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January 29, 2021

By Electronic Mail: **publiccommentsDWR@ncdenr.gov**

Ramesh Ravella
Department of Environmental Quality
1636 Mail Service Center
Raleigh, North Carolina 27699-1636

Re: Comments on Draft Swine Biogas Permit Modifications (AWS820005, AWI820466, AWI310039, AWI310035)

Dear Mr. Ravella:

On behalf of the **North Carolina Environmental Justice Network (NCEJN),** we submit these Comments on the above-referenced Draft Swine Biogas Permit Modifications issued by the N.C. Department of Environmental Quality (DEQ) Division of Water Resources (DWR). DWR's draft permit modifications allow anaerobic digesters on four of the nineteen swine operations that plan to participate in Align RNG, LLC's (Align's) proposed BF Grady Road biogas project (Grady Road Project). DEQ has an obligation under North Carolina law and Title VI of the Civil Rights Act of 1964 to deny these permit modifications, and we urge DEQ to fulfill that obligation now.

We note at the outset that the "public meeting" that DWR held telephonically on January 26, 2021 to accept comment and answer questions about these Draft Permit Modifications shirked the agency's obligation, under its Public Participation Plan, to be transparent and "meaningfully involve" residents who will be most directly and adversely affected. DWR's dismissal of several questions from those residents during the meeting adds insult to injury. We nevertheless note that despite incorrect access information which left a significant number of people unable to provide comment and ask questions, the number of people calling in to voice their opposition to DWR's issuance of these permit modifications more than doubled the number of individuals calling to support them.

NCEJN is a statewide, grassroots, people of color-led coalition of community organizations and their supporters and members who work with low-income communities and people of color engaged on issues of climate, environmental, racial, and social injustice. NCEJN's mission is to promote equitable treatment, health and environmental equality for all people of North Carolina through community action dedicated to clean industry, safe workplaces, and fair access to all human and natural

resources. It seeks to accomplish these goals through organizing, advocacy, research, and education based on principles of justice, democratic participation, and equitable access to political and economic power for all people. A key component of NCEJN's advocacy has been direct engagement in DEQ's public participation process, particularly regarding the permitting of facilities and other DEQ policies and practices that raise issues of environmental justice and adversely impact and unfairly burden non-white and low-wealth North Carolinians.

NCEJN and its allies have been advocating for decades about the environmental justice impacts of permitted industrial hog operations (IHOs) in eastern North Carolina. That advocacy helped lead to a moratorium on permitting new lagoon and sprayfield waste disposal systems, the Smithfield Agreement in 2000, and eventually to a permanent ban on those systems in 2007. The 2007 statutory performance standards that resulted would substantially reduce IHOs' adverse impacts on nearby residents, who are (as shown by the 2014 Title VI complaint NCEJN, REACH and Waterkeeper Alliance brought against DEQ) disproportionately African American, Latinx and Native American.

The express intent of the Smithfield Agreement and the 2007 legislation was to ultimately eliminate the use of the antiquated and harmful lagoon and sprayfield system. DWR's permit modifications enabling the Grady Road project under the pretense of "clean energy" contravene the 2007 legislation. By issuing these permit modifications, DWR further entrenches the injurious and antiquated lagoon and sprayfield system, which has been proven to have a racially discriminatory impact on Native American, Black and Latinx North Carolinians.

As recently made clear by the Fourth Circuit Court of Appeals, this antiquated system, banned by our legislature over 20 years ago yet continued by DEQ under the Swine General Permit, causes harm to surrounding residents and could and should be replaced by technologies that would greatly reduce that harm. That has not happened because Smithfield Foods will not allow it to happen, and instead of holding that corporation accountable, the State of North Carolina has made itself complicit, by doing things like allowing these permit modifications to entrench an injurious system that burdens communities of color twice as much as it burdens white people in our state.

> Thus, Appellees provided evidence from which a jury could conclude [Smithfield] knew the procedures in place at Kinlaw Farms did not adequately address -- and actually persisted in -- known harms associated with lagoon-and-sprayfield operations and similar tightly controlled large hog farms in the region.

