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<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>MARKED</u>
<u>Petitioner</u>		
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5	copy of statement, Register's Septic Tank Pumping to HORF, 9/21/09; copy of purchase order, HORF to Register's Septic Tank Pumping, received 9/25/09; copy of check, HORF to Register's Septic Tank Pumping, 10/22/09	105
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<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>MARKED</u>
7	report of Environmental Chemists, Inc., 9/30/10; collection and chain of custody, 9/7/10	107



1 that case. However, that case was reassigned to myself by  
2 Chief Administrative Law Judge Julian Mann.

3           Let me ask, are all parties in possession of the  
4 documents that I've just mentioned?

5           Mr. Jones:           Yes, Your Honor.

6           Ms. LeVeaux:        Yes, Your Honor.

7           The Court:           And do the parties stipulate to  
8 receiving adequate notice of today's hearing?

9           Ms. LeVeaux:        Yes, Your Honor.

10          Mr. Jones:           We do.

11          The Court:           And do the parties that  
12 everything was timely filed in this case?

13          Ms. Jones:           We do.

14          Ms. LeVeaux:        Yes, Your Honor.

15          The Court:           And do the parties stipulate  
16 that the information is correct, obviously not the  
17 allegations, but addresses, phone numbers, that sort of  
18 thing, on those documents?

19          Ms. LeVeaux:        Yes.

20          Mr. Jones:           Absolutely.

21          The Court:           That being the case, let me do  
22 make mention on the record that as is my practice, I did hold  
23 a brief prehearing conference in which we went over any out-  
24 standing motions that we need to address before we get  
25 started, also any--the matters of the order in which we would

1 proceed, burden of proof, that sort of thing. Does that  
2 adequately but briefly describe our prehearing conference?

3 Ms. LeVeaux: Yes, sir.

4 Mr. Jones: Yes, Your Honor, it does.

5 The Court: That being the case, let's have  
6 an accounting of the parties. As I stated, I am Augustus B.  
7 Elkins II, the presiding judge, properly sworn and assigned  
8 to this case. We're extremely fortunate to have a very  
9 experienced court reporter, whom I've worked with, and I'll  
10 have her introduce herself for the record.

11 The Reporter: Kay McGovern.

12 The Court: And any questions that you  
13 might have about a copy of the transcript or anything dealing  
14 with the hearing Ms. McGovern will be glad to help you. I  
15 notice that Petitioner is represented by counsel, if you  
16 would introduce yourself, please?

17 Mr. Jones: Thank you, Your Honor. My name  
18 is Henry W. Jones, Jr. I'm with the firm of Jordan, Price,  
19 Wall, Gray, Jones in Raleigh. With me today is one of our  
20 associates, Lori Jones, no relation, but a very fine young  
21 attorney, and I'm glad to have her with me.

22 House of Raeford Farms is a North Carolina  
23 corporation. They have one management person here today, Mr.  
24 Clay Howard, who is a resident now of Pinehurst, but--so we  
25 will have at least one representative with us---

1                   The Court:                   (interposing) Okay, thanks.

2                   Mr. Jones:                   ---here today.

3                   The Court:                   Thank you very much. I do note  
4 the respondent is represented by counsel. If you would  
5 introduce yourself, please, and anyone at the table with you?

6                   Ms. LeVeaux:                Thank you, Your Honor. My name  
7 is Anita LeVeaux, assistant attorney general, representing  
8 the North Carolina Department of Environment and Natural  
9 Resources, Division of Water Quality.

10                   I have with me today Linda Willis, who is our  
11 primary inspector and engineer on this case. I also have  
12 Jeff Poupart and Geoff Kegley. And Your Honor, I also have  
13 an intern with me, Sarah Wilson.

14                   The Court:                   Welcome. Thank you.

15                   Ms. LeVeaux:                And she'll be with us I don't  
16 think too much longer this morning, but she's going to try to  
17 drop in and out of the proceedings. I would point out for  
18 the Court--and I don't represent Mr. Sheesley, but we do have  
19 John Sheesley, EPA, also in the courtroom.

20                   The Court:                   Welcome to you as well.  
21 Excellent. It appears that all requisite qualifications have  
22 been met for us to proceed. And no party has filed any  
23 matter seeking disqualification of the judge and I'm not  
24 aware of any. Does either party wish to challenge the judge  
25 for cause?

1                   Mr. Jones:                   No, Your Honor.

2                   Ms. LeVeaux:                   No, Your Honor.

3                   The Court:                   That being the case, let me  
4 make mention that we've had a brief discussion. And I do  
5 want to go on the record there is the matter in these cases  
6 of burden of proof that is twofold, the burden of going  
7 forward and the burden of persuasion, the burden of  
8 persuasion of course being the more important, I suspect, of  
9 the two.

10                   In these cases at the Office of Administrative  
11 Hearings, burden of proof is by a preponderance or greater  
12 weight of the evidence. In this particular case, based on  
13 the case law and discussions that we have had, I am assigning  
14 the burden of proof to the petitioner in this case. That  
15 being said, let's go on the record for any objection to that  
16 particular assignment, if you like.

17                   Mr. Jones:                   Your Honor, I will make an  
18 objection. And I do have a short argument I'd like to  
19 make---

20                   The Court:                   (interposing) Okay.

21                   Mr. Jones:                   ---on that issue.

22                   The Court:                   Okay.

23                   Mr. Jones:                   Would it be timely to do that  
24 now or wait in order for the other motion?

25                   The Court:                   No, this will be fine now.

1                   Mr. Jones:                   The only thing I wish to bring  
2 to the Court's attention--I really had not looked at this  
3 last week. We talked about it in our conference call. But  
4 in doing some research on the issue, I found some case law  
5 that I thought I'd bring to the Court's attention, if I can  
6 find it.

7                   The case I want to bring to the Court's attention  
8 is the case of *Holly Ridge Associates, LLC v. North Carolina*  
9 *Department of Environment and Natural Resources*. And if I  
10 could approach, I've got a copy of it.

11                   The Court:                   Yes, you may.

12                   Mr. Jones:                   I at first, Your Honor, have to  
13 admit one of the last hearings I had here, actually downtown,  
14 the burden of proof was assigned to the State. And I was  
15 sort of going from that memory. Ms. LeVeaux mentioned that  
16 the burden of proof to show abuse of discretion, arbitrary  
17 and capricious on the part of the state was on the  
18 petitioner. And I objected at the time.

19                   I went and did some research and now I know why  
20 she said what she did. On further review, I notice the  
21 *Overcash* case, which I think was also a DENR state agency  
22 case, indicated that the burden of proof rests with the  
23 petitioner even--and that just sort of took all the arguments  
24 I made on the phone call and turned them around on me.

25                   So I did a little bit more and found this Supreme

1 Court case, which actually is of course the Supreme Court as  
2 opposed to the Court of Appeals and is a year after *Overcash*.  
3 And if you look, Your Honor, most of this case involves the  
4 question of intervention of right versus discretionary  
5 intervention. And you may know this case by heart already.  
6 I don't know.

7           But I noticed on the next to the last page of the  
8 case, the second column, the last few sentences of the  
9 continuation of the paragraph on the first--under the second  
10 column says--they cite *Overcash v. Department of Environment*  
11 *and Natural Resources* and says, "('[C]ontrolling case law  
12 places the burden of proof on the petitioner in an  
13 administrative contested case proceeding to prove that he is  
14 entitled to relief from an agency decision.')" "

15           They didn't overrule *Overcash*, but I thought the  
16 next sentence was something that we might need to get some  
17 instruction on. "DENR bore the burden of proving that Holly  
18 Ridge violated the S[edimentation] P[ollution] C[ontrol]  
19 A[ct]." So I guess my question to the Court is--I can  
20 understand how we can have the burden of proof to show that  
21 the state agency committed error.

22           The state agency, according to the Supreme Court  
23 in this case says that DENR bears the burden of proving that  
24 we violated the statute or the rules or what have you. So in  
25 my interpretation, we share a burden. It would seem to me

1 the State has to prove that we violated the statute or the  
2 regulations as they've alleged in their decision is the  
3 reason we're here today.

4 We have to go forward then and prove that their  
5 findings are error, violation of law, unconstitutional,  
6 arbitrary and capricious, or what have you. So--and that has  
7 some bearing on how we go forward, and it just seems to me  
8 based upon this case that further argument might be in order.

9 The Court: Okay. Ms. LeVeaux.

10 Ms. LeVeaux: Your Honor, I have not had an  
11 opportunity to read the case, but I would rely on my  
12 motion--my response for summary judgment. I think I  
13 addressed that issue within that document, so I'll rely on  
14 the arguments there.

15 The Court: Okay. Now, let's--okay.

16 Mr. Jones: Just--I should have said this.  
17 In looking at this logically, which may be a mistake, I don't  
18 know, but it seemed to me the state has sent forth a decision  
19 and assessment of penalty. If the Court will look at our  
20 petition, you'll notice it was almost drafted like an answer  
21 in a civil case. We admitted, denied, denied, denied.  
22 Anything that was not specifically admitted was denied, the  
23 intent being to put various things at issue.

24 In a civil case, the way this would proceed would  
25 be the state agency would show that we had violated the law.

1 We would come forward with defenses, which is the way we've  
2 sort of postured the case. We're adaptable on that.

3           But it would seem to me that if the State doesn't  
4 go forward with proving that we violated the law, we would be  
5 put in a position where we have to go forward first to prove  
6 that we did not violate the law, and then they would prove  
7 later that we violated the law. It just seems to me to be  
8 kind of backwards. So that's the reason I'm bringing it  
9 forward. We're adaptable. We can do whatever needs to be  
10 done.

11           The Court:           Okay. And this is not the  
12 first time this has arisen my ten or so years here, and so I  
13 think I can address your concerns in light of both this case  
14 and prior cases as well. I do note I want to just--I'll just  
15 use the opportunity now to move into motions as long as we've  
16 started with that.

17           Let me do make mention on the--before we do that,  
18 just my duties and that sort of thing. It's my duty, of  
19 course, to hear all the evidence, to rule on any motions that  
20 are being taken up, and to ultimately make a decision in this  
21 particular case. My decision could come at any time. It  
22 could come during the case itself upon a proper motion.

23           It could come after today's hearing or the hearing  
24 as we get completed, be it today or some other day, or it  
25 could come sometime after that. And that's more than likely

1 the scenario depending on the number of exhibits and that  
2 sort of thing I receive. I'm obviously not going to fool  
3 anybody if I have a big notebook up here that I've read all  
4 of them and make decision right after we're through. So  
5 that's the usual scenario.

6 I do have two responsibilities. One I've just  
7 mentioned, and that is to render a decision in this particu-  
8 lar case. I have a second responsibility that I take equally  
9 as serious. And that is to make sure we have a good, fair  
10 record in this particular case.

11 I am fully aware of today's hearing or at least  
12 the hearing over the course of time that it takes for this  
13 case that this is the opportunity for both sides to present  
14 witnesses, to present exhibits, that sort of thing. And this  
15 is probably the only time you will have that opportunity.

16 Decisions made after the hearing is completed  
17 here, be it final decisions, appeals, my experience is on the  
18 record with very limited opportunity to add anything to the  
19 record. So I take very seriously my responsibility to make  
20 sure that both sides have a full, fair opportunity to present  
21 everything they wish to have in the record. That being said,  
22 do either parties wish to talk to their clients at this  
23 particular time?

24 (No response.)

25 The Court: And you fully understand all

1 that I've mentioned. Let me make mention, as I said, as is  
2 my practice, I did hold a brief prehearing conference, and we  
3 did--part of the reason was to discuss any motions. And  
4 there were actually some that I had received prior to the  
5 hearing today.

6           The first motion that I do want to mention, and  
7 I'll mention it without the need of any argument, just  
8 basically what we spoke in terms of in the prehearing, is the  
9 respondent's motion to compel petitioner to pay a requested  
10 expert witness fee. And I am looking that over and seeing in  
11 talking with counsel, particularly Ms. LeVeaux, on that  
12 motion itself, I'm satisfied that Ms. LeVeaux herself does  
13 not represent the particular witness himself.

14           So obviously there are some questions involved. I  
15 know the witness was at UNC Wilmington, so capacity as a  
16 state employee, not a state employee, time off. There's also  
17 the question of whether UNC Wilmington has any particular  
18 regulations dealing with its employees, as I do--as I'm  
19 familiar with several of the universities that do have very  
20 specific regulations dealing with witnesses serving both as  
21 fact witnesses and expert witnesses and their entitlement to,  
22 one, protections from the state during their travel and  
23 stuff, as well as compensation they might receive. But those  
24 are answers that could only come from that witness himself.

25           And as I've told the parties, I am denying

1 respondent's motion to compel the payment of witness fees at  
2 this particular time based primarily on the fact, not  
3 the--any information presented; I'm not making any judgment  
4 on that--but on the fact that Ms. LeVeaux does not represent  
5 that particular person. So at that point--obviously if she  
6 did, he would be a state employee. She's only allowed to  
7 represent state employees, and so I'm not sure that was his  
8 capacity and what he finds.

9           I will very liberally allow him, either himself or  
10 on behalf of--or counsel on his behalf, to intervene in the  
11 case for this purpose only. And Ms. LeVeaux has said that  
12 she would relay that back to him.

13           That being said, what I would like to do is to  
14 move right into any brief discussion on Petitioner's motion  
15 for partial summary judgment that was filed on October the  
16 13th. And I believe, Ms. LeVeaux, I received your reply  
17 yesterday, and was reading that. So any discussion, Mr.  
18 Jones, on that motion?

19           Mr. Jones:           Yes, briefly, Your Honor.  
20 Thank you for the opportunity. First of all, should I  
21 address you from here, or is this okay?

22           The Court:           That would be your choice.

23           Mr. Jones:           On the motion for summary  
24 judgment, Your Honor--and I apologize for the somewhat late  
25 filing on that. In looking at it, I actually wish I had

1 filed it much sooner.

2           It really didn't occur to me that we might be  
3 entitled to partial summary judgment until about a week or so  
4 ago when we were going through the charges and parsing the  
5 words very closely with some of the witnesses, and it was  
6 almost like a light bulb went off, Your Honor.

7           The motion for summary judgment is based very  
8 specifically upon this. And you've read our motion and our  
9 brief. If you look at the wording of the charges, Your  
10 Honor--paragraph III, the decision attached to the findings  
11 and decision and assessment of civil penalties, is probably  
12 the most expeditious way of looking at this.

13           If you look at the wording of what we're charged  
14 with, it says we're hereby assessed the civil penalty of  
15 \$25,000:

16           "For violation of General Statute Section  
17 143-215.1(a)(6); causing and permitting waste to  
18 be discharged to or in any manner intermixed with  
19 waters of this State in violation of water quality  
20 standards applicable to the assigned classifica-  
21 tions or in violation of any effluent standards or  
22 limitations established for any point source,  
23 unless allowed as a condition of any permit,  
24 special order, or other appropriate instrument  
25 issued or entered into by the Commission under the

1           provisions of the Article."

2           The emphasis there is--the meaning of the statute  
3 is we can be charged with a violation if we discharge or  
4 allow some form of material to be intermixed with the waters  
5 of the state without a permit. But that's not all that has  
6 to be proven in that particular statute.

7           There also must be a violation of water quality  
8 standards applicable to the assigned classifications or in  
9 violation of any effluent standards or limitations  
10 established for any point source. So it's sort of a dual  
11 thing. We have to cause something to be intermixed with the  
12 public waters of the state that violate water quality  
13 classifications or effluent standards or limitations, which  
14 are set by rule.

15           The next paragraph says a separate violation and a  
16 separate fine of \$25,000 "For violation of 15A NCAC 2B  
17 .0211(3)(b); violating the dissolved oxygen water quality  
18 standard for Class C-Sw[amp] waters of the State," which is  
19 the regulation of a water quality standard, which is a  
20 regulation, and then a separate violation and \$25,000 "For  
21 violation of 15A NCAC 2B .0211(3)(c); by allowing settleable  
22 solids and sludge in excess of the water quality standard for  
23 Class C-Sw[amp] waters of the State."

24           So Your Honor, if you look at these together, this  
25 whole motion is based upon this very simple thing, and that

1 is we don't really have three separate violations here. We  
2 have one, maybe at the most two depending on how the state  
3 wanted to proceed on this.

4           In order to be responsible for the first  
5 paragraph, we have to be responsible for one or the other of  
6 these as well. We've been charged separately basically for  
7 the same thing. We have caused waters to be intermixed with  
8 waters of the state in violation of water quality standards,  
9 which are in paragraphs 2 and 3.

10           If we're guilty of this (indicating), we're guilty  
11 of these (indicating). If we're not guilty of that  
12 (indicating), we can't be guilty of this (indicating). If  
13 we're not guilty of these (indicating), we can't be  
14 responsible for this (indicating).

15           In other words, these two regulatory water quality  
16 standards are incorporated in the statutory violations we are  
17 alleged to have committed. And so in reality, we've been  
18 charged with three separate things for probably one actual  
19 act or violation. They're all interdependent.

20           And Your Honor, it kind of reminds me--Ms. LeVeaux  
21 in her brief cited a case which I wish we had cited. It's  
22 the case of *Murphy Family Farms v. the North Carolina*  
23 *Department of Environment and Natural Resources*. If we could  
24 approach, Your Honor?

25           The Court:                   Yes, you may.

1                   Mr. Jones:                   This case is near and dear to  
2 my heart because I was counsel for the petitioner in this  
3 case. And, you know, the history of that case, Your Honor,  
4 was it was tried before Judge Gray here. Judge Gray granted  
5 summary judgment, partial summary judgment, on grounds very  
6 similar to what I'm raising today.

7                   The grounds were that in that particular case the  
8 state had charged for one act, the fact that a lagoon  
9 breached down in eastern North Carolina, basically down just  
10 a few miles from where this case takes place today. There  
11 was a breach. Water from a lagoon escaped into a branch, and  
12 the state charged them for eight separate violations for what  
13 was in essence one violation, one act or omission, and  
14 charged them for eight violations.

15                   I argued successfully to Judge Gray that that was  
16 one violation, not eight. Judge Gray agreed. It went to the  
17 Environmental Management Commission. They disagreed and  
18 revised Judge Gray's ruling in that case. There was appeal  
19 to Judge Alford in Superior Court, and we prevailed again.

20                   The North Carolina Court of Appeals heard the  
21 matter on appeal and reversed Judge Alford. However, Judge  
22 Wynn gave a dissenting opinion. And the dissenting opinion  
23 said on page--the dissent begins on page 347, Your Honor.  
24 And the last paragraph on that page says:

25                   "The majority, recognizing that N.C. Gen. Stat.

1           Section 143-215.1(a)(6)," the same statute, "is  
2           stated in the disjunctive held Murphy's violation  
3           'was that it caused its waste to be intermixed  
4           with the waters of this State in violation of the  
5           applicable water quality for an ongoing period of  
6           eight days.' However, '[i]n construing statutes  
7           courts normally adopt an interpretation which will  
8           avoid absurd or bizarre consequences, the  
9           presumption being that the legislature acted in  
10          accordance with reason or common sense and did not  
11          intend untoward results.'"

12           I think the same reasoning is applicable here  
13 today. You've got one violation that subsumes two water  
14 quality standards in the regulations, not three violations  
15 where they break them all apart separately and say that's a  
16 violation, that's a violation, and that's a violation.  
17 Clearly if we had violated the statute, we must have violated  
18 the two regulations too because we've got to violate the  
19 regulations in order to violate the standard.

20           I think, Your Honor, this is very similar to being  
21 charged in a criminal case with murder and also assault with  
22 a deadly weapon. If we're guilty of murder, we've assaulted  
23 with a deadly weapon. You know, one is subsumed within the  
24 other, but we're not going to be convicted of both, or Ms.  
25 Jones thinks an even better example is speeding.

1           If we have violated a 55 mile an hour speed limit,  
2 we're not charged with violating the 55 mile an hour speed  
3 limit and the 45 mile an hour speed limit and the 35 mile an  
4 hour speed limit. We violated the 55 mile an hour speed  
5 limit. It incorporates all the others below it.

6           What they've done here is just like they did in  
7 *Murphy Farms*. They have pancaked these violations in an  
8 effort to pile more fines on the petitioner, just like they  
9 did in *Murphy Farms*, and have attempted to take something  
10 that's really one thing and turn it into two or three.

11           And in that case, Your Honor, in *Murphy Farms*, it  
12 went to the Supreme Court after the Court of Appeals. And  
13 I've attached the Supreme Court decision in that case. We  
14 actually went to Edenton and argued that case in Edenton to  
15 the North Carolina Supreme Court. It's the first time they  
16 had sat outside of Raleigh in over 100 years. And when they  
17 opened the Edenton courthouse down there after their  
18 renovation, they heard arguments. We went down there and  
19 argued it.

20           The Supreme Court ruled in favor of *Murphy*, our  
21 side, and adopted Judge Wynn's reasoning that that statute  
22 could not be read to create eight separate violations instead  
23 of one. And I think it's the same spirit we're urging here  
24 today, Your Honor. There are at most two violations. I  
25 suppose they could proceed on the basis of violating two

1 water quality standards, but not the statute and the two  
2 water quality standards that are subsumed within the statute.

3           And that is the basis of our motion for summary  
4 judgment. If it doesn't dispose of the entire case, we can  
5 see, but we think it does dispose of perhaps two of the  
6 violations in the decision.

