NORTH CAROLINA
HYDE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISTION
FILE NO: 12-CVS-10

ROSE ACRE FARMS INC.,
Petitioner,

and

NORTH CAROLINA POULTRY FEDERATION, INC.,
Petitioner-Intervenor

VS.

NC DEPARTMENT OF ENVIRONMENT and NATURAL RESOURCES,
Respondent

and

PAMLICO-TAR RIVER FOUNDATION, WATERKEEPER ALLIANCE INC., AND FRIENDS OF POCOSIN LAKES NATIONAL WILDLIFE REFUGE, INC.,
Respondent-Intervenors.

ORDER UPON JUDICIAL REVIEW

THIS MATTER comes on before the Senior Resident Superior Court Judge for the Second Judicial District upon a Petition for Judicial Review of a final agency decision, by Petitioner, pursuant to N.C.G.S. § 150B-43. The undersigned has previously held a scoping hearing and entered Orders as Follows:

1. The Court entered an Order Allowing Intervention by The North Carolina Poultry Federation Inc., on the 4th day of May, 2012.

2. The Court entered an Order Granting a Motion to Intervene by the Pamlico Tar River Foundation, Waterkeeper Alliance Inc., and Friends of the Pocosin Lakes National Wildlife Refuge, dated the 4th day of May, 2012.

3. The Court entered an Order establishing a briefing schedule, dated the 21st day of August, 2012.

4. The Court entered an Order upon Petitioner's Motion to Strike and/or Expunge, settling the record constituting the proper documents for Judicial Review, dated the 21st day of August 2012.

5. The Court entered an Order Granting the Environmental/Intervenor's Motion for Relief to File an Over Length Brief, on the 25th day of October 2012.

6. The Court Denied the Environmental/Intervenor's Motion to Take Judicial Notice of Facts concerning the United States Fish and Wildlife Service, and the Pocoson National Wildlife Refuge, on the 26th day of October, 2012.

7. The Court entered an Order Granting the Petitioner's Motion for Leave to Allow an Over Length Brief, on the 30th day of October, 2012.

8. The Court, after reconsideration of its previous Order dated August 22, 2012, entered an Order striking the Sara Ward Memorandum to Keith Larack dated August 7, 2009, on the 8th day of November, 2012.

9. The Court entered an Order Denying Petitioner's Motion to Take Judicial Notice of certain Records and Reports, on the 8th day of November, 2012.

10. The Court entered an Order Prohibiting Further Evidentiary Requests, Requests to Reconsider, or New Evidence Motions, on the 8th day of November, 2012.

All such rulings are incorporated by reference herein.

The Court conducted oral arguments on the Petition for Judicial Review on the 26th day of November, 2012, at the Hyde County Courthouse. Present and appearing for the Petitioners were Mr. Gary H. Baise, and Mr. Anson Keller, of the Washington DC Bar, having been admitted *pro hoc vice*, Mr. Joseph A. Miller, General Counsel to Rose Acre Farms, having being admitted *pro hoc vice*, and R. Sara Compton of the Wake County Bar; and appearing for the North Carolina Poultry Federation Inc., Petitioner/Intervenor, was Mr. Henry W. Jones, Jr. of the Wake County Bar; appearing for the Respondent State of North Carolina were Mr. Frances W. Crawley, and Ms. Anita LeVeaux, of the North Carolina Attorney General's Office; and appearing for the Environmental/Intervenors were Mr. Jerome R. Eatman, Jr. of the Wake County Bar, and Ms. Eve C. Gartner, of the New York Bar, having been admitted *pro hoc vice*.

The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are adopted as such.

The Court, after hearing the arguments of counsel, and upon consideration of the Record Proper, and all Memorandums and Briefs filed by all parties, hereby makes the following:

FINDINGS OF FACT

I. PROCEDURAL BACKGROUND

1. Rose Acre Farms (hereinafter RAF) owns and operates an egg production facility in Hyde County North Carolina. (Tr. A-415)

2. The new facility began operation in 2004, and on November 23rd, 2004, was issued NPDES permit NCA-148024.(Tr. A-415) Birds were actually placed on site on August 15, 2006. (Tr. A-426)

