Environmental Quality

PAT McCRORY
Governor

DONALD R. VAN DER VAART
Secretary

SAM M. HAYES
General Counsel

August 1, 2016

Via Email and Federal Express

Lilian S. Dorka, Acting Director
Office of Civil Rights
U.S. Environmental Protection Agency
Mail Code 1201A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-1000

RE: EPA OCR File No. 37R-16-R4

Dear Ms. Dorka:

I am responding to your letter of July 12, 2016, regarding allegations made by EarthJustice on behalf of the NC Environmental Justice Network, REACH, and Waterkeeper Alliance, Inc., regarding intimidation of Complainants in connection with EPA OCR File No. 11R-14-R4. It is unfortunate that Complainants in this matter have chosen to lodge a further complaint in an apparent attempt to bolster their tenuous claims in connection with File No. 11R-14-R4. In order to justify their claims, Complainants have articulated a standard so wholly subjective that it trivializes the very serious nature of the conduct that 40 CFR § 7.100 is designed to address.

The allegedly intimidating conduct claimed by the Complainants essentially consists of the appearance by legal representatives of the NC Pork Council ("NCPC") and the National Pork Producers Council ("NPPC") at the initial mediation session scheduled in connection with File No. 11R-14-R4. The complaint in that case was premised on the reissuance of a general permit for swine farms that did not discharge waste through a point source to waters of the State. The majority of swine operations in the State of North Carolina have coverage under the general permit. For a solution to be reached that addressed the complaints, those swine operations would necessarily have to be involved. Unilateral action by the NC Department of Environmental Quality ("DEQ") further limiting those permits would be challenged, potentially beginning multiple years of litigation with an uncertain outcome. In summary, all stakeholders should have had a seat at the table if there were to be changes to the general permit. NCPC and NPPC represented the majority of those potential stakeholders. I discussed this point with Ken LaPierre, Deputy Regional Administrator at EPA Region 4. He concurred that inclusion of all stakeholders was a reasonable, common-sense approach.

Indeed, had the mediation been scheduled at the offices of NC DEQ, we would not have kept anyone standing in the hallway.[1] Many mediations involve separate discussions between parties and mediators without the parties ever meeting together. If the Complainants were too uncomfortable to confront representatives of the NCPC and NPPC, the mediation could have proceeded notwithstanding. If the space available to the parties was not sufficient at the offices of the UNC Center for Civil Rights to allow this separation, it would have been a simple matter to relocate to the offices of NC DEQ.

NCPC and NPPC petitioned the EPA Office of Civil Rights ("OCR") to intervene in a January 7, 2016, letter to Ms. Golightly-Howell from counsel for those organizations. Copies of the letter petitioning to intervene were simultaneously sent to counsel for the Complainants. Complainants objected, but no decision on the petition was made by the OCR until January 15, 2016. While the NCPC and the NPPC were aware of Complainants' objections to their intervention in the mediation, it was not at all unreasonable that they sought to participate in the initial mediation session, while their petition was pending. As noted above, NCPC and NPPC are clearly stakeholders with an interest in this matter.

The complaint in connection with File No. 37R-16-R4 was filed on July 11, 2016. The intimidation alleged was the "presence, as well as the lack of notification [of the intent of the NCPC and NPPC representatives to attend the mediation]."[2] The presence of these individuals should have come as no surprise to Complainants given the still-pending petition to intervene and the position of NC DEQ, which was well-known to Complainants' counsel, that participation by representatives of the regulated community was essential. According to the complaint, the presence of those representatives was "anxiety-producing." Complainants provide as an example of the alleged "anxiety" that one of the Complainants' representatives worried that the NCPC and NPPC "might be gathering information about the identities of participants," irrespective of the fact that there was no suggestion that that actually happened or how it might have been undertaken.

Complainants neglect to mention that their initial complaint in File No. 11R-14-R4 identifies the individuals on whose behalf the complaint was filed. NC DEQ is subject to the

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[1] The "demand" referenced in the complaint in File No. 37R-16-R4 to be put in a conference room refers to a request by me that the NCPC and NPPC representatives not have to stand out in the hallway while NC DEQ, Complainants and the mediator discussed the matter. The photograph at Complainants' Exhibit 6 illustrates, better than intimidation, the rude treatment suffered by the NCPC and NPPC representatives at the hands of Complainants' counsel.