7           The Court:           Thank you. Your reply, Ms.  
8 LeVeaux?

9           Ms. LeVeaux:        Thank you, Your Honor. Your  
10 Honor, I'm glad that Mr. Jones pointed to Judge Wynn's  
11 dissent. And the sole purpose for us, the mission in  
12 bringing up this case, we were well aware of the fact that  
13 you're talking about a single discharge versus continuous.  
14 And we were talking--and that was the argument there, was  
15 that you couldn't assess day after day after day for a  
16 continuous violation when it emanated from one violation, one  
17 discharge. And that was the issue there.

18           But the point there that we wanted to point to was  
19 a point that Mr. Jones reiterated, and I'm going to actually  
20 agree with him on that, and that is that--it's going to the  
21 paragraph that he just referenced to--the Court recognized  
22 that "courts normally adopt an interpretation which will  
23 avoid absurd or bizarre consequences, the presumption being  
24 that the legislature acted in accordance with reason and  
25 common sense." And that's what we're asking this Court to

1 embrace here.

2           Your Honor, we have a discharge without a permit.  
3 Certainly there was a discharge of waste. a discharge of  
4 waste without a permit stands on its own. An entity could  
5 have a variety of different permits, but if it doesn't have a  
6 permit to discharge, there's a violation.

7           We as lawyers know that a lot of offenses sound  
8 very much alike, but an element can be different and that  
9 makes the offense different. So Your Honor, if we have  
10 discharge of waste without a permit, that's the first  
11 violation. The maximum of \$25,000 was assessed for that  
12 violation, one time, not continuous, onetime violation.

13           Dissolved oxygen standard is separate. I can't  
14 present to you here today evidence which relates to fecal  
15 coliform and ask you to assess for dissolved oxygen, although  
16 both could be argued as stream standard violations.  
17 Dissolved oxygen is the violation. That's the evidence we  
18 found.

19           Settleable solids: well, Your Honor, there again,  
20 we can't ask you to charge for dissolved oxygen and just say,  
21 "Oh, don't worry about it, Judge. Just put it under  
22 settleable solids." Were the solids there or were they not?  
23 That is an issue before the Court; three separate violations,  
24 three separate burdens.

25           Your Honor, we stand by the arguments that we

1 waged in our response. We stand by Judge Wynn's comments.  
2 There was a question of the disjunctive versus the conjunc-  
3 tive in that opinion. And I saw that Mr. Jones argued the  
4 case, but it went up to the Supreme Court and then the court  
5 just kicked it all the way back and it was resolved.

6           But the point that I just wanted to wage or  
7 present before this Court is reason and common sense, Your  
8 Honor. So we could put--someone could put acid or anything  
9 into the waters and if they--and then if they're cited for  
10 something else in addition to it as it relates to a stream  
11 standard violation, we can't assess for the fact that they  
12 discharged this acid or fecal or whatever into the waters  
13 without a permit?

14           Now, there's rules that allow for some discharge  
15 into the waters of the state. But again, a lot of factors or  
16 variables are taken into consideration to accommodate that  
17 discharge. In this instance, Your Honor, a discharge was  
18 not--a permit was not allocated to House of Raeford for this  
19 discharge of waste.

20           We stand by the filings, Your Honor, and we submit  
21 that we have properly assessed for three separate violations  
22 consistent with the North Carolina General Statutes and the  
23 North Carolina Administrative Code and the rules and  
24 regulations.

25           Mr. Jones:                   Your Honor---

1                   The Court:                   (interposing)   Since you have  
2 the burden of proof on your motion, I'll let you have the  
3 last say.

4                   Mr. Jones:                   Thank you.   We accept that  
5 burden.   I think I can explain it this way.   If you parse the  
6 words in what we're charged with violating, the statute, in  
7 order to violate the statute, we must also violate the water  
8 quality standards that are in the regulations.

9                   So what they've done is they've said you  
10 violated--by not having a permit and discharging, and  
11 violating the water quality standards, that is a violation.  
12 So contrary to what Ms. LeVeaux says, there's the charge and  
13 there's a hefty \$25,000 fine for that.   If someone discharges  
14 into the waters in violation of the standards for DO or  
15 whatever, fecal coliform, there is your fine.   And we're  
16 charged with that.   That's probably acceptable, and we can  
17 try the case on that basis.

18                   But then they come in order to add on more fines,  
19 punitively I suppose, and they say, "Well, in addition to  
20 violating the statute, which incorporates the regulations,  
21 we're going to charge you separately for violating the  
22 regulations too."   And again, Your Honor, these are the same  
23 thing.   They just charged us three times for the same act,  
24 which is the violation of the statute.   And I just suggest  
25 strongly that's just not permissible.

1           Now, if we look at how this should be done, if  
2 the--the way the regulations should be used is if we had  
3 actually had a discharge permit, which we don't, and violated  
4 our permit by discharging more than the permit allowed in  
5 excess of these water quality standards that are in the  
6 regulation, those are what the regulations are for. And we  
7 can be charged with that.

8           If we have a permit and we test the waters in the  
9 creek below where we discharge, then we're not violating the  
10 statute because we have a permit. If we--but we can still  
11 violate the law even with a discharge permit. And by doing  
12 that, if we discharge in excess of the permit, we violate the  
13 dissolved oxygen standard or the standard for Class C swamp  
14 waters, as is done here, the last charge, we violate those  
15 regulations and I suppose they can charge us for that.  
16 Because we have a permit, they can charge us for this. They  
17 can charge us for violating the water quality standards.  
18 That's what those regulations are for.

19           But they can't come to us and say "You did this  
20 without a permit, which incorporates A and B, and we're going  
21 to separately charge you for violating A and B while we're at  
22 it, because those are specifically incorporated in the  
23 statute."

24           And, Your Honor, again I ask you to underline the  
25 following words: "intermixed with the waters of this State

1 in violation of the water quality standards applicable to the  
2 assigned classifications or in violation of any effluent  
3 standards or limitations established for any point source."

4           That--those words incorporate the two standards  
5 below them. And that's why we contend appropriately we  
6 should be trying this case on the statute that we--that if  
7 anything, we violated that, but not all three. Thank you.

8           The Court:           Okay. And lastly, I believe  
9 that I received today a motion in limine?

10           Mr. Jones:           Correct. And again, I  
11 apologize. Unusual for this forum, pretty common in the  
12 Supreme Court--I mean in the Superior Court forum--I'm going  
13 to ask Ms. Jones to argue that, if I may.

14           The Court:           That would be fine.

15           Ms. Jones:           Your Honor, I do have just four  
16 brief evidentiary issues. The first has to do with testimony  
17 by Kenneth Rhame. He was an on-site EPA investigator and was  
18 named as a witness by Ms. LeVeaux, as a potential witness, at  
19 the hearing.

20           We had requested back in January, I believe, to  
21 informally speak with him, trying not to tie up his schedule.  
22 We were informed we could not do that, and so then we asked  
23 for a formal deposition. We were also denied access to Mr.  
24 Rhame by the EPA based on some federal regulations.

25           However, when we were denied the opportunity to

1 depose him, the EPA informed us and copied us with a letter  
2 that had been sent to Ms. LeVeaux, who asked for his  
3 attendance at this hearing, that "As a fact witness Mr. Rhame  
4 would limit his testimony to his knowledge of the sludge  
5 release that he observed in Beaverdam Creek, and he will not  
6 offer an opinion or conclusion as to the origin of that  
7 release." And those letters and communications are attached  
8 as an exhibit to the motion.

9           Our motion in limine is simply that his testimony  
10 be so limited. If the EPA is going to take a stance that Mr.  
11 Rhame is only allowed to testify as to what he observed and  
12 not offer any opinions as to an origin of the release, then  
13 he should be held to that standard. And that's what the  
14 first motion in limine is based on, Your Honor.

15           The Court:           Okay.

16           Ms. Jones:           The second one relates to  
17 testimony by Dr. B.K. Song. Dr. Song was identified by the  
18 State as an expert witness to render an opinion regarding  
19 some DNA fingerprints testing and analysis that he performed.

20           We're actually moving to exclude Dr. Song's  
21 testimony in its entirety, and that's based on testimony from  
22 the State. At his deposition, Mr. Poupart testified that Dr.  
23 Song's analysis was basically just some supplemental  
24 information. He specifically stated that the testing method  
25 was not an approved method, not from the state's lab

1 certification folks. He again stated, and these are pages  
2 128 to 130, which the deposition transcript is also attached  
3 to the motion, that the test is "not an approved method and  
4 there's no water quality standard for DNA."

5           Based on the fact that the state's individual who  
6 assessed the violation did not rely on the testing method and  
7 basically stated that it was not an approved method, I don't  
8 think that Dr. Song's testing, and testimony for that matter,  
9 bears any relevance to this proceeding and it should be  
10 excluded.

11           There are also other grounds for excluding Dr.  
12 Song's testimony on the basis that it's inherently unreliable  
13 There is also deposition transcripts attached as an exhibit  
14 to the motion where Dr. Song testified that there was no  
15 chain of custody information with the samples that he  
16 received. He did not know when the samples were taken. He  
17 did not know by whom they were taken. He didn't know how the  
18 samples were stored.

19           And in addition to that, Your Honor, there's the  
20 issue that Dr. Song was instructed to destroy the samples by  
21 the state. So that rendered my client without the ability to  
22 do any sort of retesting. Your Honor, case law holds that a  
23 judge may exclude DNA evidence, may deem it inadmissible for  
24 any number of reasons, including unreliable procedures or  
25 results, contamination of the sample, or chain of custody

1 questions. And we would contend that all three of those  
2 would apply in this situation. But, again, the test itself  
3 was deemed to be an unapproved method by the state, and there  
4 is testimony already to that effect.

5           The next motion, Your Honor, relates to evidence  
6 of permit violations by Joe Teachey or other employer--  
7 employees of the petitioner. In the State's second request  
8 for admissions, there was a focus there on admissions  
9 regarding specific requirements of my client's permit and  
10 specific requirements of applicable regulations.

11           For example, the respondent sought admission that  
12 consistent with ORC--with the permit, the ORC, which is the  
13 operator in charge, is required to take immediate corrective  
14 actions in the event that the facilities fail to perform  
15 satisfactorily. There was a request that we admit that the  
16 regulation and the permit require the ORC to visit the  
17 facilities five days per week.

18           In for example Mr. Teachey's deposition, who is  
19 the wastewater manager at House of Raeford, there were also  
20 questions geared towards the specifics of the permit and  
21 specifics of the regulations. To the extent that none--that  
22 respondent is seeking to approve or show that any alleged  
23 violation of the permit or the regulations didn't serve as a  
24 basis for this assessment and violation, that testimony and  
25 line of questioning should be excluded because it's simply

1 not relevant.

2           And then, Your Honor, our last motion in limine  
3 relates to evidence of historical violations that may have  
4 been imposed by DENR against House of Raeford at the Rose  
5 Hill facility, or any other facilities for that matter. The  
6 statute that Mr. Jones referred to earlier, 143-215.6--and  
7 actually, this is 6(a), parens little a--allows a civil  
8 penalty of not more than \$25,000 to be assessed against an  
9 entity.

10           The only way to get higher than a \$10,000 penalty  
11 is if there have been fines imposed against the violator  
12 within the last five years. So the statute limits the  
13 historical penalty review when assessing this type of  
14 violation and penalty.

15           Accordingly, the only relevant violation history  
16 would be limited to a five year period, and any evidence or  
17 mention of prior historical violations are not pertinent and  
18 should be excluded, Your Honor.

19           The Court:                   Thank you. Your response, Ms.  
20 LeVeaux?

21           Ms. LeVeaux:               Briefly, Your Honor. First of  
22 all, Your Honor, as you may or may not be aware, we have a  
23 discharge. And this is our opinion, and this is what we  
24 allege, is that there's been--there was a discharge of  
25 hundreds of thousands of gallons of waste.

1           We didn't see anyone discharging the waste. We  
2 didn't see where the lagoon--there was a dip in the lagoon or  
3 a breach of the lagoon. We didn't see any of that. But what  
4 we did see was hundreds of thousands, if not millions, of  
5 gallons of waste that had been discharged in to Cabin Branch.  
6 We have a circumstantial case, Your Honor.

7           We ask you to deny every single argument or issue  
8 that the petitioner just waged on its motion in limine.  
9 First of all, Your Honor, the petitioner argued that Kenneth  
10 Rhame's testimony should be limited. We would object to  
11 that, because the EPA--at least this is our understanding--  
12 just didn't want their guy to go back and forth, back and  
13 forth, back and forth.

14           He was going to put his guy on, present his guy,  
15 bring his guy from Atlanta one time. Each side would get an  
16 opportunity to ask questions. Each side would have an oppor-  
17 tunity to cross-examine. It was just an efficient way of  
18 handling their involvement. That was our take on this.

19           What petitioner asked us to do is limit his  
20 testimony to a letter. And Your Honor, we have a document  
21 that we're going to introduce into evidence. There's only  
22 one document that Kenneth Rhame produced. But if you align  
23 yourself with the arguments waged by Petitioner, we'll be  
24 precluded from bringing that--presenting that document.

25           And we submit that it was the best evidence. That

1 was a document that was created at that time that he was out  
2 there back--way back when in September--around September 15,  
3 2009. So Your Honor, we adamantly oppose Petitioner's  
4 request as it relates to Mr. Rhame.

5           Secondly, Your Honor, the DNA evidence:  
6 essentially Petitioner would ask that you put the cart before  
7 the horse and before we even have an opportunity to establish  
8 a foundation to show you how we used Dr. Song's expertise  
9 just eliminate it altogether. Before you've had an oppor-  
10 tunity to see any of the evidence, they ask that you come to  
11 the conclusion, based upon their assertions, that there was  
12 contamination, that the samples were improperly and  
13 improvidently drawn. Your Honor, again, they're asking you  
14 to take the case away from us before we even have an oppor-  
15 tunity to show you why we did what we did.

16           Finally, Your Honor, Mr. Joe Teachey is their  
17 operator in charge. And they're asking you to limit the  
18 questions that I have raised, the examination that I've  
19 raised as it relates to Mr. Teachey. Well, Your Honor, Mr.  
20 Teachey did have a duty as an operator in charge to inspect  
21 his lagoons. And he had an opportunity--he had--he was  
22 supposed to do this on a daily basis and more than one time a  
23 day.

24           And yes, Your Honor, it's no surprise we are  
25 asserting that you should have seen hundreds of thousands of

1 gallons of sludge, of waste, in a stream that is directly  
2 behind their lagoon. Yes, Your Honor, that is our assertion.  
3 And yes, Your Honor, we will be asking about his duties and  
4 responsibilities. And we will be asking him what he did on  
5 those days and how he had an occasion not to do this.

6           And Your Honor, as you mentioned at the outset,  
7 all of this is to prepare a record. We don't have any  
8 objection to them preparing their record, but we ask you not  
9 to allow their motion in limine to prevent us from presenting  
10 our record.

11           And again, Your Honor, I would rely on arguments  
12 that I've made, but I would point out to the Court that I did  
13 not see this motion in limine until a few--just before I came  
14 in--I mean until I arrived here today in court. And we would  
15 ask that you deny the motion in limine, Your Honor, the  
16 motions in limine.

17           The Court:           Thank you. Thus having the  
18 burden of proof, I'll let you have the last say, Ms. Jones.

19           Ms. Jones:           Thank you, Your Honor. Just  
20 very briefly, with regard to Mr. Rhame, the EPA investigator,  
21 I would just like to reiterate, we're only trying to limit  
22 his testimony to his factual investigation.

23           Ms. LeVeaux was put on notice February 25th, 2011,  
24 which again is an exhibit that is attached to your packet. I  
25 believe it would be A-3. In fact, I can let you know

1 exactly, Your Honor. Again, that was February 2011. It's  
2 attached to the last page of Exhibit A-3.

3 And the letter from the EPA to Ms. LeVeaux  
4 specifically states, "As a fact witness, Mr. Rhame will limit  
5 his testimony to his knowledge of the sludge release that he  
6 observed in Beaverdam Creek, and he will not offer an opinion  
7 or conclusion as to the origin of that release."

8 That's all we're being--we're asking Mr. Rhame to  
9 be held to, what the EPA has indicated that he could testify  
10 about. Frankly, Your Honor, we've been prejudiced by not  
11 being allowed to depose him, by not even being allowed to  
12 speak informally with him, a telephone call, anything along  
13 those lines.

14 So the fact that Ms. LeVeaux has a document that  
15 she would like to introduce into evidence that somehow  
16 doesn't comply with what the EPA has stated that Mr. Rhame  
17 can testify to, that should have been taken care of prior to  
18 this hearing date. We've got clear direction as to the scope  
19 of his testimony here today.

20 Your Honor, with regard to Dr. Song's testimony,  
21 Ms. LeVeaux argued that we're putting the cart before the  
22 horse because we're talking about chain of custody,  
23 contamination, those types of issues. We're also talking  
24 about testimony from the state, from Mr. Poupart, who said  
25 this is not an approved method of testing. This is not

1 approved. And that alone should exclude Dr. Song's  
2 testimony.

3           If the Agency relying on, or supposedly relying  
4 on, that type of information says that it is not a reliable  
5 or approved method of testing and says that it's just  
6 supplemental information, it should not come up before Your  
7 Honor.

8           And again, we would just reiterate arguments with  
9 regard to Mr. Teachey. Ms. LeVeaux can certainly ask him  
10 questions about what he did and didn't do, but to the extent,  
11 again, which is our motion, that she's trying to prove some  
12 violation of a permit or regulation that did not serve as the  
13 basis for this proceeding, that's improper.

14           The Court:           Thank you.

15           Ms. LeVeaux:        I'm sorry. I'm going to ask  
16 permission--I forgot to address one issue, and that was the  
17 issue on the historical--I mean not the historical, but the  
18 approved method, and---

19           The Court:           (interposing) Okay.

20           Ms. LeVeaux:        ---if you will?

21           The Court:           I will.

22           Ms. LeVeaux:        Thank you, Your Honor.

23           The Court:           Of course, I'm going to give  
24 Ms. Jones the last say-so on that too.

25           Ms. LeVeaux:        Okay, you can give her the

1 last--I'm sorry I missed that. Your Honor, approved method  
2 is a term of art. That carries a certain connotation. For  
3 the Department of Environment and Natural Resources to say  
4 that something is an approved method, it's gone through  
5 iterations and iterations, and it's gone through an approval  
6 process.

7           But an approved method is not an analogous with  
8 the fact that Mr. Poupart is precluded from considering this  
9 method as a new method. So I just want to say briefly that  
10 when you're saying the question asked of Mr. Poupart was is  
11 this an approved method, there are certain approved methods  
12 but there's certain criteria that must be established for it  
13 to be an approved method.

14           So that is a term of art, and I would be more than  
15 willing to put Mr. Poupart on the stand to speak to that more  
16 so if the Court is inclined to hear, you know, what's the  
17 difference between an approved method versus a method where  
18 you just look at this new evidence.

19           I mean DNA is basically something that has only  
20 been used in the criminal court system within the last ten  
21 years. So it's something that has certainly evolved. So it  
22 wouldn't surprise me that it's not an approved method, but  
23 that doesn't mean that they're precluded from considering  
24 this information, and that is not a new scientific method  
25 that DENR is and did embrace in its consideration of the

1 factors.

2           And I just want to say very briefly, Your Honor,  
3 that Mr. Poupart when he was discussing, he doesn't just look  
4 at--he takes in the entire enforcement history of the House  
5 of Raeford, so not just the House of Raeford Rose Hill or the  
6 House of Raeford Wallace. He takes all the House of  
7 Raeford's history. And so unfortunately or fortunately,  
8 House of Raeford Wallace may have done something, but that  
9 could actually be factored in to his assessment as it relates  
10 to Rose Hill.

11           The Court:           Anything further, Ms. Jones?

12           Ms. Jones:           Your Honor, I would just  
13 reference Mr. Purpart's testimony that is attached to the  
14 motion where he does say that it's not an approved method and  
15 it was supplemental in its consideration. With regard to the  
16 last statement of Ms. LeVeaux, we'd again just ask that  
17 violation history be limited to five years in accordance with  
18 the statute.

19           The Court:           Thank you. Let's take--I  
20 believe I've gotten all the motions, have I not?

21           Mr. Jones:           Yes, Your Honor.

22           The Court:           That being the case, let me  
23 take at least till noon, and if I find that I'll be longer,  
24 I'll come back down and perhaps even recess us for lunch.  
25 But I think, based on having prior reading a lot of the

1 material that you've been discussing that I should be able to  
2 make some decisions by then. But let's be in recess till  
3 around noon, please.

4 Ms. LeVeaux: Thank you, Your Honor.

5 The Court: Thank you.

6 The Reporter: Off the record. 11:39 a.m.

7 (A brief recess was taken.)

8 The Reporter: On the record. 12:09 p.m.

9 The Court: This hearing will come to  
10 order. It's now seven minutes after 12:00 on October the  
11 25th, 2011, and all parties present when we recessed are  
12 again present. Having gone through, I believe, all that we  
13 spoke about before the recess, let me make some determina-  
14 tions.

15 Let's start first with the motion for partial  
16 summary judgment. Without going into a lot of detail on case  
17 recitations, let me just remind the parties of the standard  
18 of review that is required for that type of motion, that is  
19 summary judgment is designed to eliminate either formal trial  
20 or issues within the trial where material facts are not  
21 disputed and only questions of law are involved.

22 Since summary judgment is a drastic remedy, it  
23 should be used cautiously with due regard to its purposes and  
24 a cautious observance of its requirements and never as a tool  
25 to deprive any party of a trial or an issue in the trial when

1 genuinely disputed factual issues may exist. Summary  
2 judgment is an extreme remedy and should be awarded only  
3 where the truth is quite clear.

