

parties' submission of materials, including but not limited to supporting briefs, final arguments and proposals after receipt of the official transcript. All materials were received by the Undersigned from both parties on or about March 6, 2012. By Order dated April 20, 2012 signed by Julian Mann, III, Chief Administrative Law Judge, the due date for the Decision was extended to June 4, 2012. The ALJ's decision was filed and the matter closed at the OAH on or about May 31, 2012 ("Original Decision"). The decision upheld the imposition of a \$25,000.00 fine for violation of N.C. Gen. Stat. § 143-215.1(a)(6) but found the imposition of \$25,000.00 fines for violations of 15A NCAC 2B.0211(3)(b) and 15A NCAC 2B .0211(3)(c) were in error. The enforcement costs charged against HORF were reduced by two thirds.

Petitioner and Respondent both filed timely exceptions and objections to the ALJ's decision and requested oral argument before the Environmental Management Commission ("EMC"). The Final Agency Decision adopted in part and rejected in part the Decision of the ALJ. The EMC issued its Final Agency Decision ("EMC's Decision") imposing a total civil penalty of \$50,000.00 and enforcement costs of \$905.30 against Petitioner House of Raeford Farms, Inc. ("HORF"). The Commission vacated that portion of the civil penalty assessment imposing a \$25,000.00 penalty for violation of 15A NCAC 2B 0211(3)(b). The electronic filing system at the OAH has the Office of Administrative Hearings receiving the Final Agency Decision on October 9, 2012.

On November 9, 2012, Petitioner filed a Petition for Judicial Review of the EMC's Decision in the Duplin County Superior Court. Following a hearing, on May 30, 2014, the Superior Court issued its decision, reflecting the prior decision of the ALJ, and imposed a single \$25,000.00 fine and enforcement costs of \$452.65 against Petitioner.

Petitioner and Respondent both appealed the Superior Court's decision. Following oral argument, the North Carolina Court of Appeals issued its decision on July 21, 2015, remanding the case "to the finder of fact for further findings regarding House of Raeford's actions, timeliness and other evidence in light of the eight statutory factors set forth in N.C. Gen. Stat. § 143B-282.1(b), and for further consideration of the amount of any civil penalty to be imposed." (See part VIII. Conclusion, Opinion of the Court).

The matter was remanded to the Office of Administrative Hearing by the Environmental Management Commission on March 23, 2016 and assigned to ALJ Augustus B. Elkins II. Pursuant to the Notice and Order filed April 29, 2016 in the OAH, the parties provided proposals for a supplemental proposed decision consistent with the July 21, 2015 Court of Appeals decision by July 29, 2016.

On August 6, 2016, Petitioner filed Petitioner's Response to State's Proposed Revised Decision. On August 23, 2016, Respondent filed Respondent's Reply to Petitioner's Response to Respondent's Proposed Revised Decision. On August 29, 2016, Petitioner filed Petitioner House of Raeford Farms, Inc.'s Sur-Reply to Respondent's Reply to Petitioner's Response to Respondent's Proposed Revised Decision. On September 7, 2016, Respondent filed Respondent's Response to Petitioner's Sur-Reply filed August 29, 2016.

APPEARANCES ON REMAND

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

For Respondent: Anita LeVeaux
Mary L. Lucasse (notice of appearance filed July 27, 2016)
Special Deputy Attorneys General
North Carolina Department of Justice
Raleigh, North Carolina

RECORD OF THE CASE

(at the Office of Administrative Hearings)

Witnesses

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

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

Exhibits**For Petitioner:**

Ex. 1	Civil Penalty Assessment
Ex. 2	Notice of Violation to Petitioner dated 10/15/09
Ex. 3	Letter from R. Johnson to R. Shiver dated 10/23/09

