

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  
ENVIRONMENTAL QUALITY,

Respondent,

and

WEYERHAEUSER COMPANY,

Respondent-Intervenor,

and

PASQUOTANK COUNTY,

Respondent-Intervenor.

MEMORANDUM IN OPPOSITION  
TO WEYERHAEUSER  
COMPANY'S MOTION FOR  
SUMMARY JUDGMENT

NOW COME Petitioners, Stephen E. Owens and Jillanne G. Badawi, by and through the undersigned counsel, and file this Response to Weyerhaeuser Company ("Weyerhaeuser")'s Motion for Summary Judgment.

### ARGUMENT

#### **I. WEYERHAEUSER IS NOT THE REAL PARTY IN INTEREST FOR THE PURPOSES OF MAKING CLAIMS SPECIFIC TO IBERDROLA**

Petitioners do not dispute that Weyerhaeuser properly moved to intervene in this case and was granted intervention pursuant to Rule 24(a)(2), which allows a party to intervene when it "claims an interest relating to the property or transaction which is the subject of the action."

N.C.G.S. § 1A-1, Rule 24. But Weyerhaeuser has not argued solely on behalf of *its* interests in this case. It has argued on behalf of *Iberdrola's* interests, and it has clearly done so in concert with Iberdrola. *See Wey. Mem. Supp. Summ. J, Ex. A.*<sup>1</sup> Petitioners take no issue with Weyerhaeuser arguing its preferred interpretation of the Wind Energy Act. But to the extent that it argues that “Iberdrola will suffer...substantial prejudice and harm” and that Iberdrola has “vested rights in the Desert Wind Project,” these claims may only be properly brought by Iberdrola as the “real party in interest.” *Wey. Mem. Supp. Summ. J. 7-8, 15-10; N.C.G.S. § 1A-1, Rule 17(a).* Iberdrola could have intervened in this action to make claims about its constitutional rights or any harm that may befall it. It did not, presumably to stay outside the reach of this Court’s injunctive powers, which reach only “the parties to the action.” *N.C.G.S. § 1A-1, Rule 65(d); 26 N.C.A.C. 3.0101(a).* Issues that are specific to Iberdrola are therefore not properly before this Court. Nonetheless, Petitioners file this response to Weyerhaeuser’s arguments.

**II. IBERDROLA’S PRIOR CERTIFICATES AND AGREEMENTS ARE ONLY RELEVANT INsofar AS THEY SHOW THE LEGISLATURE’S INTENT TO NOT USE THEM AS THE CRITERION FOR GRANDFATHERING**

Respondent-Intervenor points to the fact that Iberdrola conducted extensive “planning, permitting, and development of a wind energy facility called the Desert Wind Project.” *Wey. Mem. Supp. Summ. J. 2.* It then lists examples of approvals, conditional use permits, and economic development agreements that Iberdrola either obtained or entered into. *Wey. Mem. Supp. Summ. J. 3.* To be clear, Petitioners do not dispute that the fact that these approvals, permits, etc. actually occurred or exist. Rather, Petitioners argue that the existence of these

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<sup>1</sup> Petitioners wish to make clear that they are *not* alleging any sort of misconduct on the part of Weyerhaeuser’s counsel. Petitioners fully understand that Weyerhaeuser’s counsel has a legal duty to advance any and all arguments that might result in a favorable judgment for their client. Petitioners merely question whether Weyerhaeuser has standing to make claims that are specific to Iberdrola.

permits and agreements is irrelevant to the legal issue of whether Respondent DEQ's April 29 letter violated the Administrative Procedure Act and 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.G.S. §§ 143-215.115, et seq.). Hereinafter, Petitioners refer to this law as the "Wind Energy Act" or "the Act."

The Wind Energy Act is very clear about what facilities it does and does not apply to. It says:

**"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."** Section 2 of SL 2013-51 (emphasis added).

The Act does not mention economic development agreements with counties. It does not mention conditional use permits obtained by wind energy developers. It does not mention Water Quality Certifications from the North Carolina Department of Environmental Quality (NCDEQ). It does not mention Water Quality Certifications from NCDEQ. It does not mention Orders Issuing Certificates of Public Convenience and Necessity from the North Carolina Utilities Commission ("NCUC"). It further does not mention Orders Issuing Certificates of Environmental Compatibility and Necessity and Waiving Public Notice and Hearings from the NCUC. As to all of these items that Weyerhaeuser puts before the Court, the Wind Energy Act is silent.

