**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF NORTH CAROLINA**
**WESTERN DIVISION**

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| ROSE ACRE FARMS, INC.,<br><br>Plaintiff,<br><br>v.<br><br>NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,<br><br>JOHN E. SKVARLA, SECRETARY , THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, and<br><br>TOM REEDER, DIRECTOR, DIVISION OF WATER RESOURCES, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,<br><br>Defendants. | ) | NO. 5:14-CV-00147-D |

**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE OF PAMLICO-TAR RIVER FOUNDATION, FRIENDS OF POCOSIN LAKES NATIONAL WILDLIFE REFUGE, AND WATERKEEPER ALLIANCE**

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## GLOSSARY OF ABBREVIATIONS

Proposed Intervenors refer to the following items using the abbreviations described below.

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| ALJ | Administrative Law Judge |
| DENR | North Carolina Department of Environment and Natural Resources |
| EMC | North Carolina Environmental Management Commission |
| NPDES | National Pollutant Discharge Elimination System |
| OAH | North Carolina Office of Administrative Hearings |
| PTRF | Pamlico-Tar River Foundation |

## INTRODUCTION

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Pamlico-Tar River Foundation, Friends of Pocosin Lakes National Wildlife Refuge, and Waterkeeper Alliance (collectively, "Proposed Intervenors") seek to intervene as Defendant-Intervenors in the above-captioned proceeding. This is the latest attempt in the long-running efforts of Plaintiff ("Rose Acre") to avoid regulation under the Clean Water Act and the National Pollutant Discharge Elimination System ("NPDES") permitting requirements, 33 U.S.C. § 1342. Proposed Intervenors are public interest environmental groups that have advocated to ensure Rose Acre's compliance with the Clean Water Act since as early as 2004, and have protected their own interests as intervenors in Rose Acre's NPDES permit dispute in multiple proceedings and venues since 2011. Proposed Intervenors have full party status as intervenors in the state administrative action that Rose Acre seeks to stay through this present action in federal court. Proposed Intervenors request, in this expeditiously-filed motion, that they be permitted to continue their longstanding and avid protection of their interests and their members' interests by ensuring that Rose Acre complies with the Clean Water Act and operate in accordance with a NPDES permit.

## SUMMARY OF THE NATURE OF THE CASE

The dispute before this Court began as a contested case initiated by Rose Acre in the North Carolina Office of Administrative Hearings ("OAH") in October of 2010, which continued to a final agency decision by the North Carolina Environmental Management Commission ("EMC") in January of 2012, and was pursued in an appeal by Rose Acre to the North Carolina Superior Court in March of 2012. The North Carolina Superior Court issued its Opinion and Order in January of 2013, upholding the final agency decision. *Rose Acre Farms Inc. v. N.C.*

*Dep't of Env't & Natural Res.*, No. 12-CVS-10, 2013 WL 459353 (N.C. Super. Ct. Jan. 4, 2013). In that decision, the Superior Court found that the Clean Water Act's exemption for "agricultural stormwater discharges," 33 U.S.C. § 1362(14), does not apply to any pollutants expelled from the ventilation fans on Rose Acre's confinement houses that reach navigable waters; concluded that the North Carolina Department of Environment and Natural Resources ("DENR") has authority to require Rose Acre to obtain a NPDES permit; and remanded the case to the OAH for an evidentiary hearing on the facts. 2013 WL 459353. Rose Acre did not appeal the Superior Court decision, and the case currently is pending in the OAH for a hearing before an Administrative Law Judge.

Now, more than a year after the Superior Court's remand, Rose Acre impermissibly seeks to re-litigate the already-decided legal claims before this Court. In the present action filed on March 12, 2014, Rose Acre seeks declaratory judgments from this Court that the pollutants expelled from the ventilation fans in its confinement houses that ultimately wash into navigable waters are agricultural stormwater discharges exempt from NPDES permitting requirements; that Rose Acre is not required to obtain a NPDES permit; and that DENR has no authority to require Rose Acre to operate under a NPDES permit. Rose Acre also asks this Court to enjoin DENR from requiring Rose Acre to obtain a NPDES permit and to stay the proceedings currently pending in the OAH.

## STATEMENT OF FACTS

Rose Acre operates an egg production facility in Hyde County, North Carolina which includes twelve high-rise confinement houses holding 3.2 million egg-laying hens. Compl. for Declaratory J. and Req. for Stay of State Administrative Action, ECF No. 5 ¶ 32 ("Compl."). The twelve confinement houses are ventilated by fans, which expel the feathers, dust, litter, and

excrement – containing ammonia – from within the confinement houses. *Rose Acre Farms Inc.*, 2013 WL 459353 ¶ 32; *see also* Compl. ¶ 34. The Rose Acre facility is nearly surrounded – from the north, northeast, east, southeast, and southwest – by bodies of water and wetlands, and also is located approximately two kilometers, or less than one and a quarter miles, from the Pocosin Lakes National Wildlife Refuge ("Wildlife Refuge"). Decl. of Attila Nemecz ¶ 10 & Ex. A ("Nemecz Decl."). Nearly three quarters of the Wildlife Refuge consist of open water, wetlands, or swamp, *see id.* ¶ 5, and the Fourth Circuit has described the Wildlife Refuge as a "115,000-acre wetlands area." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 182 (4th Cir. 2005). The Rose Acre facility also is surrounded by canals and ditches that drain into the Pungo River, a tributary of the Pamlico River. Decl. of Heather Jacobs Deck ¶ 16 ("Deck Decl.").

