STATE OF NORTH CAROLINA COUNTY OF PERQUIMANS	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 15 EHR 07012

STEPHEN E. OWENS and STEPHANIE G. BADAWI, Petitioners, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF ENERGY, MINERAL AND LAND RESOURCES Respondent.	)	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

NOW COMES Respondent, North Carolina Department of Environmental Quality ("NCDEQ"),[1] Division of Energy, Mineral and Land Resources ("DEMLR"), by and through the undersigned counsel, pursuant to 26 N.C.A.C. 03.0101 and Rules 12(b)(1) and 12(b)(6), of the North Carolina Rules of Civil Procedure, and files this Memorandum of Law in Support of Motion to Dismiss.

PROCEDURAL HISTORY & STATEMENT OF FACTS

On May 17, 2013, the North Carolina General Assembly enacted Session Law 2013-51, creating a new wind energy permitting program under which developers of future wind energy projects in North Carolina are required to apply for and receive permits to build and operate wind energy facilities. 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.) ("S.L. 2013-51" or "Wind Act"). S.L. 2013-51 by its own terms applies only to wind energy facilities that had not already received certain written "Determinations of No Hazard to

[1] The North Carolina Department of Environment and Natural Resources has been renamed the North Carolina Department of Environmental Quality effective September 18, 2015.

Air Navigation" from the Federal Aviation Administration ("FAA") at the time the law became effective. S.L. 2013-51, sec. 2.

Atlantic Wind, LLC ("Atlantic Wind") and its affiliate Iberdrola Renewables ("Iberdrola") have been developing its Desert Wind Project ("Project") since long prior to the May 17, 2013 passage of S.L. 2013-51. Based on information provided to Respondent by Atlantic Wind, Respondent sent correspondence to Atlantic Wind on April 29, 2015 ("April 29 Letter"), stating that the Project is not subject to the permitting provisions of S.L. 2013-51 because the Project had received the necessary FAA determinations prior to S.L. 2013-51 becoming law. Construction has been underway on the Desert Wind Project since July 14, 2015. *See, e.g., Groundbreaking at North Carolina's First Wind Farm*, Iberdrola Renewables, http://iberdrolarenewables.us/rel_15.07.14.html (July 14, 2015).

This case constitutes the latest in a series of legal challenges filed by various individuals represented by the same organization regarding the Desert Wind Project.

On May 22, 2015, James L. Ownley, filed a contested case petition challenging the April 29 Letter and seeking to enjoin construction of the Desert Wind Project. Judge J. Randolph Ward denied Ownley's request for restraining order, and on July 27, 2015, Ownley filed a Notice of Voluntary Dismissal after receiving Respondent's motion to dismiss.

On May 11, 2015, John Woodard, filed a contested case petition also challenging Respondent's April 29 Letter and seeking to enjoin construction of the Project. This Court dismissed that petition on August 28, 2015, holding that Woodard had failed to state a claim upon which relief could be granted and "failed to establish that he has suffered an injury to his legal rights to justify his demand to an administrative hearing." Final Order and Order of Dismissal at 5-6, Woodard v. NCDENR, 15 EHR 03522 (N.C.O.A.H., Aug. 28, 2015) (Lassiter)

(attached as "Exhibit A").

Instead of appealing that decision to Superior Court in Pasquotank County in accordance with the Administrative Procedure Act, see N.C.G.S. 150B-45, on October 12, 2015 Woodard filed a complaint in Superior Court of Wake County, raising claims under Article I § 6 of the North Carolina Constitution (the Separation of Powers Clause) and the North Carolina Declaratory Judgment Act, N.C.G.S. § 1-253 *et seq*, once again challenging the April 29 Letter and seeking injunctive relief. See Complaint ¶¶76-79, Woodard v. NC DEQ, 15 CVS 13685 (Oct. 12, 2015) (attached as "Exhibit B"). In the Complaint, Woodard states that "the Office of Administrative Hearings is not the proper venue for Plaintiff to bring his case against [Respondent]." *Id.* ¶ 16. That case is now pending in Wake County Superior Court.

Now, one hundred and fifty (150) days after Respondent sent the April 29 Letter and seventy-four (74) days after construction began on the Desert Wind Project, Petitioners Stephen E. Owens and Stephanie G. Badawi ("Petitioners") have filed *this* petition for contested case hearing ("Petition"). They are represented by the same Counsel that represented Ownley and Woodard and raise nearly identical claims to those raised by Ownley and Woodard. Petitioners claim that Respondent erroneously "fail[ed] to require Iberdrola to go through the permitting process" (Pet'rs' Statement of the Case 2) and that the April 29 Letter constituted an "ultra vires act." (Pet.1.) Petitioners further contend that Respondent's action denied Petitioners the protections of a DEQ permitting process (Pet.1.) and that the harm done to Petitioners can "only be repaired by compliance with the permitting procedures established under the Act." (Pet'rs' Statement of the Case 2.).

In sum, Petitioners challenge Respondent's determination that the Project is not subject the Wind Act's permitting requirements and seek to force Respondent to force Atlantic Wind to

apply for a permit under the Act.

ARGUMENT

This case constitutes the fourth legal action filed by Petitioners' Counsel seeking to halt construction of the Desert Wind Project. Like the other legal challenges, this latest effort contains numerous deficiencies that require dismissal of Petitioners' case with prejudice.

First, this court lacks subject matter jurisdiction over the Petition where (i) the Petition is untimely under N.C.G.S. § 150B-23 and (ii) Petitioners' claims are not redressable through any relief that this Court is empowered to grant. Second, Petitioners have failed to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure where (i) Petitioners cannot claim that Respondent failed to act as required by law where the Wind Act did not require Respondent to take any mandatory action and (ii) Petitioners' claim that Respondent's April 29 Letter constituted an "ultra vires" act lacks any basis in law or fact.

In sum, Petitioners' untimely effort to challenge the Desert Wind Project in OAH is not the proper avenue through which to obtain relief.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PETITION

A. The Petition is untimely.

"Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C.G.S. § 1A-1, Rule 12(h)(3); § 1A-1, Rule 12(b)(1) (authorizing a motion to dismiss for lack of subject matter jurisdiction). "In order for OAH to have jurisdiction over [a] petitioner's appeal . . . [the] petitioner is required to follow the statutory requirements outlined in [the General Statutes] for commencing a contested case." Nailing v. UNC–CH, 117 N.C. App. 318, 324, 451 S.E.2d 351, 355 (1994), disc. review denied, 339 N.C. 614, 454 S.E.2d 255 (1995). Pursuant to N.C.G.S. §150B-23(f), "Unless another statute or a federal statute or

regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days." Thus, where the petitioner fails to file a petition within the limitations period established by N.C.G.S. § 150B-23(f), the Court lacks subject matter jurisdiction over the petition. See Empire Power Co. v. N. Carolina Dep't of Evn't, Health & Natural Res., Div. of Env'tl. Mgmt., 337 N.C. 569, 594, 447 S.E.2d 768, 783 (1994) (stating that a petitioner "may commence an administrative hearing only by timely filing a petitioner" and that "failure to timely file constitutes waiver of any right to that administrative remedy").

The APA provides that the limitations period commences "when notice is given of the agency decision to all persons aggrieved *who are known to the agency.*" N.C.G.S. § 150-23(f) (emphasis added). In this case however, the only party whose interests the agency *knew* would be directly affected by its decision was Atlantic Wind. Given that the agency's letter reflected Atlantic Wind's desired reading of the section 2 of S.L. 2013-51, Atlantic Wind was not aggrieved by the decision and there were no other entities "known" to the agency to which notice of its letter should have been given. Indeed, Respondent cannot be expected to ascertain the identity of all members of the public who might possibly be aggrieved by its correspondence with a single company. Moreover, Petitioners have not alleged any basis in the Petition for disregarding the statute of limitations in this instance. See Templeton v. Town of Boone, 208 N.C. App. 50, 53, 701 S.E.2d 709, 712 (2010) (stating that the party invoking subject matter jurisdiction has the burden of proving that jurisdiction exists).

The Petition was filed by Petitioners one hundred and fifty days (150) after Respondent sent the April 29 Letter and seventy-four (74) days after construction began on the Desert Wind

Project. Because Petitioners failed to comply with the 60-day limitations period established under N.C.G.S. § 150B-23(f), the Court lacks subject matter jurisdiction over the Petition.

B. Petitioners' claims are not redressable by this Court.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." Aubin v. Susi, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). The elements of standing are (1) an injury in fact, (2) that is "fairly traceable to the challenged action of the defendant," and (3) that "*will be redressed by a favorable decision.*" Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002) (emphasis added); see also State ex rel. Utilities Comm'n v. Cowee Mountain Imp. Ass'n, Inc., 173 N.C. App. 234, 617 S.E.2d 721 (2005) (applying these elements in a case challenging an agency action under the APA). Thus, standing will be held lacking where the remedies sought are "unavailable and inappropriate." Marriott v. Chatham Cnty., 187 N.C. App. 491, 495, 654 S.E.2d 13, 17 (2007).

Here, it is apparent from the face of the Petition that the harms Petitioners allege cannot "be redressed by a favorable decision" of this Court. Marriott, 187 N.C. App. at 494, 654 S.E.2d at 16. Even if Petitioners prevail upon the Court to adopt its interpretation of the Wind Act, the Court cannot require Iberdrola who is not a party to this litigation to file a permit application. (Pet'rs' Statement of the Case 3.) Moreover, to the extent Petitioners seek an order from the Court directing Respondent to "require Iberdrola to go through permitting process" this Court is without authority to grant it. See N.C.G.S. § 143-215.126 (stating that where a person fails to obtain a permit before constructing a wind facility "the [Agency] *may* impose an administrative penalty" or "*may* institute an action for injunctive relief"); see N.C.G.S. § 150B-33; Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether

through civil or criminal process, is a decision generally committed to an agency's absolute discretion.") (citations omitted); Citizens against the Asphalt Plant v. N.C. DENR, 01 EHR 2278 at ¶ 6, 2003 WL 21638176 (N.C.O.A.H., April 9, 2003) ("[N]either an ALJ nor a court may disturb the Respondent's discretion to select a particular enforcement strategy." (citing Heckler, 470 U.S. 821).

To the extent Petitioners would seek from this Court a *declaratory ruling*, stating the Court's view of what the legislature intended when it enacted Section 2 of S.L. 2013-51—the APA explicitly states that such a remedy is *beyond the purview of OAH.* See N.C.G.S. § 150B-2(2) ("'Contested case' does not include . . . declaratory rulings"); N.C.G.S. § 150B-33 (enumerating the powers of an ALJ).

In short, Petitioners seek "unavailable and inappropriate" remedies in this case. Marriott, 187 N.C. App. at 495, 654 S.E.2d at 16-17. Thus, Petitioners lack standing to pursue their claims and this court is without jurisdiction to consider them.

II. PETITIONERS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER RULE 12(B)(6).

Rule 12(b)(6) of the North Carolina Rules of Civil Procedure authorizes a motion to dismiss for failure to state a claim upon which relief may be granted. In order to survive a 12(b)(6) motion, Petitioners must, at minimum, "allege the substantive elements of a valid claim." Atkinson v. Lesmeister, 186 N.C. App. 442, 445, 651 S.E.2d 294, 296 (2007). Further, dismissal under Rule 12(b)(6) is appropriate where "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). In considering Respondent's motion to dismiss under Rule 12(b)(6), the

"well-pleaded factual allegations of the [petition] are treated as true." Dalenko v. Wake County Dep't of Human Servs., 157 N.C. App. 49, 56, 578 S.E.2d 599, 604 (2003). Even so, the trial court "is not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Laster v. Francis, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009) (quotation omitted).

In this case, Petitioners were required to plead facts establishing the elements set forth in section 150B-23(a) of the APA. That section requires that a petition:

> state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:
>
> (1) Exceeded its authority or jurisdiction;
> (2) Acted erroneously;
> (3) Failed to use proper procedure;
> (4) Acted arbitrarily or capriciously; or
> (5) Failed to act as required by law or rule.

N.C.G.S. § 150B-23(a) (emphasis added).

A. Petitioners allege that Respondent failed to act as required by law yet cite no legal authority directing Respondent to act.

Petitioners allege that Respondent erred by "fail[ing] to require Iberdrola to go through the permitting process." (Pet'rs' Statement of the Case 3.) While Petitioners have checked all boxes on the Contested Case Form indicating that Respondent "Exceed its Authority or jurisdiction; Acted erroneously; Failed to use proper procedure; Acted arbitrarily or capriciously; or Failed to act as required by law," it is readily apparent from the factual allegations in the Petition that Petitioners' primary grievance is that Respondent "failed to act as required by law" by not "require[ing]" Atlantic Wind to obtain a permit. (Pet'rs' Statement of the Case 3.)

North Carolina case law has made clear that an agency cannot be sued under the APA for failing to act as required by law when a statute imposes no "mandatory" duties upon the agency. In N. Carolina State Bd. of Educ. v. N.C. Learns, Inc., the court considered whether the State Board of Education ("SBOE") had failed to act as required by law under N.C.G.S. § 150B-23(a)(5) by not acting upon a virtual charter school's charter application. __ N.C. App. __, _, 751 S.E.2d 625, 634 (2013) review denied, 762 S.E.2d 209 (N.C. 2014). The court held that by not responding to the application, the SBOE had not "'[f]ailed to act as required by law or rule,' and thus, N.C.G.S. § 150B–23(a)(5) was not applicable. The court went on to explain that "[i]naction can constitute 'action' sufficient to trigger jurisdiction in OAH" only when "there is *an obligation to act.*" Id. (emphasis added). The court ruled that no such obligation existed where the statute in question "contain[s] no specific language regarding the consequences of a failure to act." Id. Indeed, only in cases where such consequences exist will a failure to act become actionable under the APA.

