



STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

ROY COOPER
ATTORNEY GENERAL

REPLY TO:
Thomas D. Henry
Transportation Section

September 20, 2013

Via E-mail and U.S. Mail

Kim Hausen
Chief Hearings Clerk
Office of Administrative Hearings
6714 Mail Service Center
Raleigh, North Carolina 27699-6714
E-mail: oah.clerks@oah.nc.gov

Re: Defenders of Wildlife, et al. v. DENR-DCM; 13 EHR 16087

Dear Ms. Hausen:

Please accept for filing the attached/enclosed Motion to Intervene by the North Carolina Department of Transportation in the above-referenced contested case. Copies will follow by regular mail. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas D. Henry", with a long, sweeping flourish extending to the right.

Thomas D. Henry
Assistant Attorney General

cc (w/encl): Julie Youngman (SELC), counsel for Petitioners, *via U.S. Mail and e-mail*
Christine Goebel (NCDOJ), counsel for Respondent, *via hand delivery and e-mail*
Shelley Blake (NCDOT), General Counsel, *via e-mail*

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RALEIGH, NC 27601

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 EHR 16087

COUNTY OF WAKE

DEFENDERS OF WILDLIFE and)
 NATIONAL WILDLIFE REFUGE)
 ASSOCIATION,)
)
 Petitioners,)
)
 v.)
)
 NORTH CAROLINA DEPARTMENT OF)
 ENVIRONMENT AND NATURAL)
 RESOURCES, DIVISION OF COASTAL)
 MANAGEMENT,)
)
 Respondent.)
 _____)

**MOTION TO INTERVENE
BY THE NORTH CAROLINA
DEPARTMENT OF
TRANSPORTATION**

N.C.G.S. § 1A-1, Rule 24
N.C.G.S. § 150B-23
26 N.C.A.C. 3.0117

NOW COMES the North Carolina Department of Transportation (“NCDOT”), by and through counsel, and respectfully files this Motion to Intervene (“Motion”) in the Office of Administrative Hearings (“OAH”) pursuant to Rule 24 of the North Carolina Rules of Civil Procedure, N.C.G.S. § 150B-23, and 26 N.C.A.C. 3.0117. NCDOT respectfully submits that it should be allowed to intervene with the full rights of a party to defend its permit issued under the Coastal Area Management Act (“CAMA”), N.C.G.S. §113A-100 *et seq.*, authorizing a new bridge to replace the 50-year-old Herbert C. Bonner Bridge (“Bonner Bridge”) on the Outer Banks of North Carolina. In further support of this Motion, NCDOT shows as follows:

Procedural History and Facts

1. This case concerns CAMA major development permit No. 106-12 (“Permit”), which was issued by Respondent North Carolina Department of Environment and Natural Resources, Division of Coastal Management (“DCM”) on September 19, 2012. The Permit authorizes

NCDOT to move forward with the construction of Phase I of NCDOT Project No. B-2500 (“B-2500”).

2. Phase I of B-2500 involves the construction of a new bridge to replace the existing Bonner Bridge, a two-lane crossing over Oregon Inlet in Dare County, which serves as the only roadway connection between Hatteras Island and the mainland. Bonner Bridge, built in the early 1960s, is now 50 years old, is approaching the end of its service life, and is therefore due for replacement. To keep the existing bridge safe and operational for public use, NCDOT invests significant resources in maintaining the current structure. On an annual basis, the bridge carries about 2 million vehicle trips.

3. NCDOT began exploring replacement options for Bonner Bridge in the early 1990s. After years of environmental study, public outreach, and interagency coordination, NCDOT selected a replacement option that calls for the new bridge to be built parallel to and immediately west of the existing Bonner Bridge. The northern and southern termini of the new structure would be located proximately to the termini of the existing Bonner Bridge. The decision to proceed with this replacement option was memorialized in a Record of Decision signed on December 20, 2010 by the Federal Highway Administration (“FHWA”), which acts as NCDOT’s federal transportation partner on federally-funded highway projects.

4. The Permit under challenge in this contested case authorizes construction of the new replacement structure. Petitioners, the Defenders of Wildlife and the National Wildlife Refuge Association, initiated their challenge with the filing of a Third Party Hearing Request, directed to DCM and the Coastal Resources Commission, on October 8, 2012. See N.C.G.S. § 113A-121.1(b) (“A person other than a permit applicant or the Secretary who is dissatisfied with a

decision to deny or grant a minor or major development permit may file a petition for a contested case hearing only if the Commission determines that a hearing is appropriate.”).