4           The Court must determine if there is any triable  
5 material issues of fact viewing all evidence presented in the  
6 light most favorable to the nonmoving party, which of course  
7 in this case is the respondent. The slightest doubt as to  
8 any fact entitling--would entitle the nonmovant to a trial.  
9 Facts asserted by the party answering a summary judgment  
10 motion must be all accepted as true. Further, summary  
11 judgment may not be used where conflicting evidence may be  
12 involved, and moreover, if there's a question which can only  
13 be resolved by the weight of the evidence, summary judgment  
14 must be denied.

15           Based on the arguments presented, not having heard  
16 the specific facts regarding the discharge itself as opposed  
17 to the other two, at this time I am denying Respondent's  
18 motion for summary judgment.

19           The Reporter:           Excuse me, Your Honor. Would  
20 that be Petitioner's motion?

21           The Court:           I'm sorry. You're exactly  
22 right. Thank you; the petitioner's motion for partial  
23 summary judgment.

24           Secondly, regarding the motions in limine, as the  
25 parties are aware, written motions which--motions in limine

1 are motions usually made before or just after the beginning  
2 of a jury trial to avoid injection into the trial itself of  
3 matters that are irrelevant, inadmissible, and prejudicial  
4 and where particularly the granting of the motions in limine  
5 is not a ruling on any evidence.

6           There are certain things that go in the Office of  
7 Administrative Hearings that obviously don't apply.  
8 Obviously we're not a jury trial. So I'm very hesitant, as I  
9 told both parties up front, to grant these types of motions  
10 simply because I don't have to worry about a jury being  
11 confused or prejudicial, and I certainly can award little to  
12 no weight to any evidence that's presented, and of course I  
13 could deny the evidence once it's presented to me.

14           So based on that, I am at this point in time  
15 denying the motion in limine on all four of the requests.  
16 That obviously, as counsel knows, does not prevent counsel at  
17 the time the evidence is presented, if it would even be  
18 presented and for what purpose it might be presented, to make  
19 whatever objections that might be relevant at that particular  
20 time. But at this point in time to summarily deny even the  
21 introduction of that type of evidence would be inappropriate  
22 and certainly not in the spirit of motions in limine.

23           You had asked lastly too, and I think rightly so,  
24 Mr. Jones, regarding the burden of proof itself, particularly  
25 the case you read, and that is not a novel situation at the

1 Office of Administrative Hearings. And there are really two  
2 things that are going on at one time in these types of  
3 hearings always.

4           The state has made some kind of investigation, and  
5 based on that investigation they have then taken a course of  
6 action. When bringing matters before the Office of  
7 Administrative Hearings, according to the case law, the  
8 petitioner bears the burden of proof.

9           However, it comes about because the department has  
10 made findings based on substantial evidence to bring about  
11 the action that causes the parties to come into the Office of  
12 Administrative Hearings in a contested case. And I believe  
13 Ms. LeVeaux even made mention of that in our telephone  
14 conversation.

15           The burden of proof lies with the petitioners.  
16 However, the burden that the investigation and the findings  
17 were made with substantial evidence in mind, not with a 50-50  
18 chance or that sort of thing, certainly lies with the  
19 respondent, that they made their investigation, they sub-  
20 mitted their findings, they took their action based on an  
21 investigation, so that's one thing she'll be showing, not  
22 something out of thin air, so to speak, and that that  
23 investigation led to conclusions based on substantial  
24 evidence in the investigation that it was the right course of  
25 action in the respondent's mind.

1           I don't know that that helps you any. You  
2 probably will see something similar to that. It's pretty  
3 common in nurse aide registry cases where it becomes a little  
4 confusing, but quite frankly, as both parties know, it very  
5 often does not fall on the 50-50 line where the burden of  
6 proof plays a huge role. Usually the evidence bears out one  
7 side or the other as carrying that weight, that preponderance  
8 of the evidence. But I think that's what that means in that  
9 particular case.

10           You certainly see that where the burden of proof  
11 lies with the petitioner say in a nurse aide registry case or  
12 these types of cases. However, most of the discussion or a  
13 lot of discussion centers around the investigation itself  
14 that brought about the particular petition to come into  
15 court.

16           And certainly if the investigation is lacking,  
17 even if it bears some truth but if it's not substantial  
18 evidence, so to speak, within the investigation itself, then  
19 it would fail, and obviously the petitioner would carry their  
20 burden based on that. Does that make sense or is it--you  
21 asked for an explanation, and that's probably the best  
22 explanation I can give to you.

23           Mr. Jones:           It is. It is. I think the  
24 question I had was in terms of the process. Would that mean  
25 that the State proves the issues and the notice of decision

1 and assessment and we present our defenses or we present our  
2 defenses and then the State does something?

3           The Court:           Yeah. You present your--you go  
4 forward presenting why you believe that it was an incorrect,  
5 unsubstantiated investigation. I think we've covered that.  
6 I've looked at the time. What I would like to do is--I  
7 presume, based on what I've seen on the screen, that  
8 Petitioner does wish to make an opening argument.

9           Mr. Jones:           Yes, Your Honor.

10           The Court:           And does Respondent wish to  
11 make an opening argument before--right after Petitioner or  
12 before their case?

13           Ms. LeVeaux:           Before the case, Your Honor.

14           The Court:           Before the case?

15           Ms. LeVeaux:           Yes.

16           The Court:           Okay. What I'd like to do,  
17 then, is to take the time now to have an opening argument,  
18 and that might then be a good time for us to break for lunch.

19           Mr. Jones:           Thank you, Your Honor.

20           The Court:           If you will proceed, please.

21           Mr. Jones:           Thank you, Your Honor. And  
22 again, I'll just speak from here if I can.

23           The Court:           That will be fine.

24                             O P E N I N G   S T A T E M E N T          12:17 p.m.

25           Mr. Jones:           Again, Your Honor, I'm Henry W.

1 Jones, Jr., counsel for House of Raeford Farms, Incorporated.  
2 I have to say up front that I--and it will probably be more  
3 clear as the day wears on--I come from an era of paper, not  
4 technology, so--Ms. Jones on the other hand comes from an era  
5 of technology. She's very friendly with this kind of thing.

6 I'm going to be fumbling with this stuff and I'll  
7 be relying on paper and you'll be looking at the technology  
8 and all that, and I apologize if it's awkward, but it's  
9 just--it's kind of the curse of being older, I guess.

10 The Court: Well, I don't know that I  
11 consider that a curse---

12 Mr. Jones: (interposing) Well---

13 The Court: ---because I am of the age of  
14 paper as well.

15 Mr. Jones: I love paper as opposed to  
16 technology, but since we've got it, I think we'll try to take  
17 advantage of it, and if it aids in Your Honor's understanding  
18 of the case, then I think that's fine.

19 House of Raeford Farms, Your Honor, as it will be  
20 shown, is a multifacility company. The company is based in  
21 North Carolina. Its headquarters is in Rose Hill, North  
22 Carolina, which is in Duplin County. They have other  
23 facilities. They are a poultry production company. They  
24 have side companies which produce the live birds, both  
25 chickens and turkeys. They are then conveyed to processing

1 facilities like you'll be hearing about today and tomorrow.

2           Those processing facilities are slaughtering  
3 facilities. They slaughter the birds and then move them out  
4 for sale. The live operation is separate. You probably  
5 won't be hearing anything about that anytime during the  
6 course of the hearing. And those are separate entities  
7 anyway, separate incorporated entities.

8           The Rose Hill facility is a chicken processing  
9 plant. They have chicken processing plants in Wallace, which  
10 is also in Duplin County, Wallace or Teachey. You will hear  
11 it referred to either one, but I always refer to it as  
12 Wallace. They have a turkey--a totally separate turkey  
13 facility in Raeford, North Carolina. They have chicken  
14 facilities in Columbia, South Carolina and Greenville, South  
15 Carolina, and they have a further processing facility in  
16 Hemingway, South Carolina and a chicken processing plant in  
17 Arcadia, Louisiana, all supported by live operations in  
18 separate corporations.

19           So what you'll be hearing about today for the most  
20 part is the facility in Rose Hill, North Carolina, and it's a  
21 facility just located outside of Rose Hill on Highway 117 in  
22 the heart of Duplin County.

23           The issues that you'll be hearing about stem from  
24 what was an anonymous phone call, we think a complaint filed  
25 by a neighbor along that particular branch or creek that runs

1 behind the petitioner's plant that would have been called in  
2 around September 9th of 2009, fully two years ago.

3           The complaint resulted in what became an  
4 investigation by state and maybe even federal agents. It  
5 related to sludge, whatever that word means, that was located  
6 in a creek behind the company's facility near Rose Hill. The  
7 facility is located on a branch called Cabin Branch, which is  
8 a Class C swamp water, as classified in North Carolina.

9           As a result of the investigation that ensued, the  
10 state department, the state agency, issued fines and  
11 penalties based upon three separate violations. And we've  
12 referred to those earlier today. As you can see, the first  
13 one is a violation of N.C. General Statute 143-215.1(a)(6),  
14 which is causing or permitting waste to be discharged or  
15 intermixed with the waters of the state in violation of water  
16 quality standards without a permit.

17           The company has a nondischarge permit. It does  
18 not--is not permitted to discharge from that particular  
19 facility. And there is a separate violation for the dis-  
20 solved oxygen standard as well as the additional standard,  
21 water quality standard, for Class C swamp waters in the state  
22 using it as best use--using those waters in their best use.  
23 Those are what the charges are.

24           And again, we reserve our argument concerning the  
25 lawfulness of the three separate charges incorporated--

1 those should have been incorporated into one, we think--in  
2 both the responsibility aspect of this case as well as the  
3 punishment aspect of the case, if it comes to that point.

4           There will be no direct evidence of a violation in  
5 this case. What was found was a number--a volume of material  
6 located in Cabin Branch behind the company's plant. Even Ms.  
7 LeVeaux said in her arguments on the motion this is a case  
8 based totally upon circumstantial evidence. There will be no  
9 direct evidence of a violation. It would be based upon  
10 circumstantial evidence.

11           In our contention there are three main facts that  
12 this case rests on. One is that there was a volume of waste-  
13 like material found in the creek behind the company's plant.  
14 Number two, the company performed some wastewater lagoon  
15 maintenance between its primary and secondary lagoons, two  
16 different lagoons, earlier in September of 2009. And  
17 finally, there's no other company or individual who has  
18 admitted discharging the material into the creek.

19           The conclusion that the state reached is that it  
20 must be the responsibility of the nearest company, and that  
21 was House of Raeford Farms. Our contention is that that is  
22 the evidence that you'll be hearing from the State, that our  
23 client committed the violations that we've referred to  
24 before.

25           We will have evidence, Your Honor, from company

1 personnel that will explain the wastewater and treatment  
2 system that the company uses, and that evidence will show  
3 that the processing plant uses large amounts of water for  
4 processing, you know, to clean the birds and to run them  
5 through the system. As a result of that, there's a good bit  
6 of wastewater that exits the plant.

7           The evidence will show that that wastewater goes  
8 to a dissolved air flotation like system, where solids and  
9 liquids are to some extent separated. Some of the solids are  
10 separated from the liquids in that system. The solids are  
11 then picked up and trucked to what's known as a rendering  
12 operation, which in this particular case is Carolina  
13 By-Products, also located in Duplin County.

14           Those solids, feathers, blood, grease, some fats  
15 and oils--and I'm sorry this is right before lunch, but in  
16 order to get the point across--those materials are picked up  
17 and taken to a separate rendering operation, where they are  
18 rendered into such things as dog food and feed. Lower  
19 categories of product use those materials. And the company  
20 actually pays the rendering operation to take them away, and  
21 they take them away several times a month.

22           After that, what water or liquid is left in the  
23 dissolved air flotation system is pumped to a primary lagoon,  
24 which in this case is a huge lagoon where what solids are  
25 left and liquids sit there, and hopefully the solids settle.

1 The liquids are then by gravity feed sent down to a secondary  
2 lagoon, and the water stays there in that lagoon.

3           Both of those lagoons are extremely large. I  
4 think the evidence will show that they are many acres--I  
5 think it's like 4 acres that those--each one of those lagoons  
6 encompasses. And then well behind the secondary lagoon runs  
7 Cabin Branch. The neighbor on one side of the company is  
8 what's known as Parker Bark Company there on that same area  
9 of the creek. And they are one of the company's neighbors.

10           And as part of the investigation obviously--well,  
11 let me finish up the treatment system. The water in the  
12 secondary lagoon is then pumped a pretty good distance by a  
13 pump and then a pipe to--by an underground pipe to another  
14 area of Duplin County, where it is sprayed on fields with  
15 crops, and that natural spray is done and eliminates the  
16 water from the secondary lagoon and it forms sort of a  
17 natural fertilizer for the crops.

18           And that whole system whereby the wastewater is  
19 sprayed upon the fields is a permitted system in accordance  
20 with North Carolina. So it's a complicated system. It was  
21 constructed in the early 1990s and is part of the company's  
22 system.

23           Our contention is that and we think the evidence  
24 will show there are two other companies who are located well  
25 upstream from House of Raeford that could have and probably

1 did contribute to the material that was found in the creek  
2 behind House of Raeford Farms.

3           They have significant histories of discharge of  
4 waste material into this very same creek. There is evidence  
5 that will be produced maybe by the State and certainly by the  
6 company that those companies were noticed by the state for  
7 having committed discharges both before and after the  
8 investigation of House of Raeford started and was concluded.

9           Numerous sources in addition to those two large  
10 companies could also have contributed to this mess. Our  
11 evidence will show that this entire area is a largely agri-  
12 cultural area. There are trailer parks. There is a public  
13 school in the area with a very poor, beat-up, and poorly  
14 maintained waste system. There are septic fields in the  
15 area. There's livestock operations along the creek, both  
16 upstream and downstream from the company.

17           And I think our evidence will show that in terms  
18 of water quality standards--dissolved oxygen, fecal  
19 coliform--you could have gone to this very same creek area a  
20 month or two months before the investigation started and you  
21 would have found heavily degraded creek conditions. You  
22 could go there two months later, two years later, and you  
23 would find heavily degraded water quality standards, lower  
24 than the legal standards that we have been charged with in  
25 those two regulations that I've read abundantly already.

1           And you will find they're probably lower than  
2 legal today as a matter of fact, and that's the way it's sort  
3 of existed through history as a result of all the different  
4 business and livestock and agriculture that goes on in that  
5 area. Numerous sources, in summary, have contributed to the  
6 degraded conditions in that creek, and our evidence will so  
7 show.

8           The objective evidence that you usually look for  
9 in a case like this is some form of overtopping of lagoons,  
10 evidence of the breach of a lagoon, or perhaps surface  
11 drainage from a lagoon, spots on the ground, discoloration,  
12 residue showing on the ground, showing some sort of elimina-  
13 tion from the lagoon onto the ground. None of that evidence  
14 will exist today or tomorrow, whenever this case is heard.

15           There was no objective evidence of overtopping,  
16 breach, or surface drainage from the company's lagoons. You  
17 will not--you will not hear anything about that. There was  
18 no pumping of any waste material from the lagoon to the  
19 creek. No one saw any. No one has admitted to any after a  
20 thorough investigation. You will find no direct evidence of  
21 any pumping.

22           In order to get any kind of volume of water from  
23 the lagoons to the creek it would have to have been pumped  
24 and carried by either pipe or by a pump and haul truck.  
25 There will be no evidence of any of that.

1           In fact you will hear evidence that the company  
2 has--does not have the means to do that kind of extensive  
3 pumping and hauling or pumping and carrying. Such would have  
4 taken time, an enormous amount of money, and a lot more  
5 knowhow than this company has.

6           What you will hear from our evidence is that this  
7 creek and the area around the creek has characteristics and a  
8 certain topography that creates a stagnation effect that  
9 comes to a culmination right behind the company's facility.  
10 The evidence will show that area is deeper, sort of a hole in  
11 the creek behind the company.

12           The topography of the land is such that it  
13 basically runs from high to low and creates an effect where  
14 it makes it very difficult for that creek to flow. At times  
15 it stands extremely still and is stagnant when there's no  
16 heavy rain events or something to push the water along.

17           The bends in the creek just downstream from the  
18 company's plant create a condition that lends itself to  
19 stagnation in the area of the company's plant. And there's  
20 also just downstream from the company's plant a--really a  
21 pond, which is another characteristic of this waterway that  
22 causes the creek to stagnate behind my client's plant, and  
23 there will be evidence indicating that as well.

24           So at the time that the investigation started we  
25 will show that there were conditions that actually promoted a

1 migration of waste upstream to the area where the company's  
2 plant is and the creek behind it, and waste material migrated  
3 from the areas upstream to the area behind the plant,  
4 stagnated, and was in that condition when the anonymous phone  
5 call was made on September the 9th of 2009.

6           At the time of the anonymous phone call it's  
7 important that the lagoons were functioning properly and they  
8 had adequate freeboard. In other words, they had enough area  
9 between the lip of the lagoon and the water levels to sustain  
10 the amount of liquid that was in the lagoons.

11           Immediately prior to the investigation in  
12 September of 2009 our evidence will show North Carolina in  
13 general, eastern North Carolina specifically, had gone  
14 through a period of almost historic drought, very little  
15 rainfall. The lagoons were in good condition, no over-  
16 topping.

17           Immediately before the investigation started there  
18 was a--there was a rainfall event that was fairly significant  
19 in that area, which could have created a condition where in  
20 the creek the rainfall from runoff and just direct flow  
21 created a very strong flow that would have allowed the waters  
22 on Cabin Branch to carry waste material from further upstream  
23 to the area behind the plant.

24           Finally, our conclusion based upon the evidence  
25 will be that the creek water with accumulated levels of waste

1 material from at least two and maybe even more upstream  
2 contributors could easily have moved down the creek and  
3 stopped due to natural characteristics of the land and the  
4 creek behind the company's plant and lagoons.

5           Second, the company has not violated the statute  
6 or the two water quality regulations cited by the agency and  
7 the fines are completely and totally erroneous. Number  
8 three, there is no evidence to support the agency's claim  
9 that the company is responsible for the accumulation of  
10 wastewater sludge in the creek, also that the decision by the  
11 agency to find the company in violation of the statute and  
12 the two water quality regulations is erroneous.

13           We will also have the conclusion that the agency  
14 has committed error by fining the company for violation of  
15 the statute and violation of the two water quality standards  
16 upon which the statute rests. Finally, the agency committed  
17 further error in calculating the three fines in the amount of  
18 \$25,000 per alleged violation because among other things the  
19 agency failed to properly apply the factors set forth in  
20 G.S. 143B-282.1, subparagraph (b).

21           Your Honor, based upon that we look forward to  
22 putting on our case and responding to the decision and fines  
23 that the agency has assessed.

24           The Court:                   Thank you. And I understand,  
25 again, that you were going to present an opening before the

1 beginning of your case, Ms. LeVeaux?

2 Ms. LeVeaux: Yes, sir.

3 The Court: Good. With that in mind, I  
4 have that it's 12:35, and let's give everybody a little drive  
5 time in case you need that. Let's return back at 1:45,  
6 please.

7 (The hearing was recessed at 12:37 p.m. to  
8 reconvene at 1:45 p.m. this same day.)



1           The Reporter:           Okay.  
2           The Witness:           George Clayton Howard, Jr.  
3           The Reporter:           Clayton; thank you very much.  
4           The Witness:           Yes, ma'am.  
5           Mr. Jones:           Well, I've already learned  
6 something.  
7           The Witness:           There you go.  
8           Mr. Jones:           I didn't know his first name  
9 was George. Thank you.

10                           D I R E C T   E X A M I N A T I O N       1:59 p.m.

11           By Mr. Jones:  
12           Q    Mr. Howard, tell me where you work.  
13           A    Currently I'm with House of Raeford in the  
14 Raeford, North Carolina facility.  
15           Q    Okay. And tell me, the Raeford facility is a  
16 turkey facility---  
17           A    (interposing) A turkey operation.  
18           Q    ---in Raeford?  
19           A    Yes, sir.  
20           Q    Before you went there, where did you work?  
21           A    Operations manager for House of Raeford in Rose  
22 Hill, North Carolina.  
23           Q    Okay. And how long did you do that?  
24           A    For nine years, approximately.  
25           Q    Do you remember what year you started there?

1           A       2001, November.

2           Q       And you were working at the Rose Hill facility in  
3 2009?

4           A       Yes, sir.

5           Q       Okay. Before you started with House of Raeford,  
6 what did you do?

7           A       I was the plant manager for Athens, Alabama,  
8 Pilgrim's Pride.

9           Q       Okay. And before that what did you do?

10          A       I was the sales coordinator for Pilgrim's Pride in  
11 Gainesville, North Carolina (sic).

12          Q       Okay. And before that?

13          A       I was the tray pack plant manager for Carolina  
14 Turkeys in North Carolina in Mount Olive.

15          Q       So you've been involved in the poultry industry in  
16 some form or fashion for a long time?

17          A       Since approximately 1987.

18          Q       Okay. Now, you mentioned that you were working at  
19 the Rose Hill facility in 2009. What job did you have there  
20 then?

21          A       Operations manager.

22          Q       Okay. And tell me, what did the operations  
23 manager do?

24          A       I'm responsible for all plant activities,  
25 accounting, medical, QA, quality assurance, wastewater,

1 mechanical, and refrigeration and sales.

