STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15 CVS 13685
JOHN J. WOODARD, JR. Plaintiff, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY Defendant.	MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

NOW COMES the Plaintiff, John J. Woodard, Jr., by and through the undersigned counsel, and files this Memorandum of Law in Opposition to Defendant's Motion to Dismiss.

PROCEDURAL HISTORY & STATEMENT OF FACTS

On May 17, 2013, the North Carolina General Assembly enacted Session Law 2013-51. *See* An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, ch. 51, 2013 N.C. Sess. Laws 51 (codified at N.C. Gen. Stat. §§ 143-215.115, et seq). Hereinafter, Plaintiff refers to this law as the "Wind Energy Act." This Act, by its own terms, applies only to wind energy facilities that have not received a written "Determination of No Hazard to Air Navigation" issued by the FAA on or before May 17, 2013. The Wind Energy Act does not require the FAA determinations to be active or unexpired, but simply to have been received prior to the Wind Energy Act's effective date. The "no hazard" determinations effectively filled the shoes of the Act prior to its effective date. The permitting program

established by this law is to be carried out by the North Carolina Department of Environmental Quality (hereinafter "DEQ" or the "Defendant").

Plaintiff's case centers on DEQ's actions in regard to what was originally called the "Desert Wind Project," and is now called the "Amazon Wind Farm East." This development, first conceived of in 2011 and reimagined in 2014, is a product of Atlantic Wind, a subsidiary of Iberdrola Renewables. Under federal law, and for each of the 151 tall structures that made up its original plan for the Desert Wind Project, Iberdrola was required to obtain Federal Aviation Administration (hereinafter "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 Iberdrola's original Desert Wind Project plan. These determinations expired on December 29, 2012. If Iberdrola had then constructed the facilities for which it had received no hazard determinations in 2012, the project would unquestionably not fall within the parameters of the Wind Energy Act, as that project had received the requisite "no hazard" determinations from the FAA.

But Iberdrola abandoned the facilities for which it had previously received "no hazard" determinations. Instead, it plans to construct a different set of facilities, as evidenced by the 2014 application for "no hazard" determinations that the corporation submitted to the FAA. The turbines at issue in the 2014 applications were of different sizes and were constructed in different locations. As this new project did not receive FAA "no hazard" determinations prior to the effective date of the Wind Energy Act, it is subject to the Act's requirements.

DEQ reviewed this information and reached the conclusion that the Desert Wind Project, in its 2014 form, was clearly subject to the requirements of the Wind Energy Act, including but not limited to a permitting process, an environmental impact assessment, and opportunities for

members of the community, like the Plaintiff, to be involved in the permitting and siting process. On March 18, 2015, DEQ issued a letter stating that because the 2014 version of the Desert Wind Project had not received FAA "no hazard" determinations prior to the effective date of the Wind Energy Act, the project *was* subject to the requirements of the Act. (Pl.'s Comp. Ex. 6).

On April 29, 2015, little more than a month after issuing its original letter, DEQ issued a second letter completely contradicting its statements in March of 2015. Rather than being subject to the requirements of the Wind Energy Act, DEQ found that Iberdrola's 2014 Desert Wind Project *does not* fall within the purview of the Act. DEQ advised Iberdrola Renewables that the Wind Energy Act does not apply to the corporation and went so far as to say that "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 bring the Desert Wind Project within the requirements of the Act." (Pl.'s Comp. Ex. 5). It is logically impossible that Defendant's letters of both March 18 and April 29 contain correct statements of law, and it is clear on the face of the law that the second letter is in error.

On May 11, 2015, the Plaintiff filed a petition for a contested case hearing in the Office of Administrative Hearings (hereinafter "OAH"). At issue was whether DEQ acted in violation of the Administrative Procedure Act and/or other laws when it sent the April 29, 2015 letter to Iberdrola Renewables informing the corporation that its Desert Wind Project would not be subjected to North Carolina state regulatory standards for wind energy facilities. In his OAH petition, Plaintiff alleged that this letter constituted an illegal act that deprived him of the protections of the legislatively-enacted wind permitting process of the Wind Energy Act.

After several months of litigation, Administrative Law Judge Melissa Owens Lassiter granted the Defendant's motion to dismiss in that action. Central to her grant of dismissal was

her finding that "[Plaintiff] is not a 'person aggrieved,' pursuant to N.C. Gen. Stat. § 150B-2(6) as he is not presently aggrieved…[H]e thus [lacks] standing to appeal [DEQ]'s April 29, 2015 action under N.C. Stat. 150B-2(6) and 150B-23(a)." *See* the August 23, 2015 Final Decision and Order of Dismissal of Judge Melissa Owens Lassiter in the matter of Woodard v. North Carolina Department of Environment and Natural Resources, attached hereto as Exhibit C. Neither the Plaintiff nor DEQ appealed Judge Lassiter's decision.

On October 12, 2015, Plaintiff filed this action against Defendant. Plaintiff then filed a motion for the *pro hac vice* admission of Dr. David Schnare on October 26. On November 18, Defendant filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Finally, on December 2, Plaintiff filed a revised motion for admission *pro hac vice* of Dr. David Schnare.

The Plaintiff comes to this court seeking a declaration that the Desert Wind Project, as it stands today, is a new or, alternatively, an expanded wind energy facility that falls within the purview of the Wind Energy Act, and that DEQ therefore broke the law by informing Iberdrola otherwise. Such a declaration would alleviate uncertainty for the parties to this dispute. Further, Plaintiff seeks a declaration that by issuing its April 29 letter, DEQ violated the doctrine of separation of powers as described in N.C. Const. Art I § 6, and in doing so harmed the Plaintiff. Should this Court find that the Plaintiff does not have standing to bring his constitutional claim, it should still find that the Plaintiff has standing to seek a declaratory judgment as to the proper reading of the Wind Energy Act in order to alleviate uncertainty.

SUMMARY OF ARGUMENT

The Plaintiff has standing to bring the claims asserted in his complaint, and these claims are properly stated. He has standing to seek a declaratory ruling under the Uniform Declaratory

Judgment Act independent of his constitutional claim. Further, he has standing to bring his constitutional claim both as a taxpayer and as one who has suffered harm as a result of a constitutional violation.

The Plaintiff has not failed to exhaust his administrative remedies, as he has none available to him. As a matter of law, the Plaintiff is not a "person aggrieved" under the Administrative Procedure Act due to the doctrine of collateral estoppel, or issue preclusion, as this issue has already been fully litigated by the parties to this dispute at the Office of Administrative Hearings (OAH). Plaintiff was not obliged to appeal the determination of OAH that he is not a "person aggrieved," and DEQ did not cross-appeal. Because he is not a "person aggrieved," he has no administrative remedies available to him under the Administrative Procedure Act.

ARGUMENT

I. PLAINTIFF HAS STANDING TO BRING AND HAS PROPERLY STATED THE CLAIMS ASSERTED IN THE COMPLAINT

a. Plaintiff has standing to seek a declaratory ruling under the Uniform Declaratory Judgment Act independent of his constitutional claim.

Plaintiff seeks a declaratory ruling pursuant to the Uniform Declaratory Judgment Act. N.C. Gen. Stat. § 1-253. That statute and others vest courts with the power to "declare rights, status, and other legal relations, whether or not further relief could be claimed." N.C. Gen. Stat. § 1-253. It further provides that "no action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." Id. Such declarations are proper pursuant to this Court's power to declare the "status or other legal relations…affected by a statute." N.C. Gen. Stat. § 1-254.

Our state's declaratory judgment act "furnishes a proper method of determining all controversies relative to construction and validity of a statute." City of Raleigh v. Norfolk S. Ry. Co., 275 N.C. 454, 461 (1969). It exists to provide a "speedy and simple method of determining the rights, status and other legal relations under…statutes…and to afford relief from uncertainty and insecurity created by doubt as to rights, status, or legal relations thereunder." Prudential Ins. Co. of Am. V. Powell, 217 N.C. 495 (1940). The Plaintiff is required to allege a "controversy" that is "real and actually exists between parties having adverse interests" in order to maintain an action under the Uniform Declaratory Judgment Act. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 244 (1960). He has done so on two counts, by (1) alleging that DEQ's interpretation of the disputed statute, and its actions based on that interpretation, harm him by depriving him of statutory protections from which he would have benefitted and (2) by alleging that Defendant's interpretation of the disputed statute, and its actions based on that interpretation, harm him by violating our state's Constitution. (Pl.'s Comp. Par. 4, 39, 74).