3. That NPDES permit expired October 31, 2009. (Tr. A-415)

4. That on the 25th day of March, 2009, the Division of Water Quality (DWQ) of the North Carolina Department of Environment and Natural Resources (DENR) received an application for permit renewal from RAF. (Tr. A-407)

5. The application did not request any changes in the numbers of animals to be housed on the site, or any of the conditions contained in their initial application dated February 17, 2004, or any changes in the best management practices approved in the 2004 permit. (Tr. A-415)

6. That on the 17th day of December, 2003, the Division of Water Quality of the North Carolina Department of Environment and Natural Recourses issued RAF a stormwater management permit, to construct, operate and maintain the facility's stormwater management needs. (Tr. A-387)

7. Pursuant to State and Federal regulations concerning NPDES permits, the Division of Water Quality conducted a public comment period for the renewal of the Rose Acre Farms/ Hyde County egg farm permit.

8. That on the 24th day of September, 2010, Keith Larick, an employee of the Division of Water Quality involved with large animal feeding operations, provided a summary of such public comments to all parties. (Tr. A-78)

9. That on the 24th day of September, 2010, the Division of Water Quality of the North Carolina Environment and Natural Resources department issued the renewal of permit NCA-148024, by letter of the same date of Coleen H. Sullins, authorizing the continued operation of the facility and its animal waste and process waste water, treatment, storage and land application systems, pursuant to the Federal Clean Water Act, N.C.G.S 143-251.1, and that agreement between the

State of North Carolina and the US Environment Protection Agency dated October 15, 2007. (Tr. A-40)(Tr. A-293)

10. The permit authorized the operation of the Hyde County egg farm with an animal capacity of no greater than an annual average of 4,000,000 laying hens and 750,000 pullets, and the application to land as specified in the facility's Nutrient Management Plan. (NMP)(Tr. A-40, A-42)

11. In Section 11, paragraph 32 of the renewal permit, RAF was required to implement amended best management practices (BMP) as contained in that paragraph in subsection A-E. (Tr. A-47)

12. Also contained in the renewal permit, in section III, paragraphs 17 and 18, were two additional requirements regarding migratory bird activity and the placement of stream monitoring devices. (Tr. A-52)

13. That on the 15th day of October, 2010, RAF filed its Petition for a Contested Case Hearing in the office of Administrative Hearings for the State of North Carolina. (Tr. A-23)

14. Each party filed pre-hearing statements, with attachments, and memorandums of law. (Tr. A-47-88)

15. That on of about the 10th day of March, 2011, the North Carolina Poultry Federation moved to Intervene as a Petitioner, and on the 11th day of March 2011, the Administrative Law Judge presiding, Augustus R. Elkins, II, granted said Motion to Intervene. (Tr. A 101-107)

16. On the 6th of June, 2011, RAF filed a Motion for Summary Judgment. (TR. A-108) That each party filed Memorandums of Law supporting their positions on the motion for Summary Judgment. (Tr. A-101-338)

17. That on the 15th day of August, 2011, the matter came on for hearing upon Petitioner's Motion for Summary Judgment before the Honorable Augustus B. Elkins, II, Administrative Law Judge. (Tr. B-1)

18. That on the 17th day of October, 2011, Administrative Law Judge Elkins issued his decision granting Summary Judgment for Petitioner. (Tr. B-5-20)

19. That on the 18th day of October, 2011, the Pamlico Tar River Foundation, Waterkeeper Alliance Inc, and Friends of Pocosin Lakes Wildlife Refuge filed a Motion to Intervene in the contested case hearing. (Tr. A-556)

20. That on the 28th day of October, 2011, Judge Elkins denied said Motion, holding that he was without authority to review or consider any further Motions after his filing of the decision by Summary Judgment on October 17, 2011. (A-680)

21. That on or about the 22nd day of November, 2011, the same proposed Environmental Intervenors filed a Motion to Intervene before the North Carolina Environmental Management Commission, (EMC) and attached a Memorandum of Law in support thereof. (Tr. C-1-144)

22. Over RAF's opposition, the NPDES committee of the Environmental Management Commission granted the Environmental Intervenor's request to Intervene with participation limited to the filing of a written brief or Memorandum, on the 7th day of December, 2011.

