STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF WAKE	19 CVS_____
N.C. Farm Bureau Federation, Inc., Petitioner, and North Carolina Environmental Justice Network and North Carolina State Conference of the National Association for the Advancement of Colored People Petitioner Movant-Intervenors v. Department of Environmental Quality, Division of Water Resources, Respondent.	**PETITION FOR JUDICIAL REVIEW AND STAY OF PROCEEDINGS [N.C. Gen. Stat. §§ 150B-43 and 150B-48].**

1. NOW COME the North Carolina Environmental Justice Network (NCEJN) and the North Carolina State Conference of the National Association for the Advancement of Colored People (NC NAACP) (the Petitioner Movant-Intervenors below, hereinafter "Intervenors"), pursuant to N.C. Gen. Stat. §§ 150B-43 and 150B-48, seeking judicial review of the Order denying Intervenors' Motion to Intervene and a stay of the North Carolina Office of Administrative Hearings ("OAH") proceedings in this contested case pending judicial review by this Court. The Order was filed on September 6, 2019 by the Honorable Donald W. Overby ("ALJ"), in OAH Docket No. 19 EHR 2739, 2740 and

2741 and is attached hereto as Exhibit A. Intervenors take exception to Conclusions of Law 9- 22 (Ex. A, pp. 3-6), which are affected by error of law; unsupported by substantial evidence admissible under N.C. Gen. Stat. §§ 150B-29(a), 150B-30, or 150B-31; and arbitrary and capricious. In support of this Petition and these exceptions, Intervenors show the court:

I. Procedural Background

2. On May 10, 2019, the North Carolina Farm Bureau ("Farm Bureau") commenced a contested case in the OAH to challenge the North Carolina Department of Environmental Quality's (DEQ) issuance of the Swine General Permit No. AWG100000 ("the Swine Permit"), the Cattle General Permit No. AWG200000, and the Poultry General Permit No. AWG300000. The Farm Bureau alleged that in issuing those permits, DEQ violated N.C. Gen. Stat. § 150B-1 *et seq*., the Administrative Procedures Act (APA) rulemaking process. *See* Farm Bureau Pet'n for Contested Case, filed May 10, 2019, Docket No. 19 EHR 2739, 2740 and 2741.

3. In addition, the Farm Bureau claims the permits were improperly influenced by a settlement agreement with DEQ resolving a Title VI complaint filed with the U.S. Environmental Protection Agency. Farm Bureau identifies the Title VI Complainants (which include Intervenor NCEJN) and their legal counsel (including the undersigned, Elizabeth Haddix and Mark Dorosin) as witnesses in the contested case. *See* Farm Bureau Prehearing Statement, filed June 13, 2019, at 13.

4. Respondent DEQ disputes Farm Bureau's claims that the agency failed to follow proper procedures in its development of the general permits. *See* DEQ Prehearing

Statement, filed May 16, 2019. DEQ alleges that a general permit is not a rule, and that the issuing of general permits is thus not controlled by the rulemaking procedures of the APA. DEQ alleges not only that it fully complied with the public participation requirements of 15A N.C. Admin. Code 2T.0111(b), but that it also went beyond minimum requirements for doing so by holding multiple rounds of comment periods and public meetings.

5. Intervenors filed a Motion to Intervene in the Farm Bureau's contested case on June 25, 2019. Farm Bureau filed a response objecting to the Motion to Intervene on July 1, 2019, and DEQ filed a response on July 2, 2019 which states that the agency "takes no position on the Motion."[1]

6. Also on July 2nd , DEQ moved for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), alleging that Farm Bureau's pleadings fail to state a claim on which relief can be granted. Upon information and belief, to date, the ALJ has not filed any order regarding Respondent's Motion.

7. On September 6, 2019, the ALJ denied NCEJN and NAACP's Motion to Intervene. The Order held that the groups 1) "do not have a direct and immediate interest related to the permit," and 2) their claims cannot be addressed by the OAH, because it "is a state agency of limited statutory jurisdiction not including the ability to hear claims brought under the cited federal statutes or the North Carolina Constitution." Exhibit A at

[1] On June 28, 2019, the Board of Agriculture for the State of North Carolina filed a limited Motion to Intervene as *amicus* in the contested case pursuant to N.C. Gen. Stat. 150B-23(d) and 26 NCAC 03 .0117(a) and indicated that Farm Bureau had no objection to the intervention. The ALJ granted that motion. *See* Exhibit A at 6.

4.

