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March 24, 2016

Via Hand Delivery

Office of Administrative Hearings
New Hope Professional Center
1711 New Hope Church Road
Raleigh, North Carolina 27609-6285

Re: *Owens v. NCDEQ, et al.*, No. 15 EHR 07012

Dear Clerk:

Please find enclosed for filing an original and one copy of Respondent-Intervenor Weyerhaeuser Company's Motion for Summary Judgment and its Memorandum of Law in Support of its Motion for Summary Judgment in the above-captioned matter.

Please return one file-stamped copy of these pleadings to us via our courier.

Thank you for your assistance with this matter. Please do not hesitate to call if you have any questions.

Sincerely,

Alan H. McConnell

Enclosures

11246206V.1

STATE OF NORTH CAROLINA

COUNTY OF PERQUIMANS

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
15 EHR 07012

STEPHEN E. OWENS and JILLANNE G. BADAWI,

Petitioners,

v.

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

Respondent,

and

WEYERHAEUSER COMPANY,

Respondent-Intervenor,

and

PASQUOTANK COUNTY,

Respondent-Intervenor.

RESPONDENT-INTERVENOR WEYERHAEUSER COMPANY'S MOTION FOR SUMMARY JUDGMENT

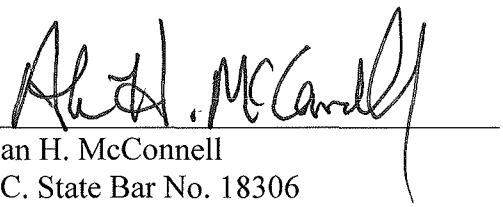
Weyerhaeuser Company, by and through its undersigned counsel and pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, respectfully files this Motion for Summary Judgment requesting that the court enter judgment in Respondent's favor on Petitioner's Petition for a Contested Case Hearing.

Pursuant to 26A NCAC 03 .0115(b), Weyerhaeuser Company respectfully requests a hearing on this motion.

WHEREFORE, Weyerhaeuser Company respectfully moves that the court enter judgment in Respondent's favor on Petitioner's Petition for a Contested Case Hearing and grant such other relief as the court deems necessary.

This the 24th day of March, 2016.

KILPATRICK TOWNSEND & STOCKTON LLP



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Attorneys for Weyerhaeuser Company

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **RESPONDENT-INTERVENOR WEYERHAEUSER COMPANY'S MOTION FOR SUMMARY JUDGMENT** has been served this day upon each of the following party of record in this proceeding or their attorney by depositing a copy thereof in the United States mail, postage prepaid.

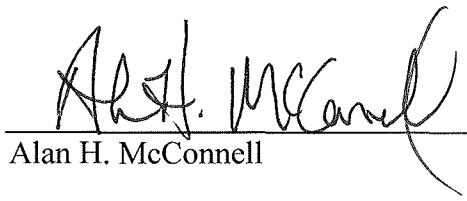
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This the 24th day of March, 2016.



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STATE OF NORTH CAROLINA

COUNTY OF PERQUIMANS

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
15 EHR 07012

STEPHEN E. OWENS and JILLANNE G. BADAWI,

Petitioners,

v.

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

Respondent,

and

WEYERHAEUSER COMPANY,

Respondent-Intervenor,

and

PASQUOTANK COUNTY,

Respondent-Intervenor.

RESPONDENT-INTERVENOR WEYERHAEUSER COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Weyerhaeuser Company ("Weyerhaeuser"), by and through its undersigned counsel and pursuant to North Carolina Rule of Civil Procedure 56, respectfully submits this Memorandum of Law in Support of Its Motion for Summary Judgment. In this contested case brought against Respondent, the North Carolina Department of Environmental Quality ("NCDEQ"),[1] Division of Energy, Mineral and Land Resources ("DEMLR"), Stephen E. Owens and Jillanne G. Badawi (collectively, "Petitioners") seek a ruling from this court that a well-developed wind energy facility that has been subject to intense regulatory and public scrutiny and has already obtained

[1] Effective September 18, 2015, the North Carolina Department of Environment and Natural Resources ("NCDENR") was renamed the North Carolina Department of Environmental Quality.

valid government approval be subject to burdensome and duplicative permitting requirements. Such a ruling (i) would contradict the plain meaning of the statutory language, the legislative intent, and the interpretation of Respondent, the agency charged with administering the statute; and (ii) would violate the wind developer's vested rights.

Weyerhaeuser respectfully requests that the court enter an order granting its motion for summary judgment and enter judgment in Respondent's favor on Petitioner's Petition for a Contested Case Hearing.

