

STATE OF NORTH CAROLINA
COUNTY OF DUPLIN

BEFORE THE
ENVIRONMENTAL MANAGEMENT
COMMISSION
10 EHR 5508
DV 09-0046

HOUSE OF RAEFORD FARMS, INC.)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA)
 DEPARTMENT OF ENVIRONMENT)
 AND NATURAL RESOURCES,)
 DIVISION OF WATER QUALITY,)
 Respondent.)
)

FINAL AGENCY DECISION

THIS MATTER came before the Environmental Management Commission (“Commission”) for final agency decision pursuant to N.C.G.S. § 150B-36 at its regularly scheduled meeting on September 13, 2012, in Raleigh, North Carolina. Commissioners Deerhake and Tedder did not participate in the deliberations or decision in this contested case. Petitioner House of Raeford Farms, Inc. (“House of Raeford”) was represented by Lori P. Jones, Esquire of Raleigh, N.C. The Respondent, North Carolina Department of Environment and Natural Resources, Division of Water Quality (“DWQ”), was represented by Assistant Attorney General Anita LeVeaux.

On September 10, 2010, House of Raeford filed a petition for contested case with the Office of Administrative Hearings. A hearing was held beginning on October 25, 2011, and concluding on December 20, 2011, in Raleigh, N.C. before Augustus B. Elkins, II, Administrative Law Judge (“ALJ”). ALJ Elkins filed a decision on May 30, 2012 recommending upholding the \$25,000.00 civil penalty for discharging waste to the waters of the State in violation of water quality standards without a permit and \$452.65 of investigation costs.

ALJ Elkins recommended reversing and vacating the two \$25,000.00 civil penalties and \$905.30 of investigation costs for violation of the water quality standards for dissolved oxygen and settleable solids and sludge.

The official administrative record was transmitted to the Commission on June 19, 2012, and the Chairman entered an Order on July 24, 2012 extending the time to make the Final Decision. DWQ and House of Raeford filed exceptions with supporting written arguments opposing the adoption of the ALJ decision.

Based upon the review of the whole record, exceptions and supporting briefs, and the parties' oral presentations, the Commission makes the following:¹

FINDINGS OF FACT

1. House of Raeford is a corporation organized and existing under the laws of the State of North Carolina and operates a chicken processing facility, the Rose Hill Fresh, IQF Chicken Plant, located at 3333 US Highway 117 South, Rose Hill, NC in Duplin County. House of Raeford 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. 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 DWQ's Surface Water Protection Section, issued a Findings and Decision and Assessment of Civil Penalties against House of Raeford arising out of an alleged discharge from its facility into Cabin Branch Creek. DWQ, by and through Mr. Poupart, assessed a total civil penalty against House of Raeford in the amount of \$75,000.00 plus enforcement costs of \$1,357.95. (Pet. Ex. 1)

¹ Changes and deletions to the contents of the Findings of Fact and Conclusions of Law contained in the ALJ's Decision are identified by strikethrough, and additions are identified by underline. For easier reading and clarity, the parties are referred to throughout by name.

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 State. 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 its plant operations, House of Raeford 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. House of Raeford 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 House of Raeford'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 House of Raeford facility. Two ponds that were formerly limestone quarries are located immediately downstream of the 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 House of Raeford's facility because it is so close to the 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. House of Raeford'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 waters, 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 House of Raeford facility. The size of the drainage basin for Cabin Branch that would contribute to flow behind House of Raeford is approximately 5.6 square miles.
12. Valley Protein is located upstream of the House of Raeford 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, oils and solids. Valley Protein accepts animal by-products from House of Raeford. 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 House of Raeford does at its facility.

13. Duplin Winery is also located upstream of House of Raeford, 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 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 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 House of Raeford, who escorted them to the south side of the House of Raeford 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 House of Raeford 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 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 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 House of Raeford 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 state 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 House of Raeford 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 House of Raeford 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 House of Raeford 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, House of Raeford’s 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 House of Raeford’s benefit to get the matter in the creek cleaned up.

29. Register’s Septic Tank Pumping, operated by Kenneth Register, was hired by House of Raeford to remove material from Cabin Branch Creek behind the House of Raeford 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 House of Raeford 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 House of Raeford property that was long enough to run from Lagoon 1 to the creek, nor did he see any pump on the House of Raeford property capable of pumping material from Lagoon 1 to the creek.