Here, not only is there no provision delineating what occurs when Respondent fails to "require" a person to obtain a permit, there is also no requirement that the agency do so in the first place. The Wind Act only imposes obligations on the persons seeking to operate a wind energy facility and not upon the agency until an application is submitted. The agency's authority to enforce the wind act against individuals who operate without a permit is discretionary. The Wind Act states that "*No 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.G.S. § 143-215.116; see also, e.g., N.C.G.S. § 143-215.117 (stating that before filing an application "*a person shall* request a preapplication site evaluation meeting to be held between the applicant and the Department"); § 143-215.117 (stating that before filing an

application "*the applicant shall* request the scheduling of a scoping meeting between the applicant and the Department" (emphasis added)); § 143-215.119 (stating the information that "*[a] person applying for a permit . . . shall* include . . .in an application for the permit" (emphasis added)); § 143-215.121 (stating that "*[t]he applicant for a permit or a permit holder . . . shall* establish financial assurance"); § 143-215.122 (stating that "*[t]he applicant shall* annually submit copies to the Department of any post-construction monitoring"). The agency's obligations only arise once a permit has been submitted. See N.C.G.S. § 143-215.120 (stating that the Department shall consider certain criteria when evaluating a permit and shall issue a decision within ninety (90) days). A person who constructs a wind facility without a permit (should one be required) proceeds at her own peril.

Because the agency error alleged in the Petition is that the agency failed to act as required by law, and Petitioners fail to point to any statutory provision requiring the agency to act, the Petition fails to state a claim upon which relief can be granted under Rule 12(b)(6) and should be dismissed.

B. Petitioners fail to allege facts supporting its claim that Respondent engaged in an *ultra vires* act.

In addition to alleging that Respondent failed to act as required by law, Petitioners generally claim that the April 29 Letter itself was "ultra vires." Our courts have stated that "the term ultra vires is used to designate the acts of corporations beyond the scope of their powers as defined by their charters or acts of incorporation." Lambeth v. Thomasville, 179 N.C. 452, 454, 102 S.E. 775, 776 (1920). The term is also generally used to refer to instances in which an act is unauthorized or "beyond the scope of power allowed or granted by . . . law." Black's Law Dictionary (10th ed. 2014). Thus, an act is only ultra vires if it is "beyond the power" of the agency. Bowers v. City of High Point, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994).

Because Petitioners contend that the April 29 Letter constituted an *ultra vires* act, they ask this Court to "void" the letter. Petitioners allege no facts and cite no law to support the proposition that Respondent "exceeded its authority" or "failed to use proper procedure" in sending the April 29 Letter, N.C.G.S. § 150B-23(a)(1), (3). Nor do they properly assert that sending the letter was "beyond [the agency's] power." Bowers, 339 N.C. at 417, 451 S.E.2d at 287. To the contrary, state agencies routinely give guidance to the regulated community regarding the application of the laws they administer. In this instance, Atlantic Wind asked Respondent whether it would be required to obtain a permit under the Wind Act. Respondent sent a letter to Iberdrola informing it that no permit was required pursuant to Section 2 of S.L. 2013-51. When an agency responds to an inquiry from a member of the public as to whether a particular statute requires the person to obtain a permit, the agency does not commit an *ultra vires* act.

While Petitioners may disagree with Respondent's interpretation of the Wind Act, Petitioners may not challenge correspondence between agency officials and a member of the public as *ultra vires.* Petitioners request that the Court "void" the April 29 Law is without legal basis and must be dismissed.

CONCLUSION

For the foregoing reasons, the Petition should be dismissed in its entirety with prejudice for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

Respectfully submitted this is the 3rd day of November, 2015.

ROY COOPER
ATTORNEY GENERAL

By: _____

Asher P. Spiller
Assistant Attorney General
NC State Bar No. 46425
Aspiller@ncdoj.gov

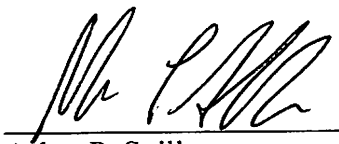
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS has been served on the Petitioners by depositing a copy of the same in an official depository of the United States Mail, first class, postage prepaid, and addressed to Petitioners' counsel of record as follows:

Elliot Engstrom
Civitas Institute Center for Law and Freedom
100 South Harrington St.
Raleigh, NC 27603
Eliot.engstrom@nccivitas.org
Counsel for Petitioner

This the 3rd day of November, 2015.



Asher P. Spiller
Assistant Attorney General

FILED

STATE OF NORTH CAROLINA
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IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF PASQUOTANK
15 EHR 03522

OFFICE OF ADMIN HEARINGS

JOHN J WOODARD JR
Petitioner,

vs.

NC DEPARTMENT OF ENVIRONMENT AND NATUREAL RESOURCES, DIVISION OF ENERGY, MINERAL, AND LAND RESOURCES
Respondent.

FINAL DECISION ORDER OF DISMISSAL

Upon consideration of Respondent's Motion to Dismiss filed on July 15, 2015, Petitioner's response thereto, the parties' submission of additional information, and for good cause shown, the undersigned hereby **GRANTS** Respondent's Motion as follows:

APPEARANCES

For Petitioner: Elliot Engstrom, Center for Law and Freedom, Civitas Institute, 100 South Harrington St., Raleigh, North Carolina 27603.

For Respondent: Daniel S Hirschman, Special Deputy Attorney General, and Asher P Spiller, Assistant Attorney General, North Carolina Department of Justice, PO Box 629, Raleigh, North Carolina 27602-0629

ISSUES

1. Is Petitioner a "person aggrieved" under N.C. Gen. Stat. § 150B-2(6), and thus, have standing to bring this case before the Office of Administrative Hearings?

2. Has Petitioner failed to state a claim upon which relief can be granted?

3. Did Respondent err in determining that Session Law 2013-51 (codified at N.C. Gen. Stat. § 143-215.115 *et seq*) does not apply to the Desert Wind Project?

EXHIBIT A
PENGAD-Bayonne, N. J.

FINDINGS OF FACT

Background Facts

1. By letter dated April 25, 2015, Respondent issued a decision that Iberdrola's Desert Wind Project ("Iberdrola's) was not subject to "An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities" ("the Act") based on a plain reading of the Act. Respondent explained this is true, because:

> [T]he FAA issued determinations to Iberdrola, for its Desert Wind Project, on June 29, 2011, prior to the Act becoming law, despite the fact that the FAA issued determination 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.

(Document Constituting Agency Action, April 25, 2015 letter)

2. On May 11, 2015, Petitioner filed a *pro se* contested case petition with the Office of Administrative Hearings contesting Respondent's April 29, 2015 decision that Iberdrola Renewables' Desert Wind Project is not subject to permitting provisions of the Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities. The petition form Petitioner completed asked Petitioner to, "Briefly state facts showing how you believe you have been harmed by the State agency or board." Petitioner responded that:

> Iberdrola renewables initial FAA determination (11/11) expired in 2012. There was no FAA determination for Desert Wind for 6 mos. FAA determination of 6/29/11 was voided due to substantial changes. Gen Statute 21C does not say these only apply to project with FAA Det after 5/17/13. Clock should be reset to date of current FAA determination.

(May 11, 2015 Petition)

May 11, 2015 Petition

3. Item number five (5) on the contested case petition form states, "Because of these facts, the State agency or board has: (check at least one from each column.) Petitioner answered the right column by checking that Respondent had exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure acted arbitrarily or capriciously, or failed to act as required by law or rule. However, Petitioner did not complete or check any of the items in the left column of number (5) that asked Petitioner to indicate whether Respondent had deprived him of property, ordered him to pay a fine or civil penalty, or otherwise substantially prejudiced my rights.

4. In his *pro se* petition and *pro so* Prehearing Statement, Petitioner failed to provide any facts establishing how he was directly or indirectly affected substantially in "his person, property, or employment" by Respondent's April 29, 2015 decision. Specifically, Petitioner failed to state how he had been adversely or injuriously affected, damnified, suffered a loss or injury, had a grievance or cause for complaint, or suffered an infringement or denial of legal rights by Respondent's April 29, 2015 decision. Neither did Petitioner state how Respondent had "deprived [him] of property, ordered [him] to pay a fine or civil penalty, or otherwise substantially prejudiced [his] rights." N.C. Gen. Stat. § 150B-23(a).

Amended Petition

5. On August 10, 2015, Petitioner's counsel responded to Petitioner's Motion to Dismiss, and contemporaneously filed an Amended Petition (Exhibit 8 of such Motion) and an Amended Prehearing Statement with the Office of Administrative Hearings. In the Amended Petition, Petitioner stated the following facts as "how he believed he had been harmed" by Respondent's April 29, 2015 decision:

> Pursuant to N.C.G.S. § 143-215.115 thru 143-215.126, Respondent is obligated to properly permit wind energy facilities. However, in a letter dated April 29, 2015, Respondent told Iberdrola Renewables that their Desert Wind project was not the subject to the permitting provisions of these statutes. This is an incorrect statement of the law, and therefore, Respondent is failing to act as required under the law. Due to this incorrect statement of law, the Desert Wind project is not being properly permitted, and this lack of statutorily mandated oversight from Respondent will result in harm to Petitioner.

(Amended Petition, Exh 8 of Respondent's Motion to Dismiss) In item number (5) of the amended petition, Petitioner placed an "x" indicating that Respondent "otherwise substantially prejudiced my rights."

6. In this Amended Petition, Petitioner failed to state any facts alleging how Respondent's April 29, 2015 determination had directly or indirectly substantially affected Petitioner's "person, property, or employment." N.C. Gen. Stat. § 150B-2(6) That is, Petitioner failed to state how he had been adversely or injuriously affected, damnified, suffered a loss or injury, had a grievance or cause for complaint, or suffered an infringement or denial of legal rights by Respondent's April 29, 2015 decision. Neither did Petitioner allege how Respondent had "deprived [him] of property, ordered [him] to pay a fine or civil penalty, or otherwise substantially prejudiced [his] rights." N.C. Gen. Stat. § 150B-23(a).

CONCLUSIONS OF LAW

1. This contested case is subject to dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b) of the Rules of Civil Procedure, N.C. Gen. Stat. §§ 150B-33(b)(3a).

2. "Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. G. S. § 1A-1, Rule 12(h) (3).

Lack of Standing - Not Person Aggrieved

3. "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v.* Susi, 140 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). "The term [standing] refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Neuse River Found., Inc. v. Smithfield Foods, Inc.,* 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32(1972)).

4. Under N.C. Gen. Stat. § 150B-23(a), a person must file a petition with the Office of Administrative Hearings (OAH) to commence a contested case hearing under Chapter 150B, the NC Administrative Procedure Act ("NCAPA"). The right to file a petition for a contested case hearing in the Office of Administrative Hearings (OAH) is limited to a "person aggrieved." N.C. Gen. Stat. § 150B-23(a). Whether someone is an "aggrieved person" within the meaning of N.C. Gen. Stat. § 150B-2(6) is a question of standing.

5. The party invoking the subject matter jurisdiction of a tribunal has the burden of proving that such jurisdiction exists. *Templeton v. Town of Boone*, 208 N.C. App. 50, 53, 701 S.E.2d 709, 712 (2010)

6. N.C. Gen. Stat. § 150B-2(6) defines a "person aggrieved" as:

> [A]ny person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.

7. "In order for [a] petitioner to prevail on his claim to status as a 'person aggrieved' under the NCAPA, [a] petitioner must first demonstrate that her personal [sic], property, employment or other legal rights have been in some way impaired." *In re Denial of Request for Full Admin. Hearing,* 146 N.C. app. 258, 261, 552 S.E. 2d 230, 232, *disc. rev. denied,* 354 N.C. 573, 558, S.E. 2d 867 (2001)

8. In this case, Petitioner is not a "person aggrieved," pursuant to N.C. Gen. Stat. § 150B-2(6) as he is not presently aggrieved. In both his petition and amended petition, Petitioner failed to establish facts that he has been directly or indirectly affected substantially in his "person, property, or employment" by Respondent's April 29, 2015 determination. Nothing in the petition or amended petition indicates that Petitioner is adversely affected, imminently threatened, or is likely to be threatened or affected by any

future events that may occur as a result of Respondent's April 29, 2015 decision. Even if one draws all inferences in Petitioner's favor, it is clear that Petitioner failed to demonstrate that his "legal rights have been in some way impaired." *Id.* 146 N.C. at 261, 552 S.E.2d at 232; see also *Diggs v. N.C. Dept. of Health and Human Services*, 157 N.C.App. 344 578 S.E.2d 666 (2003). As a result, Petitioner is not presently a "person aggrieved," and thus, lacks standing to appeal Respondent's April 29, 2015 action under N.C. Gen. Stat. § 150B-2(6) and 150B-23(a).

9. In his Response to Respondent's Motion to Dismiss, Petitioner asserted that denial of a hearing would itself be an injury to Petitioner, and thus make Petitioner the necessary aggrieved person status to demand an administrative hearing. However, our Court of Appeals, in *In re Denial of Request for Full Administrative Hearing*, 146 N.C. App. at 260, 552 S.E. 2d at 232, has held that such an argument is "both circular and without merit." Procedural injury, standing alone, cannot form the basis for aggrieved status under the NC Administrative Procedure Act. *Id.*, citing *Empire Power Co. v. N.C. Dept. of E.H.N.R*, 337 N.C. 569, at 590, 447 S.E. 2d 768, 780-81 (1994). Unlike the petitioner in *Empire*, Petitioner in this case has failed to establish that he has suffered any injury to his legal rights to justify his demand to an administrative hearing.

Failure to State a Claim

10. A motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting the question of whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory. *Hubbard v. County of Cumberland*, 143 N.C.App. 149, 150–51, 544 S.E.2d 587, 589, disc. review denied, 354 N.C. 69, 553 S.E.2d 40 (2001) Nevertheless, the trial court "is not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Lasater v. Francis*, 199 N.C. App. 572, 577, 681 S.E. 2d 858, 862 (2009) (quotation omitted)

11. On a motion to dismiss for failure to state a claim, the complaint must be liberally construed in the light most favorable to the nonmoving party, and the Court should not dismiss the complaint, unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief. *Holloman v. Harrelson,* 149 N.C.App. 861, 561 S.E.2d 351 (N.C.App. Apr 16, 2002)

12. In this case, Petitioner has failed to state a claim, in his petition and amended petition, for which relief can be granted, because he failed to state any facts tending to establish how Petitioner was substantially affected, directly or indirectly, by Respondent's April 29, 2015 decision. In his petition and amended petition, Petitioner also failed to allege facts demonstrating how Respondent deprived him of property, ordered him to pay a fine or civil penalty, or otherwise substantially deprived his rights, as required by N.C. Gen. Stat. § 150B-23(a). Petitioner's mere conclusory statements and recitation of the legal statutory requirements, in his petition and amended petition, without specific facts demonstrating how Petitioner suffered injury or impairment to his legal

rights, was insufficient to state a claim upon which relief can be granted under N.C. Gen. Stat. § 150B-23(a).