STATEMENT OF THE FACTS

This contested case involves Petitioners' challenge of the April 29, 2015 decision made by Respondent that a wind project under construction by Atlantic Wind, LLC ("Atlantic Wind"), an affiliate of Iberdrola Renewables (collectively, "Iberdrola"), on land partially owned by Weyerhaeuser is not subject to the permitting requirements of Session Law 2013-51, An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, codified at N.C. Gen. Stat. §§ 143-215.115, *et seq.* (the "Wind Act"). *See* Affidavit of Craig Poff ("Poff Affidavit") at Ex. 1, attached hereto as Exhibit A.[2]

I. Iberdrola conducted extensive planning, permitting and development prior to the enactment and effective date of the Wind Act.

In or about 2009, Iberdrola began planning, permitting and development of a wind energy facility called the Desert Wind Project in Pasquotank and Perquimans Counties, North Carolina. Poff Affidavit ¶ 5. The Desert Wind Project is located on approximately 22,000 acres of land; Weyerhaeuser owns approximately 2,938 acres of this land. (Affidavit of Aaron Welch ¶ 6

[2] The Affidavit of Craig Poff was filed by Atlantic Wind, LLC in support of its Petition for Contested Case filed with this court on April 17, 2015. Pursuant to North Carolina Rule of Evidence 201, a court may take judicial notice of facts relating to the particular case or parties, such as the Poff Affidavit. *See State ex rel. Utilities Commission v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 286, 287, 221 S.E.2d 322, 323 (1976) ("This Court has recognized in the past that important public documents will be judicially noticed."); *West v. Reddick, Inc.*, 302 N.C. 201, 274 S.E.2d 221 (1981) ("This Court has long recognized that a court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration.").

(attached to Weyerhaeuser Company's Memorandum of Law in Support of Motion to Intervene).)

By 2013, Iberdrola was well into the planning, permitting and development phases of the Desert Wind Project. Poff Affidavit ¶ 8. By that time, Iberdrola had:

- Secured from the Federal Aviation Administration ("FAA") Determinations of No Hazard to Air Navigation ("DNHs") for 166 proposed wind turbines in Pasquotank and Perquimans Counties on June 29, 2011. *See id.* ¶ 8.a, Ex. 2.
- Entered into an economic development agreement with Pasquotank County on April 26, 2011. *See id.* ¶ 8.b, Ex. 3.
- Entered into an economic development agreement with Perquimans County on April 25, 2011. *See id.* ¶ 8.c, Ex. 4.
- Obtained conditional use permits ("CUPs") from the respective Boards of Commissioners of Pasquotank and Perquimans Counties in July 2011. *See id.* ¶ 8.d, Exs. 5 and 6.
- Obtained a 401 Water Quality Certification from the North Carolina Department of Environment and Natural Resources (now NCDEQ) on January 19, 2012. *See id.* ¶ 8.e, Ex. 7.
- Obtained an Order Issuing Certificate of Public Convenience and Necessity for the Desert Wind Project from the North Carolina Utilities Commission ("NCUC") on May 3, 2011. *See id.* ¶ 8.f, Ex. 8.
- Obtained an Order Issuing Certificate of Environmental Compatibility and Public Convenience and Necessity and Waiving Public Notice and Hearings for construction of a new transmission tap line in Perquimans County to allow interconnection of the Project to the 230 kV transmission network owned and operated by Virginia Electric and Power Company from the NCUC on August 1, 2011. *See id.* ¶ 8.g, Ex. 9.
- Entered into property agreements with landowners to site the wind facilities on landowners' property. *See id.* ¶ 8.h, Ex. 10.

In approximately 2013, after Iberdrola heavily invested in the extensive planning, permitting and development of the Desert Wind Project, Iberdrola learned that the North Carolina General Assembly was considering enacting a program in which wind energy projects in North Carolina would be subject to certain permitting requirements. *Id.* ¶ 10. Iberdrola was

concerned that the proposed permitting requirements would unfairly impact the already well-developed Desert Wind Project. *Id.* ¶ 11. In response, Iberdrola participated in numerous discussions with members of the General Assembly, Legislative Staff, representatives of NCDENR, representatives of the Governor's Military Liaison Office and others requesting that the Desert Wind Project be excluded from the permitting requirement of the Wind Act. *Id.* Members of the General Assembly, representatives of NCDENR, representatives of the Governor's Military Liaison Office and others agreed that enactment of the Wind Act could jeopardize the Desert Wind Project and substantial investment in North Carolina and in the rural communities of Pasquotank and Perquimans Counties. *Id.*

On May 17, 2013, the North Carolina General Assembly enacted the Wind Act, establishing certain permitting requirements for future wind energy facilities and expansions of such facilities. *See* N.C. Gen. Stat. §§ 143-215.115, *et seq.*; *see also* Poff Affidavit at Ex. 1. To clarify the scope of the Wind Act and to specifically exclude the Desert Wind Project from the permitting requirements of the Wind Act, the General Assembly included Section 2 of the Session Law 2013-51 (the "Grandfather Clause"). *See* Poff Affidavit at Ex. 1. Iberdrola, members of the General Assembly, representatives of NCDENR, representatives of the Governor's Military Liaison Office and others negotiated and drafted the Grandfather Clause. *Id.* ¶¶ 12-13. The Grandfather Clause provides that the permitting requirements of the Wind Act apply ***only*** to those wind energy facilities or wind energy facility expansions[3] that have not