Ex. 4	Letter from C. Howard to M. Rechtman dated 03/18/10
Ex. 5	Register's Septic Tank Pumping Statement dated 09/21/09; Purchase Order to Register's; Check to Register's dated 10/22/09
Ex. 6	Report of Environmental Chemists dated 10/08/10; Chain of Custody dated 09/28/10
Ex. 7	Report of Environmental Chemists dated 09/30/10; Chain of Custody dated 09/07/10
Ex. 8	Photographs labeled U and V
Ex. 9	Photographs labeled W and X
Ex. 10	Curriculum Vitae of James K. Holley, P.G.
Ex. 11	Document regarding monitoring results at Valley Protein, 03/26/06 – 01/15/09
Ex. 12	Handwritten document entitled "Storm Water Permit & Site Inspection"
Ex. 13	Notice of Violation to Valley Proteins dated 05/11/09 and Compliance Inspection Report dated 04/22/09
Ex. 14	Letter to R. Shiver from D. Frey dated 05/27/09
Ex. 15	Letter to L. Willis and J. Conway from E. West dated 06/16/09, with aerial photograph
Ex. 16	Letter to DWQ from D. Frey dated 06/26/09, with monitoring report
Ex. 17	DWQ Laboratory Results dated with handwritten date 10/06/09, with sample information from 09/24/09
Ex. 18	Compliance Inspection Report for Duplin Wine Cellars dated 04/21/09
Ex. 19	Compliance Inspection Report for Duplin Wine Cellars dated 06/23/09
Ex. 20	Compliance Inspection Report for Duplin Wine Cellars dated 07/08/09
Ex. 21	Compliance Inspection Report for Duplin Wine Cellars dated 09/23/09
Ex. 22	Compliance Inspection Report for Duplin Wine Cellars dated 09/24/09
Ex. 23	Compliance Inspection Report for Duplin Wine Cellars dated 07/22/10
Ex. 24	Compliance Inspection Report for Duplin Wine Cellars dated 09/15/10
Ex. 25	Notice of Violation to Duplin Winery dated 10/15/10
Ex. 26	PowerPoint presentation by James K. Holley, P.G.
Ex. 27	Handwritten Field Notes of Rufino Salgado
Ex. 28	Summary of DWQ Sampling Data
Ex. 29	Summary of DWQ and EPA Sample Data
Ex. 30	Civil Penalty Assessment Factors prepared by Jeff Poupart 08/10/10
Ex. 31	Civil Penalty Assessment Factors by M. Matthew, not signed or dated
Ex. 32	Photographs labeled Y and Z

Ex. 33	Cavanaugh Invoice dated 09/14/09; Check to Cavanaugh dated 09/16/09
Ex. 34	DWS Memorandum re Fish Kill on Beaverdam Branch dated 04/07/09
Ex. 35	Email from S. Pettergarrett to L. Willis dated 09/25/09
Ex. 36	Email from R. Salgado to L. Willis dated 10/02/09
Ex. 37	Email from S. Pettergarrett to R. Salgado and L. Willis dated 10/14/09
Ex. 38	DWQ Memorandum re Enforcement Recommendation dated 11/13/09 [redaction in original exhibit]
Ex. 39	Letter from C. Howard to C. Stehman dated 08/12/10, unsigned
Ex. 40	Larger aerial photograph of site, image dated 03/19/07
Ex. 41	Smaller aerial photograph of site, image date 03/06/10
Ex. 42	PowerPoint presentation by James K. Holley, P.G. – Rebuttal Testimony

For Respondent:

Ex. 1	Corporate information on Petitioner
Ex. 2	Permit Extension and Return of Renewal Application dated 12/23/09
Ex. 3	[Not Admitted]
Ex. 4A	DWQ and EPA Sample Data
Ex. 4B	EPA Beaver Dam Release Summary and Report [Redacted]
Ex. 5A	Calibration Records, 09/10/09
Ex. 5B	Calibration Records, 09/15/09
Ex. 5C	Calibration Records, 09/18/09
Ex. 5D	Calibration Records, 09/21/09
Ex. 5E	Calibration Records, 09/23/09 by Salgado
Ex. 5F	Calibration Records, 09/23/09 by Willis
Ex. 5G	Calibration Sheet, 09/23/09
Ex. 5H	Environmental Chemists Report with Chain of Custody, 09/23/09
Ex. 5I	Environmental Chemists Report with Chain of Custody, 09/24/09
Ex. 5J	Environmental Chemists Report with Chain of Custody, 09/25/09 (sampled 09/18/09)
Ex. 5K-1	Environmental Chemists Report with Chain of Custody, 09/25/09 (sampled 09/23/09)
Ex. 5K-2	Environmental Chemists Report with Chain of Custody, 09/30/09
Ex. 6	Figure 1 - Dissolved oxygen levels on 09/10/09
Ex. 7	Figure 2 - Dissolved oxygen levels on 09/15/09
Ex. 7A1 - 7A10	DWQ Lab Results
Ex. 8	Figure 3 - Dissolved oxygen levels on 09/23/09
Ex. 9	Figure 4 - Physical parameters on 09/10/09 and 09/15/09
Ex. 10	Figure 5 - Photo locations

