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| **STATE OF NORTH CAROLINA** | **IN THE OFFICE OF ADMINISTRATIVE HEARINGS** |
| **COUNTY OF DUPLIN** | **10 EHR 5508** |
| HOUSE OF RAEFORD FARMS, INC., Petitioner, | |
| v. | **DECISION** |
| NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, Respondent. | |

**THIS MATTER** came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, beginning on October 25, 2011 and concluding on December 20, 2011, at the Office of Administrative Hearings in Raleigh, North Carolina. The record was left open for the parties' submission of materials, including but not limited to supporting briefs, final arguments and proposals after receipt of the official transcript. All materials were received by the Undersigned from both parties on or about March 6, 2012. By Order dated April 20, 2012 signed by Julian Mann, III, Chief Administrative Law Judge, the due date for this Decision was extended to June 4, 2012.

## APPEARANCES

**For Petitioner:** Henry W. Jones, Jr.
Lori P. Jones
Jordan Price Wall Gray Jones & Carlton, PLLC
Raleigh, North Carolina

**For Respondent:** Anita LeVeaux
Assistant Attorney General
North Carolina Department of Justice
Raleigh, North Carolina

## ISSUES

Whether Respondent exceeded its authority or jurisdiction, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule in issuing an assessment of a civil penalty totaling $75,000.00, plus investigative costs of $1,357.95, to the Petitioner for violation of N.C. Gen. Stat. § 143-215.1(a)(6), 15A NCAC 2B

.0211(3)(b) and 15A NCAC 2B .0211(3)(c) per the notice of Civil Penalty Assessment signed August 10, 2010, by Respondent.

## WITNESSES

**For Petitioner:**
George Clayton Howard, Jr.
James K. Holley, P.G.
Kenneth Wayne Register, Jr.
Davey Wayne Cavanaugh

**For Respondent:**
Linda Willis
Kenneth Rhame
Robert Poindexter
Geoffrey Kegley
Stephanie Garrett
Richard Shiver
Jeffrey O. Poupart
Joseph Teachey
James Bushardt
Bongkeun Song, Ph.D.

## EXHIBITS

**For Petitioner:**

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| Ex. 1 | Civil Penalty Assessment |
| Ex. 2 | Notice of Violation to Petitioner dated 10/15/09 |
| Ex. 3 | Letter from R. Johnson to R. Shiver dated 10/23/09 |
| Ex. 4 | Letter from C. Howard to M. Rechtman dated 03/18/10 |
| Ex. 5 | Register's Septic Tank Pumping Statement dated 09/21/09; Purchase Order to Register's; Check to Register's dated 10/22/09 |
| Ex. 6 | Report of Environmental Chemists dated 10/08/10; Chain of Custody dated 09/28/10 |
| Ex. 7 | Report of Environmental Chemists dated 09/30/10; Chain of Custody dated 09/07/10 |
| Ex. 8 | Photographs labeled U and V |
| Ex. 9 | Photographs labeled W and X |
| Ex. 10 | Curriculum Vitae of James K. Holley, P.G. |
| Ex. 11 | Document regarding monitoring results at Valley Protein, 03/26/06 – 01/15/09 |
| Ex. 12 | Handwritten document entitled "Storm Water Permit & Site Inspection" |
| Ex. 13 | Notice of Violation to Valley Proteins dated 05/11/09 and Compliance Inspection Report dated 04/22/09 |
| Ex. 14 | Letter to R. Shiver from D. Frey dated 05/27/09 |

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| Ex. 15 | Letter to L. Willis and J. Conway from E. West dated 06/16/09, with aerial photograph |
| Ex. 16 | Letter to DWQ from D. Frey dated 06/26/09, with monitoring report |
| Ex. 17 | DWQ Laboratory Results dated with handwritten date 10/06/09, with sample information from 09/24/09 |
| Ex. 18 | Compliance Inspection Report for Duplin Wine Cellars dated 04/21/09 |
| Ex. 19 | Compliance Inspection Report for Duplin Wine Cellars dated 06/23/09 |
| Ex. 20 | Compliance Inspection Report for Duplin Wine Cellars dated 07/08/09 |
| Ex. 21 | Compliance Inspection Report for Duplin Wine Cellars dated 09/23/09 |
| Ex. 22 | Compliance Inspection Report for Duplin Wine Cellars dated 09/24/09 |
| Ex. 23 | Compliance Inspection Report for Duplin Wine Cellars dated 07/22/10 |
| Ex. 24 | Compliance Inspection Report for Duplin Wine Cellars dated 09/15/10 |
| Ex. 25 | Notice of Violation to Duplin Winery dated 10/15/10 |
| Ex. 26 | PowerPoint presentation by James K. Holley, P.G. |
| Ex. 27 | Handwritten Field Notes of Rufino Salgado |
| Ex. 28 | Summary of DWQ Sampling Data |
| Ex. 29 | Summary of DWQ and EPA Sample Data |
| Ex. 30 | Civil Penalty Assessment Factors prepared by Jeff Poupart 08/10/10 |
| Ex. 31 | Civil Penalty Assessment Factors by M. Matthew, not signed or dated |
| Ex. 32 | Photographs labeled Y and Z |
| Ex. 33 | Cavanaugh Invoice dated 09/14/09; Check to Cavanaugh dated 09/16/09 |
| Ex. 34 | DWS Memorandum re Fish Kill on Beaverdam Branch dated 04/07/09 |
| Ex. 35 | Email from S. Pettergarrett to L. Willis dated 09/25/09 |
| Ex. 36 | Email from R. Salgado to L. Willis dated 10/02/09 |
| Ex. 37 | Email from S. Pettergarrett to R. Salgado and L. Willis dated 10/14/09 |
| Ex. 38 | DWQ Memorandum re Enforcement Recommendation dated 11/13/09 [redaction in original exhibit] |
| Ex. 39 | Letter from C. Howard to C. Stehman dated 08/12/10, unsigned |
| Ex. 40 | Larger aerial photograph of site, image dated 03/19/07 |
| Ex. 41 | Smaller aerial photograph of site, image date 03/06/10 |
| Ex. 42 | PowerPoint presentation by James K. Holley, P.G. – Rebuttal Testimony |