[3] The Wind Act was drafted so that wind energy facilities that had already received a permit pursuant to the Wind Act would need to go through the permitting process again if there was an "expansion" of the wind energy project. "'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." N.C. Gen. Stat. § 143-215.115(3). This definition of "expansion" does not apply to the Desert Wind Project because this project was never permitted pursuant to the Wind Act (in fact, it was intended to be excluded from the permitting process) and therefore was not "initially permitted" as referenced in the definition of "expansion."

received written DNHs issued by the FAA on or before the enactment date of May 17, 2013. *See id.* ¶ 14, Ex. 1.

After obtaining conditional use permits from Perquimans and Pasquotank Counties in July 2011 and prior to the May 17, 2013 effective date of the Wind Act, Iberdrola had invested millions of dollars in planning, permitting and development of the Desert Wind Project. *See id.* ¶¶ 8, 21. Iberdrola had also invested significant time and money in obtaining regulatory approvals of the Desert Wind Project, including notice to the public. *See id.*

Neither Perquimans County nor Pasquotank County received any objections from the public in connection with the conditional use permits issued for the Desert Wind Project. *See id.* at Exs. 5-6. The regulatory reviews, authorizations and public notices that the Desert Wind Project received or issued are consistent with the permitting requirements of the Wind Act. *Compare* N.C. Gen. Stat. §§ 143-215.115, *et seq. with* Poff Affidavit ¶ 8, Exs. 2-10.

II. Atlantic Wind has had active or pending DNHs before the FAA for the Desert Wind Project continuously since June 29, 2011.

DNHs are issued by the FAA in response to the filing of an FAA Form 7460 Notice of Proposed Construction or Alteration, but only if the FAA determines that the proposed construction or alteration poses no hazard to air navigation, among other considerations. Poff Affidavit ¶ 15. When the Wind Act was enacted on May 17, 2013, the Desert Wind Project was the only proposed wind energy facility in North Carolina that had already received FAA- issued DNHs. *Id.* ¶ 16.

On June 29, 2011, nearly two years before the Wind Act became law, the FAA issued DNHs to Iberdrola for 166 wind turbines proposed for the Desert Wind Project ("Initial DNHs"). *Id.* ¶ 23. As development of the Desert Wind Project continued after June 29, 2011, and the project plans made their way through the various agencies requiring approval or acknowledgment of the Project, Iberdrola decided not to build some of the authorized wind

turbines due to a variety of site and design constraints. *Id.* ¶ 24. For example, some of the wind turbines were abandoned to avoid wetlands. *Id.* Other turbines were abandoned to avoid turbine-to-turbine air flow interference. *Id.* Other turbines were abandoned due to geotechnical constraints. *Id.*

With respect to the Initial DNHs, these DNHs (like all other DNHs) were valid for 18 months, expiring on December 29, 2012, unless extended. *Id.* ¶¶ 23, 25. The Initial DNHs were subsequently extended and new DNHs were issued. *Id.* ¶¶ 25-40. Regardless, at the time of the May 17, 2013 effective date of the Wind Act, Iberdrola had fully effective DNHs for the Desert Wind Project. *Id.* ¶ 26. Iberdrola has had active or pending DNHs before the FAA for the Desert Wind Project continuously since June 29, 2011. *See id.* ¶¶ 23-40.

The proposed Desert Wind Project has not materially changed since the FAA issued the Initial DNHs on June 29, 2011. *Id.* ¶ 27. The types of minor modifications that the Desert Wind Project experienced following issuance of the Initial DNHs are typical of projects similar to the Desert Wind Project. Turbines or transmission facilities associated with the Desert Wind Project have not been added or substantially modified since the FAA issued the Initial DNHs. *See id.* ¶¶ 34-35, 40. In fact, as a result of more efficient turbines, which results in a 3% height increase, the number of turbines associated with the Desert Wind Project has decreased from 166 to 150 since issuance of the Initial DNHs. *Id.* ¶¶ 23, 25, 34-35. In addition, the geographical footprint of the Desert Wind Project has not increased since the FAA issued the Initial DNHs. *Id.* ¶ 28.

III. Respondent determined that the Desert Wind Project is not subject to the permitting requirements of the Wind Act.

On March 18, 2015, Brad Atkinson, Energy Section Chief for Respondent, sent a letter (the "March 18 Letter") to Craig Poff, Director of Iberdrola Renewables, stating, "DENR has determined that Iberdrola's Desert Winds Project ***is*** subject to the State's wind energy facility permitting process." *See* Affidavit of Kristin Triebel ("Triebel Affidavit") ¶ 4, Ex. 1, attached

hereto as Exhibit B. On March 26, 2015, Mr. Atkinson sent Mr. Poff a subsequent letter inviting Iberdrola to submit additional information to demonstrate that the Desert Wind Project does not require a state wind energy permit. The letter stated, "Once your response is received, we will expeditiously reevaluate the permit applicability." *Id.* ¶ 5, Ex. 2.