2 Q Okay. And you have people under your supervision,  
3 I suppose?

4 A Yes, sir, handling each department.

5 Q Okay. Who did you report to?

6 A I reported to Don Tabor.

7 Q Okay. He is the?

8 A President of chicken operations for House of  
9 Raeford.

10 Q And how many people reported to you?

11 A Approximately about 750.

12 Q Were the people for example in production--did  
13 they report to you?

14 A Yes, sir.

15 Q How about maintenance?

16 A Yes, sir.

17 Q Wastewater?

18 A Yes, sir.

19 Q All those people reported to you?

20 A Yes, sir.

21 Q Who was in charge of the wastewater and that  
22 particular operation?

23 A Joe Teachey.

24 Q Okay. Joe Teachey?

25 A Yes, sir.

1 Q And he's a resident of Duplin County?

2 A Yes, sir, lives about 6 miles from the plant, I  
3 believe.

4 Q Okay. In September, specifically September of  
5 2009, explain to the judge how the operation worked in Rose  
6 Hill, how the plant was set up, and explain how the operation  
7 worked, the process and the maintenance and all that.

8 A We have approximately 650 hourly employees. They  
9 report to a day shift shift manager. The night shift reports  
10 to a night shift shift manager. Maintenance reports to one  
11 direct maintenance manager, approximately I think 21 main-  
12 tenance employees. Accounting, we're got roughly nine folks  
13 in that. They report to our plant controller. Quality  
14 assurance, we have probably 25 employees. They report to a  
15 QA manager.

16 The plant activities, everything as far as  
17 maintenance, refrigeration, wastewater, they report to Chris  
18 Murray, the plant manager. And then sales, accounting,  
19 quality, human resources, report directly under me.

20 Q Does Chris Murray report to you?

21 A Yes, sir.

22 Q Or did he?

23 A Yes, sir.

24 Q Now, the plant itself is a chicken slaughtering  
25 plant; correct?

1           A     Yes, sir.

2           Q     Okay. Do you remember how many gallons of water  
3 go in there on any given day?

4           A     We--a little bit under a million, anywhere from  
5 about 925,000 approximately gallons a day to 980,000,  
6 depending on the kill. It's all--it all varies. We can vary  
7 as many as 20,000 birds a day at times.

8           Q     All right. Will you--and explain to the Court,  
9 then, what happens to the water when it leaves the plant,  
10 after it's done its work in the production phase.

11          A     We use a lot of water to move the different parts,  
12 like the guts and feathers. And what happens, our water  
13 exits our plant, and we have two separators. One is for the  
14 guts, and they're taken by--and separated from the water, and  
15 then taken actually with a conveyor and dumped onto a--into a  
16 trailer that goes to Valley Proteins or Carolina By-Products.  
17 The feathers go to the left-hand side. They're separated  
18 from the water. And they are--I think an auger actually  
19 takes them to the trailer.

20                   The remaining water and solids go to our DAF  
21 system. It's pumped there. It goes into that system, and  
22 there's actually air introduced and water, and the solids  
23 kind of lift up and are separated. And we skim the solids  
24 off, and they're actually pumped into a trailer that goes to  
25 Carolina By-Products.

1           Q     You mentioned a DAF system.  What does that stand  
2 for?

3           A     I'd be lying if I said.

4           Q     Okay.

5           A     I apologize.

6           Q     But you've explained what it does?

7           A     Yes, sir.  It separates the solids from the water.

8           Q     How about the material that does not get pumped to  
9 Carolina By-Products?  What happens to---

10          A     (interposing)  It goes into our primary lagoon.  
11 It's approximately, I think, about 6 acres.  And from there  
12 it kind of--the solids settle.  And the water then, as time  
13 goes on, is gravity fed into our secondary lagoon, and then  
14 from there it's pumped to our third lagoon over at our spray  
15 field approximately 2 miles away to be land---

16          Q     (interposing)  What happens on the spray field?

17          A     We land apply all our water to get rid of it out  
18 there on our hay field.

19          Q     Do you have a permit to discharge?

20          A     Yes, sir.

21          Q     For the production plant, for the---

22          A     (interposing)  Yes, sir.

23          Q     And where do you discharge it?

24          A     We discharge it onto our hay field over there at  
25 the spray field.

1 Q But not to a stream or a creek or anything?

2 A No, sir. We don't have a permit for that.

3 Q What is the nearest creek?

4 A To our plant?

5 Q Yes.

6 A It would be--we've got a creek over to the right-  
7 hand side that runs into Cabin Branch Creek, I believe.

8 Mr. Jones: Your Honor, for expedition  
9 purposes, we've got an aerial photograph of the site, and--  
10 yeah, put that up. Turn it around.

11 (Pause.)

12 Mr. Jones: Can everybody see that? Anita,  
13 can you see it?

14 (Ms. LeVeaux nods affirmatively.)

15 By Mr. Jones:

16 Q Mr. Howard, do you recognize that site?

17 A Yes, sir.

18 Q What does that describe?

19 A It's an aerial view of our plant and the  
20 surrounding area.

21 Q Okay. If I ask you questions about the plant and  
22 the surrounding area, would that help illustrate your testi-  
23 mony?

24 A Yes, sir.

25 Q If you don't mind, point out to the judge where

1 the plant is and the lagoons so he can see graphically where  
2 these things are.

3 (Witness approaches photograph.)

4 A Here's our plant right here (indicating). This  
5 area right here (indicating), it's kind of hard to see, a lot  
6 of vegetation right there (indicating), that's our primary  
7 lagoon. There's a division right there (indicating), and  
8 there's our secondary lagoon (indicating).

9 Q Now, explain--how does the water go from the  
10 secondary lagoon to the primary lagoon?

11 A We have a---

12 Q (interposing) I mean the primary to the  
13 secondary.

14 A There is a little area right here (indicating)  
15 where we actually have an opening with a (inaudible) valve,  
16 and we release the water gravity fed from the primary lagoon  
17 into the secondary lagoon by pipe.

18 Q Okay. And show the judge where in relation to the  
19 secondary lagoon the Cabin Branch is.

20 A It is right along--right through here  
21 (indicating), right along this edge (indicating), and comes  
22 around here (indicating) and opens up into this pipe  
23 (indicating).

24 Q Whose property is that pond on?

25 A Parker Bark.

1           Q     Okay.  And show the judge where Parker Bark is  
2 located.

3           A     This area right here (indicating).

4           Q     Do you know what basically they're in?

5           A     Mulch, bark, stuff like that, landscaping.

6           Q     And if you can, show generally the course of Cabin  
7 Branch upstream.  Can you follow it on that?

8           A     It goes across, opens up into this pond  
9 (indicating), and then it shoots along here (indicating),  
10 goes under a bridge right here on this particular road, and  
11 just keeps on going.

12          Q     Okay.  Now, that would be downstream, wouldn't it?

13          A     Oh, I apologize.

14          Q     Yes.

15          A     I'm sorry.

16          Q     Follow it upstream, if you would.

17          A     It comes along here (indicating) and shoots all  
18 the way across through here (indicating) and down through  
19 that area (indicating), approximately.

20          Q     Okay.  And generally where is Rose Hill in  
21 relation to all this?

22          A     Rose Hill should be somewhere in this area  
23 (indicating), approximately.

24          Q     Now, show the judge where the spray fields are.  
25 Are they located on that aerial?

1           A     The spray fields are actually cut off. The spray  
2 fields should be somewhere around here in this area  
3 (indicating).

4           Q     And we can do that more specifically, but I think  
5 you indicated that the water is--the wastewater is pumped  
6 from the secondary lagoon?

7           A     Right.

8           Q     And so where is the pump for that?

9           A     It is approximately right here (indicating). You  
10 can't quite see it, but it's positioned right there  
11 (indicating). It's a pretty big pump house.

12          Q     And where does it go?

13                 The Court:                 When you're describing, if you  
14 could at least give some description instead of "there," if  
15 you could say lower left of the lake or lagoon---

16                 The Witness:                 (interposing) Okay.

17                 The Court:                 ---things like that, just  
18 for---

19                 The Witness:                 (interposing) Yes, sir.

20                 The Court:                 ---the record, that's going to  
21 be helpful.

22                 The Witness:                 All right.

23           A     It's down lower right-hand side of the lake. And  
24 it is pumped along a--if you're looking at our property, the  
25 plant, it's pumped on the right-hand side. And I believe it

1 goes around the left-hand side of our spray field, and---

2 Ms. LeVeaux: (interposing) Objection,  
3 unless he knows.

4 The Court: Pardon me?

5 Ms. LeVeaux: Objection unless he knows.

6 A Okay. It's---

7 The Court: (interposing) It's overruled.

8 A It's pumped down through here (indicating)  
9 approximately and to our spray field over here (indicating)  
10 where it's located, our lagoon.

11 Q And what's on your spray field? Are they crops  
12 or---

13 A Usually hay.

14 Q Usually hay? Okay. While you're standing there,  
15 we've got another visual that---

16 (Pause.)

17 Q Do you recognize that area, Mr. Howard?

18 A Yes. This is a larger version. And I believe it  
19 shows our lagoon and spray field.

20 Q Okay. Where is your plant lagoon--plant lagoon?  
21 Let me ask that. Is it on there?

22 A The plant is right here (indicating). And this is  
23 the--excuse me. The plant is right here in the center  
24 (indicating), and the lagoon is right here to the left  
25 (indicating).

1 Q That lagoon then is at the spray field?

2 A Yes, sir, it is. And this--this plot right here  
3 is our spray field (indicating).

4 Q Okay. Now, can you see and identify where Cabin  
5 Branch is on that particular picture?

6 A It is to the right of the secondary lagoon, here  
7 (indicating).

8 Q Okay. Can you trace how it runs upstream? I know  
9 it doesn't run upstream, but can you go upstream?

10 A Upstream, it comes along through here  
11 (indicating), down, I believe, and cuts right through here  
12 (indicating).

13 Q Okay. Show the judge, if it's up there, where  
14 Carolina By-Products is.

15 A Valley Proteins should--well, there it is right  
16 here, at the very bottom (indicating).

17 Q Okay. And is it Valley Proteins or Carolina  
18 By-Products?

19 A Carolina By-Products.

20 Q Okay. And where is the Duplin wine company?

21 A The Duplin Winery is to the right, probably a  
22 quarter of a mile (indicating).

23 Q Okay. And where is Highway 117?

24 A 117 is probably two tenths of a mile to the right  
25 of that (indicating).

1 Q Okay. Show it, and does that go up to your plant?

2 A Yes, sir. If you go north, it leads straight to  
3 my plant, which will be on the right-hand side (indicating).

4 Q Okay. And if you would, where is Cabin Branch in  
5 relation to Duplin wines and Carolina By-Products?

6 A It is right above both those.

7 Q Okay. Point it out, if you would.

8 A It should--let's see. It should be cutting  
9 through about right in this area, just north of it  
10 (indicating).

11 Q Okay. The--in December--excuse me; in September  
12 of 2009, you indicated that you were working at the plant.  
13 You can take your seat now.

14 (Witness complies.)

15 The Reporter: Excuse me, Mr. Jones. What  
16 kind of valve did you say a little while ago?

17 The Witness: It's like a knife valve.

18 The Reporter: Knife valve?

19 The Witness: Yes, ma'am.

20 The Reporter: Thank you. I didn't hear that.

21 The Witness: Sorry about that.

22 By Mr. Jones:

23 Q Describe what that valve looks like.

24 A The valve, it's---

25 The Court: (interposing) And I should say

1 at this point too, which is probably good--I should have  
2 mentioned it at the beginning--Ms. McGovern has my ongoing  
3 permission, in order to make sure the record is very clear,  
4 to interrupt, and I know she does it sparingly, about a  
5 spelling or a particular word just to be sure we have it  
6 correct.

7           The Witness:           Yes, sir.

8           The Court:           Thank you.

9           A     It's like a--like a blade almost, a very large,  
10 long blade, probably about 2 feet by a foot and a half  
11 approximately. And it's controlled by a screw that actually  
12 you can turn and raise and lower it if you want to adjust the  
13 water in the secondary lagoon.

14          Q     If you lower the water, where does it go?

15          A     If you lower the water from the primary lagoon, it  
16 goes into the secondary lagoon.

17          Q     And is it pumped, or how does it get there?

18          A     Gravity fed; it's completely controlled by that  
19 knife valve. I mean you can cut off--if you shut it all the  
20 way, it closes up and no water gets over there. And if you  
21 start opening it up, it lets water--you can adjust your flow  
22 by that.

23          Q     So I would assume there's a change in elevation or  
24 something that allows gravity to operate?

25          A     Yes, sir.

1 Q From the primary lagoon to the secondary lagoon?

2 A Yes, sir.

3 Q In September of 2009, tell me, when did you first  
4 become aware of the state investigation of the creek?

5 A On Monday, I believe it was, the 14th, the state,  
6 Linda Willis, and the EPA, Mr. Rhame, came to my office along  
7 with Joe Teachey, and notified me that we had a problem in  
8 the creek, that there was some sludge-like material in the  
9 Cabin Branch Creek behind--directly behind the plant.

10 At that point I said, "Well, let's go look at it."  
11 And we got into several vehicles and rode back there and  
12 looked. And directly behind on the right-hand side of the  
13 primary--excuse me, secondary--part of our lagoon just to the  
14 right, there was sludge running along the back side all the  
15 way down to---

16 Q (interposing) Why don't you show that?

17 (Witness approaches photograph.)

18 A There was sludge basically backed up from the  
19 right-hand--north of this bridge (indicating) backed all the  
20 way up to about this point (indicating) of our lagoon.

21 Q So that bridge, is that the Sheffield Road  
22 lagoon--I mean bridge or---

23 A (interposing) Yes, sir.

24 Q The Sheffield Road bridge back to the corner of  
25 your property?

1           A     Yes, sir. That was as far as we actually went,  
2 and we could see--there was actually a--there's a cut right  
3 there, and there's also a big tree that lies across here  
4 (indicating), so--and it also bends and goes back to the  
5 left, so you couldn't see any further. But that's what I  
6 initially saw.

7           Q     And if the water were flowing, it would be flowing  
8 from your lagoon upwards on that map, wouldn't it?

9           A     Yes, sir. It would be going along this line  
10 (indicating).

11          Q     And is there also another creek--in addition to  
12 Cabin Creek, isn't there a Beaverdam Creek or something like  
13 that in that same area?

14          A     I believe Beaverdam is up this way (indicating), I  
15 believe, at the top.

16          Q     Is it shown further over on the left of that map,  
17 though?

18          A     The best I can recall, I believe that's the bridge  
19 right there (indicating).

20          Q     Okay. Does it come over closer to your plant,  
21 though?

22          A     It actually runs along this side right here  
23 (indicating), just I guess north of our--north of Parker  
24 Bark's property, I believe.

25          Q     Does it join Cabin Branch or are they separate?

1           A     I believe somewhere along the lines around here  
2 they diverge somewhere right before this bridge and become  
3 one.

4           Q     Or they converge?

5           A     Yes.

6           Q     Okay. Now, was that the first you had seen this  
7 condition, was on September the 14th?

8           A     That's the first I'd ever--I'd ever even looked at  
9 the creek.

10          Q     Although you had worked there for what, nine  
11 years?

12          A     Yes, sir.

13          Q     Now, any reason for that?

14          A     Just--to my best knowledge, that is not even on  
15 our company property. And with the vegetation, if you ride  
16 around there, it's kind of hard to see it unless you get--  
17 unless you--right here there's an opening (indicating).  
18 Right at the top point of our secondary lagoon, there's an  
19 opening where you can actually see the water, but I just  
20 never had a reason to go down there and look at that.

21          Q     And what is between the secondary lagoon and the  
22 creek? What is it?

23          A     There's a road where our wastewater manager uses  
24 to ride around there and actually observe lagoons 1 and 2.  
25 It goes all the way around the lagoons.

1           Q     Okay.  So there's a little road on the side of the  
2 lagoon near the creek?

3           A     On the embankment, yes.

4           Q     Okay.  What is the lay of the land from the road,  
5 that little road, to the creek?

6           A     It's a dropoff of probably about 12 feet.  It just  
7 drops off there, pretty much all the way down.  It's  
8 probably--the deepest dropoff there is probably, like I said,  
9 12 feet or so.  And it gradually, gradually--it's probably  
10 about 6 feet down here at the bottom half of the secondary  
11 lagoon.  But it gets deeper and deeper there.

12          Q     Now, on the 14th when you looked at that creek  
13 with the representative from the state, what did you see?

14          A     I saw a thick milk-murky substance sitting there,  
15 and a bunch of duckweed as well, like I said, pretty much  
16 from there (indicating) to right there (indicating).  We  
17 actually got out and walked and looked, and it was pretty  
18 consistent all the way down, or all the way upstream.

19          Q     Was the---

20          A     (interposing)  Downstream.

21          Q     Was the water running?

22          A     No.

23          Q     I mean the creek.  Was it flowing?

24          A     No.

25          Q     How would you describe the flow of the creek?

1           A     Nonexistent.

2           Q     Okay. Did that condition exist all the way back  
3 to your--to the area near your plant?

4           A     It looked like it had gotten bottled up and it had  
5 stopped about at the bottom, this bottom lower-hand side to  
6 the right of the secondary lagoon approximately in this area  
7 (indicating).

8           Q     Okay. Now, that was on September the 14th?

9           A     Yes.

10          Q     All right. Did you have any familiarity with this  
11 situation on the previous week?

12          A     No.

13          Q     And was--who was at that meeting that you had on  
14 September the 14th?

15          A     That would be Mr. Rhame and Ms. Willis from the  
16 Department of Water Quality.

17          Q     Okay. Linda Willis?

18          A     Yes, sir.

19          Q     And your person, Joe Teachey, was there?

20          A     Joe Teachey, and at that point, I believe--I  
21 believe Chris Murray came in a little bit later.

22          Q     Okay. Did you know where that milky substance,  
23 that thick substance you were talking about--do you know  
24 where that came from?

25          A     No.

1 Q Had it come from your plant?

2 A I had talked to my folks afterwards, and they said  
3 there's no way it came from---

4 Ms. LeVeaux: (interposing) Objection.

5 A ---our plant.

6 The Court: It's overruled.

7 Q Who did you talk to?

8 A Chris Murray and Joe Teachey.

9 Q Okay. Did Mr. Rhame and Mr. (sic) Willis--did  
10 they talk to you about the origin of that material?

11 A Not so much the origin; just, you know, we--at  
12 that point we discussed---

13 The Court: (interposing) Why don't you  
14 return back to the stand, Mr. Howard?

15 (Witness complies.)

16 A At that point we discussed, you know, what we were  
17 going to do to--what options we had. Mr. Rhame actually  
18 asked me what my plans were about trying to get it cleaned  
19 up. And I explained to him that I was going to--we were  
20 going to do our part to try to get it resolved.

21 We had already at that point taken six loads, two  
22 on Thursday and four on Friday, and pumped from the creek  
23 into a tanker, driven the tanker around to the primary lagoon  
24 and pumped the--whatever that--whatever it was, that murky-  
25 like stuff, we pumped it into the primary lagoon.

1 Q So the lagoon closest to the plant?

2 A Yes, sir.

3 Q And the lagoon closest to the plant, that has a  
4 thicker material in it than the secondary lagoon. The  
5 secondary---

6 A (interposing) Yes, it has a lot of nutrients,  
7 so--and a lot of solids, and we have a lot of stuff that  
8 grows in it. It's--as you can see in the picture, it's  
9 pretty well covered with vegetation for the most part, weeds  
10 and various plant life.

11 Q The secondary lagoon, would you say that that  
12 water is cleaner water?

13 A Much cleaner. As you can see on the picture  
14 there, it's just--it's clear water for the most part.

15 Q Now, you said that the previous couple of workdays  
16 before the 14th y'all had--your company had pumped water from  
17 the creek into the primary lagoon; is that right?

18 A That is correct.

19 Q Now, that was even before you were brought into  
20 it; correct?

21 A That is correct.

22 Q Do you happen to know how they managed to do that  
23 pumping?

24 A They took and pumped out of the creek into a  
25 tanker truck, a sewer truck, and filled it up. Then we drove

1 on the bottom side and drove around and pumped it back into  
2 the primary lagoon.

3 Q Okay. Whose truck was that?

4 A Register's.

5 Q The name of the company was Register's?

6 A Register--Register's Septic Company, I believe is  
7 the name.

8 Q Okay. That was not a company truck?

9 A No, sir.

10 Q Okay. Does the company have a truck like that?

11 A No, sir.

12 Q So did the company go out and contract with  
13 Register to have that facility to do it?

14 A Yes.

15 Q Now---

16 The Court: (interposing) Let me get the  
17 dates for the record correct. You said the Thursday. Would  
18 that have been what, the 17th or 18th? Is that what---

19 The Witness: (interposing) No, the prior.

20 By Mr. Jones:

21 Q The prior---

22 The Court: (interposing) The prior  
23 Thursday, before you even saw the sludge?

24 The Witness: I believe--I think Wednesday  
25 was the 9th, Thursday was the 10th, Friday--I believe, and I

1 Ms. Willis actually contracted--contacted our company and Joe  
2 Teachey on the 9th, I believe it was.

3 The Court: Okay.

4 The Witness: And I know that Thursday and  
5 Friday is when we started the process--Joe Teachey started  
6 the process--of two trucks on that Thursday and four trucks  
7 on that Friday.

8 The Court: Okay. Thank you.

9 By Mr. Jones:

10 Q Okay. And how did they get the water from the  
11 creek into the truck?

12 A They sucked it up with a pump. The tanker has an  
13 actual pump that just sucked it up.

14 Q Was that equipment owned by the company?

15 A No, sir. We don't have equipment like that.

16 Q Did it come from Register's as well?

17 A Yes, sir.

18 Q Okay. And how did you--how did the company force  
19 the material into this pump, then?

20 A Initially they had a hose that ran from the tanker  
21 truck, probably a 25 to 40 foot hose, ran it down into the  
22 creek and tried to skim the top off and get that murky-like  
23 substance and suck it into the truck.

