STATE OF NORTH CAROLINA

COUNTY OF DUPLIN

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 906

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DUPLIN COUNTY, C.S.C.
BY

HOUSE OF RAEFORD FARMS, INC.,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,

Respondent.

JUDGMENT ON JUDICIAL REVIEW

THIS MATTER came on to be heard at the April 14, 2014, session of Duplin County Superior Court before the Honorable John E. Nobles, Jr., Superior Court Judge Presiding, upon Petitioner's Petition for Judicial Review. Henry W. Jones, Jr. and Lori P. Jones of the Wake County Bar represented Petitioner House of Raeford Farms, Inc. ("Petitioner" or "HORF"). Anita LeVeaux of the North Carolina Attorney General's Office represented the Respondent, North Carolina Department of Environment and Natural Resources ("Respondent" or "Agency").

AND THE COURT, having reviewed the Petition for Judicial Review and the official record in the contested case under review and the briefs of both parties and having heard arguments from counsel for both parties, hereby adopts the findings of fact and conclusions of law of Administrative Law Judge Augustus B. Elkins II ("ALJ") with respect to the issues appealed to this Court, and makes additional conclusions of law, all as set forth below. 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.

PROCEDURAL HISTORY

1. On May 30, 2012, the ALJ, issued his Recommended Decision in the contested case filed by Petitioner against Respondent. The ALJ (1) upheld the imposition of a $25,000.00 fine for violation of N.C. Gen. Stat. §143-215.1(a)(6); (2) found that imposition of $25,000.00 fines for violations of 15A NCAC 2B.0211(3)(b) and 15A NCAC 2B.0211(3)(c) were improper and in error; and (3) reduced the enforcement costs charged against HORF by two thirds.

2. Petitioner and Respondent both submitted exceptions and objections to the ALJ's Recommended Decision and requested oral argument before the Environmental Management Commission ("Commission"), which was presented at the September 13, 2012, meeting of the Commission.

3. On October 8, 2012, the Commission issued its Final Agency Decision. The Final Agency Decision adopted in part and rejected in part the Recommended Decision of the ALJ. Specifically, the EMC upheld 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 EMC assessed a civil penalty of $25,000.00 for violating the water quality standard for floating solids, settleable solids or sludge for a total civil penalty of $50,000.00 and enforcement costs of $905.30 against Petitioner. The decision of the EMC to reject the $25,000.00 penalty for violation of 15A NCAC 2B .0211(3)(b) was not appealed to this Court and is therefore final.

4. Petitioner timely filed its Petition for Judicial Review appealing the Final Agency Decision pursuant to N.C. Gen. Stat. §143-215.5 and §150B-45.

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 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.

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.

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.

8. Lagoon 1 is located closest to the Petitioner's processing building, and Lagoon 2 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 comer 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. 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 Lagoon 1. 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 HORF's Lagoon 1 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 HORF 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."

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 Lagoon 1. 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 HORF 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 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. Cabin Branch 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 Cabin Branch.

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 Cabin Branch, nor did he see any pump on the HORF property capable of pumping material from Lagoon 1 to Cabin Branch.

31. Mr. Register charged HORF $20,000.00 for the work he performed at Cabin Branch, 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 Lagoon 1 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 Lagoon 1 was on September 4, 2009. Teachey stated that lowering the level of Lagoon 1 began on September 1, 2009, and

ended on September 8, 2009. HORF was able to lower the level in Lagoon 1 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. Mr. Cavanaugh did not own a hose long enough to stretch from Lagoon 1 to Cabin Branch.

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 Lagoon 1 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. 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 in September 2009 as well as certain physical characteristics of Cabin Branch that may explain the accumulation of sludge behind the HORF facility.

41. As water enters the Cabin Branch 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 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." 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 Protein is a rendering facility that accepts offal from facilities in the area, including the HORF 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 comer of the parking area. Structural BMPs will need to be provided to contain and treat this wastewater properly." 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." 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'."

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.

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."

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." 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."

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." A Compliance Inspection Report for Duplin Wine Cellars prepared by DWQ dated September 24, 2009, also indicated "the waste remains in the ditch."

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. CBP or Valley Protein 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 HORF 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 HORF; 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 HORF 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. 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. 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."

59. As part of its permit from DWQ, HORF is required to maintain adequate freeboard in all three of its lagoons. Several witnesses testified that prior to September 9, 2009, HORF 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." Mr. Teachey testified that the freeboard in Lagoon 1 was "running high" and "less than one foot" in violation of HORF's permit on September 10, 2009. DWQ's James Bushardt testified that there were high freeboards in the lagoons and he observed floating sludge on Lagoon 1. Mr. Howard testified that the freeboard in Lagoon 1 is "always pretty high in parts." Mr. Howard stated in testimony that on or around September 10, 2009, HORF's Lagoon 1 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 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 upstream of HORF's facility. The DO standard for Class C-Sw waters like Cabin Branch is 4.0 mg/L. 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.

64. The test results performed by DWQ in September 2009, throughout the drainage basin for Cabin Branch, 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.

CONCLUSIONS OF LAW

1. The Final Agency Decision entered by the Environmental Management Commission on October 8, 2012, was subject to review by this Court as a final decision pursuant to N.C. Gen. Stat. § 150B-36(b).

2. All parties are properly before the Court, the matter is properly brought on for hearing pursuant to N.C. Gen. Stat. § 150B-43 *et seq.*, and the Court has jurisdiction over the parties and the subject matter.

3. All parties have been properly designated and there is no question as to misjoinder or nonjoinder.

4. The standard of review of this Court sitting in judicial review of the Final Agency Decision is set forth in N.C. Gen. Stat. § 150B-51. This Court has reviewed allegations that the Final Agency Decision is in violation of constitutional provisions; in excess of the statutory authority or jurisdiction of the agency or administrative law judge; made upon unlawful procedure; or affected by other error of law under a *de novo* standard of review. This Court has reviewed allegations that the Final Agency Decision is unsupported by substantial evidence admissible under G.S.150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted, or is arbitrary, capricious, or an abuse of discretion, under the whole record test.

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

6. Pursuant to N.C. Gen. Stat. Ch. 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.

7. 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.

8. In accordance with *Painter v. Wake County Ed 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), affd, 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).

9. 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.

10. Though there is not direct evidence of a release of sludge material from HORF, 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, the Undersigned finds persuasive two further facts. First, DWQ observed no sludge upstream of the HORF facility. The water upstream from the HORF 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.

11. 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).

12. N.C. Gen. Stat. § 143-215.l(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.

13. 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]."

14. The Agency sets forth its authority for civil penalties in 15A NCAC 21.0104. 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.

15. 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."

16. 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 by 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.

17. 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.

18. 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.

19. 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.

20. 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, and given the burden of proof this Court is required to apply, the Court affirms in part and reverses in part the Final Agency Decision and hereby orders, adjudges and decrees that:

1. Petitioner is assessed a civil penalty of $25,000.00 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 standard described in 15A NCAC 2B .0211(3)(c).

2. Petitioner is assessed investigation and enforcement costs of $452.65 associated with the foregoing violation.

3. All other civil penalties and investigation and enforcement costs imposed by the Commission are reversed.

This the 27th day of May, 2014.

John E. Nobles, Jr., Superior Court Judge Presiding