

FILED

STATE OF NORTH CAROLINA

IN THE OFFICE OF

COUNTY OF PERQUIMANS

2016 FEB 22 PM 3:37

ADMINISTRATIVE HEARING

16 EHR 07012

OFFICE OF ADMIN HEARINGS

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.

**INTERVENOR-RESPONDENT'S
PREHEARING STATEMENT**

Intervenor-Respondent Pasquotank County (the "County") submits this Prehearing Statement pursuant to the Order entered by this tribunal on October 6, 2015. As required by Rule 24(c) of the North Carolina Rules of Civil Procedure, this Prehearing Statement accompanies the County's contemporaneously submitted Motion to Intervene.

1. THE ISSUES TO BE RESOLVED

No wind energy facility can be built or expanded without a permit, unless it received a written Determination of No Hazard to Air Navigation ("Determination") from the Federal Aviation Administration ("FAA") before May 17, 2013. The Desert Wind Project (the "Project") received a Determination in June 2011. Accordingly, Respondent Department of Environmental Quality ("DEQ") concluded that no permit was required. Is DEQ's determination permissible?

2. A BRIEF STATEMENT OF THE FACTS AND REASONS SUPPORTING THE PARTY'S POSITION ON EACH MATTER IN DISPUTE

On May 17, 2013, North Carolina enacted a statute requiring renewable energy providers to obtain a permit from DEQ before beginning construction on any wind energy facilities. S.L. 2013-51 ("Wind Act"). The Wind Act created a number of new requirements before the permit would be issued, including various environmental studies and public comment periods. N.C. Gen. Stat. §143-215.119. However, section 2 of the Wind Act specifically provides:

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.

Well before the Wind Act was passed, Iberdrola Renewables and its affiliates Desert Wind, LLC and Atlantic Wind, LLC (collectively, "Iberdrola") had been working with the various stakeholders, including the County, to plan, design, and obtain regulatory approval for the Project, which was to be the largest wind energy facility in North Carolina. On June 29, 2011, the FAA issued Determinations to Iberdrola stating that the proposed wind turbines did not pose a hazard to air navigation. As the planning progressed and the Project was refined to comply with other regulatory requirements, Iberdrola requested a second set of Determinations for the Project that included significantly fewer turbines, some slightly taller turbines, and changes in the locations some of the turbines. The FAA issued a second set of Determinations for the Project in December 2014.

In light of the passage of the Wind Act, Iberdrola requested clarification from DEQ on whether the new permitting requirements applied to the Project. On April 29, 2015, DEQ sent Iberdrola a letter stating that the Project

is not subject to the permitting provisions of the [Wind] 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. Contested Case Hearing, Ex. 5.

Petitioners, who own land near the Project, claim that DEQ is wrong in interpreting the text of the Wind Act to exempt the Project from the new permitting requirements. Pet. Contested Case Hearing 1. Petitioners contend that this supposedly erroneous view of the Wind Act 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.*

DEQ filed a motion to dismiss the Petition, but that motion was denied on December 14, 2015. On January 14, 2016, the administrative law judge entered a scheduling order setting a hearing date for mid-April, 2015. The County Board of Commissioners voted to intervene in the contested case on February 15, 2016, and the County subsequently moved to intervene. The motion to intervene is currently pending.

3. THE STATUTES, RULES, AND LEGAL PRECEDENT, IF KNOWN

This contested case primarily concerns the proper interpretation of Section 2 of Session Law 2013-51. The case also involves Chapter 150B of the North Carolina General Statutes and the precedent applying that statute. The case will also involve precedent related to statutory interpretation and deference to agency interpretations, as well as all statutes, rules, and legal precedents cited or identified by Petitioner, Respondent, or Intervenor-Respondent.

4. A LIST OF PROPOSED WITNESSES

The County may call any of the following individuals, either live or through deposition testimony, to offer testimony at hearing:

- a. Rodney Bunch, Pasquotank County Manager;
- b. All witnesses identified or called by Petitioners;
- c. All witnesses identified or called by Respondent;
- d. Any individuals necessary for impeachment or rebuttal purposes; and
- e. Any witnesses that may be identified in discovery.

The County reserves the right to supplement or amend the foregoing list with other witnesses, including expert witnesses, as they may be identified during the course of discovery and of preparing for the hearing in this matter.

5. WHETHER YOU WISH TO PURSUE DISCOVERY. IF SO, THE LENGTH OF TIME REQUIRED

The County may pursue discovery. The County anticipates that any discovery would be completed by March 24, 2016, as provided in the January 14, 2016 Scheduling Order.

6. LOCATION AND DATE OF HEARING

The County does not object to this contested case being heard on April 12-13, 2016 in Perquimans County, as provided in the January 14, 2016 Scheduling Order.

7. IF YOU DO NOT HAVE AN ATTORNEY, YOUR HOME AND BUSINESS ADDRESS AND TELEPHONE NUMBER

Intervenor–Respondent is represented by the undersigned counsel.

8. ESTIMATED LENGTH OF HEARING

The County estimates that a hearing in this matter will take one or two days.

9. OTHER SPECIAL CONSIDERATIONS

The County has moved to intervene in this case as a Respondent, with all the rights and powers of a party under the governing regulations and rules.

The County reserves the right to supplement, modify, or otherwise amend the responses above as this matter progresses.

This the 22nd day of February, 2016.

WOMBLE CARLYLE SANDRIDGE & RICE

A Limited Liability Partnership

By: _____

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*Counsel for Intervenor-Respondent Pasquotank
County*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **PREHEARING STATEMENT** 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:

Elliot Engstrom
Civitas Institute
100 S. Harrington Street
Raleigh, NC 27603
Counsel for Petitioners

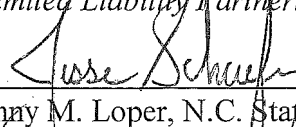
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Counsel for Respondent

This the 22nd day of February, 2016.

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