23. That on or about the 15th day December, 2011, the North Carolina Department of Environment and Natural Resources, Respondent, filed Exceptions to the ALJ's entry of Summary Judgment in favor of Petitioner. (Tr. F-2)

24. That all parties including Intervenors filed briefs. (Tr. I-1 thru I-79, J-1 thru J-13, and K-1 thru K-79)

25. That on the 23rd of January, 2011, the NPDES Committee of the Environment Management Commission filed the Final Agency Decision as decided at a regularly scheduled meeting on January 11, 2012. (OAH record Index Volume III, last document, pages 1-8)

26. The Final Agency Decision vacated the decision of the ALJ, denied the Motion for Summary Judgment, remanding the case back to the Office of Administrative Hearings for an evidentiary hearing. (OAH record index Volume III, last document, page 7)

27. RAF filed its Petition for Judicial Review in Hyde County Superior Court on or about the 2nd of March, 2012.

II. THE RAF FACILITY

28. RAF operates a laying hen facility with 12 high rise hen houses populated by 3,200,000 laying hens. (Affidavit of Everhart, Tr. A-207) The eggs produced roll down a slight incline and onto a conveyor belt that takes them to another building, which separates, washes and sanitizes them. After inspection they are packaged and shipped. (Tr. A-208)

29. The egg wash water is then pumped to a lagoon where an air jammer aerates the water. The water then goes to a small lagoon which allows any solids, such as dirt, egg white, or yolks from the broken shells to settle out. The wash water is then pumped to an irrigation system to be applied to land as permitted by DWQ. (Tr. A-208)

30. The hen houses are constructed so as to catch the manure produced by the hens in a storage area beneath them. This manure is stored in a manure area and then removed to a compost facility in a separate building. Together with the hens that die in the facility, the solids are composted following the requirements of class A compost set by EPA guidelines. It is then packaged and sold to the public as compost or soil nutrients. (Tr. A-207)

31. RAF does not have any permits to discharge egg wash water or manure and mortalities to waters of the State, and their systems are designed to not allow these materials to enter the waters of the State.

32. The hens are kept cool and dust and feathers are eliminated from the twelve high-rise houses by ventilation fans that blow feathers and dust from the bird litter and manure, which contain ammonia. (Tr. A-209, 383)

33. The ventilation fans face other buildings which are separated by grassy areas, which contain other shrubs and trees and are designed to capture the feathers, dust and litter discharged from the fans. (Tr. A-33)

34. The RAF facility also has a separate stormwater permit to manage stormwater run off from the entire project area, which is 123.7 acres. (Tr. A-388)

35. The stormwater permit collects stormwater and holds it before it discharges into canals which reach the upper Pungo River. (Tr. A-388)

36. The record does not contain the actual stormwater plans and specifications of the management plan, however it does allow for 36.6 acres of impervious surfaces. (Tr. A-388)

III. SCOPE AND STANDARD OF REVIEW

37. This Court sits as an Appellate Court to review a final agency decision pursuant to N.C.G.S. 150B-43.

38. That RAF asserts that DWQ lacks statutory authority to require RAF to apply for and receive an NPDES permit. That the Court has used the *de novo* standard of review to determine that argument, as set forth in section IV hereof.

39. That RAF asserts that the EMC erred in determining that genuine issues of material fact existed and that RAF was not entitled to Summary Judgment as a matter of law. The Court has used the *de novo* standard of review as to that argument, as the Court's review of a final agency decision denying summary judgment and remanding back to OAH for an evidentiary hearing is a question of law. However, in considering the evidence and its sufficiency to support the final agency decision that a material fact existed, the Court has also employed the

whole record test to determine whether the decision of the EMC is supported by evidence in the whole record, as set forth in Section V hereof.

40. That RAF asserts that DWQ lacks the statutory authority to impose certain best management practices (BMP) within the NPDES permit, and the Court has used the *de novo* standard of review as to that argument, as set forth in section VI hereof.

41. That RAF asserts that even if DWQ is authorized to impose BMP conditions on the NPDES permit, certain BMP conditions are unreasonable, arbitrary and capricious, and not rationally related to a legitimate state concern. The Court has used the *de novo* standard of review as set forth in section VII of the hereof.