A suit seeking a declaratory judgment must further allege a controversy that is not merely hypothetical, but that presents questions which a ruling by this Court can resolve. Carolina Power & Light Co. v. Iseley, 203 N.C. 811, 167 S.E. 56, 60 (1933). This is in line with the general rule that a plaintiff's injury must be redressable by a favorable decision of the court where he seeks relief. *See* Marriott v. Chatham Cty., 187 N.C. App. 491, 494 (2007).

Mr. Woodard's case presents such questions, and thus presents this Court with the opportunity to provide him with relief. His complaint seeks several declarations to the effect that the Defendant has acted in an illegal and unconstitutional manner based on an improper interpretation of a statute. (Pl.'s Comp. Par. 76-78). His complaint further seeks an injunction

pursuant to these declarations. (Pl.'s Comp. Par. 79). Were this Court to grant the relief requested, Mr. Woodard would be in a very different situation than he is today on two counts.

First, Mr. Woodard would no longer suffer from the uncertainty of not knowing whether DEQ has deprived him of statutorily-enacted protections – in fact, this uncertainty would be resolved even if the Court ruled *against* Mr. Woodard, as there would at least be a clear answer on a disputed question of law. Second, were this Court to grant the declaratory relief requested, the rights and duties of the parties to this dispute would be as they were in March of 2015. The Defendant would therefore be required to carry out the permitting process proscribed by the Wind Energy Act. The Plaintiff would be able to participate in the "permit preapplication site evaluation meeting" required by N.C. Gen. Stat. § 143-215.117(c). He further would be able to participate in the scoping meeting required by N.C. Gen. Stat. § 143-215.118. Finally, the Plaintiff would be able to participate in the public hearing mandated by N.C. Gen. Stat. § 143-215.119(f). These are real, concrete benefits that the Plaintiff has been denied by the illegal actions of the Defendant. The Plaintiff's case therefore presents this court with an actual case or controversy and an opportunity to provide him with relief via a favorable decision.

There are administrative remedies that DEQ may allege Mr. Woodard has failed to pursue prior to filing this civil action. As discussed below in Section II of this memorandum, Mr. Woodard has no administrative remedies as a matter of law. *See* pp. 11-14, *infra*.

b. Plaintiff has standing to bring his constitutional claim for two independent reasons, and has properly stated such a claim

1. Plaintiff has standing to bring and has properly stated a direct constitutional claim under Article I § 6 of the North Carolina Constitution to remedy a violation of his constitutional rights

i. Plaintiff states a valid constitutional claim

The Defendant is an executive agency created by the legislature, and has only those powers granted to it by that elected body. *See* Article 7 of the Executive Organization Act of 1973, codified in N.C. Gen. Stat. §§ 143B-275 thru 344.60. Among the statutory duties of the Defendant are to "provide for the protection of the environment" and "to provide for the…public health through…the administration of environmental health programs." N.C. Gen. Stat. § 143B-279.2(1), 1(b). In issuing its letter of April 29, 2015, the Defendant exceeded its authority, contravened its legislative mandate, and unconstitutionally acted in a legislative capacity by refusing to implement the Wind Energy Act with respect to the 2014 Desert Wind Project.

Article I § 6 of the North Carolina Constitution provides that "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from one another." N.C. Const. Art I § 6. This provision regarding separation of powers was not placed in an area of our Constitution regarding the structure of government, but was rather placed in Article I, the Declaration of Rights. The "very purpose" of this Article is to "ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with powers of the State." Corum v. Univ. of N. Carolina Through Bd. of Governors, 330 N.C. 761, 783 (1992). Our courts have held that other provisions of this Article are "self-executing" because there was no other "adequate state remedy" available to "one whose constitutional rights have been abridged." *See* Corum at 782, *citing* Midgett v. Highway Commission, 260 N.C. 241, 249-50 (1963).

The same rationale for other provisions being "self-executing" applies to Article I § 6. As it is by the violation of this constitutional provision that DEQ harmed Mr. Woodard, it is only by enforcement of the provision that his constitutional rights can be repaired. Where our

Constitution points out no specific remedy and no statute affords an adequate remedy, "the common law will furnish the appropriate action for adequate redress of such grievance." Midgett at 249-250. While Mr. Woodard's declaratory claims seeking to alleviate uncertainty will provide him with some form of relief, those declarations can be issued without recognition that DEQ violated the Plaintiff's constitutional rights. Complete relief for Mr. Woodard includes an order by this Court recognizing that DEQ unconstitutionally acted in a legislative capacity.

ii. Plaintiff has alleged sufficient facts in support of his constitutional claim

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). There can be no doubt that this principle is "a cornerstone of our state and federal governments." State ex rel. Wallace v. Bone, 304 N.C. 591, 601 (1982). In promulgating the Wind Energy 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). However, 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). Plaintiff has alleged that such a violation has occurred here.

Mr. Woodard alleges that Defendant's issuance of its letter dated April 29, 2015 was an unconstitutional act in violation of Article I § 6 of our state's Constitution. The Defendant

usurped the authority of the legislature to make law by purporting to make a decision that had already been made by that elected body – 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. By doing so, Defendant directly caused harm to the Plaintiff by unconstitutionally depriving him of legislatively enacted protections of which he is an intended beneficiary. This harm is redressable by a favorable decision of this Court.

2. Plaintiff has standing as a citizen taxpayer to challenge an unconstitutional use of taxpayer funds by the Defendant which caused him harm

The core of any issue is "whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." In re Appeal of Barbour, 112 N.C. App. 368, 373 (1993)(*quoting* Stanley v. Dep't of Conservation and Dev., 284 N.C. 15, 29 (1973). From this general principle come many rules surrounding the doctrine of "taxpayer standing."

North Carolina case law demonstrates that "a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds." Goldston v. State, 361 N.C. 26, 33 (2006). Such a suit may be brought so long as a plaintiff demonstrates a connection between the challenged action and an injury to "persons, property, or constitutional rights." Stanley v. Dep't of Conservation and Dev., 284 N.C. 15, 29 (1973). If a plaintiff's constitutional rights have been violated, he need not have suffered a direct economic injury. Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 279 (1979). Further, a plaintiff has standing as a taxpayer where he shows that the carrying out of a

challenged act "will cause him to sustain personally, a direct and irreparable injury." Texfi Indus., 44 N.C. App. At 270.

The Plaintiff challenges the issuance of the April 29, 2015 letter by the Defendant as an unconstitutional use of taxpayer funds. The letter was issued by Brad Atkinson, the Defendant's Energy Section Chief. His salary, the cost of the agency's decision-making process, and the physical issuance of the April 29 letter all constitute uses of taxpayer funds. Mr. Woodard has standing to challenge the use of these funds as unconstitutional.

II. PLAINTIFF HAS NOT FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES

a. As a matter of law, Plaintiff is not a "person aggrieved" as defined by the Administrative Procedure Act due to the doctrine of collateral estoppel

DEQ claims that the Plaintiff has failed to exhaust his administrative remedies. However, in order to pursue such administrative remedies, Plaintiff would have to be a "person aggrieved" under the Administrative Procedure Act ("APA") as defined in N.C. Gen. Stat. § 150B-2(6). The doctrine of collateral estoppel, or issue preclusion, prevents DEQ from re-litigating the issue of whether Mr. Woodard is a "person aggrieved" under the APA because it has already prevailed in another forum on this exact same issue.

Collateral estoppel applies when (1) the issue is the same as that involved a prior action, (2) in the prior action the issue was raised and actually litigated, (3) the issue was material and relevant to the disposition of the prior action, and (4) the determination made on that issue was necessary and essential to the resulting judgment. Urquhart v. East Carolina School of Medicine, 211 N.C. App. 124, 128 (2011)(citation and quotation marks omitted).