**For Respondent:**

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| Ex. 1 | Corporate information on Petitioner |
| Ex. 2 | Permit Extension and Return of Renewal Application dated 12/23/09 |
| Ex. 3 | [Not Admitted] |
| Ex. 4A | DWQ and EPA Sample Data |
| Ex. 4B | EPA Beaver Dam Release Summary and Report [Redacted] |
| Ex. 5A | Calibration Records, 09/10/09 |
| Ex. 5B | Calibration Records, 09/15/09 |
| Ex. 5C | Calibration Records, 09/18/09 |
| Ex. 5D | Calibration Records, 09/21/09 |
| Ex. 5E | Calibration Records, 09/23/09 by Salgado |

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| Ex. 5F | Calibration Records, 09/23/09 by Willis |
| Ex. 5G | Calibration Sheet, 09/23/09 |
| Ex. 5H | Environmental Chemists Report with Chain of Custody, 09/23/09 |
| Ex. 5I | Environmental Chemists Report with Chain of Custody, 09/24/09 |
| Ex. 5J | Environmental Chemists Report with Chain of Custody, 09/25/09 (sampled 09/18/09) |
| Ex. 5K-1 | Environmental Chemists Report with Chain of Custody, 09/25/09 (sampled 09/23/09) |
| Ex. 5K-2 | Environmental Chemists Report with Chain of Custody, 09/30/09 |
| Ex. 6 | Figure 1 - Dissolved oxygen levels on 09/10/09 |
| Ex. 7 | Figure 2 - Dissolved oxygen levels on 09/15/09 |
| Ex. 7A1 - 7A10 | DWQ Lab Results |
| Ex. 8 | Figure 3 - Dissolved oxygen levels on 09/23/09 |
| Ex. 9 | Figure 4 - Physical parameters on 09/10/09 and 09/15/09 |
| Ex. 10 | Figure 5 - Photo locations |
| Ex. 11A – 11B | Figures 6 and 7 - Photo locations |
| Ex. 12 | Figure 8 – Stream identification and sample locations |
| Ex. 13, 13A-13U | Cabin Branch Stream Walk photographs and maps |
| Ex. 14A-14AA | Photographs |
| Ex. 15 (LW1-32) | Photographs |
| Ex. 16 | Northeast Cape Fear by Land |
| Ex. 17A | Field Notes |
| Ex. 17B | Travel Log and information |
| Ex. 18 | Chain of Custody, 09/23/09 |
| Ex. 19A | Resume of Bongkeun Song |
| Ex. 19 B | [Not Admitted] |
| Ex. 19C | Email correspondence |
| Ex. 20 | Notice of Violation dated 10/15/09 |
| Ex. 21 | Letter to R. Shiver from R. Johnson dated 10/23/09 |
| Ex. 22 | DWQ Memorandum re Enforcement Recommendation dated 06/22/10 |
| Ex. 23 | Civil Penalty Assessment Factors by M. Matthews, unsigned and undated |
| Ex. 24A | Civil Penalty Assessment Factors by Jeff Poupart dated 08/10/10 |
| Ex. 24B | Assessment History run date 10/24/11 |
| Ex. 24C | Notice of Violation dated 09/007/04 with Compliance Inspection Report |
| Ex. 24D | Letter to R. Johnson from T. Croft dated 03/23/07 with Compliance Inspection Report |
| Ex. 24E | Letter to T. Croft from C. Murray dated 04/23/07 |
| Ex. 24F | Letter to R. Johnson from E. Carey dated 01/05/09 with Compliance Inspection Report |

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| Ex. 24G | Notice of Violation dated 08/06/10 with Compliance Inspection Report |
| Ex. 25 | Letter to R. Johnson from C. Sullins dated 08/10/10 re Assessment of Civil Penalties, with attachments |
| Ex. 26 | Petition for Contested Case Hearing with attachments |
| Ex. 27, 27A – 27KK | PowerPoint presentation by James K. Holley, P.G. |
| Ex. 28A | Map |
| Ex. 28B | Map |
| Ex. 29 | Resume of James B. Bushardt, P.E. |
| Ex. 30 | Resume of Richard "Rick" Shiver |
| Ex. 31 | Non-Discharge Application Report Spray Irrigation Sites |
| Ex. 31A | Spray Irrigation Records |
| Ex. 32 | Handwritten log of Joseph Teachey |
| Ex. 33 | Excerpts of Teachey Deposition |
| Ex. 34 | Resume of James B. Bushardt, P.E. |

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

## FINDINGS OF FACT

1. Petitioner is a corporation organized and existing under the laws of the State of North Carolina. Petitioner, House of Raeford Farms, Inc., operates a chicken processing facility, the Rose Hill Fresh, IQF Chicken Plant, located at 3333 US Highway 117 South, Rose Hill, NC in the County of Duplin. Petitioner does not have a National Pollutant Discharge Elimination System Permit that allows the discharge of treated or untreated process wastewater to surface waters of the State.

2. Respondent, North Carolina Department of Environment and Natural Resources, Division of Water Quality (DWQ), monitors and regulates discharges into waters of the State pursuant to N.C. Gen. Stat. § 143-215.1.

