

SENT VIA EMAIL

August 10, 2023

Elizabeth S. Biser, Secretary
N.C. Department of Environmental Quality
217 W. Jones Street
Raleigh, NC 27603

Dear Secretary Biser:

The Environmental Justice and Equity (EJE) Advisory Board was formed contemporaneously with the execution, by the Department of Environmental Quality, of a civil rights settlement regarding the issuance of a general permit governing waste management at industrial hog operations. We write today to urge you to direct agency action to mitigate the persistent, discriminatory impact of issuing permits to these operations without adequate protections for public health and the environment.

First, it bears repeating that pollution from hog operations is an environmental justice issue that has affected thousands of North Carolina families for decades. As we observed in a prior advisory statement, submitted in October 2021:

The lagoon and sprayfield waste management system used at industrial hog operations pollutes waterways,¹ contaminates drinking water,² and dirties the air people breathe.³ This pollution and the resulting harms to human health have

¹ Michael A. Mallin et al., Industrial Swine and Poultry Production Causes Chronic Nutrient and Fecal Microbial Stream Pollution, 226 WATER, AIR, SOIL & POLLUTION 407 (2015), *available at* <https://link.springer.com/article/10.1007/s11270-015-2669-y>; Christopher D. Heaney et al., Source Tracking Swine Fecal Waste in Surface Water Proximal to Swine Concentrated Animal Feeding Operations, 511 SCI. TOTAL ENV'T 676 (2015), *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4514616/>; JoAnn M. Burkholder et al., Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality, 115 ENVT.HEALTH PERSP. 308 (2007), *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1817674/>.

² Wendee Nicole, CAFOs and Environmental Justice: The Case of North Carolina, 121 ENVT.HEALTH PERSP. 182, A186 (2013), *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3672924/> (“Even without spills, ammonia and nitrates may seep into groundwater, especially in the coastal plain where the water table is near the surface.”); M.E. Anderson & M.D. Sobsey, Detection and Occurrence of Antimicrobially Resistant E. coli in Groundwater on or near Swine Farms in Eastern North Carolina, 54 WATER SCI.&TECH. 211, 217 (2006), *available at* <https://pubmed.ncbi.nlm.nih.gov/17037155/> (“Overall, the results of this study demonstrated that antibiotic-resistant E. coli were present in groundwaters associated with commercial swine farms that have anaerobic lagoons and land application systems for swine waste management.”); Kenneth Rudo, Groundwater Contamination of Private Drinking Well Water by Nitrates Adjacent to Intensive Livestock Operations (ILOs), N.C. DEP'T OF HEALTH AND HUMAN SERV., 414, 418 (June 1999).

³ Nina G.G. Domingo et al., Air quality-related health damages of food, 118 PROCEEDINGS OF THE NAT'L ACAD. SCI. 1 (May 2021), *available at* <https://www.pnas.org/content/118/20/e2013637118>; Leah Schinasi et al., Air Pollution, Lung Function, and Physical Symptoms in Communities Near Concentrated Swine Feeding Operations, 22 EPIDEMIOLOGY 208, 208 (2011), *available*

burdened neighbors—mainly people of color and low wealth communities—for decades.⁴ As such, this is one of the most significant and well-studied environmental injustices in North Carolina; public health and environmental experts agree on the harm that this system causes for people and the environment.

The adverse impacts of this system of waste management were also acknowledged by EPA, which, in a 2017 letter to DEQ, stated that “adverse impacts on nearby residents from the lagoon spray field method of treatment and disposal of waste from industrial swine operations are documented in numerous peer reviewed scientific studies, including more than thirty conducted in North Carolina.”⁵

The discriminatory impacts of DEQ-permitted hog operations on vulnerable North Carolinians constitute a textbook environmental justice issue. We share the “deep concern” expressed by EPA in its 2017 letter “about the possibility that African Americans, Latinos, and Native Americans have been subjected to discrimination as the result of NC DEQ’s operation of the Swine Waste General Permit program” in violation of Title VI and EPA’s ensuing regulations.⁶ We therefore recommend that the agency act differently, both procedurally and substantively, to ensure fair and equal treatment and meaningful involvement of all North Carolinians, regardless of race, color, national origin, or income, in the development, implementation, and enforcement of these permits.