8. The Order denying the Motion to Intervene is a Final Decision triggering Intervenors' right to judicial review pursuant to N.C. Gen. Stat. § 150B-43. *See Anderson v. Seascape at Holden Plantation, LLC*, 232 N.C. App. 1, 753 S.E.2d 691 (2014) (order denying a motion to intervene affects a substantial right). Intervenors satisfy N.C. Gen. Stat. § 150B-43's requirement because they are "persons aggrieved"[2] by the ALJ's denial of their motion to intervene, have exhausted all administrative remedies made available to them by statute or agency rule, and are therefore entitled to judicial review.

II. Intervention as of Right (Rule 24 (a)(2))

9. The ALJ's conclusion that the NC NAACP and NCEJN failed to meet the requirements of N.C. Gen. Stat. §§ 1A-1, N.C. Rule of Civ. Proc. 24 (a)(2), 150B-23(d), and 26 NCAC 03 .0117 is affected by error of law; unsupported by substantial evidence admissible under N.C. Gen. Stat. §§ 150B-29(a), 150B-30, or 150B-31; is arbitrary and capricious, and should be reversed.

10. A party seeking intervention as a matter of right pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) "must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Holly Ridge Assoc.*, 361 N.C. 531, 537, 648 S.E.2d 830, 835 (2007) (quoting *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515

[2] "'Person aggrieved' means 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).

S.E.2d 675, 683 (1999)). The ALJ erroneously concluded that Intervenors failed to show they have the necessary interest required by (1), and did not reach whether or not they had shown (2) or (3). *See* Exhibit A at 5.

a. Intervenors' Direct and Immediate Representational Interests[3]

11. As an initial matter, the ALJ erroneously disregarded the fact that Intervenors are "persons aggrieved" entitled to participate in the contested case at the OAH. *See Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, Div. of Envtl. Management*, 337 N.C. 569, 447 S.E.2d 768 (1994). In *Empire Power*, the court held that an adjacent landowner was a "person aggrieved" entitled to have his claims heard at the OAH because he alleged "sufficient injury in fact to interests within the zone of those to be protected" by the law the agency failed to follow when it issued the challenged permit; he "may be expected to suffer from whatever adverse environmental consequences the [permitted operation] might have;" and that a decision in his favor "would substantially eliminate or redress the injury likely to be caused by" the permit decision. *Id.* at 589-590, 447 S.E.2d at 780.

12. Here, Intervenors are similarly "persons aggrieved." The swine facilities at issue are only allowed to operate pursuant to the Swine Permit issued by DEQ. Intervenors have alleged direct injury in fact from DEQ's failure to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and N.C. Const. Art. I, § 19 when it issued the Swine Permit. They have also alleged that their organizations and members will

[3] For the purposes of Rule 24, this issue is framed in the context of the Petitioners' "interests." In a non-intervention context, the same analysis is characterized as standing.

suffer from the adverse consequences the permitted operations will have, and that requiring DEQ to comply with federal and state anti-discrimination law will substantially redress those injuries.

13. The ALJ's conclusion that Intervenors "do not have a direct and immediate interest related to the permit" contravenes established law regarding an organization's standing to sue on behalf of its members ("representational standing") as well as on its own behalf ("organizational standing"). *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 181, 120 S. Ct. 693, 704 (2000)("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.")(internal citations omitted).

14. In their motion and brief filed at the OAH, Intervenors established that each organization has members with a direct and immediate interest in the Swine Permit, that those interests are germane to the organizations' purposes, and because of the injunctive relief they request, challenging DEQ's actions in issuing the Permit does not require the participation of individual members. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. at 181, 120 S. Ct. at 704.

15. As asserted in their Motion to Intervene and its attached affidavits, NCEJN members include African American residents of Eastern North Carolina who live near the highest concentration of swine operations covered by the Swine Permit. Those NCEJN members endure the harms caused on a recurrent basis by permitted hog operations,

including air and water pollution, noxious odors, truck traffic and waste runoff, flies and buzzards, and swine waste that makes its way onto their property and into their homes. *See* Affidavit of NCEJN, Attachment A to NCEJN & NC NAACP Motion to Intervene, filed June 25, 2019.

16. Those members disproportionately endure those harms because of their race, and therefore have a direct interest in the Swine General Permit and in ensuring that it complies with DEQ's obligations under state and federal law to address its racially discriminatory impacts.

17. NCEJN also clearly established that the direct and immediate interest of its members is germane to the organization's purpose. NCEJN is a non-profit, grassroots, African American-led coalition of community organizations, individuals and their supporters. NCEJN members include low income people of color as well as community organizations with whom NCEJN works to address issues of climate, environmental, racial, and social injustice across the state. NCEJN's mission is to ensure that environmental public policy is based on mutual respect and justice for all peoples, free from discrimination or bias. In pursuit of this goal, NCEJN has worked for more than a decade to combat environmental racism by encouraging meaningful regulation and monitoring of North Carolina's animal agriculture industry so as to address industry practices that create pollution and nuisances which harm people's health.