## I. PROCEDURAL BACKGROUND

In 2004, DENR issued a five-year NPDES permit to Rose Acre for the operation of the egg production facility in Hyde County. *Rose Acre Farms Inc.*, 2013 WL 459353 ¶¶ 2-3. Five years later, on March 25, 2009, Rose Acre applied to DENR for a renewal of its permit. *Id.* ¶ 4. Rose Acre's application for a renewal did not seek any changes to the terms or the best management practices mandated by the 2004 permit. *Id.* ¶ 5. On September 24, 2010, following a public comment period, DENR issued a renewed NPDES permit to Rose Acre. *Id.* ¶ 9.

### A. State Administrative Proceedings

On October 15, 2010, Rose Acre filed a contested case petition in the OAH, challenging the newly renewed NPDES permit and arguing that DENR has no authority to require Rose Acre to operate under a NPDES permit. *See id.* ¶ 13; *Rose Acre Farms, Inc. v. N.C. Dep't of Env't & Natural Res.*, 10 EHR 6501, 2012 WL 1072764 (N.C. Office of Admin. Hearings Jan. 30, 2012).

On or about October 17, 2011, the Administrative Law Judge ("ALJ") issued a recommended decision granting Rose Acre's motion for summary judgment. *Rose Acre Farms Inc.*, 2013 WL 459353 ¶ 18. Pursuant to state law, the contested case then went to the EMC for a final agency decision. *See* N.C. Gen. Stat. § 150B-34(a) (2011).[1]

Proposed Intervenors, whose motion to intervene before the OAH had been rejected by the ALJ as untimely, filed a motion to intervene in the EMC proceeding. *Rose Acre Farms Inc.*, 2013 WL 459353 ¶¶ 19-21. By order dated December 7, 2011, the EMC granted Proposed Intervenors intervention with participation limited to the filing of a written brief. *Id.* ¶ 22. Proposed Environmental Intervenors filed written exceptions to the ALJ's decision and also presented argument before the EMC on January 11, 2012. *See id.* ¶¶ 24-25.

On January 30, 2012, the EMC issued the final agency decision vacating the ALJ's recommending decision and denying Rose Acre's motion for summary judgment. *See Rose Acre Farms, Inc.*, 2012 WL 1072764. In its decision, the EMC described the evidence in the record before it:

> [DENR] supported its response to the motion for summary judgment with materials showing surface water sampling demonstrated that levels of various forms of ammonia and nitrogen, phosphorus, and fecal coliform were higher in waters near the facility after the start of operations. [DENR]'s response also shows that biological materials and agricultural waste in the form of feed, bedding, feathers, dust, litter and other particles are emitted by the ventilation fans and deposited in the facility's stormwater pond and subsequently discharged to the waters of the State.

*Id.* The EMC concluded that this evidence "casts doubt on the correctness" of the ALJ's factual findings that the Rose Acre facility does not discharge pollutants to waters of the State. *Id.* The

[1] This provision has since been amended by 2011 N.C. Sess. L. 398 (S.B. 781), which went into effect on January 1, 2012.

EMC remanded the case back to OAH for "a full evidentiary hearing to determine the facts in the matter." *Id.*

**B. Proceedings before the North Carolina Superior Court**

On or about March 2, 2012, Rose Acre filed a Petition for Judicial Review in Hyde County Superior Court. *Rose Acre Farms Inc.*, 2013 WL 459353 ¶ 27. Proposed Intervenors requested intervention in the proceedings, and in a May 4, 2012 order, the Superior Court granted their motion to intervene of right and permissively. *See Rose Acre Farms, Inc. v. N.C. Dep't of Env't & Natural Res.*, No. 12 CVS 10, 2012 WL 1932471 (N.C. Super. Ct. May 4, 2012). The Superior Court concluded that the Proposed Intervenors "have a demonstrated and strong interest in this proceeding and, in particular, in whether DENR can regulate the Rose Acre facility by requiring it to hold a [NPDES] permit conditioned on certain Best Management Practices, and the disposition of this action may as a practical matter impair or impede the ability of these organizations to protect that interest." *Id.* Proposed Intervenors subsequently participated fully in the proceeding before the Superior Court.