Ex. 11A – 11B	Figures 6 and 7 - Photo locations
Ex. 12	Figure 8 – Stream identification and sample locations
Ex. 13, 13A-13U	Cabin Branch Stream Walk photographs and maps
Ex. 14A-14AA	Photographs
Ex. 15 (LW1-32)	Photographs
Ex. 16	Northeast Cape Fear by Land
Ex. 17A	Field Notes
Ex. 17B	Travel Log and information
Ex. 18	Chain of Custody, 09/23/09
Ex. 19A	Resume of Bongkeun Song
Ex. 19 B	[Not Admitted]
Ex. 19C	Email correspondence
Ex. 20	Notice of Violation dated 10/15/09
Ex. 21	Letter to R. Shiver from R. Johnson dated 10/23/09
Ex. 22	DWQ Memorandum re Enforcement Recommendation dated 06/22/10
Ex. 23	Civil Penalty Assessment Factors by M. Matthews, unsigned and undated
Ex. 24A	Civil Penalty Assessment Factors by Jeff Poupart dated 08/10/10
Ex. 24B	Assessment History run date 10/24/11
Ex. 24C	Notice of Violation dated 09/007/04 with Compliance Inspection Report
Ex. 24D	Letter to R. Johnson from T. Croft dated 03/23/07 with Compliance Inspection Report
Ex. 24E	Letter to T. Croft from C. Murray dated 04/23/07
Ex. 24F	Letter to R. Johnson from E. Carey dated 01/05/09 with Compliance Inspection Report
Ex. 24G	Notice of Violation dated 08/06/10 with Compliance Inspection Report
Ex. 25	Letter to R. Johnson from C. Sullins dated 08/10/10 re Assessment of Civil Penalties, with attachments
Ex. 26	Petition for Contested Case Hearing with attachments
Ex. 27, 27A – 27KK	PowerPoint presentation by James K. Holley, P.G.
Ex. 28A	Map
Ex. 28B	Map
Ex. 29	Resume of James B. Bushardt, P.E.
Ex. 30	Resume of Richard “Rick” Shiver
Ex. 31	Non-Discharge Application Report Spray Irrigation Sites
Ex. 31A	Spray Irrigation Records
Ex. 32	Handwritten log of Joseph Teachey

Ex. 33	Excerpts of Teachey Deposition
Ex. 34	Resume of James B. Bushardt, P.E.

FINDINGS OF FACT

1. The Administrative Law Judge has determined that it is not necessary to reopen the record to take additional testimony or receive further exhibits as the existing record contains all sufficient testimony and evidence necessary to support the supplemental findings of fact and conclusions of law contained in this decision. All prior findings of facts issued in the original decision are hereby incorporated by reference.

2. The documents relied on in assessing the civil penalty against HORF for violating N.C. Gen. Stat. §143-215.1(a)(6) include but are not limited to Respondent's Exhibits 1 through 18 and 20 through 25. Jeff Poupart testified that he "was not limited in any way" and considered not only the region's assessment factors but weighed the factors against his experience in other cases. (T p 1176) In addition, Poupart considered information received from and the opinions of the DWQ and EPA employees who investigated the incident including testimony from Linda Willis, Geoff Kegley, Rick Shiver and Kenneth Rhame. Poupart did not visit HORF's facility.

