

STATE OF NORTH CAROLINA
COUNTY OF DUPLIN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
NO. 10-EHR-5508

HOUSE OF RAEFORD FARMS, INC.,)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA DEPARTMENT OF)
 ENVIRONMENT AND NATURAL)
 RESOURCES,)
)
 Respondent.)

TRANSCRIPT OF HEARING

Before Honorable Augustus B. Elkins II
Administrative Law Judge

TUESDAY, DECEMBER 20, 2011

Courtroom B
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, North Carolina
9:30 a.m.

Volume 8 of 8
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A P P E A R A N C E SON BEHALF OF PETITIONER:

Henry W. Jones, Jr., Esquire
Lori Peoples Jones, Esquire
Jordan Price Wall Gray Jones & Carlton, PLLC
1951 Clark Avenue
Post Office Box 10669
Raleigh, North Carolina 27605-0669
(919) 828-2501,
hjones@jordanprice.com
ljones@jordanprice.com

ON BEHALF OF RESPONDENT:

Roy A. Cooper III
Attorney General
By: Anita R. LeVeaux
Assistant Attorney General
North Carolina Department of Justice
Environmental Division
114 West Edenton Street
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6875
aleveaux@ncdoj.gov

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38	memorandum, Shiver to Matthews, 11/13/09, re Enforcement Recommendation DV-2009-0046, House of Raeford Farms, Inc. Rose Hill Fresh/IQF Chicken Plant, Duplin County, North Carolina	1477	1536
39	letter, Howard to Stehman, 8/12/10, re NOV-2010-PC-0932	1377 1495	1536
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25	letter re assessment of civil penalties, DV 2009-0046, 8/10/10, with attachments	1551	
31	Non-Discharge Application Report, Spray Irrigation Site(s), House of Raeford, September 2010	1395	
31A	spray irrigation records, House of Raeford, 9/1/09 - 9/11/09	1394	1395
33	<i>House of Raeford Farms, Inc. v. North Carolina Department of Environment and Natural Resources,</i> Deposition of Joe Teachey, 5/26/01, as redacted	1475	1477
34	résumé, James B. Bushardt, P.E.	1393	1395

1 **FURTHER PROCEEDINGS** 9:36 a.m.

2 The Court: This hearing will come to
3 order. It's now 9:33 on December the 20th, 2011. All
4 parties present when we recessed are again present with the
5 exception of our last witness, who completed his testimony.

6 Ms. LeVeaux?

7 Ms. LeVeaux: Your Honor, I believe it was---

8 Mr. Jones: (interposing) Yeah, I don't
9 believe we had gone to---

10 The Court: (interposing) You're right;
11 I'm sorry.

12 Mr. Jones: Mr. Bushardt.

13 The Court: Right; there he is. Thank you.

14 (Whereupon,

15 **JAMES BUSHARDT**

16 the witness on the stand at the time of adjournment, resumed
17 the stand and testified further as follows:)

18 The Court: So let me retract my opening
19 remarks and say that all parties present when we recessed are
20 again present. And I apologize. Cross-examination, Mr.
21 Jones.

22 Mr. Jones: Thank you, Your Honor.

23 **CROSS - EXAMINATION** 9:37 a.m.

24 By Mr. Jones:

25 Q Mr. Bushardt---

1 A (interposing) Yes, sir.

2 Q ---my name is Henry Jones. Have you got
3 Petitioner--I mean Respondent's exhibit book up there? Just
4 keep that handy. I may refer to that later. I'm not going
5 to ask you about that right now. It should be a black
6 notebook.

7 A This must be it. It's not marked as Respondent's
8 notebook, though. It's *House of Raeford Farms v. DENR*. Is
9 that the correct one?

10 Mr. Jones: May I approach the witness?

11 The Court: Yes, you may.

12 A I've got Petitioner's exhibits--let's see.

13 Q That's fine.

14 A Okay, good. Sorry; I didn't know what I was
15 looking at.

16 Q I wouldn't do that, but with the intervening night
17 I just thought we'd just have it handy. Mr. Bushardt, I'm
18 Henry Jones. I represent House of Raeford Farms, as you
19 know. I'm just going to ask you a few questions in response
20 to some of the questions that the State asked yesterday
21 afternoon before we adjourned.

22 You testified briefly about the impact of the dam
23 and dam safety with regard to the wastewater system that the
24 company--when I say company, I mean House of Raeford--has.
25 And you said there were safety issues. In this case, are you

1 aware--are there any dam safety violations involved in this
2 particular case?

3 A No, sir.

4 Q Okay. Are you acquainted with the Dam Safety Act?

5 A I know a little bit about it, but it's really
6 not--it's not my responsibility to know about it. That's
7 another division that regulates that.

8 Q Okay. And when I say dam, that's D-a-m Safety
9 Act. You also talked about inspections of lagoon number 1
10 and number 2, but specifically lagoon number 2. Are you
11 aware--were there any safety issues involved in this case
12 with regard to lagoon number 2?

13 A No, sir.

14 Q Okay. Was there any evidence that you know of a
15 breach or a leak from lagoon number 2?

16 A Not for a long time.

17 Q Since 2009?

18 A Yeah, not for a long time before that.

19 Q Okay. With regard to inspections of the lagoons,
20 in this case are there any charges related here to inadequate
21 inspections of the wastewater system?

22 A In this case?

23 Q In this case.

24 A No, sir.

25 Q Let me ask you, are you acquainted with the

1 company's wastewater permit?

2 A Yes.

3 Q Okay. I believe that permit is at Respondent's
4 exhibit book number 2, Exhibit Number 2.

5 (Witness peruses documents.)

6 Q Are you there?

7 A Yes, sir; I'm there.

8 Q Okay. Look at the first page of the actual permit
9 proper, the--where it says "North Carolina Environmental
10 Management Commission, Department of Environment and Natural
11 Resources, Raleigh Surface Irrigation System Permit." Are
12 you at that page?

13 A Yes.

14 Q Now, from my review of other similar permits, tell
15 me, isn't the scope of the permit, what the permit permits--
16 in that first paragraph, doesn't it describe what the system
17 is that's permitted?

18 A That first paragraph is only a description of the
19 treatment system.

20 Q Okay. But that's what the company is permitted to
21 operate; correct?

22 A That's correct.

23 Q Okay. Now, show me in there, in that paragraph,
24 where the creek itself is part of the permit system.

25 A The creek is not part of this nondischarge system.

1 Q Okay. Thank you. If the lagoon number 1--go back
2 to lagoon number 1. If it overtopped, you said yesterday,
3 there would be a drain or drainage to Parker Bark's property;
4 correct?

5 A Yes, sir.

6 Q Not towards the direction where the ditch is;
7 correct?

8 A That is correct. And I'd like to say they've done
9 some work with that since then, so I don't know if it would
10 be the same today as it was the last time I saw it.

11 Q But I'm speaking in reference to---

12 A (interposing) A previous time.

13 Q ---September of 2009?

14 A Yes, sir. That was the low part of the berm. And
15 it was low because their neighbors were driving on it and
16 compacting it down.

17 Q Okay. While you're still there at the exhibit
18 book, Mr. Bushardt, go to Exhibit--tab 24.

19 (Witness complies.)

20 A I'm there.

21 Q Are you there?

22 A Yes, sir.

23 Q I think that you testified with regard to Exhibit
24 Number 24C?

25 (Witness peruses document.)

1 A Yes, sir.

2 Q I notice there's a notice of violation here dated
3 September 7, 2004. Did you by any chance see a copy of the
4 letter that Mr. Johnson sent back to Mr. Stehman in response
5 to that notice of violation?

6 A No, sir, I did not.

7 Q You've never seen that letter?

8 A No.

9 Q So you're not aware of what response the company
10 made in response to this letter, are you?

11 A No, sir.

12 Q If they agreed to perform any procedures in
13 response to this letter or abate any alleged violation,
14 you're not aware of that; correct?

15 A I'm not.

16 Q And by the way, Mr. Stehman, is that Stehman or
17 Steeman (phonetic)?

18 A It's Dr. Charles Stehman.

19 Q Stehman, okay.

20 A Yes.

21 Q Like there's an a in there, Stehman?

22 A S-t-e-h-m-a-n.

23 Q Okay. Mr. Bushardt, go to the compliance inspec-
24 tion report that I think is behind there.

25 (Witness complies.)

1 A I'm there.

2 Q Okay. Where it has Inspection Summary---

3 A Uh-huh.

4 Q ---it says, "The treatment lagoons contained less
5 flooding sludge and grass accumulations as compared to the
6 previous inspection." Do you remember seeing that?

7 A Yes, uh-huh.

8 Q Okay. Did that indicate that the company had done
9 something since the previous inspection to eliminate sludge
10 and grass accumulation?

11 A No, sir, not necessarily.

12 Q But it could mean that, couldn't it?

13 A That wasn't my intention. The floating marsh
14 grass and the floating sludge on the ponds--can--can I talk
15 with a visual aid?

16 Q Sure.

17 The Court: Yes, you may.

18 A This won't take but a second.

19 (Witness approaches photograph.)

20 This is the industrial site (indicating). This is
21 the lagoon number 1 (indicating). This is the lagoon number
22 2 (indicating). This is the creek (indicating). And as you
23 see lagoon number 1 here, this is supposedly an imagery in
24 March, so---

25 The Court: (interposing) Of what year?

1 The Witness: Well, you know, what I've
2 noticed? These are the same photographs, and one has a
3 different date than another. One has March 6th--imagery date
4 March 6, 2010; imagery date March 18th, 2007. They're the
5 same photographs. Look at that cloud right there
6 (indicating), and look at that cloud right there
7 (indicating). So I don't really know what date I'm looking
8 at here, okay?

9 A But anyway, this is the floating matter on lagoon
10 number 1. It shows up brown. In March it would be dormant.
11 It would be brown. They're required to plant green grass
12 around their spray fields, which is not in the picture, but
13 they would show up green. But anyway, you can see the shape
14 of this. Also it looks the same on that one (indicating).

15 Wind blows this all around. It can compact it.
16 And so yeah, I noticed that things looked a little clearer
17 that day. It could happen due to weather conditions pushing
18 this stuff around. It's not the same shape. It's not
19 covering the same area.

20 (Witness returns to stand.)

21 Q But you did report that the lagoons contained less
22 floating sludge?

23 A Appeared--appeared less.

24 Q And less grass accumulation?

25 A Yes, sir.

1 Q And then 24D as in dog, Mr. Bushardt?

2 A Yes, sir.

3 Q There's a letter here from Tara Croft that you
4 referred to yesterday. Do you remember that letter?

5 A Yeah, I worked--I worked with Tara at that time.
6 I trained her as an inspector.

7 Q And then, Mr. Bushardt, go to 24E as in Edward.
8 (Witness complies.)

9 A I'm there.

10 Q Isn't this a letter that Chris Murray sent back to
11 Ms. Croft in response to her previous letter?

12 (Witness peruses document.)

13 A Yes.

14 A Okay, and informing Ms. Croft that the company was
15 obtaining quotes on the best possible ways to clean the first
16 primary lagoon to bring the facility into compliance--are you
17 aware of that?

18 A I read that yesterday, yes, sir.

19 Q Okay. Have you seen that before?

20 A I have.

21 Q Okay. Do you recall what the company did
22 following their sending of this letter?

23 A I don't think they did anything.

24 Q Do you recall that they on two occasions removed
25 grass mat and vegetation from the lagoon?

1 A No, sir, only one occasion. I gave them
2 permission to do it one time. That was in the spring of 2011
3 after we met in the summer of 2010. So if they've done it
4 twice, they've done it without my knowledge one time.

5 Q Do you recall they did it after this letter?

6 A Yes. Oh, no, wait a minute. Excuse me; let me
7 strike that. No, I don't know that they've done anything
8 after this letter.

9 Q You don't recall that they did it after this
10 letter?

11 A I would have to say they did not.

12 Q So if they did, it would be a surprise to you?

13 A It would.

14 Q Then, Mr. Bushardt, on 24E--excuse me, 24G as in
15 girl--do you remember that letter?

16 A Yes, I wrote this letter---

17 Q (interposing) Okay.

18 A ---for my supervisor's signature.

19 Q We've all done that. Let me ask you, did you
20 receive the company's response to this letter?

21 A I can't see that I received a written response.
22 This letter prompted a meeting between myself and House of
23 Raeford staff that started out with me asking them "How would
24 y'all like to remove this stuff?" And things kind of went
25 from there. And I can describe how it was done.

1 But no, I'm not aware of a letter that was sent
2 back in writing. I'm not saying that one wasn't. I couldn't
3 find one in our files or it would be in this book
4 (indicating).

5 Q Mr. Bushardt, did the company offer to aerate
6 lagoon number 1?

7 A I heard mention of that, but there was no offer to
8 me that--you know, that that was going to go through. I
9 think it would be a good thing.

10 Q Between 2007 and 2009, do you recall specifically
11 someone like Chris Murray or Clay Howard asking you if the
12 company could have permission to aerate lagoon number 1?

13 A I do remember talking with someone about the
14 possibility of aerating lagoon number 1, but I can't remember
15 the time and I can't remember--I know it was, you know,
16 someone, Chris or--perhaps Chris or someone that works with
17 him, a staff from House of Raeford. We discussed that.

18 Q Do you recall--and aeration would have been a
19 positive thing to do in relation to---

20 A (interposing) Oh, yes. I mean it---

21 Q ---the problem with lagoon number 1?

22 A It would increase treatment capability tremen-
23 dously.

24 Q If they proposed to aerate lagoon number 1,
25 wouldn't they--would they have to get a new permit for that?

1 A They would have to probably get a modification.
2 We would--we would want to take a look at the power of the
3 aerators and make sure that they could actually produce
4 enough oxygen above and beyond the oxygen uptake of the
5 lagoon based upon its surface area.

6 Q And to do that, they'd have to modify the permit
7 they had at that time?

8 A They would have to hire an engineer and submit a
9 permit modification request; yes, sir.

10 Q So then they'd have to go through the process of
11 modification. How long would that take?

12 A Statutorily, we're supposed to have a permit back
13 when we've received a modification by 90 days. Sometimes if
14 we don't get enough information in that application--it's
15 quite often that way, but it can go on, drag on another month
16 or two. Letters go back and forth: "We would like to know
17 about this." Their consultants provide us those letters.
18 And then we're back on track and we're doing things.

19 Q Does it require a public notice?

20 A No. This is a nondischarge system, no public
21 notice requirement.

22 Q Did you in any way encourage them to do aeration?

23 A I can't quite remember my response, but just by
24 what I told you when you asked me that question--it's out of
25 the blue for me. I would--I would have said the same thing.

1 I'm just not sure what I said then.

2 Q Let me hand you a copy of a letter, Mr. Bushardt.

3 It would be marked, I think, Petitioner's Exhibit 39.

4 (Petitioner Exhibit 39 was
5 marked for identification.)

6 Q Granted, this is a copy without letterhead, but if
7 you'd take a second to look at that and see if it brings
8 anything back for you or rings a bell.

9 (Witness peruses document.)

10 A I just want to check to see what that permit
11 condition is.

12 (Witness peruses document.)

13 And that permit condition is "Facility shall be
14 properly maintained and operated at all times."

15 (Witness peruses document.)

16 I've read it.

17 Q Okay. Do you remember receiving this?

18 A I can't say that I do, but I mean we--we talked
19 about all these things on the second page with my--you know,
20 with my verbal meetings with House of Raeford staff.

21 Q So it could have been sent. You just never got a
22 copy of it?

23 A It wasn't sent to me, sir.

24 Q Okay. It was sent to Mr. Stehman---

25 A (interposing) That's right.

1 Q ---I guess, because he wrote the NOV?

2 A I wrote the NOV for his signature.

3 Q I mean he signed the NOV?

4 A That's right.

5 Q And they replied apparently to him, if at all.

6 And do you remember Clay Howard?

7 A Oh, yes.

8 Q Was he the operations manager at that time?

9 A He was in a management position.

10 Q So it was logical he could have sent that back in
11 his management position?

12 A I'm sure that he did.

13 Q Okay. Yesterday you mentioned that with the
14 pumping of water from lagoon 2 to the spray field, to the
15 irrigation lagoon, 3, and the spray field, that, you know,
16 there was always the potential of clogging and accumulation
17 of gunk in the pipeline that's underground. Were you aware
18 of any clogging of those pipelines during 2009 from lagoon 2
19 to lagoon 3?

20 A No, sir.

21 Q Okay. You said that there was always a possi-
22 bility of what you call a single point failure. Were you
23 aware of a single point failure in August or September of
24 2009?

25 A I haven't received any reports of any.

1 Q Ever?

2 A Ever.

3 Q So to your knowledge, the system between lagoon
4 number 2 and lagoon number 3 was properly functional?

5 A Yes.

6 Q You were talking about the ditch yesterday. Did
7 you walk the ditch--and I'm going to point to it. It's the
8 one--we didn't show this yesterday, but it's the ditch that I
9 guess is to the south of the two lagoons (indicating)?

10 A I'm familiar with that ditch.

11 Q Okay. Did you--did you walk that ditch in
12 September of 2009?

13 A Sir, I didn't respond to any part of this
14 incident. No, I did not.

15 Q Okay. So you don't know whether there was any
16 water or any foreign material in that ditch, do you?

17 A I do not.

18 Q If--but I think you did testify yesterday that if
19 gunk from lagoon number 1 had been conveyed to the ditch so
20 that it could then be conveyed to the creek, it would leave
21 some kind of marker or marking or residue in that ditch,
22 wouldn't it?

23 A It sure would, unless it was washed off.

24 Q Okay. And how would they wash it off?

25 A Well, you know they've got an industrial facility

1 there. They've got a water supply. I mean stuff like that
2 can happen.

3 Q Well, I mean the company uses water to process its
4 product; correct?

5 A Yes.

6 Q And that's what that water is for; correct?

7 A Not 100 percent maybe. You know, are you saying
8 that every gallon they pump out of the ground is used in
9 their process?

10 Q Well, I didn't ask that, but I did say that they
11 use their water to process their product.

12 A Yes, they do. It's a wet operation.

13 Q And it's a heavy user of water?

14 A They process a lot of wastewater.

15 Q So any water they use for some other purpose like
16 that they cannot use to process their product; correct?

17 A I would think that would be correct, yes, sir.

18 Q Are you aware of whether they receive town water
19 from Rose Hill?

20 A I'm not.

21 Q Okay. Do you know whether they have well water?

22 A I do not know. I'd have to guess they have some
23 wells.

24 Q The--you went to lagoon 1 in your periodic
25 inspections. What did it smell like?

1 A It smelled anaerobic, a real putrid smell. It
2 smelled bad.

3 Q Like decomposing animals and animal parts, that
4 sort of thing?

5 A No. A putrid odor would be one that would attract
6 beggars like rodents, birds, and insects. It would bring
7 them to that, putrid.

8 Q Well, let me ask you if--based on your experience
9 inspecting the plant and knowing the lay of the land---

10 A (interposing) The wastewater plant.

11 Q Yeah; well, the wastewater system, sure.

12 A Yes, sir.

13 Q If you took a significant volume of the lagoon
14 water in lagoon number 1 and dumped it in the creek, wouldn't
15 the creek smell like the lagoon?

16 A I would think that it would initially. That first
17 lagoon is pretty much anaerobic. It has no oxygen content.
18 That creek--you could probably look at all the records that
19 were submitted on sampling that creek, and it's going to at
20 least have some oxygen. It's not going to be anaerobic.

21 And so I would say that--and we heard this
22 throughout the trial: was it smelly, was it not smelly,
23 talking about the stuff in the creek. It's my opinion--I
24 think I said it yesterday, is that I'm one of the ones that
25 believes that the odor that was detected down in that creek

1 was from the lagoon and maybe not from the sludge itself.

2 But I'm guessing. I wasn't there.

3 I think that when you remove the FOG--the fats,
4 oil, and greases--if you put it into a surface water body
5 like that, it's not going to take all the oxygen out at once.
6 There's going to be something called the time of concen-
7 tration that has to occur to actually reduce the oxygen level
8 in the water column. And--you know, and I don't know how
9 long that time of concentration would be.

10 From an engineering standpoint, it's something
11 that's used in the Streeter-Phelps equation. And I mean you
12 could Google that and learn all kinds of things about it.
13 But the bottom line is I think if that sludge did not have an
14 odor to it in that creek it's because there was some aerobic
15 composition that was being undertaken in that creek.

16 Q Are you saying, though, that if odor, heavy odor,
17 was detected, there's a potential that the person who
18 detected the odor could actually be smelling the lagoon?

19 A Yes, sir.

20 Q I mean if you're around those lagoons and the wind
21 is correct, you're bound to smell the lagoons; correct?

22 A That's right. If you're downwind, you could smell
23 it from a long way. Well, I say a long way; you know, to try
24 and qualify that, you know, maybe 200, 300 yards.

25 Q If the--and if the wind were blowing in the right

1 direction, then I guess even more than that, couldn't it?

2 A Well, that's what I was saying. If the wind was
3 blowing--blowing it towards you and you were downwind, at 200
4 or 300 yards I think you could smell that lagoon.

5 Q And you mentioned the--from looking at photographs
6 of the creek, just the material in the creek, I think you
7 said that it looked like it had a little bit of age?

8 A Well, it had some leaves on it.

9 Q Leaves and---

10 A (interposing) That's the only thing that I could
11 go by. I mean other than that it's just a picture of some
12 solids in the creek. And, you know, my best guess--I mean
13 it's not going to be looking at--I mean there's no way for me
14 to look at a cross section of this stuff. I'm looking down
15 on the top of it. I was trying to see if there were cracks
16 in it and stuff.

17 But really the thing that kind of told me the
18 most, it's been there long enough to have leaves on it. And
19 those leaves didn't appear--they didn't appear to be wet.
20 They appeared to be just laying on the top. They appeared to
21 be dry.

22 Q Could they have been there a week?

23 A I think it's possible they could have been there a
24 week.

25 Q Could it have been two weeks?

1 A I don't know. That would be conjecture. I mean I
2 think there's going to come a certain point due to rainfall
3 or something like that, it's going to incorporate all that
4 stuff, leaves, sludge. Everything is going to kind of come
5 together. It's going to settle on out after a while maybe.

6 Q But without rainfall, the leaves could be dry and
7 on top of that material for some time, couldn't they?

8 A Probably so.

9 Q Yeah.

10 A Probably so.

11 Q Could you tell how thick the material was from
12 looking at those pictures?

13 A I sure couldn't.

14 Q So it could have been a quarter of an inch or---

15 A (interposing) It would be my guess just from
16 looking at what I saw approximately an inch thick, maybe a
17 little bit less, more than a quarter of an inch.

18 Q But an inch or less?

19 A Yes, sir.

20 Q Now, when you talked about the levels of material
21 in lagoon number 1, if the company--according to its system
22 and your inspection, even with the floating vegetation--that
23 was merely floating vegetation on lagoon number 1; correct?

24 A Yes, sir, uh-huh.

25 Q The liquid is down below that. So if you wanted

1 to remove liquid from lagoon number 1, you could--you could--
2 you could arrange to have that liquid removed from lagoon
3 number 1, couldn't you?

4 A It's just like a grease trap.

5 Q Yeah, which was a usual procedure?

6 A In that lagoon you've got--you've got settleable
7 solids on the bottom. You've got floating solids on the top.
8 You've got a layer in between that I want to say is not going
9 to be clear but it's going to be--it's going to have less
10 solids in it.

11 Q And in order to remove that liquid, that--and in
12 removing the liquid it would lower the level in the lagoon,
13 wouldn't it?

14 A It would.

15 Q And to do that--you could do that by turning the
16 valve there at the berm and allowing water from lagoon number
17 1 to relocate to lagoon number 2 by gravity; correct?

18 A That's right.

19 Q So that was the way the permit permitted that to
20 be done; correct?

21 A No, sir. This system wasn't permitted to operate
22 as an anaerobic lagoon. I said yesterday that the presence
23 of those solids on that lagoon is not in--it's in violation
24 of good operation and maintenance.

25 Q But what I'm saying is if you wanted to lower the

1 level in lagoon 1, you turn the valve and you release water
2 to lagoon number 2?

3 A Water that's a lot clearer than on the bottom or
4 on the top; yes, sir.

5 Q And that in effect lowers the level of lagoon
6 number 1?

7 A That's how Mr. Teachey has been having to operate
8 since I can remember.

9 Q So I mean even though there are settleable solids
10 on the bottom and there may be floating vegetation, that's
11 how you lower the level of lagoon number 1?

12 A Yes, sir.

13 Q Okay. And you don't have to pump it to the ditch
14 or you don't have to pump it to the creek or you don't have
15 to pump it to Parker Bark. You've got a way to do it;
16 correct?

17 A Oh, not necessarily. It depends on the actual
18 liquid level of the lagoon. Things have to be just right
19 where your outlet pipe is within that clear area. If you had
20 2 feet--let's say you had 2 feet less of freeboard. You
21 might have that floating vegetation right up against the
22 outlet pipe. And, you know, it certainly would have a
23 potential to foul it.

24 Q Well, have you seen any evidence of that here?

25 A No, sir.

1 The Court: For clarity of the record,
2 how--and you have observed this. Obviously as lagoon 1
3 lowers, lagoon 2 raises; correct? And I presume at some
4 point the flow would stop unless lagoon 2 was let out. Does
5 that happen at the same time or---

6 The Witness: Mr. Teachey operates in a way
7 that he will--he will probably allow a constant flow from
8 lagoon number 1 dribbling into lagoon number 2, and then he's
9 watching the freeboard of lagoon number 2. He wants to
10 maintain 2 foot freeboard in that pond. It's not full of
11 floating stuff. It doesn't have a staff gauge in it so he
12 doesn't actually know by the inch if he's there, but he can
13 look and he can make an estimate, "I've got good freeboard
14 there."

