Elkins

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,

Respondent.

PETITIONER'S OBJECTION TO RESPONDENT'S AMENDMENT TO ITS AMENDED PREHEARING STATEMENT

NOW COMES HOUSE OF RAEFORD FARMS, INC., Petitioner, by and through undersigned counsel, and hereby objects to Respondent's Amendment to its Amended Prehearing Statement which was served on or about March 7, 2011. Petitioner incorporates herein by reference its Objection to Respondent's Proposed Expert Witnesses and Motion to Strike currently pending before the Court. Petitioner further shows unto the Court:

1. Respondent has filed both a *Response to Petitioner's Objection and Motion to Amend Prehearing Statement* ("Response") and *Respondent's Amendment to Its Amended Prehearing Statement* ("Amendment"). Petitioner objects to the Amendment for the reasons set out below and in Petitioner's original Objection and Motion to Strike.

2. At the outset, however, it must be noted that in Paragraph 1 of its Response, Respondent claims that on or about February 15, 2010, Petitioner filed an Amended Prehearing Statement without leave of court as required by Rule 15(a). This is entirely inaccurate.

3. On February 15, 2011, Petitioner forwarded a proposed Motion to Amend Initial Prehearing Statement to counsel for Respondent requesting consent to the same. Exhibit A to Respondent's Response is a copy of the proposed motion, not a copy of any motion filed with the Court as represented in Respondent's Response.

4. That same day, counsel for Respondent indicated she had no objection to the witness Petitioner sought to include on the prehearing statement. Exhibit B to Respondent's Response is a copy of the e-mail correspondence dated February 15, 2011, between counsel for Petitioner and Respondent.

5. Petitioner did not file its Motion to Amend Initial Prehearing Statement until February 17, 2011 – after receiving counsel for Respondent's consent. A true and accurate copy of the file-stamped motion to Amend Initial Prehearing Statement is attached hereto as **Exhibit A**.

6. Petitioner fully complied with Rule 15(a) of the North Carolina Rules of Civil Procedure in seeking to amend its Prehearing Statement by (1) obtaining consent from opposing counsel and (2) submitting said amendment in the form of a Motion to this Court. Notably, Rule 15(a) allows amendment of pleadings by leave of court or by written consent of the adverse party.

7. In response to Petitioner's objection to Respondent's filing of an amended prehearing statement without consent or leave of court, on or about March 7, 2011, Respondent filed its Amendment (again, an Amendment to its Amended Prehearing Statement). The purpose of the Amendment was apparently to take out any reference to expert witnesses, as noted in Paragraph 12 of Respondent's Response: "Respondent further moves to amend its Amended Prehearing Statement to exclude the designation of its witnesses as experts ..."

8. Petitioner does not object to the Amendment to the extent it removes any reference to expert witnesses.

9. Petitioner does, however, continue to object to Respondent's unfounded stance that it does not have to identify expert witnesses prior to the trial of this matter. Respondent has moved to amend its Prehearing Statement "with the understanding that such a[n] [expert] tender may be made at trial." (*See* ¶ 12, Response, emphasis added.)

10. Petitioner is entitled to information regarding Respondent's expert witnesses prior to trial, or in the alternative, is entitled to a clear indication that Respondent does not intend to call any expert witnesses.

11. In addition, for the reasons set out in its Motion to Strike, Petitioner objects to the Amendment to the extent it identifies new witnesses Charles Stehman, Rick Shiver and Dr. B.K. Song on the grounds that these individuals were not identified as potential witnesses in any capacity. The discovery period in this matter has closed, and should these individuals, or other unnamed DWQ employees be allowed to testify, Petitioner will have been prejudiced by not having the opportunity to depose these individuals.

12. Accordingly, Petitioner hereby objects to Respondent's Amendment and reiterates its Motion to Strike, again asking that the Court strike newly identified witnesses Charles Stehman, Rick Shiver and Dr. B.K. Song, that Respondent be precluded from calling as witnesses any unidentified "other DWQ" employees, and that Respondent be precluded from calling any unidentified expert witnesses.

WHEREFORE, Petitioner respectfully requests that its Objection be accepted by this Court, that its Motion to Strike be granted, that the relief requested be allowed, for such other and further relief as the Court may deem just and proper under the circumstances.

This the 10th day of March, 2011.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Objection and Motion to Strike was this day served upon the below-named persons by Hand Delivery, if so indicated, or by depositing a copy of the same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Anita LeVeaux, Assistant Attorney General
N.C. Department of Justice
Environmental Division
Post Office Box 629
Raleigh, NC 27602-0629

VIA UNITED STATES MAIL

COUNSEL FOR RESPONDENT

This the 10th day of March, 2011.

By: Henry W. Jones, Jr.
Henry W. Jones, Jr