

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.

**MOTION FOR PRELIMINARY  
INJUNCTION TO STAY  
PROCEEDINGS BELOW  
[Rule 65 and N.C.G.S § 150B-48].**

COME NOW 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) (collectively, the Petitioner Movant-Intervenors below, hereinafter “Intervenors”), pursuant to Rule 65 of the N.C. Rules of Civil Procedure and N.C. Gen. Stat. §150B-48, seeking a preliminary injunction to stay the North Carolina Office of Administrative Hearings (“OAH”) proceedings in this contested case pending the determination of Intervenors’ Petition for Judicial Review, filed contemporaneously with this Motion. In support of this Motion, Intervenors show the court:

1. On May 10, 2019, the North Carolina Farm Bureau Federation (“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. Farm Bureau Pet’n for Contested Case, filed May 10, 2019, Docket No. 19 EHR 2739, 2740 and 2741.

2. 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.”

3. DEQ filed a Motion for Judgment on the Pleadings on July 2, 2019. That motion is still pending before the OAH and could be ruled on at any time.

4. Discovery in the contested case is proceeding.

5. On September 6, 2019, the NCEJN and NAACP’s Motion to Intervene was denied. The Administrative Law Judge (ALJ) 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.” Order on Motion to Intervene, attached to Petition for Judicial Review as Exhibit A, at 4.

6. The Order denying the Motion to Intervene, which includes findings of fact

and conclusions of law and forecloses Intervenor's ability to participate in the contested case, is a final order pursuant to N.C. GEN. STAT. §150B-34. The inability to intervene in the contested case and to protect Intervenor's interests related to the issuance of the Swine General Permit affects Intervenor's substantial right, and the deprivation of that right will cause them irreparable injury if not corrected before the case further proceeds to hearing and final adjudication of the merits. *See, e.g. Edwards v. Richardson*, 255 N.C. App. 693, 803 S.E.2d 870 (2017) (order denying motion to intervene affects a substantial right).

7. Pursuant to N.C. GEN. STAT. § 150B-43, Intervenor's are "persons aggrieved" (defined as "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" under N.C. GEN. STAT. § 150B-2(6)) and have exhausted all administrative remedies made available to them by statute or agency rule. They are therefore entitled to and have now sought judicial review of the ALJ's Order by this Court.

8. The legislature has expressly recognized that it may be necessary to stay an administrative decision pending judicial review. *See* N.C. GEN. STAT. § 150B-48. Because Intervenor's risk irreparable injury if the litigation and adjudication of the contested case is allowed to proceed while their Petition is pending, Intervenor's are seeking a stay to ensure that, if this court determines that the denial of their motion to intervene should be reversed, their substantial rights are protected and preserved.

9. N.C. GEN. STAT. § 150B-48 provides that "The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of

G.S. 1A-1, Rule 65.” Intervenors satisfy Rule 65’s requirements for obtaining a preliminary injunction or stay of the OAH proceedings where they have demonstrated a likelihood of success on the merits in their appeal of the Order, and where they will be irreparably harmed if the OAH case proceeds without them.

10. As set out more fully in their Petition for Judicial Review, Intervenors have demonstrated a likelihood of success on the merits in their appeal where they met all the requirements for intervention of right pursuant to N.C. Gen. Stat. § 1A-1, N.C. Rule of Civ. Proc. 24 (a)(2), and showed that the ALJ erred in concluding that they “do not have a direct and immediate interest related to the permit.”

11. Through their Motion to Intervene and supporting affidavits, and as further set out in the affidavits attached to this Motion, NCEJN and NC NAACP have established that each organization has both immediate and direct representational interests (on behalf of their members who will be directly harmed by the Swine Permit which is the subject of the contested case), as well as immediate and direct organizational interests (that their respective organizations will suffer injury in fact if the Swine Permit is issued, because both organizations will have to divert resources to counter its discriminatory effects, and DEQ’s actions frustrate their organizational missions). *See* Affidavits of Naeema Muhammad on behalf of NCEJN, and Rev. Dr. T. Anthony Spearman on behalf of NC NAACP, attached hereto as Attachments 1 and 2.

