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By email and USPS certified mail

Office of External Civil Rights Compliance
U.S. Environmental Protection Agency (Mail code 2310A)
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
Title_VI_Complaints@epa.gov

Re: Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 40 C.F.R. Part 7

INTRODUCTION

On behalf of (b)(6) Privacy, (b)(7)(C) Enf. Privacy, and Friends of the Earth (together, “Complainants”), the Vermont Law and Graduate School’s Environmental Justice Clinic submits this complaint against the North Carolina Environmental Management Commission (“EMC”) and Department of Environmental Quality (“DEQ”) (collectively referred to as “DEQ”) for its failure to adequately regulate the dry litter poultry industry across the State of North Carolina, particularly in (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties. By abdicating its responsibility to regulate the largest industry in the state, DEQ has allowed for an explosion of new dry litter poultry facilities in these counties resulting in environmental, health, and wellbeing harms that disproportionately impact Native American, Black, and Latino residents.¹ These disparate impacts are in violation of Title VI of the Civil Rights Act of 1964 and EPA’s implementing regulations, 40 C.F.R. Part 7.

Last year, animal feeding operations in North Carolina produced 1 billion birds and, at any given time, there are at least 100 chickens and turkeys for every one person in the

¹ See U.S. Dep’t of Agric. Nat’l. Agric. Statistics Services, *2022 N.C. Agric. Statistics* 1, 52 (2022) https://www.nass.usda.gov/Statistics_by_State/North_Carolina/Publications/Annual_Statistical_Bulletin/AgStat/NC_AgStatBook.pdf; *QuickFacts N.C.*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/NC/RHI125221> (last visited Apr. 11, 2023).

state.² These birds are raised in what are known as dry litter poultry facilities. Production involves confining thousands of chickens or turkeys in long barns, and the litter (a combination of feces, urine, water, and sawdust or other bedding) is typically stored in outdoor piles attracting rodents and incubating generations of flies. The smell of the litter has been compared to “rotting meat” and “putrid death.”³ One declarant described the piles of litter or “crust”:

Crust is dumped across the street from my house around every hundred days.... Each of the five piles is over eight feet tall. They stand there and started fuming off. The odor is terrible. Sometimes it feels like the flies are about to eat us alive—the dogs can’t even live in the yard.⁴

Additionally, chemicals and nutrients from the litter run off into the waterways and aerosolized particles from the dust blows across the region, impacting water and air quality and harming residents’ health. One declarant observed:

Rates of asthma and cancer are increasing rapidly while quality of life declines. I cannot prove where the cancer is coming from, but we are starting to see what they call cancer clusters.⁵

Many residents, especially young people, are choosing to leave. But many homeowners are stuck as the industry destroys their quality of life and property values. Declarants describe their predicament:

I helped [my daughter] buy a home but she didn’t want a home here. I remember she told me that she would never come back to [REDACTED] County because people are dying and it’s not going to change unless we do something about it.⁶

The locals here are walking off and leaving their ancestry, saying that there’s a better life out there for us but it sure isn’t here in [REDACTED] County.⁷

² Gavin Off et. al., *With Little Oversight, NC Poultry Farms Raise 1 Billion Birds a Year. Who Pays the Cost?* CHARLOTTE OBSERVER (Jan 27, 2023, 4:47 PM), <https://www.charlotteobserver.com/news/state/north-carolina/article267887592.html>.

³ Keri Brown, *When a Chicken Farm Moves Next Door, Odor May Not Be The Only Problem*, AM. UNIV. RADIO (Jan. 24, 2016), <https://www.wemu.org/2016-01-24/when-a-chicken-farm-moves-next-door-odor-may-not-be-the-only-problem/>; Tanya Eiserer & Mark Smith, *‘The Smell is Putrid Death’: They Had a Nice Place in the Country – Until Hundreds of Thousands of Chickens Moved in Next Door*, WFAA (May 6, 2022), <https://www.wfaa.com/article/news/local/investigates/sanderson-farms-the-smell-is-putrid-death-they-had-a-nice-place-in-the-country-until-hundreds-of-thousands-of-chickens-moved-in-next-door/287-e9b55b0b-97e6-4ab4-95ff-c500c252339e>.

⁴ Decl. of [REDACTED] ¶ 11, attached as Declaration of [REDACTED].

⁵ Decl. of [REDACTED] ¶ 16, attached as Declaration of [REDACTED].

⁶ Decl. ¶ 22.

⁷ Decl. ¶ 24.

In addition to health and environmental concerns, the crusting and poultry houses have impacted my property value. Who's going to come here in their right mind and buy this? If your house worth \$300,000–\$400,000 with adjoining properties, now it drops to \$100,000 because of the surroundings.⁸

Dry litter poultry operates in a unique regulatory gap: it is the only animal feeding operation (AFO) type that is categorically not subject to DEQ permitting requirements or regulatory oversight. At the same time, dry litter poultry is the single largest contributor to excess nutrient pollution in the state's waterways.⁹ Yet North Carolina's legislators and regulators simply stand by.

North Carolina's legislative power is derived from and controlled by the North Carolina Constitution. In 1972, the people of North Carolina adopted an amendment to the Constitution setting forth the public policy on the conservation of natural resources and the protection of environmental quality. The first clause of this provision, the Conservation Clause, explicitly declares conservation of resources and the protection of the public trust to be the public policy of the State. The Conservation Clause provides:

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.¹⁰

As the North Carolina Supreme Court has previously recognized, this provision must guide the interpretation of questions involving the protection and conservation of waters. “Our state constitution mandates the conservation and protection of public lands and waters for the benefit of the public.”¹¹ Similarly, the North Carolina Court of Appeals has used this provision to aid its evaluation of the purposes of the statutes enacted by the General Assembly.¹² This is relevant here because the North Carolina General Statutes direct DEQ to act on permits so as “to prevent violation of water quality standards due to the cumulative effects of permit decisions.”¹³

⁸ (b)(6) Privacy, (b)(7) Decl. ¶ 17.

⁹ N.C. Dep't. Env't. Quality, *Basinwide Manure Production Report: A Comparison of PAN and P2O5 Produced from Poultry, Swine and Cattle Operations in North Carolina*, 1 (2015), https://files.nc.gov/ncdeq/Environmental%20Management%20Commission/Water_Quality_Committee_Meetings/2017/March/Attachments/Basinwide%20Manure%20Production%20Report%20%20Appendices.pdf [“2017 Basinwide Manure Production Report”].

¹⁰ N.C. Const. Art. XIV, § 5.

¹¹ *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 532, 369 S.E.2d 825, 831 (N.C. 1988).

¹² *See Parker v. New Hanover County*, 173 N.C. App. 644, 653, 619 S.E.2d 868, 875 (N.C. Ct. App. 2005).

¹³ N.C. GEN. STAT. § 143-215.1 (b)(2).

DEQ's mutual abdication of its obligations to protect the lands and waters from poultry waste is therefore not only a violation of Title VI, but of its constitutional and statutory duties.

DEQ's purported mission is to provide "science-based environmental stewardship for the health and prosperity of ALL North Carolinians."¹⁴ And yet, despite the dry litter poultry industry's obvious threat to environmental and human health, DEQ does not require dry litter poultry facilities to submit a single document to the agency. A new poultry grower can show up at any time in any location subject only to often permissive local zoning requirements. DEQ does not inspect these facilities or request any information about their operations, not even their locations.¹⁵

As a result of this unchecked regulation, dry litter poultry facilities are overwhelmingly concentrated in areas already overburdened with a long history of environmental discrimination, particularly stemming from the hog industry.¹⁶ For years, communities and advocacy groups have spoken out against the swine industry's "grossly inadequate and outdated" waste management practices inundating eastern North Carolina and impacting the health, environmental, and wellbeing of the region's Native American, Black, and Latino communities.¹⁷ Finally, in 2018, community groups came to a settlement agreement with DEQ after alleging similar Title VI violations in 2014.¹⁸ Now, dry litter poultry facilities are concentrating in the same areas, creating a panoply of cumulative impacts not being accounted for by DEQ.

This complaint alleges DEQ is violating Title VI in two ways. First, DEQ's failure to implement a comprehensive and effective permitting regime for dry litter poultry facilities is a systemic violation of Title VI. Second, because of this systemic failure, DEQ cannot accurately consider cumulative impacts on water quality in its other permitting processes as it is required to do by state statute.¹⁹ Each time DEQ issues a permit without considering the cumulative impacts of dry litter poultry facilities, it is a discrete violation of Title VI. Collectively, this complaint refers to these violations as "DEQ's failure to adequately regulate dry litter poultry facilities."

These failures disproportionately impose adverse environmental, health, and wellbeing effects on Native American, Black, and Latino residents. DEQ cannot justify its abdication of its responsibility to protect the air and water quality in these regions while less discriminatory alternatives exist.

The Complainants call upon EPA to investigate DEQ's violations and implore DEQ to bring dry litter poultry under a comprehensive and adequately protective permitting regime to ensure equitable environmental, health, and wellbeing outcomes for all residents in North Carolina.

¹⁴ *Our Mission*, N.C. DEP'T OF ENV'T. QUALITY, <https://deq.nc.gov/about/history-of-deq> (last visited Apr. 11 2023).

¹⁵ 2017 Basinwide Manure Production Report, *supra* note 9.

¹⁶ U.S. ENV'T PROT. AGENCY, CLOSURE OF ADMINISTRATIVE COMPLAINT (May 7, 2018), https://www.epa.gov/sites/default/files/2018-05/documents/2018-5-7_ncdeq_reach_closure_letter_per_adr_agreement_11r-14-r4_recipien.pdf.

¹⁷ N.C. Env't. Justice Network et. al., *Complaint Under Title VI of the Civil Rights Act of 1964*, 42 U.S.C. §2000d, 40 C.F.R. Part 7, (Sept. 3, 2014), <https://earthjustice.org/wp-content/uploads/north-carolina-ej-network-et-al-complaint-under-title-vi.pdf> ["2014 Swine Complaint"].

¹⁸ CLOSURE OF ADMINISTRATIVE COMPLAINT, *supra* note 16.

¹⁹ N.C. Gen. Stat. § 143-215.1 (b)(2).

I. COMPLAINANTS AND RESPONDENT

Complainant [REDACTED] is a member of the [REDACTED] Tribe of North Carolina. He has lived in [REDACTED] County since he was born. He has worked as the [REDACTED] Riverkeeper for the past four years. The [REDACTED] Riverkeeper position is hosted by the [REDACTED] Alliance, which in turn is licensed by the Waterkeeper Alliance. The Waterkeeper Alliance is a global network of grassroots leaders whose goal is to protect everyone's right to clean water. The Waterkeeper Alliance has more than 300 local waterkeeper groups worldwide, and [REDACTED] Riverkeeper is one of them. The bulk of the river's watershed is located in [REDACTED] County, North Carolina. [REDACTED] mission as the [REDACTED] Riverkeeper is to advocate for the protection of fishable, swimmable, drinkable water for all communities in the [REDACTED] River watershed.

Complainant [REDACTED] is a member of the [REDACTED] Tribe of North Carolina. She was born in the town of [REDACTED] North Carolina, in [REDACTED] County. She currently resides in her ancestral home of [REDACTED], North Carolina. She is married and is a parent of four children, as well as a grandparent to four children. [REDACTED] graduated from the University of North Carolina at Pembroke with a dual degree in mathematics and psychology. For the past four years, [REDACTED] has worked in opposition to the proposed Atlantic Coast Pipeline. She currently works as a [REDACTED] Program Manager for Friends of the Earth. She is part of the leadership team at [REDACTED] Collective. [REDACTED] is also a co-founder of the [REDACTED] County Community Action Center.

Complainant Friends of the Earth is a tax-exempt, nonprofit environmental advocacy organization founded in 1969. Friends of the Earth is headquartered and incorporated in the District of Columbia with additional office space in Berkeley, California, and has staff located across the United States. Friends of the Earth International is the world's largest grassroots environmental federation. In the United States, Friends of the Earth has more than 296,000 members in all 50 states. In North Carolina, Friends of the Earth has more than 6,100 members. Friends of the Earth has members and staff residing in [REDACTED] County, where many dry litter poultry facilities are located. These members act as a grassroots base of support for [REDACTED] County communities.

