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 RESPONDENT NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY'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 Respondent North Carolina Department of Environmental Quality ("DEQ")'s Motion for Summary Judgment.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 2 OF THE WIND ENERGY ACT BRINGS IBERDROLA'S CURRENT PROJECT WITHIN ITS PERMITTING REQUIREMENTS

A. The wind energy facility referred to in Respondent DEQ's April 29 letter is not the same facility that received DNHs from the Federal Aviation Administration (FAA) prior to May 17, 2013.

Respondent DEQ admits that the 2014 incarnation of the Desert Wind Project has different turbines of greater height and located in different locations. Pet'rs' Mot. Summ. J. Ex. J. It also admits these turbines did not have Determinations of No Hazard to Air Navigation from the FAA (DNHs) prior to May 17, 2013. Resp.'s Mot. Supp. Summ J. 6. Further, DEQ admits that the FAA does not give a DNH for a "project" or an "array" of turbines, but rather gives multiple DNHs for a given array in order to account for each turbine. Resp.'s Mem. Supp. Summ. J. 4. DEQ argues that the changes in the turbine heights and their location are irrelevant, and that because "the project" had received DNHs prior to passage of the Wind Energy Act, "the project" is not subject to the Act's permitting provisions. Resp.'s Mem. Supp. Summ. J. 12.

The words on the face of the Wind Energy Act lead to a different conclusion:

> "Wind energy facility" means 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.G.S. § 143-215.115(2).

Because the turbines now being constructed by Iberdrola are of greater capacity, larger in size, and of greater height than those for which the FAA gave its DNHs, the current project is not the "wind energy facility" that received DNHs prior to passage of the Wind Energy Act; thus it is subject to the provisions of that Act. The new turbine model and increased height of the towers necessary for the operation of the altered facility; they are part of a different wind energy facility than the one that received DNHs prior to passage of the Act. For this reason alone, the current project is subject to the requirements of the Act.

Even if one disregarded the Act's unambiguous definition of a wind energy facility and concluded the current project was not a different facility, it is unambiguously a "wind energy facility expansion." Per the Act:

> "'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). DEQ admits the current project modifies the turbines, including increasing their height. Resp.'s Mem. Supp. Summ. J. 6. It argues that an expansion does not exist unless there is a "substantial" modification of the turbines, and further argues that an increase in height of thirteen feet and an increase in generating capacity of 0.5 MW is not substantial. In essence, DEQ claims a fifty story building is not "substantially" taller than a forty-eight-story building and that a turbine with twenty-five percent greater power capacity is not "substantially" more powerful. DEQ offers no authoritative or reasoned basis for suggesting these modifications are insubstantial.

The Act self-defines by example the term "substantially modifies," giving the clear example of "increasing the height of such equipment" as a substantial modification. N.C.G.S. § 143-215.115(3). The Act's inclusion of this example makes unambiguous the meaning of "substantially modifies," and demonstrates the clear intent of the legislature. Further, DEQ's unfounded approach is in direct conflict with the criteria used by the FAA and the Pasquotank County Building Code. All parties agree that the FAA required new DNHs for taller structures. It would not have, had the increase in height been insubstantial. As a further example, in Pasquotank County, height limitations are controlled to the nearest foot. *See* Pasquotank County Zoning Ordinance § 8.01, attached hereto as Exhibit A. Petitioners ask the Court to keep in mind the engineering specificity required for building permits and construction approvals.

To overcome this Court's recognition of long-standing and highly detailed engineering and safety-based criteria used by the FAA and County Ordinances as to what constitutes a

substantial modification of a building, each of which consider adding stories to the height of a structure as substantial enough to require new permitting, DEQ must offer an equally authoritative engineering and safety-based alternative criterion for what would or would not constitute a "substantial" modification. They offer no such criterion and no rational basis for a criterion and thus their conclusion that adding two floors to the height of a building is not substantial is arbitrary and capricious in itself.

Based on the material facts to which all parties have agreed, the current Iberdrola project constitutes either a different facility or an expanded facility from that contemplated prior to passage of the Act. All parties agree that the current formulation of the wind project was not contemplated, much less permitted by the FAA prior to passage of the Act. Under Section 2 of the Act, the current project is not exempted and thus is subject to the permitting provisions of the Act.

B. The Desert Wind Project was never "initially permitted" for purposes of the Wind Energy Act.

DEQ offers an alternative defense. It cites the Act's language limiting the need to fully comply with the substantive elements of the Act only to modifications of projects "over that which was initially permitted." N.C.G.S. § 143-215.115(3). DEQ then makes the incredible suggestion that because the initial project (made up of 150 FAA-defined facilities) was not subject to the permitting process of the Act, then it need never be subject to the Act because it was never "initially permitted." Resp.'s Mem. Supp. Summ. J. 13-14. Petitioners use the word "incredible" with care. Under DEQ's interpretation of Section 2, Iberdrola could expand its wind project to cover the entire State of North Carolina and still would never be subject to the Act. Id. DEQ can point to no legislative history that suggests this was the intent of the General Assembly. At its core, DEQ's interpretation would unconstitutionally deprive North Carolinians

of equal protection of the laws, robbing citizens, including the Petitioners in this case, of the process due under the Act. *See* N.C. Const. Art. I § 19.