The Superior Court issued its decision on January 4, 2013, affirming the EMC's final agency decision. *Rose Acre Farms*, 2013 WL 459353. The Superior Court found that the Clean Water Act's agricultural stormwater exemption, 33 U.S.C. § 1362(14), "does not apply to pollutants, if there be any, reaching the waters of the State from expulsion by the ventilation fans, if any such pollutants are found to come from the unapplied feather, manure, litter or dust." *Id.* ¶ 55. It concluded that DENR "has the authority to require [Rose Acre] to obtain an NPDES permit." *Id.* ¶ 56.

With respect to the facts of the case, the Superior Court found that "[a]n examination of the entire record reveals a forecast of evidence of discharge by the Respondent [DENR]." *Id.* ¶

57. In reviewing the evidence in the record, the court described "sampling data compiled both prior to the beginning of birds moving into the facility, beginning on August 15, 2006, and from that date until May 31, 2008," the results of which showed that "ammonia nitrogen, total inorganic nitrogen, total phosphorus, and fecal coliform" were "significantly higher" after the start of operations at the Rose Acre facility. *Id.* ¶¶ 59-60. The Superior Court also described the conclusions of a report entitled "Fate of Ammonia Emissions from Rose Acre Farms," prepared by experts retained by Rose Acre. *Id.* ¶¶ 61-66. This report, attached as Exhibit B to the Nemecz Decl., was intended to "provide an independent assessment of the magnitude of N [nitrogen] deposition into the Pocosin [Lakes National Wildlife Refuge] due to $NH_3$ [ammonia] emissions from the Rose Acre Farm." Nemecz Decl. Ex. B at 2. The report concluded that the Rose Acre facility emits 1.04 million kilograms, or approximately 2.29 million pounds, of ammonia each year. *Id.* at 4. These experts estimate that this ammonia deposits between 83,200 and 135,200 kilograms/year of nitrogen within two kilometers of Rose Acre, before reaching the boundary of the Wildlife Refuge; and deposits 8,638 kilograms of nitrogen in the Wildlife Refuge itself each year.[2] *See id.* at 5, 13, 19. The Superior Court concluded that this report by Rose Acre's expert was properly part of the record in the proceeding and should have been, but was not, considered by the ALJ. 2013 WL 459353 ¶¶ 64-66. Ultimately, the Superior Court affirmed the EMC's denial of Rose Acre's motion for summary judgment and remanded the matter to OAH "for an evidentiary hearing upon those issues raised in the Petition." *Id.* ¶ 76.

[2] 8,638 kilograms is approximately 19,044 pounds. Depending on the model used, this figure can be as high as 66,560 kilogram/year, or 146,740 pounds/year of nitrogen deposited in the Wildlife Refuge. *See* Nemecz Decl. Ex. B at 17.

### C. Present Status of the State Administrative Proceedings

In February of 2014, OAH advised the parties that it intended to set this matter for hearing. Approximately a month later, counsel for Rose Acre informed counsel for Proposed Intervenors that it had filed the Complaint in the above-captioned proceedings and was seeking a stay of the OAH proceedings. Proposed Intervenors have filed an opposition to Rose Acre's motion for stay.

## II. INTERESTS OF PROPOSED INTERVENORS

Proposed Intervenors are non-profit environmental organizations whose members have special connections to the natural resources in the area affected by the Rose Acre facility and who have a strong interest in ensuring that the Clean Water Act protects waterways from the pollution caused by large-scale industrial agriculture operations, such as the Rose Acre facility. When ammonia is released into the air, it is deposited to the earth's surface as nitrogen. *See* Decl. of Marc A. Yaggi ¶ 13 ("Yaggi Decl."); Nemecz Decl. Ex. B. When this nitrogen lands on surface waters, it increases the nutrient levels and acidity of the water body and over time can cause eutrophication of the waters, leading to algae blooms and fish kills. Deck Decl. ¶¶ 8, 16; Yaggi Decl. ¶ 13. As is evidenced in the history of the proceedings, Proposed Intervenors have long sought to protect their interests in healthy waterways and a well-functioning ecosystem in the Pocosin Lakes National Wildlife Refuge against Rose Acre's efforts to avoid regulation under the Clean Water Act for the ammonia and other pollutants released from its confinement houses.

The Pamlico-Tar River Foundation ("PTRF") is a North Carolina not-for-profit organization whose mission is to restore and protect the waters of the Tar-Pamlico River Basin, in which the Rose Acre facility is located. *See* Deck Decl. ¶ 2. To protect this expansive

watershed, PTRF focuses on reducing unpermitted discharges of pollutants – particularly of excess nutrients, such as ammonia and nitrogen, which contribute significantly to the degradation of water quality in a watershed that already has been designated by the state as "nutrient-sensitive." *See id.* ¶¶ 7-9. The over 2,000 members of PTRF have a direct interest in this case because many of them live, work, and recreate in the Tar-Pamlico River Basin, in which the Rose Acre facility is located. *Id.* ¶¶ 3, 21. DENR's authority to regulate discharges from the Rose Acre facility into surrounding waters has a direct bearing on the ability of PTRF's members to safely and enjoyably partake in the many recreational opportunities in the Tar-Pamlico River Basin, to enjoy the watershed's natural beauty, and to protect the value of their property. *Id.*