Here, the prior action is the matter of Woodard v. North Carolina Department of Environment and Natural Resources, 15 EHR 03522,[1] filed in the Office of Administrative Hearings (OAH). In that OAH action, (1) the issue of whether Mr. Woodard is a "person aggrieved" was involved, (2) the issue of whether he is a "person aggrieved" was raised by DEQ and actually litigated, (3) the issue was material and relevant to the disposition of the prior action, and (4) the determination made of whether he was aggrieved was necessary and essential to the resulting judgment.

Both Mr. Woodard and DEQ briefed the issue of whether he was a "person aggrieved" pursuant to N.C. Gen. Stat. § 150B-2(6). *See* DEQ's Memorandum in Support of Motion to Dismiss and Mr. Woodard's Response Thereto in the matter of Woodard v. North Carolina Department of Environment and Natural Resources, attached hereto with exhibits omitted as Exhibits A and B. The issue was therefore (1) involved and (2) actually litigated.

Further, the issue was (3) material and relevant to the disposition of the prior action and (4) necessary and essential to the resulting judgment. In her order dismissing the case, Judge Melissa Owens Lassiter found that Mr. Woodard "is not a 'person aggrieved,' pursuant to N.C. Gen. Stat. § 150B-2(6) as he is not presently aggrieved…As a result, [Woodard] is not presently a 'person aggrieved,' and thus, lacks standing to appeal [DEQ]'s April 29, 2015 action under N.C. Gen. Stat. § 150B-2(6) and 150B-23(a)." *See* Final Decision and Order of Dismissal of Judge Melissa Owens Lassiter in the matter of Woodard v. NC Department of Environment and Natural Resources, 15 EHR 03522, attached hereto as Exhibit C.

[1] The NC Department of Environment and Natural Resources (DENR) was renamed the NC Department of Environmental Quality (DEQ) on September 18, 2015 when Gov. McCrory signed the 2015-16 state budget into law. For more information, see Walker, Michele W. "DENR Has a New Name - N.C. Dept. of Environmental Quality." North Carolina Department of Environmental Quality, 21 Sept. 2015. Web. <http://portal.ncdenr.org/web/guest/denr-blog/-/blogs/denr-has-a-new-name-n-c-dept-of-environmental-quality?_33_redirect=%2Fweb%2Fguest%2Fdenr-blog>.

Judge Lassiter's August 23 order disposed of Mr. Woodard's entire claim. All relief which he sought against DEQ at the Office of Administrative Hearings was denied. Neither party appealed Judge Lassiter's determination.

b. Plaintiff was not obliged to appeal the determination of the Office of Administrative Hearings that he was not a "person aggrieved," and the Defendant did not cross-appeal.

Because neither party appealed Judge Lassiter's ruling at the Office of Administrative Hearings (OAH), it binds both parties going forward. The North Carolina Supreme Court refers to this principle as "mutuality of estoppel." *See, e.g.,* Thomas M. McInnis & Associates, Inc. v. Hall, 318 N.C. 421, 429 (1986), *quoting* Bernhard v. Bank of America, 122 P.2d 892 (1942). Even erroneous judgments, including judgments based on clear errors of law, are binding on both parties absent an appeal. "To be valid a judgment need not be free from error. Normally no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding res judicata and collateral estoppel effect in all courts, Federal and State." King v. Grindstaff, 284 N.C. 348, 360 (1973).

Mr. Woodard filed suit in the Office of Administrative Hearings because he believed he was a person aggrieved as defined by the Administrative Procedure Act, and was therefore entitled to relief in that forum. DEQ disagreed. The issue was briefed, and the administrative law judge sided with the Defendant. Whether her decision was right or wrong, the North Carolina Supreme Court has held that it must be respected and binds both parties. DEQ is estopped from relitigating the issue of whether Mr. Woodard is a "person aggrieved" under the Administrative Procedure Act.

c. As Plaintiff is not a "person aggrieved" under the Administrative Procedure Act, he has no administrative remedies.

There are three potential administrative remedies that a person in the Plaintiff's shoes could pursue. One is to file a petition for a contested case hearing with the Office of Administrative Hearings. N.C. Gen. Stat. § 150B-23(a). A second is to seek a declaratory judgment from DEQ itself. N.C. Gen. Stat. § 150B-4(a). A third would be to seek a declaratory ruling from the Environmental Management Commission. 15A N.C.A.C. 2I.0601. All three of these administrative remedies require a petitioner to be a "person aggrieved" as defined in N.C. Gen. Stat. 150B-2(6). For the reasons stated above, Mr. Woodard is, as a matter of law, not a person aggrieved. *See* pp. 11-13, *supra*. He therefore has no administrative remedies that he could have exhausted before coming to this Court.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied in its entirety.

Respectfully submitted this the 17th day of December, 2015.

BY: _____

Elliot Engstrom
Center for Law and Freedom
Civitas Institute
100 S. Harrington Street
Raleigh, NC 27603
N.C. State Bar No. 46003
Counsel for the Plaintiff

CERTIFICATE OF SERVICE

I certify that the attached MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS has been served on the Defendant by depositing a copy with the United States Postal Service with sufficient postage, addressed to:

Served on: Asher Spiller
North Carolina Department of Justice
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001
Counsel for Defendant

This the 17th day of December, 2015.

By: _____

Elliot Engstrom
Center for Law and Freedom
Civitas Institute
100 S. Harrington Street
Raleigh, NC 27603
N.C. State Bar No. 46003
Counsel for the Plaintiff

EXHIBIT A

Respondent's Memorandum in Support of Motion to Dismiss in the matter of Woodard v. North Carolina Department of Environment and Natural Resources, 15 EHR 03522

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

JOHN J. WOODARD JR., Petitioner, 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 AND IN RESPONSE TO PETITIONER'S REQUEST FOR STAY**

NOW COMES Respondent, North Carolina Department of Environment and Natural Resources ("NCDENR"), Division of Energy, Mineral and Land Resources, Energy Section ("DEMLR"), by and through the undersigned counsel, pursuant to 26 N.C.A.C. 03.0101 and Rules 12(b)(1), 12(b)(2), 12(b)(5), 12(b)(6), and 65 of the North Carolina Rules of Civil Procedure, and files this Memorandum of Law in Support of Motion to Dismiss and in Response to Petitioner's Request for Stay.

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"). 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 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") has been developing its Desert Wind Project ("Project") since prior to the May 17, 2013 passage of S.L. 2013-51. Based on information provided to Respondent by Atlantic Wind, Respondent made the determination, by written correspondence to Atlantic Wind on April 29, 2015, 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.

Petitioner filed a *pro se* contested case petition[1] on May 11, 2015, alleging wrongful actions by Respondent but not alleging that Petitioner was harmed by Respondent's actions. Petitioner challenges the Respondent's determination that the Project is not subject to the law's permitting requirements.

On June 8, 2015 Petitioner sent a letter to this Court seeking a stay "that prevents Iberdrola Renewables (dba Atlantic Wind LLC) from beginning construction on any part of the Desert Wind project, pending the outcome of this hearing."

On June 24, 2015 Petitioner sent a second letter to this Court renewing Petitioner's request for a stay of Atlantic Wind's efforts to construct the Project.

Petitioner subsequently filed a Prehearing Statement with this Court in which Petitioner identified two bases for his claims. First, Petitioner contends that section 2 of S.L. 2013-51 does not have legal force and effect, or in Petitioner's words "does not have preference over what appears in the official NCGA website of NC Statutes." (Petr.'s Prehearing Statement ¶ 2(a).) Second, Petitioner contends that the statute was "incorrectly drafted" because the statutory

[1] Respondent received notice on July 9, 2015 that Petitioner now has retained counsel in this matter.

definition of the term "wind energy facilities" differs from the FAA's use of the term. (Id. ¶ 2(b).) For these reasons, Petitioner contends that Atlantic Wind cannot claim the benefit of the exception outlined in section 2 of S.L. 2013-151.

On June 26, 2015, Respondent filed a Prehearing statement with this Court notifying the Court *inter alia* of its intent to file a motion to dismiss challenging the sufficiency of the Petitioner's claims as well as this Court's jurisdiction over this matter.