15 And so how he maintains the--simultaneously
16 maintains the level of lagoon number 2 is he'll cut on his
17 pumping station that has a couple of pumps in it and it'll
18 pump the force main to the storage lagoon, lagoon number 3.

19 And so all I was saying is really the floating
20 vegetation is--it can be a problem if the level of lagoon
21 number 1 is such that it's allowing that floating vegetation
22 to be at the invert of the outlet pipe. I think there's a
23 potential problem there.

24 By Mr. Jones:

25 Q Well, I mean even assuming that's the case, and

1 you don't know that it was in September of 2009, you could--
2 you could submerge a pump and pump liquid over the berm to
3 lagoon number 2, couldn't you?

4 A I don't think you could do that at the rate of
5 800,000 gallons a day. And I mean that's what their permit
6 is rated for. But, you know, I've heard testimony that
7 they're running more flow through there than that. I heard
8 900,000 at the beginning of all this.

9 You know, a little portable pump is just not going
10 to be capable of producing that much. Even though you could
11 line up four or five of them, I don't even know that you
12 could successfully transfer.

13 Q But you could pump liquid over the berm to lagoon
14 number 2?

15 A Yes, sir; you sure could.

16 Q And, you know, given enough days and enough power
17 and pumps, I guess you could continue to pump until it's
18 done; correct?

19 A You could do that.

20 Q And that's really just a matter of a few feet?

21 A That's right. And you've got gravity going for
22 you too.

23 Q That's right. That's right.

24 Mr. Jones: No further questions.

25 The Court: Redirect, Ms. LeVeaux?

1 Ms. LeVeaux: Yes.

2 REDIRECT EXAMINATION 10:11 a.m.

3 By Ms. LeVeaux:

4 Q In cross-examination, Mr. Jones asked you to
5 reflect upon where the wastewater would flow if lagoon number
6 1 were to overflow where the berm was the lowest. And you've
7 indicated that it would flow to Parker Bark because there's
8 an indentation. But do you know to which way it would flow
9 thereafter? Does it---

10 A Yes, let me show that.

11 The Witness: Could I---

12 The Court: (interposing) Yes, you can.

13 The Witness: ---approach the visual aid?

14 (Witness approaches photograph.)

15 A This is roughly the low area (indicating) of that
16 lagoon right here. It's not really a berm, you know. And so
17 yesterday I mentioned the fact of the phenomenon of creeks;
18 they've been here since the beginning of time. You just
19 don't have a big, drastic terrain change. It's real gradual.

20 And that's what you have here. And this is a low
21 area right here (indicating). It's essentially a little
22 lower over on this side too (indicating). But this creek has
23 caused the terrain to kind of come up gradually. This one is
24 in the ground. This one is partially in the ground, the
25 outside. This is a pretty high berm (indicating). And so if

1 it comes over right about here (indicating), it's just going
2 to run down behind the berm and right on towards the creek.

3 Q And which creek, Cabin Branch?

4 A Let's see. This is the Beaverdam Creek, right,
5 that's coming in from this way (indicating), and then Cabin
6 Branch comes this--yeah, it would come into Cabin--let me
7 guess. Let me guess. Yeah, I think it would come into Cabin
8 Branch (indicating).

9 Q Okay. Thank you. You may sit back down.

10 (Witness returns to stand.)

11 Q Isn't it true that Petitioners may not want to put
12 sludge into their secondary lagoon because it would foul up
13 the secondary lagoon; correct?

14 A Well, it has the potential once it starts moving
15 through the system to foul up any mechanical parts that are
16 there beyond it. The mechanical parts that we're talking
17 about in this system would be the pumping station and force
18 main to transfer the water from lagoon number 2 to lagoon
19 number 3, the chlorination feed and irrigation pumping
20 station that sends this flow on out to the fields, and the
21 many hundreds of spray irrigation nozzles that would put it
22 out over the land at a uniform rate.

23 You'd start getting some clogging there. You'd
24 have nonuniformity. You could have localized ponding in your
25 irrigation area. You could have runoff because of that

1 ponding.

2 Q Okay. Also in cross-examination you referenced--
3 or in direct examination--well, you referenced to the
4 vegetation and the floating--the fact there was a floating
5 vegetation. Could that floating vegetation prevent you from
6 seeing the entire lagoon?

7 A You know---

8 Q (interposing) In reference to lagoon number 1
9 primarily.

10 A I think--no. I think that lagoon has always been
11 in a state somewhat similar to these visual aids where
12 there's going to be it looks like about 10 percent of it
13 that's open. They can't have that stuff accumulating around
14 their influent pipe. It wouldn't--I can't say that it would
15 go into the lagoon then.

16 Q But it would prevent you from seeing the entire
17 lagoon, would it not, depending upon where the vegetation was
18 floating---

19 A (interposing) Oh---

20 Q ---or pushed to?

21 A Yeah. Well, you--it's kind of--it's tough to
22 determine what the actual freeboard is unless you can go to a
23 part of that lagoon that doesn't have any vegetation on it,
24 and then you can only look at the adjacent bank right there,
25 which may or may not be the low spot.

1 Once again, determining freeboard is something
2 that has to be done with surveying in mind when a freeboard
3 reference marker is put in. It's put in with the datum being
4 the lowest part of the containment berm.

5 Q If sludge were removed, would there not be some
6 record of it?

7 A There should be, if things were done properly.

8 Q If it were disposed of properly, where could they
9 dispose of the sludge?

10 A They have a permit to land apply the sludges at
11 agronomic rates on some land that are in Duplin County I want
12 to say maybe about 6 to 8 miles from their industrial
13 facility.

14 Q But they haven't used that; correct?

15 A I'm not aware that it has been used. They submit
16 records to us every year on an annual basis by March 1st.
17 And to my knowledge, those records say no land application
18 activity occurred for the year.

19 Q You've been sitting here through the course of
20 these proceedings. And were you here when Ms. Willis was
21 testifying?

22 A I was not here on the first day, so---

23 Q (interposing) Do you recall testimony to the
24 effect that House of--House of--House of Raeford offered to
25 flush the creek with their well?

1 A I had heard that, but I'm not sure I heard it
2 under testimony.

3 Q Okay. Well, if they had enough water to flush the
4 creek, wouldn't they have enough water to flush a ditch?

5 A I would think so, yes.

6 Q If the knife valve wasn't working properly, could
7 that be a problem for the lagoon levels?

8 A I think we heard yesterday that the knife valve
9 was already in--the knife valve--the valve that is located
10 between lagoon number 1 and lagoon number 2 was having to be
11 operated with an extender handle, that it was hard--what I'm
12 surmising is it was hard to turn, and so they had to put an
13 extension handle on it to get leverage to be able to operate
14 the thing. But it was still functional is--according to what
15 I heard yesterday.

16 Ms. LeVeaux: May I approach the witness,
17 Your Honor?

18 The Court: Yes, you may.

19 Ms. LeVeaux: And I would like to ask the
20 court reporter first to have these marked, please, for
21 identification purposes.

22 (Respondent Exhibit 34 was
23 marked for identification.)

24 By Ms. LeVeaux:

25 Q Mr. Bushardt, I've handed you Respondent's Exhibit

1 Number 34. Can you tell the Court what you have before you?

2 A It looks like my résumé.

3 Q And you talked about this yesterday. Is that not
4 correct?

5 A Well, not all of it. I'll admit---

6 Q (interposing) Would you go through it, please?

7 A Sure. My employer from 2--from February '91 to
8 present as an environmental engineer, the State of North
9 Carolina, Division of Water Quality in Wilmington, North
10 Carolina; my duties, provide engineering oversight to staff.
11 I conduct permitting and permitting support functions,
12 detailed plans and specifications are reviewed for compliance
13 with the division's guidelines and engineering principles,
14 perform compliance inspection of permitted facilities,
15 enforce state pollution control statutes and code, provide
16 public service and education relating to division policy.

17 Q And you are a P.E.?

18 A I am.

19 Ms. LeVeaux: Your Honor, we have no further
20 questions of this witness but would move Respondent's Exhibit
21 34, and also at this time Respondent's Exhibit 31A. And I'm
22 not quite sure--I'd really like to see that, but 31A, because
23 I do have 31 as well, into evidence.

24 The Court: Any objection to---

25 Mr. Jones: (interposing) No objection.

1 there was an overtopping from the low point in the lagoon,
2 which is on the Parker Bark side, and it drains to the creek
3 along that boundary with Parker Bark---

4 A (interposing) Yes, sir.

5 Q ---a common boundary, would that have been
6 characterized as an accidental discharge under the permit?

7 A Well, it definitely would not be knowing and
8 willful. But realizing that the permit has a requirement for
9 them to maintain a 2 foot freeboard and--it takes--it takes a
10 little bit of--it takes a lot of volume of liquid to raise
11 that however many acre lagoon--well, the permit calls that
12 lagoon somewhere between 7 and 8 million gallons. It's
13 described in the permit.

14 And so to answer your question, it would take a
15 lot of time to do that. And we would approach every case on
16 a case by case basis. It would be difficult for me just to
17 say a flat out yes, they would be held responsible for that
18 or no, they would not.

19 Q They could be held responsible even for an
20 accidental discharge, couldn't they?

21 A Oh, no, sir. I mean it would be--it would be my
22 opinion that--you know, for instance, we've had a couple of
23 20 inch rainfall events that, you know, were due to flooding
24 and whatnot that happened in September. And so we have a
25 rule that says all ponds--well, maybe not this one, but swine

1 farms and whatnot, they're supposed to withstand a 25 year,
2 24 hour storm.

3 And what we get out of all that is, okay, well, if
4 you average out everything, if you keep 2 feet of--if you
5 don't have a situation where a lot of stormwater is running
6 into your nondischarge system, which you shouldn't have, then
7 2 foot of freeboard will usually satisfy a 25 year, 24 hour
8 storm, which is approximately 8 inches of rainfall in a 24
9 hour period.

10 If you have something that's over that, I would
11 say that the division doesn't really stand as good of a
12 chance of winning that case. They've been operating with a 2
13 foot freeboard. They got rainfall that caused it to go over.
14 The rainfall was over the 25 year, 24 hour storm. I think we
15 would have to at least give a little credit to the permittee.

16 The flip side of that, it may not all come in one
17 day. There's a thing called chronic rainfall where--you
18 know, it's a nondischarge system, so they can't spray when
19 the fields are too wet. So if you have 4 inches of rain one
20 day and three days later before the ground dries out you get
21 a few more inches, and this persists, then you could actually
22 overflow the lagoon in what we call chronic rainfall. And we
23 would not have as strong a case in a situation like that.

24 Q Okay. Well, pardon me. That was a--that was a
25 longer explanation than I was anticipating. So let me try to

1 penetrate that a little bit. Are you saying, then, that if
2 the lagoon overtopped and the water went to the creek that
3 that would not be a chargeable offense?

4 A Under certain rainfall events, I would say we
5 would have a difficult time winning the case.

6 Q You would have to determine whether or not there
7 was---

8 A (interposing) Every---

9 Q ---rainfall or some other cause for the discharge?

10 A Every situation is a case by case kind of
11 scenario. They're not all the same.

12 Q But you would be willing to say it was not a
13 willful discharge?

14 A Talking about chronic rainfall or excessive
15 rainfall, yeah, I think you could--you could definitely say
16 that would not be willful. If you're talking about 3 inches
17 of rainfall and a pond being kept with a 6 inch freeboard and
18 because of wind or something you got a little bit over, yeah,
19 that's a pretty good case for us, a pretty good case to win.

20 Q Would it be a willful discharge?

21 A No.

22 Q So if that were done and the company, whoever it
23 would be, was charged with a willful discharge, then that
24 would be incorrect, wouldn't it?

25 A Could be.

1 Mr. Jones: Thank you.

2 The Court: Redirect?

3 Ms. LeVeaux: Just a few questions, Your
4 Honor.

5 **F U R T H E R R E D I R E C T E X A M I N A T I O N**

6 _____ 10:27 a.m.

7 By Ms. LeVeaux:

8 Q Mr. Bushardt, you were in the courtroom when Mr.
9 Holley was testifying, Petitioner's expert, and he talked
10 about that the creek was constricted and there were logs
11 and--at various points of his testimony he talked about the
12 creek being constricted.

13 Despite the various things in the creek, what
14 would give the creek this energy to flush tons of material--
15 if it were coming from upstream, what would give that creek
16 that kind of energy to flush that downstream?

17 A Well, it would be inclement weather, excessive
18 rainfall.

19 Q And how would you describe excessive?

20 A A good enough rainfall flow to cause runoff from
21 the land as opposed to rainfall that's of like nature that
22 doesn't really produce any stormwater runoff. Once the creek
23 would fill, you know, it would start pushing material on down
24 hydraulically, you know, to the lower gradient.

25 Q Plus you would see a fingerprint, would you not?

1 A You would think that you would see some indication
2 at any points where you had a backup potential, particu-
3 larly--that creek runs under Highway 117 and so it's
4 culverted.

5 And I can't--I haven't walked that creek. I don't
6 know what size pipes they have in there. But it--you know,
7 they're probably sized adequate to keep the flow from coming
8 over the state highway, but they might not be sized enough to
9 actually prevent a backup from happening on the upgradient
10 side.

11 Q And while a 3 to 4 inch rain may have some effect
12 on the fecal or DO, a 3 to 4 inch rain isn't analogous to or
13 similar to a chronic rain or a 25 year, 24 hour storm, is it?

14 A It's not.

15 Q And in fact you have those 3 to 4 inch rains from
16 time to time in that region fairly often, do you not?

17 A Well, I think the records show we had that in
18 September--oh, what was it, 27th and 28th of 2010.

19 Ms. LeVeaux: Thank you; no further
20 questions.

21 The Court: Anything further?

22 (Mr. Jones shakes head negatively.)

23 EXAMINATION 10:29 a.m.

24 By The Court:

25 Q Let me ask just some clarifying things for the

1 record and try to tie some testimony together. Now, you have
2 been going out inspecting these lagoons for a while; correct?

3 A Not on an annual basis. It's not what I do day to
4 day. We have inspectors, but, you know, I train them. And
5 throughout my career I've gone--out of all the stuff that we
6 saw here, we saw four inspection reports. I did one in 2004
7 and I did one in 2010.

8 Q Okay. How familiar are you with those lagoons?

9 A I've been to them enough to where I feel pretty
10 familiar. I mean I've actually seen one discharge.

11 Q Okay. And how familiar are you with the people
12 there as well---

13 A (interposing) Oh, I---

14 Q ---Mr. Teachey and others?

15 A I know them all. I work well with them, or at
16 least I'd like to think I work well with them.

17 Q Okay. Mr. Teachey described that he was trying to
18 lower lagoon number 1 as much as possible in order to put the
19 new valve in. If he's having 650,000 to 800,000 gallons of
20 stuff--water and stuff coming in and that would maintain it
21 and he wants to lower it, how much would he have to lower to
22 get a good lowering of lagoon 1 in order to do what he had
23 talked about wanting to do?

24 A That's going to be difficult for me to answer,
25 Your Honor, because they put in a new transfer pipe, and I'm

1 really not sure what--the level of that. I've seen some
2 pictures of it and it appears to be, you know, maybe 2 to 3
3 feet below the crest of that road that separates the two
4 ponds.

5 So I would--you know, I would venture to say that
6 the transfer pipe is going to have to be--to answer your
7 question, if they're putting in 800,000 gallons a day, that
8 transfer pipe is going to have to be doing that plus more to
9 be able to reduce the liquid level in that pond number 1.

10 Q And how much more is part of my question.

11 A Pardon me?

12 Q An equal number, another 800,000 gallons or what,
13 if he wants to lower that?

14 A Well, you know, I would have to know the volumes--
15 I would have to know the area of the lagoon and the actual
16 distance that they want to drop it. That would make a
17 volume. There is 7.48 gallons in a cubic foot. And that's
18 how I would go about trying to answer your question. But
19 without the specific inputs, I couldn't tell you right now
20 what the gallonage would be.

21 Q Okay. The last is Mr. Teachey's records show that
22 he wasn't there the day before or the day of the beginning of
23 that lowering process. Who would he leave in charge of doing
24 that?

25 A Well, he's got--he's got wastewater staff that are

1 A To the renderer, yes, sir.

2 Q And there's evaporation and other means of loss,
3 isn't there?

4 A Yeah. In the summertime you've got evapo-
5 transpiration as well as evaporation, or you did while you
6 had the marsh grass there.

7 Mr. Jones: Okay. All right. Thank you.

8 The Court: Anything further, Ms. LeVeaux?

9 Ms. LeVeaux: No.

10 The Court: You may step down. Thank you
11 very much. And before your next witness, let's take about a
12 ten minute break, please.

13 The Reporter: Off the record. 10:35 a.m.

14 (A brief recess was taken.)

15 The Reporter: On the record. 10:45 a.m.

16 The Court: This hearing will come to
17 order. It's now 10:45 on December the 20th, 2011. All
18 parties present when we recessed are again present with the
19 exception of our last witness, who completed his testimony.
20 Your next witness, Ms. LeVeaux?

21 Ms. LeVeaux: Yes, Your Honor. We would call
22 Dr. B.K. Song to the stand.

23 The Court: Okay. Dr. Song, if I can have
24 you approach here to my right? It would be our normal
25 procedure to swear you in unless you prefer to be affirmed.

1 Dr. Song: That's fine.

2 The Court: Okay. If you'll place your
3 left hand on the bible and raise your right and face the
4 court reporter, please?

5 (Whereupon,

6 **BONGKEUN SONG, Ph.D.**

7 was called as a witness, duly sworn and testified as
8 follows:)

9 The Court: If you'll have a seat, please,
10 sir, and if you would state your first and last name and
11 spell them both?

12 The Witness: Bongkeun Song, B as boy, o-n-g-
13 k-e-u-n, last name Song, S-o-n-g.

14 The Court: Thank you. You may direct your
15 attention to Ms. LeVeaux.

16 Ms. LeVeaux: Thank you, Your Honor.

17 **D I R E C T E X A M I N A T I O N** 10:46 a.m.

18 By Ms. LeVeaux:

19 Q Dr. Song, please state your name and occupation
20 for the Court.

21 A My name?

22 Q Yes, sir; your name and your occupation for the
23 Court.

24 A My name is Bongkeun Song and my--I'm an associate
25 professor at Department of Biology and Marine Biology at

1 UNCW.

2 Ms. Jones: Your Honor, I'm sorry. We need
3 to renew our motion in limine. And I don't know if this is
4 the most appropriate point. We are objecting to the entire
5 testimony of Dr. Song, renewing that motion, objecting, and
6 would like to discuss that with the Court if now is the
7 appropriate juncture.

8 The Court: Let me get started on some of
9 the preliminary stuff. And I would like you to do that upon
10 the first question of substance that Ms. LeVeaux might have
11 for him.

12 Ms. Jones: Thank you, Your Honor.

13 The Court: I suspect she's going to talk
14 about his qualifications at first; is that correct?

15 Ms. LeVeaux: Yes, sir.

16 The Court: And then upon her first
17 question of substance, then I would like to hear your motion
18 specifically. You can continue.

19 Ms. LeVeaux: Thank you, sir.

20 By Ms. LeVeaux:

21 Q Dr. Song, could you state your duties and
22 responsibilities generally as it relates to your position at
23 UNCW?

24 A So I have a teaching obligation. So I teach cell
25 biology and also microbiology courses and also teach graduate

1 students. And also I do research. 40 percent of my work
2 assignment is research. So I do research like water quality
3 and also looking for some sort of the indication of how the
4 contamination occurring in particular environment.

5 Q And do you work for the Department of Environment
6 and Natural Resources?

7 A No.

8 Q If you will, please, turn to--there's a big
9 notebook in front of you. It's the respondent's exhibits.
10 And if you'll turn to tab number 19, please.

11 (Witness complies.)

12 A Okay.

13 Q And if you'll turn to Respondent's Exhibit 19A,
14 and look at it for a minute and tell the Court whether or not
15 your recognize that exhibit.

16 (Witness peruses document.)

17 A Yeah, this is my CV.

18 Q And is this CV accurate?

19 (Witness peruses document.)

20 A Yes.

21 Q Have there been any changes to the CV?

22 A Yes, there are some.

23 Q Okay. And if you will, please, go through your CV
24 and describe for the Court exactly what you have before you
25 in Exhibit 19A.

1 A So 19A, which I have a CV, in the first page is my
2 education and professional experience. Those are same. And
3 then---

4 Q (interposing) Well, I need you to go through--go
5 through your--go through each one, please, and---

6 A (interposing) So read through?

7 Q Yes, because we need this for the record.

8 A Okay. So I am associate professor, Department of
9 Biology and Marine Biology and also associated with Center
10 for Marine Biology--Marine Science at University of North
11 Carolina Wilmington. And that's address 5600 Marvin K. Moss
12 Lane, Wilmington, North Carolina 28409. And my phone number
13 is (910) 962-2326 and fax number---

14 Q (interposing) Okay. And then you can just go--
15 and then you can just go to your education. I didn't mean---

16 A (interposing) Okay. My education is I had post-
17 doctoral training from 2000 to 2004 in molecular microecology
18 at Princeton University.

19 Q And what did that entail?

20 A It's training to be--studying the microbial
21 community and the environment using the molecular technique.
22 And so using the targeted--the functional genes and other
23 genetic material we can identify the presence of specific
24 groups of the bacteria and then try to looking for their
25 function in the different ecosystems.

1 Q Okay, and bacteria from the intestines or where?

2 A No, this is--this training was not for that part
3 of it.

4 Q Okay.

5 A Uh-huh. So this bacteria especially is present in
6 seawaters or sediment or river waters.

7 Q And then if you'll just go through 2000---

8 A (interposing) Okay. 2000, I have received Ph.D.
9 in environmental science, Rutgers State University of New
10 Jersey. And my dissertation title was Diversity of Bacteria
11 Capable of Degrading Halobenzoates under Denitrifying
12 Conditions. My advisor was Dr. Max Häggblom.

13 Q Now, what's degrading halobenzoates?

14 A Halobenzoate is one of those--the halogenate, the
15 compound, it's used as some of the model compound to study
16 the degradation of the chlorinated compound like PCB and PCE
17 types of it. Those are the--one of those model compound
18 using for those kind of degradation studies, biodegradation
19 study.

20 Ms. Jones: Your Honor, I'm sorry. If I
21 may, just to clarify, we're not objecting to Dr. Song's
22 qualifications and we're not objecting to his résumé being
23 introduced, now that he's here. Our objection really only
24 has to do with the factual specific testing that he
25 performed.

1 The Court: Okay.

2 By Ms. LeVeaux:

3 Q You can go forward. And so if you'll go to 1997.

4 A 1997, I received a master's in environmental
5 science, Rutgers State University of New Jersey. And my
6 thesis title was Microbial Diversity of Toluene Degraders
7 under Denitrifying Conditions. My advisor was Dr. Norberto
8 Palleroni.

9 Q And then what did that entail?

10 A So this case is another related bioremediation
11 study, especially when petroleum or the crude oil contamina-
12 tion leading into this toluol as one of the contaminants. So
13 using these bacteria we can clean up those contaminants in
14 different ecosystems.

15 Q Okay. And you are now currently an associate
16 professor---

17 A (interposing) Uh-huh.

18 Q ---at UNCW? You also did your research at UNCW?

19 A That's right.

20 Q And did you do some research at Princeton
21 University as well?

22 A That's right.

23 Q What type of research did you do there?

24 A So that research was about studying the microbes
25 in waters and sediment.

1 Q Okay.

2 A Yeah, uh-huh.

3 Q Okay, and similarly your graduate research
4 assistantship at Rutgers?

5 A Uh-huh; yes, sir. Yes, ma'am.

6 Q And tell me about--just very briefly about the
7 Million Dollar Club award that you--that was awarded to you
8 in 2010, the James Merritt.

9 A So in 2010 James--I received the award from UNCW
10 because I brought more than \$1 million external grant from
11 funding agency. I have--I received a grant from the National
12 Science Foundation and U.S.--United States Department of
13 Agricultures, and those overall funding was over \$1 million.

14 Q And the reference to teaching courses, are those
15 the courses that you're teaching right now?

16 A Yes, I've been teaching those.

17 Q And these are the current--courses that you've
18 been teaching at UNCW currently?

19 A Yes. Yes, ma'am.

20 Q And if you'll just read those courses into the
21 record?

22 A Okay.

23 The Court: Well, before I do that, what I
24 do want to do now is, as I think we're starting to move into
25 his expertise and that sort of thing, and in glancing at the

1 motion in limine, I know that you're moving--which I denied
2 at the time--to exclude the testimony of Dr. Song in its
3 entirety on the grounds that the testing method that he used
4 is not an approved method, and secondly, that it was not
5 relied on by DENR anyway; is that correct? Is that what I'm
6 understanding?

7 Ms. Jones: That is, Your Honor.

8 The Court: Okay.

9 Ms. Jones: We're not objecting to Dr.
10 Song's qualifications. And the methodology--the objection to
11 the methodology is based on the State's own testimony.

12 The Court: Okay. Well, let's--I think
13 that's the point in time because I have now an idea of Dr.
14 Song. And I presume that some of the argument will be on the
15 testing method is his qualifications in order to use those
16 methods. So let me take that up right now then again. Why
17 don't you state for the record the objection? If you'll hang
18 on, Dr. Song, right there.

19 Ms. Jones: Thank you, Your Honor. Again,
20 this is a renewal of our motion in limine and an objection to
21 the testimony of Dr. Song. He was brought here today to
22 testify on one aspect of the case, and that relates to some
23 DNA testing and analysis that he performed during the state's
24 investigation of this matter.