On behalf of its members, PTRF has worked throughout the past decade to minimize the water pollution from the Rose Acre facility. *Id.* ¶ 11. When Rose Acre first announced its intent to construct a massive egg production facility in the Pamlico-Tar watershed and in close proximity to the Pocosin Lakes National Wildlife Refuge, PTRF, along with others, wrote to DENR repeatedly, expressing concerns about the water quality impacts of the Rose Acre facility and questioning whether the NPDES permit issued by DENR adequately addressed pollution from the facility. *See id.* ¶¶ 12-14 & Exhibits A-C. In 2010, when Rose Acre sought to renew its NPDES permit, PTRF again submitted comments to DENR expressing concern that the draft permit would not adequately reduce or eliminate water pollution caused by ammonia released from the facility. *Id.* ¶ 17 & Ex. F. In 2011, despite having spent years urging DENR to more stringently regulate discharges, including ammonia, from the Rose Are facility, PTRF – along with the other Proposed Intervenors – intervened on behalf of DENR in the EMC and state court proceedings to ensure that Rose Acre's untenable interpretation of the Clean Water Act would

not minimize the scope of DENR's authority to require Rose Acre to operate under a NPDES permit.

Friends of Pocosin Lakes National Wildlife Refuge was formed in 2008 as a non-profit, all-volunteer membership organization whose mission is to protect the Wildlife Refuge and the over 300 wildlife species that depend on the protected habitat within it. *See* Nemecz Decl. ¶¶ 3, 6. The foremost feature of the Wildlife Refuge is its water. *See id.* Ex. A. The Wildlife Refuge consists of five major bodies of water – Scuppernong River, Pungo Lake, New Lake, the northwest and southwest forks of Alligator River, and Lake Phelps – which are interspersed with marshes and wetlands. *Id.* ¶ 7. These waters serve as important habitat for a variety of migratory birds and waterfowl. *Id.* ¶ 6. Members of Friends of Pocosin Lakes enjoy the Wildlife Refuge in a variety of ways – whether through fishing, biking, bird-watching, or observing the varied wildlife in the refuge. *Id.* ¶ 9.

Friends of Pocosin Lakes National Wildlife Refuge and its members consequently have a direct interest in DENR's authority to regulate pollutants from Rose Acre's confinement houses, which Rose Acre's own experts acknowledge are being deposited into the Wildlife Refuge, *see* Ex. B to Nemecz Decl., and contribute to nutrient pollution that can upset the fragile balance of the Wildlife Refuge's ecosystem. Nemecz Decl. ¶ 15. Such water quality degradation directly undermines the efforts of the Friends to preserve and protect the environmental quality of the Wildlife Refuge and also interferes with the ability of its members to recreate and enjoy the natural beauty of the Wildlife Refuge. *Id.* ¶ 15. As a result, Friends of Pocosin Lakes National Wildlife Refuge, like the other Proposed Intervenors, have intervened and participated actively in the administrative and state court proceedings since 2011, to protect their interests by ensuring

that the water pollution caused by Rose Acre's ammonia releases are regulated under a NPDES permit.

Waterkeeper Alliance is a non-profit membership organization with more than 8,000 individual members, some of whom live, work, and recreate within the Tar-Pamlico River Basin. Yaggi Decl. ¶¶ 3, 8. Waterkeeper Alliance also has 215 member programs, including PTRF, which collectively protect more than 100,000 miles of rivers, streams, and coastlines around the world. *Id.* ¶¶ 3-9. A key part of the mission of Waterkeeper Alliance is to protect watersheds from the pollution caused by concentrated animal feeding operations ("CAFOs"), such as the Rose Acre facility. *Id.* ¶¶ 10-12. The Clean Water Act is the primary tool on which Waterkeeper Alliance and its members rely to protect waterways, and Waterkeeper Alliance has been party to virtually every major Clean Water Act litigation involving the regulation of CAFOs, including the two cases over EPA's recent major revisions to the CAFO regulations – *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011), and *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005) – which Plaintiff cites repeatedly in its Complaint, *see* Compl. ¶¶ 2, 45, 54. Yaggi Decl. ¶¶ 14-15. Significantly, Waterkeeper Alliance also is an intervenor in *Alt v. EPA*, No. 2:12-CV-42, 2013 WL 4520030 (N.D. W. Va. April 22, 2013), the key case upon which Rose Acre relies in the present litigation before this Court, *see* Compl. ¶ 6. Yaggi Decl ¶¶ 17-18.[3] *Alt* is currently pending in an appeal before the Fourth Circuit Court of Appeals. *Id.* ¶ 18.