24 Q Did that work?

25 A A little bit. I mean you were getting a lot of

1 water in there due to the nature of it sucking, so there was  
2 a lot of water getting in there other than just the  
3 murky-like substance.

4 Q So what did you try then? What did the company  
5 try then?

6 A We did that for two days. I believe on Monday we  
7 actually used the tankers one more time. At that point we  
8 decided that we would take and run a hose with a pump placed  
9 on the top up there where the driveway is going around the  
10 lagoon. And we actually ran a hose from the--from the creek  
11 to the pump and from the pump into the secondary lagoon and  
12 did away with the tanker trucks. They were--they were---

13 Q (interposing) How did you do that?

14 A It was making a mess, especially on the top up  
15 there, and there were a lot of ruts going on. And it was  
16 also just the time issue, just a lot faster just to go ahead  
17 and pump directly into the secondary lagoon as opposed to  
18 waiting on trucks and pumping, filling a truck up, driving it  
19 around, pumping it out in the primary. We just decided to  
20 put it in the secondary lagoon.

21 Q Did the state agree to this procedure?

22 A I ran every--at that point after Ms. Willis and I  
23 talked and Mr. Rhame, I tried to run--I ran everything past  
24 them. And that's what we all agreed on.

25 Q Did they all agree that that was the proper

1 procedure to use?

2 A Yes, sir.

3 Q Did y'all try to think of anything else that could  
4 be done to---

5 A (interposing) I talked with Ms. Willis a little  
6 bit about--there is a creek on the bottom-hand side also of  
7 the lagoons that runs---

8 (Witness approaches photograph.)

9 ---basically all the way--from the start of the  
10 plant all the way down on the right-hand side (indicating)  
11 and runs all the way down and joins up to this creek  
12 (indicating). We actually looked at--there is another ditch  
13 that runs along here (indicating).

14 We looked at taking some water and pumping water  
15 into this creek right here (indicating) and trying to  
16 introduce some water. We actually built rocks, and those  
17 rocks are still there, where we would pump water and it would  
18 aerate. And we would try to flush this creek.

19 But Ms. Willis--and we got everything set up and  
20 talked with Ms. Willis about this, and Ms. Willis asked us  
21 before we really started going into this that she needed to  
22 talk to some folks because this area back here (indicating),  
23 she was scared that it might disrupt that area behind the  
24 secondary lagoon.

25 So we looked at doing that and we decided that--

1 Ms. Willis notified me at that point not to do that because  
2 it might be disruptive to this area (indicating), to the  
3 right-hand side of the secondary lagoon.

4 Q Okay. So it seems like if you did that, you  
5 weren't removing the material from the creek. You were just  
6 sort of sweeping---

7 A (interposing) Flushing it.

8 Q Yeah.

9 A Yes. We all pretty much agree that we were going  
10 to probably need a natural occurrence to flush this system or  
11 problem away.

12 Q You mean like a rain or---

13 A (interposing) A big rain, a rainfall.

14 Q Do you recall--what was the weather like before  
15 this period in September of 2009?

16 A Very dry.

17 Q When you went out there with the state agents--you  
18 can sit down. We're making you walk to death.

19 (Witness complies.)

20 Q Did you see any observable signs that any of the  
21 material from your lagoons had gone into the creek?

22 A None. In fact our--we walked around, I walked  
23 around, with Ms. Linda Willis and Mr. Rhame, and we walked it  
24 pretty thoroughly. And one of the things that Mr. Rhame  
25 said, and he said this in front of Mr. Ashley Guy, our

1 maintenance---

2 The Court: (interposing) It's overruled.

3 Whenever counsel objects, you need to stop.

4 The Witness: I'm sorry. I didn't hear that.

5 I apologize.

6 The Reporter: And I didn't hear it either,

7 Your Honor. Ms. LeVeaux, could you please speak up when you

8 make objections, because I didn't even know that had

9 happened.

10 The Witness: I apologize.

11 The Reporter: I didn't hear you.

12 The Court: It's all right. You can

13 continue.

14 A He made the statement that "I see no evidence of

15 any--anywhere where any pumping had been done, or I see no

16 evidence of where there had been--something had spilled

17 over," nor did I--I didn't see evidence--nor did my main-

18 tenance manager as well, who was with me.

19 Q Mr. Teachey?

20 A My maintenance manager, Ashley Guy.

21 Q Ashley Guy. And Mr. Rhame is--works with EPA?

22 A He is--I don't know what capacity, but he's with

23 the EPA.

24 Q Okay. Do you see him today?

25 (Pause.)

1           A     No, sir.

2           Q     Had you ever seen Mr. Rhame before?

3           A     No, sir.

4           Q     Had you ever seen Ms. Willis before?

5           A     No, sir.

6           Q     Now, was there any evidence that the lagoons,  
7 either one of them, had ever topped?

8           A     No, sir.

9           Q     Now, you mentioned that there was a--this area  
10 here--I'll point to it. This area that runs down this  
11 property line to the right of both of these lagoons  
12 (indicating), was there any evidence in that ditch-looking  
13 place that any water or material had escaped through there?

14          A     No, sir.

15          Q     Was there evidence of mud or material on the  
16 ground around the lagoon?

17          A     No, sir.

18          Q     To your knowledge, had the company over the  
19 previous period of time done any pumping of the contents of  
20 either of those lagoons into the creek?

21          A     No, sir.

22          Q     I mean you're sure of that?

23          A     Had no reason to.

24          Q     Now, according to the records there was an  
25 anonymous phone call, or an anonymous complaint, made to the

1 state on September the 9th. Do you know who made that  
2 complaint?

3 A No, sir.

4 Q Do you know how long the material had been in the  
5 creek by the time the complaint was made?

6 A I never looked at the creek before then, so no,  
7 sir.

8 Q I'm going to hand you a document.

9 (Pause.)

10 The Court: Let me ask a quick question  
11 too. You had said that you noticed it was backed up for  
12 quite a ways into the pond and beyond. Am I understanding  
13 that?

14 The Witness: Yes, sir.

15 The Court: While you're cleaning up I  
16 guess your part, have you noticed other people cleaning up  
17 their part down on their property?

18 The Witness: No, sir.

19 The Court: Okay. So you were the only one  
20 cleaning up that area?

21 The Witness: Yes, sir.

22 The Court: Okay. Thank you.

23 The Reporter: Mr. Jones, is this Respondent's  
24 1?

25 Mr. Jones: Yes, ma'am.

1 (Petitioner Exhibit 1 was  
2 marked for identification.)

3 By Mr. Jones:

4 Q Mr. Howard, have you ever seen this document  
5 before?

6 A Yes, sir.

7 Q What is it?

8 A It is my notice of violation for the material in  
9 the creek.

10 Q And it's signed on the last page by Mr. Poupart?  
11 (Witness peruses document.)

12 A Yes, sir.

13 Q And did the company receive this assessment or  
14 this penalty at some point after September the 14th, 2009?

15 A Yes, sir.

16 Q Now, let me ask you about some of the contents of  
17 this. You've read and reviewed this document; correct?

18 A Yes, sir.

19 Q Okay. The top paragraph, A, says that the "House  
20 of Raeford Farms is a corporation organized and existing  
21 under the laws of the State of North Carolina." Is that true  
22 or false?

23 A True.

24 Q The second finding of fact, that it operates a  
25 chicken processing facility, is that true?

1           A     True.

2           Q     How about "The facility does not have an NPDES  
3 Permit that allows the discharge of treated or untreated  
4 process wastewater to surface waters of the State"? Is that  
5 true?

6           A     True.

7           Q     On September the 10th it says Mr. Kegley and Ms.  
8 Willis with DWQ inspected House of Raeford in Rose Hill,  
9 North Carolina. Is that true?

10          A     I remember Ms. Willis. I'm not saying it isn't  
11 true. I just don't remember the other gentleman.

12          Q     Okay.

13          A     I apologize.

14          Q     Go to the next one. "On September the 10th...,  
15 Division Representatives observed a film on the surface of  
16 the water at both Beaverdam Branch crossings, Sheffield Road,  
17 and Brooks-Quinn Road." Is that true?

18          A     Yes, sir, true.

19          Q     Okay. Show the judge where those crossings are,  
20 if you would, please.

21                   (Witness approaches photograph.)

22           The Reporter:       Your Honor, just to correct the  
23 record, I mistakenly said Respondent's 1, and that's of  
24 course Petitioner's 1.

25           The Court:           Thank you.

1           A     Let's see. That is, I believe, Beaverdam  
2 (indicating), and I apologize for not knowing. I was a  
3 little nervous earlier. I believe that's where Beaverdam  
4 starts, right here (indicating). And that is Brooks Quinn,  
5 and I believe this is what you called Sheffield.

6           Q     Are you sure about that?

7           A     Well, I apologize. That's Sheffield (indicating).  
8 And I know there's a crossing here, right there (indicating).  
9 I believe that's Beaverdam.

10          Q     Or Brooks Quinn?

11          A     Brooks Quinn, I apologize, Sheffield, and what was  
12 the other one?

13          Q     Beaverdam Branch crossing.

14          A     I believe that's this one right here (indicating),  
15 the one furthest away to the north.

16          Q     Okay. Go ahead and--you can take your seat.

17                   (Witness complies.)

18          A     Now, skip down to the sub F, paragraph F. It  
19 says:

20                   "On September the 15th, 2009, Division  
21 Representatives met with Joe Teachey at the  
22 H[ouse] of R[ae]ford...-Rose Hill facility and  
23 requested access to the area of the facility  
24 located adjacent to Cabin Branch, directly behind  
25 their secondary wastewater lagoon."

1 Is that a true statement?

2 A Yes, sir, true.

3 Q "The Division Representatives observed Cabin  
4 Branch filled with sludge and had wastewater-like character-  
5 istics." Were you at that meeting?

6 A On the 15th, I believe so, yes.

7 Q Okay. To your recollection, did they see Cabin  
8 Branch filled with a sludge and wastewater-like character-  
9 istics?

10 A No.

11 Q "Floating sludge was seen on the surface of Cabin  
12 Branch, beginning directly behind their secondary wastewater  
13 lagoon and extending downstream to the confluence of Cabin  
14 Branch and the lake behind the Parker Bark facility." Is  
15 that a true statement?

16 A True.

17 Q And then the next paragraph says "Kenneth Rhame"--  
18 that's the fellow you talked about before?

19 A True; yes, sir.

20 Q "and Kevin LaPointe of the U.S. Environmental  
21 Protection Agency also conducted an investigation." Is that  
22 true?

23 A I know he was a part of it. I only shook his hand  
24 briefly. I really didn't speak to him, I believe just one  
25 time on the phone.

1 Q Okay. But he did show up at the---

2 A (interposing) Yes, he was there.

3 Q ---at the company's property too?

4 A Yes.

5 Q Go to the conclusions of law on the next page.

6 (Witness complies.)

7 Q Mr. Howard, it says on paragraph D:

8 "The H[ouse] o[f] R[ae]ford] F[arms]-Rose Hill  
9 facility violated N.C. General Statutes Section  
10 143-215.1(a)(6) by causing or permitting a waste,  
11 directly or indirectly, to be discharged to or in  
12 any manner intermixed with the waters of the State  
13 in violation of the water quality standards  
14 applicable to the assigned classifications."

15 Is that a true statement?

16 A No, sir.

17 Q Go to paragraph E.

18 "The H[ouse] o[f] R[ae]ford]...-Rose Hill facility  
19 violated 15A NCAC 2B .0211(3)(b) for causing the  
20 depletion of oxygen in Cabin Branch and Beaverdam  
21 Branch below the water quality standard for Class  
22 C-Sw[amp] waters of the State."

23 Is that a true statement?

24 A No, sir.

25 Q Subparagraph F, "The House of Raeford-Rose Hill

1 facility violated 15A NCAC 2B. 0211(3)(c) for depositing  
2 floating solids and sludge in Cabin Branch and Beaverdam  
3 Branch impairing it for its best use." Is that a true  
4 statement?

5 A No, sir.

6 Ms. LeVeaux: Your Honor, we're going to  
7 object to the questions to the extent that they require the  
8 witness to interpret the law. If he's speaking to the  
9 factual allegations as they would relate to the law, that's  
10 fine, but for him to say a conclusion of law is correct or  
11 incorrect we submit, Your Honor, he's not qualified to do  
12 that.

13 Mr. Jones: Your Honor, if he can't, I  
14 don't know who can. You know, either they violated it or  
15 they didn't. That's what we're here about today.

16 The Court: It's overruled.

17 By Mr. Jones:

18 Q Okay. Now, in spite of your answers there, your  
19 company over several days, you testified, did a cleanup  
20 procedure?

21 A Yes, sir.

22 Q Do you recall generally how much the company spent  
23 to do the cleanup procedure in the creek?

24 A It was approximately \$20,000.

25 Q Okay, spent with Register's?

1           A     Yes, sir.

2           Q     Anybody else?

3           A     Davey Cavanaugh, I don't know how much he charged.  
4 I used him to try to help out--help me with some fact  
5 finding. And it took some--I basically used a couple of my  
6 managers pretty much full time for about three days there  
7 just helping me with this, Ashley Guy, my maintenance  
8 manager, and my plant manager.

9           Q     Now, you've indicated that the company was not  
10 responsible for that material being in the creek?

11          A     Yes, sir.

12          Q     Why did you allow the company to go in and do that  
13 cleanup if they were not responsible for the---

14          A     (interposing) I told Mr. Rhame, and I believe Ms.  
15 Linda Willis was with us also, that, you know, I've got  
16 family in that area, and that was pretty much my decision to  
17 try to continue cleaning it up and to get that cleaned up. I  
18 didn't want to pollute that area. I didn't know where it  
19 came from, but somebody had to come forward and start  
20 cleaning it up. And nobody else was volunteering. And  
21 that's what I told my boss. I said, "Let me get this cleaned  
22 up." And he said, "Go ahead."

23          Q     In spite of the fact that the company did not  
24 create the condition in the first place?

25          A     Correct.

1           Q     Did--to your knowledge, did Parker Bark or anybody  
2 else along that creek contribute to the cleanup of the creek?

3           A     Nobody else was involved at House of Raeford.

4           Q     In the cleanup?

5           A     Yes, sir.

6           The Court:           So for clarity, did the sludge  
7 still remain in the pond and further down as you had pointed  
8 out?

9           The Witness:           We didn't get all of it  
10 completely cleaned up, no, sir. It took--we had some rain-  
11 fall probably approximately about three weeks to a month  
12 after this that kind of did a pretty good job getting it  
13 flushed out. But no, we did not get it completely cleaned  
14 out with our efforts.

15           The Court:           Did you go down to somebody  
16 else's property, then, to start cleaning it down there as  
17 well?

18           The Witness:           No, the furthest we actually  
19 got we--if you don't mind?

20           The Court:           Not at all.

21           The Witness:           And Ms. Linda Willis was  
22 involved with this, and at that point Mr. Rhame as well. At  
23 this bridge here (indicating) we actually had some pumps, and  
24 we were actually taking water and pumping it in the air and  
25 aerating and trying to get some air flow there.

1           We actually took some padding and tried to collect  
2 some of the solids. We even had Register about right here  
3 (indicating) start squeegeeing and trying to squeegee the  
4 solids back upstream so that we could suck them out and put  
5 them in this secondary lagoon here.

6           The Court:           All right.

7           By Mr. Jones:

8           Q     How long did you try to do that?

9           A     Approximately four days all and all for cleanup.

10          Q     So that would mean--you know that it occurred on  
11 September--you said September the 10th, or September the  
12 11th?

13          A     On that Thursday--Thursday, Friday, Monday, and  
14 Tuesday, I believe.

15          Q     Okay. And the first two days you said you were  
16 pumping the water into the primary lagoon?

17          A     Correct.

18          Q     What day did you start pumping it into the  
19 secondary lagoon?

20          A     That would be Monday.

21          Q     Monday.

22          A     Excuse me; I apologize. That would be Tuesday.

23          Q     Tuesday?

24          A     Yes, sir.

25          Q     Was it pretty well over by September the 15th, the

1 pumping and cleanup?

2 A For the most part.

3 Q Do you know---

4 A (interposing) We kept aerators down at the bridge  
5 above where we were working previously I believe for about  
6 three days.

7 Q Beyond that point?

8 A Yes, sir.

9 Q Would that be the Sheffield bridge?

10 A Yes, sir; on Sheffield Road, yes, sir.

11 Q Okay. Do you happen to know how many gallons of  
12 material you pumped---

13 A (interposing) We took and we measured the trucks.  
14 We took a count of all the trucks that we used and that we  
15 pumped. And then we took Register and calculated with their  
16 pump the volume. And we pumped a little bit over a million  
17 gallons of water and muck into our lagoons.

18 Q So that would be water and waste material?

19 A Yes, sir.

20 (Petitioner Exhibit 2 was  
21 marked for identification.)

22 Q I going to hand you Exhibit Number 2. Mr. Howard,  
23 have you ever seen this document before?

24 A Yes, sir.

25 Q What is it?

1           A     It's the notice of violation, actually, for this  
2 particular issue.

3           Q     Okay. It's dated October the 15th, 2009; correct?

4           A     Yes, sir.

5           Q     Now, it's addressed to Robert C. Johnson?

6           A     Yes, sir.

7           Q     Is he the CEO of the company?

8           A     Yes, sir.

9           Q     Okay. Did you see it at that time, though?

10          A     Yes, sir, he actually showed it to me.

11          Q     Okay. And you notice that--or you recall it  
12 charges the company with violating the law by allowing this  
13 material to get into the creek; correct?

14          A     Yes, sir.

15          Q     What was your reaction to receiving this?

16          A     Pretty angry, because again, like I--and I had  
17 talked to Ms. Linda Willis and talked to Eric Rhame, and at  
18 that point, you know, Eric Rhame made the statement to me, "I  
19 can't say that you did or didn't do this, and I see no  
20 evidence where there's been any overspill, and I see no  
21 evidence where there has been any illegal pumping or  
22 pumping." And---

23                   Ms. LeVeaux:           (interposing) Objection.

24          A     ---we had taken a considerable amount of time and  
25 energy, and like I said, a considerable amount of money. I

1 believe at this point I didn't know exactly how much we had  
2 spent, but I knew it was pretty expensive, and, you know, I  
3 thought we had--we had done a pretty good--I thought we had  
4 done a pretty good job trying to eliminate this situation.  
5 So I was angry.

6 Q Okay. Did the company respond to that notice?

7 A Yes, sir, they did.

8 The Reporter: Your Honor, did you hear the  
9 objection by Ms. LeVeaux?

10 The Court: I couldn't tell if somebody was  
11 clearing their throat or if it were---

12 Ms. LeVeaux: (interposing) No, I did  
13 object.

14 The Court: That's overruled.

15 The Witness: I'm sorry. I didn't hear it.

16 The Reporter: Number 3?

17 Mr. Jones: 3.

18 (Petitioner Exhibit 3 was  
19 marked for identification.)

20 Mr. Jones: And I'm going to do this real  
21 quickly just for background purposes, Your Honor. These are  
22 background documents.

23 By Mr. Jones:

24 Q Is this the reaction or the response from the  
25 company to the state agency over the notice of violation?

1           A     Yes, sir.

2           Q     Did--I notice that you didn't sign this letter.  
3 It was signed by Robert C. Johnson. Did you have any  
4 participation in the preparation of this letter?

5           A     Most of these words are mine.

6           Q     Okay. Did Mr. Johnson sign it?

7           A     Yes, sir.

8           Q     So would it be fair to say that your reaction to  
9 the notice of violations is incorporated into this letter?

10          A     Yes, sir.

11          Q     I notice that the--on the first page in the second  
12 full paragraph it says there towards the end of the para-  
13 graph, "In all, we estimate that we oversaw the pumping of  
14 approximately 1,000,031 gallons over a four day period into a  
15 Company lagoon from the creek." Was that based upon the  
16 computations you said you did a few minutes ago?

17          A     Yes, sir.

18          Q     Okay. And tell me again how that was arrived at.

19          A     We took the number of tankers, also got my main-  
20 tenance manager to--I don't know exactly how big the pump was  
21 that Register used, but we actually used the number of  
22 gallons it pumps an hour and calculated it by the number of  
23 hours we ran the pump, and that's how we came up with that  
24 number.

25          Q     But that would include--when you say 1,000,031

1 gallons, that includes both water and other materials?

2           A     A lot of water. That was the problem with this.  
3 We were getting a lot of water in there. I mean there's just  
4 no way to just sit there and vacuum off, you know, this film,  
5 so you were getting mainly--mostly water.

6           Q     And then the next sentence says, "We purchased a  
7 dissolved oxygen meter." Do you know how much that cost?

8           A     No, sir. I just--Ms. Linda Willis suggested to me  
9 that I get a meter because we didn't have one, and I promised  
10 her I would, and we got one.

11          Q     And then the next sentence says, "we have been  
12 billed a total of \$20,000 for pumping and other mitigation  
13 services since September [the] 9th." And was that a true  
14 statement at the time---

15          A     (interposing) Yes, sir, at that---

16          Q     ---it was made?

17          A     At that point, yes, sir.

18          Q     Are you aware of any charges that have been  
19 incurred for cleanup since you wrote this letter?

20          A     No, sir.

21          Q     Then did the company receive an inquiry from EPA  
22 in Atlanta after that?

23          A     To my best knowledge, no, sir.

24          Q     Well, let me hand you this. This will be Number  
25 4.

1 (Petitioner Exhibit 4 was  
2 marked for identification.)