3. According to N.C. Gen. Stat. §143B-282.1(b), the final agency decision in contested cases that arise from civil penalty assessments shall be made by the Commission. In the evaluation of each violation, the Commission shall recognize that harm to the natural resources of the State arising from the violation of standards or limitations established to protect those resources may be immediately observed through damaged resources or may be incremental or cumulative with no damage that can be immediately observed or documented. Penalties up to the maximum authorized may be based on any one or combination of the following factors:

- (1) The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation;
- (2) The duration and gravity of the violation;
- (3) The effect on ground or surface water quantity or quality or on air quality;
- (4) The cost of rectifying the damage;
- (5) The amount of money saved by noncompliance;
- (6) Whether the violation was committed willfully or intentionally;
- (7) The prior record of the violator in complying or failing to comply with programs over which the Environmental Management Commission has regulatory authority; and

(8) The cost to the State of the enforcement procedures

4. There is testimony and evidence in the record relating to each of the factors as set forth with specifics below.

5. The testimony and evidence in support of the first factor includes testimony that the unauthorized discharge of untreated sludge into the Cabin Branch Creek significantly harmed the natural resources of the State, removed the protected “best uses” of these waters, and posed a threat to public health.

- a. Cabin Branch and Beaverdam Branch are classified as Class C-SW waters (swamp waters) of the State and are located in the Cape Fear River Basin. Class C-SW waters characteristically have low velocities and are fed by wetland and low-lying areas. (T pp 637, 944-46) When the sludge discharge was added to these natural factors, the result was that the water in the creek was not running downstream, the creek was not flowing, and the flow of the creek was “nonexistent.” (T pp 77-8) Further, there was a double-digit fish kill observed floating on the surface of the creek. (T p 1000) The sludge in the creek has an overall “adverse effect on the water environment, sort of summarizing ecosystem effects, aesthetics, [and] propagation.” (T p 1179)
- b. Willis and Kegley drove to the downstream location where the problem had been identified and worked upstream to identify the source of the problem. (T pp 627-28, 830; Resp. Ex. 22) At the first stop, the bridge over Beaverdam Branch at Brooks Quinn Road, Willis observed an organic brown film that “looked like a biomass, sludgy . . . like greasy brown material floating all over the surface of the water.” (T p 628-29) Willis tracked the sludge upstream to the creek behind the HORF facility. Willis testified, “I’ve never seen anything like that in my life.” “[T]he creek was just full of sludge from bank to bank and as far as the eye could see. It was an unbelievable sight. . . . The sludge standing in the creek was very thick.” (T p 642) The sludge was fresh, a light brownish tan color: “It starts out looking like a milkshake and then as it decomposes, it gets [darker] because of the septicity[.]” (T p 643) The sludge adhered to the shoreline and was so thick on the surface of the water that it had ridges. (T p 643-44) Willis determined the point of origin (where the sludge entered the creek) by identifying the freshest sludge. Willis also walked upstream to the adjacent property line. There was nothing in the water upstream of the ditch adjacent to the south side of the HORF lagoon system. (T p 645) Upstream, the water was clear. (T p 646)
- c. Sludge allows significant exposure for potential disease and pathogenic bacteria and viruses to affect wildlife health. (Resp. Ex. 21) As wildlife is intimately connected to the natural environment, wildlife sickness will undoubtedly affect the natural resources within their habitats.
- d. Sampling data showed numbers that were “far below what would be typical” which would have a “severely adverse effect on [the] water environment.” (T p 1179)

Aquatic life in the creek ecosystem would be “completely choked off” by the solids that were bank to bank. (T p 1179) The harm to natural resources is evident by the sludge blanketing the creek and fish kills occurring throughout the creek.