31. Mr. Register charged House of Raeford \$20,000.00 for the work he performed at Cabin Branch Creek, and he was paid \$20,000.00 by House of Raeford. In assessing penalties against House of Raeford, DWQ did not consider the \$20,000.00 that House of Raeford 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 dike 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, House of Raeford hired Mr. Holley to perform an independent review of the circumstances leading to DWQ citing and fining House of Raeford 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 House of Raeford 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 House of Raeford facility. Immediately downstream of the House of Raeford 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 House of Raeford 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 House of Raeford.

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 House of Raeford 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 (Cleno 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 House of Raeford 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 House of Raeford 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 House of Raeford. 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 House of Raeford 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 House of Raeford.

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 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 House of Raeford discharged sludge into Cabin Branch Creek. There was no direct evidence of any failure of the House of Raeford 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 House of Raeford 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, House of Raeford is required to maintain adequate freeboard in all three of its lagoons. Several witnesses testified that prior to September 9, 2009, House of Raeford 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 House of Raeford'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 House of Raeford 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 .021 l(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 House of Raeford'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 House of Raeford 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 House of Raeford facility. Low dissolved oxygen was a systemic problem throughout Cabin Branch and its tributaries.
65. When assessing penalties for a violation, DWQ's 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.
66. Beginning on September 10, 2009 and continuing over several days, DWQ staff of the Wilmington Regional Office conducted an investigation of the unauthorized discharge of the floating, brown, greasy, sludge-like material observed and monitored in Cabin Branch and Beaverdam Branch in Duplin County. The cost to DWQ for staff's investigation and monitoring of the discharged floating and settleable solids, instream water quality standards and the inspection of upstream facilities was \$1,357.95.

[Reason for Additional Finding of Fact: The substantial evidence supports the time, travel and resources expended by DWQ staff in investigating and monitoring the waste discharged to the waters of the State. The substantial undisputed record evidence shows the unauthorized discharge of brown, sludge-like, greasy material was observed floating on and submerged in Cabin Branch from a point near House of Raeford's secondary lagoon extending downstream and into Beaverdam Branch. The material was not present upstream of House of Raeford. The sludge-like material, which was very similar in color and composition to the sludge floating in House of Raeford's primary wastewater lagoon, exceeded the assigned water quality standard for floating solids, settleable solids and sludge in Class C waters and impaired its designated uses. . (T pp 626-45, 654-55, 721-25, 1142-43, 1184; Res. Ex. 22, Pet. Ex. 23)]

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings had and the Commission now has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. The Commission is authorized to make the final decision assessing civil penalties in contested cases pursuant to N.C.G.S. §143B-282.1. 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.

[Reason Conclusion of Law Modified: The Commission is authorized by statute to make the final agency decision in contested cases within its subject matter jurisdiction.]

2. Petitioner House of Raeford 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. Chapter 143, Article 21, Respondent DWQ 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. Comm'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. 1508-23(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, *disc. rev. denied*, 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.*, 288 N.C. 165, 217 S.E.2d 650 (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*, 255 N.C. 619, 122 S.E.2d 681 (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, House of Raeford has failed in its required burden of proof to show that DWQ was unreasonable in finding House of Raeford 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 and in finding House of Raeford violated the water quality standard for floating solids, settleable solids or sludge for waters assigned the Class C classification, 15A NCAC 2B .0211(3)(c), on September 9, 2009.

[Reason Finding of Fact Modified: the preponderance of substantial evidence and Findings of Fact show the floating and suspended solids and sludge discharged by House of Raeford covered Cabin Branch from side to side and extended downstream into Breaverdam Branch impairing the designated uses in violation of 15A NCAC 2B .0211(3)(c).]

7. Though there is not direct evidence of a release of sludge material from 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 in the record to support the agency’s ruling regarding a discharge of waste by House of Raeford into the waters of the State without a permit. Besides the similarities of material found in ~~the~~ House of Raeford’s lagoon(s) and Cabin Branch Creek, ~~the Undersigned finds persuasive~~ two further facts are persuasive. 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 House of Raeford is applauded for voluntarily offering and indeed cleaning up the creek, ~~the Undersigned is struck~~

~~with the fact that~~ House of Raeford, 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.

