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February 14, 2022

Ms. Lilian Dorka
Director, External Civil Rights Compliance Office
U.S. Environmental Protection Agency
Mail Code 2310A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: EPA Complaint No. 05RNO-21-R4

Dear Ms. Dorka:

On behalf of the North Carolina Department of Environmental Quality I write in response to EPA's letter dated January 13, 2022, informing the Department that EPA accepted for investigation Complaint No. 05RNO-21-R4. The Complaint focuses on the issuance by DEQ of four permits authorizing the installation of digesters at four swine farms in North Carolina. The purpose of the digesters is to generate biogas resulting from the storage and decomposition of animal waste.

EPA's acceptance letter identifies two areas of investigation: first, the issuance by DEQ of three individual permits and one certificate of coverage authorizing the installation of anaerobic digesters at the four swine farms in North Carolina; and second, whether DEQ is complying with the Title VI general nondiscrimination obligations, including actions to ensure meaningful access to DEQ's services, activities, and programs for those with limited English proficiency and disabilities and whether DEQ's public participation plan is consistent with Title VI and other federal civil rights laws.

Over the past five years, DEQ has been actively engaged in addressing Title VI concerns related to swine farm operations and, more broadly, the agency's decision making and public engagement process. In this response, we provide information regarding DEQ's substantial and continued commitment to Title VI compliance; updated information on the four permits that are the subject of the Complaint and a summary of DEQ actions to develop a general permit for swine farms with digesters. The Department requests that EPA defer its investigation while the permits that are the subject of the Complaint undergo judicial review, as described in more detail herein.



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A. DEQ Actions Prior to the Issuance of Biogas Permits

1. DEQ Reaches Settlement on 2014 Title VI Complaint

DEQ regulates the animal waste management for most swine farms through a general permitting process. The general permit establishes conditions that are applicable to all swine farm operations that request and obtain a certificate of coverage under the general permit. The swine general permit is subject to renewal every five years. In 2014, the North Carolina Environmental Justice Network, Rural Empowerment Association for Community Help, and Waterkeeper Alliance, Inc., filed a Title VI complaint against the Department for the 2014 renewal of the swine general permit. After a series of attempted alternate dispute resolutions, the community groups and DEQ entered mediation in June of 2017. The mediation ultimately resulted in a Settlement Agreement, executed in 2018.¹

The Settlement Agreement outlined numerous DEQ actions to address the concerns raised in the 2014 complaint over a two-year period, including the establishment of a Title VI/Environmental Justice coordinator position, development of an environmental justice tool, and improvement in public participation and language access to DEQ activities. DEQ further agreed to submit the draft 2019 swine general permit to its enhanced stakeholder process to solicit public participation and comments. The Department agreed to draft a rule that would implement a point system to track operators' permit violations, and to conduct twelve-month air and water monitoring studies. Upon the conclusion of the respective studies, the Department agreed to provide the draft reports to interested parties for comment and to publish the final reports on DEQ's website.

On May 4, 2020, DEQ published a follow-up report on the implementation of the Settlement Agreement's requirements and DEQ's compliance with Title VI.² Titled "Title VI: Increasing Equity, Transparency, and Environmental Protection in the Permitting of Swine Operations in North Carolina," the report provides an overview of the actions taken by the Department to improve the swine operations permitting process, including the development of the general swine permit, and identifies further actions DEQ is undertaking and planning to undertake regarding the permitting process, Title VI, and DEQ's environmental justice programs.

¹2018 Settlement Agreement, North Carolina Dep't of Env'tl. Quality (May 3, 2018)

(https://files.nc.gov/ncdeq/documents/files/Final%20Settlement%20Agreement_attachments%20and%20sig.pdf).

² Title VI: Increasing Equity, Transparency, and Environmental Protection in the Permitting of Swine Operations in North Carolina, North Carolina Dep't of Env'tl. Quality (May 4, 2020) (<https://deq.nc.gov/media/15659/download>).



2. DEQ Establishes the Secretary’s Environmental Justice and Equity Advisory Board

On May 2, 2018, then-DEQ Secretary Michael Regan established the Secretary’s Environmental Justice and Equity Advisory Board “to advise the Secretary on the consistent implementation of fair treatment and meaningful involvement of North Carolina citizens across the Department.” The Board is composed of seventeen voting members and must specifically include members of minority communities, scientists and epidemiologists, and representatives from environmental and local community groups.³ The Board meets a minimum of four times a year and DEQ provides extensive public awareness of the meetings.