13. As Petitioner failed to state a claim upon which relief can be granted, the Office of Administrative Hearings lacks subject matter jurisdiction to hear Petitioner's petition.

14. Given the disposition of this ruling, the undersigned need not rule upon the other grounds Respondent stated as a basis for its Motion to Dismiss, and need not rule upon pending Petitioner's Motion for Admission *Pro Hac Vice*.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **GRANTS** Respondent's Motion to Dismiss, and **DISMISSES** this contested case.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.**

In conformity with 26 N.C. Admin. Code 03. 0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.**

N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. The party who files a Petition for Judicial Review must also send a copy of the Petition for Judicial Review to the Office of Administrative Hearings when he or she files an appeal to ensure the timely filing of the record.

This 20th day of August, 2015.

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned, hereby certifies that a copy of the foregoing **FINAL DECISION,** is **DEEMED SERVED** upon the following persons the date it is enclosed in a wrapper and placed in an official depository of the United States Postal Service, as evidenced by the postmark date of the wrapper, addressed as follows:

Elliott Engstrom
Center for Law and Freedom
Civitas Institute
100 South Harrington St.
Raleigh, North Carolina 27603.
ATTORNEY FOR PETITIONER

John J Woodard Jr
117 Pelican Pointe Drive
Elizabeth City, NC 27909
PETITIONER

Daniel S Hirschman
Special Deputy Attorney General
Asher P Spiller
Assistant Attorney General
North Carolina Department of Justice
PO Box 629
Raleigh, North Carolina 27602-0629
ATTORNEYS FOR RESPONDENT

Dr. David W Schnare, Director
Free Market Environmental Law Clinic
9033 Brook Ford Road
Burke, Virginia 22015

This 28th day of August, 2015.

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
Telephone: (919) 431-3000
Facsimile: (919) 431-3100

STATE OF NORTH CAROLINA

15CV013605

Wake County

In The General Court Of Justice
☐ District ☒ Superior Court Division

Name Of Plaintiff
John J. Woodard, Jr.

Address
117 Pelican Pointe Drive

City, State, Zip
Elizabeth City, NC 27909

VERSUS

Name Of Defendant(s)
North Carolina Department of Environmental Quality

CIVIL SUMMONS

☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3, 4

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1
Sarne Hayes, General Counsel
North Carolina Department of Environmental Quality
Green Square Building, 217 W. Jones Street
Raleigh, NC 27603

Name And Address Of Defendant 2

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and

2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)
Elliot M. Engstrom, Esq.
Civitas Institute Center for Law and Freedom
100 S. Harrington Street
Raleigh, NC 27603

Date Issued: OCT 1 2 2015 Time: ☐ AM ☒ PM

Signature

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

☐ ENDORSEMENT (ASSESS FEE)
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement | Time | ☐ AM ☐ PM

Signature

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

NOTE TO PARTIES: *Many counties have MANDATORY ARBITRATION programs in which most cases where the amount in controversy is $15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and if so, what procedure is to be followed.*

AOC-CV-100, Rev. 8/07
© 2007 Administrative Office of the Courts

EXHIBIT B

PENGAD-Bayonne, N.J.

15CV013685

STATE OF NORTH CAROLINA FILED

COUNTY OF WAKE

2015 OCT 12 P 2:12

WAKE COUNTY, C.S.C.

BY DS

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

CIVIL ACTION # _____

JOHN J. WOODARD
Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY
Defendant.

COMPLAINT

INTRODUCTION

1. This action is brought pursuant to Article I § 6 of the North Carolina Constitution; the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1-253; and An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, N.C. Gen. Stat. §§ 143-215.115 thru 215.126.

2. Hereinafter, N.C. Gen. Stat. §§ 143-215.115 thru 215.126, "An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities," will be referred to as the "Wind Energy Act."

3. Plaintiff comes to this Court as a taxpayer and citizen seeking a declaration that Defendant took an illegal, unconstitutional, ultra vires act in issuing its April 29, 2015 letter informing Iberdrola Renewables that its Desert Wind facility is not subject to the permitting provisions of the Wind Energy Act. The Desert Wind facility was recently renamed the "Amazon Wind Farm East." For the purposes of this litigation, "Desert Wind" and "Amazon Wind Farm East" are one and the same.

4. Defendant's illegal and unconstitutional actions have directly harmed Plaintiff both by depriving him of statutory protections of which he is an intended beneficiary and by violating his rights under the North Carolina Constitution.

5. Plaintiff has no adequate remedy other than a direct constitutional claim, both because he has exhausted his administrative remedies and because a direct constitutional claim is the proper state remedy.

6. Plaintiff seeks a permanent injunction compelling Defendant to comply with the Wind Energy Act and the North Carolina Constitution by withdrawing its letter issued on April 29, 2015 and properly implementing the provisions of the Wind Energy Act.

PARTIES

7. The allegations of Paragraphs 1-6 are incorporated herein by reference.

8. Plaintiff is a natural person residing in Pasquotank County. He is a North Carolina citizen, taxpayer, and resident. Absent Defendant's illegal and unconstitutional act, Plaintiff would be the beneficiary of a statutory regime that protects him against potential environmental degradation and allows him a voice in the process for wind energy permitting in North Carolina.

9. Defendant North Carolina Department of Environmental Quality (hereinafter "Defendant") is an executive agency of the State of North Carolina. It is a creation of the legislature under Article 7 of the Executive Organization Act of 1973. The newly-named DEQ only recently ceased using the name "North Carolina Department of Environment and Natural Resources" (DENR). For the purposes of this litigation, DEQ and DENR are one and the same.

SUBJECT MATTER JURISDICTION

10. The allegations of Paragraphs 1-9 are incorporated herein by reference.

11. This action is brought pursuant to N.C. Gen. Stat. § 1-253 and §§ 143-215.115 thru 215.126. This Court has jurisdiction over the subject matter of this action pursuant to N.C. Gen. Stat. § 1-253.

12. This action is further brought under Article I § 6 of the North Carolina Constitution. In the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under the North Carolina Constitution.

13. On May 11, 2015, Plaintiff filed suit under the Administrative Procedure Act ("APA") before the Office of Administrative Hearings ("OAH") claiming that he was a "person aggrieved" and therefore could challenge Defendant's issuance of its April 29, 2015 letter as an illegal agency action.

14. On August 23, 2015, Judge Melissa Owens Lassiter of the Office of Administrative Hearings dismissed Plaintiff's OAH petition. Central to Judge Lassiter's dismissal was her finding that "[Plaintiff] is not presently a 'person aggrieved,' and thus, lacks standing to appeal [Defendant]'s April 29, 2015 action under [the APA]." See Paragraph 8 of the Final Decision and Order of Dismissal in the matter of Woodard v. Department of Environment and Natural Resources, 15 EHR 03522, attached hereto as Exhibit 7.

15. Neither Plaintiff nor Defendant appealed Judge Lassiter's order before the end of the statutory period, finalizing the Office of Administrative Hearings' determination that Plaintiff has no remedy against Defendant under the APA. The August 23, 2015 order is therefore res judicata as to both Plaintiff and Defendant in subsequent litigation.

16. Plaintiff does not come to this Court seeking a review of Judge Lassiter's decision under N.C. Gen. Stat. § 150B-45(a)(2). The attached ruling of the Office of Administrative

Hearings is only relevant insofar as it demonstrates why the Office of Administrative Hearings is not the proper venue for Plaintiff to bring his case against Defendant.

PERSONAL JURISDICTION AND VENUE

17. The allegations of Paragraphs 1-16 are incorporated by reference herein.

18. This Court has jurisdiction over the parties pursuant to N.C. Gen. Stat. § 1-75.4.

19. Venue is proper in this Court as to the Defendant pursuant to N.C. Gen. Stat. § 1-77(2).

STANDING

20. The allegations of Paragraphs 1-19 are incorporated by reference herein.

21. Plaintiff is a North Carolina citizen and taxpayer, and therefore has standing to challenge illegal or unconstitutional uses of state funds. Tax dollars were used by Defendant to carry out its illegal and unconstitutional activities. Further, the specific act of issuing the April letter constituted a use of taxpayer funds, and therefore constituted harm to Plaintiff.

22. Plaintiff further has standing to bring a direct constitutional claim under Article I § 6 of the North Carolina Constitution to remedy a violation of his constitutional rights. Such a violation constitutes harm to Plaintiff.

23. Defendant has deprived Plaintiff of his statutory right to participate in the permitting process as described in the Wind Energy Act.

24. Because of Defendant's illegal and unconstitutional act, Plaintiff cannot know what environmental and economic impacts he will suffer from the Desert Wind facility, or meaningfully exercise his statutory and constitutional rights under North Carolina law.

FACTUAL ALLEGATIONS

25. The allegations of Paragraphs 1-24 are incorporated herein by reference.

26. In 2011, Atlantic Wind, a subsidiary of Iberdrola Renewables, proposed construction of a wind energy facility, referred to herein as the 2011 Desert Wind Project.

27. In 2014, Iberdrola changed the 2011 project by increasing the heights of the wind towers and changing their locations.

28. To distinguish between the initial project and the changed project, the latter is hereinafter referenced as the "2014 Desert Wind Project."

29. Under federal law, and for each of the 151 tall structures that made up its 2011 wind energy facility, Iberdrola was required to obtain Federal Aviation Administration ("FAA") determinations that the tall structures posed no hazard to civil aviation. On June 29, 2011, the FAA issued 151 "Determinations of No Hazard to Air Navigation" for the 2011 Project. See, e.g., Exhibit 1.

30. These determinations expired on December 29, 2012. See, e.g., Exhibit 1.

31. On June 27, 2014, after expiration of the 2011 no hazard determinations, Iberdrola submitted a new set of applications to the FAA for its 2014 project. See, e.g., Exhibit 3.

32. As admitted by Defendant in its April 29, 2015 letter (attached hereto as Exhibit 5), the 2014 application differed from the 2011 plan in two ways. First, the heights of the wind towers were increased from 486 feet above ground level to 499 feet above ground level. Compare Exhibit 1 with Exhibits 2, 3, & 4. Second, Iberdrola changed the location of some wind towers. Exhibit 2 provides a list of all the 2014 wind tower locations by latitude and longitude. A search of that list shows that the location of the 2011 wind tower identified in Exhibit 1 is not among the 2014 locations.

33. Iberdrola had to obtain different "no hazard" determinations from the FAA because the structures in the 2014 Project were materially different from the structures in the 2011 Project.

34. On May 17, 2013, after the 2011 FAA determinations expired for the 2011 Project, but before the 2014 FAA determinations were granted, the General Assembly enacted N.C. Session Law 2013-51, "An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities" (the "Wind Energy Act"). The Wind Energy Act became effective when enacted, and sets forth permitting requirements for wind facilities.

35. Pursuant to the Wind Energy Act, no person shall undertake construction, operation, or expansion activities associated with a wind energy facility in North Carolina without first obtaining a permit from Defendant – and Defendant is obliged to carry out this permitting process.

36. The Act applies to wind energy facilities or expansions that have not received a "No Hazard to Air Navigation Determination" from the FAA prior to May 17, 2013.

37. Defendant examined the information submitted by Iberdrola Renewables, and on March 18, 2015 issued a letter declaring that "Iberdrola's [2014] Desert Winds Project is subject to the State's wind energy facility permitting process" which required Iberdrola to conduct an environmental impact study and required Defendant to review that study and otherwise take it into account in the permitting process. See Defendant's March 18, 2015 letter to Iberdrola Renewables, attached hereto as Exhibit 6.

38. One month later, Defendant issued a second letter, indicating that it had "renewed its review of the Act" and determined the 2014 project was not subject to permitting. See Defendant's April 29, 2015 letter to Iberdrola Renewables, attached hereto as Exhibit 5.

39. At issue in this case is Defendant's determination, described in Paragraph 38, *supra*, that the 2014 Desert Wind Project is not subject to the permitting provisions of N.C. Gen. Stat. §§ 143-215.115 thru 215.226. For the reasons discussed below, this determination was an illegal and unconstitutional act by Defendant. This illegal and unconstitutional act essentially nullified legislatively enacted protections from which Plaintiff would have benefited, and deprived Plaintiff of his statutory right to participate in or object to the permitting process. Plaintiff can only be made whole by an order of this Court compelling Defendant to perform its legally mandated task and put the Desert Wind Project through the statutorily mandated permitting procedure.

FIRST CLAIM FOR RELIEF (DECLARATORY JUDGMENT)

40. The allegations of Paragraphs 1-39 are incorporated herein by reference.

41. Defendant is an executive agency created by state law. It has only those powers granted to it by the legislature. *See* Article 7 of the Executive Organization Act of 1973, codified in N.C. Gen. Stat. §§ 143B-275 thru 344.60.

42. While Defendant has some discretion as to how to interpret legislation, it does not have the power to "promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law." Hall v. Toreros, II, Inc., 176 N.C. App. 309, 319 (2006).

43. Among the legislatively mandated duties of Defendant are to "Provide for the protection of the environment" and "to provide for the protection of the environment and public health through...the administration of environmental health programs." N.C. Gen. Stat. § 143B-279.2(1), (1b).

44. Among the aforementioned "environmental health programs" are the provisions of Session Law 2013-51, "An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities," effective as of May 17, 2013 and codified in N.C. Gen. Stat. §§ 143B-215.115 thru 215.126. Hereinafter, this law will be referred to as the "Wind Energy Act" if not otherwise specifically referenced.