25 Perhaps the most important issue is the State is

1 now seeking to submit Dr. Song's testimony even though the
2 State has stated on more than one occasion now that it's not
3 an approved method that the State can rely on. That's
4 separate and apart from Dr. Song's qualifications, which we
5 don't dispute.

6 Mr. Poupart testified at his deposition, which was
7 part of our motion in limine, that it's not an approved
8 method, that it was simply supplemental information that he
9 used. In fact, there was a decision or discussion about
10 whether to include it at all because it's not an approved
11 method. In testimony yesterday, Mr. Poupart testified again
12 that it's not a method that's approved and, again, that it
13 was supplemental information.

14 Under those circumstances, Dr. Song's analysis and
15 testing should not be allowed into evidence. The hallmark
16 for admissibility of scientific evidence is the methodology
17 and whether it's approved or not. If you have the state
18 agency that is assessing the violation and penalties saying
19 that it's not approved, that's problematic. The testing
20 again has no relevance since it was not relied upon for that
21 purpose and was again just supplemental information.

22 Your Honor, I'd also note that--presumably that
23 the State never intended to use it in its case because there
24 is deposition testimony that was attached to our motion in
25 limine from Dr. Song where the State told Dr. Song to destroy

1 the filtered preserved sample just one month after his
2 testing on September 23rd. That means that no further
3 testing could be done by anyone retained by the House of
4 Raeford. That means no further testing could be done by Dr.
5 Song. That means no further testing could be done by any
6 other independent individual.

7 And for the State to attempt now to inject this
8 testing analysis into the case when it has said that it is
9 not an approved method, it was not relied upon, and where the
10 State specifically directed that the sample be destroyed is
11 improper.

12 Now, there are other issues that have been brought
13 up as well that goes to chain of custody. The last time we
14 heard about this sample, it had been left at a receptionist's
15 desk in a building at UNCW. Dr. Song's deposition testimony
16 is that he received it in his lab. But there is a missing
17 link between when it was left at a receptionist's desk and
18 when it arrived at Dr. Song's lab. There's also issues
19 associated with the fact that the testing was not done by Dr.
20 Song himself but by two students.

21 But again, Your Honor, I think the most important
22 thing for purposes of the current motion and objection is the
23 State's stance on this subject, which again, it is not an
24 approved method. It was supplemental information. It is not
25 what was relied on in assessing a violation against the House

1 of Raeford. And therefore we would move that the evidence be
2 excluded and that Dr. Song's testimony be excluded.

3 The Court: Thank you. Your response, Ms.
4 LeVeaux?

5 Ms. LeVeaux: Yes, Your Honor, thank you.
6 Your Honor, well, a couple of things have been called into
7 question. Number one, because it's not an approved method--
8 and Mr. Poupart went through that. An approved method that
9 the State will adopt takes years and years and years before a
10 method is recognized as a, quote, approved method, end quote.

11 But what was significant in Mr. Poupart's testi-
12 mony was he said he did rely upon it. You have methods. You
13 have scientific evidence that changes. And we're constantly
14 in a change--a state of flux. So he did rely upon this
15 information. He said he considered it. He said it wasn't
16 the first thing, but he coupled that with everything else.
17 And this was all the information that he considered in
18 reviewing the factors, in making the assessment, in deter-
19 mining whether in fact the violations as brought were in fact
20 substantiated.

21 Here we have Dr. Song. And there's been no
22 objection to his expertise, which we think is great because
23 we think his expertise will clarify a lot of the evidence and
24 will assist the trier of fact. And we submit that as it
25 relates particularly to the DNA report, which was relied upon

1 by Mr. Poupart, that he has a better understanding of that
2 than anyone else in this room, the various peaks and valleys,
3 and that would assist the trier of the fact.

4 And we submit, Your Honor, that this witness, Dr.
5 Song, is better qualified when it comes to rendering an
6 opinion about this document because we couldn't render an
7 opinion. And if we did, we don't have the credentials to
8 back up any opinion we might render.

9 So again, we would submit that--we would submit
10 that it takes facts and then takes it to the level of his
11 expertise and where his expertise is needed and warranted as
12 it relates to reading this document, which--I'll remind the
13 Court the DNA report has not been introduced into evidence
14 because it lacks the foundation--that everyone else up to
15 this point has had--has not been able to give the proper
16 foundation to this document. It is a scientific report which
17 requires a scientific analysis, which we would submit would
18 assist the trier of the facts.

19 I handup, if Your Honor will allow me to
20 approach, a memorandum on the expertise on an expert witness'
21 testimony. And included in this--in this case, this
22 memorandum for your consideration, sir, is the case of *Sonnet*
23 *v. Sonnet*.

24 And in that case--it's a divorce case. And the
25 wife in the divorce case presented a doctor, and so the same

1 question came up, well, you know, is this a fact witness or
2 is this an expert witness. And the Court found that, well,
3 yeah, up to a point there were facts but then there were
4 certain points where his expertise was relied upon and
5 needed. And he was allowed as--and the doctor was allowed as
6 an expert in that case. And we just offered it for your
7 consideration, Your Honor.

8 But we argue, Your Honor, that there is scientific
9 evidence. The methods are not the, quote-end quote, approved
10 methods that are utilized by DENR, but they are scientific
11 methods with scientific value that--Dr. Song is here. He
12 brings his expertise. He brings his knowledge.

13 Within his testimony, questions of fact have been
14 raised in Petitioner's motion because they argue about the
15 point in which the samples were brought to UNCW. We have in
16 the courtroom today the DENR scientist who dropped the
17 samples off. And then we have--at the point in time when
18 Dr.--which Dr. Song will testify to, when he received them
19 and he broke these samples off into--so that they could be
20 analyzed further.

21 Also within the memorandum is--I mean also we
22 would argue to the Court that what was done by the assistants
23 were done at Dr. Song's direction, under Dr. Song's super-
24 vision, and under Dr. Song's control. And he, Dr. Song, at
25 the end verified the accuracy of those documents.

1 There is case authority, and I can present those--
2 those cases to you, *State v. McCord*, at 140 NC App, 634, 648,
3 and also 538 S.E. 2d 633, 658, in 2000, where the Court--the
4 Court of Appeals has held where a--research is done and
5 someone else is doing it, but upon the work, the supervisor
6 has observed it, he is--he's available for cross-examination,
7 and he testifies to an opinion of what was being done
8 because--he can address that opinion because it was done--
9 what was being done was under his supervision, control,
10 direction. He can in fact verify the accuracy of it. And so
11 there's no violation of any constitutional rights or the
12 opportunity or the lack of an opportunity to cross-examine
13 because he can address those concerns.

14 Also, Your Honor, we further submit that Dr. Song
15 when he takes the stand--he can speak to the samples. He can
16 speak to, well, what if there was some cross contamination?
17 What, if any, significance would that have? Again, this
18 would assist the triers of fact because the question is
19 obviously raised if they're arguing that the sample was
20 brought off at--dropped off at UNCW let's say for example on
21 the 18th and two or three days later let's say that Dr. Song
22 analyzed it. Well, is that enough time for this sample to
23 become altered? Again, Dr. Song will explain that, will
24 offer clarification for the trier of fact.

25 Finally, Your Honor, we argue that there can be

1 weaknesses in the chain of custody, and that does not go to
2 the admissibility of the evidence. It does go to the weight
3 of the evidence. So if the Court or the triers of fact
4 submit that, "Well, you know, it was here. I'm going to look
5 at this other evidence and I'm going to give it 80 percent
6 and I'm going to only give Dr. Song's testimony 20 percent,"
7 again, that's not the question here. The question is the
8 admissibility of the evidence.

9 And, Your Honor, we would submit that there's
10 authority that would support that any gaps in the chain
11 especially would go to the weight of the evidence and to the
12 extent that it can be--cannot be identified or it's easily
13 altered.

14 The Court: Well--have a seat, Ms. Jones.
15 Actually, she--Ms. Jones listed this towards the end, but I
16 actually find it, certainly with the headlines in the paper
17 these days, to be one of the most relevant parts of this.
18 And that is that he was told to destroy the sample and no
19 further testing could be available or allowed or that sort of
20 thing, which I'm sure all counsel realize the consequences of
21 that sort of thing in most any kind of hearing. How do you
22 speak to that and---

23 Ms. LeVeaux: (interposing) Thank you, Your
24 Honor, because---

25 The Court: (interposing) I actually

1 consider that one of the more important aspects of her
2 motion.

3 Ms. LeVeaux: Absolutely, and we would submit
4 that the State did not tell him to destroy that evidence.
5 And that will be---

6 The Court: (interposing) But was it
7 destroyed, though?

8 Ms. LeVeaux: I don't know if it was
9 destroyed. I think--I think the extracts were made. And I
10 think that the evidence--after the extracts were made, I
11 think the smell was so foul in the--within the lab, I think
12 that that main sample--but I think the extracts were already
13 made. And I can ask the witness that question.

14 The Court: Let's do that, then. Let's
15 have some voir dire on that point right this minute. You
16 wanted to respond to that, Ms. Jones?

17 Ms. Jones: Well, did you want--Your Honor,
18 I just would say that there a deposition under oath that Dr.
19 Song gave. In five different locations he stated that the
20 State told him to destroy that sample and that it was in fact
21 destroyed. And, Your Honor, there were some other things
22 stated by Ms. LeVeaux, but if you want to proceed with voir
23 dire, I can put those on hold.

24 The Court: Let me see that first, then, if
25 you'll approach Dr. Song, then.

1 Ms. LeVeaux: Your Honor, are we taking him
2 on voir dire so he can identify---

3 The Court: (interposing) Yes.

4 Ms. LeVeaux: ---and explain? Thank you,
5 sir.

VOIR DIRE

11:06 a.m.

6 By Ms. Jones:

7 Q Dr. Song, if you would look at the front cover of
8 that document, could you read the title for me?
9

10 A The deposition of Bongkeun Song.

11 Q Okay. And did you in fact participate in a
12 deposition where I was asking you questions back on July
13 28th, 2011?

14 A Yes, ma'am.

15 Q If you would turn to page 55 of that deposition
16 transcript?

17 (Witness complies.)

18 Q Are you there, sir?

19 A Uh-huh.

20 Q And if you look at the bottom, line 24, there's a
21 question. And I said, "Currently," period, "In other words,
22 if I wanted to perform this same test now, could I do that?"
23 On page 56, what is your answer?

24 A "I was asked to destroy it."

25 Q And then I say, "You were asked to destroy it?"

1 And your response?

2 A "Yes. So I told to throw them out."

3 Q Okay. And then I asked you, "Who told you to
4 throw them out?" Can you---

5 A (interposing) Yes. "Jenniffer Bagwell"; uh-huh.

6 Q Okay. And I say, "Why do"---

7 The Court: (interposing) Who was that?
8 I'm sorry.

9 The Witness: Jennifer Bagwell, sir.

10 The Court: Okay.

11 By Ms. Jones:

12 Q And I ask you in the next sentence, "Why did she
13 tell you to throw them out?" And you stated?

14 A "No, no, no. I told her to throw them out."

15 Q And then I say, "Okay." And your answer?

16 A "I -- once I gave [the result], he was -- I recall
17 Rick mentioned that the sample to be destroyed."

18 Q And who is Rick?

19 A Rick Shiver.

20 Q Okay. Now, if you'll go to page--I'm sorry, line
21 24 on that same page, and I said, "Well, I'll rephrase. Did
22 Rick Shiver tell you to destroy the samples?" And on page
23 57, what was your response?

24 A "Yes."

25 Q And then on lines 14 through 16, do you again

1 indicate there that the filter that was collected was
2 destroyed?

3 A Yeah. Yes. Yes, ma'am; uh-huh.

4 Q And isn't it correct that the filter that you
5 obtained can be frozen for testing for a lengthy period of
6 time?

7 A Can I explain? Can I explain what's---

8 Q (interposing) Sure.

9 A ---what that mean of destroying here mean? So
10 there was some misunderstanding here. One is the sample was
11 filtered, which is, you know, breaking apart to extract the
12 DNA. So that was destroyed the way how to extract the DNA.

13 And the sample itself when we received it in the
14 water--and while we preserve those, and it was--we put them
15 in the freezer and you crack the bottle and you release it.
16 So we just throw them out. That's what it is talking about.

17 And here I have confusion about when I talked to
18 Rick about whether we can--once we finish this analysis
19 whether we can get rid of this DNA which was extracted from
20 the filters. And apparently that's what I was understanding
21 about whole--the idea about destroying the sample.

22 Q Okay. So the DNA extraction material could have
23 been frozen?

24 A Could be frozen.

25 Q And it could have been retested?

1 A Could have been retested.

2 Q Okay.

3 A Uh-huh.

4 Q And you were directed to destroy that?

5 A I told my--I told my technician, Jennifer Bagwell,
6 to do that because we--I saw we finished the whole analysis
7 because we don't maintain--retain all the sample. However,
8 she didn't remember. She doesn't remember if she throw them
9 out.

10 Q Okay. But--if you'll turn to page 72 of that
11 deposition transcript?

12 A Page what?

13 Q 72.

14 A 72.

15 (Witness complies.)

16 Q Okay.

17 Q And if you'll look at lines 8 through 10---

18 A (interposing) 8 through 10.

19 Q ---you state you had a conversation with Rick,
20 "and he mentioned the sample should be destroyed after
21 analysis done"; is that correct?

22 A Yes.

23 Q Okay.

24 A That's what I--that's how I recall that, uh-huh.

25 Q And then if you'll look at page 108?

1 (Witness complies.)

2 Q If you'll look at lines 11 through 13, I say, "The
3 filter sample could have been frozen." And you agreed,
4 "[Yes], it was frozen, it was frozen"; is that correct?

5 A Yes.

6 Q And then if you'll look at lines 22 through 24, I
7 asked you, "Just tell me how long you kept it before you
8 destroyed it, if you know?" And then you said, "I don't
9 remember. Maybe a month."

10 A So this here--we have to define what you asking
11 me. So I thought you asked me about DNA, not the filter. So
12 filter was already destroyed, you know, the--right after we
13 received the sample I filtered the water and then we used
14 that filter to extract the DNA. So the filter is not there
15 anymore.

16 Q Right.

17 A So then we used the DNA to do analysis, okay? So
18 the--here is the DNA once we finish those--the analysis. So
19 we--I was thinking that remove that DNA sample because we
20 don't use that anymore.

21 Q Okay. Dr. Song, were you not directed to destroy
22 the DNA sample?

23 A Here is the misunderstanding between Rick and me.
24 He didn't understand what the sample he told me to destroy.
25 He thought the sample that was destroyed was--the sample was

1 delivered; the water sample, not the DNA sample. I under-
2 stand there's a DNA sample, so that's why I thought--you
3 know, because we don't have any sample left, only the left
4 sample was DNA only at that time point.

5 Q At the date of your deposition was it your under-
6 standing at that point that Rick Shiver had told you to
7 destroy the DNA sample?

8 A That was how I understood.

9 Q Okay. And there is no other--there is no DNA
10 sample existing to date?

11 A I was--so after I communicated with Jennifer
12 Bagwell, so I was looking for that DNA sample in my lab. I
13 have several freezers stored all the samples. I could not
14 find it.

15 Q And in fact at your deposition you testified it
16 was destroyed?

17 A Because I told Jennifer Bagwell to throw them out.

18 Q Correct.

19 A But she did not remember.

20 Q Correct.

21 A Uh-huh.

22 Q There can be no more testing on that sample; is
23 that---

24 A (interposing) Cannot find it.

25 Ms. Jones: That's all, Your Honor.

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The Court: Ms. LeVeaux?

Ms. LeVeaux: Just two questions.

D I R E C T E X A M I N A T I O N 11:13 a.m.

(resumed)

By Ms. LeVeaux:

Q You said that Jennifer Bagwell didn't understand. So there is--so the sample could be in the freezer. You said you were unable to locate it. But you're saying that--and correct me if I'm wrong on this, but I think you're saying you've just been unable to locate it thus far, but it could be in the freezer; is that correct?

A It could be. So if Jennifer Bagwell come to my lab and look for her old boxes--we store it depending on the research done. Some of--for example, if we need to publish that specific data set, we just need to store those samples just in case we need to back up. However, this case is not anything we want to publish. That's why we didn't care much about it.

Anyhow, so Jennifer Bagwell, if she come back in my lab, and she might be able to identify which boxes was stored and then could locate them, might be.

Q Okay, so---

A (interposing) Possibly today, but---

Q I'm sorry. So then the answer is that the sample could still be in the freezer, correct, the DNA sample, this

1 DNA extract?

2 A I cannot say that with a yes or a no, yeah,
3 because I have six freezers. All--samples are put here and
4 there, so it's very hard to---

5 Q Okay. But there's been repeated questioning about
6 whether or not Mr. Shiver told you to destroy this. And
7 please--just for a point of clarification, please explain
8 what Mr. Shiver was speaking to and what he told you to do.

9 A So he told me to destroy the sample. I thought
10 when I talked to him about that, that destroying sample was
11 meaning for DNA. I think what he is think--his idea--you
12 know, his idea of a sample was the water sample.

13 Q Because of the---

14 A (interposing) Uh-huh.

15 Q ---smell; correct?

16 A Because we do not have the sample anymore, right,
17 because we lost the sample while we preserve those water
18 samples in the cold--in freezers.

19 Ms. LeVeaux: No further questions.

20 Ms. Jones: Just briefly, Your Honor.

21 **VOIR DIRE** 11:15 a.m.

22 By Ms. Jones:

23 Q Dr. Song, as of the date of your deposition, it
24 was your understanding that sample had been destroyed and was
25 not in your lab; is that correct?

1 A What sample we are talking about?

2 Q The DNA sample.

3 A The DNA sample was not destroyed.

4 Q The DNA---

5 A (interposing) Filter was---

6 Q ---filter---

7 A (interposing) Filter was destroyed.

8 Q The DNA filter was destroyed?

9 A DNA filter was destroyed, not DNA.

10 Q All right. And did you learn after your deposi-
11 tion of what you think Rick Shiver's misunderstanding was?

12 A Yes, ma'am.

13 Ms. Jones: No further questions, Your
14 Honor.

15 EXAMINATION 11:16 a.m.

16 By The Court:

17 Q So your loss of any sample occurred about a month
18 after you took the sample; is that correct? So it's either
19 destroyed or lost or misplaced---

20 A (interposing) The---

21 Q ---your understanding was somewhere--a month or so
22 after you looked at it?

23 A DNA sample?

24 Q Whichever sample you want to tell me about.

25 A Okay. Let's--starting with the water sample which

1 I received, water sample was destroyed within a week, because
2 how we presoak them, we put them in the freezer and then we
3 crack the bottle. So we could not store it anymore because
4 it smelled and we throw them out.

5 Q Okay. So through--is that a normal process that
6 happens or is that a mistake---

7 A (interposing) We---

8 Q ---that took place?

9 A We typically filter those samples and then we do
10 not keep them anymore. But in this cases, I don't remember
11 how much sample I received, but it was quite a bit of water
12 volume, but we only use small amount to filter them. Because
13 it has sludges and also suspended particle, I was not able to
14 filter much water.

15 So the filter sample, typically we concentrate the
16 bacteria, any biomass, on the filter. We use that for the
17 DNA analysis. So the rest of the sample I could sample more
18 in the sample filter, but it was not the cases. I just give
19 them to Matt McIver. He's another technician in the other
20 lab. He stored them both in his freezer. He isn't aware of
21 our proper storing processes. And then I just take care of
22 the filter, which it has been concentrated, all the sludges
23 and all the stuff in there.

24 And then the filter was used for DNA extraction on
25 the 23rd. And then the DNA--so DNA, after the DNA has been

1 used and DNA was not thrown out yet, at some--it could be
2 somewhere in my freezer.

3 Q Or it could be thrown out? You don't know which?

4 A Well, it's been more than two years, so we did
5 some lab cleanups and so it's hard to---

6 Q So let me be sure I understand. You turned--took
7 some extract that you needed, gave the rest to Matt, who
8 improperly stored them, caused them to crack, and then you
9 threw those away?

10 A Yes, Your Honor.

11 Q Okay. And then the DNA was not something you were
12 going to publish anyway---

13 A (interposing) Yes, sir.

14 Q ---so you didn't have a particular need to save
15 them, so they could be destroyed or could be somewhere---

16 A (interposing) Could---

17 Q ---hidden in one of those freezers?

18 (Pause.)

19 The Court: I want to take about a ten
20 minute recess, please.

21 The Reporter: Off the record. 11:19 a.m.

22 (A brief recess was taken.)

23 The Reporter: On the record. 11:34 a.m.

24 The Court: This hearing is called to
25 order. It's now 11:30 on December 20th, 2011. All parties

1 present when we recessed are again present.

2 In reviewing the arguments by both sides and
3 certainly the case law--as both parties know, particularly in
4 administrative hearings, I have a fair amount of latitude in
5 granting certain evidence in that I don't have to worry about
6 a jury trying to properly weigh.

7 So the arguments presented in terms of chain of
8 custody, in terms of assistants using it, and in terms of it
9 being a perhaps unproven method at this time and in terms of
10 Mr. Poupart not using it specifically, all those I have a
11 fair amount of latitude and would feel quite comfortable with
12 that situation in going forward.

13 However, in considering whether testimony
14 concerning destroyed evidence should be admitted, there are
15 several factors that case after case demands that I review,
16 including the reason for its unavailability, the materiality
17 of evidence, the likelihood of mistaken interpretation, not
18 to mention the cross-examination to that, and the prejudice
19 to the other party caused by the unavailability of evidence.

20 So in determining whether to exclude such
21 evidence, I must consider the probative value, the proba-
22 bility, what might or might not cause undue prejudice, and
23 the harmful effects as opposed to outweighing the value
24 itself.

25 I find admission of testimony describing the

1 physical evidence here that has been destroyed under the
2 circumstances or lost or misplaced under the circumstances
3 that the record now shows would violate the petitioner's due
4 process rights and their confrontational rights, as the
5 production of that evidence might be beneficial to the
6 petitioner and in no way can be found or used at this time.

7 In doing so, the probative value of testimony
8 regarding a test that was not used specifically by Mr.
9 Poupart in his determination, simply as a side review, as
10 well as the other factors in there is--the probative value of
11 that is outweighed by the danger of undue prejudice to the
12 petitioner.

13 For those reasons as well as I think supporting
14 case law that counsel can find time and time again, I am not
15 allowing the testimony of Dr. Song and the DNA testing. Was
16 there any other purpose in Dr. Song's testimony, Ms. LeVeaux?

17 Ms. LeVeaux: Your Honor, we would make an
18 offer of proof at this time and have it preserved for the
19 record. And also, Your Honor, we would ask--we understand
20 that Ms. Bagwell is out of the state right now. She's going
21 to return--she's the assistant that may have misplaced this.
22 And she's going to return to the state after the 29th of this
23 month.

24 The Court: Okay.

25 Ms. LeVeaux: And we are going to see if we

1 can't get authorization--that is, monies to pay for her to
2 come down and go to the lab and see if she can't locate
3 that--the DNA.

4 The Court: Okay.

5 Ms. LeVeaux: So for those reasons, Your
6 Honor, we're going to ask that the case be just--we're going
7 to make--we would like to make our offer of proof if the
8 Court is amenable to that. We'd also like the opportunity if
9 Ms. Bagwell is able to--Ms. Bagwell works for--she worked for
10 UNCW. She's not a--she doesn't work for the State. And
11 we're going to see if she's able to locate that.

12 And I guess at that time, if we were to conclude
13 this case, we would ask that the case be reopened for the
14 limited purpose of reevaluating, and we would ask you to
15 reconsider your decision at that time.

16 The Court: Okay. I certainly have no
17 problem at all with offer of proofs. That is done quite
18 frequently, particularly in certificate of need cases, and
19 so--when evidence is excluded. So feel free to do that. I
20 will put that under seal. I will not review it or look at
21 it, so obviously it will play no part in my decision.

22 I am hoping we can conclude the case shortly.
23 And, of course, as long as the case is open, I do have the
24 latitude to review certain things. So if we're able to
25 conclude today, what I'll do is to see the--both parties'

1 desire for transcripts, that sort of thing, set out kind of a
2 date for proposals of fact and conclusions of law and of
3 course giving myself the 45 days, hopefully less, in a
4 decision.

5 If all that you are seeking occurs within that
6 time period, then I certainly would seriously review opening
7 up the case for that limited testimony. If, however, that
8 does not take place in that time, in other words if I am able
9 to issue my final decision before they--your witness that you
10 were talking about is able to do what they want to do or need
11 to do or might be able to do, particularly as this case falls
12 before January 1st of 2012, I am not under the old law a
13 court of continuing jurisdiction. So I actually do not have
14 the authority to reopen the case once a decision is issued.

15 But that certainly could be presented to the final
16 decision maker as additional evidence, which is usually
17 required to be done, and the offer of proof will of course
18 accompany the record. Does that make sense to both parties?

19 Ms. Jones: Yes, Your Honor.

20 Ms. LeVeaux: Thank you, Your Honor. Your
21 Honor, since you've ruled in favor of the petitioners, just a
22 point of clarification for tab number 19, if you'll tell me
23 what you're excluding. And also if you could speak to tab
24 number--I think number 5, which is in fact indeed what Mr.
25 Poupart said that he looked at.

1 And I'm just trying to find--trying to understand
2 just so that I don't cross the boundary of what has been
3 admitted and versus what is not admitted into evidence. I
4 think it's tab number--if you'll go through 19 for me,
5 please, and then also--I think it's number 4. Let me just
6 make sure, or 3.