- e. The presence of sludge presents a danger to public health. The ditch near Cabin Branch Creek was “full of black septic wastewater with putrid odor”, with septic being a word intermittent with decay. “It’s often associated with a description of sewage.” (T p 233) At the Brooks Quinn bridge crossing, a “brown film” was visible. It had the appearance of “a biomass, sludgy, like greasy brown material floating all over the surface of the water.” (T p 628) The brown material floating on the surface of the water “was not natural” in its organic composition. (T p 629) Sludge allows significant exposure for potential disease and pathogenic bacteria and viruses to affect public health.
 - f. The presence of sludge eliminates the use and enjoyment of recreational waters. The water in Cabin Branch Creek is classified as C-Sw waters, meaning that the water is available to be used for “secondary recreational use.” Secondary recreational use, while not used for swimming or body contact, is used for “boating or fishing.” (T pp 804-5) Due to the sludge in Cabin Branch Creek, this water was no longer available for boating or fishing purposes. (T pp 804-5) This discharged severely impacted the public’s aesthetic enjoyment of the public trust area and prevent any public secondary use and enjoyment of recreational waters.
6. The testimony and evidence in support of the second factor includes testimony that there was significant damage to Cabin Branch Creek for a period of at least two months from the initial discharge.
- a. Willis testified that the “amount of sludge in the creek [immediately behind House of Raeford] was unlike anything that she had ever seen.” (T p 642)
 - b. The violations were discovered on 10 September 2009. (Resp. Ex. 21) While there is no way to know exactly when the violation first occurred, the sludge was present in the creek before its discovery on 10 September 2009. Sludge takes on different characteristics depending on how long it has been released into an environment. When sludge is fresh, it has a light brown or tan appearance and does not have an odor. By the time that sludge is old, it has started decomposing and has a black appearance. Its black appearance is due to its septicity and lack of oxygen. The sludge in the creek directly behind the HORF lagoon was fresh sludge, due to its tan color and lack of odor. (T p 643) Over time as the sludge moved downstream from HORF, it took on a darker appearance, indicating it was septic. (T p 645)
 - c. The duration of this environmental event “would persist until the waste is fully digested by biological activity in the receiving stream.” In order for the waste to be fully digested, “large rain events are needed to flush this wastewater...downstream...where dilution can help minimize the impacts to the stream.” (Resp. Ex. 21) However, once a discharge of this magnitude is released,

“there’s not a lot of options once it’s already in [the] steam.” As Willis explained, “There’s no way of really retrieving it...there’s really no technique to isolate the area that has been impacted...” (T p 666)

7. The testimony and evidence in support of the third factor includes testimony that there was significant damage to water quality and air quality.

- a. Water in the creek was septic for miles. (T pp 799-801; Resp. Exs. 20 and 25). The creek was impaired all the way from the point behind HORF lagoon to Beaverdam Branch. (T pp, 810, 1193, 1044-46; Resp. Exs. 9, 13, and 14)
- b. The quantity of surface water was affected by the removal of best usage water due to floating sludge and film. Best usage of waters refers to water for “aquatic life propagation, maintenance of biological integrity (including fishing and fish), wildlife, secondary recreation, agriculture and any other usage except for primary recreation or as a source of water supply for drinking, culinary or food processing purposes.” (T pp 945-6) In an effort to rid the creek of sludge, HORF hired a contractor with a tanker truck to pump the sludge from the creek into one of their lagoons. During this four-day period of pumping sludge out of the creek, HORF extracted approximately 1,000,031 gallons of water intermixed with sludge. (Resp. Ex. 21) This extraction of over one million gallons of water affected the quantity of water in a presently low flow system. (T pp 101, 623)
- c. The quality of surface water was affected by the fact that despite pumping over one million gallons of water out of the creek, sludge was still present. (T p 96) The sludge present in the creek was “septic for a significant stretch.” (Resp. Ex. 24) Poupart explained that he knew the water was septic because “the dark color [of the stream indicated from the photographs] and the depressed levels would indicate septic conditions.” (T p 1201) Following the cleanup efforts, it took approximately three weeks to a month before there was a rainfall that could flush out the sludge in the water. (T p 96) Thus, damage done to the creek could not be fully mitigated.
- d. The quality of surface water was affected by input of nutrients and fecal coliform bacteria. The depressed water levels fell “below water quality standards for Class Sw of the State.” (Resp. Ex. 23) These depressed levels choked off aquatic life and ultimately depleted aquatic life in areas affected by sludge. The depressed levels also caused a significant stretch of the creek downstream of HORF to turn septic. (T p 1180) In an attempt to rebuild the steam, excessive amounts of nutrients were pumped into the creek, resulting in excessive growth of aquatic vegetation. (Resp. Ex. 23)
- e. The quality of surface water was affected by the excessive concentrations of fecal coliform bacteria. Two fecal coliform samples were taken: one at Beaverdam Branch and Brooks Quinn Road crossing, and another directly behind the HORF facilities. (T pp 777-78; Resp. Ex. 5H) The fecal coliform sample taken at

