STATE OF NORTH CAROLINA

COUNTY OF PERQUIMANS

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EHR 07012

STEPHEN E. OWENS and
JILLANE G. BADAWI,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF ENERGY MINERAL AND LAND RESOURCES,

Respondent,

and

WEYERHAEUSER COMPANY and PASQUOTANK COUNTY,

Respondent–Intervenors.

BRIEF REGARDING THE PROPER INTERPRETATION OF SESSION LAW 2013-51

Respondent–Intervenor Pasquotank County (the "County"), pursuant to this Court's March 11, 2016 Order allowing the County to intervene in this matter, submits this Brief Regarding the Proper Interpretation of Session Law 2013-51.

ISSUE

Proposed wind energy facilities and expansions are exempt from new permitting requirements if they received written Determinations of No Hazard to Air Navigation ("Determinations") from the Federal Aviation Administration ("FAA") on or before May 17, 2013. The proposed Desert Wind facility ("Desert Wind Project") received Determinations in June 2011, November 2012, and December 2014. Is the proposed facility exempt from the permit requirements?

BACKGROUND

On May 17, 2013, North Carolina enacted a statute requiring renewable energy providers to obtain a permit from the Department of Environmental Quality ("DEQ")—formerly known as the Department of Environment and Natural Resources ("DENR")—before beginning construction on any wind energy facilities or expansions of wind energy facilities. S.L. 2013-51 ("Wind Energy Act"). The Wind Energy Act specifically exempted certain proposed wind energy facilities from the new permitting requirement:

> This act is effective when it becomes law and applies only to those wind energy faciliites 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 [May 17, 2013].

Id. § 2 (hereinafter, the "Grandfather Clause").

The Desert Wind Project had received Determinations for the proposed facility's turbines in June 2011, and these Determinations were renewed in November 2012.[1] Pet'rs' Mot. Summ. J. 2; Aff. of Craig Poff, dated April 6, 2015 ("Poff Aff.") ¶¶ 23, 25-26.[2] At the time the Wind Energy Act was drafted, the Desert Wind Project was the only proposed wind energy facility in North Carolina that had received a Determination. Poff Aff. ¶ 16.[3] The Grandfather Clause was

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[1] The original Determinations authorized construction of 166 turbines. Due to planning refinements, Iberdrola renewed the Determinations for only 150 turbines. Poff Aff. ¶ 12.

[2] The Poff Affidavit is Exhibit M to the Respondent's Memorandum in Support of its Motion for Summary Judgment, Exhibit A to Respondent-Intervenor Weyerhaeuser's Memorandum in Support of its Motion for Summary Judgment, and Exhibit B to Iberdrola's Request for Declaratory Ruling served on DEQ (which is **attached as Exhibit A** to this brief).

[3] The Desert Wind Project is a first of its kind; no previous wind energy facility has ever been built in North Carolina. *See* Pet'rs' Mem. Supp. Mot. Summ. J., Ex G, at *3 (email from DEQ

included in the bill after representatives from Iberdrola Renewables ("Iberdrola"), the developer of the Desert Wind Project, expressed concern to lawmakers that the proposed Wind Energy Act might derail the project, which had been in development for nearly four year and had already deeply invested in design, planning, and obtaining regulatory and zoning approvals from diverse government entities (including the County). Poff Aff. ¶¶ 5, 10-13; County's Mot. Intervene, Ex. A, at ¶¶ 3, 5, 7; Resp't's Memo. Supp. Mot. Summ. J., Ex C, at ¶¶ 7-8.

After the Wind Energy Act became law, but before its existing Determinations expired, Iberdrola submitted applications for new Determinations. Pet'rs' Mot. Summ. J. 3, at ¶ 5(e); Poff Aff. ¶¶ 29, 32-33, 35. Iberdrola later amended these applications to account for a small increase in height for the proposed turbines and small shifts in the proposed turbine locations. *Id.*[4] The FAA issued Determinations for this revised plan on December 2, 2014.[5] Pet'rs' Mem. Supp. Mot. Summ. J. 8; Poff Aff. ¶¶ 36-37.

DEQ originally took the position that the Desert Wind Project was not exempt from the Wind Energy Act. Pet'rs' Mem. Supp. Mot. Summ. J., Ex H & Ex. G, at *3-4; Resp't's Mem.

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representative stating that "[w]e are pleased to hear that . . . North Carolina may soon have its first wind farm.")

