastructure. N.C. Gen. Stat. § 143-215.115(2). The Grandfather Clause does not require that individual turbines receive “a written determination of no hazard to air navigation” prior to May 17, 2013. S.L. 2013-51, sec. 2. It requires a facility to receive a DNH.

The Desert Wind Project is not a set of facilities, nor is it a second facility that was

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<sup>3</sup> It should be noted that Petitioners are not even consistent in their own use of the term “facility.” While at times they refer to the Desert Wind Project as consisting of a set of facilities, at other times, when it suits their argument, they refer to the Project as a single facility, stating for instance, “the Desert Wind Project is . . . a new ‘wind energy facility.’” Pet’rs’ Mem. p 7; *id.* p 8 (“the Wind Energy Act[sic] is a ‘new wind energy facility’”).

created in place of an abandoned facility. It is one project that received written DNHs from the FAA prior to May 17, 2013. Petitioners' argument must be rejected.

**b. The Desert Wind Project Does Not Constitute a Wind Energy Facility Expansion.**

As an alternative argument in support of their challenge to the Desert Wind Project, Petitioners argue that the Desert Wind Project is itself a wind energy facility expansion. Petitioners maintain that adjustments to Iberdrola's plan for the Desert Wind Project, a project that had not even commenced construction when these changes occurred, constituted a wind energy facility expansion. Such a reading is contrary not only to a common sense reading of the term "expansion," which implies that there is an existing facility upon which to expand, it ignores crucial terms in the statute that rule out Petitioners' interpretation.

Indeed, Petitioners blatantly read words out of the Wind Act to suit their desired interpretation of the law. Petitioners state for instance:

Iberdrola changed the locations, increased the height, and changed the turbine model to be used atop its wind towers after the enactment of the Wind Energy Act. It therefore has "increased the height of" those turbines since the enactment of the Wind Energy Act.

Pet'rs' Mem. pp 8-9. The Wind Act's Grandfather Clause does *not* provide that an individual that alters the plan specifications for its turbines since the enactment of the Wind Energy Act must obtain a permit. Rather, it provides that a "Wind Energy Facility Expansion" that has not received a DNH as of the enactment of the Wind Act is subject to the Act's permitting requirements, and defines "expansion" to include an increase in turbine height "beyond that which was initially permitted." N.C. Gen. Stat. § 143-215.115(3). Petitioners conveniently omit this language from its analysis.

The Desert Wind Project never underwent an expansion. It never added or modified existing turbines or transmission infrastructure. *See* Resp't's Mem., Exs. R-Q. In fact, the number of turbines proposed for the Project has decreased, just as the size of the Project's projected geographic footprint has decreased. *Id.* The Project certainly never "increased the height" of existing wind turbines "beyond that which was initially permitted." *Id.* Indeed, the Project's proposed turbines were never subject to a Wind Energy Facility Permit from the State.

In short, the Desert Wind Project is not a wind energy facility expansion and is excluded from the Wind Act's permitting requirements because it had obtained DNHs prior to May 17, 2013.

## **II. DEQ DID NOT EXCEED ITS AUTHORITY OR JURISDICTION.**

Petitioners seem to contend that because DEQ is an executive agency, it is without the authority to interpret the Wind Act. A state agency does not exceed its authority or jurisdiction by administering a statute in accordance with its own interpretation of it. Such an action falls directly within the purview of a state agency within the Executive Branch. The Wind Act, through incorporation of other statutory definitions by reference, defines "Department" as "the Department of Environmental Quality." N.C. Gen. Stat. § 143-215.115; N.C. Gen. Stat. § 143-212(3). The Wind Act further specifically authorizes DEQ to administer and enforce the permitting requirements of the Wind Act. *See e.g.* N.C. Gen. Stat. § 143-215.116 ("No person shall ... without first obtaining a permit from the Department"); N.C. Gen. Stat. § 143-215.117(b) ("[T]he applicant ... shall submit a preapplication package to the Department"); 215.119(e) ("[T]he Department shall hold a public hearing..."); N.C. Gen. Stat. § 143-215.120(a) ("The Department shall approve an application..."); N.C. Gen. Stat. § 143-215.126(a) ("The Secretary

of [the Department] may impose an administrative penalty...”); N.C. Gen. Stat. § 143-215.126(b) (“The Secretary of [the Department] ... may institute an action for injunctive relieve...”).

In support of its contention that DEQ exceeded its authority, Petitioners baldly assert, without citation to any record or Respondent’s filings, “Were Respondent DEQ’s interpretation of the Wind Energy Act as being discretionary to be adopted by this Court, N.C.G.S. §143B-279.2(1b) and the provisions of the Wind Energy Act – in addition to an untold number of environmental regulations – would be rendered meaningless.” Pet’rs’ Mem. p 9. This argument has no foundation whatsoever. DEQ does not, nor has it ever, argued that the Wind Act’s requirements are “discretionary.”

While DEQ maintains a level of enforcement discretion with respect to violations of the State’s environmental regulations (a well-established and uncontroversial proposition), the requirements of the Wind Act are by no means discretionary. The Wind Act unequivocally states that “[n]o person shall undertake construction, operation or expansion activities associated with a wind energy facility in this state without first obtaining a permit from the Department.” N.C. Gen. Stat. §143-215.116. The Act thus places a non-discretionary duty on a developer to obtain a permit for a wind energy project. Of course, the Grandfather Clause also excludes certain projects from the Act’s permitting requirement.