Over the past three years, the Board’s meeting agendas, developed in conjunction with DEQ staff, have covered numerous topics that are of interest to communities across North Carolina, such as hurricane relief, coal ash closure, climate risk and resilience, natural gas pipelines, and COVID-19.⁴ Through in-person and virtual access, the meetings have become a public forum for discussion of challenging environmental and social justice issues. Each meeting includes time reserved for public comment to the Board on any issues. Following some of the meetings, the Board has issued statements and recommendations for consideration by DEQ.

3. DEQ Establishes Monitoring Requirements for Animal Waste Operations

On April 12, 2019, DEQ issued a renewed general permit for swine farms with several new provisions. The permit included certain monitoring and reporting requirements for all farm operators who requested a certificate of coverage. For example, the general permit required:

a. For each field with a phosphorus index (“P-index”) above a certain threshold, the permittee would be required to conduct a phosphorus loss assessment tool (“PLAT”) analysis and, depending on the results of the PLAT analysis, might have to take certain remedial steps;

b. All permittees must submit annual reports to [DEQ]; and,

³ Detailed guidelines regarding the Board’s membership requirements are outlined in the charter. North Carolina Dep’t of Env’tl. Quality Secretary’s Environmental Justice and Equity Advisory Board Charter, <https://files.nc.gov/ncdeq/EJ/EJEAB-Charter-v2-9-23-20.pdf> (September 29, 2020).

⁴ Information about past and upcoming meetings, as well as presentation materials and other information is made publicly available on our website. <https://deq.nc.gov/outreach-education/environmental-justice/secretarys-environmental-justice-and-equity-board>. *Secretary’s Environmental Justice and Equity Board*, NORTH CAROLINA DEPT’ OF ENVTL. QUALITY, <https://deq.nc.gov/outreach-education/environmental-justice/secretarys-environmental-justice-and-equity-board> (last visited Feb. 14, 2022).



c. The [Department] must require groundwater monitoring if there was evidence of groundwater impacts to off-site wells, or evidence of migrated off-site groundwater contamination or surface water contamination via groundwater.

Shortly after, on May 10, 2019, the North Carolina Farm Bureau Federation filed a contested case in the North Carolina Office of Administrative Hearings challenging the above monitoring and reporting requirements.⁵ The Farm Bureau contended the Department lacked the authority to impose the requirements without first undergoing rulemaking pursuant to the North Carolina Administrative Procedure Act. The Administrative Law Judge ultimately concluded that the challenged permit requirements were void for “violat[ing] the APA in the absence of the rulemaking process.” DEQ has appealed the decision to Wake County Superior Court, where it is now pending.

B. DEQ Action Related to the Subject Digester Permits

1. DEQ Issues Four Digester Permits after Community Involvement and Outreach

Before making a final decision on the four permits that are the subject of the Complaint, DEQ sought comments and input from the public and the surrounding communities. The Department held a public comment period on the draft permits from December 22, 2020, through January 29, 2021, with a virtual public meeting conducted on January 26, 2021. Notice of the virtual public meeting was advertised in English and Spanish and was first issued on December 22, 2020.⁶

Information detailing both the public comment period and virtual public meeting was posted on DEQ’s webpage and emailed directly to the Department’s interested parties’ lists. Along with publication of the draft permits and the relevant application materials, DEQ issued a Draft Environmental Justice Report.⁷ The Report was posted on the Department’s website alongside the permit application materials and sent directly to interested parties.

⁵ *North Carolina Farm Bureau Federation Inc., v. NC Department of Environmental Quality (“DEQ”)*, 19 EHR 2739, 2740, 2741, at *5 (Feb. 9, 2021) (Attachment A).

⁶ Notice of Public Meeting and Public Comment Period on Animal Operation Biogas Permit Requests, Dep’t of Env’tl. Quality, (Dec. 22, 2020) <https://deq.nc.gov/media/17806/download>.