Respondents North Carolina Department of Environmental Quality ("DEQ") and Environmental Management Commission ("EMC") are state government agencies. The North Carolina General Assembly has charged the EMC and DEQ with protecting the environment and human health. EMC promulgates rules in accordance with the delegating statute and DEQ enforces the rules. DEQ's regulatory divisions are tasked with monitoring permitted facilities and ensuring compliance of projects and licensees. Animal feeding operations such as the dry litter poultry facilities at issue in this complaint fall within DEQ's regulatory authority. This complaint refers to both EMC and DEQ collectively as DEQ.

II. JURISDICTION

EPA has jurisdiction over a Title VI complaint if four criteria are met: the complaint must 1) be in writing; 2) allege discriminatory acts that, if true, violate EPA's nondiscrimination

regulation; 3) identify a recipient of EPA financial assistance as the entity that committed the alleged discriminatory act; and finally, 4) be received within 180 calendar days of the alleged discriminatory act.²⁰

This written complaint is timely filed and identifies violations by DEQ, a state government agency that receives EPA funding and is thus bound by Title VI of the Civil Rights Act of 1964.²¹ At the time of writing this complaint, DEQ has received \$15,870,000 from the EPA for the 2023 fiscal year which constitutes 93.68 percent of their funding.²² As discussed in this Complaint, DEQ’s “deemed permitted” regulatory scheme for dry litter poultry facilities (the “02T Regulations”) results in an ongoing systemic violation of Title VI, and DEQ has engaged in at least two associated discrete actions within the last 180 days by failing to consider the cumulative impacts of dry litter poultry facilities when issuing two new permits within the last 180 days. These permitting decisions and the 02T Regulations themselves violate Title VI because they have disproportionate and adverse impacts on Native American, Black, and Latino residents.

On December 29, 2022 and February 17, 2023, DEQ renewed two Swine Waste Management System General Permits²³ AWG100000 (the “General Permit”) for two swine facilities in (b)(6) Privacy, (b)(7)(C) Enf. Privacy respectively.²⁴ Both facilities are in census blocks identified by DEQ as being potentially underserved—the (b)(6) Privacy, (b)(7)(C) County block is 68.75 percent minority and 36.82 percent low-income and the (b)(6) Privacy, (b)(7)(C) County block is 66.17 percent minority and 62.32 percent low-income.²⁵ These communities experience higher rates of death caused by heart disease, stroke, and diabetes as well as higher rates of infant death and child mortality.²⁶ DEQ is required by N.C. Gen. Stat. § 143-215.1 to “act on all permits as to prevent violation of water quality standards due to the cumulative effects of permit decisions.” Instead,

²⁰ 40 C.F.R. § 7.120; *see also* ENV’T PROT. AGENCY EXTERNAL C. R. COMPLIANCE OFF., CASE RESOLUTION MANUAL, 7-11 (Jan. 2017), https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf.

²¹ 42 U.S.C. § 2000d (2018); 40 C.F.R. § 7.25; 40 C.F.R. § 7.35(b); *see also* Title VI Compliance, N.C. DEPT. OF ENV’T. QUALITY, <https://deq.nc.gov/permits-regulations/title-vi-compliance> (last visited Apr. 11, 2023) (“As a recipient of federal funding, DEQ is required to comply with the rules, laws and regulation of Title VI.”).

²² *Recipient Profile, N.C. Dep’t. of Env’t. Quality*, USASPENDING, <https://www.usaspending.gov/recipient/4c5c9d1f-be52-87a1-3c49-b89303b6df52-C/2023> (last visited Apr. 11, 2023).

²³ The General Permits are the same type of permits at issue in the 2018 settlement agreement between DEQ and community groups impacted by the hog industry. The 2018 complainants shared similar concerns about hog waste as the current complainants have about dry litter poultry waste, particularly around surface and groundwater pollution. *See* 2014 Swine Complaint, *supra* note 17.

²⁴ (b)(6) Privacy, (b)(7)(C) Enf. Privacy Permit No. AWS310123 (Feb. 17, 2023), attached as Exhibit 1 (b)(6) Privacy, (b)(7)(C) Enf. Privacy DEQ, (b)(6) Privacy, (b)(7)(C) Enf. Privacy Permit No. AWS820545 (Dec. 29, 2022), attached as Exhibit 2 [(b)(6) Privacy, (b)(7)(C) Enf. Privacy

²⁵ NCDEQ COMMUNITY MAPPING SYSTEM VER. 1.0, (last accessed Apr. 6, 2023) <https://ncdenr.maps.arcgis.com/apps/webappviewer/index.html?id=1eb0fbe2bcfb4cccb3cc212af8a0b8c8>. (Search for permit numbers AWS820545 (b)(6) Privacy, (b)(7)(C) County) and AWS310123 (b)(6) Privacy, (b)(7)(C) County) and click on the colored section of the map to see general census block information.)

²⁶ NCDEQ ENVIRONMENTAL JUSTICE TOOL MAPS, <https://ncdenr.maps.arcgis.com/apps/dashboards/5b65176a2d494271a871563846c974d7#ObjectID=144758> (Census block in (b)(6) Privacy, (b)(7)(C) County), <https://ncdenr.maps.arcgis.com/apps/dashboards/5b65176a2d494271a871563846c974d7#ObjectID=148227> (Census block in (b)(6) Privacy, (b)(7)(C) County), (last accessed Apr. 12, 2023).

DEQ adopted rules wherein dry litter poultry facilities are “deemed permitted.” As discussed in detail below, DEQ is unable to factor dry litter poultry industry impacts into permit renewals, resulting in DEQ being unable to accurately consider cumulative impacts on water quality in its permitting decisions. As long as these cumulative impacts go unaccounted for, DEQ is in violation of Title VI.

III. FACTUAL BACKGROUND

A. DEQ’s “permitted by regulation” scheme fails to regulate and enforce environmental protections in the dry litter poultry industry.

A public information officer with DEQ said it best:

We regulate swine, we regulate cattle, and so we know where those farms are and we can track what kind of nutrients go into the water. We have no idea where the poultry farms are, we have no idea since they aren’t regulated, but we do know that they are contributing to the pollution in our waters.²⁷

North Carolina General Statute § 143-215.1 delegates the authority to DEQ to regulate concentrated AFOs (CAFOs) and their impacts on state water quality via a permitting scheme.

In general, the delegating statute requires that DEQ “*shall* act on all permits so as to prevent . . . any significant increase in pollution of the waters of the State from any new or enlarged sources.”²⁸ It further requires that DEQ “*shall* also act on all permits so as to prevent violation of water quality standards due to the *cumulative effects of permit decisions*.”²⁹ The statute defines cumulative effects as “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.”³⁰

In accordance with the statute, DEQ regulates animal waste systems due to their impact on water quality under Subchapter 02T. All “animal operations” must obtain a permit before constructing or operating an animal waste management system. Animal operations are defined via state statute as “operations involving 250 or more swine, 100 or more confined cattle, 75 or more horses, 1,000 or more sheep, or 30,000 or more confined poultry with a liquid animal waste management system.”³¹ In order to obtain a permit, the operator must submit an animal waste management plan to DEQ.³² Obtaining a permit makes these animal operations subject to DEQ

²⁷ Keri Brown, *Exclusive: New Report Finds ‘A Lot More’ Poultry Waste Than Officials Realized*, WFDD, (Apr. 6, 2017), <https://www.wfdd.org/story/exclusive-new-state-report-finds-%E2%80%98lot-more%E2%80%99-poultry-waste-officials-realized>.

²⁸ *Id.* § 143-215.1.(b)(1) (emphasis added).

²⁹ *Id.* § 143-215.1.(b)(3) (emphasis added).

³⁰ *Id.*

³¹ N.C. GEN. STAT. ANN. § 143-215.10B(1).

³² 15A N.C. ADMIN CODE 2T.1304.

annual inspections and enforcement.³³ It also means that their locations are publicly available, and DEQ is able to assess their impact on state water quality as required by the statute.³⁴

Strikingly absent from the definition of “animal operations” is dry litter poultry. In fact, the industry is specifically excluded. Since the definition only encompasses *wet* litter poultry, DEQ is free to adopt different rules for regulating dry litter poultry facilities. As such, DEQ issued Subchapter 02T in 2006 and made dry litter poultry facilities “permitted by regulation” under rule 15A NCAC 02T .1303 (“02T Regulations”).

Under the 02T Regulations, only dry litter facilities housing more than 125,000 birds must obtain a permit from DEQ before beginning operations. Only one facility in the state exceeds this number.³⁵ In effect, there are essentially no restrictions on *when* or *where* a dry litter poultry facility begins operations because they are already “deemed permitted.”³⁶

In terms of *how* a dry litter facility operates, there are minimal requirements. The 02T Regulations state that (1) the poultry litter must be applied within agronomic rates to the operator’s land; (2) the litter must be kept at least 100 feet from a well; and (3) the litter cannot be applied on wet land or applied during precipitation events.³⁷

The 02T Regulations also require that facilities holding more than 30,000 birds maintain records that “include the dates the litter was removed, the estimated amount of litter removed, and the location of the sites where the litter was land applied by the poultry operation.” If a manure hauler is used, facilities must have records that include “the dates the litter was removed, the estimated amount of litter removed, and the name, address, and phone number of the manure hauler.”³⁸

The 02T Regulations also prohibit operators from leaving dry litter piles uncovered for more than 15 days (“15-Day Rule”).³⁹ As discussed more thoroughly in section F *infra*, there are myriad health and environmental implications associated with leaving dry litter piles uncovered for even a few days, let alone 15. Further, section D *infra* describes how operators frequently violate this rule, leaving dry litter piles uncovered and fuming for months with no intervention from DEQ.

The 02T Regulations stand in contrast to the oversight afforded the state’s other CAFO operations. DEQ has publicly accessible mapped locations, records, and annual inspection reports from every one of the state’s 2,489 swine CAFOs. Though these measures have generally failed to protect communities and the environment in any meaningful way, dry litter poultry facilities are comparably and egregiously unrestricted.

³³ N.C. GEN. STAT. § 143-215.10F.

³⁴ G.S. § 143-215.1.b(1).

³⁵ *Animal Facility Map*, “List of Permitted Animal Facilities 4-5-2023” N.C. DEP’T OF ENV’T. QUALITY, <https://www.deq.nc.gov/about/divisions/water-resources/permitting/animal-feeding-operations/animal-facility-map> (last visited Apr. 12, 2023).

³⁶ *See Id.*; 15A N.C. ADMIN CODE 2T.1303.

³⁷ 15A N.C. ADMIN CODE 2T.1303(a)(1).

³⁸ 15A N.C. ADMIN CODE 2T.1303(a)(2).

³⁹ 15A N.C. ADMIN CODE 2T.1303(a)(2)(f).

In essence, North Carolina dry litter poultry facilities operate on an honor system. Under the 02T Regulations, DEQ has no knowledge of the state’s dry litter poultry facility locations because such facilities do not need to register or request any permit to begin operation. This hamstring DEQ’s ability to enforce even its minimal rules on dry litter poultry facilities. Further, facilities need not submit records to DEQ. Though the rules require dry litter poultry facilities to keep records on site, DEQ has no system for reviewing whether these records exist or are even in compliance.

In 2017, DEQ’s Division of Water Resources wrote a Basinwide Manure Production Report (“Basinwide Report”) with the objective of estimating the amount of nutrients generated by animal operations that had not been accounted for in previous assessments.⁴⁰ The Basinwide Report summed up the way 02T Regulations undermine the environmental goals of the state: “The locations of dry litter poultry operations and the disposal of their waste are not known to environmental regulators, making it difficult to form a complete picture of possible non-point source contributions within a specific watershed.”⁴¹

B. DEQ directly violates state statute when it is unable to consider cumulative impacts of dry litter poultry facilities when making permitting decisions.

As stated above, DEQ is statutorily obligated to prevent the violation of water quality standards due to the cumulative impact of permit decisions on state waters. This means that DEQ must “include the effects of additional projects similar to the requested permit when issuing or renewing permits.”⁴² The absence of any substantive information about dry litter poultry facilities due to their “deemed permitted” status makes it impossible for DEQ to consider their impact when making water quality permitting decisions⁴³—a clear abdication of DEQ’s statutory authority.