45. N.C. Gen. Stat. § 143-215.116 states that "No person shall undertake construction, operation, or expansion activities associated with a wind energy facility in this State without first obtaining a permit from [Defendant]."

46. N.C. Gen. Stat. § 143-215.115(2) defines a "wind energy facility" as "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."

47. The 2014 Desert Wind Project constitutes a new "wind energy facility" commenced after the effective date of the Wind Energy Act, and therefore it is subject to the provisions of the Wind Energy Act. Defendant has no authority to simply decline to implement the law.

48. As a new "wind energy facility" the 2014 Desert Wind Project is subject to the provisions of the Wind Energy Act as promulgated by the legislature. As such, Defendant is obliged to carry out the permitting process required by the Wind Energy Act.

49. Under the Act, as a resident and affected property owner, and especially as one living and working in close proximity to the Desert Wind Facility, Plaintiff has a right to benefit from the information gained through the permitting process.

50. Plaintiff seeks a declaration from this Court that the 2014 Desert Wind Project is subject to the provisions of the Wind Energy Act as a new "Wind energy facility" as defined in N.C. Gen. Stat. § 143-215.115(2), and that Defendant therefore acted erroneously and exceeded its authority by issuing its April 2015 letter to Iberdrola Renewables stating that the 2014 Desert Wind Project is not subject to the permitting provisions of the Wind Energy Act.

SECOND/ALTERNATIVE CLAIM FOR RELIEF (DECLARATORY JUDGMENT)

51. The allegations of Paragraphs 1-50 are incorporated herein by reference.

52. In paragraphs 40-50, Plaintiff seeks a declaration from this Court that the 2014 Desert Wind Project is a new "wind energy facility" as defined in N.C. Gen. Stat. § 143-215.115(2).

53. For the reasons stated in Paragraphs 40-45, Plaintiff alleges alternatively that the 2014 Desert Wind Project is a "wind energy facility expansion" as defined in N.C. Gen. Stat. § 143-215.115(3).

54. N.C. Gen. Stat. § 143-215.115(3) defines a "wind energy facility expansion" as "any activity that (i) 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 (emphasis added).

55. The 2014 Desert Wind Project constitutes a "wind energy facility expansion" commenced after the effective date of the Wind Energy Act, and therefore it is subject to the provisions of the Wind Energy Act. Defendant has no authority to simply decline to implement the law.

56. As a "wind energy facility expansion" the 2014 Desert Wind Project is subject to the provisions of the Wind Energy Act as promulgated by the legislature. As such, Defendant is obliged to carry out the permitting process required by the Wind Energy Act.

57. Under the Wind Energy Act, as a resident and affected property owner, and especially as one living and working in close proximity to the Desert Wind Facility, Plaintiff has a right to benefit from the information gained through the permitting process.

58. As an alternative to the theory that the 2014 Desert Wind Project constitutes a new "wind energy facility," and pursuant to well-established North Carolina case law liberally allowing the pleading of alternative theories, Plaintiff seeks a declaration from this Court that the 2014 Desert Wind Project is subject to the provisions of the Wind Energy Act as a "wind energy facility expansion," and that Defendant therefore acted erroneously and exceeded its authority by issuing its April 2015 letter to Iberdrola Renewables stating that the 2014 Desert Wind Project is not subject to the permitting provisions of the Wind Energy Act.

THIRD CLAIM FOR RELIEF (N.C. CONST. ART I § 6)

59. The allegations of Paragraphs 1-58 are incorporated herein by reference.

60. Defendant is an executive agency created by the legislature and has only those powers granted to it by the legislature. *See* Article 7 of the Executive Organization Act of 1973, codified in N.C. Gen. Stat. §§ 143B-275 thru 344.60.

61. In addition to the requirements of the Wind Energy Act, the General Assembly has further charged Defendant with the duties to "Provide for the protection of the environment" and "to provide for the protection of the environment and public health

through...the administration of environmental health programs." N.C. Gen. Stat. § 143B-279.2(1), (1b).

62. Defendant exceeded its authority, contravened its legislative mandate, and illegally acted in a legislative capacity by refusing to implement the Wind Energy Act with respect to the 2014 Desert Wind Project. See paragraphs 40-58, *supra*.

63. "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. Art. I § 35.

64. North Carolina courts interpret our state's constitution liberally in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of citizens in regard to both person and property. Corum v. Univ. of N. Carolina Through Bd. of Governors, 330 N.C. 761, 783 (1992).

65. Article I § 6 of the North Carolina Constitution states that "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

66. This provision regarding separation of powers was deliberately placed in Article I of our state's Constitution, despite the existence of several other constitutional articles that deal with the structures and functions of the various branches of government.

67. Article I is a "Declaration of Rights" of the citizens of North Carolina. The purpose of this Article is to ensure that a violation of individual and personal rights by anyone invested with powers of state is never permitted. State v. Manuel, 20 N.C. 144, 23 (1838).

68. "A violation of the separation of powers doctrine occurs when one branch of state government exercises powers that are reserved for another branch of state government." Biggers v. Bald Head Island, 200 N.C. App. 83, 87 (2009).

69. "There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments." State ex rel. Wallace v. Bone, 304 N.C. 591, 601 (1982).

70. In promulgating the Act, the North Carolina legislature delegated its authority over wind energy facilities to the Defendant. This delegation is legal under the delegation doctrine, which states, "[A] legislature *may* delegate a limited portion of its legislative powers to administrative agencies so that these agencies may exercise their expertise in complex matters with which a legislative body cannot deal directly." Town of Spruce Pine v. Avery Cnty., 123 N.C. App. 704, 712 (1997).

71. Courts must closely monitor such delegations of power to ensure that "agency decision-making is not arbitrary and unreasoned." Adams v. N. Carolina Dep't of Natural & Econ. Res., 295 N.C. 683, 697-98 (1978).

72. "An administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law." Hall v. Toreros, II, Inc., 176 N.C. App. 309, 319 (2006).

73. Defendant's issuance of its letter of April 29, 2015 was an illegal and unconstitutional act in violation of N.C. Const. Art I § 6. Defendant usurped the authority of the legislature to make law in North Carolina when the Defendant purported to make a decision that had already been made by the legislature: that new wind energy facilities and wind energy facility expansions occurring after the effective date of the Wind Energy Act would be subject to state permitting standards.

74. Defendant has directly harmed Plaintiff by violating his rights under Article I § 6 of the North Carolina Constitution.

75. This Court should declare that in issuing its letter of April 29, 2015, Defendant violated Plaintiff's rights under Article I § 6 of the North Carolina Constitution, and that Defendant's letter of that date is therefore null and void, leaving Defendant's March 18, 2015 letter as the controlling statement.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests the following relief:

76. That judgment be entered declaring that in issuing its letter of April 29, 2015, Defendant improperly determined that the 2014 Desert Wind Project is not a new "wind energy facility" as defined in N.C. Gen. Stat. § 143-215.115(2).

77. That, alternatively to the declaration requested in Paragraph 76, *supra*, judgment be entered declaring that in issuing its letter of April 29, 2015, Defendant improperly determined that the 2014 Desert Wind Project is not a "wind energy facility expansion" as defined in N.C. Gen. Stat. § 143-215.115(3).

78. That judgment be entered declaring that in issuing its letter of April 29, 2015, Defendant violated Article I § 6 of the North Carolina Constitution by improperly depriving Plaintiff of the benefits of legislation enacted by the General Assembly.

79. That this Court enter an injunction (1) compelling Defendant to retract its letter of April 29, 2015, thus reinstating its letter of March 18, 2015 and (2) compelling Defendant to properly implement N.C. Gen. Stat. §§ 143-215.115 thru 215.126 with respect to the Desert Wind Project.

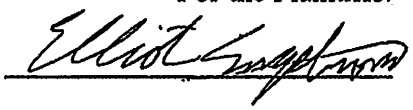
80. That Plaintiff be granted such other and further relief as the Court deems just and proper.

REQUEST FOR JURY

81. Plaintiffs request a jury for any such matters that might be tried by a jury.

This the 12th day of October 2015.

For the Plaintiffs:



Elliot Engstrom
N.C. Bar # 46003
Center for Law and Freedom
Civitas Institute
100 S. Harrington Street
Raleigh, NC 27603
elliot.engstrom@nccivitas.org

EXHIBIT 1 — FAA "DETERMINATION OF NO HAZARD TO AIR NAVIGATION" ISSUED ON JUNE 29, 2011

Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
2601 Meacham Boulevard
Fort Worth, TX 76137

Aeronautical Study No.
2011-WTE-2312-OE

Issued Date: 06/29/2011

Tina Bartunek
IBERDROLA RENEWABLES
1125 NW Couch St
Portland, OR 97209

**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Wind Turbine A2
Location:	Windfall, NC
Latitude:	36-17-05.45N NAD 83
Longitude:	76-29-21.68W
Heights:	486 feet above ground level (AGL)
	498 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure is marked/lighted in accordance with FAA Advisory circular 70/7460-1 K Change 2, Obstruction Marking and Lighting, white paint/synchronized red lights - Chapters 4,12&13(Turbines).

It is required that FAA Form 7460-2, Notice of Actual Construction or Alteration, be completed and returned to this office any time the project is abandoned or:

_____ At least 10 days prior to start of construction (7460-2, Part I)
__X__ Within 5 days after the construction reaches its greatest height (7460-2, Part II)

See attachment for additional condition(s) or information.
This determination expires on 12/29/2012 unless:

(a) extended, revised or terminated by the issuing office.
(b) the construction is subject to the licensing authority of the Federal Communications Commission (FCC) and an application for a construction permit has been filed, as required by the FCC, within 6 months of the date of this determination. In such case, the determination expires on the date prescribed by the FCC for completion of construction, or the date the FCC denies the application.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE E-FILED AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE. AFTER RE-EVALUATION

OF CURRENT OPERATIONS IN THE AREA OF THE STRUCTURE TO DETERMINE THAT NO SIGNIFICANT AERONAUTICAL CHANGES HAVE OCCURRED, YOUR DETERMINATION MAY BE ELIGIBLE FOR ONE EXTENSION OF THE EFFECTIVE PERIOD.

Additional wind turbines or met towers proposed in the future may cause a cumulative effect on the national airspace system. This determination is based, in part, on the foregoing description which includes specific coordinates and heights . Any changes in coordinates will void this determination. Any future construction or alteration requires separate notice to the FAA.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

If we can be of further assistance, please contact our office at (404) 305-7081. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2011-WTE-2312-OE.

Signature Control No: 137915776-145372207 (DNE -WT)
Michael Blaich
Specialist

Attachment(s)
Additional Information

Additional information for ASN 2011-WTE-2312-OE

A Department of the Navy (DON) evaluation determined the structure would not have an adverse aeronautical effect on flight operations, flight procedures, and safety of flight and as such the DON is providing a No Objection. While the evaluation determined the structure would not have an adverse aeronautical effect, construction of windturbines may have an adverse impact on DON receiver subsystem site at the Naval Support Activity, Northwest in Chesapeake, Virginia. The FAA requires the Proponent, prior to construction, to contact:

Director, Forces Surveillance Support Center, 1298 Olympic Boulevard, Chesapeake, Virginia 23322