5. The Coastal Resources Commission denied the Third Party Hearing Request on October 23, 2012, resulting in Petitioners’ filing of a Petition for Judicial Review (“PJR”) in Wake County Superior Court (No. 12 CVS 16364) on November 21, 2012. NCDOT’s Motion to Intervene in the proceeding was granted by the Superior Court on April 1, 2013.

6. After hearing oral arguments from all parties, including NCDOT, on June 25 and 28, 2013, the Superior Court granted the PJR and remanded the matter for a contested case hearing by Order dated July 29, 2013. As a result, Petitioners initiated this contested case in OAH by filing a Petition for Contested Case Hearing on August 1, 2013.

7. The Petitioners involved in this contested case are also involved in a related federal lawsuit which they filed against NCDOT and FHWA concerning the same bridge replacement project. See Defenders of Wildlife, et al. v. N.C. Dep’t of Transp., et al., No. 2:11-cv-00035-FL, 2013 U.S. Dist. LEXIS 133019 (E.D.N.C. September 16, 2013). Petitioners filed their federal lawsuit in July 2011, asserting claims under various federal environmental provisions and seeking to stop the bridge replacement selected by NCDOT and FHWA. On September 16, 2013, the Honorable Louise W. Flanagan of the U.S. District Court for the Eastern District of North Carolina entered an Order, on the parties’ cross motions for summary judgment, which rejected all of Petitioners’ federal claims and granted summary judgment in favor of NCDOT and FHWA. See id.

Timeliness

8. This Motion satisfies the timeliness requirement. See N.C.G.S. § 1A-1, Rule 24; 26 N.C.A.C. 3.0117.

9. “In considering whether a motion to intervene is timely, the trial court considers ‘(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances.’” Hamilton v. Freeman, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859 (2001) (quoting Procter v. City of Raleigh Bd. of Adjust., 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999)), disc. review denied, 355 N.C. 285, 560 S.E.2d 802 (2002).

10. “[I]n practice, ‘[a]s a general rule, motions to intervene made prior to trial are seldom denied.’” Holly Ridge Assocs., LLC v. N.C. Dep’t of Env’t & Natural Res., 361 N.C. 531, 537, 648 S.E.2d 830, 835 (2007) (quoting State Employees’ Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985)).

11. In this matter, the litigation is in its early stages. The Petition was filed only last month, on August 1, 2013. The Notice of Contested Case and Assignment and Order for Prehearing Statements were issued on August 13, 2013. NCDOT is not aware of any formal discovery, dispositive motions, or mediation having taken place. Nor has this contested case been calendared for hearing.

12. Undersigned counsel for NCDOT has consulted with DCM’s counsel, who has indicated that DCM supports NCDOT’s intervention in this contested case. Undersigned counsel for NCDOT has also consulted with Petitioners’ counsel, who has indicated that Petitioners do not intend to file an opposition to this Motion.

13. Therefore, allowing NCDOT’s intervention at this early stage would not prejudice the rights of existing parties or disrupt the flow or integrity of these proceedings.

Intervention as of Right

14. NCDOT seeks to intervene as of right for the purpose of protecting its interest in the challenged Permit.¹

15. “Intervention in a contested case hearing is controlled by interlocking statutes.” Holly Ridge, 361 N.C. at 535, 648 S.E.2d at 834 (discussing N.C.G.S. §§ 1A-1, Rule 24, and 150B-23(d)). Pursuant to section 150B-23(d), “[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.”

16. Rule 24(a)(2) states that, upon timely application, anyone shall be allowed to intervene “[w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

17. NCDOT meets the standard for intervention under Rule 24(a)(2). The Permit under challenge authorizes construction of a replacement structure for a critical component of the State’s transportation infrastructure and directly relates to public property and right-of-way under NCDOT’s control. The Permit is also connected to a \$215 million contract that NCDOT awarded in 2011 to a private contractor for the design and construction of the replacement bridge. Therefore, the Permit, the \$215 million contract, and the lands on which the project will be constructed all constitute the “property or transaction” at the heart of this lawsuit. The disposition of this action may directly impair and impede NCDOT’s ability to proceed with the replacement of the 50-year-old bridge – a bridge on which 2 million vehicle trips depend each

¹ NCDOT does not consent to jurisdiction of this Court as to the adjudication of any other claims or issues, whether arising under state or federal law, other than those that are directly and properly associated with the challenged Permit. See N.C.G.S. § 150B-1(e) (“The contested case provisions of this Chapter do not apply to the following: . . . (8) The Department of Transportation, except as provided in G.S. 136-29.”).

year. Also, the disposition of this action may result in higher costs to NCDOT and the public. NCDOT, the holder of the Permit under challenge and this State's transportation agency, has a direct stake in the litigation, as the agency's interests, mission, and ability to meet the transportation needs of the State could all be impacted.