3. On or about August 10, 2010, Jeff Poupart, Point Source Branch Chief of the Division of Water Quality, Surface Water Protection Section, issued a Findings and Decision and Assessment of Civil Penalties against House of Raeford Farms, Inc. (HORF) arising out of an alleged discharge from a HORF facility into Cabin Branch Creek. The Respondent, by and

through Mr. Poupart, assessed a total civil penalty against HORF in the amount of $75,000.00 plus enforcement costs of $1,357.95. (Pet. Ex. 1.)

4. A penalty of $25,000.00 was assessed for an alleged violation of N.C. Gen. Stat. § 143-215.1(a)(6) for causing or permitting waste to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission. A penalty of $25,000.00 was assessed for violation of 15A NCAC 2B .0211(3)(b) for violating the dissolved oxygen water quality standard for Class C-Sw waters of the Sate. A penalty of $25,000.00 was assessed for violation of 15A NCAC 2B .0211(3)(c) for allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State. (Pet. Ex. 1.)

5. As part of Petitioner's plant operations, Petitioner maintains a wastewater system to treat the water that is used to carry the offal produced in the rendering process out of the plant. Water is utilized in various portions of the processing operation, including in moving solids from the chicken processing plant to a diffused air floatation (DAF) system. At the DAF, solids are separated from the water and pumped into a tanker trailer that goes to Valley Protein (sometimes referred to as Carolina By-Products).

6. Some of the water going to the DAF is transported away with the material being carried to Valley Protein, and some evaporates. The remaining water is pumped to the Facility's primary lagoon (Lagoon 1), which is approximately 795 feet long and 329 feet wide. At Lagoon 1, remaining solids separate out, and water is gravity fed into a secondary lagoon and then pumped approximately two miles away to a third lagoon. HORF then land applies water from the third lagoon to its spray fields. The secondary lagoon (Lagoon 2) is approximately 790 feet long and 324 feet wide.

7. The Facility is permitted to operate a non-discharge wastewater system that involves the DAF, lagoons and spray fields, along with various components related to the same. (Resp. Ex. 2.)

8. The primary lagoon is located closest to the Petitioner's processing building, and the secondary lagoon is located closest to Cabin Branch Creek. Cabin Branch Creek (Cabin Branch) flows from its headwaters, which are located in the vicinity of Valley Protein, downstream through several sharp turns and eventually runs behind the HORF Facility. Two ponds that were formerly limestone quarries are located immediately downstream of the HORF Facility and Cabin Branch flows through these ponds. Cabin Branch thereafter joins with Beaverdam Branch and flows toward Sheffield Road.

9. An operator in charge (ORC) could see the creek behind the HORF facility because it is so close to Petitioner's lagoon. An ORC, among other things, has a duty to inspect. He or she is responsible for checking the lagoon(s) and looking for burrowing by rodents, trees that are problematic, wet areas, freeboard levels and other threats to the lagoon. Petitioner's ORC is Joe Teachey.

10. Both Cabin Branch and Beaverdam Branch are classified as Class C-Sw waters of the State and are located in the Cape Fear River Basin. Class C-Sw, or swamp waters, are characteristically slow flowing. Class C-Sw waters are fed by wetland and low-lying areas. These types of streams are subject to low flow and backing up.

11. Water from all of the upstream areas of Cabin Branch flows behind the HORF facility. The size of the drainage basin for Cabin Branch that would contribute to flow behind HORF is approximately 5.6 square miles.

12. Valley Protein is located upstream of the HORF Facility. Valley Protein is a rendering facility that accepts offal from the slaughtering of animals and transforms the offal into other usable products. Offal consists of the innards of chickens, turkeys and swine. Valley Protein also takes feathers and blood as well as skimmings from DAF units. The skimmings include grease and oils and solids. Valley Protein accepts animal by-products from HORF. Valley Protein produces a wastewater stream from their operations and has a series of lagoons to treat the wastewater, as well as a nondischarge permit to spray irrigate on adjacent lands, in a similar manner to what HORF does at their facility.

13. Duplin Winery is also located upstream of HORF, adjacent to the Valley Protein facility, in the Cabin Branch drainage area.

14. On September 9, 2009, late in the workday, DWQ received an anonymous call which complained of something in the creek and a foul smell at the Beaverdam Branch crossings of Sheffield Road and Brooks Quinn Road.

15. This anonymous complaint was directed to DWQ's Linda Willis' attention. Ms. Willis is an environmental engineer for DWQ. Her main duties involve inspecting industrial facilities and municipal wastewater treatment facilities that have NPDES wastewater and NPDES stormwater permits, including those located in Duplin County.

16. Geoffrey Kegley is a hydrogeologist with DWQ's Aquifer Protection Section. The majority of his duties as a hydrogeologist are to conduct permitting and compliance monitoring as part of the NPDES program for non-discharge wastewater treatment systems.

17. On September 10, 2009, DWQ's Willis and Kegley, began an investigation of the anonymous caller's report at the Beaverdam Branch crossing of Brooks Quinn Road. At that location, they observed a greasy, brown film or biomass floating over the surface of the water. In an effort to isolate the source of the greasy, brown film or biomass floating on the surface, DWQ investigated all of Beaverdam Branch and its tributaries upstream from the Brooks Quinn Road. At the Johnson Parker Road crossing of an unnamed tributary that feeds into Beaverdam Branch upstream of the Brooks Quinn Road crossing, the greasy, brown film or biomass floating on the surface of the water was not observed.

18. Two hog farms along the unnamed tributary were investigated by DWQ and were determined not to be the source. The operator at the farms reported no incidents of overtopping

of their lagoons. The lagoons had adequate freeboard, there was no evidence of any breach of the lagoons' walls, and the ditches that drain from the lagoons to Beaverdam Branch were dry.

