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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Mr. Donald R. van der Vaart
Secretary
North Carolina Department of Environmental Quality
217 West Jones Street
Raleigh, North Carolina 27603

MAY 09 2016

Dear Secretary van der Vaart:

I am writing as a follow up to our discussions last November concerning the initial findings of the Environmental Protection Agency Region 4 (EPA) differential oversight review of the North Carolina Department of Environmental Quality (NCDEQ) enforcement programs. EPA initiated the review in response to performance trends observed in NCDEQ's State Review Framework (SRF) metrics during the Annual Data Metrics Analysis (ADMA). The FY14 ADMA for North Carolina revealed significant downward trends over the prior four years (FY11 – FY14) in several key enforcement related metrics, including drops in informal and formal enforcement actions, penalties, and significant non-compliance designations. The drop in enforcement outputs and outcomes coincides with several legislative and policy changes made in 2011 which became effective in FY12.

EPA notified NCDEQ in early 2015 that additional review was needed to determine if the State was meeting its delegated responsibilities for compliance assurance implementation. To advance EPA's understanding of NCDEQ's programs, review teams consisting of Office Enforcement Coordination (OEC) staff and representatives for the Clean Air Act (CAA), Clean Water Act (CWA), and Resource Conservation and Recovery Act (RCRA) conducted a differential oversight review of records of recent violations and enforcement activities. These reviews were completed in FY15, and a summary of the results was shared with your senior enforcement managers in our annual EPA/State compliance assurance meeting on November 9, 2015.

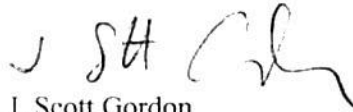
As promised during our meeting, I have included with this letter a more detailed description and examples of the concerns our reviews have identified. Additionally, I have also articulated proposed steps I believe are needed to address each issue. I suggest that NCDEQ and EPA schedule a meeting in Raleigh or Atlanta within the next few weeks to begin outlining a plan for addressing the identified concerns.

While there is still much work to be done, I am encouraged to see recent improvements reflected in the oversight file reviews and some of the FY15 ADMA metrics, and I wanted to acknowledge the progress in these areas. These improvements are a step in the right direction, and I hope they can form the foundation for further progress. However, consistent with the Agency's National Strategy for Improving Oversight of State Enforcement Performance, EPA will continue to pursue appropriate escalation actions to address the concerns we have identified if adequate progress is not made. These efforts may

include additional EPA oversight of inspections and enforcement, independent EPA actions, and reviews of program authorization.

My sense from our meeting in November was that NCDEQ enforcement managers agreed with EPA's findings and sought specific input on areas of resolution. I look forward to establishing specific steps toward improvement. As always, feel free to contact me to discuss any ideas or concerns.

Sincerely,



J. Scott Gordon

Director

Office of Enforcement Coordination

Enclosure

cc: Mr. John Evans, Chief Deputy Secretary
Mr. Tom Reeder, Assistant Secretary for the Environment
Ms. Sheila Holman, Director, Division of Air Quality
Mr. Michael Scott, Director, Division of Waste Management
Ms. Kim Colson, Director, Division of Water Infrastructure
Mr. Jay Zimmerman, Director, Division of Water Resources
Mr. Tracy Davis, Director, Division of Energy, Mineral & Land Resources

bcc: Carol Kemker, Acting Director, Air, Pesticides and Toxics Management Division
Beverly Spagg, Chief, Air Enforcement and Toxics Branch
James Giattina, Director, Water Protection Division
Denisse Diaz, NPDES Permitting and Enforcement Branch
Alan Farmer, Director, Resource Conservation and Restoration Division
Bill Truman, Acting Chief, Enforcement and Compliance Branch

Enclosure

EPA's expectations for the performance of North Carolina's compliance assurance programs are laid out in a collection of program-specific agreements and national policy documents for each program, including, but not limited to the documents indicated below:

Overarching:

- Revised Policy Framework for State/EPA Enforcement Agreements
- Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Agreements

CAA:

- NCDEQ Air Planning Agreement for the CAA Section 105 grant
- NCDEQ CAA Compliance Monitoring Strategy (CMS) Plan
- Clean Air Act Stationary Source Compliance Monitoring Strategy
- Timely and Appropriate Enforcement Response to High Priority Violations
- Guidance on Federally-Reportable Violations for Clean Air Act Stationary Sources

CWA:

- NCDEQ CWA Section 106 grant work plan
- NCDEQ NPDES EMS Plan
- NCDEQ/Region 4 CWA Memorandum of Agreement
- CWA NPDES Compliance Monitoring Strategy
- CWA NPDES Enforcement Management System