Waterkeeper Alliance and its members therefore have manifold interests in the present proceedings. Not only are its individual members and member affiliates, like PTRF, directly

[3] In *Alt,* the District Court of the Northern District of West Virginia granted intervention to Waterkeeper Alliance and its member organization, Potomac Riverkeeper, recognizing that these groups "seek to protect certain negative implications which could potentially affect the water quality of the Potomac River and its tributaries." *Alt*, 2013 WL 4520030 at *12.

affected by the water pollution resulting from the Rose Acre facility, Waterkeeper Alliance and its members also have a strong interest in ensuring that the Clean Water Act is interpreted appropriately to provide protection against the water pollution resulting from industrial agriculture.

Proposed Intervenors' and their members' strong interests in the outcome of Rose Acre's long-running permit dispute allowed these groups to intervene successfully before both the EMC and the Superior Court. *See Rose Acre Farms, Inc.*, 2012 WL 1932471. Now, Proposed Intervenors' hard-fought victory obtained from the EMC and upheld by the state court – reversing the ALJ's grant of summary judgment to Rose Acre – is in jeopardy as Rose Acre seeks to re-litigate the same questions and issues before this Court. For at least the past three years, Proposed Intervenors have participated fully, alongside Rose Acre, DENR, and other intervenors, in litigating and seeking a resolution to the ongoing dispute now pending before OAH. Their interests consequently are directly at stake in the present action before this Court.

## ARGUMENT

Proposed Intervenors should be granted intervention as of right pursuant to Federal Rule of Civil Procedure 24(a), because they meet all the required criteria for intervention as of right. In addition, Proposed Intervenors meet the criteria for permissive intervention set forth in Federal Rule of Civil Procedure 24(b). Accordingly, this Court should grant permissive intervention as an alternative to intervention as of right.

### I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT

Proposed Intervenors are entitled to intervene as of right because they meet all of the requirements set forth in Rule 24(a) of the Federal Rules of Civil Procedure. Pursuant to Rule 24(a), this Court, upon a "timely motion,"

> must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a); *see also Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991). This Circuit has emphasized that "liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." *Feller v. Brock,* 802 F.2d 722, 729 (4th Cir.1986) (internal quotation marks omitted); *see also In re Grand Jury Proceedings (PHE, Inc.)*, 640 F. Supp. 149, 151 (E.D.N.C. 1986) (emphasizing that Federal Rule of Civil Procedure 24 "is to be liberally construed to allow persons to protect their interests if they are likely to be prejudiced"). As is set forth below, Proposed Intervenors have filed a timely motion requesting intervention; have an interest related to the subject of the above-captioned action; could face impairment of their ability to protect this interest as a result of this Court's disposition; and are not adequately represented by the parties in this action. Accordingly, this Court "must permit" Proposed Intervenors' intervention of right. Fed. R. Civ. P. 24(a).

**A. Proposed Intervenors' Motion is Timely**

Proposed Intervenors timely move to intervene. In determining whether a motion to intervene is timely, courts consider "how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for the tardiness for moving to intervene." *Georgia-Pacific Consumer Products v. Von Drehle Corp*., 815 F. Supp. 2d 927, 930 (E.D.N.C. 2011) (quoting *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989)). Here, Proposed Intervenors are seeking leave to intervene at the earliest possible stage in the proceedings. The suit has not progressed beyond the initial pleadings. Plaintiff filed suit on March 12, 2014. ECF No. 5.

Defendant answered the complaint on May 12, 2014. ECF No. 24. Just two days later, Proposed Intervenors seek leave from this Court to intervene in order to protect their interests in Rose Acre's long-running refusal to accept a NPDES permit. Proposed Intervenors' expeditious request to this Court to take part as Defendants in this matter exhibits no delay and does not prejudice the other parties.

### B. Proposed Intervenors Have a Direct and Substantial Interest Related to the Subject of This Action

Proposed Intervenors have the requisite "direct and substantial" interest in the subject of the action before this Court, *Defenders of Wildlife v. N.C. Dep't of Transp.,* 281 F.R.D. 264, 267 (E.D.N.C. 2012), which seeks to re-litigate many of the same questions that already have been considered and decided by the North Carolina Superior Court in an action in which Proposed Intervenors participated as intervenors. *See also Arista Records, LLC v. Doe No. 1*, 254 F.R.D. 480, 481 (E.D.N.C. 2008) (quoting *Donaldson v. United States,* 400 U.S. 517, 531 (1971)) (describing the "interest" required under Federal Rule of Civil Procedure 24(a)(2) as a "significantly protectable interest").