On April 2, 2015, counsel for Iberdrola sent a response letter to NCDEQ providing up-to-date information regarding (1) the status of the DNHs for the Desert Wind Project, (2) changes to the Project boundary from the date of the Wind Act's enactment, and (3) modifications to the wind turbine specifications from the date of the enactment. *Id.* ¶ 6.a, Ex. 3. On April 6, 2015, counsel for Iberdrola sent a letter to NCDEQ requesting a declaratory ruling. *Id.* at 6.b, Ex. 4. This request contained additional information regarding the Desert Wind Project. *Id.* In addition, on April 22, 2015, counsel for Iberdrola sent a letter to NCDEQ that contained additional information regarding the Desert Wind Project. *Id* ¶ 6.c, Ex. 5.

After having the opportunity to review the additional information provided by Iberdrola, on April 29, 2015, Brad Atkinson sent a third letter ("April 29 Letter") to Craig Poff reversing Respondent's prior determination. The letter stated:

> DENR has renewed its review of the Act and has determined that Iberdrola's Desert Wind Project ***is not*** subject to permitting provisions of the Act based on a plain reading of the Act. This is true because the FAA issued determinations to Iberdrola, for its Desert Wind Project, on June 29, 2011, prior to the Act becoming law, despite the fact that these FAA issued determinations subsequently expired on May 21, 2014. Likewise, the fact that individual turbines within the Desert Wind Project have both increased in heights and changed coordinate locations from Iberdrola's June 2011 FAA issued determinations does not implicate the permitting provisions of the Act.

See id. ¶ 7, Ex. 6 (emphasis added).

IV. If Iberdrola is required to comply with the Wind Act, it will suffer substantial prejudice and harm.

Iberdrola began development of the Desert Wind Project seven years ago, and in reliance on permits, authorizations and approvals and Respondent's April 29 Letter, Iberdrola has

continued to develop the Desert Wind Project. *See* Poff Affidavit ¶¶ 5, 8, 18-19, 21, 24, 34. To date, Iberdrola has invested millions of dollars in planning, permitting and construction of the Desert Wind Project. *See id.* ¶ 21.

To require Iberdrola to go through the unnecessary and duplicative permitting requirements this late in the project would result in substantial prejudice and harm to Iberdrola. *Id.* ¶¶ 11, 17-22. There is a significant risk that the Board of Directors of Iberdrola could abandon its plans for the Desert Wind Project entirely in the face of the significant delays and uncertainty associated with the permitting requirements of the Wind Act. *Id.* ¶ 20. If the Board denies funding for the Desert Wind Project and/or abandons the Project altogether, not only will Iberdrola lose the significant time and resource investment it has dedicated to the Desert wind Project's development, but North Carolina would lose substantial capital investment in a rural area of the State, a source of clean renewable energy, substantial tax revenue for both Pasquotank and Perquimans Counties, and good paying jobs. *Id.* ¶ 22.

ARGUMENT

Summary judgment is warranted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). A genuine issue is one that can be maintained by substantial evidence, and a material fact is one that would prevent the nonmoving party from prevailing. *Bd. of Educ. of Hickory Admin. School Unit v. Seagle*, 120 N.C. App. 566, 463 S.E.2d 277 (1995).

The moving party bears the initial burden of showing a lack of triable issues of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 352 (1985). Once the moving party has met that burden, the burden shifts to the nonmoving party to show

that a genuine issue of fact exists with respect to an essential element of the claim. *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 544, 459 S.E.2d 23, 26 (1995) (citations omitted). In meeting this burden, statements that are merely "conclusory and fail to point to specific facts" are insufficient. *Lavelle v. Schultz*, 120 N.C. App. 857, 862, 463 S.E.2d 567, 571 (1995). Instead, "[t]o overcome a motion for summary judgment, [a party] must set forth 'specific facts' to show a genuine issue." *King ex rel. Heard v. Popkins & Assocs.*, No. COA03-1405167, 2004 WL 2937634, at *3 (N.C. App. Dec. 21, 2004) (quoting N.C. R. Civ. P. 56(e)). In this contested case, Petitioners bear the burden of proof. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447 (2006) ("[T]he burden of proof rests on the petitioner challenging an agency decision.").

I. Based on the plain meaning, legislative history and Respondent's interpretation of the Wind Act and the Grandfather Clause, the Desert Wind Project *is not* subject to the permitting requirements of the Wind Act.