I. Procedural Recommendations

We understand that DEQ’s Division of Water Resources conducted a “stakeholder” process to solicit input regarding the terms of the primary permits governing hog waste in North Carolina: the swine waste management system general permit (AWG100000) and the swine digester general permit (AWG400000). More than 2000 swine operations hold a certificate of coverage under one of these permits allowing them to operate their waste

at <https://pubmed.ncbi.nlm.nih.gov/21228696/>; Sacoby M. Wilson & Marc L. Serre, Examination of Atmospheric Ammonia Levels Near Hog CAFOs, Homes, and Schools in Eastern North Carolina, 41 *ATMOSPHERIC ENV’T* 4977, 4985 (2007), available at https://www.researchgate.net/publication/223777299_Examination_of_atmospheric_homes_and_schools_ammonia_levels_near_hog_CAMS_in_Eastern_North_Carolina

⁴ Steve Wing & Jill Johnston, Industrial Hog Operations in North Carolina Disproportionately Impact African-Americans, Hispanics and American Indians 2 (2014), available at <https://www.ncpolicywatch.com/wp-content/uploads/2014/09/UNC-Report.pdf> (finding that industrial hog operations are disproportionately located near communities of color and low-wealth communities in eastern North Carolina); Dana Cole et al., Concentrated Swine Feeding Operations and Public Health: A Review of Occupational and Community Health Effects, 108 *ENVTL. HEALTH PERSPECTIVES* 685 (2000), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1638284/>; Kendall M. Thu, Public Health Concerns for Neighbors of Large-Scale Swine Production, 8 *J. AGRIC. SAFETY & HEALTH* 175, 176 (2002), available at

<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.410.1811&rep=rep1&type=pdf>; Steve Wing & Susanne Wolf, Intensive Livestock Operations, Health, and Quality of Life Among Eastern North Carolina Residents, 108 *ENVTL. HEALTH PERSP.* 233 (2000), available at <https://www.jstor.org/stable/3454439>.

⁵ Letter from EPA to DEQ in Case 11R-14-R4 (January 12, 2017).

⁶ *Id.*

management systems. We offer the following procedural observations and recommendations:

(1) DEQ ignored its commitments in the 2018 Title VI Settlement

The settlement agreement included, in Section VI.E.5, a commitment by DEQ to “Create and maintain a database of contacts who have shown or might show interest in participation of [sic] program events as stakeholders.” DEQ stated that its Title VI and Environmental Justice Coordinator would “assist with the expansion of the ‘Sunshine List’ used by DEQ to invite participants in stakeholder processes for permits” and review and update the list “on an annual basis for accuracy.” Apparently, DEQ created a database of contacts, but failed to maintain or update the list.

On March 10, 2023, DEQ invited a select group of individuals to participate--at unspecified times, dates, or locations--in the stakeholder process for the renewal of the same permit that was the subject of the 2018 settlement. DEQ sent multiple invitations demonstrating the agency’s failure to maintain the database of interested stakeholders. For example, the list included four former organizers for NC Environmental Justice Network, none of whom is still employed by the organization and one of whom died in January of 2022. The list included incorrect email addresses for Waterkeeper Alliance staff and multiple North Carolina Riverkeepers. And it included a former REACH employee who has not been with the organization for years. In other words, DEQ did not even keep the contacts updated *for the very organizations to which it promised this maintenance*. Meanwhile, the list failed to include interested stakeholders currently holding leadership positions with each of those organizations. To our knowledge, none of the staff of any of those organizations was contacted, at any point prior to the issuance of stakeholder invitations, to assess the accuracy of the list. Worse still, one of those staff members is also a member of this Board and was not consulted prior to the commencement of the process to ensure interested parties were invited to participate.

In the future, we recommend that DEQ keep all commitments made to community organizations in the context of a Title VI settlement; the parties should not be left questioning whether the state’s promises will be kept.

(2) DEQ should not exclude interested stakeholders in the current review and comment period

When circulating the invitations to participate in the stakeholder process, DEQ initially stated that the invitations were not assignable. The agency literally invited a dead person and insisted that only that specific invitee could occupy one of the limited seats available at the time. Fortunately, in response to multiple objections, DEQ ultimately allowed original invitees to assign their invitations. But the agency required assignment of invitations *before* indicating where the stakeholder meetings would be held, limiting the

ability of an invited party to confirm the availability of an interested alternative before assigning an invitation.

