

NORTH CAROLINA

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 12965

WAKE COUNTY

FRANCIS X DE LUCA, and)
NEW HANOVER COUNTY BOARD)
OF EDUCATION)
Plaintiffs)

v.)

JOSH STEIN, in his capacity as)
ATTORNEY GENERAL OF)
NORTH CAROLINA)
Substitute Defendant.)

MOTION FOR PRELIMINARY
INJUNCTION and NOTICE
OF HEARING

The defendant will PLEASE TAKE NOTICE that the Plaintiffs will bring on for hearing before the Superior Court Judge then presiding on June 27, 2017 at 2:30 PM this Motion for Preliminary Injunction.

In the Amended Complaint Plaintiffs asked for a preliminary injunction enjoining the Substitute Defendant, Josh Stein, Attorney General from "distributing payments made pursuant to the July 25, 2000 Agreement to anyone other than to the Civil Penalty and Forfeiture Fund" and for a mandatory injunction to "recover the funds previously distributed by him for Supplemental Environmental Programs within three years next preceding the filing of this complaint."

Materials submitted in support of the Motion for Preliminary Injunction are as follows:

1. Affidavit of Francis X. De Luca establishes his standing to bring this action pursuant to the doctrine of Goldston v. State 361 NC 26 (2006) and public documents covering the origin of the program and its current status.
(The court may take judicial notice that the Plaintiff, New Hanover County Board of Education is a body politic with the capacity to sue and be sued, G.S. 115C-40 and 44(a), and that it has standing to bring this action as an intended beneficiary under Article IX section 7 of the Constitution and of GS 115 C – 457.2.

2. In discovery the Defendants produced the signed Agreement between the Attorney General of North Carolina and Smithfield Foods and its subsidiaries. The signed agreement is attached as exhibit A to the First Request for Admissions filed on May 16, 2017.
3. In discovery the Plaintiffs received from the Defendant numerous press releases from the Atty. Gen. detailing how he distributed up to \$2 million each year for supplemental environmental programs dating from July 24, 2002 through November 22, 2013. These are attached as exhibit B to the First Request for Admissions. Exhibit D to said Request for Admissions is a press release dated July 25, 2000 explaining the Agreement.

Plaintiffs Exhibit A, B and D together with Exhibits 1-4 attached to DeLuca Affidavit establish paragraphs 3, 4 and 5 of the facts alleged in the Amended Complaint: then Atty. Gen. Michael Easley on July 25, 2002 agreed that Smithfield Foods, Inc. and its subsidiaries would pay \$2 million per year for 25 years to a fund set up by the Atty. Gen. who then would distribute these funds to grant recipients for Supplemental Environmental Programs, most recently as of August 2016.

The court may take judicial notice that in the case of North Carolina School Boards Association et al. versus Moore, 359 NC 474 (2005) the Atty. Gen., Roy Cooper, was a named party. The North Carolina Supreme Court held that monies paid for these types of Supplemental Environmental Programs were subject to Article IX section 7 of the Constitution and must go to the Civil Penalty and Forfeiture Fund in accordance with Article IX section 7 and GS 115 C – 457.2.

4. The Plaintiff will also seek to introduce Request for Admissions 1 through 104 as are not denied by the Defendant prior to the hearing. Most of these admissions are to the admissibility of various public documents. The documents are voluminous and will be brought to court for the hearing. Attached to this Motion are a few of the documents which are most pertinent, including those behind tabs 87,88, 89, and 90. These documents establish the allegations of paragraph 9 of the Amended Complaint.

Exhibit 87 – May 8, 2000 Notice of Violation to Carroll's Foods, Inc.

Exhibit 88 – May 30, 2000 Notice of Violation to Murphy Farms, Inc. and documents dated March 6, 2000, January 11, 2000, May 4, 1999, August 11, 1995, August 23, 1995, April 21, 1995, May 4, 1999, August 11, 1995, August 23, 1995, June 9, 2000,

November 11, 1999, January 27, 2000, May 30, 2000, February 4, 2000, November 10, 1999, February 4, 2000, November 10, 1999, January 5, 2001, December 19, 2000, November 9, 1999, January 13, 2000, March 22, 2000, January 12, 2000, January 17, 2000, February 16, 2000, January 13, 2000, January 17, 2000, March 22, 2000, January 12, 2000, January 17, 2000, June 7, 1999, September 22, 1999, May 30, 2000, November 10, 1999.

