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STATE OF NORTH CAROLINA COUNTY OF DUPLIN		IN THE OFFICE OF ADMINISTRATIVE HEARINGS 10 EHR 5508
HOUSE OF RAEFORD FARMS, INC., Petitioner, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER QUALITY, Respondent.	)	PETITIONER HOUSE OF RAEFORD FARMS, INC.'S SUR-REPLY TO RESPONDENT'S REPLY TO PETITIONER'S RESPONSE TO RESPONDENT'S PROPOSED REVISED DECISION

NOW COMES HOUSE OF RAEFORD FARMS, INC. ("Petitioner"), by and through undersigned counsel, and hereby submits the following Sur-Reply to Respondent's Reply to Petitioner's Response to Respondent's Proposed Revised Decision:

1. Petitioner re-asserts the objections and argument set forth in its Reply to Petitioner's Response to Respondent's Proposed Revised Decision.

2. In its Reply, Respondent argues that "Petitioner is attempting, based on certain language in the Court of Appeals' decision, to claim that the Court of Appeals has <u>already</u> concluded that the testimony in the record from Mr. Poupart (as opposed to the Findings of Fact regarding his testimony) is inadequate to support the civil penalty assessment." (Resp. Reply, p. 3.) Respondent completely misapprehends Petitioner's argument. Petitioner's argument is that (1) the record reflects that Mr. Poupart was asked about each penalty factor; (2) Mr. Poupart provided testimony regarding each penalty factor; (3) and this Court should determine that Mr. Poupart's testimony on each factor is insufficient to support a $25,000 penalty.

3. Respondent also argues: "If Petitioner's current position is that the ALJ may only consider Mr. Poupart's testimony and that the testimony of Mr. Poupart in the existing record is inadequate, Respondent is puzzled as to why Petitioner does not simply inform the ALJ that the hearing should be re-opened for additional testimony." (Resp. Reply, p. 4.) Respondent should be reminded that Petitioner initially did ask for additional hearing, but Respondent maintained that there was no need to reopen the record to take additional testimony. After further consultation, Petitioner agreed at the status conference before the ALJ to forgo a hearing and to work from the existing record. Mr. Poupart provided testimony on each penalty factor. It is not the testimony that Respondent might desire, but it is testimony on each and every factor, and the testimony supports Petitioner's opinion that a $25,000 penalty was improper. Petitioner has absolutely no reason to request additional testimony that would allow Mr. Poupart a second chance to enhance his responses to the exact same questions that were already asked. His assessment consideration was inherently flawed, as reflected in his original testimony, and he does not get to correct those flaws some six year after coming to his original decision.

4. Respondent contends that this Court should consider testimony from other witnesses as support for Mr. Poupart's penalty decision, going so far as to say that "Mr. Poupart had available to him the testimony and evidence presented to this Court during the 2011 hearing." (Resp. Reply, p. 5.) Obviously that is not the literal case. The hearing took place in late 2011 over a year after Mr. Poupart assessed his penalty, lasted over a week, and included detailed questioning of and testimony provided by numerous witnesses. Even if the testimony given at that hearing was "available" to Mr. Poupart, which is denied, that does not mean that he obtained that information or used it in reaching his decision. Mr. Poupart himself noted that while he received the region's recommendation of assessment factors, he looked at that opinion and weighed it

against his experience from other cases "and use[d] portions of it in my factors consideration." (T. p. 1176, emphasis added.) Only Mr. Poupart can testify as to what he considered during his penalty consideration and what portions of information available to him factored into his decision.

5. As outlined in Petitioner's previous filings, Mr. Poupart was asked about each and every penalty assessment factor and the specifics of what he considered as to each. He did not list or describe the type of testimony from other witnesses that Respondent would have this Court enter as supplemental findings of fact as set forth in Respondent's Proposed Decision, Paragraphs 69 – 76. Respondent proposes over six pages of single-spaced supplemental findings of fact that allegedly support Mr. Poupart's penalty assessment. (Resp. Proposed Decision, pp. 16 – 22, paragraphs 69 - 76.) Within those paragraphs and sub-paragraphs, there are some 57 citations to the hearing transcript. Only 18 of those citations are to testimony of Mr. Poupart. In other words, two-thirds of the testimony upon which Respondent's proposed penalty assessment rests come from individuals that (a) were not responsible for the assessment decision and (b) were testifying at a hearing long after the assessment decision had already been made.

6. Petitioner respectfully requests that this Court enter the Proposed Findings of Fact and Conclusions of Law Regarding Civil Penalty previously submitted by Petitioner.

This the 29th day of August, 2016.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was this day served upon the below-named persons via email and by depositing a copy of the same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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This the 29th day of August, 2016.

By: /s/ Lori P. Jones
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