18. Similarly, the NC NAACP established that it was seeking to intervene on behalf of members with a direct and immediate interest in the contested case, and specifically referenced the interest of hundreds of NC NAACP members who live in those

southeastern counties in which industrial hog operations are most densely concentrated. *See* Affidavits of NC NAACP and Sylvia Barnes, Attachments B and C to Motion to Intervene.

19. Those NC NAACP members are harmed on a recurrent basis by the impacts from surrounding permitted swine operations, including air and water pollution, noxious odors, truck traffic, flies and buzzards, and swine waste that makes its way onto their property and into their homes. They have a direct and immediate interest in the Swine General Permit and in ensuring that it complies with DEQ's obligations under state and federal law to address its racially discriminatory impacts, because like NCEJN's members of color, they are disproportionately impacted by those impacts because of their race.

20. The affidavit of NC NAACP President Rev. T Anthony Spearman noted that the organization's members "have participated in community meetings" held by DEQ regarding the Swine Permit, and that "hundreds of its members" live in communities adversely impacted by concentrated industrial hog facilities. *See* Affidavit of NC NAACP, Attachment B to Motion to Intervene.

21. The Motion to Intervene and attachments also clearly established that the direct and immediate interest of its members is germane to the NC NAACP's purpose. NC NAACP is North Carolina's branch of the nation's oldest and largest civil rights organization. It is the second largest state conference of the NAACP in the United States. For over 70 years, NC NAACP has pursued its mission to ensure the political, educational, social and economic equality of all persons and to eliminate racial hatred and

discrimination. Addressing and remedying environmental injustice is one of the key components of the NC NAACP's program.

22. Both Intervenors are community-based membership groups and bring this petition on behalf of their membership, and at the request of their members. Intervenors have hundreds of members who live adjacent or proximate to swine operations that DEQ allows to operate under the Swine Permit.

23. Intervenors' members have attended numerous hearings and public meetings on issues related to the Swine Permit, and submitted comments on the permits that are the subject of this contested case hearing.

24. DEQ's action in issuing the Swine Permit has a significant and adverse impact on the health and well-being of Intervenors' members and their families, on the use and enjoyment of Intervenors' members' property, the value of their property and other economic interests.

25. In light of Intervenors' Motion and supporting affidavits, which attest to many of the ways in which Intervenors have direct and immediate interest in the issuance of the Permit and the contested case in a representational capacity on behalf of their members, the ALJ's Order denying the Motion to Intervene is affected by error of law, unsupported by substantial evidence, and is arbitrary and capricious.

b. Intervenors' Direct and Immediate Organizational Interests

26. In addition to Intervenors' sufficient showing of direct and immediate representational interests, they have also alleged sufficient facts to establish direct and immediate organizational interests in DEQ's issuance of the Swine Permit. *See Havens*

Realty Corp. v. Coleman, 455 U.S. 363, 379, 102 S. Ct. 1114, 1124 (1982) (holding that "where Petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact"); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 345, 97 S. Ct. 2434, 2442 (1977) (noting "that the interests of the Commission itself may be adversely affected by the outcome of this litigation").

27. In *N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections*, 283 F.3d 393 (M.D.N.C. 2017), the court recognized that even if the NAACP could not establish representational standing, the litigation could still proceed because it satisfied the requirements of organizational standing.

> An organization can establish standing to sue on its own behalf when it seeks redress for an injury suffered by the organization itself. The North Carolina NAACP alleges that it "has been forced to divert its valuable and limited resources away from its core mission and planned voter-mobilization, voter-protection, and voter-education activities . . . in order to investigate, respond to, mitigate, and address the concerns of its members resulting from Defendants' unlawful en masse voter challenge and purging practices." (ECF No. 1 ¶ 89.) The North Carolina NAACP has, therefore, established a cognizable injury by alleging that Defendants' practices have hampered [its] stated objectives causing [it] to divert its resources as a result. Further, the North Carolina NAACP has not only plausibly alleged but has also provided evidence to show that these injuries are fairly traceable to the conduct of the Cumberland Defendants.

Id., at 402 (internal citations omitted).

28. Intervenors' Motion and affidavits show that their respective organizations will suffer injury in fact if DEQ's 2019 Swine General Permit is issued without provisions to address its racially discriminatory impact, because both organizations have had to and

will continue to have to divert valuable and limited resources from their respective planned activities in order to counter the discriminatory effects of DEQ's Swine General Permit. *See* Affidavit of NCEJN, Attachment A, Motion to Intervene and Affidavit of Rev. Dr. T. Anthony Spearman, Attachment B, Motion to Intervene.