Beaverdam Branch and Brooks Quinn Road crossing downstream of HORF showed 27,000 fecal coliform bacteria colonies per 100 ml. The second fecal coliform sample taken directly behind HORF showed over 60,000 fecal coliform bacteria colonies per 100 ml. (T p 778; Resp. Ex. 5H) These unwarranted concentrations of fecal coliform bacteria pose enormous public health concerns for exposure to disease causing bacteria and viruses.

- f. The air quality was affected by the foul odor of sludge. The discovery of sludge originated from an anonymous caller complaining about the odor from the creek. (T p 624) Downstream from HORF, the smell at the Sheffield and Brooks Quinn Beaverdam Branch crossings, was foul.
8. The testimony and evidence in support of the fourth factor includes testimony that the cost of rectifying the damage was significant.
 - a. The cost of cleanup, pumping solids and waste out of the creek, would be a significant cost, uncalculated at the time the report was created. (T p 1180) Although Poupart knew at the time of his recommendation that HORF had been billed \$20,000.00 for pumping one million gallons of water and sludge from the creek, he was unsure of what the final cost would be. (Pet. Ex. 5; Resp. Ex. 21; T p 1203) Poupart explained that many “cleanups take weeks and months” and that his recommendation letter “was written only a month after the incident occurred. So we have cleanups that last years, so I didn’t know if that was the final cost or just the preliminary billing they had received.” (T p 1203)
 - b. The damage done to the creek cannot be rectified either short or long term. “No measures could be taken to mitigate the effects of the sludge and wastewater in the received stream.” These effects include “nutrient loading, depressed water readings, excessive concentrations of fecal coliform bacteria, increase in turbidity, and effects to the aesthetic qualities of the Branches.” (Resp. Ex. 23)
 9. The testimony in support of the fifth factor includes testimony that HORF saved money by not properly managing their waste.
 - a. The amount of money saved by noncompliance would be “[the] cost of properly managing the water.” (T p 1180) There was no ability to figure out exactly what the cost would have been to properly manage that waste if it had to be hauled off or spread on fields. (T p 1181) In or around September 2009, HORF had to replace a valve in their primary lagoon. (T pp 1229-34) Clay Howard, CFO of HORF, did not shut down the facility and continued operating during the three-day valve prep and replacement. (T pp 1234-36) When asked what the cost would be for HORF to shut down their facility in order to replace the valve, Joe Teachey was unable to give a ballpark number, saying “you’ve got 650 employees times \$10 times eight hours. And then you’ve got the market.” (T p 1501)

- b. HORF adds a million gallons of wastewater to Lagoon 1 each day. The lagoon is designed to hold seven million gallons but is choked in most areas with thick vegetation and solids. (T pp 792) This lagoon has never been cleaned out, and “as those solids build up in time, you lose effective treatment capacity.” (T p 1047) Cleaning out the lagoon is necessary to maintain adequate storage capacity. (T pp 792-93, 1052) The level of the wastewater in the HORF’s lagoons was chronically high. (T p 1341 and 1046-47) HORF saved money by not properly managing their waste.
10. The testimony in support of the sixth factor includes testimony that HORF willfully and/or intentionally discharged waste without a permit.
- a. The violation by HORF in illicitly discharging waste without a permit was committed willfully or intentionally. When investigating the violation, there was “no indication of an accident” and there was “sufficient freeboard in lagoons.” This indicated that “there had not been a breach of the lagoon or some kind of accident that had caused” the discharge, such as “a pipe bursting.” There was “sufficient freeboard in the tertiary, the pumping lagoon, and the secondary lagoon” indicating that it “wasn’t a matter of rainfall, often like a hurricane or a severe weather event, or some event that would have caused them to overtop the lagoon.” Furthermore, there was no evidence of a breach in the dike wall, no break in the wastewater line from the secondary lagoon to the spray field and thus, no sign that an accidental release occurred. (T p 1181)
- b. It was concluded by Willis at DWQ that the sludge in the creek was the same as the sludge in the HORF lagoon. Due to the fact HORF obtained no permit to discharge the sludge from their primary lagoon to the creek, they allowed “waste to be introduced directly or indirectly into the waters of the state.” (T p 803) Willis concluded that the discharge was “illicit” and she considered the discharge to be “willful and intentional, because it wasn’t accidental.” (T pp 879, 809) Willis provided her conclusion that the sludge and wastewater were intermixed into Cabin Branch willfully or intentionally in her summary of the incident that was reviewed by Poupart.
- c. When asked if he believed the release was intentional due to the absence of an accident, Poupart explained that he’d “been trained that the bar for willful and intentional is quite high and that this factor is rarely used or not used often.” He went on to further explain “the bar is so high to prove an intentional nature, so if it had been direct witness of the incident or something like that, but we did not have that.” (T p 1204-05) Not taking into account how the waste got into the creek, but simply given the fact that waste was present in the creek, Poupart concluded that the discharge was “intentional, but not willful.” (T p 1206)
11. The testimony and evidence in support of the seventh factor includes testimony that HORF has a significant amount of penalties and actions assessed against them.