19. Upstream from the unnamed tributary and the Brooks Quinn Road crossing, at the Sheffield Road crossing of Beaverdam Branch, a floating, brown, greasy, sludge-type material was observed on the surface of the water and trapped in the vegetation in and around the Sheffield bridge and along the banks of the creek. The Sheffield Road crossing of Beaverdam Branch is just downstream of the House of Raeford facility.

20. DWQ investigated Cabin Branch as it passed behind the Parker Bark facility, Parker Bark is downstream of House of Raeford Farms on Cabin Branch. DWQ could see Cabin Branch as it passed behind the facility. Cabin Branch converges with Beaverdam Branch at the northeast corner of the Parker Bark property.

21. During the investigation, DWQ representatives met with Joseph Teachey, wastewater manager for HORF, who escorted them to the south side of the HORF lagoons to view the creek. DWQ investigated Cabin Branch as it passed behind the House of Raeford facility. At Cabin Branch, immediately behind the House of Raeford, DWQ and Teachey observed a "sludgy," greasy, "light brownish-tannish" material in the creek that appeared thick and solid. (T p. 642) The material looked like sludge or waste water and contained oils and grease.

22. The sludge covered the creek from bank to bank, a width of nearly 20 feet. The sludge had formed ridges and made it impossible to see the water beneath it. Ms. Willis testified that the amount of sludge in the creek was unlike anything she had ever seen and appeared to her to look like the sludge in the Petitioner's primary lagoon. Joseph Teachey testified that the material was not greasy like the material in Lagoon 1 and was not the same color. Ms. Willis stated that the material did not have an odor. Joseph Teachey testified that the material smelled like mud. He stated the material in Lagoon 1 and the DAF smelled bad. There was no definitive evidence regarding how long the material had been in the creek at the time of the anonymous call.

23. The sludge observed behind the House of Raeford facility was very thick and fresh looking. It was a light brownish-tannish color and it floated on the surface of the water. DWQ observed that the sludge in the House of Raeford's primary lagoon looked like the sludge in the creek.

24. DWQ observed no sludge upstream of the House of Raeford facility. The water upstream from the House of Raeford facility was reflective and clear. There was no oily, greasy material, and nothing in the vegetation.

25. Clay Howard was the Operations Manager for the House of Raeford at the time. In his October 23, 2009 letter to Rick Shiver, Regional Supervisor of the Wilmington Regional Office, Mr. Howard stated that a representative of HORF met with DWQ (Ms. Willis) on September 9th, and though the origin of the sludge was unknown, "our company engaged a contractor with a tanker truck to pump the foreign matter out of the creek and into one of our two

lagoons." He went on to say that "the contractor pumped two loads of material out of the creek that day," and that "on the following Friday, the contractor pumped a total of four loads from the creek into the lagoon." (Pet. Ex. 4)

26. Though there was no direct evidence of a HORF discharge, Mr. Howard felt that as a family man and member of the community, he wanted the sludge cleaned up and out of the creek.

27. On September 15, 2009, Ms. Willis, Mr. Howard and Kenneth Rhame, a U.S. Environmental Protection Agency (EPA) representative met in Mr. Howard's office. Ms. Willis testified that Mr. Rhame took the lead at the meeting. Mr. Rhame testified that the sludge in the creek appeared to be the same as in the primary lagoon. He also stated that there was a double digit recent fish kill. EPA Investigator Rhame requested that HORF attempt to remediate the creek. He testified that Mr. Howard agreed to take the material out of the creek. Mr. Rhame testified that the State was the lead agency and that HORF was not cited by EPA.

28. There are conflicting accounts of when House of Raeford began to clean the creek. Mr. Howard noted that his dates may be in contrast to other dates and he deferred to DWQ Willis' dates. Joe Teachey, HORF Waste Water Manager, testified that the clean-up first began on September 14, 2009 and that it continued for four days. This notation was in his logbook that clean-up of the creek had begun on September 14, 2009. He testified that Linda Willis suggested it would be to HORF's benefit to get the matter in the creek cleaned up.

29. Register's Septic Tank Pumping, operated by Kenneth Register, was hired by HORF to remove material from Cabin Branch Creek behind the HORF facility. Pumping from the creek began by September 14, 2009. Mr. Register initially used a hose to bring material from the creek to his tanker truck, which was located about 100 feet away. He then drove his truck to Lagoon 1 and discharged it into the lagoon via a hose that was about 25 feet long. Later in the week, material was placed into Lagoon 2. Approximately 1,000,000 gallons of liquid and material were pumped from the creek. About 90% of what was pulled out of the creek consisted of water. There was a difference in what was left of the floating material on the top of the water after pumping by Register's. The Creek began to clear the first day, but the material on the bottom would then resurface. The cleanup performed by HORF did help to alleviate the impact of the material in the Creek.

30. Mr. Register did not own a hose that was long enough to run from Lagoon 1 to the creek. Mr. Register did not see any hose on the HORF property that was long enough to run from Lagoon 1 to the creek, nor did he see any pump on the HORF property capable of pumping material from Lagoon 1 to the creek.

31. Mr. Register charged HORF $20,000.00 for the work he performed at Cabin Branch Creek, and he was paid $20,000.00 by HORF. In assessing penalties against HORF, DWQ did not consider the $20,000.00 that HORF paid to assist in cleanup of the Creek.

32. DWQ's Jeffrey O. Poupart, the Point Source Branch Chief for DWQ, testified that it is unheard of to accept unknown contaminants, such as sludge, back into lagoons without

characterizing the contaminant first. Unknown contaminants are not accepted by treatment systems due to the potential for unknown materials in the contaminants to cause an imbalance in the lagoon's biological system as well as the risk to the lagoon-owner of liability for clean-up of potentially restricted materials.