[4] Iberdrola states that the height of the proposed turbines was increased because, in light of the evolution of wind turbine technology in the intervening years, Iberdrola had "identified a more efficient wind turbine model than was originally considered." Poff Aff. ¶ 34.The few minor changes in proposed turbine locations, in turn, were "due to design and/or site constraints, such as turbine-to-turbine air flow interference, the presence of wetlands, etc." Ex. A, at n.2. Petitioners have not disputed Iberdrola's professed motives and, regardless, the reasons for the changes are not material to the issue of statutory interpretation before this tribunal.

[5] Due to concerns about potential interference with military radars, the FAA has issued Determinations for only 104 of the 150 proposed turbines. Pet'rs' Mem. Supp. Mot. Summ. J. 8; Poff Aff. ¶ 36-37. Iberdrola understands that the remaining applications will be evaluated after the construction of the first set of turbines is complete. Poff Aff. ¶¶ 37-38.

Supp. Mot. Summ. J., Ex. O; Weyerhaeuser Mem. Supp. Mot. Summ. J., Ex. B, at ¶ 4 & Ex. 1. However, after DEQ requested and received additional information from Iberdrola, DEQ ultimately concluded, by letter on April 29, 2015, 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 height and changed coordinate locations from Iberdrola's June 2011 FAA issued determinations does not implicate the permitting provisions of the Act.

Pet'rs' Mem. Supp. Mot. Summ. J., Ex J; Resp't's Mem. Supp. Mot. Summ. J., Ex. B; Weyerhaeuser Mem. Supp. Mot. Summ. J., Ex. B, at ¶ 7 & Ex. 6.

Construction on the project began on July 14, 2015. Resp'ts' Mem. Supp. Mot. Summ. J., Davis Aff., at ¶ 11; *see also* Pet'rs' Mem. Supp. Mot. Summ. J. 13. Petitioners, who own land near the proposed facility, brought a contested case to challenge DEQ's interpretation of the Grandfather Clause. Pet'rs' Pet. Contested Case Hr'g 1. Petitioners contend that DEQ's interpretation of the statute has devalued their real estate, deprived them of an opportunity to participate in public hearings and comment periods, threatened their health, and risked damage to the environment. *Id.* The ALJ allowed Weyerhaeuser and the County to intervene as Respondents on March 11, 2016.

ARGUMENT

I. Legal Standard

In a contested case hearing, the "ALJ must determine whether the petitioner has met its burden of showing, by the greater weight of the evidence, that the [a]gency substantially prejudiced petitioner's rights by acting outside its authority, acting erroneously, acting arbitrarily and capriciously, using improper procedure, or failing to act as required by law or rule." *Surgical*

Care Affiliates, LLC v. NC Dep't of Health & Human Servs., Div. of Health Serv. Regulation, Certificate of Need Section, 766 S.E.2d 699 (N.C. Ct. App. 2014) *review denied sub nom. Cumberland Cty. Hosp. Sys. Inc. v. NC Dep't of Health & Human Servs.*, 772 S.E.2d 860 (N.C. 2015). The ALJ may award summary judgment if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Cumberland Cty. Hosp. Sys., Inc.*, 764 S.E.2d at 495; N.C. Gen. Stat § 150B-33(b)(3a); N.C. R. Civ. P. 56.

Where, as here, the petitioner's claimed prejudice flows entirely from an agency's alleged misinterpretation of a statute, the matter is "ripe for summary disposition," *Brandywine Real Estate Management Services Corporation v. N.C. Dept. of Env. & Natural Resources*, 04 EHR 1439, *4 (OAH 2005) (citing *Ace-Hi, Inc. v. Dep't of Transp.*, 70 N.C. App. 214, 215, 319 S.E.2d 294, 296 (1984)), and the ALJ should employ the canons of statutory construction to resolve the matter. *See State ex rel. Utilities Comm'n v. Thornburg*, 316 N.C. 238, 245, 342 S.E.2d 28, 33 (1986) ("We must ... rely on established principles of statutory construction to interpret" a disputed statute).