ARGUMENT

Petitioner's pleadings contain numerous deficiencies and legal misapprehensions that are fatal to Petitioner's claims and require dismissal of the Petition. First, while Petitioner has put forward the beginnings of a legal argument relating to Respondent's interpretation of S.L. 2013-51, Petitioner entirely fails to indicate how that interpretation affects him. This Court thus lacks subject matter jurisdiction over the Petition because Petitioner is not a "person aggrieved" under N.C.G.S. § 150B-23(a) and therefore lacks standing.

Second, Petitioner has failed to state a claim upon which relief can be granted under the North Carolina Administrative Procedure Act ("APA") and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because Petitioner has failed to allege facts establishing the necessary elements of N.C.G.S. § 150B-23(a).

Third, Petitioner's claim that section 2 of S.L. 2013-51 does not apply to the Project fails to state a valid claim on its face as it is premised on the legal fallacy that Session Laws enacted by the North Carolina General Assembly and signed by the Governor into law do not have the force of law.

Fourth, Petitioner's claim that section 2 of S.L. 2013-51 does not apply to the Project because the North Carolina legislature erred in defining "wind energy facility" in a manner inconsistent with the FAA's use of the term must likewise be dismissed out of hand.

Fifth, the Petition should be dismissed because Respondent has not been properly served with process and, thus, this Court lacks personal jurisdiction over Respondent in this matter.

Finally, the Petitioner's request for injunctive relief should be denied because 1) the relief that Petitioner requests—an injunction issued against a private nonparty—is beyond the jurisdiction of this Court, 2) Petitioner has failed to make any showing that harm to Petitioner would result if the requested relief were denied, and 3) Petitioner has not shown a likelihood of success on the merits.

I. PETITIONER IS NOT A "PERSON AGGRIEVED" AND THEREFORE LACKS STANDING UNDER THE NORTH CAROLINA ADMINISTRATIVE PROCEDURE ACT.

"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). "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 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)). 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).

Under the APA, 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.G.S. § 150B-23(a).[2] A "person aggrieved" is "any 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." N.C.G.S. § 150B-2(6). "Where a party is not aggrieved, his appeal [of an agency decision] will be dismissed." Hoisington v. ZT-Winston-Salem Assocs., 133 N.C. App. 485, 496, 516 S.E.2d 176, 184 (1999); see, e.g., Thompson v. N.C. Respiratory Care Bd., 202 N.C. App. 340, 688 S.E. 2d 516 (2010) (holding that petitioner was not an "aggrieved party" under section 150B-2(6) and lacked standing because her interest in her person, property, or employment were not affected substantially by any administrative action of the North Carolina Respiratory Care Board, which had reversed its decision requiring her to pay monetary penalties).

Here, Petitioner has failed to show that he is a "person aggrieved," alleging neither that he was affected in his "person, property, [n]or employment." N.C.G.S. § 150B-2(6). OAH has promulgated a Petition for Contested Case Hearing form (H-06) which specifically directs petitioners to "state facts showing how you believe you have been harmed by the State agency or board." Petitioner failed to allege that Respondent took an action that harmed anyone, let alone Petitioner. The form also directs petitioners to indicate whether, due to the Agency's action, the petitioner was "deprived [] of property, ordered [] to pay a fine or civil penalty; or otherwise substantially prejudiced." Petitioner left this area blank.

[2] It should be noted that S.L 2013-51 does not provide for enforcement by way of citizen suit that would in any way alter Petitioner's burden to establish standing.

Petitioner subsequently filed a Prehearing Statement which likewise neglected to allege any facts that would support an inference that Petitioner is a person aggrieved by Respondent's determination that the Project is not subject to S.L. 2013-51's permitting requirements.

Construed liberally, the facts alleged in the Petition and the Prehearing Statement indicate only that Petitioner believes Respondent erred in its 29 April 2015 letter when it determined that the Project was not subject to S.L. 2013-51's permitting requirements. In other words, while the Petition and Prehearing Statement put forward the beginnings of a legal argument regarding what Petitioner perceives to be Respondent's erroneous interpretation of S.L. 2013-51, Petitioner has failed to allege that he has standing to pursue that argument before this Court.

In sum, even accepting all allegations in the Petition and Prehearing Statement as true, and drawing all reasonable inferences in Petitioner's favor, Petitioner has failed to allege that he is a "person aggrieved" under N.C.G.S. § 150B-23(a).

II. PETITIONER FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER RULE 12(B)(6) BECAUSE PETITIONER DOES NOT ALLEGE THE ESSENTIAL ELEMENTS OF A CLAIM UNDER N.C.G.S. § 150B-23(A).

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, Petitioner 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). 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, Petitioner was 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).

Petitioner does not come close to alleging that Respondent "deprived [him] of property, ordered [him] to pay a fine or civil penalty, or otherwise substantially prejudiced [his] rights." N.C.G.S. § 150B-23(a). In fact, as discussed in Section I above, Petitioner does not claim that Respondent's took an action that affected him at all. Petitioner has thus failed to state a claim for relief under N.C.G.S. § 150B-23(a) based on the 29 April 2015 letter, and the Petition should be dismissed.

III. PETITIONER'S CLAIM THAT SECTION 2 OF S.L. 2013-51 DOES NOT APPLY TO THE PROJECT RESTS ON A FUNDAMENTAL LEGAL FALLACY AND SHOULD BE DISMISSED

In his Prehearing Statement, Petitioner suggests that section 2 of S.L. 2013-51 does not have the force of law either because, according to Petitioner, it only appears in a "LexisNexis Editor's Note," or alternatively, because a Session Law enacted by the General Assembly does not have equal force and effect as a law codified in the North Carolina General Statutes. (Petr.'s

Prehearing Statement ¶ 2(a).) Thus Petitioner states, "My view is that since the 5/17/13 date [the effective date of the session law] does not appear in the official NCGA website version of the NC Statute, DENR has a legal basis to disregard that date." (Id.) Petitioner's attempt to erase section 2 and the effective date of the session law from S.L. 2013-51 must be dismissed out of hand.

It is axiomatic that duly enacted North Carolina Session Laws have the force of law whether or not they are codified in the North Carolina General Statutes. Indeed, House Bill 484, including section 2 and the provision providing for its effective date, became law when it passed both houses of the North Carolina General Assembly and was signed by the Governor on May 17, 2013. See N.C. Const. Art. II, sec. 22. Further, North Carolina courts have consistently given effect to uncodified portions of Session Laws. See, e.g., Custom Molders v. American Yard Prods., 342 N.C. 133, 137 (N.C. 1995) ("the statement of a legislative enactment contained in the Session Laws is controlling over the statement codified in the General Statutes"); State ex rel. Banking Comm'n Against Weiss v. N.C. Comm'r of Banks, 174 N.C. App. 78, 620 S.E.2d 540 (2005) (giving full force and effect to an uncodified grandfather clause appearing in a session law); see also Patten v. United States, 116 F.3d 1029, 1034 n.3 (4th Cir. 1997) (noting that a piece of legislation that was enacted as a section of a public law and signed by the President had the force of law even though it was not codified).

Dismissal under Rule 12((b)(6) is necessary when the complaint "on its face reveals that no law supports the plaintiff's claim." Wood v. Guilford County, 355 N.C. 161, 166, 558 S.E.2d 490, 495 (2002). To the extent Petitioner claims that Respondent erred in its determination because section 2 of S.L. 2013 does not have the force of law, Petitioner fails to state a valid claim for relief under Rule 12(b)(6).

IV. PETITIONER'S CLAIM THAT SECTION 2 OF S.L. 2013-51 DOES NOT APPLY TO THE DESERT WIND PROJECT BECAUSE THE LEGISLATURE ERRED IN DRAFTING THE STATUTE SHOULD BE DISMISSED.