33. Between Lagoon 1 and Lagoon 2 is a valve that is opened and closed by physically turning a wheel. A change in elevation between Lagoon 1 and Lagoon 2 allows water to flow via gravity through a transition pipe from Lagoon 1 into Lagoon 2 when the valve is in an open position.

34. Funds were requested in May of 2009 by Joseph Teachey to replace the valve and pipe because the valve had gotten harder to open and close and there was some corrosion on the end of the transfer pipe. Work was performed on the valve and pipe around September 8 to September 11, 2009.

35. Prior to the actual work being performed on the pipe and valve, Mr. Teachey began lowering Lagoon 1 to aid in that work. Teachey testified that he began to lower the level in the primary lagoon about a week to 10 days prior to beginning work on the pipe. In Mr. Teachey's log book, the first notation that he had begun to lower the level in the primary lagoon was on September 4, 2009. Teachey stated that lowering the level of the primary lagoon began on September 1, 2009, and ended on September 8, 2009. House of Raeford was able to lower the level in the primary lagoon by approximately one foot.

36. The work to replace the transition pipe and valve was performed by Davey Cavanaugh, a third party contractor. Before replacing the pipe and valve, Mr. Cavanaugh used clay to build a semicircular dike off the side of Lagoon 1 to close off the area immediately in front of the existing pipe and valve. After the newly created temporary dike was built, the existing valve was opened to let water within the diked area flow to Lagoon 2. The water that was left was pumped from Lagoon 1 to Lagoon 2 using a small pump with two hoses, one that was 15 feet long and one that was 15 to 20 feet long. The hoses used by Mr. Cavanaugh to pump the small amount of water from Lagoon 1 to Lagoon 2 were not long enough to stretch from Lagoon 1 to Cabin Branch Creek. Mr. Cavanaugh did not own a hose long enough to stretch from Lagoon 1 to the Creek.

37. The entire construction process took three to four days from start to finish, but the temporary dike, transfer pipe and valve were replaced in one day. Other work was performed to build a treated wood barrier or bulkhead around the valve and to dress up the road.

38. Water was able to flow from Lagoon 1 to Lagoon 2 except for the single day where the pipe and valve were replaced. Mr. Teachey stated that the primary lagoon continued to receive between 650,000 to 700,000 gallons a day for the three days between the construction of the berm on September 8, 2009, and the completion of the work on September 11, 2009.

39. James K. Holley, PG, provided extensive information regarding his credentials as a hydrogeologist, based upon both his education and experience. (Pet. Ex. 10.) Mr. Holley was accepted without objection as an expert in the field of hydrogeology.

40. In January 2011, HORF hired Mr. Holley to perform an independent review of the circumstances leading to DWQ citing and fining HORF as a result of the September 9, 2009 anonymous call complaining of materials in the creek originally sighted at the Beaverdam Branch crossings. Mr. Holley testified that there was evidence of potential upstream contributors to the conditions observed in Cabin Branch Creek in September 2009 as well as certain physical characteristics of Cabin Branch Creek that may explain the accumulation of sludge behind the HORF facility.

41. As water enters the Cabin Branch Creek drainage system, materials in the headwaters and further upstream are flushed into downstream areas and eventually conveyed to the area located behind the HORF facility. Immediately downstream of the HORF Facility, Cabin Branch Creek exhibits features that trap floating materials, including numerous fallen trees, sharp turns in the stream channel, and entry of the channel into an abandoned quarry pond. The narrower creek channel flowing behind the HORF facility opens up into a pond formed by a former limestone quarry. As water exits the narrow stream and hits the large pond feature, the velocity of the water drops, which causes backing up of water flow from that point and areas immediately upstream. These characteristics cause a condition that allows trapping of floating material and settleable solids. Mr. Holley opined that it would be possible for matter to accumulate over a period of time at this natural trapping point from the release of materials further upstream.

42. Beavers tend to cut down trees and limbs and build dams which impound waters. Beavers create significant drainage problems for creeks like Cabin Branch by impounding large areas and causing excess water buildup in areas upstream of the beaver dams which can cause stagnation of water. A letter dated June 16, 2009, from the Natural Resources Conservation Service to Linda Wills with DWQ indicates that "the volume of standing water in this drainage system has been improved by removal of beavers and beaver dams obstructing the flow of water. The Beaver Management Assistance Program (BMAP) was employed to trap the creek from the railroad to HWY 117." (Vol. 2, pp. 222, 269; Pet. Ex. 15.) This area is downstream from Valley Protein between the railroad tracks and the headwaters of Cabin Branch toward Highway 117, but upstream from HORF.

43. Carolina By-Products (CBP) or Valley Proteins is a rendering facility that accepts offal from facilities in the area, including the House of Raeford facility. CBP has an NPDES stormwater permit, but does not have a NPDES Permit that allows discharge of process waters to surface waters. CBP's waste is deposited onto a lagoon on-site; CBP is located upstream from the House of Raeford facility.

44. A Notice of Violation from DWQ to Valley Proteins, Inc. dated May 11, 2009 indicated that "Illicit discharges occur from the offal parking/staging area. The offal staging area does not provide sufficient containment to prevent the leakage of offal to the ground exposed to stormwater. The offal area has a discharge point at the southeast corner of the parking area. Structural BMPs will need to be provided to contain and treat this wastewater properly." (Vol. 2, pp. 215-216, 269; Pet. Ex. 13.) The Compliance Inspection Report prepared by DWQ dated April 22, 2009, attached to the May 11, 2009 Notice of Violation indicated the "ditch adjacent to

the offal truck staging area appeared to have wastewater characteristics. . . . It had an appearance of septicity and perhaps some organic content." (Pet. Ex. 13.) That Report also stated: "Evidence of wastewater discharges from the open tank offal trucks parked in the staging/parking area was observed. The contents of these trucks are considered 'wastewater' and therefore any spoilage to the area that does not provide 100% containment, becomes comingled with stormwater and is allowed to discharge to surface waters via the ditch adjacent to that parking area. This type of discharge is considered an 'illicit discharge'." (Vol. 2, pp. 217-218; Pet. Ex. 13.)