Though an agency's interpretation is not binding on the ALJ, it is nevertheless "entitled to great weight." *McCaskill v. Dep't of State Treasurer*, 204 N.C. App. 373, 390, 695 S.E.2d 108, 121 (2010) *aff'd in part sub nom. McCaskill v. Dep't of State Treasurer, Ret. Sys. Div.*, 365 N.C. 69, 706 S.E.2d 226 (2011); *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 (1988) ("[C]ourts recognize the long-standing tradition of according deference to the agency's interpretation"); *see also Koltis v. N. Carolina Dep't of Human Res., Div. of Facility Servs., Certificate of Need Section*, 125 N.C. App. 268, 273, 480 S.E.2d 702, 705 (1997) ("strongly persuasive" and "prima facie correct"); *Appeal of Church of Creator*, 102 N.C. App. 507, 510, 402 S.E.2d 874, 876 (1991) ("entitled to great

consideration"); *State ex rel. Utilities Comm'n v. Thornburg*, 316 N.C. 238, 245, 342 S.E.2d 28, 33 (1986) ("may and should be considered").

II. The General Assembly intended to exempt the Desert Wind Project from the permit requirement in the Wind Energy Act.

"The cardinal principle of statutory construction is that the intent of the legislature is controlling." *AH N. Carolina Owner LLC v. N.C. Dep't of Health & Human Servs.*, 771 S.E.2d 537, 548 (N.C. Ct. App. 2015) (citing *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443–44 (1983)). If the words enacted by the General Assembly are clear and unambiguous, the courts must apply the plain meaning of the text. *Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007); *see also, e.g.*, *Carrington v. Brown*, 136 N.C. App. 554, 558, 525 S.E.2d 230, 234 (2000) (unambiguous language leaves courts "without power to interpolate, or superimpose, provisions and limitations not contained therein"); *Thornburg*, 316 N.C. at 245, 342 S.E.2d at 33 (an unambiguous statute "must be accorded its clear meaning and may not be evaded by a court under the pretext of construction."). If the statute is ambiguous, by contrast, the courts should look to other indicia of intent, such as "the circumstances surrounding [the statute's] adoption," *Cape Hatteras Elec. Membership Corp. v. Lay*, 210 N.C. App. 92, 99, 708 S.E.2d 399, 403 (2011), and the "spirit of the [statute] and what the [statute] seeks to accomplish." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). Whenever possible, the statute should be given a construction that, when practically applied, would further its apparent purpose. *In re Hardy*, 294 N.C. 90, 96, 240 S.E.2d 367, 372 (1978); *see also Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 24, 348 S.E.2d 524, 526 (1986) (legislature's intended meaning can be identified by examining the "consequences which would follow … construction one way or the other.")

A second fundamental principle of statutory interpretation is that "a statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage." *In re Hayes*, 199 N.C. App. 69, 78, 681 S.E.2d 395, 401 (2009). Accordingly, "individual portions of a statute must be interpreted in the context of the whole and 'accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.'" *Overcash*, 83 N.C. App. at 24, 348 S.E.2d at 526 (quoting *Watson Industries v. Shaw, Comm'r of Revenue,* 235 N.C. 203, 210, 69 S.E.2d 505, 511 (1952)).

In this case, both the plain language of the Grandfather Clause and the undisputed circumstances surrounding its enactment clearly reveal that the General Assembly intended for the Desert Wind Project to be exempt from the new permitting requirements of the Wind Energy Act. Furthermore, Petitioners' attempt to manufacture an ambiguity by suggesting that the General Assembly would have considered the current iteration of the Desert Wind Project to be a *new* facility or expansion—one that did not receive a Determination before the enactment date—is contravened by both the purpose of the statute and its other provisions. As a consequence, the ALJ should uphold DEQ's sound interpretation that the Wind Energy Act does not apply to the Desert Wind Project.

A. The plain language and circumstances surrounding the enactment of the Grandfather Clause indicates that the General Assembly intended to exempt the proposed Desert Wind facility from the permit requirement.

The Grandfather Clause provides that the Wind Energy Act

> 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 [May 17, 2013].

S.L. 2013-51, at § 2.

The term "wind energy facility" means the turbines, buildings, transmission facilities, and other equipment that, collectively, have the capacity to produce at least a megawatt of electricity. N.C. Gen. Stat. § 143-215.115(2). A "wind energy facility expansion" is any activity that either (1) adds or substantially modifies the turbines or transmission facilities over what was originally permitted (including an increase in turbine height) or (2) increases the footprint of the facility over what was originally permitted. N.C. Gen. Stat. § 143-215.115(3). "Received" means "to come into possession of or get from outside source." Black's Law Dictionary, Receive (10th ed. 2014).

