

# Title VI and Swine Waste Biogas System Permitting by NC DEQ: Connecting the Dots



## TITLE VI LEGAL MANUAL



CIVIL RIGHTS DIVISION

U.S. DEPARTMENT OF JUSTICE

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# Swine Lagoons & Sprayfields: Key Legal Developments in NC Swine Permits



- 1996: NC General Assembly requires a system of facility permits and Moratorium
- 2000: NCAG enters into “Smithfield Agreement” with industry to fund and find Environmentally Superior Technologies leading to EST determination for category of new farms in 2006
- 2007: Lagoon Conversion Program authorized by NCGA
- 2019: Farm Bill and Budget Bill promotes Animal Waste biogas projects and changes moratorium from permits and systems to animal population (\*Keith Larick’s interpretation codified)

# Title VI-Three Part Test

## TITLE VI DISPARATE IMPACT VIOLATION

- 1) **Disparate impact.** Does the adverse effect of the policy or practice fall disproportionately on a race, color, or national origin group? See Section C.1.
- 2) **Justification.** If so, does the record establish a substantial legitimate justification for the policy or practice? See Section C.2.
- 3) **Less discriminatory alternative.** Is there an alternative that would achieve the same legitimate objective but with less of a discriminatory effect? See Section C.3.

# Title VI-Review Procedures

...receiving any disposition, service, financial aid, or benefit under the program.” *Id.* § 42.104(b)(1)(iv) (emphasis added). Agency disparate impact regulations do not define discriminatory “effects” but simply state that recipients may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin ....” *Id.* § 42.104(b)(2).<sup>10</sup>

## AGENCY PRACTICE TIP

While establishing adversity in most cases presents a low bar, investigating agencies nevertheless should employ a broad definition of adversity/harm, and gather any and all evidence of adversity/harm or risk of adversity/harm, including anecdotal evidence from complaining witnesses. Even though such additional evidence may not be required as a legal matter, it provides important context for the decision-maker. Such evidence also informs development of the appropriate remedy in the case of noncompliance.

# Disparate Impact and Health Concerns

**NCMJ**  
NORTH CAROLINA MEDICAL JOURNAL

Health  
in North

## Conclusion

Southeastern North Carolina communities located in close proximity to hog CAFOs are characterized by poor indicators of health that are not solely due to the impact of converging demographic, socioeconomic, behavioral, and access-to-care factors, but are also due to the additional impact of multiple hog CAFOs located in this area. Although causality with specific exposures from hog CAFOs was not established, our findings suggest research is needed in environmental factors that may influence these outcomes. In addition, these findings suggest an immediate need for improved screening, diagnosis, and intervention for conditions including infant mortality and LBW infants that were found to be overrepresented in these communities. Poor health outcomes in North Carolina communities adjacent to hog CAFOs may also need to be addressed by improving access to medical resources, and future studies to determine the contribution of factors that influence these outcomes are needed. NCMJ

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Environmental Justice Report  
Align RNG, LLC  
January 6, 2021

## 9. Conclusion

The EJ Report is an initial evaluation of the demographics and socioeconomics of the community area surrounding a proposed facility or permit modification. This includes information within a determined radius by the Department (one mile for this project) on race and ethnicity (decennial census year), poverty, per capita income, and ability to speak English (most current ACS census range), current NC Commerce county tier, and presence or absence of American Indian Tribal areas. The EJ Report does not include a reconnaissance of the community. The proposed Align RNG, LLC facility is located in an area designated with moderate health factors and outcomes in comparison to other areas of the State.

The study area displays higher percentages of African-American and Hispanic residents compared to the state, and in some cases, the county as well. The study area also exhibits higher poverty levels than the state, and the county in some instances. One potential LEP language group (Spanish) was identified that reaches the 5% threshold for Safe Harbor Guidelines. Extra attention was also given to ensure language data was accurate and translation and interpretation services were provided for essential documents and the public hearing and meeting. Finally, the list of sensitive receptors was consulted while considering additional outreach options that may best fit this community's needs.

Based on the results from this EJ Report, DEQ provided the following outreach:

- 1) Posted the notice for public comment in newspapers in both Sampson and Duplin counties
- 2) Consulted with the applicant to identify additional outreach methods and discuss ways to employ local vendors and HUB's throughout the process
- 3) Translated the public notice into Spanish and published the notice on the DEQ Website
- 4) Created a one-page flyer to provide an easy to understand project overview
- 5) Translated the one-page flyer into Spanish
- 6) Provided a voicemail line to receive public comment
- 7) Translated the voicemail line into Spanish
- 8) Consulted with local and state-wide Environmental and Community-based organizations to hear additional ideas for community outreach
- 9) Conducted on the ground outreach by visiting local businesses, sensitive receptors, and known community organizations
- 10) Announced reminders through social media
- 11) Provided Spanish translation service availability during the site visit and public meeting