This omission is particularly glaring when DEQ renews general permits for swine CAFOs in areas that have high numbers of both swine and poultry facilities densely packed together. In these situations, DEQ is supposed to consider the cumulative impacts⁴⁴ of a permit renewal on water quality. However, DEQ cannot accurately conduct this analysis because, due to the “permitting by regulation” system, it does not have and therefore cannot include any data on dry litter poultry’s impacts on water quality.

In the last 180 days, DEQ has renewed permits for at least two swine CAFOs in both (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties.⁴⁵ These counties are the top hog producers in the state and are in

⁴⁰ 2017 Basinwide Manure Production Report, *supra* note 9.

⁴¹ *Id.* at 1; see also Catherine Clabby, *By Air, Environmentalists Record More Flooded Farms*, N.C. HEALTH NEWS (Nov. 4, 2016), <https://www.northcarolinahealthnews.org/2016/11/04/by-air-environmentalists-record-more-flooded-farms/> (“We don’t know where all the poultry farms are,” said a spokeswoman for the DEQ who stressed that the agency welcomes any data the environmental groups provide.”).

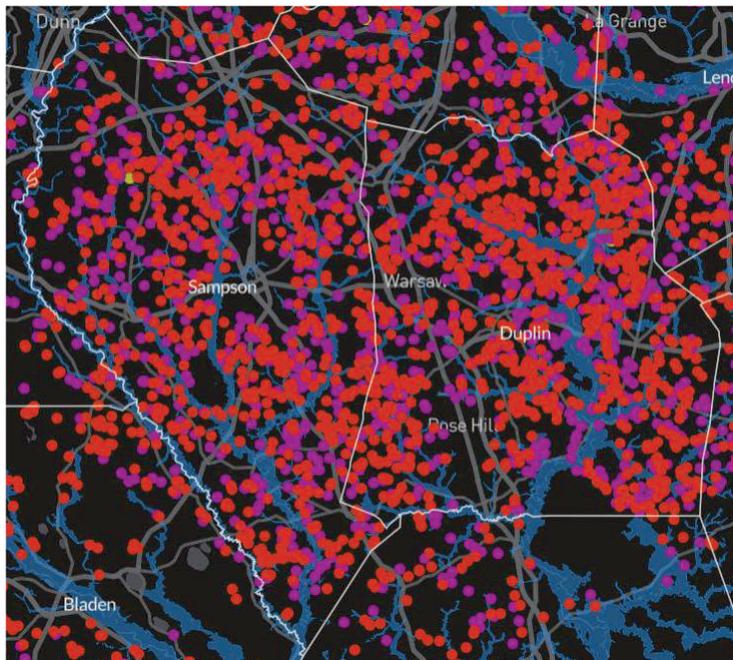
⁴² N.C. GEN. STAT. § 143-215.1(b)(2).

⁴³ *Contra* N.C. GEN. STAT. § 143-215.1.

⁴⁴ N.C. GEN. STAT. § 143-215.1(b)(2) (“Impacts attributable to the collective effects of a number of projects.”).

⁴⁵ See (b)(6) Privacy, (b)(7)(C) Enf. P Permit, *supra* note 24, attached as Exhibit 1; (b)(6) Privacy, (b)(7)(C) Enf. Privacy Permit, *supra* note 24, attached as Exhibit 2.

the top ten poultry producers.⁴⁶ The Lower Cape Fear River (“LCFR”) runs through both counties and has been impaired due to low dissolved oxygen since 1998 and pH, copper, and turbidity since 2008.⁴⁷ The LCFR was not listed as impaired until large numbers of hog and poultry facilities were built in the river basin. Many studies have shown that hog and poultry CAFOs are the best explanation for the impaired status of the LCFR.⁴⁸ Excess nutrients coming from both hog and poultry manure are continually being released into the Cape Fear River basin, in turn creating severe nutrient pollution.



Map of (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties showing estimated locations of swine (red) and poultry (purple) facilities in 2020.⁴⁹

Thus, the protection of LCFR water quality depends in large part on DEQ’s management of CAFO permitting decisions. However, due to dry litter poultry facilities’ “deemed permitted” status, DEQ is missing a significant chunk of relevant information which makes an accurate cumulative impact analysis and thereby the protection of water quality impossible. DEQ neglects to gather and consider this information despite the fact many studies have shown that dry litter poultry facilities pose the same if not greater threat than swine CAFOs to state water quality.⁵⁰

⁴⁶ U.S. Dep’t of Agric. Nat’l. Agric. Statistics Services, *2022 N.C. Agric. Statistics*, 43, 53 (2022) https://www.nass.usda.gov/Statistics_by_State/North_Carolina/Publications/Annual_Statistical_Bulletin/AgStat/NC_AgStatBook.pdf.

⁴⁷ N.C. Dep’t. of Env’t. *2022 North Carolina 303(d) List*, 1, 20-21 (June 6, 2022) <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?dbid=0&id=2738821>; see also Cape Fear River Watch, et al., *Comments on the Proposed reclassification on portions of the Cape Fear River*, 4 (Mar. 3, 2015).

⁴⁸ *Id.* at 10.

⁴⁹ Sarah Graddy et. al., *Update: Exposing Fields of Filth: Factory Farms Disproportionately Threaten Black Latino, and Native American North Carolinians*, ENVIRONMENTAL WORKING GROUP (July 30, 2020) <https://www.ewg.org/interactive-maps/2020-fields-of-filth/>.

⁵⁰ 2017 Basinwide Manure Production Report, *supra* note 9.

C. The 02T Regulations allowed dry litter poultry to become the largest source of excess nutrient pollution in North Carolina.

DEQ has abdicated its role to prevent “any significant increase in the pollution of the state from any new or enlarged sources”⁵¹ by leaving the dry litter poultry industry essentially unregulated under the 02T Regulations. In this wake, grassroots organizations, concerned residents, researchers, and local news organizations have spent the last decade documenting the tremendous hazard that dry litter poultry production poses to state water and air quality.⁵²

In 2016, North Carolina university researchers found that on average, poultry waste added more nitrogen to the state’s waterways than swine waste.⁵³ The Basinwide Report admitted that dry litter poultry facilities have become the largest and fastest growing source of excess nutrient pollution in North Carolina waterways.⁵⁴ Despite this knowledge, DEQ readopted the 02T Regulations in 2018, allowing for the dry litter poultry industry’s continued role as an active and essentially unregulated polluter.

Dry litter facilities create three main sources of pollution: (1) billions of pounds of dry litter stored in piles then spread on nearby land; (2) emissions from the poultry barns; and (3) poultry waste runoff resulting from hurricanes and flooding.

i. Dry litter piles and cropland spreading

North Carolina’s dry litter facilities produce an overwhelming amount of manure—2.5 billion pounds a year.⁵⁵ The manure is collected on dry bedding that is scraped from the poultry barns and left in large piles, often visible by the dozen near the facility. The scraped piles of litter contain chicken feces, urine, bedding, heavy metals from the animal feed, antibiotics, growth and sex hormones, pesticides, and pathogenic microorganisms.⁵⁶ The piles present two exposure pathways for water pollution: (1) nutrients and other pollutants leaching out of litter piles when

⁵¹ N.C. GEN. STAT. §143.215.1(b)(1).

⁵² See Gavin Off, *supra* note 2; [REDACTED] Decl. ¶¶ 28-30; Decl. of [REDACTED] ¶¶ 23-30, attached as declaration of [REDACTED] Decl. of [REDACTED] ¶¶ 34-42, attached as declaration of [REDACTED] Decl. of [REDACTED] ¶¶ 28-32, attached as declaration [REDACTED]

⁵³ The state legislature placed a moratorium on the growth of the swine industry in 1997, *see AFO Program Summary*, N.C. DEP’T ENV’T QUALITY, <https://deq.nc.gov/about/divisions/water-resources/water-quality-permitting/animal-feeding-operations/program-summary#:~:text=In%201997%2C%20North%20Carolina%20implemented,must%20meet%20five%20performance%20standards> (last visited Apr. 12, 2023), and has been increasing regulation over industrial hog farming since 2018 because of the environmental hazards swine waste imposes on North Carolinians. *See CLOSURE OF ADMINISTRATIVE COMPLAINT, supra* note 16; *see also* Christopher L. Osburn et. al., *Predicting Sources of Dissolved Organic Nitrogen to an Estuary From an Agro-Urban Coastal Watershed*, 50 ENVIRONMENTAL SCIENCE & TECHNOLOGY, 8473 (2016) <https://pubs.acs.org/doi/full/10.1021/acs.est.6b00053>.

⁵⁴ 2017 Basinwide Manure Production Report, *supra* note 9, at 6.

⁵⁵ Adam Wagner et. al., *Chickens Produce Billions of Pounds of Waste in NC. No One Tracks Where It Goes*. CHARLOTTE OBSERVER (Dec 2, 2022, 11:21 AM), <https://www.charlotteobserver.com/news/state/north-carolina/article267940512.html/>.

⁵⁶ Margaret Kyakuwaire et. al., *How Safe is Chicken Litter for Land Application as an Organic Fertilizer?: A Review*, 16 Int. J. Env’t Res. Pub. Health, no. 3521 (2019); Mike Stringham et al., *Poultry (Broilers, Layers, and Turkeys) Crop Profiles for North Carolina Agriculture*, N.C. STATE EXTENSION PUBLICATIONS, (Dec. 19, 2018), <https://content.ces.ncsu.edu/poultry-broilers-layers-and-turkeys>.

exposed to moisture or seeping into the groundwater after land application and (2) pollutants running off into surface water after litter is spread or sprayed on cropland.⁵⁷

Most poultry facilities do not have their own crop land to spread poultry litter, and thus use manure haulers to move their many piles.⁵⁸ Each step in the dry litter management process—storing, transporting, and spreading—presents new opportunities for leaching, runoff, and aerosolization. Both the poultry facility and the manure hauler are supposed to keep records of this activity; however, a report by the Environmental Defense Fund (“EDF”) concluded that manure haulers frequently do not report their poultry litter data.⁵⁹ Further, DEQ has no system for tracking how poultry facilities manage their waste. DEQ’s own report confirmed that “[DEQ] generally does not have the capacity to review and investigate the management and distribution of dry poultry litter.”⁶⁰

Based on the limited information available, the EDF report suggested that poultry litter is most commonly hauled and applied within the same county where it was produced.⁶¹ This suggests that the millions of pounds of dry litter manure coming from highly concentrated areas such as (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties end up on a limited and overburdened land base leading to harmful water pollution.

The Basinwide Report confirmed that land in North Carolina’s Coastal Plain area, home to (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties, is oversaturated with nutrients based on “surface water samples in an [AFO] dominated land use watershed in the Cape Fear River Basin show[ing] no difference between dry and rainy periods, indicating chronic pollution fed by groundwater instead of acute stormwater runoff events.”⁶²

⁵⁷ See Sanjay Shah et al., *Leaching of Nutrients and Trace Elements from Stockpiled Turkey Litter into Soil*, 38 J. ENVTL. QUALITY 1053, 1057 (2009) (chemicals from an uncovered litter pile at a turkey facility found in the soil up to two feet below the surface, with ammonium concentrations 62 times higher beneath the litter pile than in the soil outside of the litter pile footprint, and arsenic concentrations were also elevated); Octavia Conerly & Lesley Vazquez Coriano, *Literature Review of Contaminants in Livestock and Poultry Manure and Implications for Water Quality*, 47-50, U.S. ENV’T PROT. AGENCY (July 2013), <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100H2NI.txt>; Michael A. Mallin et. al., *Industrial Swine and Poultry Production Causes Chronic Nutrient and Fecal Microbial Stream Pollution*, 226 WATER, AIR, & SOIL POLLUTION (2015) <https://uncw.edu/cms/aelab/reports%20and%20publications/2015/mallin%20et%20al%202015%20cafo%20pollutio%20n%20wasp.pdf>.