Exhibit 89 – June 5, 2000 Notice of Violation to Smithfield Foods, Inc.

Exhibit 90 – June 6, 2000 Notice of Violation to Murphy Farms, Inc.

In other words, the settlement with Smithfield Foods, Inc. and its subsidiaries was preceded by actual violations of law by Smithfield Foods, Inc. and its subsidiaries, of which the State had knowledge.

The second part of the motion requests mandatory injunction. Plaintiffs ask only that the Attorney General initiate litigation to recover the disbursements made by the Attorney General in 2014. If this is not done promptly then the statute of limitations will run sometime this summer. In *School Board v. Moore*, supra, North Carolina Supreme Court left intact the ruling of the Court of Appeals that the statute of limitations for recovery of these funds was three years, G.S.1-52. The public schools could well use that \$2 million. Attached hereto as Exhibit 5 is a press release from the Attorney General announcing the grants for 2014 completed as of August 20, 1024.

Pursuant to Rule 65(c) of the Rules of Civil Procedure a preliminary injunction requires the giving of security by the Plaintiff. In this case the security should be nominal as there is no conceivable loss to the Attorney General by not distributing these funds which, in the ordinary course of events, would be distributed this summer.

Respectfully submitted this 9th day of June, 2017.

STAM LAW FIRM, PLLC

By: 

Paul Stam, Attorney for Plaintiffs

510 W. Williams Street

Apex, NC 27502

Tel: 919-362-8873

Fax: 919-387-7329

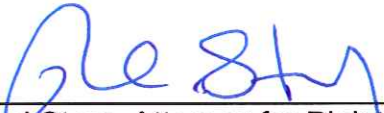
Email: paulstam@stamlawfirm.com

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing Motion for Preliminary Injunction and Notice of Hearing and the Affidavit of Francis X. DeLuca upon Defendant by delivering a copy of same to the attorneys for Defendant named below (and by email).

This the 9th day of June, 2017.

STAM LAW FIRM, PLLC

By: 
Paul Stam, Attorney for Plaintiffs
510 W. Williams Street
Apex, NC 27502
Tel: 919-362-8873
Fax: 919-387-7329
Email: paulstam@stamlawfirm.com

I. Faison Hicks
Attorney for the Defendant
Special Duty Attorney General
NC Department of Justice
Special Litigation Section
114 West Edenton Street
Office Number 349
Raleigh, NC 27603
P.O. Box 629
Raleigh, NC 27602
Tel: 919-716-6629
Cell: 704-277-8635
Fax: 919-716-6763
Email: fhicks@ncdoj.gov



\$1.9 MILLION AWARDED TO PROJECTS FOR CONSERVATION AND ENHANCEMENT OF WATER QUALITY AND NATURAL HABITAT IN NC

Release date: 8/20/2014

Environmental Enhancement Grant (EEG) Program facilitates Smithfield Agreement funding

Raleigh: Attorney General Roy Cooper announced this week the recipients of the twelfth cycle of Environmental Enhancement Grants. \$1.9 million in funding, made available by the Smithfield Agreement, will be used to protect and enhance North Carolina's environment and natural resources from the Blue Ridge Mountains to the Pamlico Sound.

The Attorney General's agreement with Smithfield Foods, the world's largest pork producer, provides annual funding for projects throughout the state to restore, enhance or protect North Carolina's environment and natural resources. In addition to providing annual funding for environmental projects, Smithfield has funded research at N.C. State University to develop and evaluate environmentally superior alternatives to currently permitted swine waste management technologies.

To date, Cooper has awarded more than \$23 million to 92 environmental enhancement projects pursuant to the Smithfield Agreement. Funds from the agreement have been used to close 223 animal waste lagoons, restore and protect more than 20,700 acres of natural areas and wildlife habitat, and support a variety of environmental education and research initiatives.