DEQ interprets the term "initially permitted" as having obtained a permit pursuant to the Wind Energy Act. But the words "initially permitted" do not surrender to such a narrow interpretation. If the General Assembly had intended to restrict the definition of a wind energy facility expansion only to those facilities that had previously received a permit, it could have easily done so. The statutory definition uses the phrase "over that which was initially permitted." N.C.G.S. § 143-215.115(3). Had the legislature wanted DEQ's narrow interpretation to apply, they could have written, "over that allowed by permit," or more likely, "over that approved by permit under § 143-215.120." But the Legislature did not do this.

The Legislature instead used the common word "permitted," a word not defined in the statute. Under North Carolina precedent, as cited to by DEQ, "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 (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 *reh'g denied*, 322 N.C. 610 (1988)). The plain and definite meaning of the word "permit" is "to allow (something) to happen" or "to give permission for something." Permit, Merriam-Webster.com (April 11, 2016), http://www.merriam-webster.com/dictionary/permitted. The plain and definite meaning of the word "permitted" is "to consent to expressly or formally." *Id.* That, of course, is the facial purpose of Section 2 of the Act: to expressly and formally allow construction of the wind energy facility as approved by the FAA prior to passage of the Act.

We know the exact nature of the wind energy facility for which the FAA had issued DNHs, and thus the height of the equipment within the facility that Section 2 of the Act allowed. In addition, we know the height of the equipment being constructed, and for which the FAA has issued DNHs only after passage of the Act, have been increased beyond that allowed by the FAA in the DNHs issued prior to passage of the Act.

The height of the wind turbines initially allowed ("permitted") is significantly less than the height of the wind turbines currently under construction. Thus, the plain and unambiguous exemption of Section 2, as controlled by the statutory definition of a wind energy facility expansion, does not apply to the current Iberdrola wind energy facility. For that reason, the April 29, 2015 letter fails to properly apply the statute and must be withdrawn.

II. IT IS IMPROPER TO READ INTO THE ACT INTENT THAT IS NOT EVIDENT ON ITS FACE

A. The Act creates new legal requirements that are neither duplicative nor can be filled by prior meetings, certificates, or approvals held by Iberdrola.

DEQ makes much of the various meetings, approvals and permits Iberdrola held or obtained, suggesting that the Petitioners have already received all the process necessary and otherwise due them under the Act. Curiously, however, DEQ claims that bringing the project under the Act would require duplication of already completed actions required under the Act. DEQ does not explain why Iberdrola would need to duplicate completed and, according to DEQ, sufficient actions that already meet the requirements of the Act. We infer those actions were sufficient by DEQ standards because DEQ uses the word "duplicative." Resp.'s Mem. Supp. Summ. J. 14. If they are not in fact sufficient for compliance under the Act, then Iberdrola would not be duplicating what it had previously done. Rather, it would be doing something else,

something the Act requires that they did not yet do, and something that provides further protections to Petitioners.

It is worth nothing that according to Weyerhaeuser Company, the previous permits, approvals, and meetings are not actually sufficient under the Wind Energy Act. In fact, Weyerhaeuser and Iberdrola believe the Act demands more due process than already afforded. Iberdrola complains that if it was required to comply with the Act, "There is a significant risk that the Board of Directors of Iberdrola could abandon its plans for the Desert Wind Project entirely in the face of the significant delays and uncertainty associated with the permitting requirements of the Wind Act." Wey. Mem. Supp. Summ. J. 8. The requirements of the Act are therefore *not* duplicative – they are independent legal requirements.

Finally, Petitioners point out that the general purpose of a grandfather clause is to prevent wastage of an economic action. Neither Respondent DEQ nor any intervenor-respondent offers any evidence of any such wastage. Instead, the general argument is that the equivalent of a permitting process has already been done. Further, if Iberdrola chose to abandon the project, they would do so because their current investment is small in comparison to what they would otherwise have to invest under the permitting scheme.

The Legislature defined the process due the Plaintiffs under the Act. If Iberdrola and DEQ have provided most of that due process, then only that not provided need be given, something that should take little time or effort. If, however, as Petitioners suspect, Iberdrola has not done what the Act requires, then Petitioners have not received the process due under the Act and this Court must so find.

B. What Respondent considers to be "costly and duplicative requirements" are actually manifestations of the legislature's intent to ensure that wind energy facilities are safe for citizens of North Carolina.

The Wind Energy Act clearly manifests the legislature's intent to regulate wind energy facilities for the safety and benefit of North Carolinians. It is administered by Respondent DEQ, whose duties include a responsibility to "provide for the protection of the environment" and "provide for the...public health through...the administration of environmental health programs." N.C.G.S. § 143B-279(1), (1b). The Act provides that citizens have a voice and participation rights in the location and construction of wind energy facilities. For example, citizens can participate in the "permit preapplication site evaluation meeting." N.C.G.S. § 143-215.117(c). They can participate in the "scoping meeting." N.C.G.S. § 143-215.118. Perhaps most importantly, members of the public under the Act are able to participate in a general public hearing on the location of a wind energy facility. N.C.G.S. § 143-215.119(f).