45. A water sample collected by DWQ upstream of HORF on September 24, 2009, indicated a substandard dissolved oxygen (DO) measurement of 1.01 mg/L located at the railroad tracks at Valley Protein.

46. Duplin Winery is a winery located upstream from House of Raeford. It produces a wastewater from the "washdown of the fermenters after the wine has been made," which then goes into a small lagoon on the back of their facility. (T p. 612)

47. A Compliance Inspection Report for Duplin Wine Cellars prepared by DWQ dated April 21, 2009, stated that "This facility has been discharging a wastewater from their wine processing operations to a lagoon with an overflow structure that discharges to the ditch behind the facility. The ditch is part of the headwaters to Cabin Branch. The ditch travels to the west to the train tracks, turns north and empties into a wetland that is the headwaters to Cabin Branch. DO was taken in the stream and was 0.5 mg/L. The ditch was full of black septic wastewater with putrid odor." (Vol. 2, p. 232-33, 271; Pet. Ex. 18.)

48. A Compliance Inspection Report for Duplin Wine Cellars prepared by DWQ dated June 23, 2009, indicated that there was still a discharge to the ditch. "The facility still had a discharge from their lagoon that takes wastewater from the winery. The contacts (Geno Kelly and Patrick Fussell) did not know where all the pipes to the lagoon were coming from." (Vol. 2, p. 234; Pet. Ex. 19.) The summary to the Report states that "Neither the consultant nor Mr. Fussell knew how much wastewater discharges to the ditch during the course of the month. It is likely the discharge is not continuous throughout the year. The greatest volumes are generated during the grape season August – November." (Vol. 2, pp. 235, 271; Pet. Ex. 19.)

49. A Compliance Inspection Report for Duplin Wine Cellars prepared by DWQ dated September 23, 2009, indicated continuing noncompliance issues. "The illicit discharge from the lagoon appeared to have been removed, however, the ditch was full of wastewater again." (Vol. 2, pp. 239, 271-272; Pet. Ex. 21.) A Compliance Inspection Report for Duplin Wine Cellars prepared by DWQ dated September 24, 2009, also indicated "the waste remains in the ditch." (Vol. 2, p. 241; Pet. Ex. 22.)

50. A water sample collected by DWQ upstream of HORF on September 25, 2009, indicated a substandard DO measurement of 0.35 mg/L located in the ditch behind the Duplin Wine facility.

51. From July until early August 2009, there were only small rainfall events. The weather was abnormally dry, minimal drought conditions. In August, two significant rain events occurred, 2.5 inches on or about August 12, and 3 inches on or about August 31. Large rain events can also serve to mobilize trapped, upstream material and flush it downstream. Mr. Holley stated that material could have been transported from upstream areas within the water column, reached the trapping point behind the HORF facility, and begun to surface and accumulate. He testified that the material could have accumulated over a period of days, weeks or months.

52. Carolina By-Products (CBP) or Valley Proteins was excluded as a source of the sludge material because: (1) DWQ's upstream investigation revealed no evidence of sludge or greasy film; (2) there was no staining upstream which would have revealed a discharge; and (3) DWQ observed good maintenance measures in place at CBP. CBP testified that they had no discharges in any of their four lagoons during the relevant time periods.

53. Duplin Winery was excluded as a source of the sludge. Their waste is a plant waste and the characteristics of their waste are not the same as what was seen behind HORF. It is initially a greenish colored liquid that turns black in color as it sets and becomes septic. DWQ excluded Duplin Winery because: (1) there was no material observed upstream; (2) the waste produced by Duplin Winery is not similar to what was observed; and (3) the waste produced by Duplin Winery may have a foul odor if it is not aerated.

54. The waste water behind HORF was "fresh" waste water. It had not been sitting or stagnating for months. In the instant matter the wastewater started out fresh and turned septic.

55. Parker Bark is a mulch facility located adjacent to the House of Raeford facility. Parker Bark does not generate waste water, but the facility does have storm water runoff that does not have the appearance or characteristics of what was found behind Parker Bark or upstream behind HORF.

56. Cow farms were excluded as a possible source because: (1) the cow farms were located upstream, and there was no material observed upstream from the House of Raeford; and, (2) cow farms could not have produced the quantity of material observed in the creek. In addition, cows do not produce the type of sludge-like material that was observed in Beaverdam Branch.

57. Two hog farms are located on a tributary to Beaverdam Branch downstream from the House of Raeford facility. DWQ excluded the hog farms as a source because: (1) although hog farms produce a waste, the waste is different from the sludge observed; (2) The hog farms reported to DWQ that they had had no recent discharges, and DWQ did not observe any signs of over-topping or spills on September 9, 2009, when they visited the hog farms; and (3) DWQ did not observe anything in the tributary adjacent to the farms.

58. There is no direct evidence that HORF discharged sludge into Cabin Branch Creek. There was no direct evidence of any failure of the HORF wastewater system, clogging of pipes, or problems with the irrigation system. There was no direct evidence that any truck

hauled in sludge to deposit behind the HORF Facility. There was no direct evidence of sludge or waste material in the ditch running parallel to the lagoons, except at the point where the ditch met Cabin Branch Creek. There was no evidence of sludge or waste material further up in the ditch. According to field notes taken by Linda Willis of DWQ, the ditch was "clear of sludge." (Resp. Ex. 17.)