12. Additionally, Intervenors demonstrated likelihood of success on the issue of OAH jurisdiction. Although the Order concluded that the OAH lacked authority to consider claims under federal statutes or the North Carolina Constitution, that

conclusion is inconsistent with other OAH decisions and the Intervenor's claims.

13. As noted in the Petition for Review, 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 14<sup>th</sup> Amendment of U.S. Constitution and Art. I, Sec. 17 of the N.C. Constitution).

14. Additionally, the Order failed to recognize that Intervenor is not seeking an administrative determination of the constitutionality of a statute, but rather a ruling whether DEQ acted arbitrarily or capriciously and/or failed to act as required by law in issuing the 2019 Swine Permit, pursuant to N.C. Gen. Stat. § 150B-23.

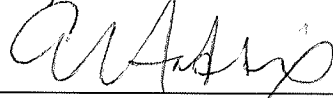
15. The Order affects Intervenor's substantial rights, which will be irreparably harmed if the administrative proceedings below are allowed to continue without Intervenor's participation as parties, because neither DEQ nor Farm Bureau represent Intervenor's interests.

WHEREFORE, Intervenor prays the Court issue an Order, pursuant to Rule 65 and N.C. Gen. Stat. § 150B-48 immediately staying this matter at the OAH and enjoining any further proceedings in that matter, pending the resolution of Intervenor's Petition for Judicial Review. Intervenor's counsel will be available for a hearing on this Motion should the Court deem one helpful to clarify the issues. Counsel have sought to confer with

attorneys for all parties in an effort to discern their availability for a hearing within the next two weeks.

Respectfully submitted, this the 2<sup>nd</sup> day of October, 2019.

Lawyers' Committee for Civil Rights Under Law



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Elizabeth Haddix  
NC State Bar No. 25818  
Mark Dorosin  
NC State Bar No. 20935  
P.O. Box 956  
Carrboro, NC 27510  
(919) 914-6106  
ccr@chambersccr.org

*Attorneys for Intervenors*

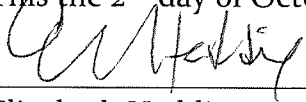
## CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing MOTION FOR PRELIMINARY INJUNCTION TO STAY 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:

Phillip Jacob Parker, Jr.  
Stephen A. Woodson  
N.C. Farm Bureau Federation, Inc.  
PO Box 27766  
Raleigh, NC 27611  
[Jake.parker@ncfb.org](mailto:jake.parker@ncfb.org)  
[Steve.woodson@ncfb.org](mailto:steve.woodson@ncfb.org)

Marc Bernstein  
Phillip T. Reynolds  
Taylor H. Crabtree  
N.C. Department of Justice  
Post Office Box 629  
Raleigh, NC 27602  
[mbernstein@ncdoj.gov](mailto:mbernstein@ncdoj.gov)  
[preynolds@ncdoj.gov](mailto:preynolds@ncdoj.gov)  
[tcrabtree@ncdoj.gov](mailto:tcrabtree@ncdoj.gov)

This the 2<sup>nd</sup> day of October, 2019.

  
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Elizabeth Haddix  
*Attorney for Intervenors*

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	)
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	)
v.	)
	)
Department of Environmental Quality,	)
Division of Water Resources,	)
	)
Respondent.	)

**ORDER**

NOW COMES the Undersigned upon the Motion for a Preliminary Injunction and Stay filed in this matter by the North Carolina Environmental Justice Network and North Carolina State Conference of the National Association for the Advancement of Colored People (hereinafter "Intervenors"). Having reviewed the Motion and supporting affidavits, the Petition for Judicial Review (filed contemporaneously), and the arguments of counsel, this Court concludes that Intervenors will be irreparably harmed if this matter is allowed to proceed at the Office of Administrative Hearings during the pendency of their Petition for Judicial Review, and that Intervenors have shown reasonable likelihood of the success



on the merits of the issues presented in their Petition. Therefore, it is hereby ORDERED that, pursuant to Rule 65 and N.C. Gen. Stat. § 150B-48, any further proceedings in this matter are stayed pending the resolution of Intervenors' Petition for Judicial Review.

This the \_\_\_\_\_ day of October, 2019

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Superior Court Judge