29. An organization can also establish standing by showing a direct injury from conduct or policies that frustrate its mission. *See, e.g., Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) ("An organization may suffer an injury-in-fact when a defendant's actions impede its efforts to carry out its mission.").

30. As described above and in detail in the Motion to Intervene and supporting affidavits, fundamental to the mission of both NCEJN and NC NAACP is their work to address and eliminate environmental, racial, and social injustice in North Carolina and to ensure that state policies and practices are equitable and free from discrimination.

31. NCEJN and NC NAACP have direct and immediate organizational interests because DEQ's action in adopting the Swine Permit requires these organizations to divert resources to address the Permit's impacts and frustrates their respective missions. In failing to properly account for those interests, the Order denying the Motion to Intervene is affected by error of law; unsupported by substantial evidence, and is arbitrary and capricious.

III. Permissive Intervention (Rule 24 (b)(2))

32. Intervenors also moved, in the alternative, for permissive intervention pursuant to Rule 24(b)(2), which provides that a movant may be permitted to intervene

"[w]hen an applicant's claim or defense and the main action have a question of law or fact in common." N.C. Gen. Stat. 1A-1, Rule 24 (b)(2).

33. The Order denying intervention erroneously concludes "as a matter of law that allowing permissive intervention . . . will unduly delay and prejudice the adjudication of the rights of the original parties in the this contested case." Exhibit A, at 6. This determination ignored the common questions of law and fact in the claims asserted by NCEJN and NC NAACP and the Farm Bureau.

34. Intervenors and the Farm Bureau both seek to show that in issuing the Swine General Permit, DEQ has acted arbitrarily and capriciously and failed to follow law, and substantially prejudiced their respective rights as described in N.C. Gen. Stat. § 150B-23(a). It should also be noted that both the Intervenors and the Farm Bureau were engaged for months in the agency's process for review, notice and comment in developing the Swine General Permit, and that the substantive claims each party has raised in the OAH have been considered by DEQ throughout that process. Given this background, there can be no dispute that common questions of law and fact exist in these claims.

35. In addition, *all* parties in this contested case expressly refer to the role of the Title VI complaint filed against DEQ in developing the 2014 Swine General Permit. There is a common question of law as to the scope and relevance of DEQ's obligations under Title VI and the effect those obligations had on drafting the Swine General Permit.

36. Intervenors allege that in adopting the Swine General Permit, DEQ acted arbitrarily or capriciously and failed to act as required by law, specifically Title VI and Article I, Sec. 19 of the state constitution. Farm Bureau alleges that DEQ acted arbitrarily

or capriciously and failed to act as required by law, specifically the N.C. Administrative Procedures Act, by participating in the process to resolve the Title VI complaint (in fact, both NCEJN and their undersigned counsel were named as proposed witnesses in the Farm Bureau's Prehearing Statement). The significance of the Title VI process, and the extent to which the law's underlying anti-discrimination provisions generally apply to DEQ and the issuance of the Swine General Permit, is central to the allegations of all three parties.

37. There are substantial common issues of law and fact at the core of the Farm Bureau's claims and the claims raised in the Motion to Intervene. Moreover, these issues have been inextricably linked throughout the process of the introduction, notice and comment, review, and adoption of the Swine General Permit. Given these common elements, and the centrality of the role of the agency's anti-discrimination obligations, intervention would not raise new issues, expand the scope of review, or delay resolution of this contested case. The denial of permissive intervention was therefore arbitrary and capricious, affected by error of law, and an abuse of discretion and should be reversed.

IV. Petitioners' Claims were Properly Brought at the OAH

38. The ALJ concludes that Intervenors' claims "can only be addressed by other means and in the proper venue," and that the OAH "is a state agency of limited statutory jurisdiction, not including the ability to hear claims brought under the cited federal statutes or the North Carolina Constitution." Exhibit A, at 4.

39. The undersigned find no Article III court ruling consistent with the ALJ's ruling; in fact, constitutional arguments and claims have been previously adjudicated at

the OAH. *See NC Alcoholic Beverage Control Commission v. Holmes Oil Company Inc T/A Cruizers 50*, 16 ABC 09933, 2017 WL 2240678 (2017) (considering Double Jeopardy clause of U.S. Constitution and Art. I, Sec. 19 of the North Carolina Constitution); *East Winston Primary School Corp. v. North Carolina State Board of Education*, 04 EDC 0029, 2005 WL 3946389 (2005) (considering 14th Amendment of U.S. Constitution and Art. I, Sec. 17 of the N.C. Constitution).