⁵⁸ See N.C. Env’t. Mgmt. Comm’n. Water Quality Comm. Meeting Minutes (Sept. 9, 2020) available online at https://files.nc.gov/ncdeq/Environmental%20Management%20Commission/Water_Quality_Committee_Meetings/2020_meeting_minutes/september/Draft-Minutes-for-September-9-2020-WQC-For-WQC-Approval--10-.pdf (discussing the report on p. 3).

⁵⁹ Memorandum from Damon Cory-Watson to Maggie Monast, Analysis of North Carolina Department of Environment and Natural Resources Poultry Manure Hauler Data, Env’t. Defense Fund (2012). The manure hauler data underlying this study was available from manure hauler reporting records, see 15A N.C. ADMIN. CODE 02T.1404, but poultry operations are not required to share records on their deliveries to manure haulers, see 15A N.C. ADMIN CODE 02T.1303(2)(E).

⁶⁰ 2017 Basinwide Manure Production Report, *supra* note 9, at 9.

⁶¹ Memorandum from Damon Cory-Watson to Maggie Monast, *supra* note 59.

⁶² 2017 Basinwide Manure Production Report, *supra* note 9, at 9.

Overapplied poultry litter leaches nutrients into waterways and harms drinking water, ecosystem life, and people's ability to safely engage in recreational and subsistence activities such as swimming and fishing.⁶³ Even at agronomic rates, pollutants in poultry waste enter waterways through leaching and runoff.⁶⁴ The Basinwide Report found that poultry operations produced three times more pounds of plant available nitrogen ("PAN") and six times more pounds of phosphorous (P₂O₅) than swine operations and eight times more pounds of PAN and nine times more pounds of P₂O₅ than cattle operations.⁶⁵ This nutrient runoff leads to toxic algal blooms resulting in die offs in aquatic life.⁶⁶

Runoff from dry litter piles can be exacerbated by natural features such as steep slopes, humid weather, or low soil porosity and permeability. The loamy clay soils of the Coastal Plain and ██████████ River basin, home to the majority of the state's swine and poultry CAFOs, are thus particularly susceptible to pollutant transport.⁶⁷

The ██████████ River is impaired due to low dissolved oxygen (DO) levels, pH, copper, and turbidity—a direct result of both poultry and swine manure.⁶⁸ Low DO occurs because the ammonium in swine and poultry manure is transported downstream to the LCFR and causes algal blooms which generate high biological oxygen demand, thereby depleting oxygen levels.⁶⁹

██████████ Riverkeepers affiliated with the Waterkeeper Alliance regularly test the state's waterways and confirm that dry litter piles are adding harmful excess nutrients and pollutants. Between January and June 2022, the Riverkeepers took water samples downstream of two 300-foot poultry litter piles in ██████████ County. The fecal coliform levels were more than double the state standards in four out of six samples. Two samples tested positive for tetracycline, an antibiotic used in the poultry industry.⁷⁰

The ██████████ Riverkeeper has sampled the water around the ██████████ processing plant in ██████████ County and found that on one occasion, the fecal coliform numbers upstream of the facility were 200 and downstream they were 10,000. The *E. Coli* numbers in the water also exceeded the test's capacity at over 12,000 MPN/100 mL when the threshold for swimming safety is 300 MPN/100 mL.⁷¹

⁶³ U.S. Dep't. of the Interior, *Nutrients in the Nation's Waters: Identifying Problems and Progress*, U.S.GEOLOGICAL SURV., (Oct. 1996), <https://pubs.usgs.gov/fs/fs218-96/>.

⁶⁴ See JoAnn Burkholder et al., Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality, 115 ENV'T HEALTH PERSPECTIVES 308, 308-09 (2007), <https://ehp.niehs.nih.gov/doi/10.1289/ehp.8839>.

⁶⁵ 2017 Basinwide Manure Production Report, *supra* note 9, at 6.

⁶⁶ Jian Liu et al., *Phosphorus leaching from loamy sand and clay loam topsoils after application of pig slurry*, SPRINGERPLUS 1, 53 (2012) <https://doi.org/10.1186/2193-1801-1-53>.

⁶⁷ Office of Sci. and Tech., Environmental Assessment of Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations, 2-19 U.S. ENV'T PROT. AGENCY (Jan. 2001).

⁶⁸ 2015 Cape Fear River Watch, et al., *supra* note 47 at 12.

⁶⁹ Michael A. Mallin & Lawrence B. Cahoon, *Industrialized Animal Production—A Major Source of Nutrient and Microbial Pollution to Aquatic Ecosystems*, 24 POPULATION & ENV'T. 369, 376-378 (2003) (internal citations omitted).

⁷⁰ Adam Wagner, *supra* note 55.

⁷¹ ██████████ Decl. ¶¶ 29-34.

Despite frequent attempts to alert DEQ to the presence of these harmful pollutants in the water, DEQ has rarely issued violations to any dry litter poultry facilities and the associated processing plants. In short, without adequate oversight from DEQ, the dry litter poultry industry's manure handling practices present an ongoing and growing threat to the state's water quality.

ii. Ammonia emissions

The millions of pounds of urine and feces sitting in over 4,000 poultry facilities across the state emit tons of ammonia into the air. Ventilation fans push this ammonia out of the barns where it then converts into nitrogen and falls back down into waterways, compounding the nitrogen water pollution already occurring from manure runoff.⁷²

A study in the Chesapeake Bay Area, which produces 5.7 billion pounds of poultry manure every year, found that ammonia air emissions added 12 million pounds of nitrogen water pollution every year to local waters.⁷³ Computer models estimated that about 600 farms can emit as much as 11,684 tons of ammonia onto land around their barns and 560 tons into the Chesapeake Bay.⁷⁴ This study was conducted by a North Carolina State University professor of air quality. He is quoted in an article saying that he is unable to conduct similar research in North Carolina because, unlike in Maryland, there is insufficient public information on the state's poultry facilities.⁷⁵

The North Carolina Legislature requires new swine farms to substantially reduce or eliminate ammonia air emissions, but this does not apply to poultry operations.⁷⁶ Without regulatory reform or monitoring, ammonia emissions from poultry barns will continue to pollute the state's waterways.

iii. Hurricanes and floodwater runoff

Many dry litter poultry facilities are built in flood prone areas because the 02T Regulations contain no restrictions on when or where such a facility can operate. The southeastern portion of North Carolina has been, and continues to be, particularly susceptible to hurricane induced flooding. When dry litter poultry facilities flood, thousands of birds, dry litter piles, and other collected waste wash away into nearby waterways and contaminate wells, feed toxic algal blooms, and spread deadly pathogens.⁷⁷

⁷² Gavin Off et. al., *supra* note 2.

⁷³ Tom Pelton et. al., *Poultry Industry Pollution in the Chesapeake Region*, ENVIRONMENTAL INTEGRITY PROJECT (Apr. 22, 2020) <https://environmentalintegrity.org/wp-content/uploads/2020/04/Chesapeake-Poultry-Report-.pdf>.

⁷⁴ *Id.*

⁷⁵ Gavin Off et. al., *supra* note 2.

⁷⁶ N.C. GEN. STAT. ANN. § 143-215.10I; 15A N.C. ADMIN CODE 2T.1307

⁷⁷ Steve Wing et. al., *The Potential Impact of Flooding on Confined Animal Feeding Operations in Eastern North Carolina*, 110 ENVIRONMENTAL HEALTH PERSPECTIVES 387, 390 (Apr. 2002) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1240801/pdf/ehp0110-000387.pdf>.

Declarants describe that after Hurricane Matthew in 2016 and Hurricane Florence in 2018, Riverkeepers affiliated with the Waterkeeper Alliance found unusual and dangerous bacterium in the waterways from decomposing animals.⁷⁸

A 2022 Environmental Working Group (“EWG”) analysis found that 97 poultry facilities are in, or within 100 feet of, a floodplain.⁷⁹ Hurricane Matthew flooded poultry facilities across the state, killing upwards of 5 million birds.⁸⁰ Two years later, Hurricane Florence flooded an estimated 35 dry litter poultry facilities and killed 1.8 million birds.⁸¹ The state spent close to \$11 million cleaning up dead birds after Hurricane Florence.⁸²

The severity and frequency of hurricanes and heavy rains are expected to increase in eastern North Carolina due to climate change.⁸³ [REDACTED] Counties are among the counties with the most CAFOs located in floodplains and are within two different watersheds, meaning that these CAFOs threaten to pollute distinct waterways and tributaries.⁸⁴

D. The 02T Regulations encourage chronic violations.

The 02T Regulations do not include a system for ensuring dry litter poultry operators act in compliance with the minimal regulations. This allows dry litter operators to violate the 02T Regulations frequently and without consequence.

As discussed in Section A *supra*, the 02T Regulations have manure record requirements for facilities with over 30,000 birds.⁸⁵ Often dry litter facilities hire manure haulers to move their piles, and the hauler is supposed to keep records on how much, when, and where the poultry manure ends up. If a manure hauler moves more than 100 tons a year, then those records must be submitted to DEQ. Manure haulers are rarely submitting records and even when they do, DEQ is unable to provide any meaningful oversight.⁸⁶

DEQ also confirmed that it only inspects dry litter poultry facilities after receiving a complaint from a concerned resident. Frequently, however, even when there is a complaint, DEQ fails to follow up or issue violations.⁸⁷

⁷⁸ [REDACTED] Decl. ¶ 18.

⁷⁹ *New EWG Research Finds Many North Carolina Factory Farms are at Risk of Flooding*, ENVIRONMENTAL WORKING GROUP, (Dec. 1, 2022) <https://www.ewg.org/news-insights/news-release/2022/12/new-ewg-research-finds-many-north-carolina-factory-farms-are>.

⁸⁰ Tom Polansek, *Millions of North Carolina Chickens Die in Hurricane Matthew Floods*, REUTERS (Oct. 12, 2016), <https://www.reuters.com/article/us-storm-matthew-poultry/millions-of-north-carolina-chickens-die-in-hurricane-matthew-floods-state-idUSKCN12C2J6>.

⁸¹ Ellen Simon, *Waterkeeper Alliance and EWG Investigation Finds Hurricane Florence Flooded Poultry Operations Housing 1.8 Million Birds*, ENVIRONMENTAL WORKING GROUP, <https://www.ewg.org/news-insights/news/2018/11/waterkeeper-alliance-and-ewg-investigation-finds-hurricane-florence>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ 15A N.C. ADMIN. CODE 2T.1303(a)(2)(i).

⁸⁶ 2017 Basinwide Manure Production Report *supra* note 9, at 9.

⁸⁷ [REDACTED] Decl. ¶ 35

Riverkeepers have been monitoring dry litter poultry violations since 2012. By 2017, they had referred violations of the 15-Day Rule to DEQ on 126 occasions and a total of 106 distinct locations.⁸⁸ This has resulted in an average of only two enforcement actions a year against dry litter poultry facilities.⁸⁹ This is in part because DEQ will restart their clock to when DEQ, itself, sees the violation despite conclusive evidence of a 15-day violation in the referral. In effect, DEQ gives dry litter poultry facilities an additional 15 days to dispose of their piles. This encourages violations and discourages residents from reporting them.⁹⁰

The number of ignored violations continues to grow. A 2022 article in the Charlotte Observer detailed how North Carolina Riverkeepers make frequent flyovers confirming that dry litter piles often sit uncovered for months without any interference from DEQ. A Riverkeeper quoted in the article said, “[W]e have documented almost 600 violations for those litter piles and storage and nothing has changed.”⁹¹

In October 2022, Complainant [REDACTED] the [REDACTED] Riverkeeper and member of the [REDACTED] Tribe, described a personal account of DEQ’s failure to regulate:

I stopped at [a dry litter poultry facility], and I was with an Environmental Justice person and DEQ guys. We saw a violation in a field across the road, I got out of the car and took pictures. The wind shifted and the spray hit me in the face, getting in my mouth. There was no violation filed. If that doesn’t get a violation then there is no point for me to continue to do this, it is a waste of time.⁹²

This is not because DEQ is without authority to act. Under the 02T Regulations, a DEQ director can independently determine whether a dry litter facility is out of compliance and require the facility to obtain a permit similar to other CAFOs.⁹³ The result would give DEQ the information it needs to have proper oversight over the facility. And yet, despite the hundreds of violations to the 15-Day Rule, the only record we found of DEQ enforcing this authority was in 2008 against an egg laying facility in [REDACTED] County.⁹⁴

E. Despite community pushback, DEQ has maintained the 02T Regulations allowing for exponential growth in the dry litter poultry industry.