7 The Court: Well, 19A is his résumé, and I
8 certainly don't have any problem, and it sounds like
9 Petitioner did not, on his résumé or expertise, admitting
10 19A. It appears that 19B begins some of those test results;
11 is that correct?

12 Ms. LeVeaux: Yes, but the---

13 The Court: (interposing) So that would---

14 Ms. LeVeaux: ---the sheet 19B is also the
15 same sheet in Exhibit 3, which Mr. Poupart said he looked at.

16 The Court: Okay. And I don't know if
17 we've admitted Exhibit 3 or not.

18 Ms. Jones: Exhibit 3 has not been
19 admitted. We've checked on that.

20 The Court: Okay.

21 Ms. LeVeaux: I thought 3 was admitted,
22 because he said he looked at it and identified it. I thought
23 19B was not admitted, but I--and it may have been an issue
24 that you reserved ruling on.

25 Ms. Jones: My recollection is neither

1 Exhibit 3 or 19B in fact have been admitted.

2 The Court: Okay. We'll look at the record
3 to double-check that.

4 Ms. LeVeaux: Okay. Okay. So---

5 The Court: (interposing) I certainly
6 don't want to have these results. I---

7 Ms. LeVeaux: (interposing) But, Your Honor,
8 can I just speak to 19--to Exhibit 3? Mr. Poupart said he
9 did look at it. Mr. Poupart for his limited understanding,
10 whatever that is--and I can put him back on the stand to ask
11 what he understood about this document, but he did say he
12 reviewed Exhibit 3. So we would ask that you allow Exhibit 3
13 even if you exclude Exhibit 19B.

14 The Court: Your response, Ms. Jones?

15 Ms. Jones: Your Honor, I don't have any
16 recollection that Mr. Poupart said that he had looked at
17 Exhibit 3. He did provide testimony that he reviewed
18 documents in preparing his opinion, but he did not reference
19 specifically to this Exhibit 3. And, Your Honor, again, for
20 the same reasons we've stated before, the document should
21 be--should not be admitted.

22 The Court: Well, I think at this point,
23 since we're uncertain--obviously Mr. Poupart's testimony is
24 his testimony, so that certainly will stand. Whatever he
25 looked at, that will stand, and I can weigh that obviously

1 with my present ruling.

2 If it was specifically pointed out that he looked
3 at this and he made some interpretation himself of that, I'm
4 not recalling that myself either. That does not mean it did
5 not happen.

6 Ms. LeVeaux: He did say he had looked at it,
7 Your Honor. I remember going through the exhibits and his
8 saying he did look at it, but I'm going to offer Mr. Poupart
9 back on the stand just for clarification of this issue.

10 The Court: Okay. Okay, that sounds--well,
11 anything further with Dr. Song?

12 Ms. LeVeaux: Just clarification on Exhibit
13 19. There's a C as well as a B.

14 The Court: Okay. Any response, Ms. Jones,
15 to C?

16 Ms. Jones: Your Honor, 19C--I'm sorry; if
17 I could take a moment, Your Honor.

18 (Pause.)

19 Ms. Jones: Your Honor, it's my recollec-
20 tion, if I could just take a moment, that 19C may have been
21 admitted.

22 The Court: And I think it's simply an
23 exchange between Mr. Shiver and Mr. Song on what will happen
24 as opposed to any results.

25 Ms. Jones: Yes, Your Honor.

1 The Court: And I have no problem with 19C,
2 so if that's not already been admitted, I will go ahead and
3 admit 19C. So we'll just simply remove 19B. And since--does
4 19B also contain the same thing as 3?

5 Ms. LeVeaux: No, sir. 3 just has the first
6 sheet, which are the peaks and the valleys, which I'm going
7 to offer Mr. Poupart to identify. But 19B has the sample
8 sheet actually attached to the DNA. It has the lab results
9 showing the specific analysis.

10 The Court: So 19B is the same--the first
11 page of 19B is the same as 3; correct?

12 Ms. LeVeaux: Just the first page, but---

13 The Court: (interposing) Just the first
14 page.

15 Ms. LeVeaux ---not the attached work and
16 the analysis.

17 The Court: Okay. I'm going to exclude
18 that as well. If I've already admitted it, I will retract
19 that. So I'll exclude Respondent's Exhibit 3.

20 Ms. LeVeaux: You're going to exclude it even
21 if we offer Mr. Poupart?

22 The Court: Well, I don't mind his
23 testimony about it---

24 Ms. LeVeaux: (interposing) Okay.

25 The Court: ---but I don't want the sheet

1 itself.

2 Ms. LeVeaux: Okay.

3 The Court: So if he can have a recollection of what he looked at and how it supplemented as he--as he described as opposed to it being a determinative factor, I certainly don't have any qualms with that at all. So if he wants to elaborate, I certainly will allow him to come back and elaborate on his use of the results he got, although it has been described as supplemental as opposed to anything else.

11 Ms. LeVeaux: Well, Your Honor, I'm a little confused because Respondent has submitted a bunch of information to Petitioners, and they brought in their experts. And their experts have actually utilized the documents and they've been able to speak to the documents that they utilized. And that was considered for their weight.

18 And here we're not asking--we're not saying he--he--if he can, he says he looked at it. He says it was supplemental. And I wanted to go deeper into that since the Court is not inclined to--just as it--just as it relates to what his background is and what his knowledge is.

23 He's just looking at a document, and I'm just a little bit confused how it is that he can't speak to a document that he reviewed and how that differs from the same

1 sort of thing that Petitioner's experts have been doing when
2 they've been taking documents produced by the State and
3 they've been able to go through a similar analysis and they
4 have the benefit of pointing to the document even though they
5 didn't prepare the document and to explain what it means.

6 The Court: I understand your point. I
7 haven't excluded any of their evidence specifically and
8 certainly testimony of destroyed evidence. Further, it would
9 be a bit inconsistent for me not to allow 19B, which is the
10 same thing--at least one page is the same thing as 3. So in
11 that regard I am going to exclude 3 if I have not already
12 done or if I was withholding ruling.

13 Again, my memory of Mr. Poupart's testimony was
14 that it was not something he specifically relied on, but he
15 simply used it as--and that testimony will stand. And of
16 course I can give it the weight that it may or may not be
17 entitled to. So with that being said, do you want to put Mr.
18 Poupart back on the stand to talk about it?

19 Ms. LeVeaux: I do, sir.

20 The Court: Okay.

21 Ms. LeVeaux: And I'll do that at the
22 appropriate time. I'm going to make an offer of proof of
23 19B, and then I'll put Mr. Poupart on the stand. And I'll
24 ask him--I know that the document won't be in evidence. Can
25 he speak to the document?

1 The Court: Certainly he can, certainly.
2 He can speak to whatever he can remember about the document
3 and that sort of thing.

4 Ms. LeVeaux: Okay. Thank you.

5 The Court: But as far as the specific
6 "this line means that line," I don't think he's been
7 qualified. And he indicated that himself as well.

8 Ms. LeVeaux: Okay.

9 The Court: But he certainly can give his
10 overall impression of that and any other report he might have
11 gotten that probably would I think have been more influential
12 with him, any written report as opposed to this kind of
13 graph.

14 Ms. LeVeaux: Thank you, Your Honor.

15 The Court: But I'll go ahead and admit for
16 the offer of proof purposes any that you wish to submit.

17 Ms. LeVeaux: We would include Exhibit 3 in
18 that offer of proof---

19 The Court: (interposing) That's fine.

20 Ms. LeVeaux: ---Your Honor?

21 The Court: That's fine. Of course, we
22 know it's a duplicate of 19B, the first page.

23 Ms. LeVeaux: That's correct. Your Honor, I
24 know that you indicated that you wanted to adjourn early for
25 lunch, and I think we've already crossed that time frame. I

1 didn't know if you wanted to do that now or maybe go forward
2 with Dr. Song?

3 The Court: Let me--Mr. Jones.

4 Mr. Jones: This is related but unrelated.

5 I know that you had a question about Dr. Song on some other
6 matters.

7 The Court: I did, and that's--I'm fixing
8 to ask that to see what time--did you have any other reasons
9 for Dr. Song's testimony for---

10 Ms. LeVeaux: (interposing) No. I just
11 wanted to get this into evidence.

12 The Court: Okay.

13 Ms. LeVeaux: So that would be the--my
14 reasons are limited to this--to these exhibits, yes.

15 The Court: Okay. We'll do a few questions
16 on that. I think she wants to verify that he wrote them and
17 that sort of thing, and I think that's certainly appropriate.
18 And, again, I will certainly accept those as an offer of
19 proof. It's not a problem at all.

20 Dr. Song, you have filed a motion to intervene
21 relating to payment of some fees?

22 The Witness: Yes, sir.

23 The Court: I'd like to take that up after
24 lunch. Are you still available after lunch? We'll come back
25 around 1:15---

1 The Witness: (interposing) Yes, sir.

2 The Court: ---after lunch. Okay, because

3 I didn't want you to think that we had forgotten about you in

4 that regard. But I do want to take that up first thing

5 afterwards. So to wrap up that, and then after that we can

6 take Mr. Poupart.

7 Ms. LeVeaux: Okay. And Your Honor, are

8 you--I'm sorry; are you allowing me to ask questions about

9 19B for my offer of proof?

10 The Court: No, just simply the authentica-

11 tion if you need to. I'll accept them as authentic without

12 you needing to voir dire him about them.

13 Ms. LeVeaux: Okay. So---

14 The Court: (interposing) I don't think

15 the---

16 Ms. LeVeaux: ---you'll just accept them as

17 authentic?

18 The Court: ---there's any problem with

19 Petitioner that these are reports he made, that they're

20 authentic, that they are--they say what they say, and any

21 reports that might go along with that, I accept them as

22 authentic.

23 Ms. LeVeaux: Okay.

24 The Court: I don't know that you need to

25 ask him that.

1 Ms. LeVeaux: Well, if that's---

2 The Court: (interposing) But I don't want

3 you to ask him---

4 Ms. LeVeaux: ---having put that in the

5 record and---

6 The Court: And I'm fine for you to add any

7 kind of memo, any kind of other report stemming from that

8 evidence itself.

9 Ms. LeVeaux: And I just want to put in one

10 or two lines and--or I can ask him by way of question as it

11 relates to the supervision and the control that he had---

12 The Court: (interposing) That will be

13 fine.

14 Ms. LeVeaux: ---on those individuals working

15 for him because there is some stuff that was done and we

16 would argue at his direction and under his supervision.

17 The Court: Okay.

18 Ms. LeVeaux: So I would just ask that one

19 question and have him answer it, if I could put that in the

20 record.

21 The Court: Sure, that's fine; that's fine.

22 I hope my ruling was specific enough too that as a rule I did

23 not have a problem with the chain of custody in the sense

24 that I could admit something and then weigh it later on, or

25 the fact that he oversaw two folks. So that's--my ruling is

1 strictly based on the fact that the particular evidence is
2 unavailable.

3 Ms. LeVeaux: Can I just ask the one
4 question, Your Honor---

5 The Court: (interposing) You certainly
6 can.

7 Ms. LeVeaux: ---about supervision?

8 The Court: You certainly can.

9 Ms. LeVeaux: Thank you.

10 **D I R E C T E X A M I N A T I O N** 11:52 a.m.

11 _____ (resumed) _____

12 By Ms. LeVeaux:

13 Q Dr. Song, you did--if you'll look at Exhibit 19B,
14 and if you would just leaf through it very quickly, please?

15 A 19B; B as in boy?

16 Q I'm sorry?

17 A It's 19?

18 Q 19; go to tab number 19 in Respondent's notebook
19 first.

20 A Okay.

21 Q And if you'll flip through the first few pages,
22 which are your CV---

23 A Uh-huh.

24 Q ---and after that is 19B.

25 A 19B.

1 Q And if you'll look through just very quickly at
2 19B?

3 A Uh-huh.

4 Q And could you just explain for the Court and for
5 the record who worked--if anybody worked on these in
6 preparing these and in what capacity they worked?

7 A So 19B is showing the DNA analysis result after we
8 received the water sample.

9 Q Who is "we"?

10 A Jennifer Bagwell and Lisa--Lisa Nguyen. So the
11 two--one was undergrad; Lisa was an undergrad student.
12 Jennifer was technician. She was my graduate student. She
13 finished completing her degree and then she was hired as a
14 technician in my lab.

15 And so Lisa--I received the--the water sample was
16 received by recipient at the center, and then a student in
17 the other college lab, but she also work in my lab, went to
18 pick up the sample. And her name is Rita.

19 And then I was told the sample was in my lab, so I
20 did filtering the water sample, which concentrate the
21 bacteria and biomethyl sludges on the filter. And then the--
22 Lisa was--Lisa and Jennifer was there as well. And Lisa did
23 the DNA extraction from filter, so destroyed the filter, got
24 the DNA out. And then after step, we need to target specific
25 bacterial growth living in animal gut. That's how we can

1 identify the sources.

2 The Court: I don't want that type of
3 testimony. If you want people's names for any chain?

4 Ms. LeVeaux: I'm sorry?

5 The Court: If you want the chain--I'm more
6 concerned with any testimony about a chain of custody.

7 Ms. LeVeaux: Okay.

8 The Court: I don't want any results or how
9 anything took place.

10 Ms. LeVeaux: Okay. Okay.

11 The Witness: So--so this--

12 By Ms. LeVeaux:

13 Q So---

14 A (interposing) I'm sorry.

15 Q ---just explain for the Court the capacity in
16 which Lisa and Jennifer worked and what their role was.

17 A So Lisa did the usual steps of work. And then
18 Jennifer follow up to what she has done for the DNA and PCS
19 step. And then she finished the rest of the analysis and she
20 brought the data to analyze together.

21 Q Okay. And were they working at your direction and
22 under your control?

23 A Yes, ma'am.

24 Q Did you in fact verify the accuracy and observe
25 their work?

1 A Yes, ma'am.

2 Ms. LeVeaux: Thank you.

3 The Court: Thank you. And again, at
4 your--at your leisure, you could submit that offer of proof
5 at any time with any memos of law or that sort of thing, Ms.
6 LeVeaux.

7 Ms. LeVeaux: Thank you.

8 The Court: With that being said, I would
9 like to break for lunch. We will return at 1:15. And at
10 that point in time, we'll take up the motion to intervene by
11 Dr. Song. Thank you.

12 (The hearing was recessed at 11:55 p.m. to
13 reconvene at 1:15 p.m. this same day.)

1 **F U R T H E R P R O C E E D I N G S** 1:16 p.m.

2 (Whereupon,

3 **BONGKEUN SONG, Ph.D.**

4 the witness on the stand at the time of recess, resumed the
5 stand and testified further as follows:)

6 The Court: This hearing will come to
7 order. It's now 1:16 on December the 20th, 2011. All
8 parties present when we recessed are again present. And I
9 understand Dr. Song has nothing further from you, Ms.
10 LeVeaux; is that correct?

11 Ms. LeVeaux: That's correct, Your Honor.

12 The Court: Okay. But I do at this time
13 want to take up--and I'll give kind of a--just a brief
14 introduction, and that is in October the respondent filed a
15 motion to compel Petitioner to pay a requested expert witness
16 fee. And at that point in time, before we got started with
17 the entire case, we held a prehearing conference. And at
18 that point in time I asked Ms. LeVeaux, one, if you were a
19 state employee. She believed you were.

20 Dr. Song: Yes, I am.

21 The Court: And obviously Ms. LeVeaux is
22 authorized to represent state employees, so my next question
23 to her was did she represent you, and she did not. She was
24 representing the--DENR in this particular matter and not you
25 in particular.

1 So with that being the case, we viewed her motion
2 more as a courtesy request but one that did not carry any
3 legal protocol or weight at the time. But I did tell her,
4 and you obviously did, that if you--and I've done this
5 several times before--if you had a request that you could--
6 you don't believe she could represent your interest, and
7 obviously she could not represent your interest at this time
8 in this matter, then the proper was to ask to intervene in
9 the case for that limited purpose, because the case would not
10 offer an opportunity for your interest to be represented.

11 And so that is--that is what I think was relayed
12 to you, and that is indeed what you did. So I do have a
13 motion that you filed, I believe it was November--the date
14 stamp is rather vague here--but it is a motion to intervene,
15 which I am granting. And that being the case, I am granting
16 it for that limited purpose.

17 And what I need you to do also is to kind of
18 express--and you can do it from the witness stand if you'd
19 like. You can have a seat beside someone and do it, whatever
20 you're most comfortable with. I need you to express your
21 request and then give both parties the opportunity to--and I
22 might have some questions myself--both parties the
23 opportunity to respond. Does that make sense to you?

24 Dr. Song: Yes, sir.

25 The Court: Okay. And your request to

1 intervene was in order to seek expert witness fees; correct?

2 Dr. Song: Yes, sir.

3 The Court: Okay. Do you want to explain
4 that to me a bit?

5 Dr. Song: I requested to--I filed a
6 motion to the proper pay for hours of my services while I was
7 doing the deposition in July of 2011. There was a discussion
8 with--that the charge should be \$300 per hour as the charge.
9 But what I have received from the opponent attorneys was \$200
10 per hour charges.

11 The Court: So you're seeking---

12 Dr. Song: (interposing) Total---

13 The Court: ---for the deposition, the time
14 of deposition?

15 Dr. Song: Time of deposition.

16 The Court: Okay.

17 Dr. Song: Yes, sir.

18 The Court: And nothing for the appearance
19 here; is---

20 Dr. Song: (interposing) No.

21 The Court: ---that correct?

22 Dr. Song: Yeah.

23 The Court: Okay. And how many hours is
24 that, then?

25 Dr. Song: That's two hours and 30

1 minutes.

2 The Court: Okay. And for two hours and 30
3 minutes you're seeking a total cost of what?

4 Dr. Song: Total cost of \$750.

5 The Court: \$750. And you've been paid how
6 much?

7 Dr. Song: \$500.

8 The Court: Okay. Well, I'll reserve any
9 of my questions, but let me ask first since the--he's seeking
10 it particularly against the petitioner, any questions that
11 you have for Dr. Song?

12 EXAMINATION 1:22 p.m.

13 By Ms. Jones:

14 Q Dr. Song, do you recall at your deposition stating
15 that you were charging the State \$200 an hour for your time?

16 A So there was some miscommunication while I was
17 there. So when I'm doing witness, the fee for being the
18 witness is \$300 no matter where I go for it. \$300 and \$200
19 charges are the consulting fees.

20 So when I do the consulting for like a DNA
21 analysis like this, I should charge \$200 per hour to state.
22 If the private sector asking for doing this work, then I
23 should charge \$300 per hour for this type of work.

24 Q Okay. Do you recall testifying at your deposition
25 that you have not been asked to provide any expert opinion?

1 A You were asking for it. I said yes.

2 Q And do you recall testifying that the only thing
3 you'd been asked to do was to talk about your part of the
4 investigation?

5 A I agree.

6 Ms. Jones: No further questions.

7 The Court: Okay. Any questions from you,
8 Ms. LeVeaux?

9 Ms. LeVeaux: Yes.

10 EXAMINATION 1:23 p.m.

11 By Ms. LeVeaux:

12 Q Dr. Song, I think you indicated to the Court that
13 you were not being paid for your time here today. And I
14 don't know if I heard the question clearly or not, but you
15 are in fact being paid for your time here today, are you not?

16 A I am, but--part of it's school-wise, but I also
17 filed that as a faculty of UNCW I am able to get extra on
18 external activity payment. This is part of---

19 Q (interposing) Correct, but today you're charging
20 the State, are you not? You're charging DWQ---

21 A (interposing) I am charging the State.

22 Q How much are you charging DWQ?

23 A \$300 per hour.

24 Q Okay. And you're charging \$300 an hour. Was any
25 other amount of money prior to your taking that deposition

1 other than \$300 an hour ever conveyed to DWQ?

2 A No.

3 Q In fact, the first time you even mentioned \$200
4 was in the deposition, was it not?

5 A That's right. That's the first time.

6 Q Did you not make it clear to me to communicate to
7 opposing counsel that you were charging \$300 an hour?

8 A I did not.

9 Q Who did you talk to about that?

10 A I talked to you about--I mean who I consult the
11 charges?

12 Q Before you went to the deposition.

13 A I talked to Dr. Larry Cahoon.

14 Q No, no, no. Who did you talk to with DWQ?

15 A Oh, that was---

16 Q (interposing) How did I know that you were---

17 A (interposing) Okay, sorry; Rick Shiver, Mr. Rick
18 Shiver.

19 Q I'm sorry?

20 A Rick Shiver.

21 Q And what did you tell Mr. Shiver?

22 A I told him that the charges for the--as a witness
23 fee is \$300.

24 Q Okay. So tell the Court how come you referenced
25 to \$200 an hour when you were in depositions.

1 A Okay. So when I get this idea about the fee of
2 witnesses, I consulted with two other faculties at UNCW. And
3 the one faculty come to the--he had the experience of being
4 the witness in the court, a court witness. And he told that
5 \$300 is the market price has been charged through that.

6 And then I consult the other faculty, and he was
7 misunderstood my question was. He was saying about two
8 different fees, \$300--excuse me, \$200 when he did a
9 consulting job to do analysis, the water quality, et cetera.
10 So if I had the clear idea about how this whole case is going
11 to happen like this, I should charge really \$200 per hour of
12 my time to doing this analysis.

13 Q And when you were in depositions, prior to you
14 going into depositions, you and I hadn't really talked
15 excessively, had we?

16 A No, we didn't.

17 Q In fact, the only thing that you knew was that I
18 was going to ask you to render an expert opinion; is that
19 correct?

20 A Yes.

21 Q And we didn't talk any more than that, did we?

22 A No.

23 Ms. LeVeaux: Thank you; no further
24 questions.

25 The Court: Okay. Anything further?

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EXAMINATION

1:26 p.m.

(resumed)

By Ms. Jones:

Q Dr. Song, I'd just like to clarify. You said that you should have charged the State \$200 an hour for your analysis?

A Yes.

Q Okay. And I believe you testified earlier that you were not asked to provide expert opinions in this case, were you?

A I was--do you mean from which side, from your---

Q (interposing) From the State.

A From the State they asked for it.

Q Okay. Do you recall at your deposition I asked you, "you've not been asked to provide any expert opinions. You've only been asked to talk about the testing that you've performed?"

A Yes, I explained what I did.

Q And you said, "Yes, I understand." And I said "That's correct?" And you said, "Yes, that's correct." That's page 98 of your deposition.

A Yes, that's correct.

Ms. Jones: No further questions, Your Honor.

The Court: Anything further, Ms. LeVeaux?

1 **EXAMINATION** 1:27 p.m.

2 (resumed)

3 By Ms. LeVeaux:

4 Q Is your understanding clear now what the State
5 wanted? I don't know if you understood then or you
6 understand now. I'm not sure. Did you understand that Ms.
7 Jones was asking you whether we had not--whether we were
8 requesting an expert opinion or not? Did you understand what
9 she was asking you?

10 A I was not clearly understanding what the question
11 was at the time, but now I understand clearly.

12 Ms. LeVeaux: Okay.

13 The Court: Anything further?

14 (No audible response.)

15 **EXAMINATION** 1:27 p.m.

16 By The Court:

17 Q Let me ask you a couple of questions, Dr. Song.
18 One is are you a state employee?

19 A Yes, sir.

20 Q And so you're paid by UNC Wilmington?

21 A Yes, sir.

22 Q Okay. Were you a state employee when you
23 performed the analysis that you performed?

24 A Yes, sir.

25 Q Okay. Did you do it at state facilities?

1 A Yes, sir.

2 (Pause.)

3 Ms. LeVeaux: Your Honor, I have a question
4 as a result of your questions.

5 The Court: Well, I've got a couple more.

6 Ms. LeVeaux: Okay.

7 The Court: Okay.

8 By The Court:

9 Q And at the time of the deposition, was that state
10 time or was that your time?

11 A It's my time.

12 Q Your time. So the deposition was on your time,
13 then?

14 A Yes, sir.

15 Q Okay. What type of regulations, if you know or
16 you can find for me, does the University of North Carolina at
17 Wilmington have regarding testimony and that sort of thing?

18 A So probably this is considered consulting,
19 consulting category. So we have a--I have document brought
20 with me. It shows--can I---

21 Q Okay. Well, let me read you what I know from
22 North Carolina State University and the University of North
23 Carolina---

24 A (interposing) Uh-huh.

25 Q ---and then--because I want to kind of compare

1 that.

2 A Uh-huh.

3 Q And it's part of their regulations. It says:
4 "Due to the expertise and position," such as you
5 have, you're "frequently sought in courts of law
6 to provide facts and data to assist in...various
7 claims and suits. When the employee provides such
8 expert witness testimony, it usually benefits one
9 party to the detriment of the other. This places
10 the...employee in an unintentional adversarial
11 position. To reduce the impact on the employee...
12 and [the] institution, and to provide uniform
13 method of handling...numbers of cases, the
14 following guidelines are established."

15 So I'm trying to see if you-all have something
16 like this. "Give testimony under only a valid duly served
17 subpoena... . Under these conditions, the employee is in an
18 official capacity as a state employee" and is protected under
19 the Tort Claims Act. So that becomes--my next question is
20 you served a valid subpoena to appear at the deposition?

21 A Yes, I did.

22 Q Okay. And if you were to be--if claims would be
23 brought against you for malpractice or anything of that sort,
24 do you have your own private insurance that would protect you
25 under those types of claims?