RCRA:

- NCDEQ RCRA grant work plan
- NCDEQ/Region 4 RCRA Memorandum of Agreement
- Compliance Monitoring Strategy for the RCRA Subtitle C Program and Appendices
- RCRA Hazardous Waste Enforcement Response Policy
- RCRA Civil Penalty Policy

EPA evaluated the performance of North Carolina's major regulatory programs during the Round 3 SRF review, which was completed in September 2013 based on FY2011 activities. The following areas were identified as the priority issues affecting the State's performance:

- For all three media (CAA, CWA, & RCRA), improvement was needed in the documentation of penalty calculations, to include the consideration of economic benefit and the rationale for any difference between the initial and final penalty assessed;
- Improvement was needed in the accuracy of data entry in the NPDES Integrated Compliance Information System (ICIS-NPDES);
- Improvement was needed in the timeliness and appropriateness of CWA enforcement actions, and these actions needed to promote a return to compliance.

A summary of all of the findings is included in the table below:

Review Element	CWA	CAA	RCRA
Element 1 - Data Completeness	Meets	Meets	Meets
Element 2 - Data Accuracy	Improvement	Attention	Meets
Element 3 - Timeliness of Data Entry	No Finding	Meets	No Finding
Element 4 - Completion of Commitments	Attention	Meets	Meets
Element 5 - Inspection Coverage	Meets	Meets	Improvement
Element 6 - Quality of Inspection Reports	Improvement	Meets	Meets
Element 7 - Identification of Violations	Meets	Attention	Meets
Element 8 - Identification of HPVs	Meets	Meets	Meets
Element 9 - Enforcement Promotes Compliance	Improvement	Meets	Meets
Element 10 - Timely and Appropriate Action	Improvement	Meets	Meets
Element 11 - Penalty Calculation Method	Improvement	Improvement	Improvement
Element 12 - Final Penalty Assessment & Collection	Attention	Meets	Meets

Despite progress in addressing some of the areas for improvement, EPA observed significant downward trends in NCDEQ’s performance metrics during the FY14 Annual Data Metrics Analysis (ADMA). Between the years of FY11 to FY14, several key enforcement related metrics showed a significant decline, including drops in informal and formal enforcement actions¹, penalties, and significant non-compliance designations.

This drop in North Carolina’s enforcement outputs and outcomes coincides with several legislative and policy changes made in 2011 which became effective in FY12. First, North Carolina’s Regulatory Reform Act of 2011 (Session Law 2011-398) required the Secretary to “develop a uniform policy for notification of deficiencies and violations for all regulatory programs within the Department...”² The resulting Uniform Violation Notification Policy for the Department of Environment and Natural Resources (often referred to as the “Tiered Enforcement Policy”) asserts “that violations of rules typically fit into three categories – 1. Recordkeeping and paperwork that result in little or no harm to the environment or public health; 2. More serious infractions that could result in harm to the environment or public health; and 3. Violations that have clearly impacted the environment or public health. The policy will formally recognize the tiered approach, so that a “Tier 1” violation will be met with a less severe response than a “Tier 3” violation.”³

The policy also establishes three forms of notice which generally correlate with these violation tiers: Notice of Deficiency (NOD) for Tier 1 violations; Notice of Violation (NOV) for Tier 2 violations; and Notice of Recommendation for Enforcement for Tier 3 violations, which is typically accompanied by a subsequent civil penalty assessment.⁴

Our data analysis and differential oversight reviews identified several direct consequences of the application of NCDEQ’s Tiered Enforcement Policy which we believe weaken the State’s compliance assurance programs. First, fewer violations are being reported to EPA (and the public) due to the fact

¹ NCDEQ has asked EPA for clarification on the definition of formal enforcement. This varies by program, but EPA has prepared the document Informal and Formal Enforcement Action Definitions which may provide some clarity.

² North Carolina Session Law 2011-398, Section 61.

³ Uniform Violation Notification Policy for the Department of Environment and Natural Resources, p. 2.

⁴ Ibid.

that NODs are not being entered into the national data systems. This practice not only falls short of EPA's policy expectations (e.g. CAA FRV policy), but it significantly reduces transparency to both EPA and the public. Next, our review confirmed that numerous sources were cited for violations utilizing the NOD or NOV, sometimes on multiple occasions, but without appropriate escalation to the more severe formal enforcement response, which compromised a key goal of "credible national deterrence to noncompliance."⁵ Evidence of this was that sources were frequently cited multiple times for the same types of violations.