18. NCDOT's interests are not adequately represented by existing parties. First, Petitioners' interests are adverse to NCDOT's. As for Respondent DCM, the statutory mandates and interests of DCM and NCDOT are plainly distinct. DCM is an agency that regulates activities affecting the coastal environment. NCDOT, meanwhile, is a transportation-focused agency whose activities, by necessity, must sometimes occur in a coastal environment.

19. Furthermore, while both DCM and NCDOT may be represented by the North Carolina Attorney General's Office, DCM and NCDOT are represented by different divisions and attorneys. NCDOT is represented by the Transportation Section of the Civil Division, whereas DCM is represented by the Environmental Division. Separate attorneys are assigned by statute to represent NCDOT: "The Attorney General is authorized to appoint from among his staff such assistant attorneys general and such other staff attorneys as he shall deem advisable to provide all legal assistance for the State highway functions of the Department of Transportation" N.C.G.S. § 114-4.2.

20. Documents and access to information belonging to the Transportation Section are kept separate and apart from DCM's attorneys in the Environmental Division.

21. Therefore, none of the existing parties can adequately represent the interests of NCDOT in this action.

22. Accordingly, NCDOT should be granted intervention as of right under Rule 24(a)(2) with all the rights of a party.

Permissive Intervention

23. In the alternative, this Court may grant permissive intervention to NCDOT because its “claim or defense and the main action have a question of law or fact in common.” N.C.G.S. § 1A-1, Rule 24(b)(2).

24. NCDOT’s positions and the pending contested case have questions of law or fact in common. NCDOT contends that the Permit under challenge was lawfully issued and that the Petition for Contested Case Hearing has no merit.

25. Moreover, there is a strong possibility that Petitioners will attempt to argue issues of law or fact that overlap with the issues in the federal lawsuit between NCDOT and Petitioners. Given the risk that Petitioners may seek findings or rulings in this contested case that diverge from the summary judgment Order entered by the federal court on September 16, 2013, NCDOT should be allowed to intervene here.

26. NCDOT’s intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. As stated in Paragraph 12 above, counsel for both Petitioners and Respondent have been consulted regarding this Motion, and no party has indicated any intent to oppose NCDOT’s intervention.

27. Accordingly, if NCDOT is not granted intervention as of right, NCDOT should be granted permissive intervention under Rule 24(b)(2) with all the rights of a party.

Conclusion

This Motion to Intervene is not accompanied by a pleading setting forth the proposed defense for which intervention is sought as no responsive pleadings are required under the OAH Rules. See 26 N.C.A.C. 3.0117. Upon receipt of an Order allowing the Motion to Intervene,

NCDOT will file a Prehearing Statement within 30 days. NCDOT respectfully submits a Proposed Order granting intervention which is attached hereto as Exhibit A.

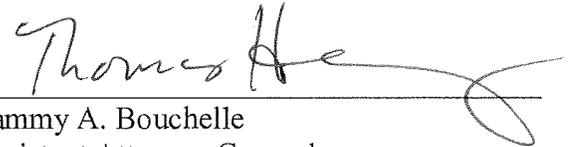
WHEREFORE, NCDOT respectfully requests that this Motion to Intervene be granted and that NCDOT be admitted as a Respondent-Intervenor with all the rights of a party.

Respectfully submitted this 20th day of September 2013.

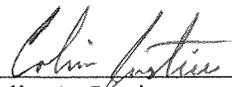
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STATE OF NORTH CAROLINA
COUNTY OF WAKE

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ADMINISTRATIVE HEARINGS
13 EHR 16087

DEFENDERS OF WILDLIFE and)
NATIONAL WILDLIFE REFUGE)
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NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
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)
Respondent.)
_____)

CERTIFICATE OF SERVICE

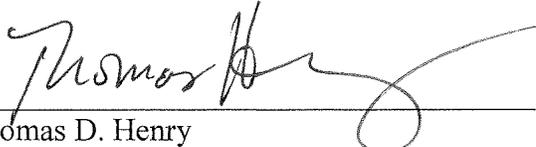
I hereby certify that on this day, the 20th day of September 2013, I served the foregoing **MOTION TO INTERVENE BY THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION** on all parties to this case in the manner indicated and addressed as follows:

By U.S. Mail with adequate pre-paid first class postage affixed thereon, addressed as follows:

Julia F. Youngman, Esq.
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, North Carolina 27516-2356
Attorneys for Petitioners

By hand-delivery:

Christine A. Goebel, Assistant Attorney General
North Carolina Department of Justice
114 West Edenton Street
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Attorney for Respondent



Thomas D. Henry
Assistant Attorney General