[2] A timely complaint must be filed within 180 days of the alleged discriminatory act. The complaint in this case was filed on the 180th day following the appearance of NCPC and NPPC representatives at the initial mediation session on January 13, 2016.

NC Public Records Law.[3] Once the complaint was received in NC DEQ offices, it became a public record available to anyone. No confidentiality was claimed, nor was any exception to the Public Records Law asserted. To the extent the individuals were allegedly concerned about their identities, the fact that they were identified in the complaint made their identities a public record.

Moreover, each of the individual complainants who were present to participate in the mediation have been vocal critics of the farms represented by NCPC and NPPC and are well known to them. It strains credulity that these individuals were intimidated by the fact that they would be identified by representatives of organizations whom these same individuals routinely criticized at public forums.

The EPA OCR website cited by Complainants is unavailing to their complaint of intimidation. It refers to confidentiality and nondisclosure of matters discussed in the ADR process. No claim has been made that suggests improper disclosure of information from the mediation.

The rules of EPA OCR provide that

> [n]o applicant recipient, nor other person shall intimidate, threaten, coerce, or discriminate against any individual or group, either:
>
> (a) for the purpose of interfering with any right or privilege guaranteed by the Acts or this part, or
>
> (b) because the individual has filed a complaint or has testified, assisted or participated in any way in an investigation, proceeding or hearing under this part, or has opposed any practice made unlawful by this regulation.

40 CFR § 7.100. There are no definitions or guidance provided to determine what is meant by the term "intimidate." Complainants suggest that intimidation for these purposes means simply to make someone afraid. Such a subjective definition for the purposes of these rules would mean that virtually any action or statement could constitute intimidation. A more rational definition would incorporate an element of objective reasonableness.

However, even if the standard was wholly subjective, Complainants belied their anxiety with an offer to confront the alleged intimidators the following day. Complainants and

[3] N.C. Gen. Stat. § 132-1, et seq.

their counsel were prepared to meet with representatives of the NCPC and the NPPC in the afternoon of the day following their initial appearance on January 13. On Thursday, January 14, 2016, at 9:07 a.m., counsel for Complainants sent an email addressed to counsel for NCPC, copying other representatives of the NCPC and NPPC, stating that

> "[c]omplainants can . . . meet today at 2. We'll be at the UNC Center for Civil Rights. To be clear, we look forward to the opportunity to hear what you have to say. We do not see this meeting as a part of the mediation process with DEQ."[4]

Did Complainants only in hindsight decide that the presence of the NCPC and NPPC representatives was intimidating? Or perhaps their claim of intimidation was more tactical than genuine. There was nothing NCPC and NPPC representatives could have done on January 13 regarding the gathering of information on the identities of participants that they could not have done on January 14.

The complaint in File No. 37R-16-R4 is not supported by any credible showing of intimidation or evidence of intimidation. NC DEQ respectfully requests that EPA OCR dismiss the frivolous complaint in File No. 37R-16-R4. We would be pleased to discuss these matters further at your convenience.

Sincerely yours,

Sam M. Hayes

Enclosure

cc: Donald R. van der Vaart

Marianne Engelman Lado
Senior Staff Attorney
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005

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[4] See Exhibit 1

Elizabeth McLaughlin Haddix
Senior Staff Attorney
UNC Center For Civil Rights
School of Law Annex
323 W. Barbee Chapel Road
Chapel Hill, NC 27517

Exhibit 1

Hayes, Sam M

From: Marianne Engelman Lado <mengelmanlado@earthjustice.org>
Sent: Thursday, January 14, 2016 10:44 AM
To: Hutson, Benne C.
Cc: Elizabeth McLaughlin Haddix; Deborah Johnson (deborah@ncpork.org); Michael Formica (formicam@nppc.org); Brugato, Thomas (tbrugato@cov.com); Mathews, Eugene E. III; Trible, Christopher E.; Hayes, Sam M; Bromby, Craig A
Subject: Re: Times to Talk

I look forward to hearing from you.