Petitioner's second and only other basis for challenging Respondent's determination is likewise facially invalid. Petitioner contends that General Assembly "incorrectly wrote" the words "wind energy facilities" when referring to entire wind energy projects, and that the term "wind energy facilities" must be given the meaning that Petitioner contends it has for the FAA, that is, "individual tall structures that might be an obstruction to air travel." (Petr.'s Prehearing Statement ¶ 2(b).) Yet, neither Petitioner, nor this Court, is at liberty to define or interpret a term in a manner that is directly contrary to the definition supplied by the legislature. The General Assembly has defined "wind energy facility" in S.L. 2013-51 to mean "the turbines, accessory buildings, transmission facilities, and any other equipment necessary for the operation of the facility that *cumulatively*, with any other wind energy facility whose turbines are located within one-half mile of one another, have a rated capacity of one megawatt or more of energy." N.C.G.S. § 143-215.115(3).

Even if that Petitioner's preferred rewrite of the statute were to help him—and it does not—the *actual* language of the statute which Petitioner incorporates by reference in his Prehearing Statement affirmatively demonstrates that "no law supports [Petitioner's] claims." Wood, 355 N.C. at 166, 558 S.E.2d at 495. As both of the arguments put forward in Petitioner's Prehearing Statement are facially invalid, the Petitioner must be dismissed in its entirety.

V. THIS COURT SHOULD DISMISS THE PETITION FOR LACK OF PERSONAL JURISDICTION AND IMPROPER SERVICE OF PROCESS BECAUSE PETITIONER FAILED TO SERVE RESPONDENT'S REGISTERED AGENT.

One of the requirements for initiating a contested case is proper service of the petition on all parties by one of the methods enumerated in N.C.G.S. § 1A-1, Rule 4(j) or (j3). N.C.G.S. § 150B-23(a) and (c). In order to serve an agency of the State, Petitioner must serve the petition on Respondent's appointed process agent by registered or certified mail. N.C.G.S. § 1A-1, Rule 4(j)(4). Rule 4's "specified requirements must be complied with or there is no valid service." Long v. Cabarrus County Bd. Of Education, 52 N.C. App. 625, 626, 279 S.E.2d 95, 96 (1981). Further, while "defective . . . service may be sufficient to give [a] party actual notification of the proceedings, such actual notice does not give the court jurisdiction over the party." Mabee v. Onslow County Sheriff's Dep't, 174 N.C. App. 210, 212, 620 S.E.2d 307, 308 (2005), disc. rev. denied, 360 N.C. 364, 629 S.E.2d 854 (2006) (quotation marks omitted). The North Carolina Rules of Civil Procedure authorize the filing of a motion to dismiss for lack of personal jurisdiction and improper service of process. N.C.G.S. § 1A-1, Rule 12(b)(2) and (5).

North Carolina courts strictly apply the requirements of Rule 4. Grimsley v. Nelson, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996). For instance, in Johnson v. City of Raleigh, the summons and complaint in a personal injury suit against a city were delivered to the mayor's office and left with the mayor's assistant. 98 N.C.App. 147, 149, 389 S.E.2d 849, 851 (1990). The court held that under the plain language of Rule 4(j)(5), the summons and complaint had to be personally delivered to "[the] mayor, city manager, or clerk." The court explained that "while delivery of the summons to the mayor's assistant was sufficient to give the City notice of the suit, *the delivery of the summons to a person other than the named official was insufficient to give the court personal jurisdiction over the City.*" Id. at 150, 389 S.E. 2d at 851 (emphasis added); see also Croom v. DOC, Div. of Empl. Sec., 143 N.C. App. 493, 497, 547 S.E.2d 87, 90 (2001) (holding that the court lacked personal jurisdiction over EEOC where plaintiff failed to

serve the EEOC in compliance with Rule 4(j)(4)); Thomas & Howard Co., Inc. v. Trimark Catastrophe Svcs., Inc., 151 N.C. App. 88, 91, 564 S.E.2d 569, 572 (2002) (affirming dismissal where plaintiff did not serve a foreign corporation's in-state registered agent, despite the corporation's actual notice based on service on its registered agent in Texas); Fulton v. Mickle, 134 N.C. App. 620, 624-25, 518 S.E.2d 518, 521-22 (1999) (affirming dismissal where plaintiff addressed summons to an insurance claims examiner "who was not an officer, director, or agent authorized to accept service of process" on behalf of the insurer, and served the process by regular mail instead of certified mail).

As of May 8, 2015, the date on the Petition, Respondent's appointed process agent was:

Sam Hayes, General Counsel[3]
Green Square Building
217 W. Jones St.
Raleigh, NC 27603

It is unclear whether Petitioner sent the Petition via registered or certified mail, but the face of the Petition indicates that Petitioner served Brad Atkinson (the Energy Section Chief), and not Mr. Hayes.

Thus, regardless of the fact that Respondent has since received actual notice of the instant litigation, this Court lacks personal jurisdiction over Respondent and dismissal of the contested case is necessary.

VI. THE PETITIONER'S REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED.

A. The Office of Administrative Hearings lacks jurisdiction to grant Petitioner's requested relief.

[3] The name and contact information for Respondent's appointed process agent is a matter of public record available on a list maintained by the North Carolina Attorney General in accordance with N.C.G.S. § 1A-1, Rule 4(j)(4)(b). http://www.ncdoj.gov/getdoc/f85e2106-9532-4a64-9c58-ebb251165639/2-6-4-3-2-Process-Agent-Directory.aspx. This Court may take judicial notice of such facts pursuant to N.C.G.S. § 8C-1, Rule 201.

While Respondent has no direct stake in whether or not this Court grants Petitioner's request for stay, Respondent questions whether this Court has authority to grant it. As an initial matter, no North Carolina Court has the authority to grant an injunction against a nonparty "absent the existence of a relationship between a party and the nonparty and notice of the injunction proceeding." Ferrell v. Doub, 160 N.C. App. 373, 378 (2003) (citing N.C. Gen. Stat. § 1A-1, Rule 65(d)); see also Evans v. Lochmere Rec. Club, 176 N.C. App. 724, 728, 627 S.E.2d 340, 342 (2006). Atlantic Wind is not a party to this litigation, nor does it have a relationship with a party as specified in Rule 65(d). Thus, Atlantic Wind is beyond the reach of this court's injunctive authority.

Furthermore, "[t]he Office of Administrative Hearings is not a 'constitutional' court and is a statutory creation and with only the authority granted to it by the General Assembly." Legette v. N.C. Retirement System, 10 DST 07375, 2011 NC OAH LEXIS 181, at *5 (also stating that "OAH does not grant equitable relief."). N.C.G.S. § 150B-33 grants this Court the authority to "[s]tay the *contested action by the agency* pending the outcome of the case, upon such terms as he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65." (emphasis added). Yet while the this Court could stay an action taken by Respondent—if such an affirmative action had been taken in this case—this Court does not have the authority to grant injunctive relief against a private party, particularly one who is not a party to the contested case. Furthermore, the plain text of N.C.G.S. § 7A-245(a) designates the Superior Court as the "proper division" to grant injunctive relief.

Insofar as Petitioner seeks to enjoin the construction of the Project, this Court lacks authority to grant Petitioner's request.

B. Petitioner has failed to satisfy his burden under Rule 65 of the North Carolina Rules of Procedure and is not entitled to a preliminary injunction.

Even if N.C.G.S. § 150B-33 could be construed to permit the OAH to grant the relief Petitioner requests over Atlantic Wind, the requirements of Rule 65 of the Rules of Civil Procedure must be met before a preliminary injunction may be issued. The burden is on the Petitioner to establish their right to a preliminary injunction. Pruitt v. Williams, 25 N.C. App. 376, 379, 213 S.E.2d 369, 371 (1975). North Carolina courts have held that a preliminary injunction "will be issued only if plaintiff is able to show the likelihood of success on the merits of his case and if plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of plaintiff's rights during the course of litigation." A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

1. Petitioner has not shown irreparable harm or that an injunction is necessary to protect Petitioner's rights.

Petitioner has failed to make any showing regarding a likelihood of irreparable loss, or any infringement of Petitioner's rights. Neither the Petition, the Prehearing Statement, Petitioner's June 8, 2015 letter, nor Petitioner's June 24, 2015 letter provide any indication that Petitioner will be remotely impacted by Respondent's interpretation regarding the applicability of S.L 2013-51 to the Project. Thus, Petitioner's request for preliminary injunctive relief in the form of a stay "that prevents Iberdrola Renewables (dba Atlantic Wind LLC) from beginning construction on any part of the Desert Wind project, pending the outcome of this hearing" should be denied.