[Reason Conclusion of Law Modified: the Conclusion of Law is amended to more clearly show the evidence of record and Findings of Fact support the conclusion that the unauthorized discharge of waste to the creek originated from House of Raeford's facility]

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 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 does not support ~~yields the conclusion that DWQ was in error when citing the assessment of the \$25,000.00 civil penalty against~~ House of Raeford for causing the depletion of oxygen in Cabin Branch and Beaverdam Branch below the numeric water quality standard for class C-Sw waters of the State.

[Reason for Modification of Conclusion of Law: the Commission adopted the ALJ's reasoning in the Conclusion of Law. The Conclusion of Law is clarified to state that the \$25,000.00 civil penalty assessment for violation of the numeric water quality standard for dissolved oxygen was not supported by the preponderance of the evidence]

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)(e).~~

[Reason for Striking Conclusion of Law: the Conclusion of Law is erroneous as a matter of law. The ALJ erred as a matter of law in interpreting and applying N.C. Gen. Stat. § 143-215.1(a)(6) as the sole governing authority for finding a violation for the discharge of waste without a permit and a violation of the water quality standard, and arriving at the erroneous conclusion that “fining the agency (sic) under both the water standard regulation and the statute is misplaced, and in truth and fact, is fining Petitioner twice for the same violation.” While N.C. Gen. Stat. § 143-215.1(a)(6) prohibits causing or permitting the discharge of waste without a permit to the waters of the State in violation of the water quality standards, N.C. Gen. Stat. § 143-215.6A provides for the assessment of civil penalties against anyone who (1) violates any classification or standard established in N.C. Gen. Stat. § 143-214.1 or (6) violates a rule of the Commission implementing this Part. These separate statutes provide the authority for assessing civil penalties for the violations at issue in this case]

9a. N.C. Gen. Stat. § 143-215.6A(1) provides for the assessment of a civil penalty not to exceed \$25,000.00 against any person who violates any classification or standard established by N.C. Gen. Stat. § 143-214.1

9b. N.C. Gen. Stat. § 143-215.6A(6) provides for the assessment of a civil penalty not to exceed \$25,000.00 against any person who violates a rule of the Commission implementing this Part.

[Reason for Additional Conclusions of Law 9a and 9b: Subsections (1) and (6) provide separate authority for assessing civil penalties for violations of water quality standards which are standards established under N.C. Gen. Stat. § 143-214.1 and are rules adopted by the Commission.]

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 \$25,000.00 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.~~

[Reason Conclusion of Law Modified: The last sentence in the Conclusion of Law is incorrect and unnecessary because the statute speaks for itself and controls over an agency regulation.]

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.”

[Reason Conclusion of Law Modified: The regulation states the water quality standards applicable to waters classified as Class C and, when violated by the action of an individual, may serve as the basis for the assessment of a civil penalty. As erroneously written by the ALJ, the violation of the regulation could not provide the basis for the assessment of a civil penalty, contrary to the plain meaning of N.C. Gen. Stat. § 143-215.6A(1) and (6).]

~~14. The regulation the Agency is citing to fine House of Raeford 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 House of Raeford twice for the same violation.~~

[Reason Conclusion of Law Stricken: Conclusion of Law 14 is erroneous as a matter of law for the reasons previously provided for Conclusions of Law No. 9, 9a and b, 12, and 13.]

14a. 15A NCAC 2B .0211(3)(c) is the standard for floating solids, settleable solids or sludge established for surface waters assigned the Class C classification. The regulation allows only such amounts of these solids or sludge “attributable to sewage, industrial wastes or other wastes as shall not make the waters unsafe or unsuitable for aquatic life and wildlife or impair the waters for any designated uses.”

[Reasons for Additional Conclusion of Law: the Conclusion of Law states the water quality standard for floating, settleable solids or sludge that is applicable to Cabin Branch and Beaverdam Branch, both assigned the Class C classification. A violation of the standard is subject to a civil penalty assessment as authorized by N.C. Gen. Stat. § 143-215.6A(1) and (6)]

~~15. DWQ impermissibly assessed a \$25,000.00 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 House of Raeford was penalized twice for the same violation and the maximum penalty of \$25,000.00 had already been reached.~~

[Reason Conclusion of Law Stricken: the Conclusion of Law is erroneous as a matter of law for the reasons previously provided for Conclusions of Law No. 9, 9a and b, 13 and 14. It fails to recognize and apply the statute that authorizes the assessment of a civil penalty for violation of water quality standards, N.C. Gen. Stat. § 143-215.6A. It is error of law to conclude that House of Raeford was penalized twice for the same violation of N.C. Gen. Stat. § 143-215.1(a)(6) when the civil penalty assessments were authorized by separate statutes and regulations.]