59. As part of its permit from DWQ, the Petitioner is required to maintain adequate freeboard in all three of its lagoons. Several witnesses testified that prior to September 9, 2009, Petitioner had consistently high freeboard in its primary lagoon. DWQ's Geoffrey Kegley testified that "The primary lagoon in all of my visits to House of Raeford prior to [September 10, 2009] and on this [September 10, 2009] have always appeared high." (T pp. 1046-1047) Mr. Teachey testified that the freeboard in the primary lagoon was "running high" and "less than one foot" in violation of HORF's permit on September 10, 2009. (T pp. 1281-1282) DWQ's James Bushardt testified that there were high freeboards in the lagoons and he observed floating sludge on the primary lagoon. Mr. Howard testified that the freeboard in the primary lagoon is "always pretty high in parts." (T pp. 152-155) Mr. Howard stated in testimony that on or around September 10, 2009, the Petitioner's primary lagoon was filled with a lot of solids.

60. Dissolved oxygen (DO) level readings are one way to determine the presence of pollutants in a stream. For Class C-Sw waters, such as Beaverdam Branch, the DO standard listed in 15A NCAC 2B .0211(3)(b) is not less than a daily average of 5.0 milligrams per liter with a minimum instantaneous value of not less than 4.0 milligrams per liter. However, swamp waters, lake coves or backwaters, and lake bottom waters may have lower values caused by natural conditions. Conditions that can impact the DO level readings include the temperature, the flow in the stream, and the amount of fresh water entering the stream. Low DO levels are common in coastal waters in warm months. It would not be unusual for DO levels to be low in a Class C-Sw during the summer, and it would not be unusual for DO levels to be low in Cabin Branch Creek and Beaverdam Branch in September 2009. Low DO levels are also more likely to be seen during a drought.

61. Prior to September 9, 2009, in the vicinity of Petitioner's facility the weather had been very dry and drought-like conditions persisted.

62. During September 2009, dissolved oxygen (DO) levels of 0.35, 1.01, 1.65, 2.2 and 3.2 mg/L were observed in areas of Cabin Branch Creek upstream of the HORF facility. (Vol. 2, p. 275; Pet Ex. 26, p. 6.) The DO standard for Class C-Sw waters like Cabin Branch Creek is 4.0 mg/L. (Vol. 4, p. 637.) All of those measurements were below the 4.0 mg/L standard.

63. During September 2009, DO levels of 0.6, 1.3, and 2.7 mg/L were observed in unnamed tributaries and waters draining into Beaverdam Branch. In adjacent but separate drainage subbasins, DO levels of 0.3 and 0.1 mg/L were recorded. (Vol. 2, pp. 277-278; Pet. Ex. 26, p. 6.)

64. The test results performed by DWQ in September 2009, throughout the drainage basin for Cabin Branch Creek, from its headwaters to the downstream reaches, showed low DO

levels that could not be assigned to the presence of the matter found in the creek behind the HORF facility. Low dissolved oxygen was a systemic problem throughout Cabin Branch and its tributaries.

65. When assessing penalties for a violation, DWQ Poupart considered the circumstances surrounding the discharge, including, the Notice of Violation, the facility's response, sampling data, maps, photographs, and the opinions of others involved in the investigation.

**BASED UPON** the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

## CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. The Petitioner, is a person within the meaning of North Carolina Gen. Stat. § 143-215.6A, pursuant to North Carolina Gen Stat. § 143-212(4).

3. Pursuant to N.C. Gen. Stat. § 143 Article 21, Respondent is vested with the statutory authority to enforce the State's environmental laws, including laws enacted to protect the waters of the State.

4. The North Carolina courts have generally allocated the burden of proof in any dispute on the party attempting to show the existence of a claim or cause of action, and if proof of his claim includes proof of negative allegations, it is incumbent on him to do so. *Peace v. Empl. Sec. Com'n of N.C.*, 349 N.C. 315, 507 S.E.2d 272 (1998) citing *Johnson v. Johnson*, 229 N.C. 541, 50 S.E.2d 569 (1948). Generally, a Petitioner bears the burden of proof on the issues. To meet this burden, Petitioner must show that Respondent substantially prejudiced its rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. "The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence." *Britthaven v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 455 S.E. 2d 455, rev. den., 341 N.C. 418, 461 S.E. 2d 754 (1995). Petitioner in this case carries the burden of proof.

5. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and

purpose of the law. Every reasonable intendment will be made in support of the presumption." See also *Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619 (1961). The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), aff'd, 343 N.C. 119, 468 S.E. 2d 57 (1996); *Comm'r of Insurance v. Fire Insurance Rating Bureau,* 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "It is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982). In weighing evidence which detracts from the agency decision, "'[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand'" *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted).

6. Based on an evaluation of all the evidence, the Petitioner has failed in its required burden of proof to show that Respondent was unreasonable in finding Petitioner violated North Carolina Gen. Stat. § 143-215.1(a)(6) by causing or permitting a waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications without a permit.

7. Though there is not direct evidence of a release of sludge material from the House of Raeford Farms, in weighing evidence which detracts from the agency decision on the above two matters including analysis and hypothesis presented founded on studies some 16 months after the incident cited, the Undersigned finds that competent evidence is found to support the agency's ruling regarding a discharge of waste into the waters of the State without a permit. Besides the similarities of material found in the lagoon(s) of Petitioner and Cabin Branch Creek, the Undersigned finds persuasive two further facts. First, DWQ observed no sludge upstream of the House of Raeford facility. The water upstream from the House of Raeford facility was reflective and clear and there was no oily, greasy material, and nothing in the vegetation. Second, though Petitioner is applauded for voluntarily offering and indeed cleaning up the creek, the Undersigned is struck with the fact that Petitioner, rather than hauling the material away, chose to place the material into its own lagoons. Testimony revealed that it is unheard of to accept unknown contaminants, such as sludge, back into lagoons without characterizing the contaminant first. Unknown contaminants are not accepted by treatment systems due to the potential for unknown materials in the contaminants to cause an imbalance in the lagoon's biological system as well as the risk to the lagoon owner of liability for clean-up of potentially restricted materials.