40. Although the North Carolina Supreme Court has held that "a statute's constitutionality shall be determined by the judiciary, not an administrative board," *Meads v. North Carolina Dep't of Agric., Food & Drug Protection Div., Pesticide Sec. (In re Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155)*, 349 N.C. 656, 509 S.E.2d 165 (1998), Intervenors have not asked for a determination of constitutionality of a statute. Instead, consistent with N.C. Gen. Stat. § 150B-23, they asked for a determination whether in issuing the 2019 Permit, DEQ acted arbitrarily or capriciously and/or failed to act as required by law (specifically, N.C. Const. Art. I § 19 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, and the United States Environmental Protection Agency's implementing regulations, 40 C.F.R. Part 7).

41. The Order states that Intervenors should have brought their state constitutional claims directly in state or federal court; however, North Carolina law is clear that a plaintiff cannot bring a claim directly under the state constitution if there exists an adequate remedy at state law. *See Corum v. University of North Carolina,* 330 N.C. 761, 784, 413 S.E.2d 276, 291 (1992).

42. N.C. Gen. Stat. § 150B-23 provides a remedy to persons aggrieved where an agency acts arbitrarily or capriciously and/or fails to act as required by law. Intervenors believe and can show that, in issuing the 2019 Swine General Permit, DEQ failed to act as required by law, specifically N.C. Const. Art. I § 19 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, and the United States Environmental Protection Agency's implementing regulations, 40 C.F.R. Part 7. In the absence of an Article III decision that OAH has no jurisdiction regarding *any* constitutional claims and that therefore a proceeding under Chapter 150B is not an "adequate remedy at state law," the motion to intervene was proper and should have been granted.

V. Motion to Stay (N.C.G.S. §150B-48)

43. If the contested case is allowed to proceed during the pendency of the determination on this Petition for Judicial Review, Intervenors will be irreparably harmed and risk permanently losing their rights to challenge the agency action. Therefore, Intervenors respectfully request that this court stay any further proceedings in this matter at the OAH, pending the outcome of this court's review.

WHEREFORE, Intervenors pray the Court:

1. Stay the OAH proceedings pending the resolution of this Petition for Judicial Review:
2. Reverse the order denying NCEJN and NC NAACP's Motion to Intervene and grant them intervention of right as full parties; and
3. Grant any other relief that the Court deems proper in the interests of justice.

Respectfully submitted, this the 2nd day of October, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing PETITION FOR JUDICIAL REVIEW AND STAY OF PROCEEDINGS was served on Petitioners and Respondent through their counsel via U.S. Mail, postage prepaid at the following addresses, with a courtesy copy sent via electronic mail:

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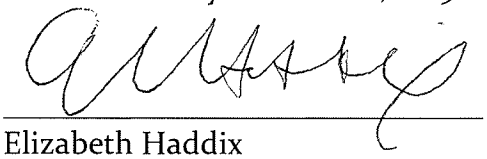
This the 2nd day of October, 2019.



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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
19 EHR 02739, 19 EHR 02740, 19 EHR 02741

North Carolina Farm Bureau Federation Inc, Petitioner, v. NC Department of Environmental Quality, Division of Water Resources, Respondent.	**ORDER ON MOTIONS TO INTERVENE**

NOW COMES the Undersigned upon the Motions to Intervene filed in this matter and finds the following:

FINDINGS OF FACT

1. On June 25, 2019, the North Carolina Environmental Justice Network (NCEJN) and the North Carolina State Conference of the National Association for the Advancement of Colored People (NC-NAACP), referred to collectively as "First Intervenors," filed a Motion to Intervene ("Motion I") seeking intervention in this contested case pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 24, 150B-23(d), and 26 NCAC 03 .0117 "with full rights of a party in this action." (Motion I, p. 1). Additionally, the First Intervenors are seeking permissive intervention "[i]n the event that intervention as a matter of right is not granted . . . ." (Motion I, p. 7, ¶ 22). Namely, the First Intervenors seek designation as Petitioner-Intervenors. (Motion I, p. 9). Petitioner filed a response to Motion I on July 1, 2019 and Respondent filed a response on July 2, 2019. First Intervenors filed a brief in support of their motion on July 19, 2019.

2. On June 28, 2019, the Board of Agriculture for the State of North Carolina ("Second Intervenor") filed a Motion to Intervene ("Motion II") seeking intervention in this contested case pursuant to N.C. Gen. Stat. 150B-23(d) and 26 NCAC 03 .0117(a) and indicated that Petitioner "has no objection to the requested intervention." (Motion II, p. 1). Respondent filed a response to Motion II on July 2, 2019.

Based on the foregoing Findings of Fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. As noted by the North Carolina Supreme Court, "[i]ntervention in a contested case . . . is controlled by interlocking statutes." *Holly Ridge Associates, LLC v. N. Carolina Dep't of Env't & Nat. Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007).