EXHIBIT 2 — LIST OF ALL 2014 WIND TOWER LOCATIONS BY LONGITUDE AND LATITUDE

Circle Search for Cases Results

Records 1 to 200 of 263

Case Number	City	State	Latitude	Longitude	Site Elevation	Structure Height	Total Height
2014-WTE-3763-OE	Windfall	NC	36° 19' 48.94" N	76° 28' 46.24" W	10	404	414
2014-WTE-3759-OE	Windfall	NC	36° 17' 02.75" N	76° 26' 18.08" W	13	499	512
2014-WTE-3758-OE	Windfall	NC	36° 17' 37.95" N	76° 27' 21.64" W	13	499	512
2014-WTE-3757-OE	Windfall	NC	36° 17' 20.90" N	76° 27' 10.90" W	15	499	514
2014-WTE-3756-OE	Windfall	NC	36° 17' 06.57" N	76° 27' 02.11" W	14	499	513
2014-WTE-3755-OE	Windfall	NC	36° 17' 14.44" N	76° 27' 45.08" W	13	499	512
2014-WTE-3754-OE	Windfall	NC	36° 17' 00.01" N	76° 27' 34.37" W	14	499	513
2014-WTE-3753-OE	Windfall	NC	36° 17' 45.57" N	76° 25' 21.59" W	13	499	512
2014-WTE-3752-OE	Windfall	NC	36° 17' 32.62" N	76° 25' 17.46" W	13	499	512
2014-WTE-3751-OE	Windfall	NC	36° 18' 14.93" N	76° 26' 23.16" W	14	499	513
2014-WTE-3750-OE	Windfall	NC	36° 16' 45.10" N	76° 27' 24.42" W	15	499	514
2014-WTE-3749-OE	Windfall	NC	36° 17' 44.76" N	76° 26' 08.21" W	14	499	513
2014-WTE-3748-OE	Windfall	NC	36° 17' 31.13" N	76° 25' 58.82" W	14	499	513
2014-WTE-3747-OE	Windfall	NC	36° 17' 20.41" N	76° 25' 46.78" W	14	499	513
2014-WTE-3746-OE	Windfall	NC	36° 17' 50.77" N	76° 26' 47.46" W	14	499	513
2014-WTE-3745-OE	Windfall	NC	36° 17' 34.54" N	76° 26' 37.27" W	13	499	512
2014-WTE-3744-OE	Windfall	NC	36° 17' 19.67" N	76° 26' 30.84" W	12	499	511
2014-WTE-3743-OE	Windfall	NC	36° 16' 48.06" N	76° 28' 01.83" W	14	499	513
2014-WTE-3742-OE	Windfall	NC	36° 20' 13.65" N	76° 24' 35.72" W	13	499	512
2014-WTE-3741-OE	Windfall	NC	36° 18' 35.89" N	76° 24' 18.06" W	14	499	513
2014-WTE-3740-OE	Windfall	NC	36° 18' 52.55" N	76° 24' 27.54" W	17	499	516
2014-WTE-3739-OE	Windfall	NC	36° 19' 03.75" N	76° 24' 38.04" W	11	499	510
2014-WTE-3738-OE	Windfall	NC	36° 22' 02.21" N	76° 22' 33.03" W	15	499	514
2014-WTE-3737-OE	Windfall	NC	36° 22' 21.24" N	76° 22' 40.13" W	13	499	512
2014-WTE-3736-OE	Windfall	NC	36° 22' 35.00" N	76° 22' 48.72" W	14	499	513
2014-WTE-3735-OE	Windfall	NC	36° 19' 19.88" N	76° 24' 44.19" W	15	499	514
2014-WTE-3734-OE	Windfall	NC	36° 22' 15.93" N	76° 23' 17.56" W	15	499	514
2014-WTE-3733-OE	Windfall	NC	36° 22' 31.44" N	76° 23' 24.07" W	13	499	512
2014-WTE-3732-OE	Windfall	NC	36° 20' 15.30" N	76° 22' 58.12" W	11	499	510
2014-WTE-3731-OE	Windfall	NC	36° 20' 27.84" N	76° 23' 09.46" W	10	499	509
2014-WTE-3730-OE	Windfall	NC	36° 19' 38.03" N	76° 24' 53.92" W	9	499	508
2014-WTE-3729-OE	Windfall	NC	36° 20' 43.17" N	76° 23' 17.75" W	14	499	513
2014-WTE-3728-OE	Windfall	NC	36° 20' 56.89" N	76° 23' 26.67" W	12	499	511
2014-WTE-3727-OE	Windfall	NC	36° 21' 09.61" N	76° 23' 37.88" W	14	499	513
2014-WTE-3726-OE	Windfall	NC	36° 21' 22.72" N	76° 23' 49.22" W	15	499	514
2014-WTE-3725-OE	Windfall	NC	36° 19' 04.18" N	76° 23' 00.64" W	13	499	512
2014-WTE-3724-OE	Windfall	NC	36° 19' 17.02" N	76° 23' 12.33" W	14	499	513
2014-WTE-3723-OE	Windfall	NC	36° 19' 30.95" N	76° 23' 20.88" W	13	499	512
2014-WTE-3722-OE	Windfall	NC	36° 19' 46.16" N	76° 23' 27.19" W	10	499	509
2014-WTE-3721-OE	Windfall	NC	36° 20' 02.33" N	76° 23' 34.43" W	12	499	511
2014-WTE-3720-OE	Windfall	NC	36° 20' 14.65" N	76° 23' 41.97" W	11	499	510
2014-WTE-3719-OE	Windfall	NC	36° 18' 26.51" N	76° 25' 11.70" W	14	499	513
2014-WTE-3718-OE	Windfall	NC	36° 20' 31.60" N	76° 23' 50.88" W	12	499	511
2014-WTE-3717-OE	Windfall	NC	36° 21' 03.17" N	76° 24' 13.74" W	13	499	512
2014-WTE-3716-OE	Windfall	NC	36° 18' 27.19" N	76° 23' 46.43" W	13	499	512

2014-WTE-3715-OE	Windfall	NC	36° 18' 40.41" N	76° 23' 20.05" W	11	499	510
2014-WTE-3714-OE	Windfall	NC	36° 18' 53.01" N	76° 23' 32.36" W	10	499	509
2014-WTE-3713-OE	Windfall	NC	36° 19' 03.90" N	76° 23' 44.66" W	14	499	513
2014-WTE-3712-OE	Windfall	NC	36° 19' 19.53" N	76° 23' 54.44" W	13	499	512
2014-WTE-3711-OE	Windfall	NC	36° 19' 50.42" N	76° 24' 12.53" W	13	499	512
2014-WTE-3710-OE	Windfall	NC	36° 20' 02.49" N	76° 24' 26.27" W	11	499	510
2014-WTE-3709-OE	Windfall	NC	36° 18' 42.26" N	76° 25' 18.33" W	10	499	509
2014-WTE-3708-OE	Windfall	NC	36° 22' 48.62" N	76° 25' 11.20" W	14	499	513
2014-WTE-3707-OE	Windfall	NC	36° 23' 08.20" N	76° 25' 25.01" W	13	499	512
2014-WTE-3706-OE	Windfall	NC	36° 22' 30.99" N	76° 25' 37.23" W	13	499	512
2014-WTE-3705-OE	Windfall	NC	36° 22' 45.93" N	76° 25' 47.80" W	13	499	512
2014-WTE-3704-OE	Windfall	NC	36° 21' 56.87" N	76° 25' 58.91" W	13	499	512
2014-WTE-3703-OE	Windfall	NC	36° 22' 51.57" N	76° 24' 37.17" W	13	499	512
2014-WTE-3702-OE	Windfall	NC	36° 22' 13.61" N	76° 26' 13.18" W	12	499	511
2014-WTE-3701-OE	Windfall	NC	36° 22' 15.12" N	76° 24' 48.43" W	12	499	511
2014-WTE-3700-OE	Windfall	NC	36° 21' 16.04" N	76° 24' 49.93" W	14	499	513
2014-WTE-3699-OE	Windfall	NC	36° 21' 30.90" N	76° 24' 59.15" W	14	499	513
2014-WTE-3698-OE	Windfall	NC	36° 21' 13.11" N	76° 25' 26.41" W	14	499	513
2014-WTE-3697-OE	Windfall	NC	36° 21' 27.74" N	76° 25' 32.37" W	15	499	514
2014-WTE-3696-OE	Windfall	NC	36° 21' 25.18" N	76° 24' 21.47" W	14	499	513
2014-WTE-3695-OE	Windfall	NC	36° 22' 26.83" N	76° 21' 49.61" W	16	499	515
2014-WTE-3694-OE	Windfall	NC	36° 21' 39.04" N	76° 21' 45.07" W	13	499	512
2014-WTE-3693-OE	Windfall	NC	36° 21' 52.14" N	76° 21' 53.33" W	13	499	512
2014-WTE-3692-OE	Windfall	NC	36° 22' 03.98" N	76° 22' 03.70" W	15	499	514
2014-WTE-3691-OE	Windfall	NC	36° 21' 47.64" N	76° 23' 43.00" W	14	499	513
2014-WTE-3690-OE	Windfall	NC	36° 21' 58.32" N	76° 23' 54.59" W	14	499	513
2014-WTE-3689-OE	Windfall	NC	36° 19' 59.51" N	76° 25' 16.14" W	15	499	514
2014-WTE-3688-OE	Windfall	NC	36° 19' 50.05" N	76° 26' 21.22" W	13	499	512
2014-WTE-3687-OE	Windfall	NC	36° 19' 36.92" N	76° 25' 44.47" W	13	499	512
2014-WTE-3686-OE	Windfall	NC	36° 19' 01.11" N	76° 25' 29.44" W	12	499	511
2014-WTE-3685-OE	Windfall	NC	36° 19' 17.19" N	76° 25' 56.81" W	13	499	512
2014-WTE-3684-OE	Windfall	NC	36° 19' 32.52" N	76° 26' 25.41" W	13	499	512
2014-WTE-3683-OE	Windfall	NC	36° 19' 46.46" N	76° 26' 45.99" W	13	499	512
2014-WTE-3682-OE	Windfall	NC	36° 18' 38.99" N	76° 25' 48.09" W	12	499	511
2014-WTE-3681-OE	Windfall	NC	36° 18' 55.67" N	76° 26' 15.36" W	12	499	511
2014-WTE-3680-OE	Windfall	NC	36° 19' 11.12" N	76° 26' 42.31" W	12	499	511
2014-WTE-3679-OE	Windfall	NC	36° 19' 26.84" N	76° 27' 08.69" W	13	499	512
2014-WTE-3678-OE	Windfall	NC	36° 19' 49.64" N	76° 27' 20.08" W	12	499	511
2014-WTE-3677-OE	Windfall	NC	36° 16' 31.54" N	76° 27' 54.83" W	15	499	514
2014-WTE-3676-OE	Windfall	NC	36° 15' 58.75" N	76° 26' 07.80" W	13	499	512
2014-WTE-3675-OE	Windfall	NC	36° 16' 10.00" N	76° 26' 33.55" W	13	499	512
2014-WTE-3674-OE	Windfall	NC	36° 15' 19.20" N	76° 27' 09.60" W	13	499	512
2014-WTE-3673-OE	Windfall	NC	36° 15' 30.39" N	76° 27' 21.79" W	13	499	512
2014-WTE-3672-OE	Windfall	NC	36° 15' 46.53" N	76° 27' 24.18" W	15	499	514
2014-WTE-3671-OE	Windfall	NC	36° 17' 33.18" N	76° 27' 55.59" W	13	499	512
2014-WTE-3670-OE	Windfall	NC	36° 17' 03.23" N	76° 28' 15.50" W	12	499	511
2014-WTE-3669-OE	Windfall	NC	36° 17' 14.55" N	76° 28' 22.00" W	12	499	511
2014-WTE-3668-OE	Windfall	NC	36° 17' 26.95" N	76° 28' 27.74" W	12	499	511
2014-WTE-3667-OE	Windfall	NC	36° 16' 52.88" N	76° 26' 50.12" W	14	499	513
2014-WTE-3666-OE	Windfall	NC	36° 19' 10.20" N	76° 27' 46.27" W	14	499	513
2014-WTE-3665-OE	Windfall	NC	36° 18' 09.19" N	76° 25' 36.07" W	13	499	512
2014-WTE-3664-OE	Windfall	NC	36° 19' 22.71" N	76° 28' 10.10" W	14	499	513
2014-WTE-3663-OE	Windfall	NC	36° 18' 54.43" N	76° 27' 32.48" W	14	499	513
2014-WTE-3662-OE	Windfall	NC	36° 18' 54.76" N	76° 27' 03.00" W	13	499	512

2014-WTE-3661-OE	Windfall	NC	36° 18' 37.09" N	76° 26' 47.43" W	14	499	513
2014-WTE-3660-OE	Windfall	NC	36° 18' 01.00" N	76° 26' 13.87" W	14	499	513
2014-WTE-3659-OE	Windfall	NC	36° 17' 00.53" N	76° 25' 39.59" W	14	499	513
2014-WTE-3658-OE	Windfall	NC	36° 18' 17.83" N	76° 27' 04.16" W	15	499	514
2014-WTE-3657-OE	Windfall	NC	36° 18' 03.81" N	76° 26' 52.08" W	15	499	514
2014-WTE-3656-OE	Windfall	NC	36° 19' 31.48" N	76° 21' 36.38" W	12	499	511
2014-WTE-3655-OE	Windfall	NC	36° 19' 45.30" N	76° 21' 40.38" W	15	499	514
2014-WTE-3654-OE	Windfall	NC	36° 19' 31.22" N	76° 22' 12.00" W	13	499	512
2014-WTE-3653-OE	Windfall	NC	36° 20' 05.38" N	76° 19' 40.64" W	14	499	513
2014-WTE-3652-OE	Windfall	NC	36° 20' 15.46" N	76° 19' 51.78" W	13	499	512
2014-WTE-3651-OE	Windfall	NC	36° 20' 09.98" N	76° 20' 10.26" W	12	499	511
2014-WTE-3650-OE	Windfall	NC	36° 20' 05.92" N	76° 20' 27.21" W	12	499	511
2014-WTE-3649-OE	Windfall	NC	36° 20' 18.39" N	76° 20' 48.97" W	12	499	511
2014-WTE-3648-OE	Windfall	NC	36° 20' 33.70" N	76° 20' 52.32" W	13	499	512
2014-WTE-3647-OE	Windfall	NC	36° 20' 01.83" N	76° 20' 45.79" W	11	499	510
2014-WTE-3646-OE	Windfall	NC	36° 20' 16.75" N	76° 21' 16.31" W	13	499	512
2014-WTE-3645-OE	Windfall	NC	36° 20' 30.57" N	76° 21' 20.44" W	14	499	513
2014-WTE-3644-OE	Windfall	NC	36° 20' 00.45" N	76° 21' 13.13" W	12	499	511
2014-WTE-3643-OE	Windfall	NC	36° 19' 46.80" N	76° 22' 16.26" W	14	499	513
2014-WTE-3642-OE	Windfall	NC	36° 21' 02.37" N	76° 22' 59.91" W	13	499	512
2014-WTE-3641-OE	Windfall	NC	36° 21' 23.06" N	76° 22' 39.25" W	12	499	511
2014-WTE-3640-OE	Windfall	NC	36° 21' 36.97" N	76° 22' 58.19" W	14	499	513
2014-WTE-3639-OE	Windfall	NC	36° 21' 56.18" N	76° 23' 14.20" W	14	499	513
2014-WTE-3638-OE	Windfall	NC	36° 20' 34.39" N	76° 22' 43.12" W	12	499	511
2014-WTE-3637-OE	Windfall	NC	36° 20' 48.70" N	76° 22' 51.81" W	11	499	510
2014-WTE-3636-OE	Windfall	NC	36° 19' 32.40" N	76° 22' 50.41" W	13	499	512
2014-WTE-3635-OE	Windfall	NC	36° 20' 49.99" N	76° 24' 02.08" W	13	499	512
2014-WTE-3634-OE	Windfall	NC	36° 23' 04.45" N	76° 24' 48.65" W	17	499	516
2014-WTE-3633-OE	Windfall	NC	36° 22' 31.33" N	76° 24' 58.17" W	14	499	513
2014-WTE-3632-OE	Windfall	NC	36° 22' 15.23" N	76° 25' 28.80" W	14	499	513
2014-WTE-3631-OE	Windfall	NC	36° 22' 35.94" N	76° 22' 01.02" W	17	499	516
2014-WTE-3630-OE	Windfall	NC	36° 21' 42.10" N	76° 22' 17.31" W	14	499	513
2014-WTE-3629-OE	Windfall	NC	36° 20' 25.74" N	76° 26' 37.87" W	12	499	511
2014-WTE-3628-OE	Windfall	NC	36° 20' 22.80" N	76° 24' 50.89" W	16	499	515
2014-WTE-3627-OE	Windfall	NC	36° 20' 21.70" N	76° 25' 25.84" W	13	499	512
2014-WTE-3626-OE	Windfall	NC	36° 20' 20.75" N	76° 25' 55.90" W	12	499	511
2014-WTE-3625-OE	Windfall	NC	36° 20' 12.17" N	76° 26' 30.28" W	11	499	510
2014-WTE-3624-OE	Windfall	NC	36° 19' 57.59" N	76° 25' 48.54" W	13	499	512
2014-WTE-3623-OE	Windfall	NC	36° 20' 38.37" N	76° 24' 59.56" W	15	499	514
2014-WTE-3622-OE	Windfall	NC	36° 15' 57.39" N	76° 25' 27.46" W	13	499	512
2014-WTE-3621-OE	Windfall	NC	36° 16' 36.07" N	76° 26' 26.15" W	15	499	514
2014-WTE-3620-OE	Windfall	NC	36° 15' 42.72" N	76° 25' 52.65" W	13	499	512
2014-WTE-3619-OE	Windfall	NC	36° 16' 30.10" N	76° 27' 03.55" W	11	499	510
2014-WTE-3618-OE	Windfall	NC	36° 15' 33.76" N	76° 26' 48.88" W	14	499	513
2014-WTE-3617-OE	Windfall	NC	36° 17' 50.04" N	76° 28' 00.75" W	14	499	513
2014-WTE-3616-OE	Windfall	NC	36° 17' 58.81" N	76° 28' 25.23" W	12	499	511
2014-WTE-3615-OE	Windfall	NC	36° 17' 12.87" N	76° 28' 55.16" W	9	499	508
2014-WTE-3614-OE	Windfall	NC	36° 17' 24.73" N	76° 29' 02.88" W	10	499	509
2014-WTE-3613-OE	Windfall	NC	36° 17' 43.87" N	76° 29' 12.98" W	9	499	508
2014-WTE-3612-OE	Windfall	NC	36° 17' 56.48" N	76° 29' 19.77" W	10	499	509
2014-WTE-3611-OE	Windfall	NC	36° 17' 12.18" N	76° 29' 29.20" W	10	499	509
2014-WTE-3610-OE	Windfall	NC	36° 16' 51.45" N	76° 29' 41.05" W	10	499	509
2014-WTE-3328-OE	Hertford	NC	36° 08' 24.48" N	76° 32' 53.17" W	16	394	410
2014-WTE-1925-OE	Hertford	NC	36° 07' 23.62" N	76° 31' 59.94" W	17	497	514
2014-WTE-1924-OE	Hertford	NC	36° 07' 29.03" N	76° 32' 23.65" W	17	497	514