WHEREFORE, based upon foregoing Findings of Fact, the Court hereby makes the following:

CONCLUSIONS OF LAW

IV. DISCUSSION AND FINDINGS UPON PETITIONER'S ARGUMENT THAT DWQ DOES NOT HAVE THE AUTHORITY TO REQUIRE RAF TO HAVE AN NPDES PERMIT (*de novo* standard of review)

42. RAF relies on *National Pork Producers Council v. USEPA*, 635 F.3d 738 (5th cir 2011), to assert that since RAF is a "no discharge" facility, DWQ has no authority to require it to apply for and receive a NPDES discharge permit. NPP clearly states that there must be "an "actual discharge" into navigable waters to trigger the Clean Water Act requirement of a NPDES permit".

43. *National Pork Producers* also clearly holds that "the primary purpose of the NPDES permitting scheme is to control pollution through the regulation of discharges into navigable waters. *NPP* at 751. Further, "It would be counter to Congressional intent for the Court to hold that requiring a discharging CAFO to obtain a permit is an unreasonable construction of the Act." *NPP* at 751.

44. *National Pork Producers* concludes "the EPA cannot impose a duty to apply for a permit on a CAFO that "proposes to discharge" or any CAFO before there is an actual discharge. However, it is within the EPA's province, as contemplated by the CWA, to impose a duty to apply on CAFO's that are discharging." *NPP* at 751.

45. In *National Cotton Council of America v. United States Environmental Protection Agency*, 553 F.3d 927, (6th Cir 2009), the Sixth Circuit Federal Court, discussed the Clean Water Act (CWA) in the context of the application of pesticides. The Court noted the CWA provides "the discharge of any pollutant by any person

shall be unlawful". 33 USC § 1311(a), Clean Water Act. Further, "pollutant is a statutorily defined term that includes at least, "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water. The Court further held "this list is not exhaustive and that "pollutant" should be interpreted broadly" *Repanos v. United States*, 547 US 715, 126 S. Ct. 2208, 165 L. Ed. 2nd 159, (2006).

46. *National Cotton Council* also defined the Clean Water Act as "prohibiting the discharge of any pollutant into navigable waters from any point source, where a point source is any discernable, confined, and discrete conveyance ... from which pollutants are and may be discharged. *N.C.C.* at 930. Further 40 CFR 122.23 provides that Concentrated Animal Feed Operations (CAFOs) as defined in section b or c, are point sources.

47. The provisions of 40 CFR 122.23(b)(4)(xi) provides that a facility containing 82,000 or more laying hens, which does not operate a liquid manure handling system, is required to obtain a NPDES permit.

48. N.C.G.S. § 143-213(24) dictates that RAF, by its size and operation, is a point source.

49. In *National Cotton Council*, a long discussion and interpretation of whether biological materials including certain pesticides was undertaken by the 6th Circuit, which found biological pesticides would be biological materials under the Clean Water Act. *National Cotton Council* at 938. The Court noted cases determining that "Salmon feces and urine that exit net pens are pollutants, and millions of pounds of live fish, dead fish, and fish remains that were discharged in Lake Michigan by a facility are pollutants within the Clean Water Act, since they are biological materials." *National Cotton Council* at 938.

50. This Court determines that it is reasonable that biological ammonia nitrogen, and fecal coliform carried by feathers and dust and expelled by the cooling fans of the hen houses likewise could constitute "biological materials".

51. *National Cotton Council* also dealt with an argument that a pollutant must be "excess" or "residue" at *the time of discharge* if it is to be considered discharged from a point source. The Court overruled this argument, saying "injecting a temporal requirement to the "discharge of a pollutant" is not only unsupported by the Act, but it is also contrary to the purpose of the permitting program, which is to permit harmful discharges into the Nation's waters. If the EPA's interpretations were allowed to stand, discharges that are innocuous at the time they are made but extremely harmful at a later point would not be subject to the permitting program." *Nation Cotton Council* at 939.

52. The EPA has issued three letters of guidance, saying that State poultry growers must apply for NPDES permits for the release of dust through poultry confinement house ventilation fans. In *NPP*, the Fifth circuit found that those guidance letters, "do not change any rights or obligations and only reiterate what has been well established since the enactment of the CWA- CAFO's are prohibited from discharging pollutants without a permit," *NPP* at 756.