3 Q Do you recognize this letter, Mr. Howard?

4 A Yes, sir.

5 Q Okay. What is this letter?

6 A This was a letter to Mr. Rechtman from myself.

7 Q Okay. You actually signed this letter?

8 A Yes, sir.

9 Q So this is your letter?

10 A Yes, sir.

11 Q And what does it do?

12 A Basically kind of giving a detailed account of  
13 everything that transpired with this situation.

14 Q Well, I notice in the first paragraph it says,  
15 "Please accept this letter as our written response to your  
16 letter of February 24[th], 2010. I am Clay Howard." Does  
17 that help refresh your memory?

18 A Yes, sir.

19 Q All right. Was there a letter to you-all February  
20 24th, then?

21 A Obviously, yes, sir, there was. I just can't  
22 recall at this point.

23 Q But you did prepare this letter---

24 A (interposing) Yes, sir.

25 Q ---and then sent it to EPA? Do you recall--was

1 there any other response from EPA to this letter?

2 A No, sir, not that I can recall.

3 Q Was it--did this letter give the response of the  
4 company in your own words back to the EPA to this particular  
5 problem?

6 A Yes, sir.

7 Q I notice in paragraph 8, Mr. Howard, on page 2,  
8 about halfway through the eighth paragraph it says, "The  
9 Company's property incorporates two lagoons. Lagoon 1  
10 contains approximately 2,400,000 and Lagoon 2 contains  
11 approximately 1,800,000 gallons." Was that based upon the  
12 computations you had at the time?

13 A Yes, sir.

14 Q You say, "Lagoon 1 is approximately 4 feet  
15 deep"---

16 A Yes, sir.

17 Q ---"and Lagoon 2 is approximately 5 feet deep"?

18 A Yes, sir.

19 Q And "Both...encompass an area of approximately 4  
20 acres"?

21 A Yes, sir.

22 Q Okay. And you knew that at the time?

23 A Yes, sir.

24 Q How far is the Cabin Creek from lagoon number 1?

25 A Approximately 675 feet.

1 Q 675 feet?

2 A Yes, sir.

3 Q From the first lagoon to Cabin Branch?

4 A Yes, sir.

5 Q Okay. I'm going to hand you Exhibit 5.

6 (Petitioner Exhibit 5 was  
7 marked for identification.)

8 Q Do you recognize these documents?

9 A Yes, sir.

10 Q And what do these represent, Mr. Howard?

11 A These are for the cleanup to Register's Septic  
12 Tank Service.

13 Q And I notice on the back there's a check for  
14 \$20,000. Was that the payment for those pumping and hauling  
15 services?

16 A Yes, sir.

17 Q Then, Mr. Howard, the--in 2010, after the state  
18 agency did the penalty, or the decision and penalty, did the  
19 company look into any testing of the creek in the area of  
20 Cabin Branch and the company?

21 A We did. We wanted to go and do some testing on  
22 our own to see how the--how it was looking at that point.  
23 And we pretty much found that for the most part upstream and  
24 downstream that the DO levels were also inadequate.

25 Q Below legal levels?

1           A     Below legal levels at that point.

2           Q     The company that you brought in to do the water  
3 testing, which company was that?

4           A     The same one used by the state.

5           Q     I mean do you remember the name?

6           A     I think it was--it's out of Wilmington. I can't  
7 recall at this point.

8           Q     Was it--do you recall Environmental Chemists?

9           A     Yes, sir, that is it.

10          Q     And do you remember---

11                Ms. LeVeaux:           (interposing)  Objection to the  
12 leading. This is his witness, Your Honor, and he's---

13                The Court:           (interposing)  I understand.

14                Ms. LeVeaux:           ---leading him.

15                The Court:           It's overruled.

16                By Mr. Jones:

17          Q     Do you remember dealing with someone named Jay  
18 Baker?

19          A     Yes, sir.

20          Q     Was he an employee of Environmental Chemists?

21          A     Yes, sir. I spoke to him on the phone a couple of  
22 times myself.

23          Q     Did you--did you travel the creek with Mr. Baker?

24          A     No, sir.

25          Q     Okay. He did this on his own?



1 Chemists before?

2 A We had.

3 Q Okay; to do what?

4 A They do a lot of our sampling, our wastewater  
5 sampling for us. They had in the past.

6 Q Is that--how was that done? What does that  
7 represent?

8 A We have to check different properties and so forth  
9 during--periodically throughout the year. And they do--I  
10 believe they're our primary laboratory.

11 Q Were you aware that they had also done the  
12 sampling or the testing for the state in 2009 in connection  
13 with this discharge?

14 A I don't believe I knew at that point, no, sir. I  
15 don't believe so.

16 Q Did you find out later that---

17 A (interposing) Yes, sir, I did find out later.

18 Q And they were responsible for doing that?

19 A Yes, sir.

20 The Reporter: Excuse me, Mr. Jones. That  
21 document, just for the record, is---

22 Mr. Jones: (interposing) 7.

23 The Reporter: ---Number 7. Thank you.

24 By Mr. Jones:

25 Q Now, in 2011, did you bring in an environmental

1 consultant to consult with the company over these charges as  
2 well?

3 A We did, yes.

4 Q And who did you bring in to talk to there?

5 A That gentleman right behind you there  
6 (indicating).

7 Q That man right there (indicating)?

8 A Yes, sir.

9 Q Does Jay Holley ring a bell?

10 A Jay Holley.

11 Q Can you remember---

12 A (interposing) I apologize.

13 Q ---his company name?

14 A Not offhand I can't, no, sir. But I know that  
15 because Jay and I were the ones that actually went--I  
16 actually went with him this time, and I went up and down the  
17 creek with him and spent a good portion of the day with he  
18 and another associate.

19 Q All right. Did you do that on foot or by boat or  
20 how?

21 A Started out and I showed him the creek. We  
22 started out---

23 (Witness approaches photograph.)

24 We started out and kind of led out right here,  
25 (indicating) pretty much where the origin of the--where it

1 had gotten backed up from back here (indicating) all the way  
2 through here (indicating). And we went around here  
3 (indicating) and looked, went up actually in here  
4 (indicating), and went all the way--again--and went to where  
5 this log is. Again, you can't get past that unless you  
6 actually take your boat and pick it up.

7           But we actually went under this bridge and looked  
8 at it and looked at all the water. And Mr. Holley actually  
9 followed--at that point I had spent pretty much all day with  
10 him. I believe the next day Mr. Holley came back with his  
11 associate and they actually looked at some stuff further  
12 upstream.

13           Q       And going downstream, could you just get in a boat  
14 and ride down the creek?

15           A       At that point, in 2009, no, you couldn't because  
16 in 2009 I actually, along with Mr. Ashley Guy--about three  
17 weeks after this happened I took a boat myself--I wanted to  
18 see what was transpiring. And I took a boat, and we had to  
19 get off at three different times and actually go around trees  
20 or logs.

21                   This time--it's my understanding they've actually  
22 taken down some of these beaver dams around here  
23 (indicating). We actually only--only had a problem one time,  
24 and that was with a log, and we kind of shimmied the boat and  
25 got past it. And it's kind of tough. There's a lot of nooks

1 and crannies, but for the most part we did.

2 Q Okay. And that was this last---

3 A (interposing) The last time in 2000 and---

4 Q ---few months that you did---

5 A (interposing) Yes, sir.

6 Q Now, when you took the boat down with Ashley  
7 Guy in 2009, how long after September 14th was that?

8 A Approximately about a month, maybe three weeks to  
9 a month.

10 Q With one other fellow?

11 (Witness nods affirmatively.)

12 Q How was the water flowing?

13 A It wasn't, nor was it flowing October--I mean this  
14 time with Jay as well. It wasn't flowing. It was just  
15 sitting there.

16 Q In 2009 when you did it, when you took that boat  
17 ride, could you see why the water was not moving?

18 A I was hung up on logs, hung up on limbs and just a  
19 lot of corners and stuff. I mean this creek is just--a lot  
20 of turns in it, and stuff gets caught up on branches and so  
21 forth.

22 Q Was it any better this last year when you went out  
23 there with Mr. Holley?

24 A Considerably.

25 Q There was more flow?

1           A     No, not more flow. It was still pretty stagnant,  
2 but--was it flowing better? Yes. Was there debris and limbs  
3 and leaves and stuff that normally catch up that we saw in  
4 2009? No.

5           Q     Did you notice any film on top of the water---

6           The Court:           (interposing) You can come  
7 back to your seat here.

8                   (Witness complies.)

9           Mr. Jones:           Yeah, I'm sorry. I keep  
10 forgetting, Your Honor. I'm willing to let him stand there.

11          A     There were a few places here and there with some  
12 light film--nothing like, you know, in the year 2009--and  
13 some heavy duckweed in certain places.

14          Q     In the area downstream from the plant---

15          A     (interposing) Yes, sir.

16          Q     ---was duckweed?

17          A     Yes, sir.

18          Q     Explain, if you would, the--in 2009 when you  
19 looked at lagoon number 1---

20          A     (interposing) Uh-huh.

21          Q     ---what was the appearance of the lagoon as you  
22 looked at it with the naked eye?

23          A     A lot of weeds and brush. I don't know what you'd  
24 call those weeds, but it had a lot of overgrowth in it.

25          Q     Any other material in there?

1           A     A lot of sludge like--a lot of sludge, solids.  
2 Parker Bark--unfortunately when the wind blows, it blows a  
3 lot of the bark in that area, in that lagoon. It still does.  
4 So there's a nice, thick padding with vegetation growing on  
5 it.

6           Q     Now, when you looked at the creek when you went  
7 down there on September the 14th, did it look--did the  
8 material in the creek look the same as it did in lagoon  
9 number 1?

10          A     No, you didn't have any of that. You just had  
11 that milky-like substance and a lot of duckweed.

12          Q     Did the creek water smell bad?

13          A     Yes.

14          Q     Did it smell like lagoon number 1?

15          A     It stunk. I don't know if I can differentiate,  
16 but it had a bad odor to it, especially when you stirred it  
17 up.

18          Q     Did y'all stir it up?

19          A     We did.

20          Q     In the eight or nine years that you worked for the  
21 plant at Rose Hill, do you recall ever receiving any kind of  
22 notice of violation or penalty from the state agency?

23          A     No, sir.

24          Q     I mean did you--well, did you receive any from the  
25 state agency?

1           A     No, sir.

2           Q     Were there any environmental violations or  
3 penalties to the company there in Rose Hill while you were  
4 there before this?

5           A     No, sir.

6           Q     Had you seen any of the state agents from DENR?

7           A     I met Mr. Bouchard at the guardhouse one day.

8           Q     Who is he?

9           A     He is a--he works for them in some capacity.

10          Q     Were there any water quality violations, though?

11          A     No, sir.

12          Q     And that's for the eight or nine years prior to  
13 September of 2009?

14          A     Yes, sir.

15          Q     Do you know--are you aware of any violations that  
16 the--let me strike that.

17                   (Pause.)

18           Mr. Jones:                Can I take just a moment, Your  
19 Honor?

20           The Court:                Yes, you may.

21                   (Pause.)

22           By Mr. Jones:

23          Q     Mr. Howard, the--prior to the anonymous call on  
24 September the 9th, 2009, there were---

25                   (Pause.)

1           Q     Had any work been done to the lagoons prior to  
2 September 9th, 2009, in the recent past before September  
3 2009?

4           A     There had.

5           Q     What kind of work had been done?

6           A     The knife that I spoke about earlier that controls  
7 the water flow gravity-wise from the primary lagoon to the  
8 secondary lagoon, it needed to be replaced, and we replaced  
9 it.

10          Q     And do you remember about what time period that  
11 would have been?

12          A     Probably about two--two weeks prior to that time,  
13 I believe.

14          Q     Okay. Two weeks prior to September 9th?

15          A     Yes, sir, about.

16          Q     Was that something that you knew about ahead of  
17 time?

18          A     I did. I knew of it, but I mean just the magni-  
19 tude of it is just--it wasn't a big deal because it was just  
20 a knife valve, so I mean I didn't go down there and look at  
21 it or didn't really have to get involved. It just really  
22 didn't entail that much work.

23          Q     But what was the purpose of that?

24          A     We just need to keep--just general maintenance,  
25 just making sure that we keep it up and you don't let stuff

1 get rusty. I mean it's pretty--that stuff is pretty acidic.

2 Q Did the company do that themselves or did they  
3 bring in a contractor?

4 A We brought in a contractor.

5 Q Do you remember who the contractor was?

6 A Cavanaugh Construction.

7 Q Is that Davey Cavanaugh you talked about earlier?

8 A Yes, sir.

9 Q Was that a company--a company that the House of  
10 Raeford had used before?

11 A Yes, sir

12 Q Are they located in Wallace or Rose Hill or---

13 A (interposing) They are located north of Wallace.

14 Q Okay. Now, what kind of work had to be done to  
15 accommodate that repair?

16 A We had to take and actually make sure we--I'll try  
17 to explain this the best we can. We tried to close off a  
18 small area, approximately 4 feet, around the opening of where  
19 the pipe was to the primary lagoon and shut off all the water  
20 there, get it cleaned out, where we could get to it. And  
21 then we took a backhoe, dug out the pipe, changed the pipe  
22 while we were also changing the knife valve.

23 Q Okay. And the area where that would have  
24 occurred, that maintenance work would have occurred, would be  
25 where?

1 (Witness approaches photograph.)  
2 A Right at the road that divides the primary lagoon  
3 from the secondary lagoon, right here (indicating).  
4 Q So there's a valve there and a pipe that goes--  
5 that's under the water level and goes under that berm---  
6 A (interposing) Under the road.  
7 Q ---or whatever---  
8 A (interposing) Yes, sir.  
9 Q ---the road, to the secondary lagoon?  
10 A Yes, sir.  
11 Q So was the valve replaced?  
12 A It was.  
13 Q And the pipe between the two lagoons was---  
14 A (interposing) Replaced.  
15 Q ---replaced?  
16 A Yes, sir.  
17 Q Okay. In order to lower the water level to create  
18 that area that you said to work in, have that to be done--  
19 for that to be done--how did you move the water from that  
20 lagoon, and where did you put it?  
21 A We actually took that--just a little bit of water.  
22 We actually took that little bit of water right there and we  
23 just--we shut off this area right here (indicating) and just  
24 dug out right this area right here (indicating), and pretty  
25 much all we had was a little bit of mud and stuff. It wasn't

1 a big job at all.

2 Q How did the water run from one lagoon to the  
3 other? Did you pump it or did it just go by gravity?

4 A By gravity.

5 Q Okay. Was a pump involved at all in doing that?

6 A It's my understanding that initially we had a  
7 small pump there in case we needed to pump from this lagoon  
8 number 1 (indicating) to lagoon number 2, but once we got  
9 everything settled, we didn't have to have any pumping.

10 Q Did you need any pipe or conduit or anything to  
11 achieve that?

12 A No, sir.

13 Q Did the company own the pump?

14 A I don't believe we did, no, sir.

15 Q During that time, did you hire any contractors  
16 other than Cavanaugh to do that?

17 A No, sir.

18 (Witness returns to stand.)

19 Q Looking back, would Mr. Cavanaugh have a--would he  
20 have been there while that work was progressing?

21 A Yes, sir.

22 Q I mean he didn't have his employees out there.  
23 Was he doing it himself?

24 A Yes, sir.

25 Q So he would have firsthand knowledge of what

1 happened on the site during that operation?

2 A Yes, sir.

3 Q During that operation, did the company pump any of  
4 the wastewater from the primary lagoon to the creek?

5 A No, sir.

6 Q Did the company have the kind of equipment that  
7 would have been necessary to pump water from the lagoon to  
8 the creek?

9 A No, sir.

10 Q Would it have had the kind of pumps with enough  
11 power to achieve that?

12 A No, sir. We would have had to go outside. Mr.  
13 Cavanaugh doesn't even have those pumps.

14 Q How about the pipe or the conduit in order to  
15 carry wastewater from lagoon number 1? I think you said the  
16 distance was 600 and---

17 A (interposing) 675 feet, I believe.

18 Q 675 feet?

19 A Yes.

20 Q Have you got that much pipe or hose to carry that?

21 A No, sir.

22 Q If the employees you have had a plan to do that  
23 kind of operation where you would pump it from the first  
24 lagoon to the creek, would you have known about that?

25 A Yes, sir. It would have been too big of an

1 operation. We would have had to rent a pump. What size I  
2 don't know, but we would have certainly had to go to an  
3 outside source and rent a large pump, get probably 800 feet  
4 of some kind of big hose or something.

5 I would have known about it. Our accounting staff  
6 would have known about it. It's just too--the scope of it  
7 was just too large to pull off with just--without me knowing  
8 about it or without accounting knowing about it or our guard-  
9 house or our management team.

10 Q Have you conducted an investigation as to whether  
11 or not this could have occurred?

12 A Yes, sir.

13 Q And what was the result of that investigation?

14 A I've not been able to find anybody that can say we  
15 rented a pump. We've not paid for a pump. We--our main-  
16 tenance--we don't have any piping that could do this. I've  
17 gone up and down that creek. We've hired outside investi-  
18 gators. I've talked to engineers to see if I did this. And  
19 everything points back that we didn't do this.

20 Q Now, if those kind of materials had been ordered  
21 or rented, would any work orders or purchase orders or checks  
22 or something have had to have been run by you?

23 A Yes, sir. At that point I would have had to sign,  
24 along with our controller.

25 Q Have you signed any of those kinds of---

1           A     (interposing) No, sir.

2           Q     ---requisitions or purchase orders---

3           A     (interposing) No, sir.

4           Q     ---or anything for that kind of material---

5           A     (interposing) No, sir.

6           Q     ---at that time? I noticed you mentioned that  
7 there was a--Register had a pumping machine and truck. And I  
8 asked you if you had a company truck that could do that, and  
9 you said no. If the company had used a pump and haul truck  
10 like that before September 9th to move wastewater, would you  
11 have known about that?

12          A     Yes, sir.

13          Q     How would you have known?

14          A     We would have had a PO written by our purchasing  
15 agent. Our--I would have signed off on a--the purchase  
16 order. And we would have written a check, and I would have  
17 signed the check, or my controller.

18          Q     Did you sign such a check or---

19          A     (interposing) No, sir.

20          Q     ---approve any such plan?

21          A     No, sir.

22          Q     Did the plan that you authorized to move water  
23 from 1 to 2 and do that replacement work--did it include any  
24 kind of pumping truck or anything like that?

25          A     No, sir.

1           Q     As a result of the replacement work that was done,  
2 did it become fully operational after that replacement was  
3 done?

4           A     Yes, sir. I mean there's just not a lot to that,  
5 so it would--yes, immediately.

6           Q     At the time the phone call was made and the  
7 investigators came and you met with them, can you recall--was  
8 the wastewater system functional?

9           A     Yes, sir.

10          Q     For the period before that, was it functional?

11          A     Yes, sir.

12          Q     Was the--did the lagoons have sufficient free-  
13 board, et cetera, to accommodate---

14          A     (interposing) Yes, sir.

15          Q     ---the water? Would there have been any other  
16 reason to lower the contents of those lagoons?

17          A     No, sir. We just didn't have a need at that  
18 point.

19          Q     How about the spray irrigation system that--where  
20 you spray to the fields, et cetera? Was that operating---

21          A     (interposing) Yes, sir.

22          Q     ---and completely functional?

23          A     Yes, sir.

24          Q     No problems with that?

25          A     No, sir.

1 Q Was the lagoon on the area of the spray field--was  
2 it--did it have adequate freeboard?

3 A Yes, sir.

4 Q Do you keep records of the freeboard for that  
5 lagoon?

6 A Yes, sir. That's the one we keep records for.

7 Q That's the only one you have to keep records for,  
8 isn't it?

9 A Yes, sir.

10 Q Have you gone back and checked those records?

11 A Yes, sir.

12 Q Was the freeboard adequate on that lagoon there?

13 A Yes, sir.

14 Q So that system was operating and was functional--  
15 functioning?

16 A Yes, sir.

17 Q Would there be any reason for the company to have  
18 moved water from the lagoons to the creek during that time?

19 A No, sir.

20 Mr. Jones: I don't think I have any more  
21 questions.

22 The Court: Okay. I'd like to take about a  
23 15 minute break before we start cross-examination.

24 Ms. LeVeaux: Thank you.

25 The Reporter: Off the record. 3:26 p.m.

1 (A brief recess was taken.)

2 The Reporter: On the record. 3:46 p.m.

3 The Court: This hearing will come to  
4 order. It's now 3:45 on October the 25th, 2011. All parties  
5 present when we recessed are again present. Ms. LeVeaux,  
6 your cross-examination.

7 Ms. LeVeaux: Thank you, Your Honor.

8 **C R O S S - E X A M I N A T I O N** 3:47 p.m.

9 By Ms. LeVeaux:

10 Q Mr. Howard, could you please tell me a little bit  
11 about your work experience before you started working with  
12 the House of Raeford?

13 A After college I started working for a firm called  
14 Valley Foods in Fayetteville, North Carolina, left there and  
15 went to work for Townsend Poultry in Pittsboro, North  
16 Carolina.