2. Petitioner has not shown a likelihood of success on the merits.

As outlined above, Petitioner's Petition and Prehearing Statement are fatally deficient. It necessarily follows that Petitioner has failed to show a likelihood of success on the merits.

Petitioner therefore fails to satisfy both requirements of Rule 65 and his request for injunctive relief must be denied.

CONCLUSION

For the foregoing reasons, the Petition should be dismissed in its entirety with prejudice for lack of subject matter jurisdiction, for failure to state a claim upon which relief may be granted, and for lack of personal jurisdiction and improper service of process, and the Petitioner's request for stay should be denied.

Respectfully submitted this is the 10th day of July, 2015.

ROY COOPER
Attorney General

By: _____

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

_____

Daniel S. Hirschman
Special Deputy Attorney General
NC State Bar No. 27252
DHirschman@ncdoj.gov

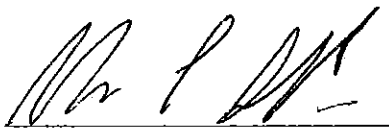
NC Department of Justice
Environmental Division
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6600 - telephone
(919) 716-6939 – facsimile
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND IN RESPONSE TO PETITIONER'S REQUEST FOR STAY has been served on the Petitioner by depositing a copy of the same in an official depository of the United States Mail, first class, postage prepaid, and addressed to Petitioner's 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 10th day of July, 2015.



Asher P. Spiller
Assistant Attorney General

EXHIBIT B

Petitioner's Response to Respondent's Motion to Dismiss in the matter of Woodard v. North Carolina Department of Environment and Natural Resources, 15 EHR 03522

STATE OF NORTH CAROLINA COUNTY OF PASQUOTANK	IN THE OFFICES OF ADMINISTRATIVE HEARINGS 15 EHR 03522
JOHN J. WOODARD JR., Petitioner, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF ENERGY, MINERAL AND LAND RESOURCES Respondent.	**PETITIONER'S RESPONSE TO RESPONDENTS MOTION TO DISMISS**

PETITIONER'S RESPONSE TO RESPONDENTS MOTION TO DISMISS

NOW COMES Petitioner, John J. Woodard, Jr., by and through the undersigned counsel, in response to a Motion to Dismiss filed by Respondent North Carolina Department of Environment and Natural Resources ("DENR").

STATEMENT OF FACTS AND PROCEDURAL HISTORY

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. In 2014, Iberdrola expanded the 2011 project by increasing the heights of the wind towers and changing their locations. To distinguish between the initial project and the expanded project, we refer to the expansion as the 2014 Desert Wind Project.

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 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. These determinations expired on December 29, 2012. *Id.* 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.

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

After Iberdrola obtained No Hazard determinations for its 2011 project, but before they obtained No Hazard determinations for the 2014 expansion, the North Carolina Legislature enacted a statute requiring expansions of wind energy facilities to obtain a permit from DENR. The Agency examined the information submitted by Iberdrola and on March 18, 2015, issued a letter that "determined that Iberdrola 's [2014] Desert Winds Project is subject to the State's wind energy facility permitting process." *See*, Exhibit 6. One month later, DENR issued a second letter, indicating it had "renewed its review of the Act" and determined the 2014 project was not subject to permitting. *See* Exhibit 5. DENR gave no reason for this reversal in its second letter and did not it its Motion to Dismiss.

[1] We note that on Exhibit 3, the FAA states "Refiling for turbine height, no change in turbine locations of 150 turbines and 1 met tower for Desert Wind Project." Examination of the lat-long locations, however, shows that this is a misstatement and is not true, as admitted by DENR.

On May 27, 2013, after the 2011 FAA determinations and after the 2011 determinations expired, but before the 2014 FAA determinations, 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 "Act"). The Act became effective when it became law, and sets forth permitting requirement for wind facilities. As discussed *infra*, 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 DENR – and DENR is obliged to carry out this permitting process. The Act applies to wind energy facilities or expansions that have not received a Determination prior to May 17, 2013.

At issue in this case is DENR's determination that the 2014 Desert Wind Project is not subject to the permitting provisions of N.C.G.S. 143-215.115 thru 215.226.

On May 29, 2015, Petitioner filed pro se for a Contested Case Hearing to challenge Respondent's determination that the Project is not subject to the requirements of the Act. On June 26, 2015, the North Carolina Attorney General filed a Transmission of Document Constituting Agency Action, followed by a prehearing statement on the same day and a motion to dismiss filed on July 10, 2015.

On July 9, 2015, Petitioner's counsel filed a notice of appearance and then petitioned the Court for an extension of time in which to respond to Defendant's motion to dismiss. Opposing counsel did not object to the extension, and an order granting the extension was issued by the Court on August 3, 2015.

Mr. Woodard now submits a response to respondent's motion to dismiss, filed contemporaneously with petitioner's amended petition.

ARGUMENT

In its Motion to Dismiss, DENR raises six arguments: that Mr. Woodard lacks standing; that he fails to state a claim; that he did state a claim, but it is fallacious; that he stated a second claim and that too is fallacious; that the Court lack personal jurisdiction; and that the Court lacks jurisdiction to issue injunctive relief that DENR suggests Mr. Woodard sought, but that in fact he did not seek. We address each argument in turn.

I. Mr. Woodard is an Aggrieved Person and meets standing requirements

Mr. Woodard is a journalist and publisher serving Elizabeth City and Pasquotank and Perquimans Counties. *See* Exhibit 7, the Woodard Affidavit. His work requires his weekly and sometimes daily journalistic activity in these counties, including on and around Up River Rd. and Mill Pond Rd., and, Ownley Road (*id.*), within the area on which Iberdrola plans to construct the 2014 Desert Wind Project. His work includes interviewing residents within the area in and near the planned Desert Wind project. *Id.* As a result, he will be subject to the well documented adverse health effects caused by wind turbines including, headaches, difficulty concentrating, irritability and fatigue, dizziness or vertigo, tinnitus and the sensation of aural pain or pressure. *Id.*

Mr. Woodard's journalism and publishing activities will suffer due to the industrial wind project. Over a hundred studies, reports and articles have documented the decrease in tourism in an area with an industrial wind project. *Id.* Mr. Woodard's publications are significantly targeted at tourists, providing them an introduction to the community and its businesses. Loss of tourism equates to loss of business. *Id.*

Mr. Woodard has an abiding interest in Pasquotank and Perquimans Counties, their rural nature and the agrarian terrain and lifestyles found there. *Id.* He reports on these and in

particular has become sensitive to the basic American ethic resident in agrarian living and the family farms in this part of eastern North Carolina. *Id.* The massive change in land use, its certain negative impact on rural living and in particular on the family farms and residences and the expected injuries to residents, livestock and lifestyles all redound negatively on Mr. Woodard as a person and as a journalist. *Id.*

Mr. Woodard recognizes that he may be forced to suffer the imminent injuries resulting from construction of the proposed facilities but because there have been no environmental or cultural analyses of the proposed project, something that would occur if the 2014 Desert Wind Project were required to obtain a permit under S.L. 2013-51, he has no assurance that the injuries he and the community will suffer have been addressed and minimized.[2]

In light of the above, under North Carolina precedent, Mr. Woodard is a "person aggrieved" and meets all elements necessary because he is "any 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." N.C.G.S. § 150B-2(6).

The standing law is on Mr. Woodard's side. Standing requires an injury in fact, but "the claimed injury 'need not be large, an identifiable trifle will suffice.'" *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. S.C. 2000) (quoting *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996)); see also *Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498, 501 (4th Cir. 1974) ("The claimed injury need not be great or substantial; an identifiable trifle, if actual and genuine, gives rise to standing.") North

[2] Mr. Woodard, like all citizens, will also suffer a degradation in national security. The Department of Defense has determined that their classified over the horizon radar system at Hampton Roads, one of only two such facilities in the U.S., will suffer a 15 percent reduction in performance due to the 2011 Desert Wind proposal. (*See*, http://wiseenergy.org/Energy/DesertWind/Wind_Farm_Standoff_from_ROTHR_Report.pdf; *and see*, General John F. Kelley, USMC, Testimony before the 113th Congress House Armed Services Committee, 26 February 2014, (*see*, http://www.southcom.mil/newsroom/Documents/2014_SOUTHCOM_Posture_Statement_HASC_FINAL_PDF.pdf).