53. The EPA guidance letters form a reasonable basis for the ALJ to conduct an evidentiary hearing to answer the question of whether RAF discharges pollutants into the waters of the State or not. The guidance documents were before the ALJ and both parties argued their merits. (Tr. B-93-97, 116, 117, 63-65)

54. RAF argues that even if ammonia and other pollutants do enter the State waters via the fan's feathers and dust, that such activity is exempt as an agricultural stormwater discharge under 33 U.S.C. 1362 (14). However, the special NPDES Program Requirements contained in 40 CFR122.23 (e) apply to the manure and litter coming from the ventilation fans at RAF. 40 CFR § 122.23 (e)(1) provides:

> " For unpermitted large CAFO's, a precipitation related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge ONLY where the manure, litter or process wastewater has been land applied in accordance with site specific nutrient management practices that insure appropriate agriculture utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.23 (e)(i)(vi) through (ix)."

55. The agricultural exemption does not apply to pollutants, if there be any, reaching the waters of the State from expulsion by the ventilation fans, if any such pollutants are found to come from the unapplied feather, manure, litter or dust.

56. DWQ has the authority to require RAF to obtain an NPDES permit.

V. DISCUSSION AND FINDINGS UPON PETITIONER'S ARGUMENT THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER RAF DISCHARGES POLLUTATNS INTO THE WATERS OF THE STATE. (*de novo* and whole record standard)

57. An examination of the entire record reveals a forecast of evidence of discharge by the Respondent.

58. Willard N. Everhart, RAF's Director of Environmental Affairs, states in his affidavit "6. All of the hen houses at the Hyde County Farm are built so that the fans are facing North and South (Ninety (90) degrees away from the stormwater

retention pond). The fans face other buildings and there are grass strips in between each house to catch any materials that the fans may blow out of them." He further avers: "7. Additionally there are various forms of shrubs and trees between where the hen houses are situated and any water basin (including the stormwater retention basin). This vegetation captures any materials (such as feathers, dust etc) that may have been emitted from the fans." Affidavit of Everhart, (Tr. A-383)

59. Respondent's forecast of evidence of discharge, in addition to the Everhart Affidavits, include sampling data compiled both prior to the beginning of birds moving into the facility, beginning on August 15, 2006, and from that date until May 31, 2008, when sampling ceased due to the nearby Evans Road peat moss wild fire which began on June 1, 2008. Summary of the Rose Acre Farm Sampling Program, May 6, 2009, Olinger and Sauber (Tr. A-426) The results concluded that the RAF operating data is significantly higher than the pre-operating data for ammonia nitrogen, total inorganic nitrogen, total phosphorus, and fecal coliform. (Tr. A-426)

60. Specifically the Olinger/Sauber report shows:

    i. That ammonia nitrogen rose in one sampling station by more that 100% (Tr. A-427 Station 09757350, 0.21 to 0.49)
    ii. That total inorganic nitrogen rose at that same sampling station from 0.28 to 0.78.
    iii. That total phosphorus rose significantly at five of the nine sampling stations.
    iv. That fecal coliform levels rose by five times the pre-operation levels at one sampling station, and by three times the pre-operating levels at another. Olinger/Sauber Report. (Tr. A-427)

61. That additional evidence is contained in the record forecasting pollutant levels in the nearby Pocosin Lakes Wildlife Refuge rising as a result of RAF's presence. That on the 1st day of June, 2011, and filed June 9, 2011, the Petitioner responded to Respondents First Request for Admissions, Interrogatories and Request for Production of Documents. That as required by the North Carolina Rules of Civil Procedure, they were signed by the attorney of record Gary H. Baise, and mailed to OAH and all parties.

62. That contained in the discovery responses was a document entitled "Fate of Ammonia Emissions from Rose Acre Farms," produced by Harper Consulting Company. Dr. Lowry A. Harper, PhD, was identified by RAF as an expert witness who would testify "with regard to the fate and transport of ammonia and determining through various models how much ammonia is generated by a facility and its fate into the air and water." (Tr. A-226) The entire report was attached. The Harper report concluded that the presence of the Rose Acre Farm

increases the nitrogen deposition into the Pocosin National Wildlife Refuge by about 1% (Tr. A-231, 252)

63. The Harper Report also calculated the dry deposition of the materials onto the refuge suggests 12% of NH_3 emissions from RAF are deposited within 2km of RAF. (Tr. A-249)