The 02T Regulations have led to a reality where dry litter poultry facilities can start, expand, and operate wherever they want. By design, there is no publicly available record of the

⁸⁸ Cape Fear River Watch, et al., *Comments on the Regulation of Dry Litter Poultry Facilities under the 02T Rules*, 9 (Nov. 22, 2017) https://law.yale.edu/sites/default/files/area/clinic/document/dry_litter_comment_final.pdf.

⁸⁹ *Id.*

⁹⁰ [REDACTED] Decl. ¶ 35; [REDACTED] Decl. ¶ 25.

⁹¹ Melba Newsome, *North Carolina Poultry Frenzy: 500 Million Birds and “Zero Transparency,”* MOTHER JONES (Feb. 17, 2022) <https://www.motherjones.com/environment/2022/02/north-carolina-poultry-farms-hog-waste-regulations-environmental-problems/>.

⁹² [REDACTED] Decl. ¶ 35.

⁹³ See 15A N.C. ADMIN. CODE 02T.1303(b).

⁹⁴ 2017 Cape Fear River Watch, et al., *supra* note 88 at 11.

number of dry litter poultry facilities currently operating under the 02T Regulations (*see* Section A *supra*). Nor is there any publicly available record of the increase over time. In the absence of this information, both the EWG and the Charlotte Observer undertook extensive investigations with the goal of counting and mapping the locations of dry litter facilities in North Carolina.

EWG was able to map the existence of 4,863 individual dry litter poultry facilities and the Charlotte Observer mapped 4,679 facilities using satellite imagery, flyovers, and GIS mapping.⁹⁵ This is more than double the number of swine CAFOs in the state, an industry that was the subject of a previous Title VI investigation for the disproportionate impact swine waste had on neighboring communities.⁹⁶ EWG also tracked the increase in dry litter facilities over time by surveying satellite imagery and comparing it to previous satellite images from the National Agriculture Imagery Program from 2008, 2012, 2016, 2018, and 2019. From this information, EWG was able to date the increases in dry litter operations to one of these years.⁹⁷

Based on the EWG report and the National Agricultural Statistic Service, there has been a consistent increase in both dry litter poultry facilities and commercial broiler production since 2006 when the 02T Regulations were adopted (*see* Chart 1 below).

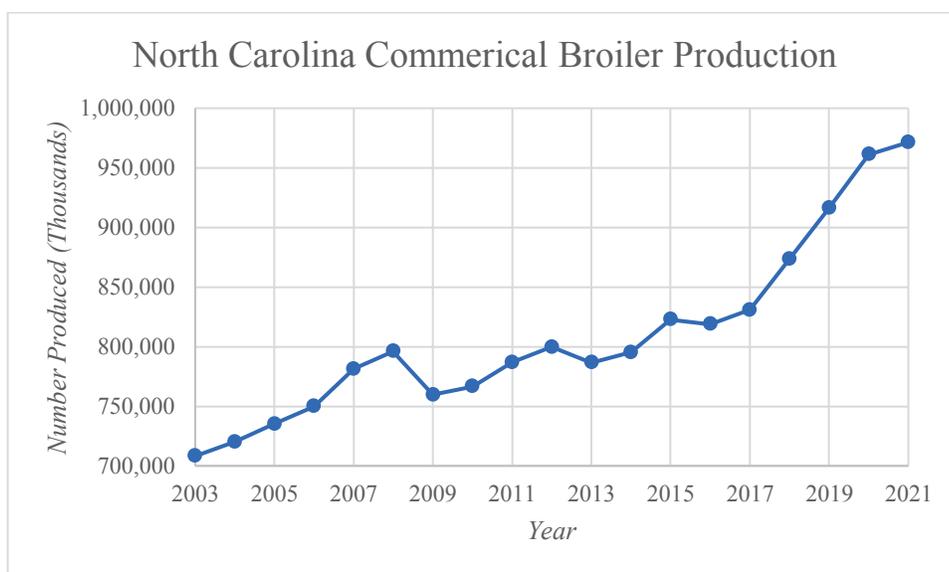


Chart 1: Graph showing the increase in commercial broiler production as reported in the National Agricultural Statistic Service from 2003 to 2021. (Note: does not include turkey numbers).⁹⁸

In 2018, DEQ reviewed the 02T Regulations pursuant to the Regulatory Reform Act of 2013, S.L. 2013-413. Twenty community groups made up of Waterkeepers, Riverkeepers, and

⁹⁵ Sarah Graddy & Al Rabine, *EWG analysis: North Carolina's factory farms are everywhere – even floodplains and other flood-prone areas*, ENVIRONMENTAL WORKING GROUP (Dec. 1, 2022) <https://www.ewg.org/research/ewg-analysis-north-carolinas-factory-farms-are-everywhere-even-floodplains-and-other-flood>; Gavin Off et. al., note 2.

⁹⁶ CLOSURE OF ADMINISTRATIVE COMPLAINT, *supra* note 16.

⁹⁷ Sarah Graddy, *Fields of Filth*, *supra* note 49.

⁹⁸ *See Agricultural Statistics*, U.S. DEP'T. OF AGRIC. <https://usda.library.cornell.edu/concern/publications/j3860694x?locale=en>.

grassroots organizations submitted comments on the proposed readoption of the 02T Regulations.⁹⁹ The comments “emphasiz[ed] the need to close significant gaps in the regulation of dry litter poultry facilities” and requested that DEQ “amend the 02T [Regulations] to bring dry litter facilities under a general permit or, at least, take interim steps to improve record-keeping and disclosure by dry litter facilities.”¹⁰⁰

The comments outlined how the 02T Regulations fail to adequately regulate dry litter facilities and lead to chronic under enforcement by DEQ. The comments also summarized how “North Carolina’s failure to grapple with the effects of dry litter poultry waste exacerbates pollution problems in already overburdened communities in the eastern portion of the state and potentially violates Title VI of the Civil Rights Act of 1964.”¹⁰¹

Despite these comments, DEQ readopted the 02T Regulations in 2018 without any changes in the oversight, management, or reporting requirements for dry litter poultry facilities.

F. The dry litter poultry industry is a hazard to public health.

DEQ’s mission is to “[provide] science based environmental stewardship for the health and prosperity of ALL North Carolinians.” However, DEQ’s failure to regulate the growth of dry litter poultry industry runs counter to this mission. The health and wellbeing of residents living in proximity to dry litter facilities are being actively harmed by the dry litter poultry industry’s proliferation.

i. Human health risks from the dry litter poultry industry

The poultry barns containing thousands of chickens in a concentrated area are a source of air pollution that pose serious risks to residents in surrounding communities. Unfiltered exhaust fans blow hydrogen sulfide, volatile organic compounds (VOCs), particulate matter (PM), and ammonia into the air. Exposure to these airborne pollutants from dry litter facilities leads to a long list of respiratory diseases such as asthma and bronchitis, thyroid problems, neurological impairments, gastrointestinal illnesses, lung cancer, birth defects, and blue baby syndrome.¹⁰²

⁹⁹ See 2017 Cape Fear River Watch, et al., *supra* note 88; American Rivers et. al., *Proposed Readoption and Revision of 15A NCAC 02T, 02U Rules*, (Nov. 22, 2017) <https://waterkeeper.org/wp-content/uploads/2017/12/11-22-17-2T-2U-Comment-Letter.pdf>; Proposed Readoption and Revision Comments were submitted on behalf of the Cape Fear River Watch, Catawba Riverkeeper Foundation, Coastal Carolina Riverwatch, Crystal Coast Waterkeeper, Haw River Assembly, MountainTrue, Sound Rivers, White Oak-New Riverkeeper Alliance, Winyah Rivers Foundation, Waterkeeper Alliance, Yadkin Riverkeeper, Rural Empowerment Association for Community Help, North Carolina Environmental Justice Network, American Rivers, Dan River Basin Association, River Guardian Foundation, Southern Environmental Law Center, SouthWings, North Carolina Conservation Network, and the N.C. Sierra Club.

¹⁰⁰ 2017 Cape Fear River Watch et. al., *supra* note 88.

¹⁰¹ *Id.*

¹⁰² Zoë Ackerman, et. al, *Fowl Matters: Public Health, Environmental Justice, and Civic Action Around the Broiler Chicken Industry*, RACHEL CARSON COUNCIL, 14, (2017) https://rachelcarsoncouncil.org/wp-content/uploads/2017/04/rcc_fowl_matters.pdf.

Hydrogen sulfide is an airborne pollutant that can have effects ranging from headaches and eye irritation to unconsciousness and death.¹⁰³

VOCs are dangerous to human health because they contribute to the formation of ground level ozone that can irritate the eyes, nose, and throat, and can aggravate asthma and other lung diseases.¹⁰⁴ VOCs also cause “headaches and the loss of coordination; nausea; and damage to the liver, kidneys, or central nervous system.”¹⁰⁵ Some VOCs are suspected or proven carcinogens.¹⁰⁶

PM emitted from dried manure, feed, epithelial cells, hair, and feathers refers to solid particles and liquid droplets found in the air.¹⁰⁷ PM is known to cause respiratory illnesses and allergies.

Ammonia is highly irritating with “a sharp suffocating odor.”¹⁰⁸ When ammonia is subsequently deposited onto surface or ground waters, it can reduce drinking water quality.¹⁰⁹

The billions of pounds of manure piled up all over the state pose a public health risk to nearby residents as a source of contaminants for deadly infections from pathogens such as *E. coli*, *salmonella*, and *Campylobacter jejuni*.¹¹⁰ The industry’s overuse of antibiotics in animal feed has created antibiotic resistant strains of bacteria that further threaten public safety¹¹¹ in counties with high concentrations of poultry houses such as (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties. And heavy metals such as copper¹¹² and lead found in these piles seep into the groundwater and can contribute to health problems such as liver damage and kidney disease for nearby residents.¹¹³

The piles are also a source of nitrates that can leach into groundwater. Nitrates oxidize iron in red blood cells into methemoglobin, which hinders the blood’s capacity to carry oxygen. This can lead to birth defects, miscarriages, and poor general health. Elevated nitrates in drinking water can be especially harmful to infants and can lead to blue baby syndrome and possible

¹⁰³ Occupational Safety & Health Admin., *Hydrogen Sulfide*, U.S. DEP’T. OF LABOR, <https://www.osha.gov/hydrogen-sulfide> (last visited Apr. 12, 2023).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Technical Overview of Volatile Organic Compounds*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/indoor-air-quality-iaq/technical-overview-volatile-organic-compounds> (last visited Apr. 12, 2023); Decl. of (b)(6) Privacy, (b)(7)(C) Enf.

Decl. ¶ 11, attached as declaration of (b)(6) Privacy, (b)(7)(C) Enf.

¹⁰⁷ *Particular Matter Basics*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/pm-pollution/particulate-matter-pm-basics#PM> (last visited Apr. 12, 2023).

¹⁰⁸ *The Facts About Ammonia*, N.Y. DEP’T OF HEALTH,

https://www.health.ny.gov/environmental/emergency/chemical_terrorism/ammonia_general.htm#:~:text=Exposure%20to%20high%20concentrations%20of.and%20nose%20and%20throat%20irritation (last visited Apr. 12, 2023).

¹⁰⁹ *Id.*; See Octavia Conerly & Lesley Vazquez Coriano, *supra* note 57.

¹¹⁰ See Octavia Conerly & Lesley Vazquez Coriano, *supra* note 57, at 19.

¹¹¹ See Karen L. Tang et al., Restricting the Use of Antibiotics in Food-Producing Animals and Its Associations with Antibiotic Resistance in Food-Producing Animals and Human Beings: A Systematic Review and Meta-Analysis, 1 THE LANCET: PLANETARY HEALTH E289 (Nov. 2017).

¹¹² See John Chastain et al., *Poultry Manure Production and Nutrient Content*, Ch. 3-b, Clemson University Extension (2017), https://www.clemson.edu/extension/camm/manuals/poultry/pch3b_00.pdf.