Sent from my iPhone
Apologies for brevity and errors

> On Jan 14, 2016, at 9:44 AM, Hutson, Benne C. <BHutson@mcguirewoods.com> wrote:
>
> Marianne:
>
> I have had something come up which requires me to get back home to Charlotte by early this afternoon. We will get back to you.
>
> Benne
>
>
> Benne C. Hutson
> Partner
> McGuireWoods LLP
> 201 North Tryon Street
> Suite 3000
> Charlotte, NC 28202-2146
> T: +1 704.343.2060
> M: +1 704.965.6555
> F: +1 704.444.8739
> bhutson@mcguirewoods.com
> Bio: http://www.mcguirewoods.com/People/H/Benne-C-Hutson.aspx
> VCard: http://vcards.mcguirewoods.com/FD425736732E6853D6E8B68BBB012858.vcf
> http://www.mcguirewoods.com
>
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> -----Original Message-----
> From: Marianne Engelman Lado [mailto:mengelmanlado@earthjustice.org]
> Sent: Thursday, January 14, 2016 9:07 AM
> To: Hutson, Benne C.

> Cc: Elizabeth McLaughlin Haddix; Deborah Johnson (deborah@ncpork.org); Michael Formica (formicam@nppc.org); Brugato, Thomas (tbrugato@cov.com); Mathews, Eugene E. III; Trible, Christopher E.; Sam Hayes (sam.hayes@ncdenr.gov); Craig A. Bromby (craig.bromby@ncdenr.gov)
> Subject: Re: Times to Talk
>
> Complainants can also meet today at 2. We'll be at the UNC Center on Civil Rights.
>
> To be clear, we look forward to the opportunity to hear what you have to say. We do not see this meeting as a part of the mediation process with DEQ.
>
> Please let us know if 2 pm works for you.
>
> Sincerely,
>
> Marianne Engelman Lado
>
> Sent from my iPhone
> Apologies for brevity and errors
>
>> On Jan 13, 2016, at 1:50 PM, Hutson, Benne C. <BHutson@mcguirewoods.com> wrote:
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>> Marianne:
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>> I will circulate these dates but we are also available to meet tomorrow if the mediation with DEQ ends today or tomorrow morning. Deborah Johnson and I can be there in person and the representatives of the National Pork Producers Council can participate by phone.
>>
>> Benne
>>
>> Benne C. Hutson
>> Partner
>> McGuireWoods LLP
>> 201 North Tryon Street
>> Suite 3000
>> Charlotte, NC 28202-2146
>> T: +1 704.343.2060
>> M: +1 704.965.6555
>> F: +1 704.444.8739
>> bhutson@mcguirewoods.com
>> Bio: http://www.mcguirewoods.com/People/H/Benne-C-Hutson.aspx
>> VCard: http://vcards.mcguirewoods.com/FD425736732E6853D6E8B68BBB012858.vcf
>> http://www.mcguirewoods.com
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>> -----Original Message-----
>> From: Marianne Engelman Lado [mailto:mengelmanlado@earthjustice.org]
>> Sent: Wednesday, January 13, 2016 12:51 PM
>> To: Hutson, Benne C.
>> Cc: Elizabeth McLaughlin Haddix

>> Subject: Times to Talk
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>> Benne,
>>
>> Perhaps we might have a quick call in the coming days to plan a meeting among complainants and the Pork Councils. In the meantime, Perhaps we can clear time for the meeting. We are available at the following times:
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>> Thursday the 21st in the morning
>> Tuesday the 26th in the morning
>> Wednesday the 27th before 11
>> Thursday the 28th until 2
>>
>> We can also find times in early February.
>>
>> Sincerely,
>>
>> Marianne Engelman Lado
>>
>>
>> Sent from my iPhone
>> Apologies for brevity and errors
>>
>> _____
>> This e-mail from McGuireWoods may contain confidential or privileged information. If you are not the intended recipient, please advise by return e-mail and delete immediately without reading or forwarding to others.
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