1 A I believe the school has that.

2 Q Does the school have them or do you have them?

3 A I don't.

4 Q You don't. So you would be relying on the state
5 Tort Claims Act to protect you; is that correct?

6 A Yes, sir.

7 Q Even during your deposition period?

8 A Yes, sir.

9 Q Have they indicated that they would do that, or do
10 you know?

11 A I do not know about the regulation.

12 Q Okay. So that helps answer that. So "If
13 testimony will result in serious conflicts...suggest other
14 experts" or other consultants to appear, "Provide only
15 factual knowledge and data...refraining from nonsubstantiated
16 opinions," "Provide advance notification to supervisor"--did
17 you do that when you---

18 A (interposing) Yes, I did.

19 Q ---were doing that--"and to the director of the
20 office...of testimony including expected date, names... ."
21 And then the last is "Accept NO fees or monies for [your]
22 testimony." So these are what I do know control other
23 universities in the University of North Carolina system, and
24 that's why I'd like to see if you know, and it sounds like
25 you might, what regulations you're provided.

1 And then of course I do know that--based on
2 personal experience that some have given depositions carrying
3 their own malpractice insurance. And of course then they've
4 charged the fees. They've done it on their own time, so to
5 speak. They've either taken vacation days or it's been after
6 hours. And so they were totally on their own, so to speak,
7 to charge what they considered a reasonable fee.

8 So that's why I want to split apart what your
9 protections and requirements are because the statutes are
10 pretty clear about state employees as opposed to when you're
11 on your own, so to speak.

12 A Uh-huh. I do not---

13 Q (interposing) Is there any response that you have
14 to any of that? So you don't carry malpractice. You're a
15 state employee. You performed these services at a state
16 facility. Did they charge you for these or did you--in other
17 words, do they charge you for using the laboratory that you
18 conducted your analysis in?

19 A Did the university charge?

20 Q Correct. Did they charge you?

21 A No.

22 Q Okay. My last would be do you have any documents
23 on the regulations of UNC Wilmington---

24 A (interposing) No, I have a document---

25 Q ---similar to what I just read you? I know it's

1 from North Carolina State University.

2 A Not exactly the same document I have, but I have a
3 document for the definition of external--external activity to
4 get paid.

5 Q Okay.

6 A That's what I would consider this is the case.

7 Q Okay.

8 A But I can look for that--the witness cases. Maybe
9 UNCW has a specific document for the--for witness.

10 Q Now, I know consulting is different in some ways,
11 although a lot of that is blended, as opposed to providing
12 witness testimony---

13 A (interposing) Uh-huh.

14 Q ---which is what I read you an excerpt from from
15 North Carolina State University.

16 The Court: Before you grab that up,
17 though, let me see, do the parties have any questions for Dr.
18 Song?

19 Ms. LeVeaux: You asked--you asked actually
20 most of my additional questions.

21 **EXAMINATION** 1:33 p.m.

22 _____(resumed)_____

23 By Ms. LeVeaux:

24 Q Dr. Song, there--you have quite a few colleagues
25 who in fact are experts and who have tendered depositions and

1 appeared in court, do you not, over there at UNCW?

2 A Say that again, please.

3 Q Is that not true?

4 A Is that true? They do, uh-huh.

5 Q Okay. And is it also--is that a term in your
6 contract, or do you know?

7 A I do not know.

8 Ms. LeVeaux: Okay. That's all I have.

9 The Court: Okay.

10 Ms. Jones: Nothing, Your Honor.

11 The Court: Great. Any documents you
12 brought with you---

13 Dr. Song: (interposing) Yes.

14 The Court: Sure, step down and grab those
15 up.

16 (Documents handed to the Court.)

17 The Court: Now, is this my copy to keep?

18 Dr. Song: Yes, sir.

19 The Court: Okay. Thank you. And this
20 is---

21 Dr. Song: A copy of that---

22 The Court: Notice of Intent to Engage in
23 External Professional Activities for Pay; excellent. Okay.
24 Good. Let me see if I have any more questions that I--here,
25 have a seat up here so you can be comfortable.

1 (Pause.)

2 EXAMINATION 1:33 p.m.

3 By The Court:

4 Q Again, having--looking at these in several cases
5 before through the years here, what you're seeking then are
6 the--do your fees that you're charging include transportation
7 costs and that sort of thing for you?

8 A No, sir.

9 Q Is that a separate charge?

10 A It's not going to be charged.

11 Q There's no charge for that. So that would be--
12 your expert fees you're asking for encompasses---

13 A (interposing) Yes.

14 Q ---not only your consulting or expert---

15 A Yes, sir.

16 Q And do you consider that you were consulting with
17 these folks or providing testimony at deposition or---

18 A There was testimony in deposition.

19 Q Okay. So they've not hired you privately to
20 consult with them; is that correct?

21 A There was Rick Shiver asking me to do the
22 analysis, DNA--the sample analysis. That was consulting.

23 Q Okay.

24 A But I did not charge for that.

25 Q So Ms. LeVeaux and DENR have asked you to provide

1 some consulting with them. Is that what I'm understanding?
2 But the House of Raeford has not. They've simply--and I
3 shouldn't say simply. They've asked you to provide testimony
4 based on your results and that sort of thing; is that
5 correct?

6 A Yes, sir.

7 The Court: Okay. Any questions that
8 either party has for me?

9 Ms. LeVeaux: No, sir.

10 By The Court:

11 Q Because the last--I'm trying to think through the
12 years here what--the money that you receive, do you retain
13 that yourself personally or do you turn that back to the
14 university?

15 A It's going to be retained myself.

16 The Court: Okay. That's all the questions
17 I have. That should give me a basis to kind of review the
18 statutes again based on what you've asked, and--but I am
19 verbally allowing the motion to intervene, and we certainly--
20 and I've certainly been able to understand the circumstances
21 around it.

22 You are free to submit--if you come across
23 anything entitled, you know, Regulations for Providing Expert
24 Witness Testimony that you can come across or ask--you might
25 even ask the university counsel or that sort of thing--then

1 feel free to send that to me, if you would.

2 Dr. Song: Yes, sir.

3 The Court: Okay, thanks. And there's no
4 further substance testimony on the case; is that correct?

5 Ms. LeVeaux: On the case, on my case?

6 The Court: Yes, ma'am.

7 Ms. LeVeaux: Yeah, I'm going to tender Mr.
8 Poupart to the stand, please.

9 The Court: Okay. You may step down.
10 Thank you very much.

11 Dr. Song: Thank you, Your Honor.

12 Ms. LeVeaux: We would call Mr. Poupart to
13 the stand.

14 The Court: Okay. He was going to come up
15 anyway. I remind you, Mr. Poupart, that you remain under
16 oath.

17 (Whereupon,

18 **JEFFREY O. POUPART**

19 was recalled as a witness, and having been previously sworn,
20 resumed the stand and testified further as follows:)

21 **D I R E C T E X A M I N A T I O N** 1:37 p.m.

22 By Ms. LeVeaux:

23 Q Mr. Poupart, you've been in these proceedings--
24 you've sat through these proceedings, have you not?

25 A That's correct.

1 Q And do you remember taking the stand and I asked
2 you what you considered in making this assessment?

3 A I do.

4 Q And there's been some discussion about information
5 from UNCW. And did you--and so if you could speak to that,
6 do you know whether or not you looked at any documents from
7 UNCW?

8 A I did.

9 Q And what did you look at?

10 A There was a--one piece of paper that had numerous
11 chromatic--or printouts, graphical tests on one piece of
12 paper comparing different results from the primary lagoon and
13 from the waste found in the creek.

14 Q And it was a DNA report, was it not?

15 A Yes.

16 Q Do you hold yourself out as a DNA expert?

17 A No, I do not.

18 Q But did you have an occasion to look at that
19 report?

20 A Yes, I did.

21 Q And what type of--and did you consider that
22 report?

23 A Yes, I did.

24 Q And what background do you have that would allow
25 you to even consider that report?

1 A Well, my degree is in chemistry with a focus on
2 analytical chemistry. And I had some years in the laboratory
3 post college. And it seemed typical to many chemical instru-
4 ments, chromatographs, that typically the frequency--you
5 know, the peaks are in--on the x axis and the y axis would
6 show the height of the peaks.

7 And on all those--the graphs that were presented
8 as documentation, the location of the peaks and the amplitude
9 of the peaks was extremely similar, and there was no errant
10 peaks off in an area where there was not peaks on one of the
11 corresponding graphs.

12 Q So this document that you looked at that showed
13 peaks, do you remember what they showed peaks and valleys of?

14 A I'm not a geneticist, but in terms of---

15 Q (interposing) I mean what was the comparison? Do
16 you know?

17 A The comparison I guess was--I guess when they
18 break the DNA apart, it---

19 Q (interposing) No, no. I'm not asking you about
20 the DNA. I'm asking you do you know what was being analyzed?

21 A The waste that was found in the creek and the
22 waste--or not waste--in the--and some material from the
23 lagoon.

24 Q And then what did you determine as a result of
25 reviewing that document?

1 A I determined that they were a match, that they
2 had--that they--that they had peaks of similar height or
3 amplitude in the same locations and that there was no errant
4 peaks between the two, that they were exactly the same
5 location and height.

6 Ms. LeVeaux: Thank you.

7 The Court: Mr. Jones or Ms. Jones?

8 Ms. Jones: Yes, Your Honor.

9 C R O S S - E X A M I N A T I O N 1:40 p.m.

10 By Ms. Jones:

11 Q Mr. Poupart, you didn't actually receive any sort
12 of signed report from Dr. Song related to the documents you
13 reviewed, did you?

14 A No, I did not.

15 Q And you've not performed the type of DNA analysis
16 performed by Dr. Song, have you?

17 A No, I have not.

18 Q And you didn't actually take the samples that you
19 referenced earlier, did you?

20 A No, I did not.

21 Q And you don't know where they were taken?

22 A I know that the locations were indicated on the
23 report as--in terms of the stream, Cabin Branch I believe it
24 said, and the lagoon, primary lagoon.

25 Q So you know that there is a reference to Cabin

1 Branch and a reference to House of Raeford?

2 A I believe it was Cabin Branch. It could have been
3 Beaverdam. It was one of the creeks.

4 Q And you don't know what the peaks on the report
5 you saw represent, do you?

6 A No, I do not.

7 (Ms. Jones and Mr. Jones confer.)

8 Q Mr. Poupart, you did testify earlier that this
9 methodology is not in the standard books as an accepted
10 method; isn't that correct?

11 A That's correct.

12 Q It's not an approved method by any certified lab,
13 by a state certified lab?

14 A That's correct.

15 Q And it was only some supplemental information you
16 had?

17 A That's correct.

18 Q In fact, there was a discussion of whether you
19 should just leave it out completely?

20 A There was discussion.

21 (Mr. Jones and Ms. Jones confer.)

22 Ms. Jones: No further questions.

23 The Court: Ms. LeVeaux?

24 **R E D I R E C T E X A M I N A T I O N** 1:42 p.m.

25 By Ms. LeVeaux:

1 Q You indicated that there were some discussions.
2 Were you a part of those discussions?

3 A There was just discussion on the fact that since
4 it wasn't an approved method was it okay to consider. And we
5 decided that since we were just considering it supplementally
6 to the other--the other evidence, the photographic evidence,
7 the chemical analysis of the creek water and the primary
8 lagoon, it was okay even though it wasn't an approved method
9 to keep in the file.

10 Q And you just didn't get the information--you knew
11 that these samples had been taken by Ms. Willis, did you not?

12 A I knew that they had been taken by the regional
13 office and--using our standard protocols for taking samples.

14 Q And then when there's reference to--there's been
15 bantering about about approved methods. Just talk about
16 that. I mean just because it's an approved method, does that
17 mean that DENR won't use it or doesn't review it?

18 A Well, there's approved methods that--it takes
19 years to become an approved method. So it can only be used--
20 it can't be used as a specific numeric--in the permit it
21 might have a limit of some number, and if--you have to use
22 the approved method to determine compliance on a regular
23 basis with that limit.

24 But quite often people take samples that are not
25 approved methods that they use for process control or just as

1 a screening method in the creek. When we find an incident,
2 we just take a quick screening method to determine what the
3 chemical speciation is or something. And they wouldn't use
4 necessarily a standard method, but it would still give us an
5 indication.

6 Q But don't the approved methods usually reference
7 to stream standards?

8 A Yes, there's approved methods for almost every-
9 thing on the--for the things that are listed in the red book
10 as having stream standards.

11 Q And do you know if there's a list for approved
12 methods for supplemental information?

13 A There would be no such.

14 Ms. LeVeaux: Okay. Thank you.

15 Ms. Jones: Just one last question, Your
16 Honor.

17 The Court: Sure.

18 **RECROSS - EXAMINATION** 1:44 p.m.

19 By Ms. Jones:

20 Q Mr. Poupart, you would agree that there's no water
21 quality standard for DNA, is there?

22 A No, there's not.

23 Ms. Jones: That's it, Your Honor.

24 **EXAMINATION** 1:45 p.m.

25 By The Court:

1 Q I have just a quick question. Did you put any
2 weight in making your decision to this, and if so, what
3 percentage of weight did you give it?

4 A Oh, I don't know percentage-wise. I did give it
5 some weight. There was already a preponderance of the
6 evidence. There's a lot of evidence that it was waste from
7 this facility because of the location and the photographic
8 evidence and the lack of upstream and the chemical analysis
9 and the downstream and the recent construction and some of
10 the other factors. There's numerous other factors, so I gave
11 it a small percentage, maybe 5 percent.

12 Q Okay. And---

13 A (interposing) Just--to me just a---

14 Q ---if you had not seen this at all, would it have
15 affected your decision?

16 A No.

17 The Court: Okay. Any further questions
18 based on mine?

19 Ms. Jones: No, sir.

20 Ms. LeVeaux: No, sir.

21 The Court: Thank you. You can step down,
22 please. Thank you. Anything further, Ms. LeVeaux?

23 Ms. LeVeaux: No, Your Honor. The State just
24 wanted to be sure that all of its exhibits were introduced
25 into evidence. And I think I've got everything except for

1 Exhibit 3 and 19B. And to the extent that nothing--that I've
2 missed something, I would at this time make a motion that all
3 my exhibits be accepted into evidence and would move them
4 into evidence except for 3 and 19B, which have been offered
5 as an offer of proof--in an offer of proof.

6 The Court: And I think we've--that goes up
7 to what--what exhibit number?

8 The Reporter: 34.

9 The Court: 34.

10 The Reporter: But there are stars on here
11 that Kay has--I don't think all of them have been admitted.

12 The Court: Okay.

13 The Reporter: Would you like me to read
14 those?

15 The Court: Well, let me hear a response
16 first.

17 Ms. Jones: Your Honor, the only one I
18 think that we still have an objection to was the entire
19 deposition transcript that was attached--or is identified as
20 33. And again---

21 The Court: (interposing) That's true. Is
22 there--I think the discussion was that what you wanted read
23 in was read in. Is there a need for 33?

24 Ms. LeVeaux: Well, Your Honor, no.

25 The Court: Because---

1 like--we have made every effort to provide smaller copies of
2 any large--or anything we produced, so we'd like--if counsel
3 could provide us with smaller copies, we would appreciate it.

4 The Court: That would be the normal---

5 Mr. Jones: (interposing) Yeah. I
6 didn't---

7 The Court: ---procedure.

8 Mr. Jones: I didn't really intend to offer
9 those, but it's one of those things why not. You know, we've
10 made so many references to it, I---

11 The Court: (interposing) Okay. And I
12 would appreciate as well a small copy. The clerks will look
13 at that and smile.

14 Mr. Jones: I'm sure.

15 The Court: And we will keep that
16 obviously, but for purposes of sending records more than
17 likely they'll want to send small copies as well.

18 Ms. LeVeaux: Your Honor, just one more
19 point: these are Google maps, and so they change. And so as
20 noted in Mr. Bushardt's testimony, one was 2007 and one was
21 2010. And so, again, it would be--my thinking is that
22 they're for corroborative purposes, is that fair, Mr.
23 Jones---

24 Mr. Jones: (interposing) Yeah,
25 depiction---

1 Ms. LeVeaux: ---and not---

2 Mr. Jones: ---of the sites.

3 Ms. LeVeaux: Because I want to make sure

4 that we're not held to that's exactly the way the site looked

5 on that date.

6 Mr. Jones: Absolutely. In fact, it's

7 really more a matter of--to illustrate to the Court where

8 things are, not necessarily exactitude. I think it has been

9 helpful in showing where the lagoons are and where the creek

10 is.

11 The Court: In fact, I think Mr. Bushardt

12 noted a cloud over something that appeared to be the exact

13 same picture with two different dates. So Google perhaps did

14 not update itself for several years. What were those numbers

15 again?

16 Mr. Jones: I think it was 30--it would be

17 34 through 38.

18 The Court: Any objection to those?

19 Mr. Jones: And then 40 and 41.

20 Ms. LeVeaux: If you have all of those, I'd

21 like to look because I think they were introduced at various

22 points and only two actually--or one was introduced today. I

23 think there's a---

24 Mr. Jones: (interposing) The one today I

25 was going to refer to later. I'm not even offering that one

1 yet.

2 Ms. LeVeaux: Okay. So if I could just---

3 Mr. Jones: (interposing) That would be

4 39.

5 The Court: Okay.

6 Ms. LeVeaux: If I could just look at

7 those briefly.

8 The Court: Let me withhold ruling---

9 Ms. LeVeaux: (interposing) What numbers?

10 34 through---

11 Mr. Jones: (interposing) 34, 35, 36, 37,

12 38, 40, and 41.

13 (Pause.)

14 The Court: Do you plan any further

15 testimony?

16 Mr. Jones: Just a brief amount.

17 The Court: Okay. Let me go ahead--and I'm

18 going to withhold ruling on those. I want to hear the

19 testimony. Then I'll take a break. And Ms. LeVeaux, if you

20 can look over---

21 Ms. LeVeaux: (interposing) Okay.

22 The Court: ---that with the---

23 Ms. LeVeaux: (interposing) I will.

24 The Court: ---assistance of---

25 Ms. LeVeaux: (interposing) Thank you.

1 Q Just tell the judge briefly what difference has
2 been made.

3 A I'm working for Mountaire Farms in Lumber Bridge,
4 North Carolina, close to Southern Pines.

5 Q Now, you still live in Southern Pines, don't you?

6 A Yes, sir.

7 Q You still---

8 A (interposing) I still live in Pinehurst.

9 Q ---have the same address?

10 A Yes, sir. It hasn't changed.

11 Q And after your testimony previously, whatever day
12 that was, you moved your employment from House of Raeford
13 Farms in Rose Hill to Mountaire Farms, Incorporated, which is
14 located in Lumber Bridge, North Carolina?

15 A Yes, sir.

16 Q And Mountaire Farms, Incorporated is a poultry
17 company---

18 A (interposing) Yes, sir.

19 Q ---slightly larger than House of Raeford Farms,
20 Incorporated, but it is still an integrated poultry company;
21 correct?

22 A Yes, sir.

23 Q And what job do you have there, Mr. Howard?

24 A Right now I'm the second processing manager on
25 night shift.

1 Q Okay. The--when you were at House of Raeford,
2 remind me, what job description did you have?

3 A Operations manager.

4 Q Operations manager. And is it true that the
5 wastewater division was beneath that; correct?

6 A Yes, sir.

7 Q And Mr. Chris Murray was underneath your guidance;
8 correct?

9 A Yes, sir.

10 Q And I think Mr. Teachey was the wastewater
11 manager?

12 A Yes, sir.

13 Q And he reported to Chris Murray?

14 A Yes, sir.

15 Q And Chris Murray reported to you?

16 A Yes, sir.

17 Q Okay. Now, could there be times when Mr. Teachey
18 would report directly to you?

19 A Yes, sir.

20 Q Did that occur frequently?

21 A Yes, sir. We conversed on a regular basis.

22 Q Okay. And that occurred in this particular matter
23 too, didn't it?

24 A Yes, sir.

25 Q There's been discussion of the creek and its

1 relation to the lagoons and the plant itself. How long were
2 you at House of Raeford before you left?

3 A Approximately nine and a half years.

4 Q Okay. If you would, go back to your memory during
5 that nine and a half years. Do you recall times when you
6 actually drove or walked around the lagoons?

7 A Yes, sir.

8 Q Did you do it often?

9 A I'd say a couple of times a month, just checking
10 on things.

11 Q Okay. Did you go around them clockwise or
12 counterclockwise, or how?

13 A I would say I went around both ways. I mean it--
14 there was not one particular way.

15 Q All right. When you went around in your--did you
16 do it in your vehicle or on foot?

17 A In my vehicle.

18 Q Okay.

19 A Or in a vehicle. Sometimes I drove. Sometimes I
20 rode, depending on---

21 Q Did you look over into the creek when you were
22 inspecting the lagoon?

23 A I've thought back on that. I can't recall
24 actually looking at the creek. Did I look over that way?
25 Quite possibly. Did I notice the creek? No, sir.

1 Q And why is that?

2 A Well, I mean it just--it's my understanding it's
3 not even on our company property. And too, I mean I was
4 looking at the lagoons. I really didn't have any business--
5 my thoughts weren't on that side over there. My thoughts
6 were on our property.

7 Q Well, were there visibility impediments between
8 the---

9 A (interposing) There's a lot of trees, heavy
10 trees, pretty much blocking the view. I mean there are
11 glimpses. I'm not going to lie about that. But I mean it's
12 not something--I mean you've kind of got to look closely if
13 you look at the pictures. I believe if you ask anybody, it's
14 not completely open, a lot of trees.

15 Q Are there any differences in the pictures that
16 were shown here in court and the way that it may have
17 appeared before September the 9th, 2009?

18 A I think the only big thing is in the northern
19 point there where a lot of our work was done---

20 Q (interposing) Are you talking about the point
21 roughly here (indicating)?

22 A Right there. With all the traffic that our
23 company did, the contractors did, people walking, I think
24 that area opened up some to my best recollection. I mean I'm
25 not going to sit here--I never--until I walked out there with

1 Ms. Linda and Mr. Rhame, I had never walked on that creek
2 there.

3 So, you know, I know we had--we had done a lot of
4 work there and the contractors had done a lot of work on, you
5 know, cleaning up once we all decided what to do. But before
6 then I can't really tell you. I mean I just didn't spend a
7 lot of time noticing that part of our---

8 Q In the process of going down there and inspecting
9 and pumping and everything, did they do any beating down of
10 the foliage and everything in that area?

11 A Yeah, we had to. I mean people were walking all
12 over the area and stuff.

13 Q Did they cut any of it out?

14 A That I don't know for sure, sir.

15 Q Do you remember the first meeting you had with the
16 state agents, Ms. Willis and any others, and Joe Teachey and
17 yourself?

18 A Yes, sir.

19 Q Okay. When they presented to you the condition in
20 the creek, do you remember what your reaction was?

21 A I think they showed me a picture and I said, "We
22 need to go look at it." We talked for a while. I don't
23 remember all the details. But I mean I know we went and
24 walked down to the area.

25 Q Okay.

1 A Drove down there and then walked to the area.

2 Q When you went down to the area, did you have a
3 conclusion as to whether or not your company was responsible
4 for that condition?

5 A Not at that point. I needed to investigate and
6 find out for sure. I mean I didn't know what was going on.
7 It's the first time I'd looked at the creek, so I didn't know
8 if that's what--really what the creek looked like.

9 Q Now, did you eventually reach a conclusion as to
10 whether or not the company was responsible?

11 A After talking with quite a few folks, yes.

12 Q And what was that conclusion?

13 A It was not our stuff. It was not House of
14 Raeford's.

15 Q Did that also depend on the appearance or the
16 condition of the material in the creek?

17 A I'd have to say talking and looking at, you know,
18 how this could have happened played a bigger part than just
19 the appearance, sir.

20 Q Okay. Did it appear to be the same material in
21 the creek as was in any of your lagoons?

22 A Was it murky like a lagoon? Yes. Did it have any
23 foliage in it as far as bushes and stuff like our lagoon 1?
24 No. It had duckweed and it was, like I've said before, kind
25 of a mucky, weak milkshake look.

1 Q It had duckweed and other material in it, though?

2 A Yes, sir.

3 Q Did you have duckweed in your lagoon?

4 A No, sir.

5 Q When the--have you had an occasion since all this
6 occurred to cost out what it would cost to--if the company
7 had really intended to pump material from the lagoon, lagoon
8 number 1, to the creek that entire distance, what equipment
9 would be necessary to do that?

10 A To the best of my ability--and again, I'm not an
11 expert, but just investigating this, trying to get to a cause
12 of what happened and everything, we probably would have had
13 to have about a 10 horsepower pump, probably a 4 inch line,
14 about 750 feet, give or take, ballpark.

15 And, you know, looking back right now, I believe
16 Mr. Murray and those guys are using a pump now that's--that
17 are pumping back to the DAF. All in all, it's probably going
18 to cost about \$10,000, \$11,000 to get all that done.

19 Q To buy that?

20 A You'd have to have a generator, I believe. I mean
21 it would just be pretty costly.

22 Q In order to operate the pump, you'd have to have
23 some form of---

24 A (interposing) A power source.

25 Q Have you thought about what kind of power source

1 would be necessary?

2 A You know, a diesel generator would probably be the
3 way to go I would think. Again, I'm not an expert, but it
4 would be substantial either way you look at it. It would be
5 a large undertaking.

6 Q How about--are there electric generators out there
7 that are available?

8 A I'm sure---

9 Ms. LeVeaux: (interposing) Objection; calls
10 for speculation.

11 The Court: It's overruled.

12 Q You can answer.

13 A Yes, sir. I mean to what size I wouldn't know,
14 sir.

15 Q Okay. It would be more than your ordinary,
16 run-of-the-mill generator, though, wouldn't it?

17 A Yes, sir. I mean it would have to be something
18 substantial.

19 Q And these diesel generators, have you ever heard
20 those things run?

21 A Pretty loud.

22 Q Pretty loud. I mean you couldn't do that in
23 secret, could you?

24 A No, sir.

25 Q Now, the--let me point to this area, the ditch

1 that's been referred to that runs along the south side of the
2 lagoons to the--from this property line to the creek
3 (indicating). Do you remember walking that ditch after you
4 were presented with the problem in September?