McIver v. Murphy-Brown, LLC, Case No. 19-1019 (Fourth Circuit, November 19, 2020) at 49.

> Appellees provided sufficient proof by demonstrating [Smithfield]'s principals had notice that their policy of maintaining their standard lagoon-and-sprayfield systems, bins, and trucks created annoyance and disturbance

> to neighbors, as evidenced by (i) community comments; (ii) studies focused on their practices and region; (iii) successful legislation/activism to ban their form of farming and find alternatives; (iv) regular inspections of the farm in question, showing knowledge that its practices were by-the-book; and (v) longstanding advocacy to *limit* nuisance suits by neighbors, from which a jury could reasonably infer knowledge that [Smithfield] intended to persist in its methods without amending its conduct to respect its neighbors' use and enjoyment of their property.

Id. at 55.

> In sum, Appellees presented "clear and convincing evidence that [Smithfield] w[as] fully aware" of the nuisance effects of its prescribed farming practices "yet did nothing or worse." *Vandevender*, 901 F.3d at 239. From the evidence here, a jury could reasonably conclude Appellant and its officers "knew -- because they were repeatedly told -- that [their currently prescribed remediation of odors, noise, and pests] was reasonably likely to result in [injury to neighboring properties]." *Id.* at 240. "They nonetheless deliberately continued to disregard duties imposed by law" -- here the duty not to harm neighbors' use and enjoyment of their own land -- "because doing so would increase profits."

Id. at 56.

> Beyond these straightforward improvements, more sophisticated solutions abound. Of note, "Terra Blue" advanced wastewater treatment technology—which was developed under the AG Agreement, *see* Maj. Op., *ante* at 8–9—is known for "pathogen reduction, odor reduction beyond the property boundaries, and . . . treat[ing] . . . wastewater constituents to a high quality before that material is disposed of." J.A. 6985–86. It is sometimes true that economic development and environmental quality are incompatible. But it is not always the case, and the notion that we are invariably forced to a binary choice is a fallacy. Mutual benefit would seem within reach here. Advanced systems may benefit hogs *and* farmers by decreasing hog mortality and increasing weight gain "compared to the traditional lagoon management." *See* J.A. 6392. However, Murphy-Brown never diverged from the lagoon-and-sprayfield system, J.A. 1988, 2005–10, or instructed Kinlaw to implement any available technological improvements, or so much as considered the cost.

Id. at 80-1, Wilkinson, J. concurring.

NCEJN strongly advocates for clean energy solutions to address climate change, we oppose biogas projects that rely on the harmful and archaic "lagoon" and sprayfield system currently used by all of the industrial hog operations that are part of the Grady Road Project. We would not oppose biogas projects which fulfill *all* of the performance standards required by N.C. Gen. Stat. § 143-215.10I and ensure a minimal loss of methane

and other emissions. Compliance with those standards constitutes the "less discriminatory alternatives" required under Title VI of the Civil Rights Act of 1964 and related EPA regulations.

N.C. Gen. Stat § 143-215.1(b)(2) also requires rejection of DWR's Draft Permit Modifications:

> The Commission shall also act on all permits so as to prevent violation of water quality standards due to the cumulative effects of permit decisions. Cumulative effects are impacts attributable to the collective effects of a number of projects and include the effects of additional projects similar to the requested permit in areas available for development in the vicinity. All permit decisions shall require that the practicable waste treatment and disposal alternative with the least adverse impact on the environment be utilized.

Neither DEQ nor DWR have assessed the cumulative effects of allowing these permit modifications for the four operations at issue—not even within the limited context of the additional fifteen operations projected to participate in the Grady Road project. Not only must the adverse impacts from those additional operations to both the environment and surrounding residents be considered, but DEQ must consider the cumulative impacts from other industrial animal operations (including poultry) and other surrounding permitted facilities.