⁷ *Swine Farm Permit Modifications Draft Environmental Justice Report*, North Carolina Dep’t of Env’tl. Quality (Dec. 22, 2020) (<https://files.nc.gov/ncdeq/afo/Biogas-DWR-Draft-EJ-Report.pdf>).



The Department also contacted local media and provided news releases to be published in the Sampson Independent on December 26, 2020, and January 6, 2021, the Duplin Times on December 31, 2020, and January 7, 2021, and in the Wilmington Star-News on December 26, 2020, and January 4, 2021. DEQ directly notified known environmental justice and community organizations, local churches, and the Coharie Indian Tribe. DEQ also advertised the public meeting date and public comment period on various social media platforms in both English and Spanish. Additionally, the Department translated a flyer providing the project information, the Public Meeting details, and the public comment period into Spanish and sent it to known Latinx community groups.

Finally, DEQ mailed notices to sensitive receptors and others located within one mile of each of the four facilities. When the virtual meeting was conducted on January 26, 2021, it included Spanish translations.⁸ On March 31, 2021, the Department published its Swine Biogas Permit Modifications Public Meeting Report and Recommendations wherein it detailed and responded to comments received during the public meeting and throughout the public comment period.⁹

Alongside the publication of the Public Meeting Report and Recommendations, DEQ issued the final permits on March 31, 2021. As a result of comments received during the public meeting and comment period, the final permits included additional monitoring and testing requirements for the permittees. Specifically, in the permits issued to Waters Farm 1–5 M&M Rivenbark Farm, Benson Farm, and Farms 2037 & 2038, Condition III.18 requires quarterly grab sampling and testing for total nitrogen or total Kjeldahl nitrogen, nitrate nitrogen (NO₃-N/NO₂-N), and ammonium nitrogen (NH₄-N).¹⁰ This sampling will occur at the influent and effluent at the digester. DEQ also conducted on-site inspections during the permitting process and, as a result, required Benson Farm, Kilpatrick Farms 1, 2, 4, and 5, and Merritt Farm to submit reports within 180 days of issuance of the permits on any additional best management practices implemented on specific sprayfields that would further reduce the risk of off-site impacts to neighboring properties and the community.

⁸Swine Biogas Processing Permitting Actions and Information, Public Meeting Recordings, (available for download at <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/animal-feeding-operations/swine-biogas>).

⁹ *Swine Biogas Permit Modifications Public Meeting Report and Recommendations*, Dep't of Env'tl. Quality Division of Water Resources, (Mar. 31, 2021) (https://files.nc.gov/ncdeq/afo/BiogasMtgReport20210331_FINAL.pdf).

¹⁰ See Permit No. AWI310035 (Waters Farm 1-5 M&M Rivenbark), Permit No. AWI310039 (Benson Farm), and Permit No. AWI820466 (Farm 2037 and 2038) (available at: <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/animal-feeding-operations/swine-biogas-processing-permitting-actions-and-information>).



2. Current Litigation on Four Biogas Permits

As referenced in the Complaint, on June 1, 2021, two community groups filed a petition for a contested case in the North Carolina Office of Administrative Hearings challenging the four permits the Department issued to Murphy-Brown on March 31, 2021.¹¹ The Petitioners contended that DEQ erred in issuing the four permits because they allege that DEQ did not consider or address the cumulative impacts of the issuance of these permits on water quality and that DEQ did not require the evaluation of alternative technologies that they allege was required by North Carolina law. The Department took the position that it adequately considered cumulative impacts and included conditions in the permits sufficient to address any impact from the installation of the digesters authorized by the permits. It also took the position that North Carolina law did not authorize DEQ to require the consideration of alternative technologies in this context.

On January 11, 2022, the Administrative Law Judge issued a final decision granting summary judgment in favor of the Department and Murphy Brown. The Administrative Law Judge concluded that, as a matter of statutory interpretation, the statutory requirements upon which the Petitioners relied did not apply to the subject swine waste management system permits and therefore that Petitioners' claims failed as a matter of law. On February 7, 2022, the Petitioners filed a petition for judicial review in New Hanover County Superior Court.¹² DEQ will remain in the case as a respondent.