A Determination is a document "issued by the [FAA] pursuant to Subpart D of Part 77 of Title 14 of the Code of Federal Regulations." N.C. Gen. Stat. § 143-215.120(c). More specifically, a Determination is prepared by the FAA after it conducts a study of the potential aeronautical effects of certain proposed structures. 14 C.F.R. § 77.9; 14 C.F.R. § 77.27; 14 C.F.R. § 77.31. A person planning to construct or alter a structure that will exceed 200 feet in height must provide notice to the FAA on Form 7460, and no construction may commence on the proposed structures unless authorized by a Determination. 14 C.F.R. § 77.5; 14 C.F.R. § 77.7; 14 C.F.R. § 77.9.

Applying these incontrovertible definitions, the plain language of the Grandfather Clause provides that a proposed wind energy facility like the Desert Wind Project is required to submit a permit application under the Wind Energy Act *only if* it had not come into possession of Determinations from the FAA prior to May 17, 2013. S.L. 2013-51, at § 2. It is undisputed that the Desert Wind Project received Determinations in June 2011 and again in November 2012—both before the enactment date of the Wind Energy Act. Pet'rs' Mot. Summ. J. 2; Poff Aff. ¶¶ 23,

25-26. The plain language of the Grandfather Clause thus shows that the General Assembly intended to exempt the Desert Wind Project from the new permitting requirements.

This prosaic conclusion is bolstered by the undisputed circumstances existing at the time the Grandfather Clause was enacted. *See McKinney v. Richitelli*, 357 N.C. 483, 487, 586 S.E.2d 258, 262 (2003) (holding that legislative intent may be found from "the circumstances surrounding its adoption which throw light upon the evil sought to be remedied."). The Desert Wind Project was the *only* proposed wind energy facility in North Carolina that was mature enough to have received Determinations when the legislation was being drafted. Poff Aff. ¶ 16. Anxious that the new legislation might derail the project—which had been in development since 2009—Desert Wind Project representatives expressed their concerns to lawmakers and other stakeholders. Poff Aff. ¶¶ 5, 11. These parties negotiated the language of the Grandfather Clause, and, subsequently, the General Assembly enacted the Grandfather Clause into law. Poff Aff. ¶¶ 12-13; Supplement to Iberdrola's Request for Declaratory Ruling, attached as **Exhibit B**, at Ives Aff. ¶ 8-11. The General Assembly's clear intent was to exempt the Desert Wind Project from the Wind Energy Act.

Tellingly, the Petitioners concede this point:

> If Iberdrola had then constructed the facilities for which it had received no hazard determinations in 2012, *the project would unquestionably not fall within the parameters of the Wind Energy Act,* as the towers in that project had received the requisite [Determinations] from the FAA. *The Wind Energy Act does not require the FAA determination to be active or unexpired, but simply to have been received prior to the Wind Energy Act's effective date of May 17, 2013.*

Pet'rs Mem. Supp. Summ. J. 3 (emphasis added).

Petitioners nevertheless attempt to concoct an ambiguity by arguing that the General Assembly would have treated the Desert Wind Project as two *distinct* proposed wind energy

facilities or expansions: the first described by the 2011/2012 Determinations and the second by the 2014 Determinations. *See id.* ("Iberdrola abandoned construction of the [originally proposed] facilities ... . Instead, it is currently constructing a *different* set of facilities, as evidenced by the 2014 applications [for Determinations.]" (emphasis added)).

But there is no ambiguity in the plain language of the Grandfather Clause—much less an ambiguity suggesting that the General Assembly might have meant what Petitioners now strain to read. Construing the Wind Energy Act to apply to the Desert Wind Project would contradict the plain language of the Grandfather Clause and, as a practical matter, render it meaningless. There are simply no other proposed wind energy facilities to which the Grandfather Clause might apply. *See Hayes*, 199 N.C. App. at 78, 681 S.E.2d at 401 (holding that courts must presume that the General Assembly did not enact meaningless laws).

It is undisputed that the Desert Wind Project is a proposed wind energy facility that has consistently been developed, both before and after the enactment of the Wind Energy Act, by the same company, in the same geographic area, pursuant to the same economic development agreements, and subject to the same regulatory and zoning permits. Poff Aff. ¶ 8 & Exs. 2-10. It is also undisputed that the project received Determinations before May 17, 2013. Pet'rs' Mot. Summ. J. 2; Poff Aff. ¶¶ 23, 25-26. Accordingly, the plain language of the Grandfather Clause exempts the Desert Wind Project from the new permit requirements, and judgment should be entered for the Respondents.