We recommend against the use of invitation-only meetings in the future to afford special access by some interested parties to agency decision makers. We understand that sometimes, such as in the context of legal settlement negotiations, the agency may be prohibited from engaging the broader public. But absent a prohibition against public engagement, we recommend affording equal opportunities to all interested parties.

If, however, the agency insists on soliciting input from a subset of North Carolinians before asking the broader public, we have related recommendations. First, invitations should always be assignable, and representatives from impacted community organizations should receive prioritization. DEQ cannot purport to meaningfully involve communities in a process designed to exclude them. The agency should give those impacted by the decision in question the choice of whether to participate in a related stakeholder process or designate another person to do so.

Second, we recommend that DEQ revisit how it determines interest in a given decision. For instance, when, as here, the agency is soliciting input about a permit that is the subject of a pending lawsuit or administrative complaint, DEQ should invite one or more representatives of the organization(s) that took related legal action. After all, initiation of legal action is a clear indication of interest in the permit in question. In this specific context, for instance, we know that the Environmental Justice Community Action Network, NC Poor Peoples' Campaign, and Duplin County Branch of the NAACP have all engaged in legal action regarding either AWG100000 or AWG400000; however, DEQ did not invite anyone to represent these organizations during the invite-only "technical stakeholder" process. Notably, representatives from two of those organizations sit on this Board. Similarly, there are multiple organizations working to support farmworkers adversely impacted by swine waste management, including as members of the labor force, yet their perspectives were not invited to contribute to DEQ's technical stakeholder process that informed the development of the current draft permit. When an organization has clearly demonstrated interest in the agency action in question, its representatives should not be forced to rely on the goodwill of and coordination with another invitee in order to receive a seat at the table.

(3) DEQ should consult tribal representatives

There are DEQ-permitted hog operations in the service areas of multiple state-recognized American Indian tribes. Analyses based on a study area that excludes the state's five major cities and western counties that have no presence of this industry show that the proportion of Native Americans living within 3 miles of an industrial swine facility is 2.18 times higher than the proportion of non-Hispanic Whites.⁷ Despite this disparate

⁷ Steve Wing & Jill Johnston, *Industrial Hog Operations in North Carolina Disproportionately Impact African-Americans, Hispanics and American Indians 2* (Aug. 2014). Notably, this academic analysis was

adverse impact, DWR did not make any attempt to conduct government-to-government consultations with any of the impacted tribal communities. But tribal consultation is critical when decisions will have impacts on indigenous communities, as underscored by the Lumbee Tribal Council in 2020 when it issued a tribal consultation mandate emphasizing tribal sovereignty and demanding true and meaningful consultation in order to consider and mitigate the impacts upon Lumbee tribal communities.

To be clear, tribal consultation is not the same thing as soliciting stakeholder input from the general public. First, indigenous knowledge and place-based relationships are qualitatively different than those of public stakeholders, and “being comparably situated alongside non-Indigenous organizations devalues centuries or millennia of Indigenous knowledge that may be relevant to the decision at hand and may even enhance or contextualize other types of information.”⁸ In addition, relegation to stakeholder status also undermines efforts of state-recognized Native nations to be viewed as holding and exercising inherent sovereignty. Thus, stakeholder status can be perceived as a tacit dismissal of sovereignty for state-recognized Tribes.

DEQ’s ultimate decision to conduct one public meeting as part of its “stakeholder” process to inform the swine waste management permits, does not remedy the failure to conduct tribal consultation. We recommend that the agency engage tribal representatives whenever, as here, the members of that tribe will be impacted by a permitting decision under consideration by the agency.

II. Substantive Recommendations

We understand that DEQ has recently announced the availability of draft general permits for review and public comment. The renewal of these permits presents another opportunity to advance environmental justice, and our role is to encourage the agency to do so.

In October 2021, we advised as follows:

DEQ must conduct a comprehensive environmental justice analysis that translates into substantive permit conditions to minimize disparate impacts from cumulative impacts of the general permit and other DEQ-permitted operations on surrounding communities, including communities of color and low-wealth communities that are already overburdened by pollution from multiple industries. To be clear, it is not enough for DEQ to evaluate the cumulative effects of permitting decisions on water quality, as required under state environmental law; the agency, as a recipient of federal funding, also has

attached to the Title VI complaint alleging discriminatory impact due to DEQ’s issuance of the swine general permit in 2014.