5 A Ms. Linda, myself, Chris Murray, Ashley Guy, and
6 Mr. Rhame walked that area, walked the creek area, walked
7 almost behind the quarry. I don't know if you want me to get
8 up and show you where we walked, but I can.

9 Q That will be fine.
10 (Witness peruses photograph.)

11 A We walked pretty much all in this area here
12 (indicating), walked around this way (indicating), walked a
13 good portion to about right here (indicating). I know that--
14 I believe Ms. Linda and the EPA folks went in further at that
15 point.

16 But I remember us all walking back here because we
17 actually went around and walked around this water part right
18 here (indicating) and came back through here (indicating).
19 And I believe we got about as far north as right in this area
20 (indicating).

21 Q When you--Mr. Howard, when you walked the ditch
22 there, just referring to that, what did you see?

23 A This was very, very dry, just not a lot--not much
24 water at all in that area.

25 Q And you'd just come out of a dry spell, as I

1 recall?

2 A Yes, sir.

3 (Witness returns to stand.)

4 Q Was there any residue or mud or residue of solid
5 material?

6 A No, sir.

7 Q Did any of the agents, federal or state, make any
8 comments about any residue of---

9 A (interposing) Mr.---

10 Q ---material?

11 A Mr. Rhame told me, Chris Murray, Ashley Guy, Joe
12 Teachey, and I believe Ms. Linda was there--I can't be for
13 sure--he saw no evidence of any kind of overrun, residue,
14 pumping, anything of that sort at that time.

15 Q The--to your knowledge, was any flushing activity
16 done to clean that ditch at any time in September of 2009?

17 A We talked about possibly---

18 Q (interposing) I'm talking about the ditch.

19 A The ditch; no.

20 Q Okay. The repair work that was done to the pipe,
21 the pipe transfer situation, as the operations manager, were
22 you aware that job was going to be done before it was done?

23 A Yes, sir.

24 Q Okay. Was--the valve that was used to lower the
25 water level in lagoon 1, do you recall whether that valve was

1 functional before there was a repair?

2 A Mr. Teachey told me that it was functional, that
3 you had to use a pipe wrench, though, to adjust it, and that
4 we needed to get that fixed.

5 Q Okay. And it was fixed?

6 A Yes, sir.

7 Q But to your knowledge, did the valve work with
8 effort?

9 A Yes, sir. Mr. Teachey stated so.

10 Q At this time in early September of 2009, are you
11 aware of any problems in lagoon number 2?

12 A No, sir.

13 Q Are you aware of any problems of material buildup
14 in the pipe between the pump house and lagoon number 3?

15 A No, sir.

16 Q Was there any sort of failure to the wastewater
17 system?

18 A No, sir.

19 Q Were there any problems with the sprinkler heads
20 or the sprinklers, irrigation system, that was operational on
21 the spray field?

22 A No, sir.

23 Q When the discussion was had of the remediation,
24 whose idea was it to remediate the creek?

25 A You know, I've tried to think back, and I know Mr.

1 Rhame was the one--the driving force behind that, and he kind
2 of took the lead. I mean he was the one that talked to me
3 about, you know, "What are your thoughts on it," "What are
4 you guys going to do about it?" And we talked back and
5 forth.

6 The best I can recall, he was the driving force.
7 But again, pretty much the whole time me, Chris Murray,
8 Ashley Guy, Joe Teachey, and Ms. Linda were pretty much a
9 group there together. I mean I was the one that was going to
10 represent our company and be the spokesperson, but our team
11 was there together.

12 Q When you say Ashley Guy, remind the judge who that
13 is.

14 A Ashley Guy was the maintenance manager at the time
15 for our plant.

16 Q And who is Ms. Linda?

17 A Ms. Linda Willis.

18 Q When you mentioned the aspect of pumping material
19 from the creek into the lagoon, did anybody object to that?

20 A No, sir.

21 Q What did Mr. Rhame say about that?

22 Ms. LeVeaux: Objection.

23 The Court: It's overruled.

24 A To the best of my knowledge, he thought that was
25 probably a good idea. Our tanking--running--like I said

1 before, those big tankers were starting to take its toll on
2 the road there. And in fact we had to do some work right
3 afterwards where it had worn down.

4 And it was just a lot easier pumping from the
5 creek back into lagoon number 2 as opposed to pumping into a
6 tanker and driving all the way around and then releasing back
7 into lagoon number 1. It just made a lot more sense.

8 Q Well, when he was on the witness stand, Mr. Rhame
9 said when you guys agreed to remediate, he went home. Is
10 that your recollection?

11 A He was gone pretty quick. I don't know, again,
12 the exact days, but he wasn't there very long at all. The
13 best of my knowledge, he was there probably about two days
14 around me and then he was gone, for whatever reason.

15 Q Did he--did Mr. Rhame and Ms. Willis disagree over
16 the pumping procedure?

17 A If they did, I never saw it, so I can't say.

18 Q But you did see them together?

19 A Yes, sir. I couldn't say that they did or didn't,
20 but---

21 Q Did Ms. Willis appear to agree with the procedure
22 to move the material into a lagoon?

23 A It was under my interpretation that she was at
24 least happy with the way we were getting the problem solved I
25 mean and taken care of.

1 Q Did anybody indicate to you that there may be a
2 question of violating your permit by taking foreign material
3 that you didn't produce and pumping it into a lagoon?

4 A No, sir.

5 Q When they pumped--I think after you testified,
6 there was testimony that most of the material that was pumped
7 onto your property into a lagoon was mostly water. Is that
8 your---

9 A (interposing) Yes, sir.

10 Q ---recollection?

11 A Yes, sir.

12 Q How much was water and how much was solid?

13 A I don't know if I can quantify it. The vast
14 majority--I mean at the end there, that's why we pretty much
15 said, "Hey, we're going to stop." And, you know, the
16 Division of Water Quality was there with us. And we all
17 agreed it was probably going to take a--I believe the quote
18 was "It's going to take an event to get this problem alle-
19 viated." We just-- pretty much everything coming out was
20 liquid that we were pumping.

21 Q Now, Mr. Howard, is there an Exhibit 39 up there?

22 The Court: That would be Petitioner's
23 Exhibit 39.

24 A Yes, sir. Here it is.

25 Q Okay. Take a minute to look at that document, Mr.

1 Howard. Do you recollect that?

2 (Witness peruses document.)

3 A This was a--I believe a notice of violation for
4 lagoon 1 having heavy vegetation and so forth in it.

5 Q And it was a notice of violation you had gotten
6 previously; correct?

7 A Yes, sir. This was the response to that notice of
8 violation.

9 Q And you signed this letter?

10 A Yes, sir.

11 Q Was it sent to someone with the state like Mr.
12 Stehman?

13 A Yes, sir. I don't--yes, sir. It was sent to him.
14 It was sent to someone, and I don't--I take it it was him.

15 Q And does it outline the steps that were going to
16 be taken to address the notice of violation?

17 A Yes, sir.

18 Q Okay. And that was August 12th of 2010; correct?

19 A Yes, sir.

20 Q Now, the--in terms of these state people that had
21 come around on the property, in the time that you have been
22 at House of Raeford in Rose Hill before September of 2009,
23 had you ever been violated and penalized by the state for a
24 water quality problem?

25 A No, sir.

1 Q Now, there was some testimony about a plant in
2 Wallace, North Carolina, which is part of the House of
3 Raeford system; correct?

4 A Yes, sir.

5 Q But it has--does it have the same management as
6 Rose Hill?

7 A No, sir. It's a separate entity.

8 Q Do you know anything about those violations at
9 Wallace?

10 A I know there was an incident. They had a problem
11 with one of their lagoons, but the--they paid some money for
12 the fine. Then it came back and there was a problem with the
13 assessment, so to speak, of the water with the permit. And
14 Division of Water Quality and House of Raeford worked it out.
15 And to my best knowledge, I think in the next few months
16 everything will be resolved with that particular issue, to my
17 best knowledge.

18 Q Do you know--has the company paid the penalty in
19 that case?

20 A Yes, sir. I believe it was probably--a
21 substantial fine. The money value I can't recall at this
22 point, but---

23 Q Do you remember how many--how many cases it was?

24 A It was one case, but they had itemized everything.
25 It was in the teens as far as the number of--number of

1 issues, but it was basically one case.

2 Q And was that put into a civil matter and put into
3 court---

4 A (interposing) Yes, sir, it was.

5 Q ---as one case?

6 A Yes, sir.

7 Q Did--would you tell the judge again--you were not
8 responsible for the discharge you say, but you did agree to
9 remediate the creek?

10 A Yes, sir.

11 Q Why?

12 A To be honest with you, I mean that's what being a
13 good corporate citizen was. It was the right thing to do. I
14 didn't know--I didn't know what else to do. If we didn't do
15 it, I knew--I knew nobody else would. And I don't really
16 have another reason for that.

17 My boss didn't tell me to do that. It was pretty
18 much my decision. And I told Bob Johnson what we were going
19 to do, and that's what we did.

20 Q And when you did it, Mr. Rhame with EPA left;
21 correct?

22 A Yes, sir, he wasn't--a couple days. Again, I'm
23 terrible with dates, but I think that's about right. He was
24 there probably about two days, or at least two days with me.

25 Mr. Jones: No more questions.

1 The Court: Ms. LeVeaux?

2 **R E B U T T A L C R O S S - E X A M I N A T I O N**

3 _____ 2:16 p.m.

4 By Ms. LeVeaux:

5 Q The fact of the matter is, Mr. Howard, you guys
6 didn't even apply for a stormwater permit until after you
7 received a notice of violation; isn't that true?

8 A That is correct.

9 Q So it took some extreme actions on the part of
10 DENR to sometimes get y'all to do some stuff that they asked
11 you repeatedly before the stormwater permit to do; isn't that
12 correct?

13 A To my best knowledge, and you can ask the DENR
14 folks, I actually asked them why we hadn't been hit up for
15 that or talked about that. And they couldn't tell me
16 exactly. So I mean my opinion, right, wrong, or indifferent,
17 is I think we both failed on that.

18 And I believe I mentioned to both Mr. Rick and Ms.
19 Linda that, if you were to ask them. I mean I admit we
20 probably should have known about that, but we honestly didn't
21 know about it and nobody had mentioned it to us, to my group.

22 Q Mr. Howard, how many tanker loads were put into
23 the first lagoon by Mr. Register?

24 A I'd have to go back and look at the record. I---

25 Q (interposing) Do you have a guess?

1 A I would--I would probably say in the teens.

2 Q In the what?

3 A Probably less than 20, more than ten, probably.

4 I'd be--I'd have to go back and actually look at the bill.

5 Q Do you know the capacity of Mr. Register's truck?

6 A No, ma'am.

7 Q There was some reference earlier on in your
8 testimony about the power that would be needed, the pumps
9 that would be needed, but the fact of the matter is there is
10 a ready power source there at House of Raeford. And you
11 don't need an auxiliary power source or a generator because
12 you have power supplied by your pumping station that sends
13 water from lagoon number 2 to lagoon number 3; isn't that
14 true?

15 A There is a power source there.

16 Q Okay.

17 A I don't know if you could plug into it or not,
18 but---

19 Q Okay. How much money would House of Raeford lose
20 if it were to shut down those days that the valve was being
21 repaired?

22 A Completely just stop operating? I couldn't even--
23 I have no idea. I mean I'd be lying. I'd be speculating. I
24 have no idea.

25 Q Well, how much money per day if House of Raeford

1 didn't--if they just shut down, how much money would be lost
2 in a day?

3 A I mean that changes on a day to day basis. I---

4 Q (interposing) So just give me a sample, a low and
5 a high.

6 A You know, I hate to sound this way, but it's hard
7 to quantify. I mean, you know---

8 Q Well, you're the operations manager, so if you
9 just had an idea?

10 A Well, you've got 650 employees times \$10 times
11 eight hours. And then you've got a market. I mean what's
12 the market going to be? And I'm not trying to be smart, but
13 what's your filet market? How much are you losing there? I
14 mean it just--you know, it depends on how much--your cost and
15 what your revenue is for selling it. I mean that's a pretty
16 vague question.

17 Ms. LeVeaux: Thank you; no further
18 questions.

19 Mr. Jones: No further questions.

20 **EXAMINATION** 2:20 p.m.

21 By The Court:

22 Q Let me ask you--just to kind of go over some of
23 Mr. Teachey's stuff, you're familiar with the lagoons
24 there---

25 A (interposing) Yes, sir.

1 Q ---and that sort of thing? He approximated that
2 650,000 to 700,000 wastewater came into lagoon 1 a day. Does
3 that---

4 A (interposing) Gallons, sir?

5 Q Does that seem accurate to you?

6 A Yes, sir, and it kind of--again, it kind of
7 depends on the number of head you kill. Some weeks you may
8 kill a lot of birds or a day you may kill a lot of birds.
9 And some days due to the way we place birds, you might not
10 kill that much. But give or take, that's probably a very
11 good estimate.

12 Q Okay. And he said that the amount of water from
13 lagoon 1 into lagoon 2 was about 500,000 a week. Does that
14 sound--does that meet with your understanding?

15 A In that ballpark, yes, sir.

16 Q Okay. So if he's trying to lower lagoon number
17 1---

18 A (interposing) Okay.

19 Q ---in a four day period in order to put a new
20 valve in, he's obviously having to move 650,000 gallons from
21 lagoon 1 to lagoon 2---

22 A (interposing) Yes, sir.

23 Q ---and how much more in order to lower it?
24 Obviously the 650,000 would be just stay equal. And he
25 testified that he had a goal of removing or lowering that

1 lagoon 1 quite a bit, it seemed. How much--how many gallons
2 would he have to do on top of the 650,000 into 2--into lagoon
3 number 2?

4 A I don't know exactly. And don't hold me to this
5 number, but I believe that, you know, depending on if condi-
6 tions were dry, he could probably pump about 1200 gallons I
7 think from lagoon 2 to lagoon 3 a minute. And he could, you
8 know--so technically he could try to, you know, send all that
9 other water from lagoon 1 to lagoon 2.

10 So it's my understanding about 1200 gallons is
11 what we pump to lagoon 3. So that's the capacity he could
12 probably try to get to lagoon 2 and just push it there and
13 push it over to lagoon 3.

14 Q And during the time he testified of course with
15 his logs. Were you aware of the date that the valve would be
16 changed?

17 A I knew about. Again, it's been a few years, so--I
18 knew that work was being done, yes, sir.

19 Q Okay. And according to his logs, the day before
20 and the day of the beginning of lowering that lagoon, he was
21 not present. Do you know who is in charge when he's not
22 there?

23 A That would be our--that would be Chris Murray.
24 He's our secondary operator, sir.

25 Q Okay. So Mr. Murray was in charge of lowering the

1 lagoon, at least to start out with. Is that your under-
2 standing?

3 A Or the folks were that worked there.

4 The Court: Okay. Thank you. Do either
5 party have any questions based on my questions?

6 Ms. LeVeaux: No, Your Honor.

7 **R E B U T T A L R E D I R E C T E X A M I N A T I O N**

8 _____ 2:23 p.m.

9 By Mr. Jones:

10 Q Mr. Murray is the fellow who is present in court
11 today; right?

12 A Yes, sir. He was the plant manager also at the
13 time.

14 Mr. Jones: Thank you.

15 The Court: Thank you. You may step down.
16 Thank you, sir. Anything further, Mr. Jones?

17 Mr. Jones: I'm very strategic, Your Honor.
18 I understand he has to be back for a management meeting and
19 had to leave by 3:00, so I've done better than I promised.
20 Thank you. Last is one more time Mr. Holley.

21 The Court: Okay.

22 Ms. Jones: Your Honor, if we could have a
23 minute to set the computer up?

24 The Court: Yes.

25 (Pause.)

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(Whereupon,

JAMES K. HOLLEY, P.G.

was called as a witness in rebuttal, and having been previously sworn, testified as follows:)

The Court: Mr. Jones?

Mr. Jones: All right. You're still---

The Court: (interposing) First I'll remind you that you remain under oath. And if you would identify yourself once again?

The Witness: Yes, sir; thank you. My name is James Holley. I'm a hydrogeologist with Groundwater Management Associates in Greenville.

The Court: And you're the same James Holley who has testified before?

The Witness: Yes, sir.

The Court: Thank you.

R E B U T T A L D I R E C T E X A M I N A T I O N

2:25 p.m.

By Mr. Jones:

Q And Mr. Holley, you've sat through a good portion of these proceedings, haven't you?

A That's correct.

Q And heard an awful lot of testimony?

A I have.

Q Back during the State's portion of the case, you

1 may recall they were critiquing your report that you had
2 explained during the direct part of this case when I talked
3 to you before?

4 A Yes.

5 Q And there was some criticism of the report because
6 you didn't specifically identify in some of the industries
7 that you talked about some chicken and turkey hatcheries in
8 the same vicinity. And you're aware of that?

9 A Yes.

10 Q Would you explain to the Court why you didn't make
11 specific mention of those?

12 A Yes. I had recognized that those facilities
13 existed. And I asked Clay Howard about those operations and
14 what they were. And he identified them as being one a turkey
15 hatchery and the other a chicken hatchery. And I asked him
16 if they had similar wastewater type operations for those
17 facilities, and he said no.

18 And so I took him at his word that those
19 facilities didn't have similar lagoon type systems as what
20 the poultry operation at the House of Raeford Farms has.

21 Q And were those facilities also within the same
22 permit as House of Raeford Farms, Incorporated?

23 A My understanding is that they were--they are
24 different entities.

25 Q And Johnson--does the name Johnson Breeders,

1 Incorporated ring---

2 A (interposing) Yes, I believe that's the---

3 Q (interposing) Do you understand that's who
4 actually owns those other facilities?

5 A I believe so, yes.

6 Q Which is a separate permittee?

7 A Yes.

8 Q Now, there was also some criticism of your treat-
9 ment as to the allowance you gave to headwaters---

10 A (interposing) Uh-huh.

11 Q ---that were in the vicinity of the upstream
12 industries Carolina By-Products and Valley Proteins and
13 Duplin Winery?

14 A Yes.

15 Q Have you got an explanation for the Court about
16 you treated the headwater area?

17 A Yes. I think the critical issue related to the
18 headwaters was whether or not the lagoons at the Valley
19 Protein/Carolina By-Products facility resided in the Cabin
20 Branch drainage basin versus did they reside in the Taylor
21 Creek drainage basin, which is to the south.

22 And I believe Ms. Willis suggested that if an
23 overtop occurred from those lagoons that they would likely
24 flow into the Taylor Creek drainage system to the south. And
25 I wanted to address that because I don't think that's

1 correct.

2 I've revisited--in this slide you'll see I
3 revisited the United States Geological Survey topographic
4 map. And overlaid on this map is a purple line, which you'll
5 see here (indicating), which is a--it's generated by the
6 United States Geological Survey as the 12 digit subwatershed
7 boundary interpretation based upon the United States
8 Geological Survey's elevation mapping. And so they have done
9 digital modeling of the boundaries between watersheds, and
10 they've used this line to designate their definition of which
11 side of the topographic ridge a particular watershed exists.

12 And it's important to note that by this depiction
13 all four of the lagoons at Carolina By-Products/Valley
14 Proteins reside in the Cabin Branch watershed.

15 Q What does that mean?

16 A Well, it means that if they were to have an
17 overtop, if they were to have a spill, one would expect that
18 the overspill would drain into the headwaters region, over in
19 here (indicating), of the Cabin Branch and would flow to
20 downstream areas rather than flowing into Taylor Creek, which
21 resides to the south of this line here where I've shown--
22 shown there (indicating).

23 Q How would the migration of any material in the
24 area of the headwaters differ from being in just a regular
25 creek, Mr. Holley?

1 A Well, the headwaters in this region, as has been
2 mentioned and testified to, is a swampy area. At times it is
3 completely impounded by wet conditions as well as beaver dams
4 that tend to retain and back up water. At other times it
5 drains out significantly, especially after they removed the
6 beaver dams.

7 But as water enters that stream system, a rainfall
8 event will flush that water into eventually Cabin Branch,
9 which is the lowest part of that system, and convey it to
10 downstream areas, which eventually convey to this area behind
11 the House of Raeford Farms property (indicating).

12 Q So I guess there is a way for material, if it
13 leaves Valley Protein, to be transported through the head-
14 waters to the creek?

15 A Yes. There's a supplement to this figure that I
16 would like to also present that further clarifies the
17 location of that watershed boundary.

18 Q Go right ahead.

19 A And this next image is just simply a pop-up view
20 of supplemental elevation data. This is the LIDAR data,
21 which is a light based survey, a very detailed elevation
22 survey, that has been updated for the region. The main
23 function of a LIDAR survey is to help prepare flood maps.
24 Especially after Hurricane Floyd, there was a large effort to
25 do detailed elevation mapping using LIDAR.

1 And you'll see the position in this little blowup
2 image of the four lagoons at the Carolina By-Products
3 facility shown there. And you'll--I've left the USGS's--what
4 they call 12 digit subwatershed boundary line shown to the
5 south here (indicating).

6 I will note that Ms. Willis talked about some
7 ditching that--that may connect up close to the southern edge
8 of some of these. The LIDAR data suggests that there's one
9 lagoon, this lagoon that is the second lagoon to the east of
10 the westernmost lagoon. And it has a light colored shading
11 here. Lighter colors mean lower elevation. Darker colors
12 mean higher elevation.

13 You'll see a small swale that does connect up it
14 looks like very close to that lagoon and would drain off
15 potentially toward the south into Taylor Creek. But that's
16 the only lagoon that appears to have that potential.

17 It's also interesting to note that the primary
18 lagoons, the lagoons that were operated by Carolina
19 By-Products that would have sludge and the most enriched
20 wastewater, are these two on the eastern end, which lie
21 entirely inside the Cabin Branch drainage system. I can't
22 find any mechanism if they were to overtop to have that
23 material go into Taylor Creek unless someone physically
24 conveyed it that way artificially.

25 Q But if they overtopped at all, are you saying that

1 they would drain to the north or to Cabin Branch?

2 A They would drain toward the north into the Cabin
3 Branch drainage system. This particular image also shows an
4 enhanced blue line. I know there's been some discussion
5 about the blue line features that the geographic information
6 system from USGS presents. And you'll see a blue line
7 feature suggesting that Cabin Branch creek actually comes up
8 to the northern end of one of the two lagoons at Carolina
9 By-Products.

10 Oftentimes in this GIS presentation of this U.S.
11 Geological Survey information they won't distinguish between
12 intermittent stream flow symbols and perennial stream flow
13 symbols, those that flow year-round. They will simply use a
14 blue line feature to show that localized stream flow can
15 occur as a channel of flow at times. And that's what that
16 blue line feature is showing there.

17 Q Okay. And there was also testimony after you
18 testified to the effect that your conclusions were flawed
19 because there was no evidence of any marking of material,
20 sludge, or whatever upstream between Carolina By-Products and
21 the area just upstream of House of Raeford where the agents
22 went---

23 A (interposing) Yes.

24 Q ---to do their readings and visual observations.

25 Do you have a response to that?

1 A I do. There's been a lot of discussion about a
2 stain or some sort of upstream trail or fingerprint of this
3 material being left behind by flow from an upstream source.
4 Well, the presumption by the state in that regard is that the
5 waste, if it is a waste source, included--was a floating
6 material to start with rather than a floating material that
7 could have been built up at that location from a sunken
8 settled solids waste.

9 There are substantial inputs of settleable solids
10 wastewater that have been identified from Duplin Winery at
11 this location into the ditch. There's been a lot of
12 discussion about whether they have their own floating product
13 versus settling organic product. Clearly they have evidence
14 that the state has identified an illicit discharge of that
15 material into the ditch.

16 I believe I've presented some information to
17 suggest that winery lagoons, if they become anaerobic, can
18 grow a film or a scum on the surface at times as microbial
19 growth occurs. And that can create a filamentous floating
20 sludge on the surface of even a winery lagoon. So it
21 wouldn't be unheard of to form that type of material in place
22 in the creek behind House of Raeford Farms.

23 Q And so what does that mean in terms of leaving a
24 visible sort of fingerprint or mark that you could see with
25 your eyes as you walk the stream?

1 A Well, if it was predominantly a wastewater and
2 settled solids, you wouldn't see a floating smear along the
3 top of the waterline, so to speak. It would be transported
4 as an enriched or unit laden waste, a stormwater event, cuing
5 to a particular point where it can become trapped. After
6 becoming trapped, then it can start to break down and have
7 microbial growth that could lead to the filming, the creation
8 of a film. And I'll show some illustrations of that.

9 Q And how would something like that have become
10 untrapped, as you say?

11 A Well, as this material starts to break down and as
12 the flow stagnates behind the House of Raeford Farms due to
13 the entry of the creek into a large abandoned quarry pond,
14 the velocity decreases. The ability for that to carry
15 sediment is dramatically hampered.

16 So its sediment load drops out at that point and
17 the flow stagnates, and then the opportunity for microbes to
18 locally consume that organic material at that place can then
19 leave off a by-product of scum on the surface of the water.

20 Q Did you see indications in the evidence that has
21 been presented here of those sorts of settled solids---

22 A (interposing) I---

23 Q ---behind House of Raeford that you're also
24 talking about could have existed upstream?

25 A I heard testimony about material that had settled

1 in the creek, I did, especially from David Register, who
2 talked about as he was vacuuming the floating solids off, a
3 lot of material was being freed up from the bottom and rising
4 up to the surface during that process. That tells me that
5 there was most likely a substantial accumulation of settled
6 solids in the bottom of the creek as well as the layer on the
7 top that the state focused on.