# Swine GP Title VI 2014 Complaint Against NCDEQ

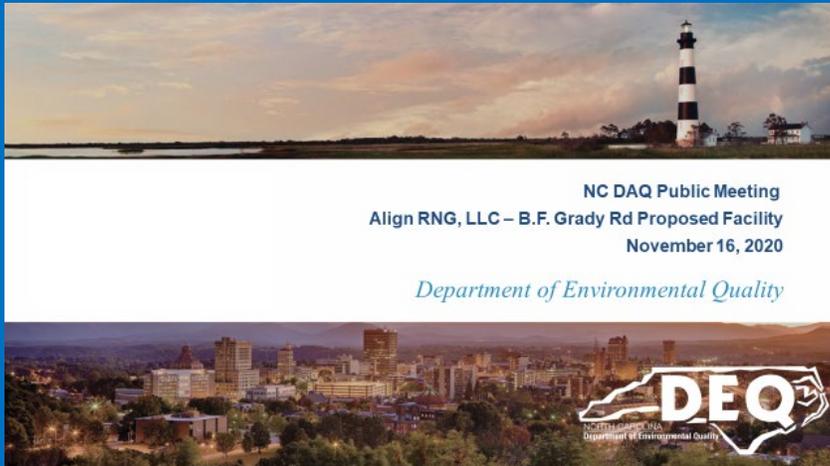
- North Carolina Environmental Justice Network (NCEJN), Rural Empowerment Association for Community Help (REACH), and Waterkeeper Alliance, Inc. filed a Title VI Complaint with the U.S. Environmental Protection Agency (EPA) which challenged Swine GP Process and Permit Terms
- Letter of concern by EPA in January of 2017
- Settlement in 2018
- New GP Process and Terms implemented by NCDEQ
- Update and Report by NCDEQ on Title VI webpage in May of 2020
- Subsequent challenge by NCFB to General Permit enhancements



# November 16, 2020 Public Meeting



- Hearing Officer's Recommendations limited to DAQ rules and concerns
- DEQ Slide Presentations Did Not Mention
  - 2014 Title VI Complaint
  - Subsequent settlement
  - Title VI standards
  - Content of EJ Reports
  - Research showing disparate impact
  - Research showing health concerns due to proximity to existing lagoon and sprayfield systems
  - Other, less harmful alternatives such as Lloyd Ray Farms or EST for the biogas digesters



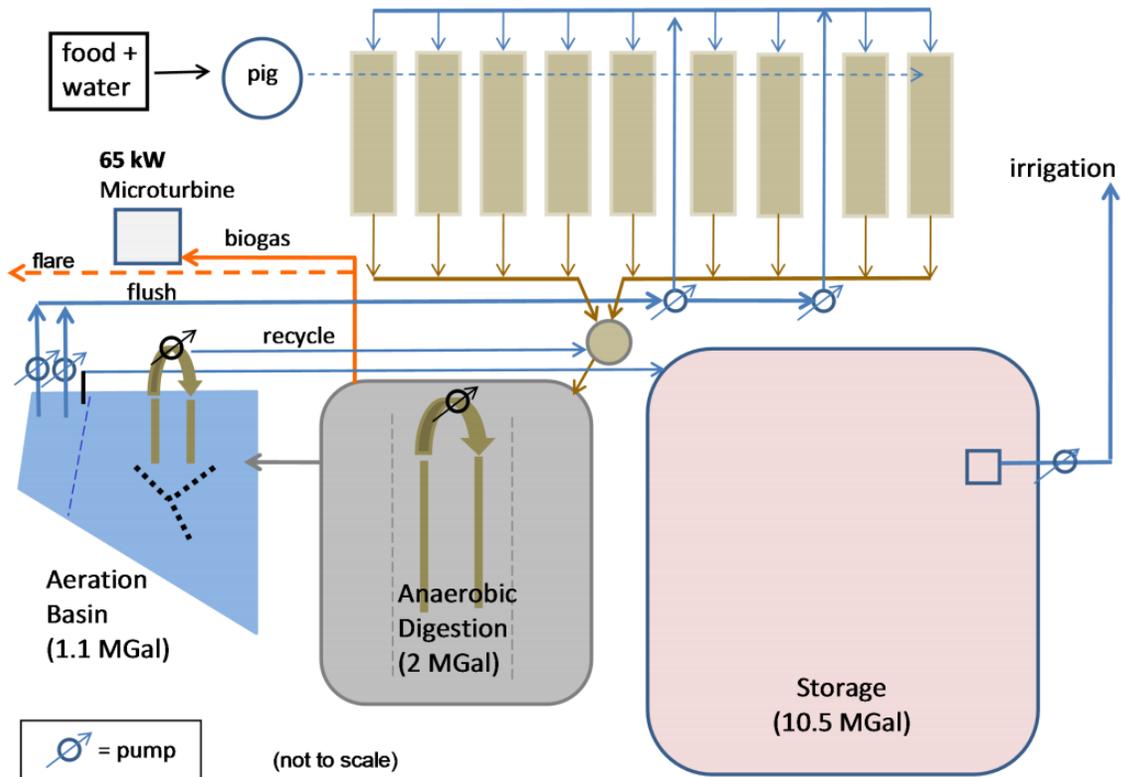
# 2021 Title VI Complaint Against NCDEQ

Although it is true that DEQ drafted an environmental justice report as part of the permitting process, this report simply evaluated the demographics and socioeconomics of the project area. DEQ did nothing to reduce the disproportionate adverse impacts of the Permits on the Black and Latinx communities in Duplin and Sampson County as Title VI requires. The report itself is devoid of any actual analysis of these impacts, much less any recommendations for reducing these impacts.<sup>152</sup>

If DEQ could justify these environmental harms and other harms, it would need to “offer evidence that its policy or decision in question is demonstrably related to a significant, legitimate goal related to its mission.”<sup>153</sup> But to date, DEQ has not put forward *any* justification for failing to consider disproportionate adverse impacts to communities of color, in the environmental justice report, public meeting report, or elsewhere. Nor could it, given that DEQ’s Division of Water Resources’ mission is “to protect, enhance, and manage North Carolina’s surface water and groundwater resources for the health and welfare of the citizens of North Carolina and the economic well-being of the state.”<sup>154</sup>

# Loyd Ray Farms-A Possible Alternative

Loyd Ray Farms System



# Questions?

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