A question of statutory interpretation, such as is the case here, is a question of law for the courts. *Brown v. Flowe*, 349 N.C. 520, 507 S.E.2d 894 (1998). For the reasons discussed below, the Desert Wind Project is not subject to the permitting requirements of the Wind Act as a matter of law.

A. The Desert Wind Project is not subject to the permitting requirements of the Wind Act based on the plain meaning of the statute.

When interpreting a statute, this court must first look to the plain meaning of the statute and where it is clear, give the statute its plain meaning. *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). Thus, "[i]f the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001).

The Wind Act provides that "[n]o person shall undertake construction, operation, or expansion activities associated with a wind energy facility in the State without a permit from the Department." N.C. Gen. Stat. 143-215.116. However, the Wind Act further provides:

> This act is effective when it becomes law and applies only to those wind energy facilities or wind energy facility expansions[4] that have not received a written 'Determination of No Hazard to Air Navigation' issued by the Federal Aviation Administration on or before that date.

Section 2 of SL 2013-51. The Grandfather Clause is clear and unambiguous: the Wind Act does ***not*** apply to either wind energy facilities or wind energy facility expansions that received a DNH from the FAA prior to May 17, 2013.

Because the Desert Wind Project received the Initial DNHs on June 29, 2011, nearly two years before the Wind Act became law, it is exempt from the permitting requirements of the Wind Act. It is irrelevant that the Initial DNHs were subsequently extended, new applications for DNHs were submitted by Iberdrola, and the FAA issued new DNHs in connection with the Desert Wind Project.

Therefore, based on the plain meaning of the Wind Act, the court should hold that because the Desert Wind Project received DNHs from the FAA prior to the effective date of the Wind Act, Respondent properly determined that this project is exempt from the permitting requirements of the Wind Act.

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[4] As discussed above, because the Desert Wind Project did not receive a permit pursuant to the Wind Act it is not a considered a "wind energy facility expansion." Regardless, any modifications to the Desert Wind Project after the Initial DNHs were issued are not substantial. As a result of more efficient turbines, which results in a 3% height increase, the number of turbines associated with the Desert Wind Project has decreased from 166 to 150 since issuance of the Initial DNHs. Poff Affidavit ¶¶ 23, 25, 34-35. In addition, the geographical footprint of the Desert Wind Project has not increased since the FAA issued the Initial DNHs. *Id.* ¶ 28.

B. Even assuming *arguendo* that the Wind Act and the Grandfather Clause are ambiguous, the legislative history of the Wind Act clearly supports Respondent's determination that the Desert Wind Project is not subject to the permitting requirements of the Wind Act.

Where the language is ambiguous or unclear, the court must interpret the statute to give effect to the legislative intent. *Frye Reg'l Med. Ctr.*, 350 N.C. at 45, 510 S.E.2d at 163. The North Carolina Supreme Court has stated that the best indicia of legislative intent are "[t]he language of the act, the spirit of the act and what the act seeks to accomplish." *Lee v. Gore*, 365 N.C. 227, 229, 717 S.E.2d 356, 358 (2011) (internal quotations omitted). "The primary rule of construction of a[n ambiguous] statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136–37 (1990); *McKinney v. Richitelli*, 357 N.C. 483, 487-88, 586 S.E.2d 258, 262 (2003) (stating that the intent of the legislature "must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied").

Consistent with the language of the Wind Act, the legislative intent of the Grandfather Clause was to specifically exclude the Desert Wind Project from the permitting requirements of the Wind Act. Poff Affidavit ¶¶ 12-14. Section 2 of Session Law 2013-51 establishes that the permitting requirements of the Wind Act apply "only to wind energy facilities and wind energy facility expansion ***that have not received a written 'Determination of No Hazard to Air Navigation' issued by the Federal Aviation Administration on or before [May 17, 2013]***." (emphasis added). Because Iberdrola received the Initial DNHs prior to May 17, 2013, the Desert Wind Project is not subject to the permitting requirements of the Wind Act.

The legislative history of the Wind Act and the circumstances surrounding its adoption also support the interpretation that the Desert Wind Project is not subject to the permitting requirements of the Wind Act. Based upon a reading of the statute in its entirety, the purpose of

the Wind Act is to require persons to obtain a permit from NCDEQ prior to constructing, operating or expanding a wind energy facility. NCDEQ is given the authority to review the proposed siting of these facilities based upon considerations of potential impacts to the environment, natural resources, civil air navigation, military air navigation, military operations and navigation in coastal waters. The General Assembly, however, recognized that it would be pointless and unreasonable to require wind energy facilities that already had gone through extensive public and regulatory review to go through the extensive permitting process required by the Wind Act. The Desert Wind Project was also the ***only*** proposed wind energy facility in North Carolina that had already received FAA-issued DNHs as of May 17, 2013. Poff Affidavit ¶ 16. Therefore, the General Assembly included Section 2 of Session 2013-51 and established that the Wind Act does not apply to wind energy facilities and wind energy facility expansions that received a written DNH prior to May 17, 2013.

