



TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2025-054

December 3, 2025

The Honorable Ronald Caldwell
State Senator
120 CR 393
Wynne, Arkansas 72396

Dear Senator Caldwell:

I am writing in response to your request for an opinion on the constitutionality of the retroactive exemption deadline found in Act 945 of 2025, the Arkansas Wind Energy Development Act (the “Act”).¹ You state that because the Act lacked an emergency clause, it became effective on August 5, 2025.² Had the General Assembly included a valid emergency clause under article 5, section 1 of the Arkansas Constitution, the Act could have taken effect immediately.³

You state that the Act exempts wind energy projects “under development” as of April 9, 2025.⁴ A project qualifies as “under development” if it has (1) executed land leases; (2) begun required state or federal studies related to construction; or (3) started construction.⁵ Finally, you state that the Act requires the Arkansas Public Service Commission (“PSC”) to develop rules by January 1, 2026.⁶

¹ A.C.A. §§ 23-18-1401 to -1419. Acts 940 and 945 of the 95th General Assembly each added a Subchapter 13 to Title 23, Chapter 18 of the Arkansas Code. Under 945, Subchapter 13 was designated the “Arkansas Wind Energy Development Act.” But under Act 940, the same subchapter was titled, “Retirement of Dispatchable Electric Generation Facilities.” Because these two enactments conflicted, the Arkansas Wind Energy Development Act has been renumbered and now appears as Subchapter 14.

² See Ark. Const. art. 5, § 1; *Fulkerson v. Refunding Bd*, 201 Ark. 957, 962, 147 S.W.2d 980, 983 (1941); Ark. Att'y Gen. Op. 2025-032.

³ Ark. Const. art. 5, § 1 (Referendum).

⁴ A.C.A. § 23-18-1418 (“A wind energy project is exempt from this subchapter if the wind energy facility project is under development as of April 9, 2025.”).

⁵ *Id.* § 23-18-1403(15).

⁶ *Id.* § 23-18-1419(a).

Against this background, you ask the following questions:

1. Does the retroactive exemption deadline of April 9, 2025, violate article 5, section 1 of the Arkansas Constitution on the grounds that:
 - a. It precedes the effective date of the Act;
 - b. It precedes the Public Service Commission rulemaking deadline; and
 - c. The General Assembly did not include an emergency clause to justify the retroactivity?

Brief response: No. Nothing in Article 5, § 1 of the Arkansas Constitution prohibits retroactive laws.

2. If the answer to Question 1 is no, is the retroactive exemption deadline of April 9, 2025, otherwise not applicable to a wind energy project that executed land lease agreements after April 9, 2025, (but before the effective date of the Act) in light of Attorney General Opinion No. 91-101 and both the fact that:
 - a. The exemption date still precedes the effective date of the Act; and
 - b. The absence of an emergency clause undermines any claim of necessity for retroactive application?

Brief response: Yes, wind energy projects that executed land leases after April 9, 2025, but before the Act's effective date of August 5, 2025, do not qualify for the exemption.

3. If the answer is yes to either or both of the foregoing questions, would a wind energy project that executes leases prior to the finalization of the PSC's rulemaking be exempt from the Act?

Brief response: No, executing leases before the PSC rules are finalized does not exempt wind energy projects from the Act's requirements.

DISCUSSION

The Arkansas Wind Energy Development Act imposes new substantive obligations on wind energy developers. These include, but are not limited to:

- Setback requirements.⁷
- Environmental impact assessments by qualified, third-party experts.⁸
- Acoustic emission limits.⁹
- Preconstruction noise modeling and enforcement.¹⁰
- Developing emergency procedures.¹¹
- Establishing financial security for decommissioning.¹²
- Insurance requirements.¹³

The Act exempts wind energy projects deemed “under development” as of April 9, 2025. By implication, all other projects—those not qualifying for the exemption—must comply with the Act once it becomes effective on August 5, 2025. This implicit mandate, rather than the exemption itself, raises constitutional questions addressed below.

Question 1: Does the retroactive exemption deadline of April 9, 2025, violate article 5, section 1 of the Arkansas Constitution on the grounds that:

- a. It precedes the effective date of the Act;***
- b. It precedes the PSC rulemaking deadline; and***
- c. The General Assembly did not include an emergency clause to justify the retroactivity?***

No, the retroactive exemption in A.C.A. § 23-18-1418 does not violate Article 5, § 1 or any other provision of the Arkansas Constitution. A retroactive provision may precede a legislative act’s effective date and remain valid —without an emergency clause—so long as it does not unlawfully

⁷ A.C.A. § 28-18-1406(a)(1)–(2).

⁸ A.C.A. § 28-18-1406(b)(1).

⁹ A.C.A. § 18-18-1406(c)(1).

¹⁰ A.C.A. § 23-18-1406(c)(2).

¹¹ A.C.A. § 23-18-1407(b)(4).

¹² A.C.A. § 23-18-1408.

¹³ A.C.A. § 23-18-1409.

impair vested rights, interfere with contractual obligations, or impose new substantive duties.¹⁴ Likewise, nothing in the Arkansas Constitution prohibits a retroactive provision from preceding a rulemaking deadline.

