

STATE OF NORTH CAROLINA  
COUNTY OF PERQUIMANS

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 EHR 07012

STEPHEN E. OWENS and JILLIAN G.  
BADAWI,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT  
OF ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF ENERGY  
MINERAL AND LAND RESOURCES,

Respondent.

**WEYERHAEUSER COMPANY'S  
MEMORANDUM OF LAW IN SUPPORT  
OF MOTION TO INTERVENE**

Proposed Respondent-Intervenor, Weyerhaeuser Company (“Weyerhaeuser”), respectfully submits this Memorandum of Law in support of its Motion to Intervene in this contested case pursuant to North Carolina General Statutes § 150B-23(d) and Rule 24 of the North Carolina Rules of Civil Procedure. Intervention by Weyerhaeuser in this matter as of right pursuant to N.C. R. Civ. P. 24(a)(2) is proper because it has significant, distinct interests in this litigation and its ability to protect such interests may be impaired by the disposition of this case. In the alternative, the Court should grant Weyerhaeuser permissive intervention pursuant to N.C. R. Civ. P. 24(b)(2) or discretionary intervention pursuant to N.C. Gen. Stat. § 150B-23(d) because the defenses Weyerhaeuser will assert as a respondent in this action have common questions of law and fact with those already in this action and intervention will not result in delay or prejudice to the parties. In further support of its motion, Weyerhaeuser shows the Court as follows:

## INTRODUCTION AND SUMMARY

This contested case involves Stephen E. Owens and Jillian G. Badawi's (collectively, "Petitioners") challenge of the April 29, 2015 decision made by the North Carolina Department of Environmental Quality ("NCDEQ"),<sup>1</sup> Division of Energy, Mineral and Land Resources ("DEMLR") that a wind project being developed by Atlantic Wind, LLC ("Atlantic Wind"), an affiliate of Iberdrola Renewables ("Iberdrola"), on land partially owned by Weyerhaeuser is not subject to the permitting requirements of N.C. Session Law 2013-51, An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities, codified at N.C. Gen. Stat. §§ 143-215.115, *et seq.* (the "Wind Act").

Weyerhaeuser has a direct and substantial interest in the outcome of this contested case. The wind project at issue, the Desert Wind Project, is being developed on lands partially owned by Weyerhaeuser. Atlantic Wind began construction of the Desert Wind Project in the summer of 2015, and it will occupy approximately 22,000 acres of land in Perquimans and Pasquotank Counties; Weyerhaeuser owns approximately 2,938 acres of this land. Affidavit of Aaron Welch ("Welch Affidavit"), ¶ 6. Weyerhaeuser is committed to creating its own energy as well as being a supplier of green energy. It is estimated that the Desert Wind Project will result in revenue of more than \$275,000 per year to Weyerhaeuser, and it is anticipated that this revenue source will increase each year. Welch Affidavit, ¶ 8.

If the court grants the relief sought by Petitioners, Weyerhaeuser will be severely and adversely affected. After obtaining all required regulatory approvals for the project and beginning construction in the summer of 2015, a court order now requiring Atlantic Wind to go through an unnecessary, lengthy and expensive permitting process – months after construction

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<sup>1</sup> Effective September 18, 2015, the North Carolina Department of Environment and Natural Resources was renamed the North Carolina Department of Environmental Quality.

has been initiated – would impose serious financial hardship on Weyerhaeuser with little if any corresponding benefit. If Atlantic Wind is required to go through the permitting process required by the Wind Act, which is only required for wind energy facilities that had not received certain written “Determinations of No Hazard to Air Navigation” from the Federal Aviation Administration (“FAA”) at the time the law became effective, the Desert Wind Project will be significantly delayed, if not defeated, resulting in significant financial losses to Weyerhaeuser. Without intervening in this case, Weyerhaeuser’s ability to protect its interests may practically be significantly impaired if not eliminated altogether. Finally, NCDEQ cannot adequately represent Weyerhaeuser’s interests in this case. NCDEQ is a state agency that represents numerous complex and conflicting interests that are not necessarily aligned with Weyerhaeuser’s interests. Therefore, Weyerhaeuser is entitled to intervene as a matter of right or, alternatively, permissively or discretionarily.