17 Q Tell me what you did for Valley Foods.

18 A I was their supervisor. It was a small deboning  
19 operation.

20 Q And tell me what your responsibilities were.

21 A Over--over approximately 60 employees that made  
22 chicken breasts, no supervisors. I was the only one; a very,  
23 very, small plant. I left there approximately 1990 and went  
24 to work for Townsend Foods for about a year and a half as a  
25 supervisor. They promoted me to department manager over

1 deboning. I probably had 120 people working under me.

2 Q Your responsibilities were managerial?

3 A Yes, ma'am.

4 Q Okay.

5 A From there--from '91 to '95 I was at Cuddy Foods  
6 and started out as a supervisor and worked my way up to  
7 processing manager.

8 Q And tell me the difference between being a  
9 supervisor managerial to processing manager.

10 A I was over most of the supervisors in the plant at  
11 that point.

12 Q Okay. So just higher on the O chart? Is---

13 A (interposing) Yes, ma'am.

14 Q ---that fair? I'm not trying to---

15 A (interposing) Yes, ma'am. Yes, ma'am. From '95  
16 to--the end of '95 to '98, I was with Carolina Turkeys. I  
17 started out as a tray pack manager, and they made me a plant  
18 manager. Tray--it's just a bigger scope. Then I got into  
19 sales for about a year in Gainesville, Georgia with Pilgrim's  
20 Pride. I got promoted to plant superintendent in Athens,  
21 Alabama.

22 Q Now, tell me with Builder's (sic) Pride, was that  
23 away from the animal---

24 A (interposing) No, ma'am.

25 Q ---spectrum?

1           A     It was still chicken processing.

2           Q     Okay. And tell me what you did as a salesperson.

3           A     I got to know the customers and coordinated all  
4 the orders and worked on trying to get---

5           Q     (interposing) From the farms?

6           A     No, from the actual customers. We were a tray  
7 pack--what you see in the supermarkets, grocery stores, in  
8 the trays. So I worked with individual retailers as well as  
9 the plant coordinating back and forth.

10                   I got promoted to plant superintendent in Athens,  
11 Alabama around 1998, then promoted to plant manager in '99,  
12 approximately, stayed there for--till October of 2001 and  
13 became the plant manager at Carolina--I mean at House of  
14 Raeford in Rose Hill. And about---

15           Q     (interposing) Till when? I'm sorry.

16           A     November 2001. And I stayed, I believe, plant  
17 manager there until the year 2004, and then they made me  
18 operations manager--approximately. It could have been 2005.

19           Q     Okay. So as a plant manager, tell me your duties  
20 and responsibilities.

21           A     I was over all plant operations as far as  
22 producing product. When I became the operations manager, I  
23 became--I got over sales, quality assurance, purchasing, some  
24 additional responsibilities that I didn't have when I was  
25 just the plant manager, and wastewater.

1 Q And so your--and that's your current--that was  
2 your last position before you went to Pinehurst---

3 A (interposing) Before I went to Raeford.

4 Q ---operations?

5 A Yes, ma'am.

6 Q Okay, I'm sorry; before you went to Raeford?

7 A Yes, ma'am. I live in Pinehurst, but I work in  
8 Raeford.

9 Q Okay.

10 A I'm sorry.

11 Q Okay, I'm sorry. And Raeford and Rose Hill, is  
12 that one and the same?

13 A No, ma'am.

14 Q Okay.

15 A Rose Hill is the chicken processing plant, and  
16 Raeford is the turkey processing plant.

17 Q Okay.

18 A I moved to Raeford in March--in April of this year  
19 working at that plant.

20 Q And how many employees do you supervise?

21 A Currently or when I was operations manager?

22 Q I'm sorry. When you--in 2009 when you were  
23 operations manager. And most of my questions will be  
24 directed during that---

25 A (interposing) Okay.

1 Q ---time period, please.

2 A Approximately about 800 to 850 employees  
3 altogether. It varies due to turnover.

4 Q And just real quick, can you tell me what your  
5 B.A. is in? Do you have a B.A. degree?

6 A No, do not.

7 Q Okay. Do you have an A.A. degree?

8 A No.

9 Q Okay. So hands-on a lot of work, a lot of hard  
10 work?

11 A Three years of college; I got out of college to---

12 Q (interposing) Okay.

13 A ---to work for Valley Foods.

14 Q And is Valley Proteins and Carolina By-Products  
15 one and the same?

16 A Valley Proteins was--was the company name, and  
17 Carolina By-Products bought them--bought them out.

18 Q And Carolina--Carolina By-Products is upstream  
19 from you-all; is that correct?

20 A Yes.

21 Q And you-all used to own Carolina By-Products, did  
22 you not? When I say you-all, I mean House of Raeford.

23 A I believe--we own the facility, I believe. No, we  
24 did not own that company.

25 Q So you owned the facility?

1           A     I---

2           Q     (interposing) But you've since sold the facility;  
3 is that not correct?

4           A     I don't know if it's the--I don't know if it's the  
5 entire building. I think they've added on since they bought  
6 out. They upgraded when they bought out from us. I think  
7 there are parts of the facility still there that were ours,  
8 but that was before my time.

9           Q     Okay. Okay. You don't know about what year that  
10 transition took place?

11          A     No, ma'am, I do not.

12          Q     And in 2009, your operator in charge was Joe  
13 Teachey; is that correct?

14          A     Yes, ma'am.

15          Q     And you're well aware of the fact that I deposed  
16 Joe Teachey?

17          A     I was there. Yes, ma'am.

18          Q     And you sat in all of the depositions, did you  
19 not?

20          A     Yes, ma'am.

21          Q     Early on in your testimony, you referenced to a  
22 knife valve. Where is that knife valve?

23          A     It is in the actual pipe that runs from the  
24 primary lagoon to the secondary lagoon.

25          Q     And that's the valve that was problematic in 2009;

1 is that correct?

2 A Yes.

3 Q And that's the valve you had replaced; is that  
4 correct?

5 A Yes, ma'am.

6 Q And you had that valve replaced on or about  
7 August-September; is that correct?

8 A Somewhere in that vicinity, yes, ma'am.

9 Q Can you help--can you narrow that date any more  
10 for me?

11 A Not without looking up something, no, ma'am; not  
12 sitting here, no, ma'am.

13 Q There was also reference to--and I'll get to them  
14 more specifically, but in your counselor's case there was  
15 reference to two letters that were written. One was written  
16 to Rick Shiver with the Department of Environment and Natural  
17 Resource, and one was written to an EPA representative; is  
18 that correct?

19 A Yes, ma'am.

20 Q Do you remember those letters?

21 A Yes, ma'am.

22 Q And in fact you drafted both letters, did you not?

23 A I believe I helped respond to one of them, and the  
24 other one yes.

25 Q Okay. Now, in Joe Teachey's deposition--and if

1 you don't remember, that's fine, but do you remember him  
2 telling me that the operation never shut down?

3 A As far as the plant, no; I mean the plant kept  
4 running. Did we quit letting stuff be gravity fed? I don't  
5 recall that.

6 Q But again, it would be Joe Teachey who would  
7 have--who would have been responsible? I mean you're the big  
8 boss, but he's under you; is that correct?

9 A Correct.

10 Q Do you--it is true, is it not, that Joe Teachey  
11 said that they never did turn off the water when they were  
12 making that replacement for that knife valve?

13 Mr. Jones: Objection; I don't know where  
14 this came from, this "Joe Teachey said."

15 The Court: Your response? Was this during  
16 a deposition?

17 Ms. LeVeaux: Well, Your Honor, he--I was  
18 just thinking--I'm just taking my lead from the direct  
19 examination. I deposed Joe Teachey. I've already  
20 established that he was present throughout Joe Teachey's  
21 deposition. And I asked if that was his operator in charge.  
22 And so I'm asking questions that relate to that deposition.

23 The Court: Okay. Are you objecting to  
24 that, or are you just questioning where it came from?

25 Mr. Jones: I didn't know. She said, "Joe

1 Teachey said." I don't remember Joe Teachey---

2 The Court: (interposing) Okay.

3 Mr. Jones: ---saying anything.

4 The Court: Do you understand the question?

5 The Witness: Yes, sir.

6 The Court: You can answer that.

7 The Witness: Okay. Can you repeat that one  
8 more time, please? I'm sorry. I got thrown off there.

9 By Ms. LeVeaux:

10 Q That's okay. In Joe Teachey's deposition, do you  
11 remember my asking him about whether or not the operations  
12 were shut down for the repair of the knife valve?

13 A When you say operations, are you--wastewater  
14 operations?

15 Q Yes, sir.

16 A I remember talk about that. I mean, you know,  
17 wastewater is not something that has to be going all the  
18 time. And it's--you know, without getting too technical, I  
19 mean it's three parts. So I don't remember him saying we  
20 shut down. I can promise you we were still pumping water.

21 I just don't--that section, it's obvious that we  
22 had to stop that because we couldn't transfer water from the  
23 primary lagoon to the secondary lagoon. So I know that  
24 wasn't transpiring. I'm sure, though, we were still pumping  
25 from the lagoon to the third lagoon.

1           Q     Do you--you mentioned--you referenced to the fact  
2 that it took a couple of hours, but do you remember in Joe  
3 Teachey's testimony his saying that it actually took a couple  
4 of days, four days?

5           A     I know it took some time to--for prep work. I  
6 remember that. He even used, I think, the word "prep" in  
7 your deposition. The actual work, I think, of getting it  
8 done didn't take but just a small period of time. The prep  
9 work probably took a lot longer than the actual work. Again,  
10 the magnitude of it just really wasn't that big as far as the  
11 actual work.

12          Q     Okay. Do you have any idea what the magnitude  
13 was, how many gallons of water, 1,000 gallons of water we're  
14 talking about when we talk about what was lost during that  
15 change?

16                Mr. Jones:                Your Honor, could I---

17           A     (interposing) No water was lost.

18                Mr. Jones:                Could I get some--does she mean  
19 from the water during the repair or---

20                The Court:                (interposing) Well, if he asks  
21 questions, I'll let him clarify.

22                Mr. Jones:                Well, I'm going to object to--I  
23 don't understand the question.

24                The Court:                Do you understand the question?

25           A     When you say lost, what--I mean no water was lost.

1           Q       While you were making the repairs, the amount of  
2 water--you said just a few gallons were lost while you were  
3 transitioning and making the repair, in placing--just placing  
4 the valve. You said you---

5           A       (interposing) We actually built---

6           Mr. Jones:           (interposing) I object. There  
7 was no water lost that I recall.

8           The Court:           Well, let me let her finish her  
9 question and explanation for---

10           Ms. LeVeaux:           (interposing) Your Honor--and  
11 I'll be honest. If I keep getting interrupted, I forget what  
12 my question is. And I---

13           Mr. Jones:           (interposing) Well, you  
14 know---

15           Ms. LeVeaux:           (interposing) I tried to go  
16 out of my---

17           Mr. Jones:           ---I'm sorry, but---

18           Ms. LeVeaux:           (interposing) Excuse me. I  
19 tried to go out of my way, Mr. Jones, not to interrupt you,  
20 and when I did object, my objections were overruled. So I'm  
21 just--I was trying to establish that his client was actually  
22 answering the question before he interrupted.

23           Mr. Jones:           Your Honor, first of all, I  
24 don't appreciate being lectured to, but number two, I don't  
25 recall him testifying that water was lost. That was the

1 basis of my objection. And for her to say--talk about the  
2 water that was lost, I have to object, Your Honor.

3           The Court:           Okay. When we get into  
4 these--now I'll lecture. When we get into these, it's my  
5 experience that sometimes objections are better served in  
6 cross-examine type questions. I'd like for her to ask her  
7 question. If he doesn't understand it, then I'll have her  
8 rephrase it in some way.

9           If it's certainly something that he disagrees with  
10 or something, he can answer, and then the clarification--I  
11 promise you I'll go back to redirect and you can clarify or  
12 whatever. I don't want to start putting words in her mouth  
13 or your mouth either. I'll let you ask the questions that  
14 you wish to ask. If he doesn't understand it or if it's not  
15 a word he remembers using, then he certainly can say so.

16           So the objection is overruled. You can ask your  
17 question. And listen carefully and then answer the question,  
18 because a lot of times she's asking you about do you remember  
19 somebody else's testimony. And so try to answer that  
20 question---

21           The Witness:           (interposing) Yes, sir.

22           The Court:           ---and then she can follow  
23 through with that, okay?

24           The Witness:           Yes, sir.

25           The Court:           You can proceed.

1 Ms. LeVeaux: Thank you, sir.

2 By Ms. LeVeaux:

3 Q Mr. Howard, you referenced to the transition in  
4 replacing the valve as being fairly minor. Tell me what you  
5 mean by it was a minor transition.

6 A The actual work on it was--we just took a backhoe,  
7 dug up the pipe, replaced the valve, put the pipe back down,  
8 and covered it up with dirt. The prep work on it, we built a  
9 berm around it.

10 As Joe stated, I believe, I think it was about 4  
11 feet around the opening, bermed off, had some water in the--  
12 in between there that we kind of got--made sure we got every-  
13 thing cleared around it, and then started working on the  
14 pipe. So the prep work probably took--the prep work probably  
15 took several days, or a couple of days, as you alluded to.  
16 The actual work--that's what I was getting at--probably took  
17 a lot less.

18 Q Okay. And tell--you tell me. Did you lose any  
19 water in the work process?

20 A The water was displaced, probably pushed back. I  
21 wouldn't say we lost it. We just bermed around it. So no,  
22 ma'am, we didn't--we didn't lose any water. We displaced it  
23 or pushed it back as best I can--I know.

24 Q And the valve is connected to a suction pump, is  
25 it not?

1           A     There is no suction pump.

2           Q     Oh, I'm sorry; the gravity pump?

3           A     Yes, it's part of the mechanism.

4           Q     So did it affect that operation at all?

5           A     Well, we couldn't let water go from the primary  
6 lagoon to the secondary lagoon during that time.

7           Q     Do you have any idea how much water was inhibited  
8 from moving from one lagoon the other during that time?

9           A     No, ma'am. I wouldn't know that answer.

10          Q     As the operator in charge, Joe Teachey is  
11 responsible for monitoring both lagoons; is that correct?

12          A     Yes, ma'am.

13          Q     In the direct examination, your attorney  
14 referenced to that you were only responsible for the free-  
15 board in one lagoon. Do you remember him saying that?

16          A     For, I believe--I'm not trying to put words in his  
17 mouth. I believe he said the actual recording and moni-  
18 toring, keeping up with that, yes.

19          Q     Okay.

20          A     Lagoon 3.

21          Q     It is--so then you're aware of the fact that  
22 you're actually required to keep at least 2 feet of freeboard  
23 in lagoon 3---

24          A     (interposing) That is correct.

25          Q     ---consistent with the permit?

1           A     But we don't have to, you know, keep documented  
2 records of that and stuff. We actually keep levels each day  
3 of lagoon 3.

4           Q     Okay.

5           A     And I believe--I believe that's part of our  
6 permit. That's something that's kept daily.

7           Q     But the liquids are really not problematic as it  
8 relates to lagoon 1. It's really the solids that are more  
9 problematic in lagoon 1; isn't that correct?

10          A     Well, if you--if we were to work, you know, a  
11 bunch of Saturdays in a row, the liquids would be--it depends  
12 on the number of head you kill. I mean there's a lot of  
13 factors. Water could be a problem if you--if we had a lot of  
14 rainfall and we killed a lot of chickens, water could then be  
15 a problem. It's both solids and water.

16          Q     But on or around September the 9th, during that  
17 time period, that--lagoon number 1, if you know, was filled  
18 with a lot of solids, was it not?

19          A     Yes.

20          Q     Do you stand by the dates that you reference to in  
21 your direct examination, or could it be that you're off a  
22 little bit on the dates?

23          A     I could possibly be off on my dates. I believe my  
24 days are right, but my dates--I'll be honest with you. I  
25 could be off. I mean it's been a long---

1 Q (interposing) Right, it was 2000 and--it was in  
2 2009?

3 A Yes. I could be off. And I apologize for that.

4 Q Okay.

5 A I do feel confident about the Thursday, Friday,  
6 and the Monday, but I'm a little hazy on the actual dates.

7 Q Okay. Is it fair to say that the operator in  
8 charge, Joe Teachey, did in fact talk with representatives  
9 with DENR before you talked with the representatives of DENR?

10 A That is correct.

11 Q And is it also fair to say that Joe Teachey told  
12 you about the problem before you actually saw any evidence of  
13 the problem?

14 A Yes, he did.

15 Q And in fact the first time that you saw any  
16 evidence of the problem was when Kenneth Rhame, the  
17 representative from EPA, showed you on his camera; is that  
18 correct--showed you pictures on his camera?

19 A I can't recall. I know he talked to me. I don't  
20 remember the pictures per se, but I know he did notify me.  
21 He was--he and Ms. Willis.

22 Q But you don't remember him showing you pictures  
23 and your saying "I didn't know it was that"--"the problem was  
24 that grave," or something to that effect?

25 A I can't recall that. I'm sorry.

1           Q     Okay.  You've referenced also to the fact that a  
2 few gallons were pumped into the primary lagoon.  Was that  
3 before or after you spoke to representatives from the EPA and  
4 DENR?

5           A     That was before.

6           Q     Was it before--so it was before you spoke to the  
7 representatives from DENR and how many days after you spoke  
8 to Mr. Teachey?

9           A     I believe there were two tanks on a Thursday, four  
10 tankers on a Friday, and then I believe that Monday is when I  
11 met with Ms. Willis and Mr. Rhame.

12          Q     The two tankers on a Thursday, do you know if that  
13 occurred in the morning or in the evening?  And if you---

14          A     (interposing)  No.

15          Q     ---don't know, that's fine.

16          A     I honestly don't know.

17          Q     Do you know how many gallons each tanker took?

18          A     No, ma'am, but they--I think that's on the bill  
19 they actually gave us.  I--no, not sitting here, no, ma'am.

20          Q     Did you see the tanker take any of the waste?

21          A     No, ma'am.

22          Q     So how did you get this information?

23          A     That was the--from the bill they gave us and  
24 actually talking with a representative from Register with Mr.  
25 Joe Teachey, Mr. Chris Murray, and Mr. Ashley Guy.

1           Q     But Joe Teachey is your operator in charge, and so  
2 he would be responsible for this---

3           A     (interposing) Yes, ma'am.

4           Q     ---work, would he not?

5           A     Yes, ma'am.

6           Q     You indicated that the weather was very dry.  
7 Would it also be fair to say it was very cloudy, that you-all  
8 were expecting a rain, if you recall?

9           A     We were expecting a rain when?

10          Q     I'm speaking to the time period around September  
11 9.

12          A     I can't recall, ma'am.

13          Q     And it is fair to say that Joe Teachey did head up  
14 the cleanup efforts? You ran the facility, but he headed up  
15 the cleanup efforts; is that correct?

16          A     After I spoke with Mr. Rhame and Ms. Willis, I  
17 took a very active role in that at that point, along with  
18 Ashley Guy.

19          Q     And Mr. Teachey continued to---

20          A     (interposing) And Mr. Teachey, yes, but I  
21 definitely took a very active role.

22          Q     Did Joe Teachey tell you when he met with repre-  
23 sentatives from DENR?

24          A     Did he tell me the date or did he tell me when he  
25 was meeting?

1 Q Did he tell you before he met with them that---

2 A (interposing) No.

3 Q ---he was going to meet with them? He did not?

4 A No, ma'am.

5 Q That was within his responsibilities to meet with  
6 the individuals from DENR?

7 A Yes, ma'am.

8 Q Did he tell you after he had met with DENR that he  
9 had met with them?

10 A I believe he told me the second day he had met,  
11 actually spoken to Ms. Willis. I believe that's when he told  
12 me about it.

13 Q So he told you two days after he met with DENR  
14 representatives?

15 A I believe that's the case.

16 Q Okay. In your direct examination, you were asked  
17 questions about what the Cabin Branch looked like behind your  
18 secondary lagoon. Could you please describe what it looked  
19 like to me, please?

20 A The best way to describe it, it had a--kind of a  
21 weak milkshake look with some duckweed is the best way I  
22 could describe it. And I believe I told Ms. Willis and Mr.  
23 Rhame that. That was the best way for me to describe it.

24 Q And can you tell me if it was a narrow stream or  
25 if it--could you just describe the depth and the width, to

1 the extent that you can?

2 A It covered the creek from side to side. I mean it  
3 was for the most part pretty consistent, consistently  
4 covered. I don't know exactly how thick it was. I didn't--  
5 but it was covered.

6 Q When you were--were you--at the creek--you said  
7 you took a more active role once you spoke with Mr. Rhame and  
8 Ms. Willis?

9 A Once I went down there and looked at everything,  
10 yes, ma'am.

11 Q Were you watching your folks as they put forth  
12 efforts in removing the sludge from the creek?

13 A Yes, ma'am. I went down there quite a bit and  
14 watched Register. And, you know, we--at one point, like I  
15 said, we looked at aerating and looked at several possi-  
16 bilities. So yes, I was back and forth.

17 Q In your observations at that time, could you get  
18 any idea of the depth from just watching the equipment go  
19 into the creek or into the branch?

20 A Probably--it was just a covering, probably a  
21 quarter of an inch, possibly. I mean I don't know. I could  
22 be off on that.

23 Q And tell me specifically--you said you went up and  
24 then you went down. Tell me how far up you went and how far  
25 down you went.

1           A       We walked the creek--me, Ms. Linda Willis, Mr.  
2 Rhame, we walked the creek almost to the pond, I believe,  
3 and then we walked back. And we actually walked to the--to  
4 the origin where it's at the bottom of the secondary lagoon.  
5 And then we actually walked the creek on the right-hand side  
6 of the plant and walked it for a good ways.