⁸ Ryan & Emanuel & David E. Wilkins, Breaching Barriers: The Fight for Indigenous Participation in Water Governance, 12 WATER 2113, (July 25, 2020).

obligations under Title VI of the Civil Rights Act of 1964, which require the agency to address harm to vulnerable North Carolinians.

DEQ conceded, in the hearing officers' report published in June 2022 prior to the issuance of the digester general permits, that it did not evaluate cumulative impacts when drafting the general permit. Instead, DEQ seemed to suggest it does not know how to evaluate cumulative impacts, instead noting "ongoing" conversations with NC DHHS and EPA, as well as mentioning efforts to track related approaches in other states.⁹

As you know, this Board has also been researching and consulting experts on the consideration of cumulative impacts. Indeed, we submit our recommendations regarding DEQ consideration of cumulative impacts to you today after more than a year of development and solicitation of expert input. Meanwhile, multiple states have developed mapping tools that, unlike DEQ's community mapping system, are used to inform agency decisions, rather than just agency outreach. Moreover, at the federal level, in the past two years EPA issued guidance on the legal authority and tools available to advance consideration of cumulative impacts before DEQ issued the current digester general permits¹⁰ as well as guidance on environmental justice, civil rights, and permitting.¹¹ and the President issued an executive order in April directing the consideration of cumulative impacts to mitigate adverse impacts on communities with environmental justice concerns.¹²

North Carolina is lagging farther behind other jurisdictions with each day that our leaders insist they need more time to consider how to evaluate and prevent discriminatory impacts of agency actions. More than twenty years ago, in its Environmental Equity Policy, DEQ claimed that it would "Develop guidelines to assess the cumulative effects of permitted facilities" and "Address environmental equity issues in permitting decisions for projects potentially having a disparate impact on communities protected by Title VI of the Civil Rights Act of 1964."¹³

This Board cannot sit idly by as the agency finalizes the permits that will govern swine waste management for the next 5 years without emphasizing the importance of acknowledging and addressing the discriminatory impact of issuing inadequately protective permits to govern swine waste management in our state.

⁹ DWR, Hearing Officer Report, 2022 Digester General Permits 16 (June 30, 2022), *available at* <https://www.deq.nc.gov/water-resources/animalops/digester-systems-general-permits-hearing-officers-report-2022/open> ("DEQ staff has been in regular communication with DHHS Epidemiology staff to advance the collaboration on mapping health data and to discuss the most recent state of the science around cumulative impact calculation and scoring metrics. DEQ is also monitoring the national landscape of the discussion and guidance around cumulative impact scoring, including what other states are implementing, and engaging in discussions with EPA staff regarding the anticipated release of cumulative impact analysis guidance documents by the end of 2022.").

¹⁰ EPA, EPA Legal Tools to Advance Consideration of Environmental Justice (May 2022)

¹¹ EPA, Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions (Aug. 2022).

¹² Executive Order 14096, 88 Fed. Reg. 25251 (April 21, 2023).

¹³ DENR, Environmental Equity Policy (2001).

We recommend DEQ operationalize our recommendations regarding the consideration of cumulative impacts when developing and finalizing general permits governing swine waste management. Notably, since the permits do not expire until 2024, and DWR started the renewal process earlier than ever before, the agency has ample time to notify applicants of the related review and comment process and potential permitting consequences.

III. Conclusion

This Board was chartered to assist the Department of Environmental Quality (DEQ) in ensuring fair and equal treatment and meaningful involvement of all North Carolinians, regardless of race, color, national origin, or income, in the development, implementation, and enforcement of environmental laws and policies. We have, repeatedly, advised the agency on the importance of better protections for neighbors of the state's industrial hog operations. And we will continue to do so until the agency acts to mitigate or eliminate the disparate impacts of the continued use of the lagoon and sprayfield system.

Respectfully submitted on behalf of EJE Advisory Board,

James H. Johnson, Jr., Ph.D., Chair
Marian Johnson-Thompson, Ph.D., Vice Chair