As expertly described in SELC's technical comments, a waste management system that incorporates solid-waste separation and nitrification-denitrification technology is the "practicable waste treatment and disposal alternative" to the proposed anaerobic digesters, with the least adverse impact on the environment. Smithfield Foods, the owner of the four subject operations, can afford this technology and in fact promised over twenty years ago to install it at all its operations. The draft permits are therefore unlawful because DWR has failed to require practicable waste treatment and disposal alternatives.

In addition, Title VI requires that DEQ deny these permit modifications because they have not only cumulative, but racially discriminatory impacts. While DEQ's December 22, 2020 Draft Environmental Justice Report acknowledges that the 209 households living within one mile of these four swine operations are disproportionately African American and Latinx, DEQ fails to assess the impacts these permit modifications will have on those households.

These impacts have been exhaustively documented and presented to DEQ by NCEJN and other advocates across the state, most comprehensively in the 2014 Title VI complaint filed with the EPA by NCEJN and other organizations against DEQ. That complaint--- which asserted that DEQ's swine permitting process and oversight of permitted facilities have a racially discriminatory impact on residents of communities in which these facilities are concentrated—was resolved by a landmark settlement

agreement in 2018. The settlement included a range of express provisions and commitments by DEQ to prioritize Title VI compliance and meaningful engagement on issues of environmental justice. Yet despite these acknowledged obligations, the agency is preparing to approve these permit modifications without engaging in a substantive environmental justice assessment of their impacts.

In addition to DEQ's environmental justice responsibilities pursuant to long-standing federal civil rights legislation and its own stated priorities and policies, Governor Cooper recently recognized the primacy of environmental justice in North Carolina. Executive Order 143, issued on June 4, 2020, states:

> WHEREAS, environmental justice refers to the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies; and
>
> WHEREAS, the U.S. Environmental Protection Agency concludes that "many minority, low income, tribal, and indigenous people in the United States have experienced higher levels of environmental pollution and other social and economic burdens" that "have led to poorer health outcomes, as well as fewer financial or advocacy opportunities;" and
>
> WHEREAS, all North Carolinians have a right to clean air, clean water, clean soil, and a stable climate, and they deserve an opportunity to participate fully and meaningfully in decisions that affect their living environment; . . . .

The Order creates The Andrea Harris Social, Economic, Environmental, and Health Equity Task Force, the duties and responsibilities of which include:

> Environmental Justice and Inclusion.
>
> a. Enhance public engagement and increase public participation by low income, minority communities in Department decisions and actions;
>
> b. Quantify health and welfare benefits of pollution reduction and identify opportunities to increase the deployment of clean energy resources;

c. Advance climate justice by prioritizing actions that equitably reduce greenhouse gas emissions, increase community resilience to the impacts of climate change, and advance sustainable economic and infrastructure recovery efforts for low-income, minority and vulnerable communities; and

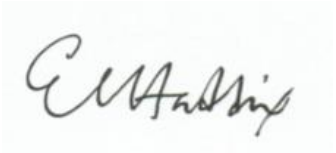
d. Encourage and enhance environmental justice, inclusion and equity education.

The permit modifications under consideration ignore these clear directives and commitments, as well as the both the spirit and the language of the 2007 ban and the Smithfield Agreement. Moreover, it seems clear that the legislature is determined to try and undercut DEQ's role in protecting communities from environmental injustice, as revealed by its willingness to expand the discriminatory lagoon and sprayfield system as a foundational element of the so-called Clean Energy Plan. The legislature further abandoned its obligations under Title VI and to environmental justice when, in an obvious effort to foreordain the approval of this project, it sought to allow the operations involved to circumvent the requirements of the 2007 legislation.[1] Given this legislative reversal and acquiescence to industry, DEQ's oversight of this matter is even more critical.

These permit modifications are inconsistent with the DEQ's legal and statutory obligations, the State's commitment to minimize and eliminate the lagoon and sprayfield system, and the Governor's Executive Order.

For all of the above reasons, we urge DEQ to deny these permit modifications.

Sincerely,



Elizabeth Haddix Mark Dorosin

Managing Attorneys, Lawyers' Committee Regional Office

CC: Title VI Administrator Renee Kramer

[1] See Section 11 of SB 315, https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S315v12.pdf.