2. Under the Administrative Procedure Act, "[a]ny person may petition to become a *party* by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24." N.C. Gen. Stat. § 150B-23(d) (emphasis added). Further, "*any person* interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge." *Id*.

3. With these two interlocking statutes, "a person or entity wishing to intervene in a contested case may choose one of two routes, either to intervene as a party or to participate in a lesser role at the discretion of the ALJ. To intervene with the full rights of a party, the applicant must satisfy the requirements of Rule 24 [of the North Carolina Rules of Civil Procedure]. However, an applicant may instead elect to participate to a lesser extent as deemed appropriate by the ALJ, pursuant to N.C.G.S. § 150B–23(d). In this latter instance, the ALJ has broad discretion to allow such participation." *Holly Ridge Associates, LLC*, 361 N.C. at 536, 648 S.E.2d at 834. However, an Administrative Law Judge does not have the same broad discretion in granting intervention with full rights as parties. *Holly Ridge Associates, LLC*, 361 N.C. at 536, 648 S.E.2d at 834–35. In order for a person or entity to have full rights as a party to a contested case, an intervenor must "meet the conditions set out in Rule 24." *Id*.

I. Intervention pursuant to N.C. Gen. Stat. § 1A-1, Rule 24

4. The North Carolina Supreme Court has highlighted that "the laudable purpose of Rule 24 intervention is generally to promote efficiency and avoid delay and multiplicity of suits[.]" *Holly Ridge Associates, LLC*, 361 N.C. at 540, 648 S.E.2d at 837.

5. In seeking to intervene under Rule 24 of the North Carolina Rules of Civil Procedure, the movant "shall serve a motion to intervene upon all parties affected thereby" and "[t]he motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." N.C. Gen. Stat. § 1A-1, Rule 24(c). Further, "[t]he same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure." *Id*.

A. Rule 24(a) – Intervention of Right

6. "An applicant may seek to intervene as a matter of right pursuant to Rule 24(a) either on the basis of (1) a statute which confers an unconditional right to intervene or (2) an interest in the property or transaction which is the subject of the action when such interest was not adequately represented by the existing parties and would be impaired if intervention were not granted." *Holly Ridge Associates, LLC v. N. Carolina Dep't of Env't & Nat. Res.*, 361 N.C. at 537–38, 648 S.E.2d at 835 (quoting N.C. Gen. Stat. § 1A-1, Rule 24(a)).

7. Specifically, under Rule 24(a)(2), a "prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Id*. (quoting *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999) (citations omitted)).

B. Rule 24(b) – Permissive Intervention

8. Rule 24(b)(1) provides that "[u]pon timely application[,] anyone may be permitted to intervene in an action . . . [w]hen a statute confers a conditional right to intervene." N.C. Gen. Stat. § 1A-1, Rule 24(b)(1). As a second option to seek permissive intervention, under Rule 24(b)(2), and upon timely application, anyone may be permitted to intervene in an action

> *[w]hen an applicant's claim or defense and the main action have a question of law or fact in common*. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. *In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.*

N.C. Gen. Stat. § 1A-1, Rule 24(b)(2) (emphasis added).

II. <u>Application</u>

A. *North Carolina Environmental Justice Network's (NCEJN) and the North Carolina State Conference of the National Association for the Advancement of Colored People's (NC-NAACP) Motion to Intervene*

First Intervenors filed Motion I seeking intervention in this contested case pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 24, 150B-23(d), and 26 NCAC 03 .0117 "with full rights of a party in this action." (Motion I, p. 1). Specifically, First Intervenors first seek intervention as of right under Rule 24(a)(2), or if unsuccessful on that basis, permissive intervention under Rule 24(b)(2).

i. Intervention as of Right under Rule 24(a)(2)

9. Moving for intervention as a matter of right, First Intervenors allege that they satisfy the requirements under Rule 24(a)(2) because they meet the requirements set forth in Conclusion of Law # 7, *supra*. However, First Intervenors do not meet the requirements in order to intervene under Rule 24(a)(2).

10. Regarding the first of the required three elements, First Intervenors conclude that they "have a direct and immediate interest relating to the issuance of the Swine General Permit." (Motion I, p. 4, ¶ 7). In expounding upon this assertion, First Intervenors explain that they "have demonstrated a continued interest relating to the issuance of the Swine General Permit" and list a detailed history of filing Title VI complaints against Respondent alleging a racially discriminatory impact from the Swine General Permit. (Motion I, p. 5, ¶ 10). While First Intervenors' organizations certainly would have interests in addressing alleged racial discrimination and the like writ large, a party seeking intervention under Rule 24(a)(2) must demonstrate that it has a *direct and immediate interest* in the proceedings before the Tribunal.