Weyerhaeuser attempts to distract the Court from the key issue in this case – whether the No Hazard to Air Navigation (DNHs) held by Iberdrola Renewables grandfather in its Desert Wind Project. The legislature easily could have included economic development agreements, conditional use permits, and Certificates of Public Convenience and Necessity as the criteria to

determine whether a given wind energy facility is grandfathered in under the Wind Energy Act. It did not. The existence of these items therefore has no bearing on whether Respondent DEQ's April 29 letter complies with the Wind Energy Act would therefore be improper other than their help in ascertaining legislative intent, as discussed below.

**III. REGARDLESS OF WHETHER IBERDROLA HAS HAD ACTIVE OR PENDING DNHs FOR "THE DESERT WIND PROJECT," IT HAS NOT HAD ACTIVE OR PENDING DNHs FOR THE ACTUAL PROJECT BEING BUILT**

Weyerhaeuser states that "Atlantic Wind has had active or pending DNHs before the FAA for the Desert Wind Project continuously since June 29, 2011." Wey. Mem. Supp. Summ. J. 5. Petitioners do not dispute that Atlantic Wind has had active or pending DNHs before the FAA continuously since June 29, 2011. But the Wind Energy Act does not grandfather in developers of Wind Energy Facilities based on whether or not that developer holds DNHs. Rather, the Act grandfathers in individual "wind energy facilities or wind energy facility expansions." Section 2 of SL 2013-51. The Wind Energy Act contains specific definitions for what constitutes a "wind energy facility" or a "wind energy facility expansion." N.C.G.S. § 143-215.115(2), (3).

It is indisputable that the DNHs held by Iberdrola in June 2011 and the DNHs for the wind turbines currently being built are for *different turbines*. Pets.' Mem. Supp. Summ. J. 3-4. Respondent DEQ said as much in its April 29, 2015 letter when it stated that "individual turbines within the Desert Wind Project have both increased in height and changed coordinate locations from Iberdrola's June 2011 FAA issued determinations." Pets' Mot. Summ. J. Ex. J. The Wind Energy Act explicitly includes "the turbines" in its definition of what constitutes a "wind energy facility." N.C.G.S. § 143-215.115(2). It further contemplates that "increasing the height of

[turbines]” is a “substantial” modification that legally constitutes a “wind energy facility expansion.” N.C.G.S. § 143-215.115(3).

The question in this case is not whether Iberdrola has held DNHs since 2011. The question is whether the turbines currently being built in northeastern North Carolina “have...received a written ‘Determination of No Hazard to Air Navigation’ issued by the Federal Aviation Administration on or before” May 16, 2013. Section 2 of SL 2013-51. They have not. All of the turbines in the current Desert Wind Project are therefore subject to the permitting requirements of the Wind Energy Act, and Respondent DEQ’s April 29 letter informing Iberdrola otherwise was in violation of N.C.G.S. § 150B-23.

**IV. LEGISLATIVE INTENT CLEARLY INDICATES THAT THE CURRENT DESERT WIND PROJECT IS SUBJECT TO PERMITTING BECAUSE THE LEGISLATURE CHOSE DNHs AS THE CRITERION FOR GRANDFATHERING**

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).

The General Assembly tied the “Grandfather Clause” of Section 2 to the issuance of FAA DNHs. DNHs specifically account for the *height* of a wind tower. The General Assembly further drafted the Wind Energy Act to say that “increasing the height of [turbines]” is a “substantial” modification. N.C.G.S. § 143-215.115(3). The legislature clearly contemplated that the height of wind turbines in North Carolina is a matter of special concern.

Weyerhaeuser states that “Iberdrola participated in numerous discussions with members of the General Assembly, Legislative Staff, representatives of NCDENR, representatives of the Governor’s Military Liaison Office and others requesting that the Desert Wind Project be

excluded from the permitting requirement of the Wind Act.” Wey. Mem. Supp. Summ. J. Weyerhaeuser then admits that “members of the General Assembly, representatives of NCDENR, representatives of the Governor’s Military Liaison Office and others negotiated and drafted the Grandfather Clause.” Id.

There is a critical flaw in Weyerhaeuser’s reasoning. The General Assembly knows that economic development agreements exist. It knows that conditional use permits exist. It knows that all of the certificates and orders that Weyerhaeuser cites in its brief exist. Further, Weyerhaeuser admits that Iberdrola participated in “numerous discussions” with legislators about its project prior to 2013, meaning that these legislators must have been informed about the specific steps that Iberdrola had taken to develop its facility prior to the effective date of the Wind Energy Act. Wey. Mem. Supp. Summ. J. 4. The legislature easily could have chosen any one of these other certificates, agreements, or permits as the criterion for whether a wind energy facility is subject to the Act’s provisions. It could have given Iberdrola the flexibility to change its project while still staying within the confines of the Grandfather Clause. *But the legislature did not do this.* The “actual words” used by the legislature “are the clearest manifestation of its intent.” N. Carolina Dep’t of Correction v. N. Carolina Med. Bd., 363 N.C. 189, 201 (2009). The legislature wrote the Act in such a way as to tie whether a facility is grandfathered in to whether it received DNHS prior to 2013. This is plain on the face of the Wind Energy Act. To read any other intent into the statute is to read into the Act intent that does not exist.