The General Assembly has provided that those who live near wind energy facilities should be able to participate in this process. This clearly evidences legislative intent to require DEQ to protect North Carolinians from the dangers of wind energy facilities. The Act should be read to uphold that intent.

C. Agreements with DoD and the Department of the Navy have no bearing on the intent of the General Assembly.

The Wind Energy Act mentions neither agreements with the Department of Defense nor agreements with the Department of the Navy as the determining factors for "grandfathering." The ultimate legal issue before the court does not deal with such agreements, but rather is whether the DNHs held by Iberdrola Renewables grandfather in its Desert Wind Project. The legislature could easily have included agreements with the Department of Defense and the Navy 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.

D. The "notice and comment" periods held by local governments and state commissions are not properly considered substitutes for the hearings mandated by the General Assembly.

Respondent DEQ notes that there have been "various 'notice and comment' periods associated with Ibderdrola's permits from state regulators" and "no fewer than three public hearings have been held in connection with the Desert Wind Project in Perquimans and Pasquotank Counties." Resp.'s Mem. Supp. Summ. J. 19-20. It states that therefore "the statutory goal of providing public notice and opportunity to comment and participate has been satisfied." Id.

Respondent DEQ is an executive agency created by the legislature. *See* Article 7 of the Executive Organization Act of 1973, codified at N.C.G.S. §§ 143B-275 thru 344.60. DEQ has special duties to provide for the "protection of the environment" and the "public health." N.C.G.S. § 143B-279(1), (1b). It is a specialized state agency with expertise on environmental issues. A hearing held by a county commission is simply not a substitute for a public hearing facilitated by a state agency that employs scientists, lawyers, and experts who have a statutory duty to protect the public from environmental harm.

Further, the General Assembly knew prior to the passage of the Wind Energy Act that public hearings with regard to wind energy facilities were already happening at the county level. The fact that, with this knowledge, the General Assembly proceeded to enact a statutory scheme requiring wind energy developers to be permitted by state agencies clearly demonstrates that the General Assembly did not believe that the public hearings that had already occurred were sufficient. Such hearings therefore could not logically satisfy the statutory goal of providing public notice and an opportunity to comment. It is fundamental that Respondent DEQ be involved in this process. Otherwise, the Act has no reason to exist.

CONCLUSION

For the foregoing reasons, Respondent North Carolina Department of Environmental Quality's motion for summary judgment should be denied in its entirety.

Respectfully submitted this the 11th day of April, 2016.

By: _____

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CERTIFICATE OF SERVICE

I certify that the attached MEMORANDUM IN OPPOSITION TO RESPONDENT NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY'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 11th day of April, 2016.

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Exhibit A – Pasquotank County Zoning Ordinance § 8.01

ARTICLE 8
TABLE OF AREA, YARD AND HEIGHT REQUIREMENTS

DISTRICT	MINIMUM LOT SIZE (See Note 8)		MINIMUM YARD REGULATIONS (See Notes 2, 3, 7 and 8)			MAXIMUM HEIGHT OF STRUCTURE (See Note 5)
	Minimum Area in Square Feet	Lot Width at Front Setback Line	Front Yard Setback in Feet	Side Yard Setback in Feet	Rear Yard Setback in Feet	In Feet
A-1 Agricultural	43,000 septic system	140	40	10	30	35
A-2 Agricultural	43,000 septic system	140	40	10	30	35
R-15 Residential	43,000 septic system 15,000 central sewer	140 100	30	10	30	35
R-15A Residential	43,000 septic system 15,000 central sewer	140 100	30	10	30	35
R-25 Residential	43,000 septic system 25,000 central sewer	140 125	40	10	30	35
R-25A Residential	43,000 septic system 25,000 central sewer	140 125	40	10	30	35
R-35A Residential	43,000 septic system 35,000 central sewer	140 125	40	10	30	35
RMH-15 Residential	43,000 septic system 15,000 central sewer	140 125	40	10	30	35
RMH-25 Residential	43,000 septic system 25,000 central sewer	140 125	40	10	30	35

RMH-35 Residential	43,000 septic system 35,000 central sewer	140 125	40	10	30	35
C-1 Commercial	43,000 septic system 15,000 central sewer	140 100	30	10	30	35
I-1 Industrial	43,000 septic system 25,000 central sewer	140 125	40	10	30	56
I-2 Industrial	43,000 septic system 25,000 central sewer	140 125	40	10	30	400
O&I Office & Institutional	43,000 septic system 15,000 central sewer	140 100	30	10	30	56
M-F Multi-Family	43,000 septic system 25,000 central sewer	140 125	40	10	30	35
P-1 Prisons	43,000 septic system 25,000 central sewer	140 125	100	100	100	56