¹¹³ See Agency for Toxic Substances & Disease Registry, *Public Health Statement: Copper*, (Sept. 2004), <https://www.atsdr.cdc.gov/phs/phs.asp?id=204&tid=37>.

infant death.¹¹⁴ Nitrates are also linked to higher rates of stomach and esophageal cancer.¹¹⁵ The rates of stomach cancer in ██████████ County are 1.9 percent higher than average and could be up to 4.7 percent higher than average after accounting for other factors.¹¹⁶ Rates of esophageal cancer are also between 0.8 to 4.4 percent higher than average.¹¹⁷ Residents relying on private wells are particularly susceptible because well water generally goes untreated. One declarant mentions increases in cancer and asthma rates:

Rates of asthma and cancer are increasing rapidly while quality of life declines. I cannot prove where the cancer is coming from, but we are starting to see what they call cancer clusters.¹¹⁸

The 02T Regulations include no guidance on how facility operators should store dry litter piles to avoid these public health risks. As a result, populations living in areas with high concentrations of dry litter facilities encounter ammonia, VOCs, particulate matter, heavy metals, contaminated drinking water, and pathogenic fungi.¹¹⁹ The health impacts of pollution from dry litter include premature death, miscarriages, infant deaths, ten different types of cancer, birth defects, cardiac illnesses, brain damage, blood disorders, respiratory diseases, neurological impairments, and skin problems.¹²⁰

ii. *Quality of life and economic harms from the dry litter poultry industry*

The unrestrained increase in dry litter poultry facilities has an overwhelmingly negative impact on residents living nearby. In addition to the physical health risks discussed above, residents suffer a decreased quality of life and diminishing property values from odors, pests, and polluted waterways.

Dry litter poultry operations release extreme odors into the surrounding atmosphere.¹²¹ The high concentration of these facilities in a few North Carolina counties means that the odor compounds around neighboring households. Residents near dry litter facilities have likened the smell to “a lot of ammonia” and “dead rotting meat.”¹²² The odors can cause negative moods, including “tension, depression, or anger, and possible neuropsychiatric abnormalities such as impaired balance or memory.”¹²³ When odors are severe, community members have to keep their

¹¹⁴ *Id.*

¹¹⁵ Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities 4* (Mark Schultz ed., 2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

¹¹⁶ N.C. state cancer profile available online at

<https://www.statecancerprofiles.cancer.gov/incidencerates/index.php?stateFIPS=37&areatype=county&cancer=018&race=00&sex=0&age=001&stage=999&year=0&type=incd&sortVariableName=rate&sortOrder=desc#notes>.

¹¹⁷ *Id.*

¹¹⁸ ██████████ Decl. ¶ 16.

¹¹⁹ Zoë Ackerman, *supra* note 102; Carla Viegas, et. al., *Fungal Contamination of Poultry Litter: A Public Health Problem*, 75 J. TOXICOLOGY & ENV'T HEALTH 1341, 1344-1345 (2012).

¹²⁰ ██████████ Decl. ¶ 16; Atul Gupta & Anil Patyal, *Impacts of intensive poultry farming on 'one health' in developing countries: challenges and remedies*, 10 EXPLORATORY ANIMAL AND MEDICAL RESEARCH 101, 104-106 (2020), <https://tinyurl.com/2p8pj5t6>.

¹²¹ John P. Chastain, *Odor Control from Poultry Facilities in POULTRY TRAINING MANUAL*, 9-1 (2003).

¹²² Keri Brown, *When a Chicken Farm Moves Next Door*, *supra* note 3.

¹²³ Melba Newsome, *supra* note 91.

windows closed, even in high temperatures with no air conditioning.¹²⁴ The odors also have a negative effect on community activities. Residents stop partaking in outdoor social gatherings, and declarants describe how their children have stopped playing outside.¹²⁵ Declarants describe visitors getting sick from experiencing the fumes for the first time.¹²⁶

One declarant has 30 chicken houses within 2 miles of his home. Piles of dry litter over eight feet tall are dumped in front of his house approximately every 100 days.¹²⁷ The piles attract flies, rodents, and other pests. Another declarant describes having to drive with a fly swatter in the car and attempting to grill outside while being surrounded by flies.¹²⁸ Research conducted by the Ohio Department of Health indicated residences within half a mile of poultry facilities had 83 times the average number of flies.¹²⁹ These attracted pests can also be a further source of disease transmission.¹³⁰

The overwhelming presence of dry litter poultry facilities interrupts community wellbeing. As poultry CAFOs rapidly expand in the [REDACTED] River basin, the [REDACTED] tribe suffers cultural and spiritual harms from the degradation of the river as the defining symbol of the Tribe itself.¹³¹

Declarants describe how recreational activities such as swimming and fishing used to be part of their lives. The waterways are now so polluted and overgrown with algae that the health department has prohibited water-based recreation and subsistence activities at various times.¹³² Residents have lost animals because their hay and feed has been contaminated with poultry waste.¹³³ Declarants also describe how family members continue to move away and stay away because of the health risks and decreasing quality of life associated with living among dry litter poultry facilities.¹³⁴

Odor, air pollution, water contamination, and increased truck traffic near dry litter poultry facilities not only harm individual wellbeing but also degrade property values.¹³⁵ The closer a property is to a CAFO, the more likely the value of the property will drop.¹³⁶ Water quality can play a significant role on property values. Clean water can increase property values by up to 25

¹²⁴ Carrie Hribar, *supra* note 115.

¹²⁵ See Catherine Clabby, *supra* note 41; [REDACTED] Decl. ¶ 13.

¹²⁶ [REDACTED] Decl. ¶ 15.

¹²⁷ [REDACTED] Decl. ¶¶ 11-12.

¹²⁸ [REDACTED] Decl. ¶ 14.

¹²⁹ P. Gerber et al., *Poultry Production and the Environment – A Review*, POULTRY IN THE 21ST CENTURY 379, 384 (Olaf Thieme & Dafydd Pilling eds., 2008).

¹³⁰ Atul Gupta & Anil Patyal, *supra* note 120 at 104.

¹³¹ Ryan E. Emanuel, Water in the Lumbee World: A River and Its People in a Time of Change, 24 ENV'TL HISTORY 25, 26 (2018).

¹³² [REDACTED] Decl. ¶ 16.

¹³³ [REDACTED] Decl. ¶ 19.

¹³⁴ [REDACTED] Decl. ¶ 11.

¹³⁵ Env't Integrity Project, *Poultry Industry Pollution in the Chesapeake Region: Ammonia Air Emissions and Nitrogen Loads Higher than EPA Estimates* 1, 19 (2020), <https://environmentalintegrity.org/wp-content/uploads/2020/04/Chesapeake-Poultry-Report-.pdf>.

¹³⁶ Christine Ball-Blakely, *CAFOs: Plaguing North Carolina Communities of Color*, 18 SUSTAINABLE DEV. L. & POL'Y 4, 6 (2017).

percent whereas polluted water decreases property values.¹³⁷ Previous studies on proximity to swine CAFOs in (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties found a negative impact on property values.¹³⁸ These same counties have seen enormous growth in poultry operations further compounding the problem.¹³⁹

Overall, dry litter poultry facilities make life more difficult for residents living nearby. Residents feel the intersecting negative impacts on a physical, psychological, environmental, and economic level. As the 02T Regulations function now, residents are without the means to improve these conditions.

G. The dry litter poultry industry exacerbates existing discriminatory impacts from the swine industry.

The people of North Carolina do not feel the staggering increase in and impacts of the dry litter poultry industry equally. North Carolina is 70 percent white, but the counties bearing the highest concentration of broilers are disproportionately non-white.¹⁴⁰ Six of the top ten broiler producing counties include the most diverse and least white county in North Carolina ((b)(6) Privacy, (b)(7)(C) Enf. Privacy County), the third least-white county in North Carolina ((b)(6) Privacy, (b)(7)(C) Enf. Privacy County), the county with the highest percentage of Native American residents ((b)(6) Privacy, (b)(7)(C) Enf. Privacy County), and the two counties with the highest percentage of Hispanic residents ((b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties).¹⁴¹

Across the state, there has been a 17 percent increase in poultry production between 2012 and 2021 according to EWG.¹⁴² However, (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties saw a 36 percent increase in poultry production during the same time period.¹⁴³ North Carolina as a whole is 70.1 percent white, 22.3 percent Black, 1.6 percent American Indian, and 10.2 percent Hispanic or Latino.¹⁴⁴ (b)(6) Privacy, (b)(7)(C) Enf. Privacy County is the most diverse county in North Carolina. According to the 2020 census, 29.3 percent of (b)(6) Privacy, (b)(7)(C) Enf. Privacy County residents were white, 23.2 percent Black, 43.6 percent American Indian, and 9.3 percent Hispanic or Latino. (b)(6) Privacy, (b)(7)(C) Enf. Privacy County has the highest percentage of Black residents at 59.5 percent. And (b)(6) Privacy, (b)(7)(C) Enf. Privacy County is 22.2 percent Hispanic and (b)(6) Privacy, (b)(7)(C) Enf. Privacy County is 20.7 percent Hispanic.

(b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties are the same counties EPA investigated following the 2014 Title VI Complaint against DEQ. During the investigation, the then-director of the External Civil Rights Compliance Office, Lilian S. Dorka, wrote a Letter of Concern to DEQ stating that there was “a linear relationship between race/ethnicity and the ... density of

¹³⁷ *The Effects: Economy*, ENV’T PROT. AGENCY, <https://www.epa.gov/nutrientpollution/effects-economy> (last visited Apr. 12, 2023).

¹³⁸ Andrew Meeker et. al., *Impacts of Swine Waste Management in North Carolina: A Geospatial Analysis* NCGROWTH 1, 14 (2020), https://ncgrowth.unc.edu/wp-content/uploads/2020/09/Geospatial_Analysis-1-1.pdf.

¹³⁹ Aman Azhar, *Pollution from N.C.’s Commercial Poultry Farms Disproportionately Harms Communities of Color*, INSIDE CLIMATE NEWS (Oct. 13, 2021), <https://insideclimateneeds.org/news/13102021/north-carolina-commercial-poultry-farms-justice-communities-of-color/>.

¹⁴⁰ *QuickFacts N.C.*, U.S. CENSUS BUREAU, *supra* note 1.

¹⁴¹ U.S. Dep’t of Agric. Nat’l. Agric. Statistics Services, *2022 N.C. Agric. Statistics*, *supra* note 1 at 52.

¹⁴² Sarah Graddy, et al., *North Carolina’s Factory Farms are Everywhere*, *supra* note 95.

¹⁴³ *Id.*

¹⁴⁴ *QuickFacts N.C.*, U.S. CENSUS BUREAU, *supra* note 1.

hogs” and that this, among other findings, “indicates that the types of adverse impacts [discovered when investigating the swine industry] are being felt by large segments of the communities of color and are potential evidence of systemic concerns, not purely anecdotal claims.”¹⁴⁵

(b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties are home to 43 percent of all hog production in North Carolina. In 2020, (b)(6) Privacy, (b)(7)(C) Enf. Privacy County also produced the most poultry of any county in North Carolina. (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties were tied as the top fifth producer, and (b)(6) Privacy, (b)(7)(C) Enf. Privacy was the eighth leading county.¹⁴⁶ A 2018 EWG report found that hog and poultry farms in these counties are packed densely together. In (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties, 93 percent of poultry operations were within three miles of at least 20 other swine or poultry farms.¹⁴⁷

EWG analyzed some individual census blocks and found, in one instance, three new dry litter poultry facilities built since 2012 in a 2.4-square-mile census block in (b)(6) Privacy, (b)(7)(C) Enf. Privacy County, collectively housing 260,000 chickens in 12 barns. “Of the 33 residents living within the census block, 85 percent are Black, and 97 percent are Black, Native American, or other people of color.”¹⁴⁸ Across the state, a different study found that Blacks were more likely than whites to live in areas with CAFOs at risk of flooding according to satellite estimates, but not according to Department of Water Quality reports.¹⁴⁹ A growing number of studies have established correlations between the siting of industrial animal agriculture operations and race. These analyses typically compile CAFO location data and census block level demographic information in a particular jurisdiction and then conduct a regression analysis to determine the significance of the relationship between the two variables. It is nearly impossible to conduct an equivalent analysis for North Carolina’s poultry industry because DEQ does not maintain a list of locations of dry litter poultry facilities. Therefore, a granular analysis of the correlation between industrial poultry operation locations and race across these counties cannot be conducted with public data.¹⁵⁰

The 2014 Title VI Complaint against DEQ chronicled the extensive environmental and public health damage that the swine industry wreaks on residents of (b)(6) Privacy, (b)(7)(C) Enf. Privacy residents. Much of the damage comes from the polluting effects of high concentrations of swine waste being collected and spread across (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties. As a result, swine facilities are polluting surface water, ground water, air quality, increasing human health risks, depressing quality of life, and decreasing property values.¹⁵¹

Though the 2018 Settlement changed the permitting requirements for these swine facilities, there are still thousands of swine facilities operating in (b)(6) Privacy, (b)(7)(C) Enf. Privacy

¹⁴⁵ CLOSURE OF ADMINISTRATIVE COMPLAINT, *supra* note 16.