Carolina courts are not limited to the "case or controversy" requirement of Article III of the United States Constitution but do mirror it. *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52, (N.C. Ct. App. 2002). North Carolina courts began using the term "standing" in the 1960s and 1970s to refer generally to a party's right to have a court decide the merits of a dispute. *Id.*

In North Carolina, courts have held that the meaning of "person aggrieved" is flexible.

> The expression 'person aggrieved' has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: Adversely or injuriously affected; damnified, having a grievance, having suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.

In re Halifax Paper Co., 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963). Moreover, a person can be aggrieved even if they seek declaratory relief.

Even more on point, a mere "procedural injury" implicit in agency failure to prepare an environmental impact statement is itself a sufficient "injury in fact" to support standing as "aggrieved parties" under G.S. § 150A-43 as long as such injury is alleged by a plaintiff having "sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have." *City of Davis v. Coleman, 521 F. 2d 661, 671 (1975).*

Arguably, if the Office of Administrative Hearings were to deny Mr. Woodard a chance to argue the merits of this case, that denial of a hearing would itself be an injury to the petitioner. *In re Denial of Request for Full Admin. Hearing*, 146 N.C. App. 258, 260, 552 S.E.2d 230, 231 (2001). In that case, the plaintiff argued she was a person aggrieved because "her legal right to a hearing was denied, [and] such denial confers upon her the necessary aggrieved status to demand an administrative hearing." *Id.* at 262, 552 S.E.2d at 232.

Because Mr. Woodard represents a class of individuals who share a threat to both environmental quality and national security (due to the loss of protection from degradation of the over the horizon radar), these injuries also provide the basis for standing. *See*, *In re Halifax Paper Co.*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963) ("One may be aggrieved within the meaning of the various statutes authorizing appeals when he is affected only in a representative capacity."), *citing to Town of Milford v. Commissioner of Motor Vehicles*, 96 A. 2d 806 (Conn. 1953); *State v. Hix*, 54 S.E. 2d 198 (W. Va. 1949); *and see*, *Merrimon v. Southern Paving & Conste. Co.,* 142 N.C. 539, 545, 55 S.E. 366, 367 (1906), *cited with approval in Goldston v. State,* 361 N.C. 26, 32, 637 S.E.2d 876, 880 (2006) (a citizen, in his own behalf and that of all other taxpayers, "may maintain a suit in the nature of a bill in equity to enjoin the government *from transcending their lawful powers or violating their legal duties* in any mode which will injuriously affect the tax-payers.") (*emphasis* added).

In addition to showing that he is an aggrieved person, Mr. Woodard has thus demonstrated that: (1) he will suffer an injury in fact that is actual and imminent, not conjectural or hypothetical; (2) the injury complained of is caused by or fairly traceable to the challenged action of DENR; and (3) it is likely that a favorable decision would redress the injury at least to some degree. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009).

Mr. Woodard meets all requirements for standing necessary to ask this Court to determine whether DENR's April 29, 2015, letter and legal conclusions are *ultra vires*.

II. Mr. Woodard states a claim

Merely as a matter of form, DENR argues that Mr. Woodard has failed to state a claim by failing to check a box on form H-06. Herein, Mr. Woodard provides an amended Form H-06

(*see* Exhibit 8) and otherwise amplifies and clarifies his claim. Mr. Woodard's original Form H-06 states clearly on its face that DENR has substantially prejudiced his rights because the agency (1) exceeded its authority or jurisdiction; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; and/or (5) Failed to act as required by law or rule. He failed to check the box entitled "otherwise substantially prejudiced my rights." Of course, his text in the original form provided that argument, but DENR apparently believes the box must be checked to state a claim. As such, Mr. Woodard has amended his H-06. He has now checked the relevant box and has explained in text that the DENR decision before this Court substantially prejudices his rights by causing him injury in fact, as discussed above in Section I.

Such an amendment is allowed this stage. The Rules of Civil procedure as contained in G.S. 1A-1 and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 apply in contested cases in the Office of Administrative Hearings ("OAH") unless another specific statute or rule of OAH provides otherwise. 26 N.C.A.C. 3.0101. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served. Rules Civ. Pro., G.S. § 1A-1, Rule 15. A 12(b) motion to dismiss is not a "responsive pleading," and therefore does not itself terminate Petitioner's unconditional right to amend once as a matter of course under Rule 15(a). *Brisson v. Kathy A. Santoriello*, M.D., P.A., 134 N.C. App. 65, 68, 516 S.E.2d 911, 913 (1999) aff'd in part as modified, 351 N.C. 589, 528 S.E.2d 568 (2000),

A. The Woodard Claim

Under § 143-215.116. ("Permit to site wind energy facilities.") "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." Mr. Woodard claims that the

April 29, 2015, DENR letter stating that the "[2014] Desert Wind Project is not subject to permitting provisions of the Act" is *ultra vires*. This is the issue now before the Court.

B. The 2011 Desert Wind Project Required a Permit under the Statute

Section 2 of the statute limits the application of the statute, stating that the statute "applies only to those wind energy facilities or wind energy facility expansions that have not received a written 'Determination of No Hazard to Air Navigation' issued by the Federal Aviation Administration on or before that date."

Well prior to when the North Carolina General Assembly enacted Session Law 2013-51, May 17, 2013, Atlantic Wind, LLC (a subsidiary of Iberdrola Renewables, Inc.) had proposed construction of a wind energy facility it designated as the "[2011] Desert Wind Project." On June 29, 2011, the FAA had issued a "No Hazard" letter for each of the 151 wind towers and related structures proposed for the 2011 Desert Wind Project. *See, e.g.*, Exhibit 1. The FAA No Hazard determinations for the 2011 project expired on December 29, 2012. *Id.* The FAA website shows no extension, revision or early termination of these determinations and absent evidence to the contrary DENR cannot argue that Iberdrola had valid FAA determinations for the 2011 project on May 17, 2013.

These facts force the question as to whether Section 2 of the statute would allow construction of the 2011 project absent Iberdrola obtaining a Section 1 permit. If a facility receives an FAA No Hazard determination, but that determination expires, does the mere fact that Iberdrola had expired determinations in hand allow it to avoid the requirements of Section 1 of the statute, or did the Legislature intend that "wind energy facility expansions that have not received a written 'Determination of No Hazard to Air Navigation' issued by the Federal Aviation Administration" implies that the determinations must be current and valid? We argue

that the only reasonable interpretation of Section 2 would require a company seeking safe harbor under Section 2 must have determinations that are current and valid as of May 17, 2013, something it appears Iberdrola did not have.

If the Court concludes that even expired determinations are sufficient to obtain safe harbor under Section 2, then the 2011 proposed project was not subject to the Section 1 permitting requirements of the statute. In that light, had the 2011 Desert Wind Project gone forward as proposed, Mr. Woodard would have no claim before this Court. But, even under the tortured interpretation that expired determinations are sufficient, Iberdrola did not pursue the 2011 project as reviewed by the FAA. They expanded their plans, changing the height and location of the towers, and as such, placed themselves firmly under control of Section 1 permitting under the statute.

C. The 2014 Desert Wind Project is an "Expansion" of the previously permitted facility and thus is subject to the statute.

In 2014 Iberdrola decided to change the turbine model they intended to use for the 2011 Desert Wind Project. Since they were taller (499 feet as opposed to 486 feet), Iberdrola had to reapply to the FAA for these 151 new structures. Iberdrola made application for its 2014 Expansion on June 27, 2014. *See* Exhibit 3. On December 2, 2014, the FAA granted Iberdrola (Desert Wind) 151 "No Hazard" letters. *Id.*

The statute defines a wind energy facility and the expansion of a wind energy facility as:

> § 143-215.115. Definitions.
>
> * * *
>
> (2) "Wind energy facility" means the turbines, accessory buildings, transmission facilities, and any other equipment necessary for the operation of the facility that cumulatively, with any other wind energy facility whose turbines are located within one-half mile of one another, have a rated capacity of one megawatt or more of energy.
>
> (3) "Wind energy facility expansion" means 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*).