16. A penalty of \$25,000.00 assessed by DWQ 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 DWQ pursuant to N.C. Gen. Stat. § 143-215.6A(1) and (6) for violation of 15A NCAC 2B .021 1(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~~ reasonable and proper. In assessing the amount of the penalty, DWQ properly considered the factors required by law, N.C. Gen. Stat. § 143B-282.1. Competent evidence is found in the record which supports the agency's assessment.

[Reason Conclusion of Law Modified: N.C. Gen. Stat. § 143-215.6A(1) and (6) provide for the assessment of a civil penalty for violations of water quality standards and Commission rules. The preponderance of the evidence and Findings of Fact support the conclusion that House of Raeford violated the water quality standard for floating solids, settleable solids and sludge assigned to Cabin Branch and Beaverdam Branch and that the \$25,000.00 civil penalty was assessed in accordance with the statutory factors in N.C. Gen. Stat. § 143B-282.1.]

18. The penalty of \$25,000.00 assessed by DWQ 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 because a preponderance of the evidence showed the low level of dissolved oxygen was caused by natural conditions in the watershed in addition to the floating and settleable solids and sludge present in the creek. ~~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.~~

[Reason Conclusion of Law Modified: The Conclusion of Law was clarified to show the reason for not assessing a civil penalty for low dissolved oxygen in the streams was because the preponderance of the evidence did not support the penalty assessment. The last sentence in the Conclusion of Law is erroneous as a matter of law for the reasons previously provided for Conclusions of Law No. 9, 9a and b, 13, 14 and 15.]

19. Reasonable costs of investigation, inspection or monitoring that reveal the violation of any rules, standards or limitations adopted by the Commission may be assessed against the person responsible. N.C. Gen. Stat. § 143-215.3(a)(9). As each of the original three penalties

assessed by DWQ was for the same amount it is proper and correct that the enforcement costs of \$1,357.95 be reduced by ~~two-thirds~~ one third or ~~\$905.30~~ \$452.65, and upheld in the amount of \$905.30 where two of the three civil penalty assessments are upheld.

[Reason Conclusion of Law Modified: The Commission is authorized to assess House of Raeford reasonable costs of the investigation that revealed violations for the unauthorized discharge of waste and of the water quality standard for floating solids, settleable solids or sludge.]

Based upon the foregoing Findings of Fact and Conclusions of Law the Commission makes the following:

FINAL AGENCY DECISION

Having considered the whole record, arguments, and submissions of the parties, the Environmental Management Commission, upon duly made motion and majority vote, does not adopt the complete Decision by the ALJ as the Final Agency Decision. The Environmental Management Commission upholds the assessment of the \$25,000.00 civil penalty for discharging waste to the waters of the State in violation of water quality standards without a permit and the \$25,000.00 civil penalty for violating the water quality standard for floating solids, settleable solids or sludge that occurred on or about September 9, 2009. The Commission vacates the penalty assessment for a violation of the numeric water quality standard for dissolved oxygen because it is not supported by the preponderance of the evidence. The Commission upholds the assessment of the reasonable enforcement and investigation costs pursuant to N.C.G.S. §143-215.3(a)(9) in the amount of \$905.30.

THEREFORE IT IS ORDERED that:

1. House of Raeford Farms, Inc. is assessed a civil penalty of Twenty-five Thousand dollars for causing or permitting waste to be discharged into Cabin Branch, a water of the State, in violation of water quality standards without a permit on or about September 9, 2009;

2. House of Raeford Farms, Inc. is assessed a civil penalty of Twenty-five Thousand dollars for violating the water quality standard for floating solids, settleable solids or sludge in Cabin Branch, a Class C water of the State, on or about September 9, 2009;
3. House of Raeford Farms, Inc. is assessed \$905.30 for costs of the investigation that revealed the violations and this amount is just and reasonable;
4. House of Raeford Farms, Inc. pay the sum of Fifty Thousand Nine Hundred Five dollars and thirty cents (\$50,905.30) to the Department of Environment and Natural Resources within the thirty-day period provided by N.C.G.S. §143B-282.1(e); and
3. the Final Agency Decision be served upon the parties personally or by certified mail.

This the 8th day of October, 2012.

N.C. ENVIRONMENTAL MANAGEMENT COMMISSION



Stephen T. Smith, Chairman