Another significant legislative development in 2011 which had direct impacts to NCDEQ's enforcement programs was the passage of North Carolina Session Law 2011-145, which amends Part 1 of Article 7 of Chapter 143B of the General Statutes by adding a new section as follows:

"§ 143B-279.16. Civil penalty assessments.

(a) The purpose of this section is to provide to the person receiving a notice of violation of an environmental statute or an environmental rule a greater opportunity to understand what corrective action is needed, receive technical assistance from the Department of Environment and Natural Resources, and to take the needed corrective action. It is also the purpose of this section to provide to the person receiving the notice of violation a greater opportunity for informally resolving matters involving any such violation.

(b) In order to fulfill the purpose set forth in subsection (a) of this section, the Department of Environment and Natural Resources shall, effective July 1, 2011, extend the period of time by 10 days between the time the violator is sent a notice of violation of an environmental statute or an environmental rule and the subsequent date the violator is sent an assessment of the civil penalty for the violation."⁶

Based on our differential oversight review findings, NCDEQ's implementation of this legislative action has resulted in fewer formal penalty actions being issued. Again, this raises concerns about effective deterrence and providing a "level playing field" for sources throughout the country.

Keeping in mind the Federal policy frame outlined here, as well as the recent state legislative and policy revisions discussed, we have summarized our program specific findings below, with recommended next steps for each area of concern.

⁵ Revised Policy Framework for State/EPA Enforcement Agreements, p. 1.

⁶ North Carolina Session Law 2011-145, p. 164.

Clean Air Act

Background: The FY14 Clean Air Act ADMA revealed significant downward trends over the prior four years in several key metrics, with a precipitous drop occurring between FY13 and FY14. As an example, CAA metric for assessed penalties dropped by 93% statewide, from about \$235,000 in FY11 to just under \$17,000 in FY14. During the same period, the number of facilities with informal and formal enforcement actions also dropped dramatically (52% and 79%, respectively). In addition, facilities with an HPV determination dropped by 64%. Though EPA makes HPV determinations on behalf of NC, this drop in HPVs results from fewer NOVs being presented to EPA for review.

Metric ID	Metric Name	2011	2012	2013	2014
1e2	Number of Facilities with an Informal Enforcement Action (Facility Count)	124	73	61	59
1f1	Number of HPVs Identified (Activity Count)	12	13	8	4
1g1	Number of Formal Enforcement Actions Issued to Tier I Facilities (Activity Count)	15	14	12	9
1g2	Number of Tier I Facilities Subject to a Formal Enforcement Action (Facility Count)	14	10	12	3
1h1	Total Amount of Assessed Penalties	\$235,159	\$95,356	\$97,629	\$16,865
1h2	Number of Formal Enforcement Actions with an Assessed Penalty	13	9	11	3
8a	HPV Discovery Rate Per Major Facility Universe	3.1%	2.8%	2.4%	0.9%

The Division of Air Quality (DAQ) revised their Facility Guidelines, Penalty Tree, and Open Burning Guidelines on March 19, 2012, to address the requirements of the Tiered Enforcement Policy. EPA applauds NCDEQ's development of a penalty policy, which is encouraged in EPA's guidance entitled "Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Agreements", which states the following:

"State and local enforcement agencies are strongly encouraged to develop written penalty policies, criteria, or procedures for penalty assessments. EPA will then review and evaluate, but not formally approve, these penalty policies, criteria or procedures for consistency with the general penalty criteria..."⁷

However, Region 4 was not given an opportunity to review these revisions, which would have put us on notice about the potential impacts of the Tiered Enforcement Policy, and given us a chance to provide feedback with respect to the policy's compliance with EPA guidance and penalty criteria.

⁷ Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Agreements, p. 2.

To further evaluate whether the drop in enforcement was warranted, EPA staff conducted a differential oversight review of 20 sources with recent violations and enforcement activities. A summary of the key findings is outlined below.

Outstanding issues:

Element 3 – Violations: Inaccurate determination/failure to report FRVs and HPVs

Half of the facilities reviewed had either a missing FRV or HPV. Although many violations identified as “Tier 1” according to the Tiered Enforcement Policy may be federally reportable violations, DAQ did not report these violations into ICIS-Air when they were cited using a NOD. In addition, DAQ has historically relied on EPA to enter HPV data into the national system, but changes are needed to the protocols for reporting to ensure that HPVs are properly entered in the new data system. Missing HPV: *Darnel, Mann & Hummel; Momentive Specialty Chemicals; Stericycle*. Missing FRV: *Domtar; Iredell; J.T. Russell; Lampe & Malphrus; OMNOVA; Unilin*

Next Steps:

- DAQ is required to report FRVs into ICIS-Air. Many of the violations DAQ cites in NODs are specifically identified as FRVs in the new FRV policy, including late reports, late source tests, and failure to maintain records, and DAQ has not been reporting these FRVs into ICIS-Air. DAQ needs to immediately begin reporting all FRVs, including those addressed by a NOD, into ICIS-Air.
- EPA strongly recommends that DAQ begin reporting HPVs into ICIS-Air as soon as the needed programing is completed. EPA also notes that DAQ is required to enter all MDR data for all enforcement actions, including both informal and formal enforcement actions.