In *Teague v. Bakker*, the Fourth Circuit, in assessing the sufficiency of the proposed intervenors' interest, concluded that the interest requirement was met because the proposed intervenors "[stood] to gain or lose by the direct legal operation of the district court's judgment on [the plaintiff's] complaint." 931 F.2d at 261. Here, Proposed Intervenors are public interest environmental organizations dedicated to protecting water quality and the integrity of ecosystems, in particular the Tar-Pamlico River Basin and the Pocosin Lakes National Wildlife Refuge. They and their members rely on adequate government oversight of the water pollution caused by Rose Acre's facility, which is made possible through the Clean Water Act's NPDES permitting regime. The direct legal operation of this Court's judgment concerning the scope of

the agricultural stormwater exemption and the characterization of CAFOs as non-"industrial" point sources would directly affect NPDES permitting and consequently, Proposed Intervenors' ability to protect their and their members' interests under the Clean Water Act.

Additionally, Proposed Intervenors are party to the state administrative proceedings that Rose Acre asks this Court to stay and therefore would "stand to gain or lose by the direct legal operation" of this Court's decision to stay the administrative proceedings and re-consider the same questions and claims that Proposed Intervenors already have litigated vigorously and with success before the EMC and state court. *See Teague*, 931 F.2d at 261. The Fourth Circuit's decision in *In re Sierra Club*, 945 F.2d 776 (4th Cir. 1991), which had a somewhat similar procedural background as the present case, is instructive. In vacating the district court's denial of intervention in that case, the Fourth Circuit found that the proposed intervenor Sierra Club had sufficient interest to intervene as of right noting that it was "party to the administrative permitting procedures" involving the state regulation challenged by Plaintiffs in the case before the court; that the Plaintiff's suit had "arise[n] out of the permit proceedings;" and that the Plaintiff's complaint sought to enjoin the defendant state agency from applying the challenged regulation to Plaintiff's permit application. *Id.* at 779. By the same token, Proposed Intervenors have a direct and substantial interest in the present case. Here, Proposed Intervenors have been and currently are party to the administrative permitting procedures before the OAH and EMC. Rose Acre's present suit, which arises out of its objections to the 2010 NPDES permit and contested case before the OAH and EMC, seeks to enjoin Defendant DENR from taking certain action with respect to Rose Acre's permitting situation. The "direct legal operation" of this Court's judgment, in other words, would directly affect the ongoing state administrative proceeding to which Proposed Intervenors are party. *Teague*, 931 F.2d at 261.

### C. Disposition of This Action May Impair Proposed Intervenors' Ability to Protect Their Interest

This Court's disposition of Plaintiff's action may "as a practical matter impair" in multiple ways Proposed Intervenors' ability to protect their direct and substantial interests. *See* Fed. R. Civ. P. 24(a)(2). First, this Court's judgment concerning DENR's authority and the scope of the Clean Water Act's agricultural stormwater exemption could leave unprotected the natural resources that Proposed Intervenors and their members treasure and have long sought to protect. A finding by this Court that DENR does not have authority to require Rose Acre to obtain a NPDES permit would leave Proposed Intervenors and their members without the controls, monitoring, and oversight that occur as part of NPDES permitting, and which are critical to reducing and eliminating the nutrient pollution released from Rose Acre's confinement houses. *See* Deck Decl. ¶ 21; Nemecz Decl. ¶ 16.

Moreover, this Circuit has recognized that "*stare decisis* by itself may furnish the practical disadvantage required" for intervention of right. *Francis v. Chamber of Commerce of U.S.*, 481 F.2d 192, 195 n.8 (4th Cir. 1973); *see also Shenandoah Riverkeeper v. Ox Paperboard, LLC*, 3:11-CV-17, 2011 WL 1870233 at *3 (N.D. W. Va. May 16, 2011) (noting that "several courts have held that *stare decisis* by itself supplies the practical disadvantage that is required for intervention under Rule 24(a)(2)") (citation omitted). Here, Proposed Intervenors regularly participate in litigation as plaintiffs in citizen suits and as intervenors in enforcement actions against CAFOs to advance their organizations' interest in minimizing pollution to local waterways. *See* Deck Decl. ¶ 10, Yaggi Decl. ¶¶ 14-17. In the present case, Rose Acre urges an expanded view of the agricultural stormwater exemption that would remove a significant portion of CAFO discharges from the protective ambit of the Clean Water Act and accordingly could result in increased nutrient pollution to surface waters. This Court's disposition of Plaintiff's

action therefore has the potential to weaken the Clean Water Act as a tool for Proposed Intervenors to accomplish their organizational missions of protecting and restoring natural resources.