1.1 Retroactivity and constitutional limits. Retroactive provisions are not inherently unconstitutional.¹⁵ The federal and the Arkansas Constitutions prohibit only specific types of retroactive laws, including bills of attainder, ex post facto laws, and laws that impair contracts or violate the Due Process Clause, Takings Clause, or principles of separation of powers.¹⁶ The Arkansas Constitution provides equivalent protections in each of these areas.¹⁷ A retroactive law is unconstitutional if it falls within one of the prohibited categories—such as impairing contracts or violating due process.¹⁸

1.2 Retroactivity analysis. The exemption in A.C.A. § 23-18-1418 is retroactive because it impliedly alters the legal consequences of a past action or event.¹⁹ It does so by requiring any wind energy projects that fail to qualify as “under development” under A.C.A. § 23-18-1403(15) by April 9, 2025, to comply with the Act’s requirements, even though the Act is not effective until August 5, 2025. But there are different types of retroactivity, a distinction that helps clarify how the Act operates.

A law can be retroactive in two ways, which are sometimes called “strong” or “weak.”²⁰ A law is strongly retroactive if it alters the past legal consequences of a past action or event *in the past*. A

¹⁴ 2 Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 41:2 (8th ed., 2024); *Hardin v. Fort Smith Couch & Bedding Co.*, 202 Ark. 814, 152 S.W.2d 1015, 1017–18 (1941); *Archer v. Sisters of Mercy Health Sys., St. Louis, Inc.*, 375 Ark. 523, 294 S.W.3d 414 (2009).

¹⁵ *Sutherland*, § 41:1.

¹⁶ *Id.*

¹⁷ See, e.g., Ark. Const. art. 2, § 17 (Attainder—Ex post facto laws—Impairment of contract); Ark. Const. art. 2, § 8 (Criminal procedure—Double jeopardy—Right against self-incrimination—Due process); Ark. Const. art. 4, §§ 1 (Division of governmental authority), 2 (Separation of powers).

¹⁸ *Sutherland*, § 41:1.

¹⁹ See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70, 280 (1994) (requiring courts to assess whether a statute is retroactive by “ask[ing] whether the new provision attaches new legal consequences to events completed before its enactment” and requiring courts to “first … determine whether [the legislature] prescribed the statute’s proper reach”).

²⁰ While numerous courts and scholars have recognized and applied this distinction, they often use different labels for the two kinds of retroactivity: **E.D. Ark.**: *St. Bernard’s Hosp., Inc. v. Sullivan*, 781 F. Supp. 576, 590–91 (E.D. Ark. 1991); **D.C. Cir.**: *Nat'l. Cable & Telecomms. Assn. v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009); **5th Cir.**: *FDIC. v. Faulkner*, 991 F.2d 262, 266 (5th Cir. 1993); **9th Cir.**: *Nat'l Med. Enters., Inc. v. Sullivan*, 957 F.2d 644, 671 (9th Cir. 1992); **Calif.**: *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 607 (Cal. 1994) (en banc); **New Jersey**: *Harris v. Branin Transp., Inc.*, 711 A.2d 311, 337 (N.J. 1998) (“A pure retroactive statute changes what the law was in the past. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring). A law or rule that has

law is weakly retroactive when it alters the past legal consequences of a past action or event *only at and after the act's effective date*.

The Act's exemption is weakly retroactive. It does not alter the legal status of actions taken before the Act's effective date. Instead, it uses a past date (April 9, 2025) to determine which projects are exempt from future obligations. In doing so, the Act does not impose new duties or penalties on completed actions but merely references those actions to establish future compliance requirements.

Importantly, the Act does not retroactively impair vested rights as it does not revoke any rights legally acquired before its effective date. For instance, entering into a land use lease after April 9, 2025, but before August 5, 2025, does not create a vested right to avoid future regulation.²¹

Finally, the Act does not interfere with existing contractual obligations. It does not invalidate or alter the terms of leases or agreements executed before the Act's effective date. The Act's obligations—such as setback requirements, environmental assessments, and insurance mandates—apply only prospectively.

One might contend that, although the Act's requirements are technically prospective, they function in practice as of April 10, 2025, because any wind energy project that does not qualify for the exemption must ultimately comply with the Act once it takes effect. For example, a non-exempt developer might construct a wind turbine after April 9, 2025, in a location that does not meet the Act's setback requirements, only to be required to relocate the turbine after the Act becomes effective.

Even in that scenario, the Act operates prospectively because the obligation to comply arises only upon the Act's effective date. While this may raise fairness concerns, the mere possibility of unfairness does not override the legislature's intent, as discussed above in section 1.1. Thus, projects that do not qualify for the exemption must comply with the Act's requirements after the Act becomes legally effective, not before.

With the general constitutional validity of the retroactive exemption addressed, the analysis next addresses article 5, section 1 of the Arkansas Constitution to explain why the exemption in A.C.A. § 23-18-1418 does not violate it.