C. **DEQ Develops General Permit for Animal Waste Digesters as Required by 2021 Farm Act**

1. Summary of Farm Act

During its 2021 session, the North Carolina General Assembly adopted the 2021 Farm Act, which requires DEQ to issue a new general permit for swine farms with digesters by July 1, 2022.¹³ DEQ took a neutral position on the bill and limited its role to providing technical comments to bill drafters and stakeholders. Although DEQ retains its authority to issue individual permits for digesters, it is expected that the general permit provisions of the bill will govern most forthcoming applications for digester systems.

¹¹ The ALJ consolidated the contested cases, Nos. 21 EHR 02068, 02069, 02070, and 02071, for review. The Petitioners' Prehearing Statement is included as Attachment B.

¹² Petitioners' Petition for Judicial Review is included as Attachment C.

¹³ N.C. Sess. Law 2021-78, Sec. 11.



2. DEQ Responds to Input from Secretary's Environmental Justice and Equity Advisory Board

In recent months, the Board has addressed the issue of biogas production at swine farms in North Carolina. The Board has taken a forward-looking approach by focusing on the adoption of the 2021 Farm Act and the general permits it authorizes. Following its meeting on August 23, 2021, the Board issued a written advisory statement to the DEQ Secretary with recommendations on the procedural aspects of DEQ's development of the new general permit for animal waste digesters.¹⁴ For example, the Board recommended the use of a facilitator for stakeholder input meetings, holding at least four public meetings, and providing a 90-day public comment period. DEQ has implemented many of the Board's recommendations, as outlined in the response to the Board from Secretary Biser.¹⁵

On October 12, 2021, the Board held a listening session focused on biogas in North Carolina communities¹⁶ and the Board issued a second advisory statement to DEQ with additional suggestions on the content of the 2022 digester general permit.¹⁷ As a result of the Board's previous recommendations, public input and DEQ's commitment to public engagement on this issue, the Department developed a stakeholder process consisting of two technical stakeholder workgroup sessions and one public input session, prior to the drafting of the general permit. DEQ engaged the UNC School of Government to facilitate all three sessions in response to the Board's request for an independent moderator. The technical stakeholder workgroup invitations went to all members of the 'Sunshine List' developed during the previous Title VI settlement as well as participants in the 2019 General permit stakeholder process. DEQ posted a summary of the workgroup sessions prior to the public input session and has considered the public input from the stakeholder process in the development of the draft general permit.¹⁸

¹⁴ Letter from the Environmental Justice and Equity Board to Secretary Elizabeth Biser (Aug. 26, 2021), <https://files.nc.gov/ncdeq/EJ/Biogas-advisory-Final-082621.pdf>.

¹⁵ Letter from Secretary Elizabeth Biser to Environmental Justice and Equity Board Members (Nov. 23, 2021), <https://deq.nc.gov/media/26798/download?attachment>.

¹⁶ The Department issued a press release on September 22, 2021, providing the public with instructions to participate. Press Release, Dep't of Env'tl. Quality, Secretary's Environmental Justice and Equity Advisory Board to hold listening session October 12, (Sept. 22, 2021), (<https://deq.nc.gov/news/press-releases/2021/09/22/secretarys-environmental-justice-and-equity-advisory-board-hold-listening-session-october-12>). The presentation materials and a recording were posted online after the conclusion of the session. See Secretary's Env'tl. Justice and Equity Board, Past Meetings, <https://deq.nc.gov/outreach-education/environmental-justice/secretarys-environmental-justice-and-equity-board#past-meetings>.

¹⁷ Letter from the Environmental Justice and Equity Board to Secretary Elizabeth Biser (Oct. 22, 2021), <https://deq.nc.gov/media/25052/open>.

¹⁸ For a summary of stakeholder working group proceedings, see *Technical Stakeholder Working Group Meeting Summary – Fall 2021*, Dep't of Env'tl. Quality, <https://deq.nc.gov/media/26431/download?attachment>.



3. Issuance of the Draft 2022 Digester General Permit

On February 1, 2022, following the stakeholder meetings conducted in the fall of 2021, DEQ announced the publication of the draft 2022 Digester General Permit. The draft permit includes several provisions related to the operation of digesters. As required by the 2021 Farm Act, the draft permit is based on the provisions in the 2019 general permit for swine farms. Among the additions in the draft permit are periodic sampling requirements for the influent and effluent at the digester for the following constituents: total nitrogen or total Kjeldahl nitrogen, nitrate nitrogen (NO₃-N/ NO₂-N), ammonium nitrogen (NH₄-N). This sampling and testing in the draft general permit would match the testing in the individual permits issued in 2021, as described above.