Finally, as a result of its extensive participation in litigation concerning the regulation of CAFOs and particularly, its ongoing participation as Intervenor in the *Alt* litigation pending in the Fourth Circuit, Proposed Intervenor Waterkeeper Alliance has a special expertise in the legal issues before this Court. *See* Yaggi Decl. ¶¶ 17-18. Waterkeeper Alliance's experience as a litigant in the Fifth Circuit *National Pork Producers* case and in the Second Circuit *Waterkeeper Alliance* case concerning EPA's revisions to the CAFO regulations, as well as in the *Alt* case as an Intervenor on behalf of Defendant U.S. Environmental Protection Agency, gives Waterkeeper Alliance insight, knowledge, and familiarity with the EPA's regulatory history of CAFOs and the Clean Water Act's agricultural stormwater discharge exemption – an expertise that is not shared by DENR. This Court has found a practical impairment of interests where the proposed intervenor, as here, asserts knowledge that "exceeds that of defendants." *Defenders of Wildlife*, 281 F.R.D. at 268 (finding that "[a]bsent [the proposed intervenor's] intervention, the court would not have benefit of [the proposed intervenor's] unique understanding, and the materials available to the court . . . may be incomplete"). For this reason, too, Proposed Intervenors have demonstrated an impairment of their ability to protect their interests that warrants intervention of right.

### D. The Existing Parties Do Not Adequately Represent Proposed Intervenors' Interest

Proposed Intervenors are entitled to intervention as of right because they also meet the final criteria: their interests are not adequately represented by the existing parties in this litigation. *See* Fed. R. Civ. P. 24(a)(2). To meet this requirement, Proposed Intervenors "need

only show that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal." *Defenders of Wildlife*, 281 F.R.D. at 269 (quoting *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 n.10 (1972)) (internal quotation marks omitted).

First, DENR's interest in representing the general public differs from the interests of Proposed Intervenors, who represent their membership and have specific organizational missions – to protect the Pamlico-Tar River Basin, in the case of PTRF and Waterkeeper Alliance, and to protect the Pocosin Lakes National Wildlife Refuge, in the case of Friends of Pocosin Lakes. *See* Deck Decl. ¶¶ 2-3, Nemecz Decl. ¶¶ 3-4, 8. Courts have widely recognized this difference in interests as sufficient basis for granting intervention to parties who enter the litigation on the same side as the government. *See, e.g.*, *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986) (finding that a government entity would be shirking its duty were it to advance [proposed intervenor's] narrower interest at the expense of its representation of the general public interest"). In *In re Sierra Club*, for instance, the Fourth Circuit granted intervention to proposed intervenor Sierra Club, noting:

> South Carolina [Department of Health and Environmental Control ("DHEC")], in theory, should represent all of the citizens of the state . . . . Sierra Club, on the other hand, appears to represent only a subset of citizens concerned with hazardous waste – those who would prefer that few or no new hazardous waste facilities receive permits. Sierra Club does not need to consider the interests of all South Carolina citizens and it does not have an obligation, though DHEC does, to consider its position vis-a-vis the national union. Although the interests of Sierra Club and South Carolina DHEC may converge at the point of arguing that [the challenged regulation] does not violate the Commerce Clause, the interests may diverge at points involving the appropriate disposition of sections of [the challenged regulation] that may not violate the Commerce Clause, the balance of hardships accruing to the parties . . ., and the public interest factor to be weighed . . . .

945 F.2d at 780. In the present case, while DENR represents the North Carolina public generally, Proposed Intervenors represent a subset of the public who believe that the Clean Water Act is a critical tool for protecting waterways from the nutrient pollution caused by industrial agriculture and seek to ensure that the full scope of the statute is preserved. As in *In re Sierra Club*, Proposed Intervenors in this case need not consider the interests of all North Carolina residents and instead only seek to protect the interests of their members in preserving and restoring the waters of the Tar-Pamlico River Basin and the Pocosin Lakes National Wildlife Refuge. As an intervenor in the ongoing *Alt* litigation, Proposed Intervenor Waterkeeper Alliance also has a specific interest in the interpretation of the agricultural stormwater exemption.

This difference in their respective interests means that Proposed Intervenors and DENR may, and indeed probably, will diverge in the course of litigating the present action. *See, e.g.*, *Funds for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) (granting intervention where federal defendant and proposed intervenor's interests "might diverge during the course of litigation"); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (reversing the district court's denial of motions for intervention and finding separate representation justified where the proposed intervenors "may well have honest disagreements with EPA on legal and factual matters"). Already, DENR's Answer presents different defenses than those raised in Proposed Intervenor's Proposed Answer and does not raise defenses concerning subject matter jurisdiction, res judicata, and the *Younger* abstention doctrine, among others, that Plaintiffs have raised in their Proposed Answer and believe to be crucial for this Court's consideration. *See* ECF No. 24.

Even beyond the divergence between DENR's interest and that of Proposed Intervenors is the legitimate concern that DENR will not vigorously defend its authority to require Rose Acre to obtain a NPDES permit. *See Teague*, 931 F.2d at 262 (finding that the proposed intervenors' interests were not adequately represented where the existing defendants had "financial constraints" that raised a "significant chance that they might be less vigorous than" the proposed intervenor in defending the case); *Mausolf v. Babbitt*, 85 F.3d 1295, 1303-04 (8th Cir. 1996) (finding that the government inadequately represented the proposed intervenor's interests by waiving and failing to enforce the regulations at issue in the case). As evidenced by the efforts of PTRF, Proposed Intervenors have long raised concerns about the inadequacy of the requirements and conditions in the NPDES permit issued by DENR to Rose Acre, and have spent years pushing DENR to do more to control the nutrient pollution caused by Rose Acre. Deck Decl. ¶¶ 12-18; *see also* Yaggi Decl. ¶ 12. In fact, Proposed Intervenors have, more often than not, been adverse to the positions taken by DENR generally, which have tended in Proposed Intervenors' view to be far too lenient and more concerned with facilitating industry activity than protecting the environment. Deck Decl. ¶ 23.