¹⁴⁶ U.S. Dep’t of Agric. Nat’l. Agric. Statistics Services, 2021 *N.C. Agric. Statistics* 1, 53 (2021) https://www.nass.usda.gov/Statistics_by_State/North_Carolina/Publications/Annual_Statistical_Bulletin/AgStat2021.pdf.

¹⁴⁷ Soren Rundquist et. al., *Under the Radar: New Data Reveals N.C. Regulators Ignored Decade-Long Explosion of Poultry CAFOs*, EWG (Feb. 13, 2019) <https://www.ewg.org/research/under-radar>.

¹⁴⁸ Sarah Graddy, *North Carolina’s Factory Farms are Everywhere*, *supra* note 95.

¹⁴⁹ Steve Wing et. al., *supra* note 77 at 387.

¹⁵⁰ *Id.*

¹⁵¹ 2014 Swine Complaint, *supra* note 17.

Counties, creating a significant burden on water and air quality, quality of life, and human health. Part of the settlement included a recital that “DEQ is committed to ensuring compliance with Title VI and EPA regulations by evaluating whether policies and programs have a disparate impact on the basis of race. DEQ maintains an ongoing interest in integrating into DEQ programs better protections for human health, vulnerable communities, the environment and civil rights.”¹⁵²

This recital rings hollow given the 02T Regulations and ongoing impacts of the dry litter poultry industry on the same populations affected by swine facilities. DEQ has no comprehensive means for evaluating the dry litter poultry industry’s growing disparate impact and is therefore unable to integrate better protections for human health, vulnerable communities, the environment, or civil rights.

IV. LEGAL VIOLATIONS

A. Legal Background

i. Title VI of the Civil Rights Act of 1964 and EPA’s implementing regulations

As a recipient of federal funds, DEQ is prohibited by civil rights laws and EPA regulations from using criteria or methods of administering a program, activity, or permitting regime which has the effect of subjecting individuals to discrimination. Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating against individuals on the basis of race, color, or national origin, and provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁵³ Title VI was explicitly enacted to remedy the United States’ long history of invidious race discrimination. It contemplates and prohibits new forms of discrimination as well as policies and practices that entrench past discrimination or “freeze” the status quo.¹⁵⁴ Title VI applies to all programs and activities receiving federal financial assistance.¹⁵⁵

EPA’s Title VI nondiscrimination regulations provides the following specific prohibitions at 40 C.F.R. § 7.35:

- (a) As to any program or activity receiving EPA assistance, a recipient shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, [or] national origin . . . :

¹⁵² CLOSURE OF ADMINISTRATIVE COMPLAINT, *supra* note 16.

¹⁵³ 42 U.S.C. §2000d.

¹⁵⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (explaining that under Title VII, which was enacted at the same time as Title VI, “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices”); *cf. Texas Dep’t of Hour. & Cmty. Affairs v. Inclusive Communities*, 135 S. Ct. 2507, 2521 (2015) (noting that “[r]ecognition of disparate impact claims is consistent with the [Fair Housing Act’s] central purpose” as it “was enacted to eradicate discriminatory practices within a sector of our Nation’s economy”) (citations omitted).

¹⁵⁵ CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, TITLE VI LEGAL MANUAL, § V, 4, https://www.epa.gov/sites/default/files/2021-01/documents/titlevi_legal_manual_rev_ed_1.pdf.

- (1) Deny a person any service, aid or other benefit of the program or activity;
- (2) Provide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program or activity;

. . .

- (b) A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin, . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, [or] national origin . . .

EPA’s Title VI guidance require state permitting agencies to minimize the “environmental impacts to local communities and ensur[e] that their practices and policies are implemented in a nondiscriminatory manner.”¹⁵⁶ Further, the Department of Justice’s guidance prohibits disparate impact discrimination to ensure that “programs accepting federal money are not administered in a way that perpetuates the repercussions of past discrimination.”¹⁵⁷ Further, courts have held that states have an affirmative obligation under Title VI and EPA regulations “to include consideration of Title VI criteria in permitting decisions.”¹⁵⁸

ii. Disparate impact liability and cumulative impacts assessment

To establish disparate impact liability under Title VI, complainants must show a specific facially neutral policy or practice (which may include an *inaction* or *failure to take action*¹⁵⁹) caused a disproportionate harm on the basis of race, color, or national origin.¹⁶⁰ Once complainants have made a *prima facie* showing of disparate impact, the defendants may avoid liability by providing a substantial legitimate justification for the policy or practice.¹⁶¹ Even if defendants are able to show such a justification, the complainants may still prevail if they show an “alternative . . . would achieve the same legitimate objective but with a less discriminatory effect.”¹⁶²

¹⁵⁶ Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance), 71 Fed. Reg. 14207, 14214 (Mar. 21, 2006), https://www.epa.gov/sites/default/files/2013-09/documents/title6_public_involvement_guidance.3.13.13.pdf.

¹⁵⁷ TITLE VI LEGAL MANUAL *supra* note 155 at § VII, 2.

¹⁵⁸ *S. Camden Citizens in Action v. New Jersey Dept. of Env’t Prot.*, 145 F.Supp. 2d 446, 476 (D.N.J. 2001) (citing to several EPA regulations that mere “[c]ompliance with environmental laws does not constitute per se compliance with Title VI,” and “a recipient’s Title VI obligation exists in addition to the Federal or state environmental laws governing its environmental permitting program.” 65 Fed. Reg. 39650, 39680.)

¹⁵⁹ Office of Gen. Counsel, Env’t. Prot. Agency, Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions, 2, (2022) (emphasis added); Env’t. Prot. Agency, Dear Colleague Letter and ECRCO Compliance Toolkit (Jan. 18, 2017).

¹⁶⁰ TITLE VI LEGAL MANUAL *supra* note 155 at § 7, 6 (citing *N.Y. Urban League, Inc. v. New York*, 71 F.3e 1031, 1036 (2d Cir. 1995)).

¹⁶¹ *S. Camden Citizens*, 145 F. Supp. 2d at 483.

¹⁶² TITLE VI LEGAL MANUAL *supra* note 155 at § VII, 12; *see also Elston v. Talladega Cty. Bd. of Educ*, 997 F.2d 1394,1407 (1993).

Cumulative impacts assessments are an important component of a disparate impact analysis; however, there is not yet official EPA guidance for these assessments.¹⁶³ EPA’s Office of Research and Development published a white paper in January of 2022 stating that EPA must address cumulative impacts in order for the agency to “fulfill its mission to protect human health and the environment,” and to comply with Executive Orders 13985 and 14008 requiring “federal action to reduce health inequities not just as single pollutant issues, but as systems challenges produced by the interaction of pollutants with economic, social, and policy drivers.”¹⁶⁴ The white paper provides an operative definition of cumulative impacts:

“Cumulative impacts” refers to the total burden—positive, neutral, or negative—from chemical and non-chemical stressors and their interactions that affect the health, well-being, and quality of life of an individual, community, or population at a given point in time or over a period of time. Cumulative impacts include contemporary exposures in various environments where individuals spend time and past exposures that have lingering effects. Total burden encompasses direct health effects and indirect effects to people through impacts on resources and the environment that affect human health and well-being. Cumulative impacts provide context for characterizing the potential state of vulnerability or resilience of the community, i.e. their ability to withstand or recover from additional exposures under consideration.¹⁶⁵

In addition to prohibitions on disparate impact discrimination and intentional discrimination, EPA regulations require that when the recipient of EPA funds previously discriminated on the basis of race, color, sex, or national origin, the recipient “shall take affirmative action to provide remedies to those who have been injured by the discrimination.”¹⁶⁶

iii. North Carolina state constitution, laws, and regulations

North Carolina Constitution Article XIV § 5 states:

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to

¹⁶³ See OFFICE OF RSCH. AND DEV., ENV’T PROT. AGENCY, EXTERNAL REVIEW DRAFT: CUMULATIVE IMPACTS, RECOMMENDATIONS FOR ORD RESEARCH, (2022) https://www.epa.gov/system/files/documents/2022-01/ord-cumulative-impacts-white-paper_externalreviewdraft-508-tagged_0.pdf; OFFICE OF RSCH. AND DEV., ENV’T PROT. AGENCY, EXTERNAL REVIEW DRAFT: CUMULATIVE IMPACTS, RECOMMENDATIONS FOR ORD RESEARCH (2022); ENV’T PROT. AGENCY, FY 2022-2026 EPA STRATEGIC PLAN DRAFT (2021) <https://www.epa.gov/system/files/documents/2021-10/fy-2022-2026-epa-draft-strategic-plan.pdf>; Exec. Order No. 13,985, 80 Fed. Reg. 7,009 (January 20, 2021).

¹⁶⁴ EPA EXTERNAL REVIEW DRAFT: CUMULATIVE IMPACTS *supra* note 163 at 3.

¹⁶⁵ *Id.* at 1.

¹⁶⁶ 40 C.F.R. § 7.35(a) (2003).

control excessive noise, and in every other appropriate way to preserve as part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

North Carolina General Statute § 143-211(a)-(b) declares that the public policy of the State is “to provide for the conservation of its water and air resources,” and “to maintain, protect, and enhance water quality within North Carolina.”

North Carolina General Statute § 143-215.10B defines animal feed operations as feedlots involving more than 250 swine, 100 confined cattle, 75 horses, 1,000 sheep, or 30,000 poultry with a liquid waste management system. Dry litter poultry operations, on the other hand, are considered “deemed permitted” by DEQ if they contain less than 125,000 birds.¹⁶⁷

North Carolina General Statute § 143-215.9D prohibits DEQ from disclosing records related to complaints of violations on agricultural operations except where a Notice of Violation is issued.

North Carolina General Statute § 106-24.1 provides that “[a]ll information published by the Department of Agriculture and Consumer Services pursuant to this Part shall be classified so as to prevent the identification of information received from individual farm operators.”

North Carolina General Statute § 143-215.1 defines when permits are required to protect water. Section (b)(2) requires that DEQ “shall also act on all permits so as to prevent violation of water quality standards due to the cumulative effects of permit decisions.” The statute defines cumulative effects as “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.”

North Carolina General Statute § 143(b)(1) requires DEQ to “act on all permits so as to prevent, so far as reasonably possible, considering relevant standards under State and federal laws, any significant increases in pollution of the waters of the State from any new or enlarged sources.” Following this provision, North Carolina General Statute §143-215.1(a)(12) requires anyone who seeks to construct or operate an animal waste management system to obtain a permit.

North Carolina Administrative Code 02T .1303 “Permitting by Regulation” establishes the requirements for dry litter poultry facilities up to 125,000 birds. Section (a)(1) requires that (1) the poultry litter must be applied within agronomic rates to the operator’s land; (2) the litter must be kept at least 100 feet from a well; and (3) the litter cannot be applied on wet land or applied during precipitation events. Section (a)(2) requires that facilities holding more than 30,000 birds maintain records that “include the dates the litter was removed, the estimated amount of litter removed, and the location of the sites where the litter was land applied by the poultry operation.” If a manure hauler is used, facilities must have records that include “the dates the litter was removed, the estimated amount of litter removed, and the name, address, and phone

¹⁶⁷ 15A NCAC 02T .130.

spreading of litter. Moreover, DEQ does not have an active compliance program for dry litter poultry facilities so even these lax criteria are not meaningfully enforced (*see supra* Section D). The 02T Regulations ostensibly require poultry growers employ certain practices intended to mitigate the harms from the storage and spreading of chicken litter but include no mechanism to check compliance with these requirements. The regulations require that some storage and spreading records be kept on-site but, here again, it provides no mechanism by which to review the records or to confirm whether they are being kept at all. As a result, DEQ's dry litter policy results in contamination of waterways and air pollution that disparately impacts communities where these facilities are concentrated.