- a. Testimony revealed that HORF had “at least 25 CPA, which means civil penalty assessments and several other actions and that this was a significant factor.” (T p 1181) HORF was assessed a total of \$932,669.50 in civil penalty assessments and other actions as of 2011. However, DWQ is only allowed to consider the factors dating five years back from the date of violation which occurred in 2009. (Resp. Ex. 24B; T pp 1182-3)
 - b. From 2004-09, HORF had 10 cases assessed against them totaling \$99,506.96. (Resp. Ex. 24) Poupart concluded that these numerous cases assessed against HORF demonstrate HORF’s disregard for regulatory authorities and practices.
12. The testimony and evidence in support of the eighth factor includes testimony that the State enforcement costs were moderately significant.
- a. The cost to the State of the enforcement procedures would be moderately significant.” (T p 1181) The enforcement procedures to the State depend on the sampling costs, travel or preparation costs for a case. (T p 1182)
 - b. An Environmental Engineer worked on the case for 24.5 hours at a rate of \$33.34 an hour, totaling \$816.83. An Environmental Sr. Tech. worked for 8 hours at a rate of \$31.94 an hour, totaling \$255.52. A Ford Explorer was used for 222 miles at a rate of \$0.53 per mile, totaling \$117.66. A Ford Expedition was used for 311 miles at a rate of \$0.52 per mile, totaling \$167.94. The amount of these enforcement costs come to a total of \$1,357.95. (Resp. Ex. 22)
13. As stated above, all Findings of Fact as set forth in the Undersigned’s May 2012 Decision are hereby incorporated by reference to stand with these specific findings with regard to the eight statutory factors set forth in N.C. Gen. Stat. § 143B-282.1(b).

CONCLUSIONS OF LAW

1. The Office Administrative hearings has personal and subject matter jurisdiction over this contested case and, as the finder of fact in this matter, is the proper tribunal on remand to make specific findings with regard to the factors set forth in N.C. Gen. Stat. § 143B-282.1(b). To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.
2. The Petitioner, is a person within the meaning of North Carolina Gen. Stat. § 143-215.6A, pursuant to North Carolina Gen Stat. § 143-212(4).

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

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

5. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." See also *Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619 (1961). The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), *aff'd*, 343 N.C. 119, 468 S.E. 2d 57 (1996); *Comm'r of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "It is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982). In weighing evidence which detracts from the agency decision, "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand" *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983) (citations omitted).