B. Construction of the Wind Energy Act as a whole also indicates that the General Assembly intended to exempt the proposed Desert Wind Facility from the permit requirement.

Even if the Grandfather Clause were ambiguous, both its purpose and the remaining provisions of the Wind Energy Act would reveal that the General Assembly clearly intended for the Desert Wind Project to be exempt from the new permit requirements.

i. The purpose of the Grandfather Clause supports the Respondents' interpretation and refutes the Petitioners' interpretation.

The purpose of a statute should be determined by examining the "evils" the statute was designed to prevent. *See Hardy*, 294 N.C. at 96, 240 S.E.2d at 372 ("[S]tatutes should be given a construction which, when practically applied, will tend to suppress the evil which the Legislature intended to prevent"); *AH N. Carolina Owner LLC v. N.C. Dep't of Health & Human Servs.*, 771 S.E.2d at 548 ("In ascertaining legislative intent, courts should consider . . . what [the statute] seeks to accomplish.").

The evil prevented by the Grandfather Clause is self-apparent: the waste of resources that might occur if a mature wind energy project were forced to abandon years of planning, design, development, and regulatory approvals simply because the rules were changed before construction began. *See State ex rel. Utilities Comm'n v. Fleming*, 235 N.C. 660, 668, 71 S.E.2d 41, 47 (1952) ("[T]he purpose of a grandfather clause is to protect and preserve bona fide rights existing at the time the passage of the legislation which contains such clause.")

Petitioners' crabbed reading of the statute does not support this obvious purpose of the Grandfather Clause. In fact, their interpretation encourages the precise outcome the Grandfather Clause was designed to prevent. Because a statute should not be read to operate against its own manifest purpose, the Petitioners' interpretation should be rejected.

ii. The language of the Wind Energy Act supports the Respondents' interpretation and refutes the Petitioners' interpretation.

Petitioners' novel argument that the General Assembly intended for the latest iteration of the Desert Wind Project to be treated as a *new* proposed facility or *new* expansion—one that had not received Determinations before May 2013—is belied by text of the Wind Energy Act itself. It is undisputed that only two changes have been made to the plan for the proposed facility after the Wind Energy Act was enacted: (1) the proposed height of the turbines has increased from 486 feet to 499 feet, and (2) some of the proposed turbine locations have shifted slightly within the proposed facility's geographic footprint. Pet'rs' Mem. Supp. Mot. Summ. J. 3; Poff Aff. ¶¶ 29, 32-33, 35.

Thus the only real dispute between the parties is the legal effect, if any, that should be given to these changes. The Respondents believe the General Assembly intended for the changes to be considered immaterial alterations of a single proposed wind energy facility—changes that do not require a permit application. The Petitioners, by contrast, believe that the General Assembly would view the changed plan as a new wind energy facility or a new wind energy facility expansion, arising after the enactment date, that *would* require a permit application. Pet'rs' Mem. Supp. Summ. J. 7-8.

This quarrel is easily resolved by evaluating whether the Wind Energy Act treats changes to a plan for a proposed wind energy facility as a continuation of the original proposed facility or as a new proposed facility or expansion. The answer is clear: the Wind Energy Act allows for changes to a proposed wind energy facility. N.C. Gen. Stat. 143-215.119(d) (recognizing that there may be "supplements, changes, or amendments to the permit application."). And it does *not*

require applicants to submit a new application when these changes arise. N.C. Gen. Stat. § 143-215.120(c) (hereinafter "Subsection C"). Instead:

> If the specific location of a turbine authorized to be constructed pursuant to the to a [Determination] ... or the configuration of the wind energy facility varies from the information submitted by the applicant upon which the Department has made its permit decision, the Department may reevaluate *the permit application* and require the applicant to submit any additional information the Department deems necessary to approve or deny a permit for *the facility as reconfigured.*

Id.