1.3 Constitutional analysis. Nothing in article 5, section 1 of the Arkansas Constitution prevents the retroactive exemption in A.C.A. § 23-18-1418 from preceding the Act's effective date. Article 5, section 1 is chiefly concerned with protecting the initiative and referendum power reserved to

exclusively future effects, but that affects past transactions is 'secondarily retroactive.' *Ibid.* A secondarily retroactive law is valid so long as it is not arbitrary or capricious. *Ibid.*"). See also Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 Ala. L. Rev. 1329, 1334–35 (2000).

²¹ See, e.g., *United States v. Locke*, 471 U.S. 84, 104 (1985) (holding that the regulation of property rights does not amount to a taking when individuals can still realize their investment-backed expectations by complying with reasonable regulations and that individuals do not have a vested right to be free from regulation).

the people of this state. The retroactive exemption does not affect the people's right to petition for a referendum or make the Act immediately effective. Instead, it applies the Act's rules to events or actions that were complete before the Act's effective date, but that application is only on and after the Act's effective date, as explained above.

Likewise, article 5, section 1 of the Arkansas Constitution does not reference rulemaking deadlines, nor does it imply that rulemaking must precede a law's effective date for it to be constitutional. The Act does not require enforcement before the Arkansas Public Service Commission promulgates its rules. In fact, the retroactive exemption reduces the need for immediate enforcement, since projects under development as of April 9, 2025, are exempt from the Act.

Moreover, the Arkansas Administrative Procedures Act, codified in A.C.A. § 25-15-201 et seq., governs the rulemaking process in Arkansas. Arkansas Code § 25-15-204 requires agencies, like the Arkansas Public Service Commission, to follow notice-and-comment procedures for rulemaking, a process that could not occur before legislation is enacted. It is common for regulatory statutes, such as the Arkansas Wind Energy Development Act, to become effective before the rulemaking process is complete.

Finally, the General Assembly is not required to include an emergency clause to justify a retroactive exemption. As explained above, retroactive provisions are not inherently unconstitutional.²²

Question 2: If the answer to Question 1 is no, is the retroactive exemption deadline of April 9, 2025, otherwise not applicable to a wind energy project that executed land lease agreements after April 9, 2025, (but before the effective date of the Act) in light of Attorney General Opinion No. 91-101 and both the fact that:

- a. The exemption date still precedes the effective date of the Act; and***
- b. The absence of an emergency clause undermines any claim of necessity for retroactive application?***

Yes, the retroactive exemption is not applicable to wind energy projects that executed land lease agreements after April 9, 2025, but before the Act's effective date of August 5, 2025, assuming none of the other conditions for qualifying for the exemption have been met before April 9, 2025.²³

²² *State v. Kline*, 23 Ark. 587, 588 (1861) ("The proposition that a statute is void merely because its terms are retroactive, cannot be maintained.").

²³ A wind energy project qualifies as "under development" if it has "(1) [e]xecuted land leases; (2) [c]ommenced necessary state and federal studies related to construction of a wind energy facility; or (3) [c]ommenced construction of a wind energy facility[.]" *See A.C.A. § 23-18-1403(15)*. Because this list is disjunctive, each condition is independently sufficient for qualifying for the exemption. *See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts* 116 (2012).

As explained above, a retroactive provision may precede an effective date. The inclusion of a retroactive provision does not make a legislative act immediately effective. Thus, the absence of an emergency clause does not invalidate a retroactive provision.

Your question references Attorney General Opinion No. 91-101. That opinion addressed Act 860 of 1991, which required taxpayers to assess their tangible personal property before the law's effective date.²⁴ My predecessor concluded that, absent an emergency clause, the requirement to assess tangible personal property before the effective date could not be enforced.²⁵

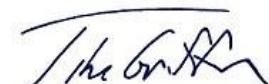
The retroactive exemption found in A.C.A. § 23-18-1418 differs significantly. Act 860 imposed an affirmative obligation—requiring taxpayers to assess tangible personal property before the law became effective. In contrast, the retroactive exemption in the Wind Energy Development Act operates passively: it relieves qualifying wind energy projects from future compliance without requiring any action before the Act takes effect. Here, no action is required before the effective date, and the exemption merely identifies which projects will be subject to future obligations. Therefore, projects that executed land lease agreements after April 9, 2025, but before August 5, 2025, do not qualify for the exemption and must comply with the Act. While the Act does not impose any legal obligations before August 5, 2025, non-exempt developers who intend to begin projects before that date need to prepare for compliance in advance to avoid delays, disruptions, or violations once the Act becomes effective and the PSC rulemaking is complete.

Question 3: If the answer is yes to either or both of the foregoing questions, would a wind energy project that executes leases prior to the finalization of the PSC's rulemaking be exempt from the Act?

Wind energy projects are not exempt from the requirements of the Act merely because they execute a lease before the Arkansas Public Service Commission finalizes its rulemaking. As discussed above in section 1.3, the Act became effective on August 5, 2025, and it applies to all nonexempt projects from that date forward, regardless of when the PSC completes its rulemaking.

Assistant Attorney General Justin Hughes prepared this opinion, which I hereby approve.

Sincerely,



TIM GRIFFIN
Attorney General

²⁴ Ark. Att'y Gen. Op. 91-101.

²⁵ *Id.*