8. The testimony and evidence at the hearing showed low dissolved oxygen (DO) levels could not be assigned only to the presence of the matter found in the creek behind the House of Raeford Farms (HORF) facility. Low dissolved oxygen was a systemic problem throughout Cabin Branch and its tributaries. Conditions that impact the DO level readings include the temperature, the flow in the stream, and the amount of fresh water entering the stream. It was not unusual for DO levels to be low in a Class C-Sw during the summer, and it was not unusual for DO levels to be low in Cabin Branch Creek and Beaverdam Branch in September 2009. As such, the preponderance of the evidence for these reasons and others cited in the finding of facts above yields the conclusion that Respondent was in error when citing

Petitioner for causing the depletion of oxygen in Cabin Branch and Beaverdam Branch below the water quality standard for class C-Sw waters of the State.

9. DWQ acted erroneously, arbitrarily and capriciously, and failed to act as required by law or rule in assessing a civil penalty for both a violation of N.C. Gen. Stat. § 143-215.1(a)(6) and a violation of 15A NCAC 2B .0211(3)(c).

10. N.C. Gen. Stat. § 143-215.1(a)(6) prohibits anyone from causing or permitting waste "directly or indirectly, to be discharged . . . in violation of the water quality standards applicable to the assigned classifications" without a permit.

11. N.C. Gen. Stat. § 143-215.6A(a)(2) allows for the enforcement of a civil penalty not to exceed $25,000 against anyone "who violates or fails to act in accordance with the terms, conditions, or requirements of such permit or any other permit or certification issued pursuant to authority conferred by [G.S. 143-215.1]"

12. The Agency sets forth its authority for civil penalties in 15A NCAC 2J.0104. This regulation provides that penalties may be assessed for "water violations as prescribed in N.C. Gen. Stat. § 143-215.6(a)." (G.S. 143-215.6 has been recodified as §§ 143-215.6A to 143-215.6C) The regulation derives its authority from the statute authorizing penalties as cited above, which refers back to N.C. Gen. Stat. § 143-215.1.

13. 15A NCAC 2B.0211 only sets the water quality standards for Class C waters, with a caveat that "additional and more stringent standards applicable to other specific freshwater classifications are specified in Rules .0212, .0214, .0215, .0216, .0217, .0218, .0219, .0223, .0224 and .0225 of this Section."

14. The regulation the Agency is citing to fine Petitioner for "allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State," is simply a water standard. The violation of this water standard is governed by the statute which sets the authority for violations and fining. Fining the agency under both the water standard regulation and the statute is misplaced, and, in truth and fact, is fining Petitioner twice for the same violation.

15. DWQ impermissibly assessed a $25,000 penalty for violation of the statute and an additional penalty for violation of the water quality standards upon which the statutory offense rests. Doing so constituted an impermissible excessive penalty given that Petitioner was penalized twice for the same violation and the maximum penalty of $25,000 had already been reached.

16. A penalty of $25,000.00 assessed by Respondent was reasonable and proper for violation of N.C. Gen. Stat. § 143-215.1(a)(6) for causing or permitting waste to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications. In assessing the amount of the penalty, DWQ properly considered the factors required by law. As competent evidence is found which would support the agency assessment amount, that amount must stand.

17. A penalty of $25,000.00 assessed by Respondent for violation of 15A NCAC 2B .0211(3)(c) for allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State was in error.

18. The penalty of $25,000.00 assessed by Respondent for violation of 15A NCAC 2B .0211(3)(b) for violating the dissolved oxygen water quality standard for Class C-Sw waters of the State was in error. Besides the preponderance of the evidence showing the dissolved oxygen was low for the reasons cited above, the same reasoning regarding 15A NCAC 2B.0211(3)(c) applies to violation of 15A NCAC 2B .0211(3)(b); regarding the dissolved oxygen water quality standard for Class C-Sw waters of the State.

19. As each of the original three penalties assessed by Respondent was for the same amount it is proper and correct that the enforcement costs of $1,357.95 be reduced by two thirds or $905.30

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

## DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above.

Based on those conclusions and the facts in this case, The Undersigned holds that Petitioner failed to carry its burden of proof by a greater weight of the evidence that Respondent was unreasonable in finding Petitioner violated North Carolina Gen. Stat. § 143-215.1(a)(6) by causing or permitting a waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications without a permit. Further Petitioner failed to carry its burden of proof that Respondent's fine of $25,000 plus $452.65 in investigation costs was unreasonable. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Petitioner's evidence does not overbear in that degree required by law the weight of evidence of Respondent in this regard.

Based on the conclusions of law and the facts in this case cited above, the Undersigned holds that the Petitioner has carried its burden of proof by a greater weight of the evidence that violation and fines relating to settleable solids and sludge, and dissolved oxygen standards was erroneous, was arbitrary or capricious, and was not in accordance with the applicable laws and State standards.

## NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the final decision.

In accordance with N.C. Gen. Stat. § 150B-36 (for cases filed before January 1, 2012) the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The agency that will make the final decision in this case is the North Carolina Department of Environment and Natural Resources.

**IT IS SO ORDERED.**

This the 30th day of May, 2012.

Augustus B. Elkins II
Administrative Law Judge

A copy of the foregoing was mailed to:

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This the 31st day of May, 2012.

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