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

On May 17, 2013, the North Carolina General Assembly enacted the Wind Act, creating a new permitting program for future wind energy facilities. N.C. Gen. Stat. §§ 143-215.115, *et seq.* The Wind Act “applies only to those wind energy facilities or wind energy facility expansions that have not received a written ‘Determination of No Hazard to Air Navigation’ issued by the Federal Aviation Administration on or before [May 17, 2013].” S.L. 2013-51, Sec. 2.

Prior to May 17, 2013, Atlantic Wind began developing the Desert Wind Project. In a letter dated April 29, 2015, NCDEQ informed Atlantic Wind that the Desert Wind Project is not subject to the permitting requirements of the Wind Act because the project had received the necessary FAA determinations prior to May 17, 2013. In the summer of 2015, Atlantic Wind began construction of the Desert Wind Project.

The Desert Wind Project will be located on approximately 22,000 acres of land in Perquimans and Pasquotank Counties. Weyerhaeuser owns approximately 2,938 acres of this land. Affidavit of Aaron Welch (“Welch Affidavit”), ¶ 6. In connection with the Desert Wind Project, it is estimated that Atlantic Wind will pay more than \$275,000 per year in lease rental payments to Weyerhaeuser. Welch Affidavit, ¶ 8. It is anticipated that this revenue source will increase each year. *Id.* Weyerhaeuser expects that projects such as the Desert Wind Project will provide an additional stream of revenue with minimal impact on its core business activities. Welch Affidavit, ¶ 9.

On November 3, 2015, NCDEQ filed a motion to dismiss this contested case. Following briefing by the parties, on December 14, 2015, the Court issued an order denying the motion to dismiss. On January 14, 2016, the court issued an Amended Scheduling Order establishing the following deadlines: (i) all dispositive motions and supporting memorandum, if any, shall be filed no later than March 24, 2016; (ii) responses to dispositive motions shall be filed no later than April 5, 2016; (iii) witness and exhibit lists shall be exchanged no later than April 7, 2016; and (iv) the hearing for this contested case shall be heard April 12-13, 2016.

## ARGUMENT

### **I. WEYERHAEUSER IS ENTITLED TO INTERVENE AS OF RIGHT IN THIS CONTESTED CASE BECAUSE ITS MOTION IS TIMELY, AND ITS INTERESTS WILL BE AFFECTED BY THE DISPOSITION OF THIS LITIGATION AND ARE NOT ADEQUATELY PROTECTED BY ANY OTHER PARTY.**

Pursuant to the North Carolina General Statutes, “[a]ny person may petition to become a party [to an administrative hearing] by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24.” N.C. Gen. Stat. § 150B-23(d). Rule 24(a) of the North Carolina Rules of Civil Procedure, in turn, provides for intervention of right as follows:

Upon timely application anyone shall be permitted to intervene in an action: . . .  
(2) When 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.

The question of whether a motion to intervene is timely is left to the discretion of the court after considering the following factors: (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. *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985). Once a motion is determined to be timely, three prerequisites must be met for a party to establish its right to intervene: (i) an interest relating to the property or transaction; (ii) practical impairment of the protection of that interest; and (iii) inadequate representation of the interest by existing parties. *Procter v. City of Raleigh, Board of Adjustment*, 133 N.C. App. 181, 184, 514 S.E.2d 745, 747 (1999).

In light of the factors in *Gentry*, Weyerhaeuser's motion to intervene is timely. This contested case is still in the preliminary stages. Petitioners filed their Petition on or about September 25, 2015, and as set forth in the Amended Scheduling Order, dispositive motions shall be filed no later than March 24, 2016, and the hearing of this contested case shall be heard on April 12-13, 2016. Further, there is no unfairness or prejudice to the parties due to delay, and the motion is not tardy. On the other hand, if the motion is denied, Weyerhaeuser will be unable to protect its property interests. Therefore, this motion is timely. *See Holly Ridge Associates, Inc. v. NCDENR*, 361 N.C. 531, 537 648 S.E.2d 830, 835 (2007) (granting motion to intervene where intervenors moved to intervene two months after the close of discovery and one month

before the contested case hearing); *see also Gentry*, 75 N.C. App. at 264, 330 S.E.2d at 648 (“As a general rule, motions to intervene made prior to trial are seldom denied.”).