8 Q Could some of that have been beneath the surface
9 upstream as well?

10 A Potentially, yes.

11 Q And---

12 A (interposing) There could have been trapped
13 pockets of that in other local trapping zones that maybe
14 didn't get investigated by the state because they didn't walk
15 far enough upstream to look.

16 Q But it could still have migrated downstream to---

17 A (interposing) Yes.

18 Q ---House of Raeford?

19 A Yes.

20 Q And you said you had additional slides of that?

21 A I believe I do. This one in particular--and I'll
22 come back to the one I skipped because it doesn't relate to
23 the question that you asked. This one in particular talks
24 about--I want to revisit the idea of stream sediment load.

25 A stream that's flowing has the ability to

1 transport sediment based upon its speed of flow. And this
2 image I actually lifted from the University of Maryland web
3 site, one of their classes. They have available slides that
4 you can look at. This is a classic image from a textbook
5 from a class.

6 And the nice thing is that you can break down the
7 transport load of flowing water into multiple aspects.
8 There's the bed load. It's that material that resides along
9 the bottom that rolls across the bottom under the speed of
10 the water. There's also some portion of that that bounces.
11 We call that the saltation population.

12 Then there's the suspended load--that's this
13 material shown over on the right (indicating)--that are the
14 very fine particles transported up in the water column that
15 represent silt and clay particles. It could also represent
16 very fine organic matter, things of that nature.

17 They're actually settleable solids but they stay
18 suspended in the water column and they cause the water to
19 look muddy. That's why after a rain event you'll often see
20 the water turns very turbid and muddy. That's typically your
21 suspended load, suspended sediment load.

22 The next portion is the dissolved load. You'll
23 see a little blowup bubble here (indicating). And they are
24 the dissolved ions that are transported by the water. This
25 can be sodium, calcium, potassium, nitrogen, all these

1 different varieties of chemical elements that are carried in
2 solution by the flowing water.

3 Now, you might ask why is that important. The
4 ability for a stream to transport some of that material
5 relates to the velocity that I testified about previously. I
6 felt like my testimony that I gave previously about stream
7 flow velocity and how you calculate that maybe wasn't fully
8 understood. So I found this nice illustration from another
9 geological university class. This is standard information
10 about stream flow calculation.

11 It shows that the discharge of a stream, the
12 volume of water carried by a stream, is equal to the area,
13 which is width times depth, multiplied times the speed, the
14 velocity that the water is flowing. And so the area, the
15 width and the depth as shown there, plays a big role in how
16 fast that water moves. The speed of that water also plays a
17 very big role in whether or not it can carry sediment, it can
18 carry particles to other downstream areas.

19 So I just want to revisit this idea. I've derived
20 this equation, laid out this equation here toward the bottom
21 where velocity, V , equals Q , the discharge, divided by the
22 cross-sectional area. So what you can recognize is that if
23 you increase the width and/or the depth of the stream, the
24 velocity has to slow down if it's carrying a set volume of
25 water.

1 So after a big rainfall event, these streams fill
2 up with water, with surface runoff. They transport that
3 water to downstream areas at a set velocity. If the channel
4 changes its cross-sectional area, the velocity will decrease.
5 Well, that's precisely what happens behind the House of
6 Raeford Farms.

7 Q Have you got a diagram that shows how--when the
8 stream gets down behind House of Raeford and meets that pond
9 behind Parker Bark, how is that impacted?

10 A I do. But I'd like to further illustrate the
11 ability of a stream that transports sediment before I show
12 this series of illustrations, these cartoons that I've
13 created.

14 This graph shows--and this is also from a
15 University of Maryland Department of Geology class. It
16 relates velocity, or speed of water, to the particle size
17 that can be transported by that speed. So on the y axis over
18 here is velocity in centimeters per second, speed of the
19 water, and on the x axis across the bottom is the size of the
20 particle that's being transported.

21 You'll notice that the speed--this line between
22 this black zone here (indicating), the top and bottom of
23 that, is that period--that velocity during which the
24 individual particles will stay in solution to be transported.
25 If you fall below a particular speed, then silt and clay for

1 instance will settle out back in this area (indicating) when
2 the velocity drops below 20.

3 But as you increase the velocity, you can start to
4 move bigger and bigger particles, okay? So as velocity
5 increases, the size of the material that can be transported
6 by that flowing water also increases. Likewise, as the
7 velocity of the water slows, the larger particles drop out.
8 They are no longer transported.

9 So to put that into the context of some illustra-
10 tions, this is a cross-sectional view. I'm going to have
11 three slides that kind of illustrate this idea of what's
12 happening. This is not intended to be to scale. It's simply
13 to illustrate the concept.

14 This first one, this shallow area over here
15 (indicating), this is--this is looking at a slice through the
16 earth as though you were--the land surface is up at the top
17 and you get deeper as you work toward the bottom of the page,
18 okay? So that's the vertical view.

19 Cabin Branch is a very shallow, narrow creek.
20 It's running behind the House of Raeford Farms facility.
21 It's on the order of 20, 25 feet wide and 3--maybe 5 feet
22 deep in some areas. It is very shallow. It will carry a
23 certain amount of water after a storm event at a particular
24 velocity that's related to how big the channel is. So I've
25 called that velocity 1. So after a large storm event, the

1 speed of the water moving through that confined channel will
2 be a predictable velocity. You could calculate that if you
3 were doing stream gauging.

4 As the water enters this abandoned quarry, the
5 depth increases dramatically and the width, which I've
6 testified about, increases dramatically. Depth times width
7 increase means velocity has to decrease. The cross-sectional
8 area of the creek changes dramatically as the stream
9 approaches the abandoned quarry. It has to. I don't have to
10 calculate exactly. It's just a fact. Velocity number 1 will
11 be much, much greater than velocity number 2 as that water
12 moves into that surface water--that large abandoned quarry.
13 So that's the first relation.

14 And what does that do with regard to sediment
15 load? As velocity decreases--and these shorter arrows that
16 I've drawn represent slower speed of water. The longer
17 arrows represent higher speed of water. As the velocity
18 decreases, the sediment load of that water is going to be
19 lost. It's going to start to drop out its largest particles.
20 Some of that's going to be organic debris, so it might be
21 particles of sediment. Some of it may be leaf litter, seeds,
22 twigs, all types of things that are picked up by stormwater
23 runoff in this stream and carried with it to this point.

24 As that material settles out, it's going to
25 deposit a layer of settleable solids on the bottom of the

1 creek--I'm sorry; I didn't mean to hit that--settleable
2 solids on the bottom of the creek. When that occurs, you
3 have a new deposit there that is available for--and in this
4 particular situation, a significant portion of that is going
5 to be organic material because we have known settleable
6 solids from wastewater discharges at the Duplin Winery.

7 We also have an enriched organic environment from
8 the headwater swamp of the creek with all kinds of decaying
9 vegetable mat. I took photos of some algal mats in the
10 ditches that would be picked up and freed up and moved
11 downstream. All of these types of materials could contribute
12 to the deposition of what's happening at this change in
13 stream velocity.

14 Now, after the storm event has passed and this
15 stream flow goes back to a more base flow, normal low flow
16 conditions, things stagnate. So here under these stagnant
17 flow conditions, velocity number 1 is close to the speed of
18 velocity number 2. There's not a whole lot of flow going on.

19 Most of the testimony at this time of September
20 9th, 10th, and so forth is that there wasn't any flow on the
21 creek, or virtually no observable flow. That's exactly what
22 you expect in this location because of the hydrodynamics of
23 the system.

24 Microbes will start to chew on the available--will
25 start to consume the available organic matter that's been

1 mobilized and deposited at this location. As those microbes
2 break down that organic matter, they're going to remove
3 oxygen from the system. The system is going to go anaerobic.
4 And some of the--the breakdown products, the--I believe Ms.
5 Willis called them bacterial bones, are actually hydrophobic.
6 That means that they are a separate phase from water and they
7 will tend to float on the surface of the water.

8 You also have a lot of off-gassing going on.
9 There's carbon dioxide being released by the breakdown of
10 material. There is nitrogen. There's potentially even
11 methane, which is very common in swamps to see methane
12 off-gassing happen as breakdown of organic matter occurs.

13 You can develop a floating scum or film in place
14 very similar to the growth that was discussed on a lagoon of
15 a winery where it would have daily changes in conditions. the
16 sunlight would tend to help to oxidize or break down that
17 floating material and it would sink to the bottom during the
18 day, and at night it will float back to the surface. You can
19 have a similar thing here.

20 At this particular location, it's interesting to
21 note that you have very limited sunlight in this area because
22 it's so overgrown with trees. You don't have a lot of wind
23 blowing across this section of the stream. Thus you're not
24 going to have a lot of sunlight that can help to interact
25 with this floating material.

1 But this is a scenario that could form a floating
2 film at this location without leaving a trail upstream of--a
3 surface trail along the water's edge. And I think it's
4 perfectly plausible.

5 Q So you could have that sort of floating material
6 at an area like was behind House of Raeford, behind Parker
7 Bark, without a similar skim or trail of material further
8 upstream?

9 A Absolutely.

10 Q And those are the kind of conditions--those
11 physical conditions that lend itself to that are actually
12 what's out there at the creek?

13 A That's correct. And it's intrinsic to the creek.
14 You can't really change it. It is the flow system that
15 exists there.

16 Q What are some of the sources of floating matter
17 that you find in these surface waters?

18 A I've done some reading about the nature of some of
19 these bacterial bones, if you will, these floating hydro-
20 phobic cells that can float to the surface of water as
21 organics are broken down.

22 This is a quote from--I've got the reference here
23 for a vendor that works on improving a wastewater lagoon
24 operation. And I selected it simply for the fact that it
25 gives some interesting discussion about the nature of growth

1 of filamentous organisms, especially those that are hydro-
2 phobic and can float to the surface of a highly organic laden
3 wastewater.

4 This is actually in reference to floating sludge
5 in activated sludge tanks. But it talks about one of the
6 problems that occur in activated sludge tanks is that--and
7 I'll read the quote.

8 "Floating sludge floats on the surface due to the
9 copious growth of *Actinomyces* and certain other
10 filamentous organisms which have a hydrophobic
11 cell structure. The hydrophobic cell surface
12 absorbs air and nitrogen gas bubbles and causes
13 the sludge to swim upwards. Floating sludge
14 should be removed quickly because it also leads to
15 the formation of foam in the septic tanks of
16 anaerobic sludge treatment."

17 Now, I've added the emphasis of the underline just
18 to bring attention to the formation of hydrophobic cells and
19 that type of thing.

20 Q What impact does that have on this case?

21 A As the storm event passed, that large storm event
22 toward the end of August, and things went back to a more base
23 flow condition; the stream system is quite stagnant. With
24 stagnant stream flow and deposition of organic laden
25 sediments in the bottom of that stream at that trapping point

1 you will have less available new oxygen coming from upstream
2 areas because there's very little flow to replace the oxygen
3 that's being consumed by the microbial activity to break down
4 the settled solids in the creek.

5 Q Has the--to your knowledge, has the state actually
6 done any work or done any assessments that have actually
7 located or found places where you have algae or aquatic
8 plants that are likely to flourish?

9 A Yes, they have. And they actually have a whole
10 separate program to look at aquatic vegetation that grows and
11 can be related to fish kills and things of that nature.

12 And before I go to that discussion, I want to make
13 sure that I point out that the state didn't collect any
14 characterization samples of the bottom sediments of the
15 stream and really determine what the full sediment load was
16 in the hydrologic system that exists behind House of Raeford
17 Farms.

18 They only focused on what they could see floating
19 at the surface and they didn't enter upon and do sampling and
20 probing and evaluation of the fitness and occurrence and
21 nature of the bottom sediments and whether or not those could
22 be a source of microbial growth and a filamentous growth at
23 the surface of the water.

24 Q Does that relate to your slide number 4?

25 A Slide number 4 that I've already passed?

1 Q Yeah.

2 A Yeah, this one (indicating), I believe, yeah.

3 Q Okay. All right. I'm talking about this one
4 (indicating).

5 A Oh, okay, yeah. So let's come back to that slide.
6 Thank you. I wanted to address the discussion about supposed
7 normal oxygen at the Cabin Branch---

8 The Court: (interposing) And before we do
9 that, I'd like to take about a ten minute break, please.

10 Mr. Jones: All right.

11 The Reporter: Off the record. 2:51 p.m.

12 (A brief recess was taken.)

13 The Reporter: On the record. 3:03 p.m.

14 (Petitioner Exhibit 42 was
15 marked for identification.)

16 The Court: Okay. This hearing will come
17 to order. It's now three minutes after 3:00 on December the
18 20th, 2011. All parties present when we recessed are again
19 present. Thank you.

20 By Mr. Jones:

21 Q Mr. Holley, in this report, Exhibit Number 42, you
22 made reference to the water column and how the difference in
23 level of the dissolved oxygen upstream could have affected
24 how the readings were done when the State did those readings
25 upstream from House of Raeford. Does this graphic explain

1 your testimony?

2 A Yes. I wanted to simply address the testimony of
3 there being supposedly normal dissolved oxygen upstream, and
4 the upstream location that the state seemed to be referring
5 to was the Brooks Quinn bridge at Cabin Branch.

6 At that time, the State was monitoring dissolved
7 oxygen at .1 meters depth, according to their data tables,
8 below the surface of the water. .1 meter is a little bit
9 less than 4 inches. It's a very shallow measurement.

10 Q Now, that's from the agency's records?

11 A From the agency's data that they produced; that's
12 correct. And that seemed to be the normal procedure that
13 they were using was to sample at .1 meters, or about 4
14 inches, a little bit less than 4 inches depth.

15 However, the water depth that's been discussed is
16 quite a bit deeper than .1 meters at Cabin--at Brooks Quinn
17 Bridge at Cabin Branch. Over time the state modified their
18 monitoring protocol with subsequent events and started to
19 profile the water column from the shallow to deeper portions.
20 There's a whole assemblage of data that shows various water
21 test results at different depths within the water column.

22 I've selected one subsequent reading point that was taken on
23 May 20th, 2010 just to illustrate a concept at this location.

24 On May 20th, 2010 at that same location, they have
25 a similar dissolved oxygen concentration near the surface of

1 the water at .1 meters. That's a 4.7 dissolved oxygen--
2 milligrams per liter dissolved oxygen concentration. I've
3 highlighted the red line here as the 4. That's the standard
4 that they considered to be normal if it's above that.

5 Notice that at the reading that was taken that
6 same day at .7 meters depth, which is quite a bit further
7 down in the water column, the reading is below the normal
8 amount. It's 3.1. This simply illustrates that in shallow
9 water, as you would expect, there's more interchange with
10 atmospheric oxygen than in deeper parts of the water system.

11 If you--if you take a reading very close to the
12 surface where wind is more likely to interact with the
13 surface, you're going to get more local intermixing of dis-
14 solved oxygen there and get a higher reading than you may at
15 the same location on the same day at a deeper part of the
16 water column.

17 The state didn't do that type of deeper profiling
18 on September 10th at the time that they were referencing the
19 dissolved oxygen being normal. Had they done a similar thing
20 that they did on May 20th, 2010, they may have seen that
21 deeper parts of the water column were indeed below normal.

22 That wasn't done, so there's no way to, you know,
23 verify whether that would have been the case or not. But
24 that certainly is a pattern that we see at this location on
25 this date as well as some other locations where they've

1 profiled readings on subsequent events. And during low flow
2 conditions, warm weather conditions, you typically see more
3 dissolved oxygen in their data set in deeper samples than you
4 do up close to the surface. So that was my only point there.

5 Q Okay. Now, get back--we--before we went to break,
6 there was a--we had a brief question about the algae and
7 aquatic plant assessment program. Why don't you go to that
8 slide?

9 A Yes, sir.

10 The Court: Before we do that, I'd like to
11 take about a five minute break and have the three attorneys
12 step back with me a minute.

13 The Reporter: Off the record. 3:08 p.m.

14 (A brief recess was taken.)

15 The Reporter: On the record. 3:10 p.m.

16 The Court: This hearing will come to
17 order. It's now seven minutes after 3:00 on December the
18 20th, 2010 and all parties present when we recessed are again
19 present. Mr. Jones.

20 By Mr. Jones:

21 Q Mr. Holley, we were talking about the plant
22 assessment program. Can you in just a few words explain the
23 slide you've got on that---

24 A (interposing) Yes.

25 Q ---and how it relates to this case?

1 A Yes, sir. I wanted to mention that the North
2 Carolina Division of Water Quality has an algae and aquatic
3 plant assessment program. And I've got a quote off of their
4 web site of the intent. I'll look at the "Analyses are
5 performed to" portion of this slide. They're performed to:

6 "Identify algae and aquatic plants, document where
7 problematic algal growths occur, identify
8 problematic taxa and their distribution, help
9 investigate possible causes of fish kills, help
10 investigate taste and odor problems in drinking
11 water supplies, [and] provide habitat character-
12 ization for bioassessment evaluations."

13 Off of this same web site is this illustration I
14 thought was a pretty compelling example of algae growth.
15 This is from the Yoepim River in eastern North Carolina.
16 It's a thick floating mat of aquatic vegetation. They've
17 identified the particular type of algae that represents this
18 thick mat.

19 And my simple statement is that some portion of
20 what floated behind the creek--or behind the House of Raeford
21 Farms in the creek could be of a similar nature. Had the
22 state employed their own resources to do some evaluation of
23 the nature of that floating material and looked to see what
24 percentage was algae, what percentage might be bacterial
25 hydrophobic cells from bacteria breakdown of organic matter

1 and things of that nature, that we would have a better
2 understanding of what that floating material actually was.

3 Q And in your next slide you talk about what was the
4 composition of the floating material. Have you reached a
5 conclusion as to what that material might have been?

6 A I don't know for certain what that material was,
7 and I don't think the state has adequately determined what
8 that material is. The various assessment activities have
9 been based in large part on observation and opinion that is
10 similarly refuted by different observations by other people
11 that were there. And so it is not well understood what that
12 material was that was behind the creek--or in the creek
13 behind the House of Raeford Farms facility.

14 Q Well, based upon the survey--the evaluation you
15 did originally and the reports you submitted and testified to
16 a few weeks ago and having heard the testimony from the
17 state's case and cross-examination of you and other
18 witnesses, have you reached additional conclusions relative
19 to the charges in this case?

20 A Well, my additional conclusions are that there's
21 been some compelling testimony to suggest that there are
22 differences between what was in the creek and what was in the
23 House of Raeford Farms lagoons, that the composition of the
24 floating material isn't known.

25 DWQ didn't obtain assistance from the algae and

1 aquatic plant assessment program to see what portion of what
2 was floating--what portion is duckweed, what portion is other
3 aquatic vegetation, what portion might be microbial in
4 nature. As a result, we really don't know what that material
5 was.

6 In my opinion DWQ has assigned responsibility to
7 House of Raeford Farms based upon their observation, their
8 assumptions, their opinion, and a predisposition without the
9 benefit of sufficient factual data to support their claims.

10 Q And what are these conclusions based on?

11 A My review of the records and my observation of the
12 testimony in this case.

13 Q Okay. And your next slide contains some of those
14 conclusions?

15 A Yes, it does.

16 Q Just briefly summarize what those conclusions are.

17 A Yeah. In my opinion the Division of Water Quality
18 didn't do all that they could have done to identify the
19 nature of the floating material in Cabin Branch. They didn't
20 evaluate the algae content, the microbial content. Much of
21 this could have been decaying, breaking down organic matter.

22 They did not sample the bottom sediments, so we
23 don't know what contribution from settled solids there might
24 have been to the condition. They didn't consider the
25 potential for this floating material to have formed at that

1 location as a breakdown product of settled solids leaving a
2 risen scum on the surface like often happens in certain
3 wastewater lagoon systems.

4 They assumed that the material was fresh, but they
5 really don't know the time frame of how long this material
6 accumulated at this location. The assertions that it was
7 fresh and had just occurred were really an opinion. There's
8 not really any evidence to demonstrate that.

9 There was a lot of discussion about color and how
10 that might come into play, but there's no categorization of
11 how long the color change occurs and that type of thing. So
12 my opinion is that it could have accumulated for days, weeks,
13 or even months before it became the condition that was
14 observed at that location.

15 Finally, the wastewater in the House of Raeford
16 Farms primary lagoon was testified it had a very strong
17 distinctive odor. But DWQ personnel, EPA, Register's Septic
18 Tank, and the House of Raeford personnel have all testified
19 that the floating material didn't have a real strong
20 characteristic odor and that it was not the same smell as
21 what's in the primary lagoon.

22 And also, Mr. Register, who was in the creek for
23 four days I believe, trudging around and vacuuming up this
24 material, he described it as being distinctively different
25 than what is in the primary lagoon. I would trust him to

1 understand the nature of wastewater because he's a pump
2 service contractor. That's his life's work is to pump
3 undesirable liquids. And if he were to have that opinion
4 that they were different, then that to me holds some weight.
5 He should know.

6 Q Anything else?

7 A Finally, Division of Water Quality didn't visit
8 the known upstream sources of nutrient loading and wastewater
9 discharge during their investigation in the early part of
10 2009. DWQ knew that there were some documented illicit
11 discharges from Duplin Winery and Carolina By-Products. To
12 me, it should have been something for them to investigate, to
13 do a diligent evaluation of all the potential sources that
14 could have contributed to the conditions behind the House of
15 Raeford Farms facility.

16 Q In summary, there was testimony during the direct
17 portion of the case critiquing your original report to the
18 effect that you were alleging that various people upstream
19 had indeed contributed or been the source of the material
20 that was in the creek behind House of Raeford Farms.

21 A Right.

22 Q Is that an accurate characterization of what your
23 report is---

24 A (interposing) No.

25 Q ---or was?

1 A No. I'm simply saying that there are known--there
2 are known contributors to degradation of water quality from
3 upstream areas. I don't know which of these contributors
4 would--could have singly or combined together been the cause
5 of the condition that developed behind House of Raeford
6 Farms. But certainly ongoing discharges and stormwater
7 runoff of nutrient laden material are contributing to the
8 degradation of the stream conditions in Cabin Branch, and
9 they shouldn't be ignored.

10 Q Well, after eight days of hearing spread out over,
11 you know, basically three weeks going back to October, you've
12 heard the direct testimony, the testimony from the state, the
13 cross-examination of Petitioner's witnesses. Have you heard
14 anything that would in any way invalidate or compel you to
15 change the testimony you issued before?

16 A No, I have not.

17 Q Okay. And your expert opinion today, is it
18 different than what it was when you testified originally?

19 A No, it's not.

20 Q And that expert opinion is summarized in your
21 expert report you gave last---

22 A (interposing) Correct.

23 Q ---session?

24 A Correct.

25 Q And again today?

1 A Correct.

2 Mr. Jones: Your Honor, I have no further

3 questions.

4 The Court: Cross-examination, Ms. LeVeaux?

5 Ms. LeVeaux: No questions.

6 The Court: You may step down. Thank you,

7 sir.

8 Mr. Jones: Your Honor, at that point I

9 think we would rest as submitted, but we would ask that--or

10 move that Exhibits Number 39 and 42 be admitted into

11 evidence.

12 The Court: Have you had a chance to look

13 at that, Ms. LeVeaux?

14 Ms. LeVeaux: I didn't, but no objection,

15 Your Honor.

16 The Court: Okay.

17 Mr. Jones: 39 was the letter that Mr.

18 Howard identified.

19 The Court: And I don't have 39 in my

20 notebook. In fact I don't have 40, 41, or 42 either. Well,

21 I have 42 now.

22 Ms. Jones: 40 and 41 are the maps.

23 The Court: Okay.

24 Ms. Jones: You may have---

25 The Court: (interposing) And then 39 I do

1 not have.

2 Mr. Jones: All right. That's easy.

3 That's easy.

4 (Document handed to the Court.)

5 The Court: Are the parties prepared to
6 make closing remarks at this time or do you need a break
7 before that?

8 Ms. LeVeaux: I'm prepared, Your Honor.

9 The Court: Say again?

10 Ms. LeVeaux: Yes, sir.

11 The Reporter: Your Honor, were those exhibits
12 you just talked about--were they received?

13 The Court: They are. They have been
14 admitted: 39, 40, 41, and 42.

15 (Petitioner Exhibits 39-42 were
16 received in evidence.)

17 The Reporter: Okay. And what about 34
18 through 38? Did I miss you receiving those, or were we
19 waiting for Ms. LeVeaux to look over them?

20 The Court: And I think there was no
21 objection to those. They're admitted also.

22 The Reporter: Thank you.

23 The Court: Thank you for that reminder.

24 (Petitioner Exhibits 34-38 were
25 received in evidence.)

1 The Court: And of course, 40 and 41 with
2 the caveat that they'll also be reduced to a smaller size as
3 well. As the parties know, the petitioner in this case
4 carries the burden of proof by a preponderance or greater
5 weight of the evidence. That being the case, I will allow
6 the petitioners to have the last say in their closing
7 remarks. Ms. LeVeaux?

8 Ms. LeVeaux: Your Honor, is the petitioner
9 waiving his first argument?

10 The Court: Pardon me?

11 Ms. LeVeaux: Which--I'm sorry; I didn't hear
12 you.

13 The Court: Since they have the burden of
14 proof, I'm allowing them to have the last say in---

15 Ms. LeVeaux: (interposing) Okay.

16 The Court: ---the argument.

17 **C L O S I N G A R G U M E N T** 3:20 p.m.