DEQ also announced the public comment period will run through May 2, 2022.¹⁹ In response to several additional Board and community requests, DEQ will provide the extended 90-day comment period and it will hold four public meetings: three in-person meetings in Sampson, Duplin and Iredell counties, and one virtual session, all scheduled in April 2022. DEQ also plans to provide translated versions of materials posted for public review. To aid in review, DEQ made publicly available “redline” versions of the draft permits, which track the changes, edits, and additions made to the 2022 draft digester general permit as compared to the 2019 General Permit.²⁰ DEQ is currently working to provide Spanish translations of the 2022 draft digester general permits. DEQ simultaneously published its Draft Environmental Justice Report, in which it analyzed significant demographical data and incorporated comments and feedback from the Board. With the expansion of the public comment period, as well as an increased number of public meetings, DEQ hopes to receive additional public comments to consider for the 2022 Digester General Permit.

D. EPA Investigation

DEQ is concerned with the basis and timing for EPA’s decision to commence an investigation in this case. EPA’s regulations indicate that EPA must review a complaint for acceptance “within twenty (20) calendar days of acknowledgment of the complaint.” 40 C.F.R. § 7.120(d)(1)(i) (2021). However, EPA’s acceptance letter of January 13, 2022 was issued 108 days after the date on which the Complaint was submitted to EPA and 104 days after EPA issued its letter entitled “Acknowledgment of Receipt of Administrative Complaint.”

¹⁹ DEQ issued public notice in both English and Spanish. See Notice of Public Meeting, Dep’t of Env’tl. Quality, (Feb. 1, 2022), (<https://deq.nc.gov/media/27078/open>) (English), (<https://deq.nc.gov/media/27079/open>) (Spanish).

²⁰ Swine Farm Digester Waste Management System General Permit Draft, Dep’t of Env’tl. Quality, (Feb. 1, 2022) <https://deq.nc.gov/media/27073/open>; <https://deq.nc.gov/media/27094/open> (redline).



Ms. Lilian Dorka
U.S. EPA
February 14, 2022

It is our understanding that EPA deferred issuing its letter of acceptance for the Complaint until after the order in the administrative hearing on the four digester permits was issued on January 11, 2022. DEQ further understands that EPA's decision to defer acceptance of the Complaint was based on the prudential factors for rejection of a complaint in EPA's Case Resolution Manual (pp. 10-11) which allow EPA to consider if the "the same civil rights allegations have been filed by the complainant against the same recipient in state or federal court individually or through a class action."

DEQ believes that EPA properly deferred action on the Complaint until after the administrative hearing concluded because the basis of the administrative petition and the basis for the Title VI Complaint overlap significantly. DEQ believes that further deferral of an EPA investigation is warranted due to the recent filing of an appeal of the Administrative Law Judge's order. The central question in this appeal is whether, as a matter of state law, DEQ has the authority to implement some of the relief requested by the complainants.²¹ The scope of DEQ's authority as defined by the applicable statutes is squarely presented in an ongoing appeal and resolution of that appeal could have substantial implications for the nature and scope of any potential resolution of this investigation.

Therefore, we believe it is appropriate for EPA to further defer its investigation while that case is under judicial review.

DEQ further believes that the information provided in this letter illustrates the significant priority that DEQ has given to compliance with Title VI requirements, particularly with regard to animal waste permitting.

We appreciate EPA's interest in this matter and look forward to further discussions with you. If you have any questions regarding this response, please contact me at (919) 707-8616 or bill.lane@ncdenr.gov.

²¹ As EPA has stated, in conducting investigations pursuant to Title VI, it is appropriate to assess the scope of the recipient's authority as defined by applicable laws and regulations. EPA, Draft Investigation Guidance, 65 Fed. Reg. 39650, 39671 (June 27, 2000).



Ms. Lilian Dorka
U.S. EPA
February 14, 2022

Sincerely,

Bill Lane

William F. Lane
DEQ General Counsel

Enclosures

cc:

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