Furthermore, Weyerhaeuser meets each of the requirements to establish its right to intervene. First, Weyerhaeuser has a direct, immediate and substantial interest relating to the property and the project that are the subject of this contested case. The Desert Wind Project will be partially constructed on land owned by Weyerhaeuser, and Weyerhaeuser will receive approximately \$275,000 per year in payments from Atlantic Wind in connection with this project. Second, intervention is necessary to protect Weyerhaeuser’s interest. If this Court grants Petitioners’ requested relief, Weyerhaeuser’s right to use, develop, market or sell its property will be significantly impaired, resulting in substantial, adverse economic consequences. This potential impairment of Weyerhaeuser’s interests is clearly sufficient to support intervention as of right. Finally, NCDEQ cannot adequately represent Weyerhaeuser’s interests in this case. NCDEQ is a state agency that represents numerous complex and conflicting interests that are not necessarily aligned with Weyerhaeuser’s interests. Therefore, Weyerhaeuser is entitled to intervene as a matter of right pursuant to Rule 24(a)(2). *See Anderson v. Seascope at Holden Plantation, LLC*, 232 N.C.App. 1, 753 S.E.2d 691 (2014) (holding that property owners’ association was entitled to intervene as a matter of right because it owned the property at issue in the case).

## **II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION TO WEYERHAEUSER.**

If the Court denies Weyerhaeuser’s request for intervention as of right, it should grant permissive intervention pursuant to Rule 24(b)(2) of the North Carolina Rules of Civil Procedure. A moving party seeking to intervene under Rule 24(b)(2) shall be permitted to intervene in an action “when an applicant’s claim or defense and the main action have a question

of law or fact in common” and the intervention does not “unduly delay or prejudice the adjudication of the rights of the original parties.” The defenses that Weyerhaeuser will assert as a respondent in this action clearly have common questions of law and fact with those in this action, and Weyerhaeuser’s intervention in this case will not result in any delay or prejudice to the parties. Thus, in the alternative, Weyerhaeuser should be granted intervention on a permissive basis, pursuant to Rule 24(b)(2). *See Koenig v. Town of Kure Beach*, 178 N.C.App. 500, 631 S.E.2d 884 (2006) (holding that the rule governing permissive intervention when an applicant’s claim or defense and the main action have a question of law or fact in common does not require a permissive intervenor to show a direct personal or pecuniary interest in the subject of the litigation); *see also Virmani v. Presbyterian Health Services Corp.*, 127 N.C.App. 629, 493 S.E.2d 310 (1997) (holding that intervenors satisfied common question of law or fact requirement for permissive intervention).

### **III. FURTHER IN THE ALTERNATIVE, THE COURT SHOULD GRANT DISCRETIONARY INTERVENTION TO WEYERHAEUSER.**

Weyerhaeuser should also be permitted to intervene in this proceeding under the liberal, alternative test for intervention in Office of Administrative Hearings (“OAH”) proceedings pursuant to N.C. Gen. Stat. § 150B-23(d). In addition to the rights to intervene provided by Rule 24 and discussed above, N.C. Gen. Stat. § 150B-23(d) clearly provides a separate more permissive test for discretionary intervention in OAH proceedings. The second sentence of N.C. Gen. Stat. § 150B-23(d) provides: “[A]ny person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.” *See State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 300 N.C. 460, 468, 269 S.E.2d 538, 543 (1980) (concluding that discretionary intervention under the APA is “without limitation” and broader than the permissive intervention under Rule 24). The factors

supporting intervention of right or, alternatively, permissive intervention clearly satisfy the “appropriateness” standard and are sufficient for this Court to exercise its discretion to allow intervention.

For the foregoing reasons, Weyerhaeuser respectfully moves for an Order allowing it to intervene in the above-captioned case and to participate fully as a party in this proceeding as Respondent-Intervenor.

Respectfully submitted this 22<sup>nd</sup> day of February, 2016.

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP



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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE** has been served this day by depositing a copy thereof in the United States mail, postage prepaid and addressed as follows:

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This the 22<sup>nd</sup> day of February, 2016.



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