Petitioners not only mischaracterize DEQ’s position, they falsely portray its implications. For instance, Petitioners state that “under Respondent DEQ’s preferred interpretation of the Wind Energy Act, Respondent has no duty to ever implement its provisions – not just in Petitioner’s case, but in any case past, present, or future.” Pet’rs’ Mem. p 9. This statement is

false. Indeed, DEQ has the statutory obligation to administer the Wind Act according to its terms. New wind energy facilities will be required to apply for a permit in accordance with the Act, and DEQ will have the obligation to process these applications in accordance with the Act.

### **III. DEQ DID NOT ACT ERRONEOUSLY.**

Petitioners offer no independent basis for claiming that DEQ acted erroneously. Any possible claims that DEQ acted erroneously are addressed throughout Respondent's Memorandum in Support of Summary Judgment and elsewhere in this Response.

### **IV. DEQ DID NOT FAIL TO USE PROPER PROCEDURE.**

Petitioners contend that DEQ failed to use proper procedure in determining that the Desert Wind Project was not subject to the permitting provisions of the Wind Act. *See* Pet'rs' Mem. pp 10-11. In support of their argument, Petitioners recite the various permitting procedures laid out in the Wind Act. *Id.* Petitioners' argument misses the mark by conflating the procedural permitting provisions of the Wind Act with the requirement in the North Carolina Administrative Procedure Act that an agency must use proper procedure when it deprives a petitioner of property, orders a petitioner to pay a fine or civil penalty, or otherwise substantially prejudices a petitioner's rights. N.C. Gen. Stat. § 150B-23(a)(3).

For the reasons discussed in Respondent's Memorandum in Support of Summary Judgment and elsewhere in this Response, DEQ determined that the permitting provisions of Wind Act were not applicable to the Desert Wind Project. The issue under N.C. Gen. Stat. § 150B-23(a)(3) is only whether DEQ violated any procedural requirements when it interpreted the statute and notified Iberdrola of its determination. Petitioner makes no allegations that DEQ used improper procedure when it corresponded with Iberdrola and analyzed the application of

the Wind Act's Grandfather Clause. Moreover, there are no applicable procedures set forth that would govern such correspondence regarding the interpretation of a statute within DEQ's purview, nor do Petitioners cite any to any such procedures. Thus, for purposes of N.C. Gen Stat. § 150B-23(a)(3), DEQ did not fail to use proper procedure.

**V. DEQ DID NOT ACT ARBITRARILY OR CAPRICIOUSLY.**

Petitioners argue that DEQ acted arbitrarily and capriciously by changing its conclusion regarding application of the Wind Act to the Desert Wind Project. *See* Pet'rs' Mem. pp 11-13. To the contrary, the undisputed facts show that DEQ acted carefully and deliberately. Moreover, agencies must have the ability to modify decisions when there is a reasonable basis for doing so.

DEQ initially notified Iberdrola that it believed the Desert Wind Project was subject to the State's wind energy facility permitting process, but invited Iberdrola to submit additional information to demonstrate otherwise. *See* Resp't's Mem., Exs. O & P. Upon receipt of additional information from Iberdrola, *see* Resp't's Mem., Ex. Q, DEQ reevaluated the applicability of the Wind Act to the Desert Wind Project and determined the permitting provisions of the Wind Act were not triggered. *See* Resp't's Mem., Ex. B; Davis Aff. ¶ 10. DEQ's decision-making process was deliberative and carefully reasoned, not "whimsical," "lack[ing] ... fair and careful consideration", or without "any course of reasoning and the exercise of judgment" as Petitioner would have this Court believe. *See* Pet'rs' Mem. pp 11-12 (*citing Rector v. N. Carolina Sheriff's Educ. & Training Standards Comm*, 103 N.C, App., 527 at 532 (1991)).

Petitioners further contend that DEQ did not receive any materially different information "about the 2011 FAA determinations" between issuance of the March 18 and April 29 letters to

DEQ. Pet'rs' Mem. p 12 (emphasis added). Petitioners' therefore conclude that DEQ acted arbitrarily by reversing its initial decision regarding application of the Wind Act. It is undisputed that DEQ was aware of the 2011 FAA determinations at the time it issued its initial decision in the March 18 letter to Iberdrola. However, that is not to say that DEQ did not receive other relevant information between the issuance of the March 18 and April 29 letters that had bearing on its decision. On April 2, 2015, in response to DEQ's invitation to submit additional information, counsel for Iberdrola sent a 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. *See* Resp't's Mem., Exhibit Q.

It is both common sense and a well-established principle of administrative law that an agency may change its course so long as the agency has a reasoned basis for doing so. *Reservation Tel. Cooperative v. FCC*, 836 F.2d 1349, 1358, n.4 (D.C.Cir. 1988). Furthermore, while agencies are free to change course when reasonably warranted, here DEQ did not even go that far. DEQ merely reconsidered a decision made under a new law after receipt of additional relevant information.

The undisputed facts in this case do not support Petitioners' contention that DEQ acted arbitrarily and capriciously. Instead, as evidenced by the record, DEQ took a deliberate and careful approach in interpreting and applying Section 2 of the Wind Act to the Desert Wind Project.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioners' Motion for Summary Judgment and grant summary judgment in favor of Respondent.

Respectfully submitted this is the 7<sup>th</sup> day of April, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing RESPONDENT'S RESPONSE TO PETITIONERS' 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 7<sup>th</sup> day of April, 2016.



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