Put simply, the legislature could have given Iberdrola *carte blanche* to change its Desert Wind Project at will while still remaining within the confines of the Wind Energy Act. It did not. It tied “grandfathering” to the existence of DNHS, and therefore to the height of turbines. The present version of the Desert Wind Project did not have DNHS prior to 2013, and it contains

turbines of different heights and in different locations than the original project. It is therefore clearly subject to the permitting procedures of the Act.

**V. THIS COURT DOES NOT BEAR THE BURDEN OF DECIDING WHETHER IBERDROLA WILL OR WILL NOT SUFFER HARM**

Weyerhaeuser attempts to force this Court to shoulder a burden that is not this Court's to bear. It states that "[t]o require Iberdrola to go through the unnecessary and duplicative permitting requirements this late in the project would result in substantial prejudice and harm to Iberdrola." Wey. Mem. Supp. Summ. J. 8. It suggests that this Court must make a decision as to whether Iberdrola has to comply with the Wind Energy Act. Petitioners do not ask this Court to do anything of the sort. Petitioners ask this Court to make Respondent DEQ retract its April 29 letter, which was in violation of the Administrative Procedure Act. To the extent that any negative repercussions befall Iberdrola, these are because of the law as enacted by the General Assembly and the choices that Iberdrola has made. If the Board of Directors of Iberdrola chooses to "abandon its plans for the Desert Wind Project" rather than work with Respondent DEQ to comply with North Carolina law, this is a decision for that Board to make. Since 2013, the Wind Energy Act has read exactly as it does now. Petitioners merely ask that this Court require Respondent DEQ to follow that law.

**VI. IF IBERDROLA ACQUIRED VESTED RIGHTS IN THE DESERT WIND PROJECT, THEN IT HAS NO VESTED RIGHTS IN THE NEW PLAN, WHICH IS SUBSTANTIALLY DIFFERENT**

**A. Iberdrola has no vested right to complete the most recent Desert Wind Project plan because that plan substantially strays from the original, which is the only "grandfathered" plan.**

Iberdrola may or may not have vested rights in its original plan, but it has chosen not to carry out that plan, instead increasing the height and changing the location of wind turbines. It is illogical to consider allowing a grandfathering of one plan to apply to a later iteration in which

Iberdrola has changed the wind turbine's model type completely, in addition to changing the number of turbines and increasing the height of each turbine. *See* Pets.' Mem. Supp. Summ. J. 3-4. Iberdrola may or may not have vested rights in the original plan, but regardless it has no such rights in a substantially modified plan. This is consistent with "the well-established principle that 'no property owner has a *per se* vested right in a particular land-use regulation such that the regulation could remain 'forever in force, inviolate and unchanged.'" MLC Auto., LLC v. Town of S. Pines, 207 N.C. App. 555, 565, 702 S.E.2d 68, 75 (2010) (citing *Michael Weinman Assocs. Gen. P'ship v. Town of Huntersville*, 147 N.C.App. 231, 233 (2001) (quoting *McKinney*, 239 N.C. at 237)).


**B. The Wind Act is not unconstitutional and void under the due process clause because Iberdrola chose to change its plan, thus forfeiting any vested rights that it may have had.**

Respondent-Intervenor argues that the Wind Energy Act is unconstitutional where it deprives Iberdrola of vested rights. *Wey*. Mem. Supp. Summ J. 15-19. There are no vested rights where a plan has not been approved. Iberdrola has shown their willingness to work with Respondent DEQ, the FAA, and other government entities throughout this process. Their decision to substantially change their wind energy facility should not be at the expense of the rights of North Carolinians in order to save Iberdrola time and money. The permitting process both ensures that wind energy facilities meet certain standards and gives members of the public like Petitioners a say in the development of such facilities. It is certainly not unconstitutional for there to be appropriate regulation of wind energy facilities as the General Assembly intended in the Wind Energy Act.

CONCLUSION

For the foregoing reasons, Weyerhaeuser Company's motion for summary judgment should be denied in its entirety.

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

By: 

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<sup>2</sup>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 WEYERHAEUSER COMPANY'S MOTION FOR SUMMARY JUDGMENT has been served by depositing a copy with the United States Postal Service with sufficient postage addressed to:

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This the 7<sup>th</sup> day of April, 2016.

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