2014-WTE-1923-OE	Hertford	NC	36° 07' 35.36" N	76° 30' 33.40" W	16	497	513
2014-WTE-1922-OE	Hertford	NC	36° 07' 34.53" N	76° 32' 55.04" W	17	497	514
2014-WTE-1920-OE	Hertford	NC	36° 07' 45.40" N	76° 30' 58.60" W	17	497	514
2014-WTE-1918-OE	Hertford	NC	36° 07' 45.90" N	76° 33' 13.78" W	17	497	514
2014-WTE-1915-OE	Hertford	NC	36° 07' 57.39" N	76° 31' 17.95" W	15	497	512
2014-WTE-1913-OE	Hertford	NC	36° 08' 05.41" N	76° 32' 15.84" W	16	497	513
2014-WTE-1912-OE	Hertford	NC	36° 08' 06.29" N	76° 31' 40.05" W	16	497	513
2014-WTE-1911-OE	Hertford	NC	36° 08' 06.82" N	76° 33' 22.68" W	18	497	515
2014-WTE-1907-OE	Hertford	NC	36° 08' 19.19" N	76° 32' 34.55" W	16	497	513
2014-WTE-1905-OE	Hertford	NC	36° 08' 21.99" N	76° 33' 36.70" W	17	497	514
2014-WTE-1903-OE	Hertford	NC	36° 08' 34.57" N	76° 33' 57.52" W	17	497	514
2014-WTE-1902-OE	Hertford	NC	36° 08' 41.42" N	76° 29' 38.01" W	15	497	512
2014-WTE-1900-OE	Hertford	NC	36° 08' 41.23" N	76° 32' 47.27" W	17	497	514
2014-WTE-1899-OE	Hertford	NC	36° 08' 45.55" N	76° 34' 18.82" W	17	497	514
2014-WTE-1898-OE	Hertford	NC	36° 08' 48.57" N	76° 31' 53.15" W	15	497	512
2014-WTE-1897-OE	Hertford	NC	36° 08' 51.59" N	76° 29' 58.21" W	16	497	513
2014-WTE-1896-OE	Hertford	NC	36° 08' 53.90" N	76° 34' 40.16" W	17	497	514
2014-WTE-1894-OE	Hertford	NC	36° 08' 59.54" N	76° 30' 19.01" W	16	497	513
2014-WTE-1893-OE	Hertford	NC	36° 08' 57.84" N	76° 33' 05.04" W	17	497	514
2014-WTE-1892-OE	Hertford	NC	36° 09' 02.43" N	76° 35' 02.97" W	17	497	514
2014-WTE-1891-OE	Hertford	NC	36° 09' 06.96" N	76° 30' 40.68" W	16	497	513
2014-WTE-1889-OE	Hertford	NC	36° 09' 09.63" N	76° 31' 56.40" W	16	497	513
2014-WTE-1888-OE	Hertford	NC	36° 09' 10.47" N	76° 35' 25.83" W	17	497	514
2014-WTE-1887-OE	Hertford	NC	36° 09' 12.37" N	76° 33' 20.21" W	18	497	515
2014-WTE-1886-OE	Hertford	NC	36° 09' 16.79" N	76° 31' 00.76" W	16	497	513
2014-WTE-1884-OE	Hertford	NC	36° 09' 20.83" N	76° 32' 23.71" W	16	497	513
2014-WTE-1883-OE	Hertford	NC	36° 09' 20.39" N	76° 33' 44.98" W	17	497	514
2014-WTE-1882-OE	Hertford	NC	36° 09' 18.98" N	76° 35' 46.92" W	18	497	515
2014-WTE-1881-OE	Hertford	NC	36° 09' 24.88" N	76° 29' 22.03" W	15	497	512
2014-WTE-1880-OE	Hertford	NC	36° 09' 26.24" N	76° 36' 09.00" W	16	497	513
2014-WTE-1879-OE	Hertford	NC	36° 09' 28.79" N	76° 34' 08.12" W	19	497	516
2014-WTE-1878-OE	Hertford	NC	36° 09' 32.44" N	76° 31' 13.23" W	16	497	513
2014-WTE-1877-OE	Hertford	NC	36° 09' 36.86" N	76° 29' 37.50" W	15	497	512
2014-WTE-1876-OE	Hertford	NC	36° 09' 37.55" N	76° 32' 35.73" W	16	497	513
2014-WTE-1875-OE	Hertford	NC	36° 09' 37.36" N	76° 34' 29.58" W	19	497	516
2014-WTE-1874-OE	Hertford	NC	36° 09' 37.75" N	76° 36' 26.92" W	16	497	513
2014-WTE-1873-OE	Hertford	NC	36° 09' 43.61" N	76° 31' 30.73" W	17	497	514
2014-WTE-1872-OE	Hertford	NC	36° 09' 49.88" N	76° 29' 52.24" W	16	497	513
2014-WTE-1871-OE	Hertford	NC	36° 09' 48.82" N	76° 34' 46.66" W	17	497	514
2014-WTE-1870-OE	Hertford	NC	36° 09' 47.69" N	76° 36' 45.62" W	16	497	513
2014-WTE-1869-OE	Hertford	NC	36° 09' 55.21" N	76° 31' 52.09" W	17	497	514
2014-WTE-1868-OE	Hertford	NC	36° 09' 56.34" N	76° 35' 09.74" W	18	497	515
2014-WTE-1867-OE	Hertford	NC	36° 10' 00.70" N	76° 30' 09.77" W	15	497	512
2014-WTE-1866-OE	Hertford	NC	36° 09' 58.73" N	76° 37' 04.54" W	15	497	512
2014-WTE-1865-OE	Hertford	NC	36° 10' 02.62" N	76° 32' 52.07" W	16	497	513
2014-WTE-1864-OE	Hertford	NC	36° 10' 06.08" N	76° 30' 33.13" W	16	497	513

EXHIBIT 3 — APPLICATION FOR NO HAZARD DETERMINATION SUBMITTED TO FAA BY IBERDROLA ON JUNE 27, 2014

Federal Aviation Administration

The system will be going offline from 9 pm to 10 pm US/Eastern on Wed, August 5, 2015 for upgrades. We apologize for any inconvenience.

« OE/AAA

Circle Search for Cases Results: Form 7460-1 for ASN 2014-WTE-3611-OE

Overview

Study (ASN):	2014-WTE-3611-OE	**Received Date:**	06/27/2014
Prior Study:	2014-WTE-1025-OE	**Entered Date:**	06/27/2014
Status:	Determined	**Completion Date:**	12/02/2014
Letters:	Determination	**Expiration Date:**	06/02/2016
Supplemental Form 7460-2:	Please login to add a Supplemental Form 7460-2.	**Map:**	View Map

Sponsor Information

Sponsor:	Desert Wind LLC
Attention Of:	Michael Clayton
Address:	2 Radnor Corp Center Suite 200
Address2:	100 Matsonford Rd
City:	Radnor
State:	PA
Postal Code:	19087
Country:	US
Phone:	484-868-3747
Fax:	

Sponsor's Representative Information

Representative:	
Attention Of:	Jamie Boyd
Address:	2 Radnor Corp Center, Suite 200
Address2:	100 Matsonford Rd
City:	Radnor
State:	PA
Postal Code:	19087
Country:	US
Phone:	484-654-1874
Fax:	

Construction Info

Notice Of:	CONSTR
Duration:	PERM (Months: 0 Days: 0)
Work Schedule:	03/01/2015 to 03/01/2017
Date Built:	

Structure Summary

Structure Type:	Wind Turbine
Structure Name:	A2
FCC Number:	

Structure Details

Latitude (NAD 83):	36° 17' 12.18" N
Longitude (NAD 83):	76° 29' 29.20" W
Horizontal Datum:	NAD 83
Survey Accuracy:	4D
Marking/Lighting:	White Paint/Synchronized Red Lights
Other Description:	
Current Marking/Lighting:	N/A Proposed Structure
Current Marking/Lighting Other Description:	
Name:	
City:	Windfall
State:	NC
Nearest County:	Perquimans
Nearest Airport:	NC01
Distance to Structure:	84632.29 feet
On Airport:	No
Direction to Structure:	325.19°
Description of Location:	Appx 3 miles from Windfall and 10 miles from Elizabeth City CG Air Station Municipal
Description of Proposal:	Refiling for turbine height, no change in turbine locations of 150 turbines and 1 met tower for Desert Wind Project

Height and Elevation

	Proposed	DNE	DET
Site Elevation:	10		
Structure Height:	499	0	499
Total Height (AMSL):	509	0	509

Frequencies

Low Freq	High Freq	Unit	ERP	Unit

← Previous Back to Search Result Next →

Federal Aviation Administration

« OE/AAA

Circle Search for Cases Results: Form 7460-1 for ASN 2014-WTE-3664-OE

Overview

Study (ASN):	2014-WTE-3664-OE	Received Date:	06/27/2014
Prior Study:	2014-WTE-1078-OE	Entered Date:	06/27/2014
Status:	Determined	Completion Date:	12/02/2014
Letters:	Determination	Expiration Date:	06/02/2016
Supplemental Form 7460-2:	Please login to add a Supplemental Form 7460-2.	Map:	View Map

Sponsor Information

Sponsor:	Desert Wind LLC
Attention Of:	Michael Clayton
Address:	2 Radnor Corp Center Suite 200
Address2:	100 Matsonford Rd
City:	Radnor
State:	PA
Postal Code:	19087
Country:	US
Phone:	484-868-3747
Fax:	.

Sponsor's Representative Information

Representative:	
Attention Of:	Jamie Boyd
Address:	2 Radnor Corp Center, Suite 200
Address2:	100 Matsonford Rd
City:	Radnor
State:	PA
Postal Code:	19087
Country:	US
Phone:	484-654-1874
Fax:	

Construction Info

Notice Of:	CONSTR
Duration:	PERM (Months: 0 Days: 0)
Work Schedule:	03/01/2015 to 03/01/2017
Date Built:	

Structure Summary

Structure Type:	Wind Turbine
Structure Name:	W24
FCC Number:	

Structure Details

Latitude (NAD 83):	36° 19' 22.71" N
Longitude (NAD 83):	76° 28' 10.10" W
Horizontal Datum:	NAD 83
Survey Accuracy:	4D
Marking/Lighting:	White Paint/Synchronized Red Lights
Other Description:	
Current Marking/Lighting:	N/A Proposed Structure
Current Marking/Lighting Other Description:	
Name:	
City:	Windfall
State:	NC
Nearest County:	Perquimans
Nearest Airport:	ECG
Distance to Structure:	89831.95 feet
On Airport:	No
Direction to Structure:	284.8°
Description of Location:	Appx 3 miles from Windfall and 10 miles from Elizabeth City CG Air Station Municipal
Description of Proposal:	Refiling for turbine height, no change in turbine locations of 150 turbines and 1 met tower for Desert Wind Project

Height and Elevation

	Proposed	DNE	DET
Site Elevation:	14		
Structure Height:	499	0	499
Total Height (AMSL):	513	0	513

Frequencies

Low Freq	High Freq	Unit	ERP	Unit

Previous | Back to Search Result | Next →

EXHIBIT 4 — 2014 NO HAZARD DETERMINATION LETTER

Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
2601 Meacham Boulevard
Fort Worth, TX 76193

Aeronautical Study No.
2014-WTE-3664-OE
Prior Study No.
2014-WTE-1078-OE

Issued Date: 12/02/2014

Michael Clayton
Desert Wind LLC
2 Radnor Corp Center Suite 200
100 Matsonford Rd
Radnor, PA 19087

**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Wind Turbine W24
Location:	Windfall, NC
Latitude:	36-19-22.71N NAD 83
Longitude:	76-28-10.10W
Heights:	14 feet site elevation (SE)
	499 feet above ground level (AGL)
	513 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure is marked/lighted in accordance with FAA Advisory circular 70/7460-1 K Change 2, Obstruction Marking and Lighting, white paint/synchronized red lights - Chapters 4,12&13(Turbines).