The following projects were selected to address surface water quality and conservation issues throughout the state:

Durham Soil & Water Conservation District was awarded \$325,000 to install stormwater reduction and treatment measures on the campus of Southern High School. The measures will provide educational opportunities for students and reduce nutrient levels in water entering the Falls Lake watershed, a drinking water source for much of Wake County.

NC Foundation for Soil & Water Conservation will receive \$280,000 to close high priority inactive animal waste lagoons, install and rehabilitate on-farm water resource systems, and provide technical training to local soil and water conservation district staff throughout the state.

NC Coastal Federation was awarded \$230,000 to eliminate seepage of agricultural drainage into a canal system feeding Long Shoal River, Alligator River and the Pamlico Sound. The installation of water control measures will reduce flooding and improve local water quality with the ultimate goal of restoring area waters for shell fish harvesting.



community.

Tar River Land Conservancy was awarded \$325,000 to purchase and protect a total of 410 acres in Halifax, Warren, and Franklin Counties. These acquisitions will permanently protect 5.4 miles of streams, 128 acres of wetlands, 144 acres within 100-year floodplains, and 362 acres of forest.

Blue Ridge Forever has been awarded \$250,000 to acquire and protect 3,082 acres in Ashe, Buncombe, Burke, Henderson, Macon, and Madison counties. The acquisitions will protect riparian buffers along more than 20 miles of streams and rivers in the French Broad, Little Tennessee, New, and Catawba Watersheds.

NC Coastal Land Trust has been granted \$225,000 to purchase a 50-acre tract along a tributary of Gales Creek in Carteret County. The property will be added to the Camp Sam Hatcher Preserve and managed as wildlife habitat and for passive recreation and education in partnership with the East Carolina Council of the Boy Scouts of America.

The Nature Conservancy has been granted \$150,000 in order to purchase the 450-acre Heatherly Tract in Bladen County. Conservation of this tract will protect waters of the Cape Fear River basin and help create a permanently protected wildlife corridor between the Bladen lakes State Forest and State-managed game land.

The 2014 Environmental Enhancement Grant cycle is now open. Those interested have until October 27 to submit letters of intent. More information is available at <http://www.ncdoj.gov/EEG.aspx>.

Media Contact: [Noelle Talley](#), (919) 716-6484

North Carolina Department of Justice / Roy Cooper, Attorney General (919) 716-6400

NORTH CAROLINA

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 12965

WAKE COUNTY

FRANCIS X DE LUCA, and)
NEW HANOVER COUNTY BOARD)
OF EDUCATION)
Plaintiffs)

v.)

JOSH STEIN, in his capacity as)
ATTORNEY GENERAL OF)
NORTH CAROLINA)
Substitute Defendant.)

AFFIDAVIT OF FRANCIS
X. DE LUCA

Francis X. De Luca being first duly sworn deposes and says:

1. I am 58 years of age and live at 200 Preston Arbor Ln Cary, NC 27513. For the last 42 years I have paid (and currently pay) income taxes to the State of North Carolina. For the last 34 years I have been a resident of North Carolina and have paid property tax and sales tax in each county in which I have had my residence.

2. A document from the Attorney General downloaded September 20, 2016 is attached as Exhibit A to this affidavit and shows that the program is still operative with the schedule for grant application.

3. My attorney received the attached Exhibits B, C, and D which show the origin of the "Supplemental Environmental Program". Exhibit B is a DENR document dated April 1, 1998 from A. Preston Howard, Director of the Division of Water Quality. Exhibit C is a DENR document dated August 18, 1998 from Michael Shore. Exhibit D is dated September 29, 2016 from Michael Pjetraj of the Division of Air Quality concluding "I believe the court case ruling was distributed with the understanding that we could not use SEPs." This email accompanied Exhibits B and C.

4. This Affidavit is made on my own personal knowledge and I am competent to be a witness.

Francis X De Luca

Francis X. De Luca

NORTH CAROLINA, WAKE COUNTY

Sworn to and subscribed before me
this 18th day of June, 2017.

Kathy A. Helbig
NOTARY PUBLIC

My Commission Expires: April 12, 2019

Documents: Deluca, Francis X Affidavit

KATHY A HELBIG
Notary Public
Chatham Co., North Carolina
My Commission Expires Apr. 12, 2019



ENVIRONMENTAL GRANTS

Attorney General Roy Cooper awards grants annually to projects that will help improve our water quality. These grants help to preserve land along our rivers, restore wetlands, clean up hog lagoons and find alternative uses for hog waste.