By the effective date of the Wind Act, the Desert Wind Project had undergone significant regulatory and public review and authorization consistent with the permitting requirements later incorporated into the Wind Act. Poff Affidavit ¶ 8, Exs. 2-10. For example, the Desert Wind Project received the Initial DNHs from the FAA on June 29, 2011. *Id.* ¶ 23. In addition, Iberdrola participated in informal and formal consultations with the United States Navy, Department of Defense and military contractors beginning in early 2011, resulting in a letter and Memorandum of Understanding. *See id.* ¶¶ 8, 23-33, 36-39. Iberdrola also applied for and obtained conditional use permits from Pasquotank and Perquimans Counties, including acoustical analysis, shadow flicker analysis, a decommissioning study, financial assurance requirements, and notice and public hearings. *Id.* ¶ 8.d, Exs. 5-6. Iberdrola applied for and obtained a Section 404 Individual Wetlands Permit from the U.S. Army Corps of Engineers and coordinated with the United State Fish & Wildlife Service and the North Carolina Wildlife

Resources Commission to address any potential impacts to protected wildlife or plant species. *See id.* Thus, Iberdrola addressed the potential impacts that the permitting requirements of the Wind Act seek to address.

Accordingly, even assuming *arguendo* that the Wind Act and the Grandfather Clause are ambiguous, the legislative history of the Wind Act clearly supports Respondent's determination that the Desert Wind Project is not subject to the permitting requirements of the Wind Act.

C. To hold that the Desert Wind Project is subject to the permitting requirements of the Wind Act would lead to absurd results and contravene the manifest purpose of the General Assembly.

"'[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.'" *Frye Reg'l Med. Ctr.*, 350 N.C. at 45, 510 S.E.2d at 163 (quoting *Mazda Motors of Am., Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 250 S.E.2d 250 (1979)). "When interpreting statutes, [a] court presumes that the legislature did not intend an unjust result." *State v. Jones*, 353 N.C. 159, 170, 538 S.E.2d 917, 926 (2000).

An interpretation that the Grandfather Clause does not include the Desert Wind Project has the potential for such a result. The Grandfather Clause was specifically drafted to exclude the Desert Wind Project from the permitting requirements of the Wind Act. In fact, the Desert Wind Project was the ***only*** proposed wind energy facility in North Carolina that had already received FAA-issued DNHs as of May 17, 2013. Poff Affidavit ¶ 16. To hold that the Grandfather Clause does not apply to the Desert Wind Project would mean that the Grandfather Clause does not apply to any wind energy facilities. It would be superfluous for the General Assembly to enact an exemption, in this case Section 2 of Session Law 2013-51, to exempt certain wind energy facilities from the permitting requirements of the Wind Act if no such

facilities existed. As the North Carolina Supreme Court has stated, "an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant[.]" *State v. Harvey*, 281 N.C. 1, 19, 187 S.E.2d 706, 718 (1972).

Moreover, by the effective date of the Wind Act, the Desert Wind Project had undergone extensive regulatory and public scrutiny, much of which is duplicative of the permitting later incorporated into the Wind Act. Poff Affidavit at ¶ 8, Exs. 2-10. To require Iberdrola to go through an additional, burdensome permitting process is not only unnecessary, it is duplicative, unreasonable and arbitrary and capricious.

Consistent with the plain meaning of the Wind Act and the legislative intent, this court should hold that Respondent properly determined that the Desert Wind Project is not subject to the permitting requirements of the Wind Act.

D. The court should defer to the interpretation of the Wind Act by Respondent, the agency charged with executing and administering the Wind Act.

"The interpretation of a statute given by the agency charged with carrying it out is entitled to great weight." *Frye Reg'l Med. Ctr.*, 350 N.C. at 45, 510 S.E.2d at 163. "'[T]he construction adopted by those who execute and administer the law in question is relevant and may be considered. Such construction is entitled to 'great consideration,' or 'due consideration.' It is said to be 'strongly persuasive,' or even *prima facie* correct.'" *Koltis v. N.C. Dep't of Human Resources*, 125 N.C. App. 268, 273, 480 S.E.2d 702, 705 (1997) (quoting *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973)) "It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992).

Here, Respondent's interpretation is not only reasonable, it would be improper for the court to substitute its judgment for Respondent's decision where there is substantial evidence in the record to support its findings." *See Craven Regional Medical Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 59, 625 S.E.2d 837, 845 (2006) ("It would be improper for this Court to substitute our judgment for the Agency's decision where there is substantial evidence in the record to support its findings."). Following discussions with and extensive information provided by Iberdrola, Respondent determined that based on a plain reading of the Wind Act, the Desert Wind Act is not subject to the permitting requirements of the Wind Act. *See* Triebel Affidavit ¶ 7, Ex. 6. For the reasons discussed above, this interpretation is consistent with the plain meaning of the Wind Act, its legislative history and the circumstances surrounding the drafting of the Grandfather Clause, and must be given deference.