It is required that FAA Form 7460-2, Notice of Actual Construction or Alteration, be e-filed any time the project is abandoned or:

_____ At least 10 days prior to start of construction (7460-2, Part 1)
__X__ Within 5 days after the construction reaches its greatest height (7460-2, Part 2)

See attachment for additional condition(s) or information.
Any height exceeding 499 feet above ground level (513 feet above mean sea level), will result in a substantial adverse effect and would warrant a Determination of Hazard to Air Navigation.

This determination expires on 06/02/2016 unless:

(a) the construction is started (not necessarily completed) and FAA Form 7460-2, Notice of Actual Construction or Alteration, is received by this office.
(b) extended, revised, or terminated by the issuing office.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE E-FILED AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE. AFTER RE-EVALUATION OF CURRENT OPERATIONS IN THE AREA OF THE STRUCTURE TO DETERMINE THAT NO SIGNIFICANT AERONAUTICAL CHANGES HAVE OCCURRED, YOUR DETERMINATION MAY BE ELIGIBLE FOR ONE EXTENSION OF THE EFFECTIVE PERIOD.

Additional wind turbines or met towers proposed in the future may cause a cumulative effect on the national airspace system. This determination is based, in part, on the foregoing description which includes specific coordinates and heights . Any changes in coordinates will void this determination. Any future construction or alteration requires separate notice to the FAA.

Obstruction marking and lighting recommendations for wind turbine farms are based on the scheme for the entire project. ANY change to the height, location or number of turbines within this project will require a reanalysis of the marking and lighting recommendation for the entire project. In particular, the removal of previously planned or built turbines/turbine locations from the project will often result in a change in the marking/lighting recommendation for other turbines within the project. It is the proponent's responsibility to contact the FAA to discuss the process for developing a revised obstruction marking and lighting plan should this occur.

In order to ensure proper conspicuity of turbines at night during construction, all turbines should be lit with temporary lighting once they reach a height of 200 feet or greater until such time the permanent lighting configuration is turned on. As the height of the structure continues to increase, the temporary lighting should be relocated to the uppermost part of the structure. The temporary lighting may be turned off for periods when they would interfere with construction personnel. If practical, permanent obstruction lights should be installed and operated at each level as construction progresses. An FAA Type L-810 steady red light fixture shall be used to light the structure during the construction phase. If power is not available, turbines shall be lit with self-contained, solar powered LED steady red light fixture that meets the photometric requirements of an FAA Type L-810 lighting system. The lights should be positioned to ensure that a pilot has an unobstructed view of at least one light at each level. The use of a NOTAM (D) to not light turbines within a project until the entire project has been completed is prohibited.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

This determination cancels and supersedes prior determinations issued for this structure.

If we can be of further assistance, please contact our office at (816) 329-2528. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2014-WTE-3664-OE.

Signature Control No: 222254341-235793590 (DNE-WT)
Cindy Whitten
Specialist

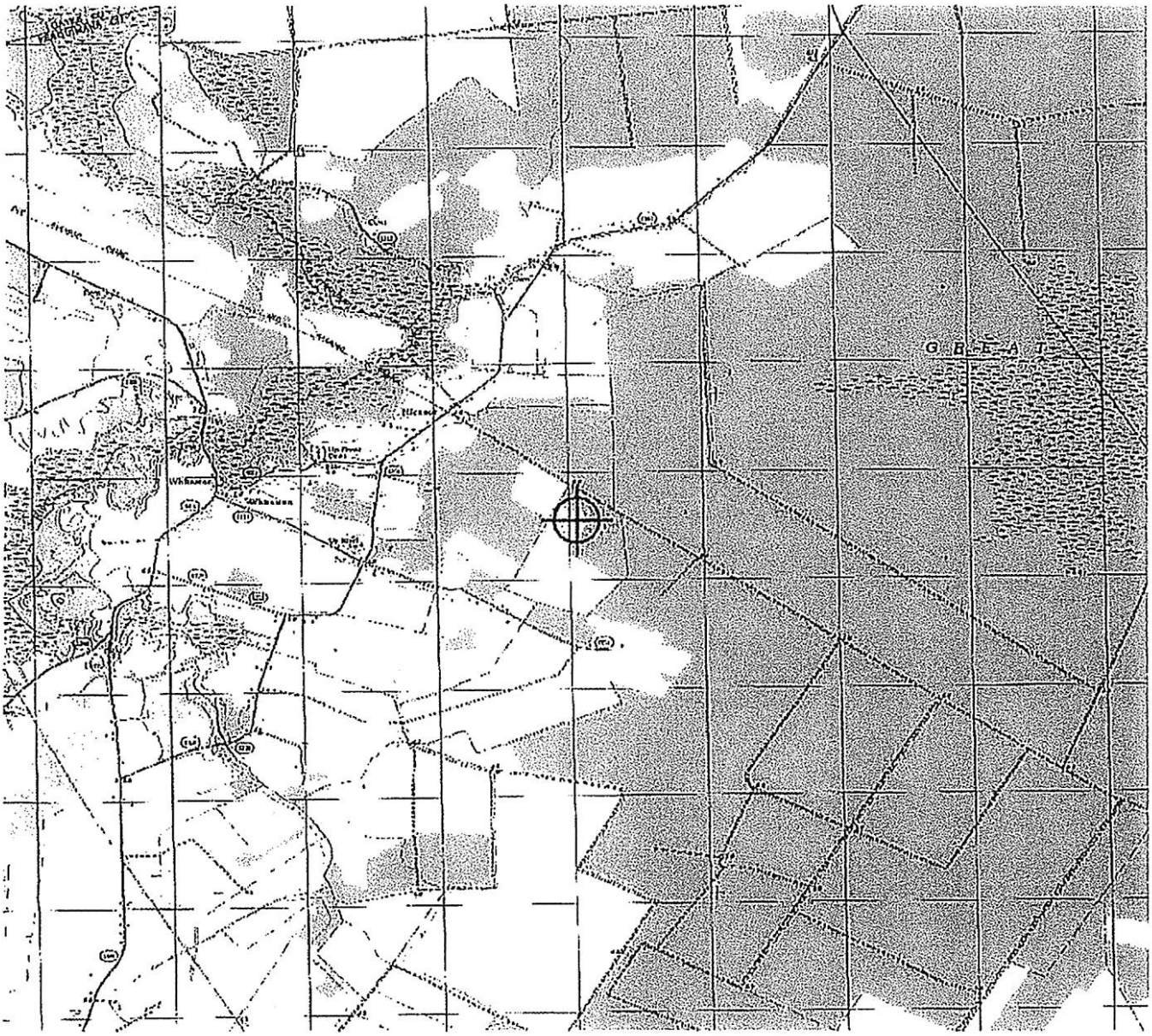
Attachment(s)
Additional Information
Map(s)

Additional information for ASN 2014-WTE-3664-OE

This determination is for 1 of 104 wind turbines approved by the Department of Defense Siting Clearinghouse. The remaining 46 wind turbines will be held in WORK status by the FAA until the clearinghouse releases and approves them in accordance with your written agreement. Any further questions reference the remaining 46 wind turbines in the project should be directed to Mr. Steven Sample, Mission Evaluation Branch, Department of Defense Siting Clearinghouse by email at osd.dod-siting-clearinghouse@mail.mil or by phone at 703-571-0076.

NOTE:
When you know for sure what your final layout plan will be for the entire project (once the DoD Siting Clearing House has released all 150 wind turbines), please notify me at 816-329-2528 or at cindy.whitten@faa.gov and then I will go back and update the marking and lighting requirement for the entire project to reduce the number of wind turbines with the red light requirement.

TOPO Map for ASN 2014-WTE-3664-OE



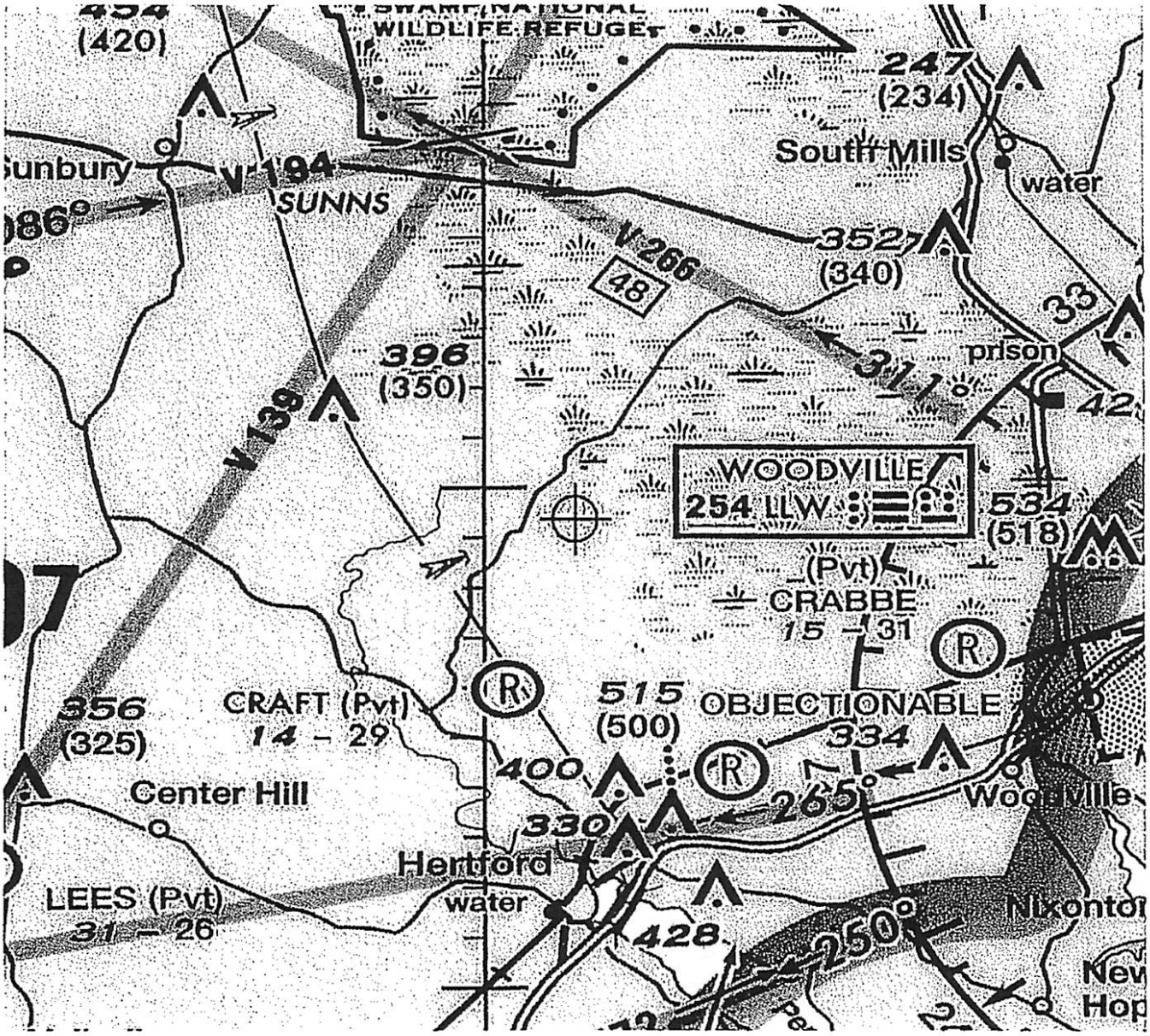

WILDLIFE REFUGE
(420)
247
(234)
South Mills
water
V 194
SUNNS
V 266
352
(340)
48
396
(350)
V 139
311°
prison
WOODVILLE
254 LLW
534
(518)
(Pvt)
CRABBE
15 – 31
R
356
(325)
CRAFT (Pvt)
14 – 29
515
(500)
OBJECTIONABLE
334
400
265°
Center Hill
330
Hertford
water
LEES (Pvt)
31 – 26
428
250°

EXHIBIT 5 — APRIL 2015 LETTER FROM DENR TO IBERDROLA RENEWABLES

North Carolina Department of Environment and Natural Resources

Pat McCrory
Governor

Donald R. van der Vaart
Secretary

April 29, 2015

Mr. Craig Poff
Director, Business Development
Iberdrola Renewables
Two Radnor Corporate Center
100 Matsonford Road, Suite 200
Radnor, Pennsylvania 19087

Re: Applicability of Session Law 2013-51 - Permitting of Wind Energy Facilities

Dear Mr. Poff:

N.C. Session Law 2013-51, An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, (the Act) was signed into law on May 17, 2013. The Act became effective when it became law on May 17, 2013 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" (a determination) issued by the Federal Aviation Administration (FAA) on or before that date.

Pursuant to the Act, no person shall undertake construction, operation, or expansion activities associated with a wind energy facility in North Carolina without first obtaining a permit from the Department of Environment and Natural Resources (DENR). A wind energy facility or wind energy facility expansion which has not received a written FAA determination, as described above, prior to May 17, 2013 is subject to the wind energy facility permitting process codified under North Carolina General Statutes § 143-215.115 et al.

DENR has renewed its review of the Act and has determined 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.

DENR strongly advises Iberdrola to keep federal, state and local government agencies and the military apprised of any further changes in the Desert Wind project.

DENR is committed to protecting North Carolina's environment and natural resources. It strives to foster a collaborate stewardship among the citizens, regulators and the business community with the goal of maintaining and enhancing North Carolina's environment and natural resources for the benefit and enjoyment of everyone living in or visiting our great state.