Since the program began, Cooper has awarded more than \$25 million to 100 projects. So far, these projects have resulted in the closure of 213 animal waste lagoons and the restoration or permanent conservation of more than 23,000 acres of land and wildlife habitat, as well as several environmental education and research initiatives.

You can read more about [projects awarded grants](#).

Program Background

On July 25, 2000, the North Carolina Attorney General and Smithfield Foods Inc. signed an agreement to identify environmentally superior technologies for hog waste disposal. Smithfield committed to provide money to promote environmental programs in North Carolina.

To maximize the benefits to North Carolina's environment, the Attorney General, after consultation with Smithfield, the NC Department of Environment and Natural Resources and others, established the Environmental Enhancement Grants Program in January 2003.

Program Objectives

The EEG Program seeks to improve the air, water and land quality of North Carolina by funding environmental projects that address the goals of the agreement between Smithfield and the Attorney General.

The EEG Program funds projects to restore and protect impaired, degraded or endangered surface waters, groundwater and other natural resources. In addition, the EEG Program promotes long-term environmental enhancement programs to conserve and protect targeted natural areas.

Because North Carolina's environmental enhancement needs will change over the 25 years of funding, the EEG Program is designed to be flexible and to shift priorities depending on the needs identified each year.

Apply for a Grant

The North Carolina Attorney General's Office will soon begin accepting applications for the next cycle of Environmental Enhancement Grants. Those interested in applying should submit letters of intent to EEG@ncdoj.gov by **Friday, September 30, 2016**. Information meetings will be held on **October 19 and 25**,



2016, and completed proposals will be due by 11 am on **Thursday, November 10, 2016.**

[Read the 2016 Request for Proposals.](#)

If you have questions about the grant program or the application process, please contact us at EEG@ncdoj.gov.

See Reports From Grant Recipients

[2002 NCFSWC Final Report Excerpts](#)

[2004 TRLC Final Report Excerpts](#)

[2005 NCCF Final Report Excerpts](#)

North Carolina Department of Justice / Roy Cooper, Attorney General (919) 716-6400

State of North Carolina
Department of Environment
and Natural Resources
Division of Water Quality

James B. Hunt, Jr., Governor
Wayne McDevitt, Secretary
A. Preston Howard, Jr., P.E., Director



April 1, 1998

MEMORANDUM

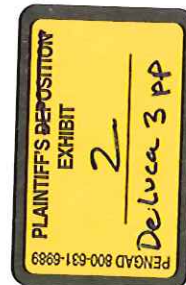
TO: Coleen H. Sullins, Acting Chief
Water Quality Section

FROM: A. Preston Howard, Jr., P.E. *SAH*

SUBJECT: Implementation of DWQ Enforcement Policy
Supplemental Environmental Projects (SEP's)

The Division of Water Quality has traditionally assessed civil penalties for violations of statutory and regulatory requirements. On occasion, these fines are appealed or reduction of the civil penalties (remission) are requested. Remissions are occasionally granted through this negotiation process. Current statutory requirements dictate that civil penalties collected through the enforcement process be set-aside for educational purposes. Although public education is a very important and a sincere use of these funds, the process returns very little to the environment which often suffers as a result of these environmental violations. This policy will set up a mechanism to provide opportunities for environmental benefit as a result of negotiated settlements where some portion of the settlement agreement may be in the form of a Supplemental Environmental Project (SEP).

Supplemental Environmental Projects are defined as projects that are beneficial to the environment and/or to public health that a defendant agrees to perform as part of a settlement to an enforcement action. A SEP also provides the defendant with the incentive to go beyond compliance to achieve greater environmental protection than would otherwise be required. During development of potential settlement arrangements, staff may introduce the possibility of a SEP but should leave the final decision of whether or not to perform a SEP entirely up to the defendant. The SEP should bear some relationship, or nexus, to the violation. The agency decision will be retained by the Division Director but potential SEP's should be discussed with the Chief of the Water Quality Section during the process of settlement development. SEP's should not be considered a routine option for all enforcement actions but should be decided upon in a selective manner. In some cases, even though a projects appears to satisfy all the provisions of this policy, application of this policy may not be appropriate, in whole or in part (e.g., the cost of reviewing a SEP proposal is excessive, the oversight costs of the SEP may be too high, or the regulated entity may not have the ability or reliability to complete the proposed SEP). The regions are encouraged to include the Division of Pollution Prevention and Environmental Assistance in the development, implementation and follow-up of SEP's.