II. Iberdrola acquired vested rights in the Desert Wind Project.[5]

A. Iberdrola has a vested right to continue to complete the Desert Wind Project as it was approved, despite any subsequent changes in the law.

North Carolina courts have long recognized vested rights[6] and have set forth a test for the establishment of such rights. *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969). To establish a vested right, a property owner must: (i) obtain a valid government approval; (ii) reasonably rely upon the approval; (iii) make a substantial expenditures or incur substantial contractual obligations; (iv) act in good faith; and (v) experience detriment if forced to comply with the subsequent change in law. *MLC Automotive, LLC v. Town of Southern Pines*, 207 N.C. App. 555, 561-62, 702 S.E.2d 68, 73 (2010) (quoting *Town of Hillsborough*, 276 N.C. at 55, 170 S.E.2d at 909).

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[5] If the court determines that the Desert Wind Project is exempt from the permitting requirements of the Wind Act as a matter of law, it is not necessary for the court to reach this argument. However, if the court determines otherwise, it is appropriate for the court to address the vested rights issue.

[6] A vested right is the right to continue a use or complete a project as it was approved, despite subsequent changes in the law.

Iberdrola has obtained valid government approval for the Desert Wind Project. In addition to conditional use permits obtained from the respective Boards of Commissioners of Pasquotank and Perquimans Counties in July 2011, Iberdrola secured other governmental approvals for the Desert Wind Project prior to the effective date of the Wind Act, including the Initial and Extended DNHs from the FAA, economic development agreements with Pasquotank and Perquimans Counties, a 401 water quality certification from NCDENR, an Order Issuing Certificate of Public Convenience and Necessity from NCUC, an Order Issuing Certificate of Environmental Compatibility and Public Convenience and Necessity and Waiving Public Notice and Hearings for construction of a new transmission tap line in Perquimans County to allow interconnection of the Project to the 230 kV transmission network owned and operated by Virginia Electric and Power Company from the NCUC, and property agreements with landowners to site the wind facilities on the landowners' property. Poff Affidavit ¶¶ 8.a-8.h. These types of governmental approvals, in particular conditional use permits, are clearly sufficient to satisfy the first prong of the test for common law vested rights. *See MLC Auto, LLC*, 207 N.C. App. at 565-66, 702 S.E.2d at 75-76; *see also La Costa Development Corp. v. Town of North Topsail Beach*, No. COA08-855, 2009 WL 2137426 (N.C. App. July 7, 2009).

Iberdrola has reasonably relied upon the government approvals of the Desert Wind Project. *See Godfrey v. Zoning Bd. of Adjustment of Union County*, 317 N.C. 51, 344 S.E.2d 272 (1986) (holding that expenditures made after issuance of valid government approval were made in reliance on such approval); *see also Warner v. W&O, Inc.*, 263 N.C. 37, 41, 138 S.E.2d 782, 785-86 (1964) ("Expenditures made for architect's drawings, so that W&O might apply for a permit, were manifestly not made in reliance on the permit thereafter issued."). Iberdrola has made substantial expenditures after, and in reliance upon, valid governmental approvals.

Even considering the substantial capital investment to construct and commission the Desert Wind Project, Iberdrola made substantial expenditures – of time, effort, and money – in reliance on the valid governmental approvals. *See Application of Campsites Unlimited, Inc.*, 287 N.C. 493, 215 S.E.2d 73 (1975) (holding that developer of a lakeside campsite project made substantial expenditure on the project before the county zoning ordinance was adopted, even though the amount expended constituted approximately 10 percent of the projected total cost of the project); *see also Sunderhaus v. Board of Adjustment of Town of Biltmore Forest*, 94 N.C. App. 324, 380 S.E.2d 132 (1989) (holding that substantial work in installing satellite dish (digging trench and laying PVC pipe) constituted substantial expenditure); *see also Thomasville of North Carolina Ltd. v. City of Thomasville*, 17 N.C. App. 483, 195 S.E.2d 79 (1973) (holding that commitment to a $60,000 earth-moving contract and obligation to repay $1.14 million loan constituted substantial expenditure). Following the issuance of the conditional use permits in July 2011 and before the effective date of Wind Act, May 17, 2013, Iberdrola had invested several million dollars in planning, permitting and development of the Desert Wind Project. *See* Poff Affidavit ¶¶ 8, 21. Although Iberdrola has not yet completed construction of the project, actual construction prior to a change in the law is not necessary to establish vested rights. *Town of Hillsborough*, 276 N.C. at 54-55, 170 S.E.2d at 909 ("It is not the giving of notice to the town, through a change in the appearance of the land, which creates the vested property right in the holder of the permit. The basis of this right to build and use his land, in accordance with the permit issued to him, is his change of his own position in bona fide reliance upon the permit.").