The words in these definitions are clear and unambiguous. To the degree Section 2 credits expired determinations (or if DENR provides evidence the FAA extended the life of those 2011 determinations past May 17, 2013), under Section 2 of the statute the Legislature "initially permitted" Iberdrola to commence construction of the 2011 Desert Wind Project without being subject to the requirements of Section 1 of the statute.

The term "permitted" is to "allow something to happen." *See* http://www.merriam-webster.com/dictionary/permitted. Under the tortured interpretation, Section 2 initially **allows** Iberdrola to construct the 2011 Desert Wind Project (**the something that was to happen**), but only as presented to the FAA in the 2011 Iberdrola application. In the words of the statute, the legislature "initially permitted" the 2011 Desert Wind Project through Section 2 of the statute.

The 2014 Desert Wind Project, however, was not "allowed" or otherwise granted a permit or in any other way "initially permitted" by DENR under Section 1 of the statute; and, it was not "initially permitted" by the Legislature under Section 2 of the statute because the FAA No Hazard determinations were made on December 2, 2014, after the May 17, 2013, enactment of the statute.

As DENR explained in its March 18, 2015, letter to Iberdrola (Exhibit 6), "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." This reflects DENR's recognition that the statute is clear and unambiguous. Under § 143-215.115(3), "any activity that . . . increa[es] the height" of the wind turbines is a "Wind energy facility expansion;" and under § 143-215.116, "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**." (*emphasis added*). Iberdrola has never obtained a permit from the Department for the 2014 Desert Wind Project and was instructed to do so under the March 18, 2015, DENR letter. DENR has never given a reason why it issued a contradictory letter on April 29, 2015, and has no reasonable basis to do so.

After the May 17, 2013, passage of Session Law 2013-51, the 2011 Desert Wind Project was expanded in scope and, as DENR admits, has changed the location of the wind towers and increased the height of the equipment, constituting an expansion of what was initially permitted and necessitating obtaining new FAA No Hazard Determinations that were not granted until December 2, 2014. The 2014 Desert Wind Project, an expansion of the 2011 project, is subject to permitting under § 143-215.116.

Thus, Mr. Woodard states his claim that the April 29, 2015, letter indicating no permit is necessary for the 2014 Desert Wind Project exceeded DENR's authority; that DENR acted erroneously in issuing the letter; that DENR failed to use proper procedure which is to require Iberdrola to obtain a permit under Section 1 of the statute before commencing construction; that DENR acted arbitrarily or capriciously in altering its finding of March 18, 2015, in which it concluded that a permit was necessary; and, that DENR failed to act as required by law, specifically, requiring permitting of the project – all with the inevitable result in injury in fact to Mr. Woodard.

III. Petitioners Fallacious Claim I

To the degree that Mr. Woodard actually made a claim that the date of passage of the act is not applicable to implementation of §§ 143-215.115 &116, he retracts that statement and rests on the claim discussed above.

IV. Petitioners Fallacious Claim II

To the degree that Mr. Woodard actually made a claim that the definitions in § 143-215.115 must be interpreted in a manner consonant with FAA definitions, he retracts that statement, except as is necessary under § 143-215.119(a)(7).

V. Lack of personal jurisdiction

Mr. Woodard has served Amended form H-06 on Mr. Sam Hayes, General Counsel, Green Square Building, 217 W. Jones St., Raleigh, NC 27603, by certified mail. Exhibit 8 (which includes Return of Service). As a result, the Court has personal jurisdiction in this matter. Notably, the fact that service occurred after DENR filed its Motion to Dismiss documents the fact that this procedural hiccup has caused no harm to Respondent.

VI. Injunctive relief lack of jurisdiction

Mr. Woodard asked the Court to stay construction at the Desert Wind Project. This was in error and reflects his unfamiliarity with the jurisdiction of the court. The Court has already addressed this issue (*see* Order Denying Motion for Stay, August 5, 2015), denying his request made in error. DENR's argument in its Motion to Dismiss is now moot.

Petitioner does, however, wish to make clear that he is seeking injunctive relief. Specifically, Mr. Woodard asks the Court to find the April 29, 2015, DENR letter null and void. When that happens, either the March 18, 2015, is resurrected or DENR is under a non-discretionary duty to inform Atlantic Wind, LLC/ Iberdrola Renewables, that it must obtain a permit under Section 1 of the statute before commencing construction or expansion of the 2014 Desert Wind Project or be subject to civil penalties for failure to obtain a permit.

AMENDMENT OF THE PREHEARING STATEMENT

In light of the above, with inclusion of all of the above, and in accord with G.S. 1A-1 and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 apply in contested cases in the Office of Administrative Hearings ("OAH") as well as *Brisson v. Kathy A. Santoriello*, Mr. Woodard amends his prehearing statement as follows:

#1 - The issues to be resolved:

Mr. Woodard argues that the April 29, 2015, DENR letter indicating no permit is necessary for the 2014 Desert Wind Project exceeded DENR's authority; that DENR acted erroneously in issuing the letter; that DENR failed to use proper procedure which is to require Iberdrola to obtain a permit under Section 1 of the statute before commencing construction; that DENR acted arbitrarily or capriciously in altering its finding of March 18, 2015, in which it concluded that a permit was necessary; and, that DENR failed to act as required by law, specifically, requiring permitting of the project.

#2 - A brief statement of the facts and reasons supporting the issue(s) in dispute:

Mr. Woodard relies on the facts as stated in the opening section above entitled Statement of Facts and Procedural History, and in Sections I and II of the Argument, *supra*.

#3 - The statutes, rules, and legal precedent, if known:

Mr. Woodard relies on the Argument made above.

#4 - A list of proposed witnesses you may call at the hearing:

Mr. Woodard may call the following persons to testify as witnesses in this contested case:

- DENR Secretary: Dr. Donald van der Vaart
- FAA NC Air Traffic Wind Turbine Specialist: Cindy Whitten
- General John F. Kelly, United States Marine Corps, Commander, United States Southern Command

Additionally, Mr. Woodard may call as a witness any person familiar with the facts of this case, as well as any person named as a witness by any other party. Mr. Woodard reserves the right to supplement this list as it prepares for hearing in this matter.

#5 - Do you wish to pursue discovery? If so, the estimated length of time required?

Mr. Woodard intends to pursue discovery and anticipates that discovery can be completed by the date set in the Scheduling Order entered on May 29, 2015.

#6 - If you received a Scheduling Order, is the date and location acceptable?

Assuming all witnesses are available for hearing, and barring any unforeseen need to extend the deadlines for completion of discovery, Mr. Woodard anticipates that it will be ready for hearing by the date set in the Scheduling Order entered on May 29, 2015. The location of the hearing is acceptable to the Petitioner.

#7 - If you do not have an attorney representing you in this case, please provide the following information in order to receive communications from this Office.

Mr. Woodard is represented by counsel.

#8 - Estimated length of hearing:

Petitioner contemplates a one day hearing.

#9 - Other special considerations:

None.

RELIEF REQUESTED

Mr. Woodard asks the Court to find the April 29, 2015, DENR letter null and void.

Respectfully submitted this 10th day of August, 2015.

JOHN J. WOODARD, JR.
By Counsel

CENTER FOR LAW AND FREEDOM
CIVITAS INSTITUTE

/s/
Elliot Engstrom
NC State Bar No. 46003
Elliot.Engstrom@nccivitas.org

Center for Law and Freedom
Civitas Institute
100 S. Harrington St.
Raleigh, NC 27603
(919) 834-2099

Counsel for Petitioner

EXHIBIT C

August 23, 2015 Final Decision and Order of Dismissal of Judge Melissa Owens Lassiter in the matter of Woodard v. North Carolina Department of Environment and Natural Resources, 15 EHR 03522

FILED
2015 AUG 23 AM 9:38
OFFICE OF
ADMIN HEARINGS

STATE OF NORTH CAROLINA
COUNTY OF PASQUOTANK

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EHR 03522

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 28th 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