Examples of Supplemental Projects include the following:

- Enhancement of downstream wetlands (prior converted or damaged) in a situation where there have been effluent discharge limit violations or a discharge without a permit.
- Stream bank restoration projects within an urban area or agricultural area where municipal or agricultural violations have occurred.
- Source reduction, reuse and/or recycling program implementation within an industrial facility. May require sharing of this knowledge with other similar facilities in the State.
- Educational programs associated with program specific issues (pretreatment, land application of residuals, animal waste management, treatment plant operations, etc...) for permit violations or people operating without proper permits. These educational programs (seminars, workshops, etc...) would need to be coordinated with appropriate and responsible entities (Cooperative Extension Service, Trade Organizations such as American Water Works Association (AWWA), Water Environment Association (WEA), League of Municipalities, Pork Producers Association, etc...).
- Water conservation device trade-in programs (i.e. 1.5 gallon toilets for 5 gallon toilets, low flow shower heads, etc...), water reduction systems, water conservation programs and/or funding a water conservation specialist for municipal or domestic systems where excessive infiltration/inflow may be contributing to excess flows and where the permittee has an ongoing program to address and remove infiltration/inflow from the system.

Many potential SEP's exist and we need to be careful about selection of these projects because there needs to be accountability associated with these projects as well. Many SEP's can involve substantial staff resources in the review, approval, implementation and operation phases. We want to ensure that the benefits derived from such projects are worth the financial reduction allowed and the efforts expended by staff. Principle responsibility for tracking implementation and operation of SEP's will reside with the defendant with oversight by the regional office staff. Central Office staff will develop a computer tracking system that will be accessible at the regional office level to assist in this tracking responsibility.

At no time should the value of a SEP be more than seventy-five percent (75%) of what would be the civil penalty assessment. The value of the SEP should be clearly justified through a report or other appropriate written plan and the value should be greater than a dollar for dollar reduction of a civil penalty. The SEP proposal must include a line item cost estimate, time line of project events, project contact name, mailing address and certification that the project is not otherwise legally required. A final report must be filed with the Division upon completion of the SEP. Information or knowledge gained through the SEP experience should be shared with other similar facilities. A settlement agreement including a SEP must have a stipulated penalty for failure to conduct the SEP as specified in the proposal, if prior approval for the variation is not granted by the Division Director. If the actual cost of the SEP is less than the estimated cost in the SEP proposal (by 5% or more), the facility shall pay the difference with interest as part of the administrative penalty to the Division.

Restrictions for SEP's include:

- Mere compliance with existing requirements cannot qualify as a SEP (i.e., must go beyond compliance with existing requirements);

Implementation of DWQ Enforcement Policy
Supplemental Environmental Projects (SEP's)
Page 3

- A SEP may not be considered if a criminal investigation is pending;
- The project does not primarily benefit the violator himself. The environment and/or the community should be the prime benefactor;
- A SEP may not be considered if a SEP was negotiated in the past but the defendant failed to perform the SEP. An exception may be made by the director for extenuating circumstances.

A communication plan should be coordinated with the Division Public Information Officer (PIO) which should indicate that the SEP was the result of a settlement agreement for the specific violations. Every SEP settlement must contain an agreement about publicity. Publicity may include up to a full-page advertisement in a local newspaper explaining the violations and the approved SEP. Approval for the advertisement must be obtained by the Division.