Element 4 – Enforcement:

Metric 9a - Enforcement actions that do not return sources to compliance

Chronic non-compliance not addressed through appropriate escalation and deterrence

During the differential oversight review, EPA identified 12 sources which were repeatedly cited by DAQ for non-compliance, often for similar offenses, but without any formal action. When escalation occurred, it did not ultimately result in a formal penalty action being taken. These sources included the following: *Darnel, Domtar, Enviva, Glenoit, Goldsboro, Iredell, Special Fab, Mann & Hummel, Murphy Brown, OMNOVA, North Carolina Central University, and Unilin*.

Inconsistent application of state enforcement policies

The differential oversight review identified several facilities for which the Tiered Enforcement Policy or Facility Guidelines, Penalty Tree, and Open Burning Guidelines were not consistently applied, or where the appropriate escalation prescribed by the policy were relaxed even when sources had poor compliance records. Facilities where EPA noted this occurrence include the following: *Domtar, Glenoit, Goldsboro,*

J.T Russell, Lampe & Malphrus, Momentive, Murphy Brown, North Carolina Central University, Stericycle, and Unilin.

Next Steps:

- The Tiered Enforcement Policy provides for both adequate compliance and deterrence actions to be effectively taken. Penalties can be sought after just one prior notice to the company, but DAQ is not exercising this discretion. EPA recommends utilizing the discretion available to DAQ within the policy to enhance environmental protection, while maintaining compliance with existing enforcement agreements and policy documents.
- Repeat violations can be an indication of ineffective environmental management by industry all the way up to systematic and/or intentional non-compliance. EPA recommends that DAQ take a broader view of a company's compliance record to ensure that these issues are addressed.

Element 5 – Penalties:

Metric 11a: Economic benefit is not adequately calculated or assessed

The Round 3 SRF review identified economic benefit in penalties as an Area for State Improvement. The differential oversight review confirmed that DAQ efforts to calculate, assess and recover economic benefit are not adequate and consistent with EPA policy, as indicated by the following examples:

For the N.S. Flexibles case (SOC 2014-002), the source exceeded its PSD-avoidance limit for VOCs, which should have automatically triggered PSD permitting and BACT analysis for VOCs. Instead, DAQ entered into an SOC with the facility, allowing them to continue operations and apply for either a Plant-wide Applicability Limit (PAL) or a PSD permit. In the interim, DAQ assessed stipulated penalties (\$1000/mo.) for each month the source exceeded its limit. DAQ describes this as the “pragmatic approach” of enforcing on the facility while allowing operations to continue. No effort was made by DAQ to calculate the economic benefit associated with continued operation of the facility above the applicable emission limit, so it is unclear whether the penalty of \$10,000 is adequate to recover the economic benefit gained.

For a second facility, Domtar, DAQ identified PSD violations. The company built a lignin solids removal plant (LSRP) without going through the PSD permitting process, asserting to DAQ that no actual emissions increases (above the significance threshold) would result from the project. However, increases in H₂S and TRS (total reduced Sulphur) did occur, and the company operated throughout 2013 and 2014 before contacting DAQ and reducing production levels. DAQ entered an SOC with the company (SOC 2015-01) which allows the company to take the LSRP to full production, resulting in an estimated 24.7 tpy of TRS and 22.7 tpy of H₂S emissions. The SOC establishes a compliance schedule and assesses a penalty of \$100,000, which clearly does not recover the economic benefit associated with plant operations beginning in February 2013 and continuing through the June 2018 compliance date in the SOC.

In the Carl Rose case, after failing a PM source test, the source continued operating for 7 months before successfully passing a retest. DAQ's penalty of \$2,000 was taken from the penalty matrix, but did not reflect any consideration for the economic benefit associated with continued operation in the interim.

Next Steps:

- Provide EPA with the current policy and procedures in place related to calculation, assessment, and recovery of economic benefit.
- If no coherent policies or procedures are in place, work with EPA to develop them consistent with the expectations laid out in EPA's "Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Agreements".⁸

⁸ *ibid*, p. 5