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

7. Though there is no direct evidence of a release of sludge material from the House of Raeford Farms, in weighing evidence which detracts from the agency decision on the above matters including analysis and hypothesis presented founded on studies some 16 months after the incident cited, the Undersigned finds that competent evidence supports the agency's ruling regarding a discharge of waste into the waters of the State without a permit. Besides the similarities of material found in the lagoon(s) of Petitioner and Cabin Branch Creek, the Undersigned finds persuasive two further facts. First, DWQ observed no sludge upstream of the House of Raeford facility. The water upstream from the House of Raeford facility was reflective and clear and there

was no oily, greasy material, and nothing in the vegetation. Second, though Petitioner is applauded for voluntarily offering and indeed cleaning up the creek, the Undersigned is struck with the fact that Petitioner, rather than hauling the material away, chose to place the material into its own lagoons. Testimony revealed that it is unheard of to accept unknown contaminants, such as sludge, back into lagoons without characterizing the contaminant first. Unknown contaminants are not accepted by treatment systems due to the potential for unknown materials in the contaminants to cause an imbalance in the lagoon's biological system as well as the risk to the lagoon owner of liability for clean-up of potentially restricted materials.

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

9. North Carolina Court of Appeals remanded this case to “formulate the amount of any civil penalty to be imposed.” (see part V, Violation of N.C. Gen. Stat. § 143-215.1(a)(6), Opinion of the Court).

10. The Court instructed that further consideration be given to “the amount of any civil penalty to be imposed.” (see part VIII, Conclusion, Opinion of the Court).

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

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

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

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

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

16. The regulation the Agency is citing to fine Petitioner for “allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State,” is simply a water standard. The violation of this water standard is governed by the statute which sets the authority for violations and fining. Assessing two civil penalties against HORF, once for a violation of the water quality standard for settleable solids and sludge contained in 15A NCAC 2B .0211(3)(c) and again under N.C. Gen. Stat. § 143-215.6(a), is in truth and fact, fining Petitioner twice for the same violation.

17. DWQ impermissibly assessed a \$25,000.00 penalty for violation of the statute and an additional \$25,000.00 penalty for violation of the water quality standards upon which the statutory offense rests. Doing so constituted an impermissible excessive penalty given that Petitioner was penalized twice for the same violation and the maximum penalty of \$25,000.00 had already been reached.

18. One penalty of \$25,000.00 was reasonably and properly assessed by Respondent against HORF for violation of N.C. Gen. Stat. § 143-215.1(a)(6) based on the finding that HORF caused or permitted waste to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards for sludge and settleable solids applicable to Class C-Sw waters of the State set forth in 15A NCAC 2B .0211(3)(c).

19. In assessing the amount of the penalty, DWQ properly considered all factors required by law.

20. In arriving at its final agency decision, the Commission is also required to consider the factors set forth in N.C. Gen. Stat. § 143B-282.1 (b) and (c) as required by law.

21. A civil penalty up to \$25,000.00 (the maximum authorized by law) may be established as described in N.C. Gen. Stat. § 143B-282.1(b). Though N.C. Gen. Stat. § 143B-282.1(b) allows for penalties up to the maximum to be based on any one or combination of eight factors, DWQ found all eight factors present in order to assess a maximum \$25,000.00 penalty. Depending on the circumstances of the case, the maximum penalty could be assessed even if fewer than eight factors had been found.

22. Given the sufficiency of evidence in the record, the Undersigned affirmatively finds there is adequate support for the civil penalty assessed against HORF in the amount of \$25,000.00 and that amount should stand.

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

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

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

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

PROPOSAL FOR DECISION ON REMAND

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

Based on those conclusions and the facts in this case, the Undersigned holds that Petitioner failed to carry its burden of proof by a greater weight of the evidence that Respondent was unreasonable in finding Petitioner violated North Carolina Gen. Stat. § 143-215.1(a)(6) by causing or permitting a waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications without a permit. Further Petitioner failed to carry its burden of proof that Respondent's fine of \$25,000.00 plus \$452.65 in investigation costs was unreasonable. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Petitioner's evidence does not overbear in that degree required by law the weight of evidence of Respondent in this regard. For the above stated reasons, the Undersigned finds that Petitioner, House of Raeford Farms, Inc. was properly assessed a civil penalty of \$25,000.00 plus \$425.65 in investigative costs for a total amount of \$25,425.65.

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

NOTICE

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

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

The agency that will make the final decision in this case is the North Carolina Environmental Management Commission.

IT IS SO ORDERED.

This the 23rd day of August, 2017.



Augustus B Elkins II
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 23rd day of August, 2017.



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