Notably, even after a change arises, the Act refers to *the* permit application and *the* facility. "A statute's use of the definite article—'the'—indicates that the legislature intended the term modified to have a singular referent." *Lunsford v. Mills*, 367 N.C. 618, 625, 766 S.E.2d 297, 302 (2014). Contrary to Petitioners' position, then, the General Assembly clearly intended for changes to "the specific locations of a turbine" or "the configuration of the wind energy facility" to be considered part of the *original* proposed wind energy facility or expansion, not the birth of a *new* proposed facility or expansion.[6]

Furthermore, Petitioners' preferred interpretation would lead to absurd results. *See Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (statutes should be interpreted in a way that avoids absurd results). If every change to the location of a proposed turbine or the configuration of the wind energy facility (including, for example, the planned height of the turbines) had the legal effect of creating a *new* proposed wind energy facility or *new*

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[6] The Act also indicates that the General Assembly was well aware that multiple Determinations may need to be issued in the course of developing a single proposed wind energy facility. *Compare* N.C. Gen. Stat. § 143-215.119(a)(7) (requiring that a permit application should include "*any* determination reached by the [FAA] *at the time the application is submitted to the Department*" (emphasis added)), *with* N.C. Gen. Stat. § 143-215.120(c) (conditioning the effective date of a permit upon the Department's review of the Determinations that would relied upon to begin construction).

proposed wind energy facility expansion, the Wind Energy Act would require a new permit application to be submitted every time the plan was refined. N.C. Gen. Stat. § 143-215.119(a). A new site visit would be required. N.C. Gen. Stat. § 143-215.117(a). New public hearings would need to be held. N.C. Gen. Stat. § 143-215.119(e). The applicant would necessarily be forced to start again from scratch.

If that were what the General Assembly intended, there would be no need to refer to "supplements, changes, or amendments to the permit application." N.C. Gen. Stat. § 143-215.119(d). And Subsection C, which allows DEQ the discretion to "reevaluate the permit application" or "require the applicant to submit additional information" after a plan change, would make no sense if a new permit application—and the subsequent permitting procedures—were required as a matter of course after each plan change. The permitting regime clearly anticipates that a proposed wind energy facility is not the immutable creature Petitioners envision; it can adapt and change without requiring a new permit application.

Nor should the Petitioners take any comfort in Subsection C's presumption that DEQ would have oversight over a modified proposed wind energy facility. The issue at bar is whether the Grandfather Clause applies. Petitioners argue that it does not because, they claim, the General Assembly would view a plan change as a new proposed wind energy facility or new proposed wind energy facility expansion. But since the General Assembly would not consider a change to a *post-enactment* proposed wind energy facility to be an abandonment of the original proposal and the creation of a new proposed wind energy facility or wind energy facility expansion, there is no support for Petitioners' argument that the General Assembly intended that meaning with regard to a *pre-enactment* proposed wind energy facility like the Desert Wind Project. Accordingly, in this case, Subsection C is merely probative of the General Assembly's intent in

enacting the Grandfather Clause. Since it is clear that the General Assembly did not intend for the Wind Energy Act to apply, Subsection C's procedures are not controlling here.

In short, a sober reading of the Wind Energy Act reveals that, though "individual turbines within the Desert Wind Project have both increased in height and changed coordinate locations from Iberdrola's June 2011 FAA issued determinations," the General Assembly did not intend for the Desert Wind Project to "implicate the permitting provisions of the Act." Pet'rs' Mem. Supp. Mot. Summ. J., Ex J; Resp't's Mem. Supp. Mot. Summ. J., Ex. B; Weyerhaeuser Mem. Supp. Mot. Summ. J., Ex. B, at ¶ 7 & Ex. 6.

Because the General Assembly intended for plan alterations, like those at issue here, to be treated as "supplements, changes, or amendments" to a single proposed wind energy facility, and because Petitioners concede that the plain language of the Grandfather Clause exempts the proposed wind energy facility at issue from the permitting requirements (or at least the version of the plan that existed on May 17, 2013), it is evident that the Desert Wind Project is not a new proposed wind energy facility or wind energy facility expansion. As a consequence, the Desert Wind Project is not subject to the permit requirements of the Wind Energy Act.

CONCLUSION

DEQ's interpretation of the Grandfather Clause is both reasonable and correct. The plain language of the clause exempts the Desert Wind Project from the Wind Energy Act's permitting requirements. And even if the Grandfather Clause were ambiguous, the purpose of the clause, the circumstances surrounding its enactment, and the structure of the Wind Energy Act each reveal that the General Assembly intended for the project to be exempt, notwithstanding the minor changes that have been made to the plan. Because Petitioners' claimed prejudice is grounded

entirely in their flawed reading of the statute, the ALJ should enter summary judgment in favor of the respondents.

This the 1st day of April, 2016.

WOMBLE CARLYLE SANDRIDGE & RICE
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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing in the above-captioned action upon all parties by depositing a copy of same in the United States Mail, first-class postage prepaid, addressed as follows:

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This the 1st day of April, 2016.

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