When violations do occur, DEQ cannot and does not implement a meaningful enforcement program. Inspections, spot checks, and follow ups to complaints—all basic components of a meaningful compliance regime—are made challenging or impossible when the responsible agency does not have even a comprehensive list of how many facilities exist, where they are, and who owns them. As one declarant said,

The problem with the regulation of the dry litter poultry industry is not just the health and environmental impacts, it is also the lack of information. If there were operational permits, it would be easier to understand poultry operations' practices. Having records submitted to DEQ would mean that DEQ would probably review the practices and would probably catch issues. It's much harder for us to identify operations' practices and catch issues, but we could review the records too if they were public.¹⁷²

DEQ says that, in practice, it does not inspect dry litter facilities unless it receives a complaint about a specific facility. However, declarants have stated that when they file complaints about litter piles being left uncovered for more than 15 days, DEQ rarely follows up on the complaint and even less often issues a violation. One declarant said,

They aren't sending people out to look and calculate the 15 days, they also won't write it up. I heard at one point that DEQ would call before they came up so [operator's] could clean it up before they got there so there would never be a write up. They won't do anything before the 15 days. Even if you file a report after that, there is generally no follow-up. They can follow up, but some do and some don't. If they don't prosecute, if DEQ finds no violation, they just throw out the report so there is no record of anything.¹⁷³

DEQ's failure to adequately regulate dry litter poultry facilities—from neglecting to set or monitor impact standards, to being unable to conduct accurate cumulative impact analysis, to failing to enforce its own exceptionally minor standards—causes significant adverse effects to the environment, health, and wellbeing of communities.

¹⁷² [REDACTED] Decl. ¶ 36.

¹⁷³ *Id.* ¶ 25.

ii. *DEQ's failure to adequately regulate dry litter poultry facilities disproportionately harms Native American, Black, and Latino residents.*

North Carolina's population is 70 percent white, but the counties bearing the highest concentration of broilers are disproportionately non-white, namely (b)(6) Privacy, (b)(7)(C) Enf. Privacy and (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties (*see supra* Section F).¹⁷⁴ Further, the recent permit renewals for the two swine CAFOs in (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties are in census blocks identified as potentially underserved due to their significant minority and low-income residents.¹⁷⁵

(b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties were also the focus of the previous Title VI Complaint against DEQ and subsequent EPA investigation into the swine industry.¹⁷⁶ The complaint documented an array of environmental, health, and quality of life harms resulting from the concentration of swine waste in these counties, noting that the area's dry litter poultry facilities contribute to and exacerbate the adverse effects of swine.¹⁷⁷ In 2017, EWG estimated that 24,000 residents of (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties lived within a half mile of a swine or poultry CAFO.¹⁷⁸ Further, in (b)(6) Privacy, (b)(7)(C) Enf. Privacy Counties, 93 percent of poultry operations were within 3 miles of at least 20 other swine or poultry farms.¹⁷⁹

These counties, historically and discriminatorily overburdened by the swine industry, are also being impacted by the poultry industry. The adverse impacts from just one of these industries is alarming and makes the need for consideration of the cumulative impacts of both strikingly apparent. However, DEQ continuously fails to consider the full cumulative impacts of the swine and poultry industries by failing to adequately regulate dry litter poultry facilities. With the poultry and swine industries booming in the most diverse and least white counties, the adverse harms caused by both mutually exacerbate each other and the impacts are then disproportionately felt by these communities of color.

iii. *DEQ's failure to adequately regulate dry litter poultry facilities is not justified.*

There is not a substantial legitimate justification for DEQ's failure to adequately regulate dry litter poultry facilities. Before the 02T Regulations were reauthorized in 2018, comments from community groups called on DEQ to "amend the 02T [Regulations] to bring dry litter facilities under a general permit" and "close significant gaps in the regulation of dry litter poultry facilities."¹⁸⁰ In the 2018 Settlement Agreement, DEQ committed to "ensuring compliance with Title VI and EPA regulations by evaluating whether policies or programs have a disparate impact on the basis of race," and "comply[ing] with applicable state and federal civil rights requirements during permitting processes and during regulatory oversight of facilities within its

¹⁷⁴ *QuickFacts N.C.*, U.S. CENSUS BUREAU, *supra* note 1 (search for (b)(6) Privacy, (b)(7)(C) Enf. Privacy counties).

¹⁷⁵ NCDEQ COMMUNITY MAPPING SYSTEM, *supra* note 25.

¹⁷⁶ 2014 Swine Complaint, *supra* note 17.

¹⁷⁷ *Id.* at 3, 33-34.

¹⁷⁸ Sarah Graddy et. al., *North Carolina's Factory Farms are Everywhere*, *supra* note 95.

¹⁷⁹ Soren Rundquist et. al., *supra* note 147.

¹⁸⁰ 2017 Cape Fear River Watch et. al., *supra* note 88.

jurisdiction.”¹⁸¹ Lastly, DEQ “is responsible for the environmental protection and quality of the State’s surface water and groundwater, and to ensure safe drinking water for its residents.”¹⁸²

DEQ is capable, aware, and required to ensure its permitting regime fulfills its purpose to protect the environment, health, and welfare of the state in a nondiscriminatory manner. Further, it is required by EPA Title VI regulations to “take affirmative action to provide remedies to those who have been injured by the discrimination.”¹⁸³ Therefore, there can be no substantial legitimate justification for DEQ to abdicate its responsibility to regulate and consider dry litter poultry facilities in its permitting regime.

iv. There are less discriminatory alternatives available to DEQ.

North Carolina is the only state in which dry litter poultry operations are categorically “deemed permitted.” Peer states such as Alabama, Georgia, South Carolina, and Mississippi have all implemented some form of permitting that closes some of the obvious gaps inherent with the 02T Regulation scheme.

Alabama produces more broilers per year than North Carolina.¹⁸⁴ AFOs in Alabama must submit a Notice of Registration with the state’s permitting authority that includes, among other details, the facility’s address, operator name, waste management plan, nearby water bodies, and animal holding capacity.¹⁸⁵ This includes dry litter poultry facilities. The Alabama Department of Environmental Management has documents easily accessible on its website that list all pending and approved Notice of Registrations for animal feeding operations.¹⁸⁶ Such a resource could not exist in North Carolina because DEQ does not require dry litter poultry facilities to submit any notice of existence given that they are “deemed permitted.”

Georgia also produces more broilers than North Carolina and requires operators that handle manure, including dry litter, to obtain an Animal Manure Handlers Permit from the Department of Agriculture.¹⁸⁷ Manure handlers are subject to storage and land application requirements.

South Carolina similarly includes dry litter poultry and land application of dry litter poultry manure under its water discharge permitting regulations.¹⁸⁸

¹⁸¹ CLOSURE OF ADMINISTRATIVE COMPLAINT, note 16.

¹⁸² *What We Do, About Water Resources*, N.C. DEP’T OF ENV’T. QUALITY WATER RESOURCES, <https://deq.nc.gov/about/divisions/water-resources> (last visited Apr. 11, 2023); *see also* N.C. Constitution, Art. IXV, § 5 (“It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry.”).

¹⁸³ 40 C.F.R. § 7.35(a)(7).

¹⁸⁴ U.S. Dep’t of Agric. Nat’l. Agric. Statistics Services, *supra* note 1 at VIII-30.

¹⁸⁵ ALA. ADMIN CODE r. 335-6-7-.01-.34.

¹⁸⁶ *Animal Feeding Operations*, ALA. DEP’T. OF ENV’T. MGMT., <https://adem.alabama.gov/programs/water/cafo.cnt> (links to pending and approved permits under “CAFO Registration Postings”) (last visited Apr. 12, 2023).

¹⁸⁷ GA. Comp. R. & Regs. 40-13-8-.03.

¹⁸⁸ S.C. Code Ann. Regs. 61-9.122.23.

Mississippi, which produces only 15 percent fewer broilers per year than North Carolina, requires that all poultry facilities with 9,000 or more birds apply for coverage under a general permit.¹⁸⁹ Such facilities must submit a waste disposal system design and undergo a site inspection prior to obtaining a permit for operation.

Right now, DEQ is an outlier by exempting essentially all dry litter operations. As the next section requests, DEQ should implement a permitting system that acknowledges and regulates the dry litter poultry industry for what it is: one of the largest industry in the state with significant associated environmental and human health risks.

V. RELIEF REQUESTED

DEQ's failure to implement a meaningful regulatory structure and keep records of dry litter poultry operations fundamentally fails to protect the health and environment of residents living in proximity to dry litter poultry facilities. This failure disproportionately affects Native American, Black, and Latino residents. As the dry litter poultry industry continues to expand, pollution and adverse impacts to human health will be made even worse in the continued absence of regulation and enforcement mechanisms. Native American, Black, and Latino residents will bear the largest brunt of these worsening impacts. To compound these harms even further, DEQ has rendered themselves unable to accurately account for cumulative impacts from dry litter poultry in any other permits it grants.

Complainants request that the Office of Environmental Justice and External Civil Rights conduct an investigation to determine whether DEQ violated and continues to violate Title VI and EPA regulations in failing to implement a meaningful permitting structure for dry litter poultry operations.

In any resolution of this matter, DEQ must update its 02T Regulations by closing the regulatory loophole that currently exists for dry litter poultry facilities when they are "deemed permitted." Instead, dry litter poultry facilities should be subject to a substantial permitting scheme that gives DEQ enough information to act on permitting decisions in a way that considers the myriad environmental and human health risks associated with the industry.

Complainants request that:

- DEQ develop an enforcement system that ensures dry litter poultry operators are properly storing their dry litter piles and monitoring the piles' impact on water and air quality and soil health.
- DEQ allow and respond to community input when it comes to issuing any new dry litter poultry permits.
- DEQ provide clear criteria to designate areas that are already overburdened with CAFOs and therefore unable to accommodate new or expanding facilities.

¹⁸⁹ 11 MISS. CODE. R. Pt. 6, R. 1.1.4.

- DEQ require new and existing dry litter poultry facilities to adopt environmentally superior technology analogous to that required by new swine farms as a result of the 2018 Title VI Settlement.
- DEQ adopt enforceable oversight systems that allow community members accessible recourse when dry litter poultry facilities violate rules that impact human and environmental health.
- EPA place conditions on future funding and awards to DEQ to ensure adequate compliance with Title VI in all its permitting actions.

In turn, DEQ will be able to accurately identify, avoid, and mitigate any discriminatory effects from permitting decisions. DEQ's current policy and practices are creating disparate adverse impacts on human health and environment for Native American, Black, and Latino residents. EPA should direct DEQ to develop a permitting system that is equitable and Title VI-compliant. Furthermore, EPA should prescribe measures for DEQ to administer that system in a non-discriminatory manner.

Thank you for your consideration of this matter.

Sincerely,

Dated April 19, 2023

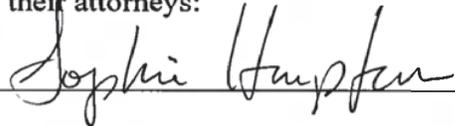
(b)(6) Privacy, (b)(7)(C) Enf. Privacy

(b)(6) Privacy, (b)(7)(C) Enf. Privacy

FRIENDS OF THE EARTH

(b)(6) Privacy, (b)(7)(C) Enf. Privacy

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ENCLOSURES:

Exhibit 1: (b)(6) Privacy, (b)(7)(C) Enf. Privacy Permit

Exhibit 2: (b)(6) Privacy, (b)(7)(C) Enf. Privacy Permit

Declaration of (b)(6) Privacy, (b)(7)(C) Enf. Privacy

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