11. Here, it is apparent that First Intervenors do not have a direct and immediate interest related to the permit. A party has a direct interest in the action "if he will either gain or lose by the direct operation and effect of the judgment." *Chambers v. Moses H. Cone Mem'l Hosp.*, 2017 NCBC 22, 2017 WL 1025461, at *8 (N.C. Super. Mar. 13, 2017) (quoting *Mullen v. Louisburg*, 225 N.C. 53, 56, 33 S.E.2d 484, 486 (1945)), *aff'd*, 814 S.E.2d 864 (N.C. Ct. App. 2018), *review allowed*, 824 S.E.2d 404 (N.C. 2019). Instead, First Intervenors have an "indirect . . . or contingent interest—an interest common to all persons . . . ." in this contested case and their indirect interests can be adequately addressed by other means. *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999) (holding that a party seeking intervention is not entitled to intervene under Rule 24(a) as a matter of right when the potential intervenor's interest is indirect or contingent, not a direct interest).

12. To this point, First Intervenors plainly admit that their organizations' purposes are to "address issues of climate, environmental, racial, and social injustice *across the state*" and to "ensure the political, educational, social, and economic equality of rights *of all persons* and to eliminate racial hatred and discrimination." (Motion I, p. 4, ¶ 8, 9) (emphasis added). While First Intervenors highlight that they "fil[e] Title VI administrative claims in order to enforce anti-discrimination law for the benefit of *its members*[,]" (Motion I, p. 4, ¶ 9) (emphasis added), the intervention they seek in this contested case is not based on a direct and immediate interest of First Intervenors related to the Swine General Permit—the parties are acting on behalf of *others*, in furtherance of First Intervenors' stated organizational missions; not acting on their *own* behalf via their organizations' direct and immediate interests. To the contrary, the party with any potential direct and immediate interest in this matter is Petitioner, North Carolina Farm Bureau Federation, Inc.

13. Additionally, First Intervenors' central claims can *only* be addressed by other means and in the proper venue. First Intervenors' claims are that Respondent "knows or should know that the Swine General Permit has a discriminatory impact on African American, Latinx, and Native American residents" when the permit at issue was issued "without anti-discrimination provisions . . . ." and the permit's issuance without such provisions are in violation of "Title VI of the Civil Rights Act of 1964 and the North Carolina Constitution[,] Article I[,] Section 19." (Motion I, p. 3, ¶ 5). Highlighted by Respondent, First Intervenors' claims, "if legitimate, should be brought in the proper venues; specifically, the U.S. District Court for the Eastern District of North Carolina and/or Wake County Superior Court." (Resp.'s Response, p. 5). The undersigned agrees. The Office of Administrative Hearings is a state agency of limited statutory jurisdiction, not including the ability to hear claims brought under the cited federal statutes or the North Carolina Constitution.

14. Moreover, First Intervenors "could challenge DEQ's issuance of the Swine Permit by filing another Title VI complaint with [the] Environmental Protection Agency . . . ." (Resp.'s Response p. 6). Given these different avenues, First Intervenors can address their stated interests, and claims raised in their motion to intervene by other means and in the proper venue.

15. Provided the analysis set forth *supra*, the first element required to prevail in order to intervene as a matter of right under Rule 24(a)(2) has not been met.

16**.** Regarding the second of the required three elements, analysis is not necessary as the undersigned has concluded that First Intervenors do not have a direct and immediate interest in this matter, establishment of which is required of a showing under the second element set forth in Conclusion of Law #7. Additionally, as for the third element, analysis is not warranted as First Intervenors do not have a valid interest, to comport with Rule 24(a)(2)'s requirements, that would warrant representation. Therefore, analysis regarding the adequacy of representation of an invalid interest is a moot point and requires no further analysis.

17. As demonstrated *supra*, First Intervenors failed to establish a right of mandatory intervention under Rule 24(a)(2).

ii. Permissive Intervention under Rule 24(b)

18. As an alternative basis of intervention, First Intervenors seek permissive intervention under Rule 24(b). In demonstrating that they have claims consisting of common questions of law, they allege that "DEQ has acted arbitrarily and capriciously and failed to follow law, and substantially prejudiced their rights" under N.C. Gen. Stat. § 150B-23(a). First Intervenors also argue that Title VI of the Civil Rights Act of 1964 are referenced by all parties. However, the questions of law raised by Petitioner in the Petition are far narrower than those raised by First Intervenors.