EXHIBIT 6 — MARCH 2015 LETTER FROM DENR TO IBERDROLA RENEWABLES

NCDENR
North Carolina Department of Environment and Natural Resources

Pat McCrory
Governor

Donald R. van der Vaart
Secretary

March 18, 2015

Mr. Craig Poff
Director, Business Development
Iberdrola Renewables
Two Radnor Corporate Center
100 Matsonford Road, Suite 200
Radnor, Pennsylvania 19087

Re: Applicability of Session Law 2013-51 - Permitting of Wind Energy Facilities

Dear Mr. Poff:

N.C. Session Law 2013-51, An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, (the Act) was signed into law on May 17, 2013. The Act became effective when it became law on May 17, 2013 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" (a determination) issued by the Federal Aviation Administration (FAA) on or before that date.

Pursuant to the Act, no person shall undertake construction, operation, or expansion activities associated with a wind energy facility in North Carolina without first obtaining a permit from the Department of Environment and Natural Resources (DENR). A wind energy facility and wind energy facility expansion which has not received a written FAA determination, as described above, prior to May 17, 2013 is subject to the wind energy facility permitting process codified under North Carolina General Statutes § 143-215.115 et al.

Based on the information you provided and the provisions of the Act, DENR has determined that Iberdrola's Desert Winds Project is subject to the State's wind energy facility permitting process. DENR welcomes the opportunity to assist Iberdrola during the wind permitting application process.

DENR is committed to protecting North Carolina's environment and natural resources. It strives to foster a collaborate stewardship among the citizens, regulators and the business community with the goal of maintaining and enhancing North Carolina's environment and natural resources for the benefit and enjoyment of everyone living in or visiting our great state.

Please contact me if you have any additional questions regarding this matter.

Sincerely,

Brad Atkinson
Energy Section Chief

EXHIBIT 7 –FINAL DECISION AND ORDER OF DISMISSAL IN THE MATTER OF WOODARD V. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, 15 EHR 03522

FILED

STATE OF NORTH CAROLINA
2015 AUG 23 AM 9:38
OFFICE OF ADMIN HEARINGS
IN THE OFFICE OF ADMINISTRATIVE HEARINGS
15 EHR 03522

COUNTY OF PASQUOTANK

JOHN J WOODARD JR
Petitioner,

vs.

NC DEPARTMENT OF ENVIRONMENT AND NATUREAL RESOURCES, DIVISION OF ENERGY, MINERAL, AND LAND RESOURCES
Respondent.

FINAL DECISION
ORDER OF DISMISSAL

Upon consideration of Respondent's Motion to Dismiss filed on July 15, 2015, Petitioner's response thereto, the parties' submission of additional information, and for good cause shown, the undersigned hereby **GRANTS** Respondent's Motion as follows:

APPEARANCES

For Petitioner: Elliot Engstrom, Center for Law and Freedom, Civitas Institute, 100 South Harrington St., Raleigh, North Carolina 27603.

For Respondent: Daniel S Hirschman, Special Deputy Attorney General, and Asher P Spiller, Assistant Attorney General, North Carolina Department of Justice, PO Box 629, Raleigh, North Carolina 27602-0629

ISSUES

1. Is Petitioner a "person aggrieved" under N.C. Gen. Stat. § 150B-2(6), and thus, have standing to bring this case before the Office of Administrative Hearings?

2. Has Petitioner failed to state a claim upon which relief can be granted?

3. Did Respondent err in determining that Session Law 2013-51 (codified at N.C. Gen. Stat. § 143-215.115 *et seq*) does not apply to the Desert Wind Project?

FINDINGS OF FACT

Background Facts

1. By letter dated April 25, 2015, Respondent issued a decision that Iberdrola's Desert Wind Project ("Iberdrola's) was not subject to "An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities" ("the Act") based on a plain reading of the Act. Respondent explained this is true, because:

> [T]he FAA issued determinations to Iberdrola, for its Desert Wind Project, on June 29, 2011, prior to the Act becoming law, despite the fact that the FAA issued determination 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.

(Document Constituting Agency Action, April 25, 2015 letter)

2. On May 11, 2015, Petitioner filed a *pro se* contested case petition with the Office of Administrative Hearings contesting Respondent's April 29, 2015 decision that Iberdrola Renewables' Desert Wind Project is not subject to permitting provisions of the Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities. The petition form Petitioner completed asked Petitioner to, "Briefly state facts showing how you believe you have been harmed by the State agency or board." Petitioner responded that:

> Iberdrola renewables initial FAA determination (11/11) expired in 2012. There was no FAA determination for Desert Wind for 6 mos. FAA determination of 6/29/11 was voided due to substantial changes. Gen Statute 21C does not say these only apply to project with FAA Det after 5/17/13. Clock should be reset to date of current FAA determination.

(May 11, 2015 Petition)

May 11, 2015 Petition

3. Item number five (5) on the contested case petition form states, "Because of these facts, the State agency or board has: (check at least one from each column.) Petitioner answered the right column by checking that Respondent had exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure acted arbitrarily or capriciously, or failed to act as required by law or rule. However, Petitioner did not complete or check any of the items in the left column of number (5) that asked Petitioner to indicate whether Respondent had deprived him of property, ordered him to pay a fine or civil penalty, or otherwise substantially prejudiced my rights.

4. In his *pro se* petition and *pro so* Prehearing Statement, Petitioner failed to provide any facts establishing how he was directly or indirectly affected substantially in "his person, property, or employment" by Respondent's April 29, 2015 decision. Specifically, Petitioner failed to state how he had been adversely or injuriously affected, damnified, suffered a loss or injury, had a grievance or cause for complaint, or suffered an infringement or denial of legal rights by Respondent's April 29, 2015 decision. Neither did Petitioner state how Respondent had "deprived [him] of property, ordered [him] to pay a fine or civil penalty, or otherwise substantially prejudiced [his] rights." N.C. Gen. Stat. § 150B-23(a).

Amended Petition

5. On August 10, 2015, Petitioner's counsel responded to Petitioner's Motion to Dismiss, and contemporaneously filed an Amended Petition (Exhibit 8 of such Motion) and an Amended Prehearing Statement with the Office of Administrative Hearings. In the Amended Petition, Petitioner stated the following facts as "how he believed he had been harmed" by Respondent's April 29, 2015 decision:

> Pursuant to N.C.G.S. § 143-215.115 thru 143-215.126, Respondent is obligated to properly permit wind energy facilities. However, in a letter dated April 29, 2015, Respondent told Iberdrola Renewables that their Desert Wind project was not the subject to the permitting provisions of these statutes. This is an incorrect statement of the law, and therefore, Respondent is failing to act as required under the law. Due to this incorrect statement of law, the Desert Wind project is not being properly permitted, and this lack of statutorily mandated oversight from Respondent will result in harm to Petitioner.

(Amended Petition, Exh 8 of Respondent's Motion to Dismiss) In item number (5) of the amended petition, Petitioner placed an "x" indicating that Respondent "otherwise substantially prejudiced my rights."

6. In this Amended Petition, Petitioner failed to state any facts alleging how Respondent's April 29, 2015 determination had directly or indirectly substantially affected Petitioner's "person, property, or employment." N.C. Gen. Stat. § 150B-2(6) That is, Petitioner failed to state how he had been adversely or injuriously affected, damnified, suffered a loss or injury, had a grievance or cause for complaint, or suffered an infringement or denial of legal rights by Respondent's April 29, 2015 decision. Neither did Petitioner allege how Respondent had "deprived [him] of property, ordered [him] to pay a fine or civil penalty, or otherwise substantially prejudiced [his] rights." N.C. Gen. Stat. § 150B-23(a).

CONCLUSIONS OF LAW

1. This contested case is subject to dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b) of the Rules of Civil Procedure, N.C. Gen. Stat. §§ 150B-33(b)(3a).

2. "Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. G. S. § 1A-1, Rule 12(h) (3).

Lack of Standing - Not Person Aggrieved

3. "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v.* Susi, 140 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). "The term [standing] refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32(1972)).

4. Under N.C. Gen. Stat. § 150B-23(a), a person must file a petition with the Office of Administrative Hearings (OAH) to commence a contested case hearing under Chapter 150B, the NC Administrative Procedure Act ("NCAPA"). The right to file a petition for a contested case hearing in the Office of Administrative Hearings (OAH) is limited to a "person aggrieved." N.C. Gen. Stat. § 150B-23(a). Whether someone is an "aggrieved person" within the meaning of N.C. Gen. Stat. § 150B-2(6) is a question of standing.

5. The party invoking the subject matter jurisdiction of a tribunal has the burden of proving that such jurisdiction exists. *Templeton v. Town of Boone*, 208 N.C. App. 50, 53, 701 S.E.2d 709, 712 (2010)

6. N.C. Gen. Stat. § 150B-2(6) defines a "person aggrieved" as:

> [A]ny person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.

7. "In order for [a] petitioner to prevail on his claim to status as a 'person aggrieved' under the NCAPA, [a] petitioner must first demonstrate that her personal [sic], property, employment or other legal rights have been in some way impaired." *In re Denial of Request for Full Admin. Hearing,* 146 N.C. app. 258, 261, 552 S.E. 2d 230, 232, *disc. rev. denied,* 354 N.C. 573, 558, S.E. 2d 867 (2001)

8. In this case, Petitioner is not a "person aggrieved," pursuant to N.C. Gen. Stat. § 150B-2(6) as he is not presently aggrieved. In both his petition and amended petition, Petitioner failed to establish facts that he has been directly or indirectly affected substantially in his "person, property, or employment" by Respondent's April 29, 2015 determination. Nothing in the petition or amended petition indicates that Petitioner is adversely affected, imminently threatened, or is likely to be threatened or affected by any

future events that may occur as a result of Respondent's April 29, 2015 decision. Even if one draws all inferences in Petitioner's favor, it is clear that Petitioner failed to demonstrate that his "legal rights have been in some way impaired." *Id.* 146 N.C. at 261, 552 S.E.2d at 232; see also *Diggs v. N.C. Dept. of Health and Human Services*, 157 N.C.App. 344 578 S.E.2d 666 (2003). As a result, Petitioner is not presently a "person aggrieved," and thus, lacks standing to appeal Respondent's April 29, 2015 action under N.C. Gen. Stat. § 150B-2(6) and 150B-23(a).

9. In his Response to Respondent's Motion to Dismiss, Petitioner asserted that denial of a hearing would itself be an injury to Petitioner, and thus make Petitioner the necessary aggrieved person status to demand an administrative hearing. However, our Court of Appeals, in *In re Denial of Request for Full Administrative Hearing*, 146 N.C. App. at 260, 552 S.E. 2d at 232, has held that such an argument is "both circular and without merit." Procedural injury, standing alone, cannot form the basis for aggrieved status under the NC Administrative Procedure Act. *Id.*, citing *Empire Power Co. v. N.C. Dept. of E.H.N.R*, 337 N.C. 569, at 590, 447 S.E. 2d 768, 780-81 (1994). Unlike the petitioner in *Empire*, Petitioner in this case has failed to establish that he has suffered any injury to his legal rights to justify his demand to an administrative hearing.

Failure to State a Claim

10. A motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting the question of whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory. *Hubbard v. County of Cumberland*, 143 N.C.App. 149, 150–51, 544 S.E.2d 587, 589, disc. review denied, 354 N.C. 69, 553 S.E.2d 40 (2001) Nevertheless, the trial court "is not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Lasater v. Francis*, 199 N.C. App. 572, 577, 681 S.E. 2d 858, 862 (2009) (quotation omitted)

11. On a motion to dismiss for failure to state a claim, the complaint must be liberally construed in the light most favorable to the nonmoving party, and the Court should not dismiss the complaint, unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief. *Holloman v. Harrelson*, 149 N.C.App. 861, 561 S.E.2d 351 (N.C.App. Apr 16, 2002)

12. In this case, Petitioner has failed to state a claim, in his petition and amended petition, for which relief can be granted, because he failed to state any facts tending to establish how Petitioner was substantially affected, directly or indirectly, by Respondent's April 29, 2015 decision. In his petition and amended petition, Petitioner also failed to allege facts demonstrating how Respondent deprived him of property, ordered him to pay a fine or civil penalty, or otherwise substantially deprived his rights, as required by N.C. Gen. Stat. § 150B-23(a). Petitioner's mere conclusory statements and recitation of the legal statutory requirements, in his petition and amended petition, without specific facts demonstrating how Petitioner suffered injury or impairment to his legal

rights, was insufficient to state a claim upon which relief can be granted under N.C. Gen. Stat. § 150B-23(a).

13. As Petitioner failed to state a claim upon which relief can be granted, the Office of Administrative Hearings lacks subject matter jurisdiction to hear Petitioner's petition.

14. Given the disposition of this ruling, the undersigned need not rule upon the other grounds Respondent stated as a basis for its Motion to Dismiss, and need not rule upon pending Petitioner's Motion for Admission *Pro Hac Vice.*

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **GRANTS** Respondent's Motion to Dismiss, and **DISMISSES** this contested case.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.**

In conformity with 26 N.C. Admin. Code 03. 0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.**

N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. The party who files a Petition for Judicial Review must also send a copy of the Petition for Judicial Review to the Office of Administrative Hearings when he or she files an appeal to ensure the timely filing of the record.

This 20th day of August, 2015.

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned, hereby certifies that a copy of the foregoing **FINAL DECISION,** is **DEEMED SERVED** upon the following persons the date it is enclosed in a wrapper and placed in an official depository of the United States Postal Service, as evidenced by the postmark date of the wrapper, addressed as follows:

Elliott Engstrom
Center for Law and Freedom
Civitas Institute
100 South Harrington St.
Raleigh, North Carolina 27603.
ATTORNEY FOR PETITIONER

John J Woodard Jr
117 Pelican Pointe Drive
Elizabeth City, NC 27909
PETITIONER

Daniel S Hirschman
Special Deputy Attorney General
Asher P Spiller
Assistant Attorney General
North Carolina Department of Justice
PO Box 629
Raleigh, North Carolina 27602-0629
ATTORNEYS FOR RESPONDENT

Dr. David W Schnare, Director
Free Market Environmental Law Clinic
9033 Brook Ford Road
Burke, Virginia 22015

This 28th day of August, 2015.

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
Telephone: (919) 431-3000
Facsimile: (919) 431-3100