Any questions regarding this matter should be directed to Mr. Don Safrit, P.E., Assistant Chief for the Point Source Branch at (919)733-5083, extension 519.

cc: Regional Supervisors
Regional Water Quality Supervisors
Assistant Chiefs for the Water Quality Section
Ernie Seneca

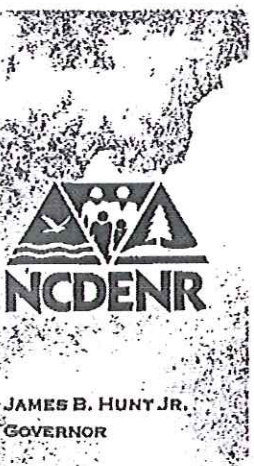
File: SEPS

RECEIVED
AUG 26 1998
U.S. DEPARTMENT OF ENVIRONMENTAL PROTECTION

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

August 18, 1998

cc Keith
Laura
See 2
Mike A



JAMES B. HUNT JR.
GOVERNOR

WAYNE McDEVITT
SECRETARY

MEMORANDUM

TO: Linda Culpepper
Phil Prete

THROUGH: Bill Holman

FROM: Michael Shore

Re: Supplemental Environmental Projects (SEPs)

They think DAD has a
SEP policy - all

file ENF

We discussed SEPs at the August 3 Environmental Protection Division Directors meeting. Dan McLawhorn participated in the discussion. The conclusions of the meeting are as follows:

- DENR does not intend to modify the draft policy. In retrospect, the role of the draft policy was to provide a model for the divisions to create their own SEP policies. With the division level policies in place (AQ, WQ, WM), nobody at the August 3 division director meeting argued for a substantive departmental policy. In short, the group concluded that policies on SEPs are a division level issue.
- Given the information in the previous bullet, DWM has the latitude to address the issues that you raised in your memo. DWM is free to develop a policy that allows SEPs to be used for companies that are the subject of a pending criminal investigation. DWM can set the threshold at indictment or conviction as you suggest in your memo. Or, as was raised in the meeting, DWM can craft a policy to allow a SEP with one division of a corporation even if another division has been convicted of violating a state environmental law.
- The draft departmental policy restriction that requires General Counsel approval for penalty reductions greater than 75% does not carry weight. As indicated in the first bullet, the DWM can draft its policy according to its needs, as the Department has no overarching policy, only a draft.

PLAINTIFF'S DEPOSITION
EXHIBIT
3
De Luca 2 pp

Memo to Linda Culpepper and Phil Prete
Page Two
August 19, 1998
Regarding SEPs

Needless to say, as you revise and implement the DWM policy, know that common sense and good judgement are crucial components of good policy. For example, divisions should consider past compliance history and outstanding violations of a company before entering into a SEP. Bill Holman encourages the divisions to develop SEP policies, and he is prepared to back the divisions as they take risks exploring the best ways to implement SEPs.

cc: Dan McLawhorn
Environmental Protection Division Directors

Paul Stam

From: Evans, John <john.c.evans@ncdenr.gov>
Sent: Thursday, October 06, 2016 9:55 AM
To: paulstam@stamlawfirm.com
Subject: Fwd: 1998 Supplemental Environmental Project
Attachments: image002.png; ATT00001.htm; image003.png; ATT00002.htm; 1998-08-18 SEPS - Shore-Holman.pdf; ATT00003.htm; 1998-04-01 Implementation of DWQ Enforcement Policy SEPs - Howard.pdf; ATT00004.htm

Sent from my iPhone

Begin forwarded message:

From: "Pjetraj, Michael" <michael.pjetraj@ncdenr.gov>
Date: September 26, 2016 at 2:03:26 PM EDT
To: "Evans, John" <john.c.evans@ncdenr.gov>
Subject: RE: 1998 Supplemental Environmental Project

John,

Attached is the policy that was quoted in your email. There is also a follow up memo to DWM.

To the best of my knowledge, the DAQ never created a SEP policy and did not use SEPs for facility violations.

I am not aware of and cannot locate a memo to the DAQ stating that we cannot use SEPS. I believe the court case ruling was distributed with the understanding that we could not use SEPs.

Michael Pjetraj, P.E.
Stationary Source Compliance Branch Supervisor
Division of Air Quality
North Carolina Department of Environmental Quality

919-707-8497 office
michael.pjetraj@ncdenr.gov

217 West Jones Street
1641 Mail Service Center
Raleigh, NC 27699-1641