64. That NCRCP 33(b) provides that Answers to Interrogatories may be used to the extent provided by the Rules of Evidence. They may be used as an admission against interest of a party. Admissions of an attorney are binding upon their clients. *Kamp v. University of NC*, 78 NC App. 214, 336 SE 2nd 640 (1985), See Woodlief, "Shuford North Carolina Civil Practice and Procedure" Section 33-8, 2012-2013 Edition

65. That Rule 56 of the NCRCP specifically dictates that "answers to interrogatories and admissions on file..." are to be considered in a summary judgment hearing. Further, Rule 801 of the NC Rules of Evidence clearly provides that the Admissions of a Party Opponent are admissible as an exception to the hearsay rule.

66. That the Petitioner's Answers to Respondent's discovery requests were proper for and should have been considered by the ALJ in the Summary Judgment hearing.

67. A question of fact exists as to whether the grassy areas designed to catch ammonia, feathers and manure drain to the retention pond during a time of precipitation. A question of fact also exists as to whether the air born feathers, litter, and dust themselves are discharged by the fans and reach the storm water ponds or the waters of the State, increasing pollutant levels as contended by Respondent.

68. Petitioner argues that a 2012 amendment to N.C.G.S. § 143-213 eliminates from consideration as a discharge any "emissions". The amendment took effect after the date of the Final Agency Decision, and defines "emission" as a release into the outdoor atmosphere of air contaminants. It provides further that any reference to discharge shall not be interpreted to include "emission". N.C.G.S. § 143-213(9) and (12), (2012 amendments)

69. That the question of whether feathers, litter and dust from the high rise chicken houses are objects discharged by the ventilation fans, or "air contaminants" is to be determined by the trier of fact after an evidentiary hearing. Petitioner's own affidavits of Willard N. Everhart as set forth in paragraph 58 above offer support for them being something other than air contaminants.

70. The 2012 amendments to N.C.G.S. § 143-213 do not require summary judgment be granted for Petitioner, as there exists a question of fact as to whether RAF discharges "air contaminants" or something else from its ventilation fans.

71. That each and every separate forecast of evidence contained in the record and set forth in paragraphs 60, 61, 62, 63, 64 and 65 herein is sufficient, standing alone, to establish a genuine issue of material fact as to whether RAF actually discharges pollutants into the waters of the State.

VI. DISCUSSION AND FINDINGS UPON PEITIONER'S ARGUMENT THAT DENR LACKS THE AUTHORITY TO IMPOSE THE BMP'S CONTAINED IN THE RECUSAL PERMIT. (*de novo* standard of review)

72. As a result of the Court's rulings in Section III and IV, the validity of the RAF NPDES permit must be decided after an evidentiary hearing. The Court declines to reach Petitioner's issues concerning the BMPs contained in the 2010 permit, pending further proceedings below.

VII. DISCUSSION AND FINDINGS UPON PETITIONER'S ARGUMENT THAT CERTAIN BMP'S ARE UNREASONABLE AND ARE ARBITRARY AND CAPRICIOUS. (*de novo* standard of review)

73. As a result of the Court's ruling in Section III and IV, the validity of the RAF NPDES permit must be decided after an evidentiary hearing. The Court declines to reach Petitioner's issues concerning the BMPs contained in the 2010 permit, pending further proceedings below.

VIII. FINAL DECISION UPON JUDICIAL REVIEW

74. That the Final Agency Decision of the Environmental Management Commission was based upon a proper rationale and upon lawful procedure and based upon substantial evidence in the record.

75. That the Court acknowledges that the Environmental Management Commission used its experience, technical competence, and specialized knowledge of its NPDES committee in the evaluation of the record before it.

76. That the Court **AFFIRMS** the Final Agency Decision of the Environmental Management Commission and remands this matter back to the Office of Administrative Hearings for an evidentiary hearing upon those issues raised in the Petition.

ORDER

NOW, THEREFORE, it is hereby **ORDERED** that the Final Agency Decision of the North Carolina Environmental Management Commission denying Summary Judgment for the Petitioners is hereby **AFFIRMED**, and this matter is remanded back to the Office of Administrative Hearings for an evidentiary hearing and decision upon those issues raised in the Petition.

This the 4th day of January, 2013

Wayland J. Sermons, Jr.
Senior Resident Superior Court Judge
Second Judicial District