19. As noted by Petitioner, First Intervenors' motion "raises entirely new Title VI and State Constitutional claims that are different from and unrelated to [Petitioner's] allegations of violations of the [Administrative Procedure Act] in its Petition." (Pet.'s Response, p. 6-7). As a result, First Intervenors "thus seek to dramatically expand the scope and nature of this proceeding" and as a result, permissive intervention as full parties "would also invariably result in undue delay and prejudice the rights of [Petitioner] and [Respondent]." *Id*. Moreover, allowing permissive intervention on the bases raised in First Intervenors' motion will shift "the focus of this matter to ancillary constitutional issues that are not within the subject matter of [the Office of Administrative Hearings]." *Id*. The undersigned agrees.

20. When considering whether permissive intervention "will unduly delay the litigation, courts consider if the intervener's claims raise collateral or extrinsic issues." *Sloan v. Inolife Technologies, Inc.*, No. 17CVS306, 2018 WL 3241721, at *1 (N.C. Super. Jan. 18, 2018) (quoting *Chambers v. Moses H. Cone Mem. Hosp.*, 2017 NCBC LEXIS 22, at *25 (N.C. Super. Ct. Mar. 13, 2017)). As demonstrated *supra*, and highlighted by Respondent, allowing First Intervenors to permissively intervene in this contested case will vastly expand the narrow scope of this contested case by raising collateral and extrinsic issues arising under federal statutes and the North Carolina Constitution, of which the Office of Administrative Hearings lacks jurisdiction to adjudicate. The narrow issue raised by Petitioner in this contested case is essentially whether Respondent "unlawfully circumvented the rulemaking procedures and requirements under the APA by issuing the Swine Permit . . . ." (Petition, Attachment 1, p. 3, ¶ 6).

21. Regarding potential similar questions of fact, First Intervenors simply state that "[t]hese questions concern the Title VI complaint and its resolution, and are referenced by both

the petitioners and respondents in their prehearing statements," that First Intervenors and their counsel were invoked as witnesses in Petitioner's Prehearing Statement, and that "[t]he significance of the Title VI process, and the extent to which the law's underlying anti-discrimination provisions generally apply to [Respondent] and the issuance of the Swine General Permit is central to the allegations of all three parties." (Motion I, p. 8, ¶ 24).

22. Based on the above, the undersigned concludes as a matter of law that allowing permissive intervention of First Intervenors under Rule 24(b)(2) will unduly delay and prejudice the adjudication of the rights of the original parties in this contested case. N.C. Gen. Stat. § 1A-1, Rule 24(b)(2) ("In exercising its discretion the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties"); *see Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 460, 515 S.E.2d 675, 683 (1999). As a result, First Intervenors shall not be permitted to permissively intervene under N.C. Gen. Stat. § 1A-1, Rule 24(b)(2).

B. *Board of Agriculture for the State of North Carolina's Motion to Intervene*

Second Intervenor filed Motion II seeking intervention in this contested case pursuant to N.C. Gen. Stat. 150B-239(d) and 26 NCAC 03 .0117(a) and indicated that Petitioner "has no objection to the requested intervention." (Motion II, p. 1).

23. In exercising his discretion under N.C. Gen. Stat. § 150B–23(d), and upon review of Second Intervenor's motion and Respondent's response, the undersigned determines that Second Intervenor shall be permitted to intervene in this contested case as *amicus curiae* to file an *amicus* brief in this matter after the evidentiary record is closed and the contested case hearing is complete. The *amicus* brief shall only address the following issue: Whether Respondent erred by circumventing the rulemaking process under the Administrative Procedure Act by adopting and imposing generally applicable conditions and requirements in the Ag Permits that are and have the practical effect of rules as defined by the Administrative Procedure Act. (*See* Petitioner's Prehearing Statement, p. 3, ¶ 2). Second Intervenor shall not be permitted to engage in discovery or participate in any other capacity in this contested case other than the basis set forth in this paragraph. Second Intervenor may not rely on or seek to introduce any evidence not developed by the principal parties in this matter.

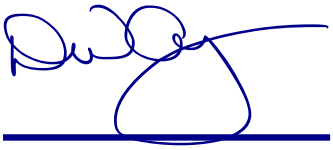
The *amicus* brief shall be filed in accordance with the deadline for the parties' Proposed Final Decisions, which shall be determined by the undersigned at the conclusion of the contested case hearing in this matter.

THEREFORE, based on the foregoing, the undersigned ORDERS the following:

1. The Motion to Intervene filed by the North Carolina Environmental Justice Network (NCEJN) and the North Carolina State Conference of the National Association for the Advancement of Colored People (NC-NAACP) is **DENIED** in its entirety; and

2. The Motion to Intervene, filed by the Board of Agriculture for the State of North Carolina is **GRANTED** subject to the limitations set forth *supra*.

SO ORDERED, this the 6th day of September, 2019.



Donald W Overby
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 9th day of September, 2019.

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