DENR's history of tepid protection of the environment raises the specter that it may reach settlement with Rose Acre in a way that harms the interests of Proposed Intervenors. *See Defenders of Wildlife*, 281 F.R.D. at 269 (finding that the proposed intervenor "satisfied its minimal burden of showing that representation of its interests, absent intervention, may be inadequate" where the proposed intervenor argued that the defendant "could settle this case in a matter that would harm [proposed intervenor's] interests"). The February 2, 2014, coal ash spill at a facility owned by Duke Energy in Eden, North Carolina, and the subsequent investigation into that catastrophe, have heavily implicated DENR's willingness to vigorously protect the

environment and the public and to exercise oversight over polluters.[4] Similarly, DENR may choose not to pursue an appeal, whereas Proposed Intervenors might. *See Rose Acre Farms, Inc.*, 2012 WL 1932471 (concluding that Proposed Intervenors' "DENR may not fully protect the Environmental Intervenors' interests"). Proposed Intervenors' interests therefore are inadequately represented by DENR.[5] To the extent that this Court chooses not to reach this issue, however, Proposed Intervenors should be granted permissive intervention, as described below. *See Evanston Ins. Co. v. G & T Fabricators, Inc.*, 263 F.R.D. 309, 311 (E.D.N.C. 2009) (noting that the proposed intervenor "may be able to satisfy the third element of Rule 24(a)(2) by proving its interests are not adequately represented by the existing parties," but that "the court need not reach this issue" because it exercises its discretion to grant permissive intervention).

## II. ALTERNATIVELY, THIS COURT SHOULD GRANT PROPOSED INTERVENORS PERMISSIVE INTERVENTION

Proposed Intervenors also satisfy the prerequisites for permissive intervention under Federal Rule of Civil Procedure 24(b), which states, in relevant part:

> (1) *In General.* On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . .

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[4] *See, e.g.*, Tyler Dukes, *Duke, DENR kept potential impacts of coal ash dam breaches secret*, WRAL.com, April 1, 2014, http://www.wral.com/duke-denr-kept-potential-impacts-of-coal-ash-dam-breaches-secret/13530422/ (reporting that DENR worked with Duke Energy "for years to ensure information about potential fallout from dam breaches – including those at coal ash ponds – would stay exempt from the state's public records law"); Trip Gabriel, *Ash Spill Shows How Watchdog was Defanged*, N.Y. Times (Feb. 28, 2014), http://www.nytimes.com/2014/03/01/us/coal-ash-spill-reveals-transformation-of-north-carolina-agency.html (reporting that DENR regulators were told to "focus on customer service, meaning issuing environmental permits for businesses as quickly as possible").

[5] This is so notwithstanding the Fourth Circuit's decision in *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013), which found a limited presumption of adequate representation – inapplicable here – where the proposed intervenors "concede that they share the same ultimate objective as the existing [government agency] defendants" and "[b]oth the government agency and the would-be intervenors want [a challenged statute] to be constitutionally sustained." 706 F.3d at 352.

> (3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b). As detailed above, Proposed Intervenors share with the existing parties an interest in the legal questions presented in the present action. Indeed, Proposed Intervenors have been intervenors since 2011 in proceedings that have considered and decided the question of whether Rose Acre is required to obtain a NPDES permit for the releases from its confinement house ventilation fans. Proposed Intervenors are party to the ongoing state administrative proceeding that would consider the questions of fact relevant to the present case.

In considering the question of undue delay or prejudice, this Circuit has "emphasized the seriousness of the prejudice which results when relief from long-standing inequities is delayed." *Hill v. W. Elec. Co., Inc.*, 672 F.2d 381, 386 (4th Cir. 1982) (citation omitted). Here, the proceeding is at its earliest stage, so no party would be prejudiced by delay. Moreover, Proposed Intervenors' long-standing participation in Rose Acre's permit dispute – before both the EMEC and the Superior Court – makes clear that intervention will not unduly prejudice the original parties in this proceeding. Proposed Intervenors are familiar with the parties in this case and with the facts and the legal issues before this Court. Their intervention in the present case simply follows on their past interventions and current involvement in this ongoing dispute initiated by Rose Acre in 2011.

## CONCLUSION

For all of the reasons set forth above, Proposed Intervenors respectfully request that this Court grant them intervention of right, or alternatively, permissive intervention.

Respectfully submitted this 14th day of May, 2014,

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