Iberdrola acted in good faith in obtaining a vested right. *See Stowe v. Burke*, 255 N.C. 527, 122 S.E.2d 374 (1961) (holding that owner did not act in good faith where the construction was begun with full knowledge of an impending zoning change and the expenses were incurred in an attempt to establish a right to continue before the impending change should become

effective); *see also Thomasville of N. Carolina Ltd. v. City of Thomasville*, 17 N.C. App. 483, 195 S.E.2d 79 (1973) (holding that landowner acted in good faith in making expenditures and incurring substantial obligations in reliance upon building permits). Iberdrola sought the government approvals in the normal course of business and made expenditures to reasonably pursue the development of the Desert Wind Project. Iberdrola did not mislead the local government, state agencies or property owners; it did not rush its applications for conditional use permits to beat an impending rule change; it did not hastily begin site work to make an appearance of substantial expenditures. Iberdrola did not become aware of the General Assembly's intention to enact the Wind Act until 2013. Iberdrola began the development of the Desert Wind Project in 2009, received government approvals nearly two years prior to the enactment of the Wind Act, and made substantial expenditures in good faith prior to the enactment of the Wind Act.

To require Iberdrola to go through the unnecessary and duplicative permitting requirements this late in the project would result in substantial prejudice and harm to Iberdrola. Poff Affidavit ¶¶ 11, 17-22. In reliance on valid government approvals obtained in 2011, Iberdrola began development of the Desert Wind Project nearly two years before the Wind Act was adopted. *Id.* ¶ 8.

Because Iberdrola has acquired a vested right to complete the Desert Wind Project, no subsequent change in law, including the permitting requirements of the Wind Act, may interfere with this right to complete the project as was approved. As stated by the North Carolina Supreme Court:

> At common law, government may not deprive a landowner of his right to continue with an approved use of his land when, in good faith and in reliance upon valid governmental approval, he makes substantial expenditures or incurs significant contractual obligations towards that approved use. Once [a developer] makes substantial expenditures in good-faith reliance on the approval, he has a vested right to carry out the project as approved.

Town of Midland v. Wayne, 368 N.C. 55, 63-64, 773 S.E.2d 301, 307 (2015) (internal quotations and citations omitted).

B. If the Wind Act affects or changes Iberdrola's vested rights, it is unconstitutional and void under the due process clause.

As the North Carolina Supreme Court has explained, "[g]eneral principles relating to whether statutes should be construed to apply prospectively or retroactively include the following:

> Ordinarily, an intention to give a statute a retroactive operation will not be inferred. If it is doubtful whether the statute or amendment was intended to operate retrospectively, the doubt should be resolved against such operation. It is especially true that the statute or amendment will be regarded as operating prospectively only, where it is in derogation of a common-law right, or where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right, or create a new liability in connection with a past transaction, invalidate a defense which was good when the statute was passed, or, in general, render the statute or amendment unconstitutional.

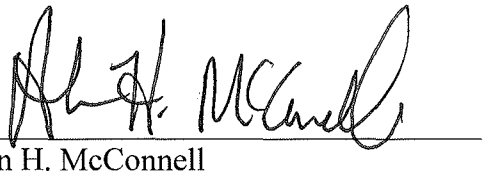
Smith v. Mercer, 276 N.C. 329, 337, 172 S.E.2d 489, 494 (1970) (internal quotations and citations omitted); *see also Bank v. Derby*, 218 N.C. 653, 659, 12 S.E.2d 260, 264 (1940) ("A retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void."); *see also de Lotbiniere v. Wachovia Bank & Trust Co.*, 2 N.C. App. 252, 261, 163 S.E.2d 59, 65 (1968) ("[T]he Legislature may not constitutionally destroy or interfere with vested rights.").

Applying these principles to the vested rights acquired by Iberdrola and the Wind Act, the court should hold that pursuant to the Grandfather Clause, the permitting requirements of the Wind Act do not apply to the Desert Wind Project. To hold otherwise, the Wind Act would be unconstitutional and void.

WHEREFORE, Weyerhaeuser respectfully requests that the court grant its Motion for Summary Judgment and grant such other relief as the court deems necessary.

This the 24th day of March, 2016.

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CERTIFICATE OF SERVICE

It is hereby certified that on this date I served the foregoing **RESPONDENT-INTERVENOR WEYERHAEUSER COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** upon all parties of record by depositing a copy thereof in the United States mail, postage prepaid and addressed as follows:

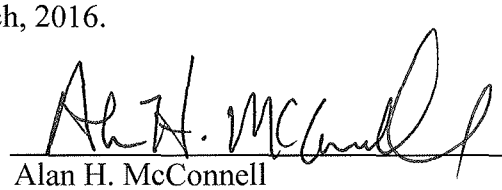
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