18 Ms. LeVeaux: Your Honor, briefly, we submit
19 that nothing was done incorrectly by DWQ. DWQ assessed for
20 three violations. They assessed for a discharge without a
21 permit, they assessed for a settleable solids violation, and
22 they assessed for dissolved oxygen. We stand by the civil
23 penalty assessment and the F and D. We believe it's
24 accurate, it sets out the legal basis for the assessments,
25 and we feel that there's been a plethora of evidence that

1 support the factual allegations and that they too are
2 adequately supported.

3 Most importantly, Your Honor, we feel that a
4 picture is worth a thousand words. And I just pulled out--we
5 tendered into evidence a lot of pictures, but I've pulled out
6 three which I find particularly persuasive. And that's
7 Figure 14P, which is a picture of the petitioner's lagoon--
8 and I'm explaining the pictures because I understand some of
9 them may be out of order--Figure 14L, which is a picture of
10 the creek, and Figure 14Q, which is again a picture of the
11 lagoon and a little corner of the lagoon. And a picture is
12 worth a thousand words. These three look exactly alike, or
13 very, very, very similar.

14 We--my client received an anonymous phone call and
15 they responded to that anonymous phone call. They were
16 objective. They acted with--by the protocol that's in place.
17 There are stream standards in place. This is a swamp water,
18 low flow. They used the resources available to them. They
19 found the source of the--they continued to look for the
20 source of the contaminant.

21 Seeing this, they took DO readings. They went to
22 Carolina By-Products--I mean they found that there was no
23 spill at Carolina By-Products. Duplin Winery doesn't
24 generate a waste of this type, and Parker Bark doesn't
25 generate a waste of this type.

1 Immediately, House of Raeford did try to mitigate
2 their discharge. They offered to pump back to their lagoons.
3 And the fact that they offered to pump back to their lagoons
4 is extremely persuasive, we submit, evidence of their wrong-
5 doing.

6 Clay Howard is the operations manager, but he
7 doesn't know how much would be lost by repair. So we're
8 looking for what could have caused this. We submit that
9 there was a valve that was being replaced. We submit that a
10 lot of things could have happened when they were trying to
11 lower the creek--lower the lagoons to do that work. If we
12 took his numbers, 650 employees times \$10 an hour times eight
13 hours, then for one day they stand to lose \$52,000. That's
14 just for one day.

15 Also, we know and there's been evidence to show
16 that the ORC, Mr. Teachey--he looked at the rain records. A
17 rain was expected. A big rain was expected. Well, if you're
18 looking at money and if you're looking at a means to do
19 different things--and he admitted that his freeboard was in
20 violation. So he didn't have a whole lot of space. He may
21 have taken a chance to do something that he wouldn't have
22 ordinarily done. And we submit that he did, that he dis-
23 charged to the waters of the state.

24 This was devastating. The amount of--the amount
25 of discharge, the sludge, whatever you want to call it, gray

1 matter, was devastating. When they went out, Ms. Willis, Mr.
2 Teachey looked at the creek, bank to bank as far as the eye
3 could see, at least 400 feet full of sludge. Ms. Willis
4 described it as fresh. That's been called into question.
5 Whatever it was, it covered bank to bank.

6 It was devastating, but not so devastating that on
7 the 10th when Ms. Willis went out there, Mr. Teachey saw it
8 but continued to monitor his lagoons, "lagoon 1 okay, lagoon
9 2 okay, lagoon 3 okay," and no record of it.

10 But more importantly and more compelling was the
11 fact that Mr. Howard wasn't contacted until the 15th. Mr.
12 Howard was not aware of how severe this discharge was until
13 the 15th. He said he saw the pictures--Mr. Rhame and Ms.
14 Willis showed the pictures and then he went out. They walked
15 out at that point.

16 Now, I guess he came to the conclusion for what-
17 ever reason that they weren't--it wasn't their discharge;
18 they didn't cause it. But he said, "Well, we're going to be
19 good guys and we're going to clean it up anyhow." We don't
20 know the reason behind that, just like we don't know the
21 reason that he left House of Raeford, but he's no longer
22 there.

23 They had a 7.7 million gallon wastewater lagoon
24 adjacent to Cabin Branch, 7.7 million gallons, 15 million
25 gallons if you look at both lagoons. So could they have

1 discharged? Yes. We look at these pictures. It looks like
2 the same waste to us. And that's our contention and that
3 continues to be our belief. Did see them discharge? No.
4 But we've got it right behind their facility.

5 We have no stains, no fingerprints. There's been
6 a lot of thesis and they have an expert who can explain this
7 and explain that. But while he says that there was--you
8 know, you don't have to have stain, Mr. Howard said, "Well,
9 it took three weeks." We say it took more than that before
10 it disappeared downstream. So while there was no stain
11 upstream, downstream it took weeks, if not a month, for it to
12 disappear, for it to--so that it was no longer there, but
13 that's okay.

14 House of Raeford's reasoning--we submit yes, they
15 had a reason to lower the lagoons. They needed to replace
16 the valve between the two lagoons. Mr. Howard stated that
17 the valve was not working. There have been some estimates on
18 the age of the sludge in the creek. All of this seems to
19 coincide with the time of the replacement of the valve and
20 the need to lower the lagoon.

21 And again, we're constantly boggled by the fact--I
22 mean why would you put back into your lagoon someone else's
23 sludge without knowing what that was? I mean why would you
24 do that, over a million gallons?

25 Could they have a means to get the water to the

1 creek? There's been conflicting testimony. But one thing
2 that's consistent is Mr. Howard said there was--there were
3 pumps. Mr. Teachey said there were submersible pumps. There
4 is a ditch that's adjacent to the lagoon, and the ditch does
5 drain to Cabin Branch. House of Raeford offered to wash the
6 waste out of the creek, to flush it out. We submit the
7 same--whatever they would use to do that, they could flush
8 any remnants of it out of the ditch.

9 And also where there's pumps, there's usually
10 hoses. Now, they talked about the pipes. We're not saying
11 that there weren't pipes there, but we're saying--but usually
12 where's there's pumps, especially a facility like this,
13 there's also hoses.

14 Upstream there were no stains. There was no
15 fingerprint, no residue. We heard from Mr. Poindexter. He
16 even said, contrary to Mr. Holley's testimony, that if there
17 were a discharge, it would go the other way. He said that.
18 I think Mr. Bushardt put it best. He said if they had the
19 capability to take the waste out of the creek, they certainly
20 had the ability to put it in. Thank you, Your Honor.

21 The Court: Thank you. Mr. Jones?

22 **C L O S I N G A R G U M E N T** 3:28 p.m.

23 Mr. Jones: Thank you, Your Honor. And
24 first, before I forget, thank you for the time and attention
25 you have devoted to this case. I know it's been a trial and

1 the petitioner--speaking on behalf of Petitioner and counsel,
2 we appreciate the attention and appreciate the courtesies
3 that have been extended by Ms. LeVeaux. There's no one in
4 that section over there I have more respect for than her, and
5 I appreciate those courtesies.

6 Judge, in this case I'm reminded--I knew a fellow
7 back when I was active in politics who was explaining the
8 difference between theories and facts. He's very cynical and
9 he said, "Henry, facts are theories you believe in. Theories
10 are facts you don't believe in." I don't know if we can test
11 the facts and theories in this case by that same standard,
12 but I would say it's critical that we all understand what the
13 difference is in this case between facts and theories. And
14 I'm going to just briefly summarize what I think the facts
15 are from the evidence in the case.

16 You probably heard, Your Honor, as I did, at least
17 three or four times the state said, "This case is circum-
18 stantial." There is no direct evidence of what they are
19 alleging in the form of the discharge in this case. If there
20 were, we probably wouldn't be here. But difficult facts make
21 for long trials, I suppose.

22 The facts that we do know are this. There was
23 solid material in the creek on September the 9th, 2009. The
24 closest commercial landowner to the creek condition was House
25 of Raeford Farms, my client.

1 House of Raeford Farms performed a pipe transfer
2 between its lagoons earlier in September 2009. The material
3 in the creek was apparent downstream from House of Raeford at
4 the Sheffield Road bridge to the area just upstream from
5 House of Raeford, and DO readings were substandard in that
6 area.

7 The facts for the company: there were poor water
8 conditions and fish kill in the spring of 2009. We know
9 that. It was attributed to agricultural runoff. There are
10 two major industries immediately upstream of House of Raeford
11 Farms, and both of them committed discharge violations in the
12 same year, 2009. Duplin Wine, for example, had a violation
13 later in September of 2009.

14 All of the landowners' drainage in this entire
15 five acre drainage region drains into Cabin Branch. And as
16 our expert witness has testified, it all flows down to House
17 of Raeford and stops or slows down behind House of Raeford
18 lagoon number 2. That is the reality. It all goes by House
19 of Raeford and it all stops right there.

20 Further, no one knows how long the material was in
21 the creek before September the 9th. There's testimony that
22 the complainant made a complaint on September the 9th, but
23 nobody can testify how long that gunk was in the creek before
24 that.

25 House of Raeford has a wastewater lagoon, lagoon

1 number 1, but by the evidence, without contradiction, it is
2 at least 650 feet from Cabin Branch, which, Your Honor, it
3 doesn't look like a lot on a drawing, but that is a long way
4 from lagoon to creek.

5 Lagoon 2, the second lagoon, had more than
6 adequate freeboard. That was concluded even by Mr. Poupart
7 and others who have testified in the case. And the irriga-
8 tion system was fully functional in a severely drought
9 season, the biggest drought in a lot of people's memories
10 that particular year, 2009. And remember from the pictures
11 immediately after the incident there was more than adequate
12 freeboard in lagoon number 2.

13 The reality of the situation is if you have water
14 that needs to be drained from lagoon number 1, all you have
15 to do is open the valve and let it flow by gravity to lagoon
16 number 2 and then pump to the irrigation field. Again, to
17 remove from lagoon number 1, all you have to do is adjust the
18 valve and send it by gravity to lagoon number 2; very cheap,
19 very easy, very quick.

20 There was a pipe transfer that was effected by Mr.
21 Davey Cavanaugh, who came and testified in his own Duplin
22 County drawl, who said there was no pumping to the creek or
23 any other area. This was done. It was very usual--usual
24 process, a very ordinary, very ordinary maintenance. Mr.
25 Cavanaugh said during the period he was there, there was no

1 pumping to any other area. The water was lowered. He did
2 his job. There was no extraordinary pumping or conveyance of
3 wastewater to any other area.

4 There has been no evidence of any objective
5 breach, overtopping, or pumping or hauling to the creek. So
6 there's a complete absence of any of that. And Your Honor--
7 if Your Honor please, there's got to be some way to get this
8 kind of material, which is thick, heavy, viscous, from its
9 original location to the creek.

10 Under intense questioning, the company has
11 consistently denied any participation in causing or
12 permitting this discharge to Cabin Branch. And let me remind
13 you, they weren't just interviewed by state agents. They
14 were interviewed by federal agents with EPA, the guys who
15 carry guns. Under intense questioning, every single company
16 person said, "We did not do this."

17 Now, the theories: in general, we contend that to
18 create an inference supporting the company's responsibility,
19 the state has to show some motive and present ability to
20 carry that thing out. One of the theories is the company
21 pumped to lower the level in lagoon number 1. Let's think
22 about that.

23 Clay Howard, the operations manager, said the
24 entire system was fully functional. They had no reason to do
25 this. Davey Cavanaugh, unless Mr. Cavanaugh lied, said no

1 pumping was carried out and they had no reason to do so.
2 Lagoon number 2 was available for any excess water, and the
3 logistics and financial expenditure to pump this kind of
4 material 650 feet is rather prohibitive.

5 I think Mr. Howard testified today in order to
6 carry that out, they would have to go out and purchase a
7 pump. A pump would have to be more than just your garden
8 variety pump to move this kind of material. You'd have to
9 have 650 to 700 feet of pipe to get it there. That can't be
10 done in a day.

11 And if it is done with the generators going and
12 the kind of commotion that would create, you can't hide
13 something like that. There's no such thing as a stealth
14 pumping like that. And I don't know why a company would do
15 that and expend that kind of money and trouble to do it when
16 they've got a ready way to unload excess water, and that is
17 into lagoon number 2.

18 Now, it's interesting, Your Honor, in two years of
19 handling this case, we never heard anything about conveyance
20 into this ditch that was on the south side of the property
21 line, in two years. And Your Honor, you can search the
22 record in vain. You will find not one reference to the
23 ditch, and there hasn't been one until a few weeks ago when
24 someone was testifying that somehow that was the easy way to
25 get it to the creek. As I said, it hasn't been expressed in

1 two years, but it kind of popped up here in the last few
2 weeks. There's nothing in the record.

3 Our contention is this entire theory was concocted
4 to try to explain the otherwise inexplicable, and that is how
5 could you move that kind of material from where it rested in
6 lagoon 1 to Cabin Branch? There's not one shred of evidence
7 to substantiate and there are no photographs.

8 And Judge, there are photographs of everything in
9 this record. For some reason, if they really thought that
10 they had pumped it into the ditch, I think we would have at
11 least one photograph of the ditch. All evidence was that the
12 ditch was dry. No one saw any stains or markers of solid
13 material in the ditch at all, bar none. Even Mr. Rhame, the
14 federal agent, said there was no evidence of any markers in
15 the ditch.

16 There has been a bit of discussion about odor both
17 ways. What do you make of the odor? Was there odor? Was
18 there not odor? If there was odor, was it strong, was it
19 light? If there was, does that mean that it was material
20 from House of Raeford? If there wasn't, does that mean that
21 it was? We've heard it both ways.

22 I don't know what to make of that other than to
23 say it's contradictory. Common sense tells me if you took
24 animal by-product and water and ran it through a DAF into a
25 lagoon and conveyed it to the creek, the creek would smell

1 like what was in the lagoon. But I don't think there's any
2 direct evidence of that. In fact there's nothing but contra-
3 diction.

4 The appearance of the solids, again, nothing but
5 contradiction. I think it depends on who you talk to. I
6 remember when in the first week of this session Mr. Holley
7 was on the witness stand and Ms. LeVeaux asked him to testify
8 from a couple of documents. One document was from the creek,
9 the material in the creek, and the other was the material at
10 the top of the DAF. And they were clearly different. One
11 was gray and one was very light tan or khaki, and he said so.
12 If that was a reference to how closely they resemble one
13 another, it certainly failed.

14 Now, expert testimony: House of Raeford has
15 provided an expert hydrogeologist to explain how the creek
16 conditions could have been caused without any participation
17 by House of Raeford. I don't think that we had to do that,
18 but it was the right thing to do. If we contend that we
19 didn't contribute that material to the creek, how could it
20 possibly have gotten there?

21 The expert testimony showed that there were other
22 known and established discharges in the same creek in 2009
23 and 2010. They could have contributed to the conditions, but
24 they were not investigated or cited with reference to this
25 case.

1 Using the state's own evidence, the expert, Mr.
2 Holley, found that Cabin Branch was consistently degraded and
3 had substantial DO and high fecal coliform from multiple
4 sources in 2009 and 2010, particularly in summer to fall of
5 that period, without the presence of even floating solids;
6 low DO, fecal coliform without sludge or floating solids.

7 By that, he noted the storm monitoring conducted
8 by Environmental Chemists in September of 2010, a year later,
9 measured dissolved oxygen in Cabin Branch at low concen-
10 trations similar to 2009 despite the absence of sludge.
11 Stream sampling conducted by Environmental Chemists in
12 September of 2010 documented elevated fecal coliform bacteria
13 throughout the drainage system of Cabin Branch despite the
14 absence of sludge.

15 Finally, dissolved oxygen concentrations in
16 September of 2009 demonstrated that dissolved oxygen was
17 depleted on Cabin Branch and areas upstream of House of
18 Raeford. This was from the state's own data collection.
19 These upstream conditions could not be related to activities
20 from the House of Raeford facility.

21 Additionally, DWQ determined that depleted DO
22 occurred upstream in Beaverdam Branch and several unnamed
23 tributaries of Beaverdam Branch that are unrelated to the
24 sludge. So there is degraded condition throughout this
25 entire drainage area unrelated to the sludge during 2009 and

1 a year later in 2010.

2 Now, Mr. Holley we think was clearly the most
3 knowledgeable witness on stream conditions and stream flow.
4 That's the reason he was hired. That's the reason he was
5 brought here. There was no contradictory expert testimony.
6 Mr. Holley was it.

7 And I think you could tell, Your Honor, as you
8 observed his demeanor and listened to his testimony, Mr.
9 Holley knows what he's talking about. He apparently loves
10 what he's talking about because he loves to talk about it.
11 He could go on at length. And I think that indicates he's
12 good at it, he really understands it, and he grooves on this
13 stuff, Your Honor, as we used to say.

14 In spite of all this and the company's persistent
15 denial of responsibility, the company undertook remediation
16 and creek cleanup. And the evidence of that is they spent
17 over \$20,000 remediating the creek.

18 Now, Your Honor, if you go back to Exhibit 25 and
19 look at the citation in this case, which is sort of the
20 origin of this whole thing, we contend--again, we made a
21 motion for summary judgment at the beginning of the case.
22 It's too late to renew the motion for summary judgment.
23 We've heard the evidence. We understand your reason for
24 denying the motion and that reason was, you know, you wanted
25 to hear some evidence about the charges, et cetera.

1 Everything that's been produced in this case, I
2 think particularly today--or yesterday from Mr. Poupart--I
3 think the Court has got to go back and look at this question
4 again and revisit it: are there three violations or is there
5 one?

6 You'll recall, Your Honor, when Mr. Poupart was
7 cross-examined--and we have great respect for Mr. Poupart.
8 However, he's not an attorney. If you go back and look at
9 the charges, on the last page of the--or the decision in this
10 case, Exhibit 25, you'll notice we're charged with a
11 violation of Section 143-215.1A(6) for:

12 "[Causing] or [permitting] any waste...to be
13 discharged to or in any manner intermixed with
14 waters of the State in violation of water quality
15 standards applicable to the assigned classifica-
16 tions or in violation of any effluent standards or
17 limitations established for any point source."

18 That indicates to me, if you read that literally,
19 if you don't introduce waste that violates a water quality
20 standard, you haven't committed that offense. You have to
21 violate a water quality standard.

22 The two water quality standards that they say we
23 violated are in the next two paragraphs, those two regula-
24 tions. One is for DO and the other is for allowing
25 settleable solids and sludge in excess of the water quality

1 standard for Class C swamp waters. Those two are included
2 into the first. And Mr. Poupart said under cross-examination
3 that there were no other water quality standards involved.

4 So really it's improper to charge the company with
5 three different violations. There was really only one. The
6 same water quality standards that they say we violated in 2
7 and 3 are the offense in citation number 1.

8 Now, it's interesting they did that because they
9 charged us the maximum penalty for each one in an effort to
10 roll up the penalties--to multiply the number of citations,
11 roll up the penalties to make them as high as possible.

12 Unfortunately, for the state, if there were any
13 offenses at all, it's one, and that's probably the first one,
14 permitting waste to be discharged in violation of water
15 quality standards, which again, Your Honor, they contend are
16 for low DO and for allowing settleable solids and sludge in
17 excess.

18 Of course we contend the DO violation in particu-
19 lar has trouble because, as our expert witness showed based
20 upon the state's own evidence, there was low DO throughout
21 the Cabin Branch and Beaverdam systems anyway. How can they
22 possibly say that we contributed that when during that period
23 of time, DO was terrible throughout the entire system? And
24 their own laboratory data reveals that.

25 Mr. Poupart's assessment of the penalty was

1 distorted, we think, in several respects. First, he
2 testified that the degree and extent of the harm to the
3 natural resources of the state for the public health and to
4 private property resulting from the violation was based upon
5 what he said. However, House of Raeford remediated the
6 problem. We endeavored to do as much as we could from
7 September the 14th until the 18th.

8 Conditions in Cabin Creek were already terrible.
9 The DO in Cabin Branch and Beaverdam Branch were already
10 substandard. And I've shown you the excerpts from our
11 expert's testimony that bears that out. Basically the last
12 one with the DO concentrations in September of 2009 demon-
13 strate that DO was depleted anyway.

14 And remember, I asked Mr. Poupart directly, "Can
15 you tell us what part House of Raeford would have done and
16 how much"--"what part of that would have been done by other
17 contributors in the already degraded stream?" He could not
18 decipher that for us. He didn't know. He simply didn't
19 know.

20 The second criteria, the duration and gravity of
21 the violation--remember, House of Raeford remediated the
22 problem from September 14th through the 18th. Most of the
23 condition had probably been remediated. And again, the
24 conditions in Cabin Creek were already terrible. The effect
25 on ground or surface water quantity or quality or on air

1 quality, again we reiterate the conditions on Cabin Branch
2 were terrible.

3 Finally, Your Honor, the cost of rectifying the
4 damage, Mr. Poupart testified during his part that he didn't
5 know how much the cost of rectifying the damage would be. We
6 now know that the cost of remediation was in excess of
7 \$20,000. That was not taken into account by Mr. Poupart when
8 he assessed the penalty.

9 He talked about the amount of money saved by non-
10 compliance. Your Honor, you've got to start with at least
11 \$20,000 because it took that to remediate the creek. I asked
12 him what seemed like a stupid question, "How much would it
13 cost to get the mess in lagoon 1 to the creek," and he didn't
14 know. That would have been an expensive proposition.

15 How could we save money when it would take a
16 considerable effort and money to get the junk to the creek in
17 the first place? No reasonable, rational company would have
18 done that in the first place because that alone would be an
19 enormous production, particularly given the fact that you
20 could have done the same thing innocently by just simply
21 letting it go into lagoon number 2.

22 And finally, whether the violation was committed
23 willfully or intentionally, basically I guess that was based
24 upon the fact that there was an absence of any evidence of
25 accidental discharge. It had to be willful, but there was no

1 evidence of any willful discharge either, I guess mostly just
2 the fact there was an absence of accidental discharge.

3 Again, Your Honor, we thank you for your time. We
4 reiterate, purely circumstantial evidence. If the company
5 had really done this and thought they had done this, I guess
6 the bottom line question is why would they have defended this
7 case when they probably could have settled it much sooner,
8 much more simply? To go through all this production over
9 this, greater expense you can imagine than even the penalties
10 involved, they must feel they have done nothing wrong.

11 Your Honor, it's a circumstantial case. We thank
12 you for your time and we look forward to the opportunity to
13 get the transcripts and express ourselves more thoroughly on
14 paper, if that would be the Court's will.

15 The Court: Thank you. Well, I think it's
16 a foregone conclusion that the parties do want copies of the
17 transcript. That being the case, my procedure--obviously
18 there is way more here than I have begun to have the oppor-
19 tunity to read and review. So obviously my decision does not
20 come at this time. It quite frankly rarely does. I don't
21 want to fool anybody by issuing something when they know
22 evidence is still there. And quite frankly, in this case it
23 does not call for that at all.

24 That being the case, what I would like the parties
25 to do is as soon as you do receive the transcript, if you

1 would provide an e-mail to each other, of course, and then to
2 my paralegal, Anita Wright, who I know you've corresponded
3 with, just to say that you have received the transcript.

4 Upon the last person receiving the transcript--
5 it's my normal experience that you-all will receive it
6 probably within a day or two of each other, perhaps even the
7 same day. And it's usually about the time that I receive it
8 as well. But I do want to confirm that you have received it.
9 Taking the last date, the last person to receive it, will
10 begin a 30 day period.

11 So for purposes of the hearing, I'm closing the
12 hearing for purposes of testimony and evidence, subject of
13 course to the fact that if something appears regarding Dr.
14 Song and the sample, then I certainly will revisit that. But
15 for all other purposes and for that as well, unless that does
16 happen, it's closed for purposes of future testimony and
17 evidence.

18 I am, however, leaving the record open for
19 submission of proposed findings of fact and conclusions of
20 law, any memorandum of law, any cases that you might have
21 access to, that sort of thing. So I would like that
22 submitted to me 30 days after the date the last person
23 receives their transcripts. Obviously, if that 30 days falls
24 on the weekend, then it would be the following Monday.

25 Obviously the parties, I know, are busy, talented

1 people and if an extension is needed, you certainly can--know
2 the process for that. But I'll be looking for that, at least
3 on my calendar, some 30 days after the last--our rules and
4 regulations allow me 45 days in which to issue a final
5 decision or a decision in a matter. It's my normal attempt
6 to try to do that within 30 days, the same as you do as well.
7 That being said, does either party have any questions for me?

8 Ms. LeVeaux: No, Your Honor.

9 Mr. Jones: None, Your Honor.

10 The Court: Okay. Well, let me thank you.

11 I'm often asked what are my favorite cases to hear. And I
12 don't know that I have any particular favorite subject
13 matter, but my favorite cases to hear are when there are two
14 extremely talented attorneys that are courteous to each other
15 and simply present the facts.

16 And that has certainly been the case here and I
17 can't thank you enough. It's given me the opportunity to
18 really concentrate on the facts themselves. Your
19 professionalism, the courtesy of your witnesses, and your
20 parties to this have made this a favorite, so to speak, based
21 on that.

22 It's simply tiresome when I have to continue to
23 regulate the process of a hearing through disagreement of
24 attorneys or witnesses or that sort of thing. And that has
25 been far from--not even close to that in this particular

1 case, and I appreciate that.

2 All that being said, I hope everyone has a good
3 holiday and we are adjourned.

4 (The hearing was closed at 3:54 p.m.)

STATE OF NORTH CAROLINA

COUNTY OF WAKE

C E R T I F I C A T E

I, Carolyn M. Kleitsch, do hereby certify that the foregoing pages 1364 through 1559 represent a true and accurate transcript of the proceedings held at the Office of Administrative Hearings on Tuesday, December 20, 2011.

I do further certify that the witness Bongkeun Song, Ph.D. 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 17th day of January, 2012.

Carolyn M. Kleitsch, CVR
Notary No. 20021260279