7                   Then we got in the car and we rode around to each  
8 one of those three bridges and looked there and---

9           Q       And so could you show me---

10          A       (interposing) Yes.

11                   (Witness approaches photograph.)

12          Q       ---or could you show us how or exactly---

13          A       (interposing) I don't know exactly the---

14          Q       (interposing) I mean just tell me the general  
15 direction that you first walked, you and Ms. Willis and  
16 Mr.---

17          A       (interposing) We came and we actually met here  
18 (indicating) first, and--because this is really the only good  
19 viewpoint that you've got of the creek. I mean you've  
20 actually got an open area that you can look at. We walked  
21 down and looked at that.

22                   And then we started off--I don't think we made it  
23 all the way to--all the way to the pond. And we actually  
24 turned and went--there's another little body of water right  
25 here (indicating). I remember us walking--walking around

1 here (indicating), and we walked---

2 Q (interposing) Okay. Let me stop you before you  
3 go upstream.

4 A Okay.

5 Q As you were walking downstream, could you describe  
6 the sludge that you saw or the waste that you saw or the  
7 matter that you saw? Just describe if it got smaller or if  
8 it still seemed to cover bank to bank. Just tell me what you  
9 saw.

10 A It pretty much covered bank to bank.

11 Q All the way down?

12 A It pretty much covered bank to bank, pretty much  
13 filled this log here (indicating). I never went any further  
14 downstream than this log where it turns right here  
15 (indicating) at Sheffield bridge. But that's---

16 Q So you-all walked downstream. Now you can tell me  
17 about upstream.

18 A And then we came back and we walked--I don't--I  
19 don't think I walked with them. I think Ms. Willis actually  
20 walked this whole creek. I was---

21 Q (interposing) Okay. I was just interested in  
22 what you did, sir.

23 A Okay. I actually walked back up on this road here  
24 (indicating). I was with Mr. Rhame at this point, I'm 99  
25 percent sure. Then we came back here and met. And we looked

1 down here (indicating) for a ways. And we didn't walk this  
2 stream, but we walked right beside it where we could actually  
3 view down. There's probably about a 6 or 8 feet dropoff to  
4 that creek as well.

5 Q Okay. You may have a seat.

6 (Witness complies.)

7 Q Could you tell me, Mr. Howard, when you walked  
8 upstream how would you describe the waste upstream?

9 A Upstream it looked like it had pretty much stopped  
10 accumulating at the corner point of lagoon number 2.

11 Q Okay. If Ms. Willis had in her notes that this  
12 occurred about September 15, 2009, is that about the date  
13 that you remember?

14 A Yes, ma'am, it's somewhere in that vicinity.

15 Q And Mr. Howard, do you remember telling Ms. Willis  
16 that you were going to try to see how much you could vacuum  
17 out, how much waste you could vacuum out?

18 A Yes, ma'am.

19 Q Tell me about that conversation. Tell me what you  
20 said to the extent that you remember.

21 A I just told her we were going to try to put our--I  
22 believe I--verbatim, put our best foot forward and try to get  
23 this vacuumed out and put it back in our lagoon and try to  
24 get it cleaned up.

25 Q Okay. And do you also remember at first telling

1 Ms. Willis that you had pumped 480,000 gallons from the creek  
2 at 60 gallons per minute?

3 A I don't remember that at that point, but I  
4 remember us calculating--that's when--Mr. Jones asked me. I  
5 remember I had my guy kind of calculating what we were  
6 doing---

7 Q (interposing) Okay.

8 A ---and keeping a total. So at that point I mean  
9 if I gave her a number, that's where I got it from.

10 Q Okay. And to the extent that you recall, do you  
11 recall having said about 1,035,000--1,000,035 gallons were  
12 pumped?

13 A I know it was--I know the million number was used.  
14 When we got our final calculation, that's what we had calcu-  
15 lated that we had used---

16 Q (interposing) Do you expect---

17 A ---or gotten.

18 Q Okay. I'm sorry. I didn't mean to cut you off.  
19 Did you finish that response?

20 A Yes, ma'am.

21 Q Okay. And you don't have any reason to believe  
22 that Ms. Willis would make up facts or put information in her  
23 notes---

24 A (interposing) No, ma'am.

25 Q ---that was incorrect, do you?

1           A     No, ma'am.

2           Q     And you've worked with her before, have you not?

3           A     Yes, ma'am.

4           Q     Do you recall saying that this 1,000,035 gallons  
5 were pumped from the creek back to the secondary lagoon?

6           A     I think I would have--I would have hoped I would  
7 have said back into our lagoons. I know that the first six  
8 trailers or tankers were pumped into the primary lagoon. I  
9 know--you know, the last day and a half I think they were  
10 pumped directly from the creek into the secondary lagoon.  
11 But the initial pumping was actually brought back to the  
12 primary lagoon.

13          Q     So if she had in her notes that you had said the  
14 secondary lagoon, that would be wrong?

15          A     I must have given her some wrong information.

16          Q     Okay. You reference in your direct examination  
17 that you walked the creek--and to the extent this is  
18 incorrect, correct me--that you walked the creek and then the  
19 creek stopped. And that was--I wrote "creek stopped." I  
20 don't know what you meant by "creek stopped."

21          A     I stopped walking it. The creek didn't stop, but  
22 I stopped---

23          Q     (interposing) Okay. So it did continue to flow?

24          A     The creek--no, it's not flowing. It's not flowing  
25 now. I mean it doesn't flow very well. But I just quit

1 walking it.

2 Q So it is fair to say that at one point you saw the  
3 creek was not flowing?

4 A Yes.

5 Q Is it also fair to say that you identified in your  
6 direct examination that upstream about what, a mile or two is  
7 Carolina By-Products? About how far is that from you?

8 A I would say that's probably a good estimate.

9 Q About a mile?

10 A Somewhere around that.

11 Q Okay. And you reference--you indicated in your  
12 direct examination that it's real bendy, that Cabin Branch is  
13 real bendy and there's curves; is that not correct?

14 A Yes.

15 Q And things can get hung up. Did you not---

16 A (interposing) Yes.

17 Q ---say that?

18 A I did say that.

19 Q Is it also fair to say that the headwaters are  
20 right there at Carolina By-Products?

21 A I've never looked at those myself, so I don't  
22 know.

23 Q And so you don't know whether it's swampy through  
24 there or just a wetland through there or what?

25 A I've never been up there, so I don't know at that

1 point.

2 Q Okay. So then when you walked with your  
3 consultant or when you rode with your consultant, you didn't  
4 go up to the headwaters?

5 A No.

6 Q But the headwaters are right behind Carolina  
7 By-Products, isn't that correct, or to the side of Carolina  
8 By-Products?

9 A I don't know.

10 Q You don't, okay.

11 A No, ma'am.

12 Q What about the water source near Duplin Winery?  
13 Did you happen to see what the area looked like near Duplin  
14 Winery?

15 A No, ma'am.

16 Q You indicated that less than a month after the  
17 incident on September 9, 2009 that you did have the occasion  
18 to walk the Cabin Branch; isn't that the case?

19 A I got in a boat.

20 Q You got in a boat?

21 A I apologize if I said--I actually---

22 Q (interposing) No, you did say--you did say you  
23 got in a boat.

24 A I got in a boat. I--unfortunately, due to the  
25 limbs, we had to get out on I think three separate occasions

1 and take our boat around because it was--there were jams or  
2 logs that had fallen.

3 Q Okay. Now, when--and I'm looking at Petitioner's  
4 Exhibit Number 1, which you should have in front of you.

5 A Yes, ma'am, I do.

6 Q And when Mr. Jones was going through Petitioner's  
7 Exhibit Number 1, on paragraph number F, you said that was  
8 not--that was incorrect. Could you read paragraph letter F  
9 and tell me how--what was incorrect about that paragraph?

10 A "On September 15, 2009, Division Representatives  
11 met with Joe Teachey at the H[ouse] [of]  
12 R[ae]ford...-Rose Hill facility and requested  
13 access to the area of the facility located  
14 adjacent to Cabin Branch, directly behind their  
15 secondary wastewater lagoon. The Division  
16 Representatives observed Cabin Branch filled with  
17 sludge and had [waste]-like characteristics.  
18 Floating sludge was seen on the surface of Cabin  
19 Branch beginning directly behind their secondary  
20 wastewater lagoon and extending downstream to [a]  
21 confluence of Cabin Branch and the lake behind the  
22 Parker Bark facility."

23 Q And you indicated that was incorrect?  
24 (Witness peruses document.)

25 A If I did, I'm wrong. I mean there was--I think we

1 all acknowledge there was sludge-like material. And I  
2 apologize if I got that wrong. That's my fault.

3 Q And I could have heard you wrong. I'm sorry,  
4 because I was writing as well, so I apologize if I  
5 mischaracterized that paragraph.

6 A But yeah, I acknowledge there was something back  
7 there.

8 Q Okay. Going to Petitioner's Exhibit Number 3---

9 A Yes, ma'am.

10 Q ---we talked about the dates possibly being  
11 incorrect. Could the dates here also be incorrect? And I'm  
12 looking specifically at paragraph number 2, the first  
13 sentence.

14 A That could be possibly off a day or two---

15 Q (interposing) Okay.

16 A ---yes, ma'am.

17 Q Off a day or two?

18 A I mean I know we got a phone call from Ms. Linda  
19 Willis, but---

20 Q Okay. And this is the letter you prepared, is  
21 that correct, or that you assisted in---

22 A (interposing) I assisted in, yes, ma'am.

23 Q This two loads--and I'm looking at--let's see;  
24 one, two, three, four--I'm looking at the fifth sentence down  
25 in paragraph number 2. And to the extent that I'm off, it

1 begins "The contractor pumped two loads of material out of  
2 creek on that day."

3 I'm just trying to figure out which day this was,  
4 if this was the day that Joe Teachey--I mean after Joe  
5 Teachey had reported it to you or if this was the day after  
6 you had met with Kenneth Rhame and Linda Willis.

7 A It's my understanding that this was--Ms. Linda  
8 Willis came down and met with Joe, I believe, on a Wednesday  
9 when all this came about. And it's my understanding this was  
10 that Thursday.

11 Q So if your day---

12 A (interposing) That next day.

13 Q ---is off, it would be the next day?

14 A The next day.

15 Q Okay.

16 A That's my understanding.

17 Q When you reference to--and I'm on page number 2,  
18 point number 1. When you reference to "The lagoons behind  
19 the plant had adequate freeboard and were not full or near  
20 dangerous levels," what constitutes a dangerous level?

21 A About to overrun or overflow.

22 Q So what's the difference between that--between  
23 your earlier statement "were not full"? What do you mean by  
24 not full?

25 A I believe we were stating that we--they were

1 nowhere near overflowing. Therefore, we couldn't have a  
2 breach I believe was the intent at that point.

3 Q Your primary lagoon is always pretty high. Is  
4 that a fair statement--the levels in the lagoon?

5 A In parts, and I'm not trying to play words, but I  
6 mean--and Ms. Linda knows this. If you go to the north side  
7 of that where Parker Bark was before we did some extensive  
8 work and they've worn down, it's--it's pretty low. If you go  
9 around on this south side there, there's, you know, a lot of  
10 pretty good freeboard. We've had to do some work, as the  
11 state knows, and we've actually had to close off that road  
12 there to keep adequate freeboard.

13 Q And if you know, in the past representatives from  
14 DENR have in fact told you to--you need to remove some of  
15 those solids out of that first lagoon, have they not?

16 A They have, which we reacted on I believe when--  
17 when Ms. Linda actually got with me a little over a year ago  
18 I believe--well, about a year and a half ago, she mentioned  
19 that we needed to do that. And I think it took me about a  
20 week, and we had already started cleaning it up.

21 Q And you do act quickly, but that wasn't the first  
22 time a representative from DENR asked you to address the  
23 solids in that primary lagoon, was it, if you know?

24 A It's the first time I had been contacted.

25 Q So Joe Teachey hadn't referenced that concern to

1 you before?

2 A I don't believe so.

3 Q When you--in paragraph number 5 when you say--you  
4 begin the sentence "Your Department and the Company engaged a  
5 laboratory in Wilmington, North Carolina to perform extensive  
6 water testing and analysis of the creek and lagoons," that  
7 was actually the EPA, was it not?

8 A I believe we also got up with Envirochem as well.

9 Q No, no, no, no, no. I'm saying if the sentence  
10 reads "Your Department and the Company," I assume the company  
11 is---

12 A (interposing) Oh.

13 Q ---House of Raeford.

14 A Yes.

15 Q I'm saying "your department" was actually not  
16 DENR, but it was the EPA, is that correct?

17 A Yes, ma'am.

18 Q Not the--okay.

19 A Yes, ma'am.

20 Q So that's incorrect; is that not true?

21 A That's correct.

22 Q I'm going to your exhibit--Petitioner's Exhibit  
23 Number 4.

24 A Yes, ma'am.

25 Q And again, you prepared this letter, did you not?

1           A     Yes, ma'am.

2           Q     Just a point of reference, in neither Exhibit  
3 Number 4 or--nor Exhibit Number 3 did you reference to the  
4 fact that you had taken a boat and actually gone and  
5 inspected the area yourself, did you?

6           A     I don't believe so, no, ma'am.

7           Q     In paragraph number 3 of Petitioner's Exhibit  
8 Number 4, did you--do you know if Environmental Chemists gave  
9 this letter--gave this to--the document entitled Report of  
10 Analysis prepared by Environmental Chem, do you know if this  
11 was given to DENR?

12          A     I don't know, no, ma'am.

13          Q     In paragraph number 5, Mr. Howard, you reference  
14 to a call. Do you know who called you on this date?

15                   (Witness peruses document.)

16          A     That should be Joe Teachey instead of Clay Howard.

17          Q     Okay. So---

18           The Court:           (interposing) For clarity,  
19 paragraph 5 of which petitioner's exhibit?

20           Ms. LeVeaux:        Paragraph--I'm still in  
21 Petitioner's Exhibit Number 4.

22           The Court:           Okay.

23           By Ms. LeVeaux:

24          Q     So in paragraph 5 of Petitioner's Exhibit Number  
25 4, page 2, it shouldn't read "Clay Howard." It should read

1 "Joe Teachey"?

2 A Yes, ma'am.

3 Q You reference in paragraph number 6 of that same  
4 exhibit--you recognize (sic) to the visible indications of a  
5 discharge disappearing by October 1, 2009, but is it more  
6 fair to say that it wasn't till December that it actually  
7 disappeared?

8 (Pause.)

9 A Again, I'm trying to recall back. I mean I know  
10 it took awhile. I mean I can't remember exactly the  
11 timetable. I apologize.

12 Q No, no, no, no, you're answering truthfully.  
13 That's fine. In paragraph number 8, there's reference to the  
14 lagoons, lagoon number 1 and lagoon number 2.

15 Does this--I remember going through the permit,  
16 and this volume seems to be different from what the permit  
17 shows. Can you tell me where this information came from in  
18 paragraph number 8?

19 A I believe Joe Teachey gave me this information, or  
20 gave us this information---

21 Q Okay.

22 A ---I believe.

23 Q But you didn't have this information?

24 A No, ma'am.

25 Q Is that fair? Okay. And is it fair to say--and

1 I'm still in Exhibit Number 4, Petitioner's Exhibit Number 4,  
2 but I am on page 3. And you reference in page (sic) 10, and  
3 you reference in the very last sentence you--could you read  
4 that last sentence for me, please?

5 A Now, where are you?

6 Q On Exhibit--still Exhibit Number 4.

7 A Yes, ma'am.

8 Q Page 3, paragraph number 10, the last sentence.

9 A "Further, the Company specifically contends that  
10 the following people have information or knowledge  
11 with regard to the Company's position and  
12 witnessed all mitigating activities: Rick Shiver,  
13 Regional Supervisor..., Linda Willis,  
14 Investigator..., and Agent [Rhame]."

15 Q And--or it could be Rhames. You're just writing  
16 it phonetically. Is that fair to say?

17 A It looks like a typo.

18 Q Do you know Agent Rhame's spelling of his name?

19 A R-h-a-m-e.

20 Q Okay, so is that this person you're referencing  
21 to?

22 A Yes. I believe so, yes, ma'am.

23 Q Okay. Okay. But the fact of the matter is that  
24 these three individuals did not witness all the mitigation;  
25 correct?

1           A     Well, I know for a fact Mr. Shiver didn't, I don't  
2 believe. He wasn't there.

3           Q     Did Linda Willis witness all of the mitigation? I  
4 mean was she there for all of the mitigation?

5           A     No, ma'am.

6           Q     And neither was Agent Rhame; is that---

7           A     (interposing) Agent Rhame was gone after a few  
8 days. I don't know what timetable.

9           Q     Can you tell me, if you know, Mr. Howard, if  
10 anyone called you about the discharge?

11          A     Nobody called.

12          Q     No one ever called other than Ms. Willis; is that  
13 correct?

14          A     After--I mean we started communicating after the  
15 initial---

16          Q     (interposing) But no one else called you?

17          A     No anonymous call, no, ma'am.

18          Q     Not that you recall?

19          A     Yes, ma'am.

20          Q     In Petitioner's Exhibit Number 4, there's a report  
21 of analysis that's attached to the end of that exhibit--at  
22 the end of that exhibit and is entitled Report of Analysis.  
23 Do you see that?

24          A     Yes, ma'am.

25          Q     Can you tell me where these samples were pulled?

1           A     Specifically, no, ma'am. I know somewhere on the  
2 creek but not exactly where.

3           Q     You don't know where they were pulled, any of  
4 them?

5           A     No, ma'am.

6           Q     Okay.

7                     (Pause.)

8           Q     Did you have any concerns--when Mr. Register's  
9 tanker was coming across that middle berm between the  
10 lagoons, did you have any concerns about the integrity of  
11 that berm or small little roadway between the two lagoons and  
12 that tanker going back and forth?

13          A     More so with the north point up there than with  
14 the middle--a lot of--it was actually making some pretty big  
15 ruts, so that was one of the decisions we used to discontinue  
16 doing that.

17          Q     And then when you discontinued doing it, just  
18 indulge me, please, and explain to me exactly what you did.

19          A     We took a hose and started pumping out of the  
20 creek directly into lagoon number 2 at that point.

21          Q     And where did you get the hose?

22          A     Register had it.

23          Q     You've used Register a lot through the years?

24          A     Yes, ma'am.

25          Q     And so you have a really good working relationship

1 with Register?

2 A Well, yes, ma'am. We work with them.

3 Q And is it fair to say the operator in charge  
4 also--Joe Teachey also has a good relationship with  
5 Register's?

6 A He knows them. Yes, ma'am.

7 Q Thank you.

8 Ms. Jones: If you could just give me a  
9 minute, Your Honor?

10 The Court: Okay.

11 (Pause.)

12 Q Just one final question, Mr. Howard: can you tell  
13 me why you would put something back into your lagoon if you  
14 didn't know what you were putting into your lagoon?

15 A Are you asking me why I cleaned it up?

16 Q No, I'm asking you why you would put a substance  
17 into your lagoon without knowing the constituents of that  
18 substance.

19 A We were just concerned about trying to help get it  
20 cleaned up I mean, and that was my call. I mean that was  
21 nobody else's call. I mean I just wanted to--I didn't really  
22 even think about that. I just wanted to try to help get  
23 whatever that was cleaned up.

24 Ms. LeVeaux: Thank you. No further  
25 questions.

1                   The Court:                   Okay. Let me ask, because I  
2 know we promised Ms. LeVeaux that we would end in just a  
3 couple of minutes here. Do you have a couple of questions or  
4 do you think---

5                   Mr. Jones:                   (interposing) What time is it,  
6 Your Honor?

7                   The Court:                   I've got that it's almost  
8 quarter till. I've got it's 20 till, and I know we promised  
9 her we would end at 4:45. So if you have five minutes of  
10 questions or if this is a good---

11                   Mr. Jones:                   (interposing) Well, then,  
12 let's---

13                   The Court:                   (interposing) Or is this a  
14 good stopping point?

15                   Mr. Jones:                   Let's cut off in five minutes.

16                   The Court:                   Okay.

17                   Mr. Jones:                   We might be able to finish him  
18 today.

19                   The Court:                   Okay.

20                   (Pause.)

21                   Mr. Jones:                   Well, maybe we ought to just  
22 stop, maybe--for safety's sake I mean.

23                   The Court:                   That sounds good. That being  
24 the case, we will adjourn for the day and come back tomorrow.  
25 Is 9:30 a good time for you-all? I'd to go a little earlier

1 so---

2 Mr. Jones: (interposing) That's fine.

3 The Court: That being the case, we're  
4 adjourned until tomorrow at 9:30.

5 (The hearing was adjourned at 4:43 p.m. to  
6 reconvene at 9:30 a.m. on Wednesday, October 26,  
7 2011. In a later discussion off the record, the  
8 time for reconvening was changed to 10:00 a.m.)

STATE OF NORTH CAROLINA

COUNTY OF WAKE

C E R T I F I C A T E

I, Kay K. Rohde, do hereby certify that the foregoing pages 6 through 163 represent a true and accurate transcript of the proceedings held at the Office of Administrative Hearings on Tuesday, October 25, 2011.

I do further certify that the witness on this day of the proceedings in the above action was duly sworn or affirmed by me in my capacity as a notary public in and for the County of Wake, State of North Carolina.

I do further certify that I am not counsel for or employed by any party to this action, nor am I interested in the results of this action.

In witness whereof, I have hereunto set my hand this 26th day of November, 2011.

---

Kay K. Rohde, CVR-CM  
Notary No. 19971050205