STATE OF NORTH CAROLINA COUNTY OF HYDE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 10 EHR 6501
ROSE ACRE FARMS, INC. Petitioner, and NORTH CAROLINA POULTRY FEDERATION, INC., Petitioner-Intervenor v. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, Respondent. and PAMLICO-TAR RIVER FOUNDATION, ET AL., Respondent-Intervenors	OPPOSITION TO PETITIONER'S MOTION FOR STAY

Pamlico-Tar River Foundation, Friends of Pocosin Lakes National Wildlife Refuge, and Waterkeeper Alliance, Inc. (jointly "Environmental Intervenors") hereby oppose the Motion for Stay submitted by Petitioner Rose Acre Farms, Inc. ("RAF") on April 30, 2014. RAF's motion should be denied because RAF seeks to delay the present proceeding in order to pursue a baseless federal lawsuit it filed in the District Court for the Eastern District of North Carolina. The federal case is an improper attempt to circumvent the Superior Court's legal ruling in the present case and violates well-established principles of federalism and comity. Even apart from the jurisdictional bars to the federal court's authority to review what is functionally an appeal from a fifteen-month-old state court ruling, *Alt v. EPA*, 2:12-CV-42, 2013 WL 5744778 (N.D.

W. Va. Oct. 23, 2013), on which RAF relies as the sole reason for initiating its federal suit, is irrelevant to the present case.

BACKGROUND

In January 2013, the North Carolina Superior Court found as a matter of law that the Department of Environment and Natural Resources ("DENR") "has the authority to require RAF to obtain [a National Pollution Discharge Elimination System ("NPDES")] permit" for any discharges that may result from pollutants emitted from the ventilation fans on the confinement houses at RAF's Hyde County facility. *Rose Acre Farms Inc. v. N.C. Dep't of Env't*, No. 12-CVS-10, 2013 WL 459353 ¶ 56 (N.C. Super. Ct. Jan. 4, 2013). The Superior Court further held that the Clean Water Act's "agricultural [stormwater] 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." *Id.* ¶ 55. RAF did not appeal this decision. Now, however, RAF seeks to stay these pending administrative proceedings on remand from the Superior Court so that the District Court for the Eastern District of North Carolina can decide the question already decided by the Superior Court: "to wit, whether the stormwater runoff [(which may contain feathers and dust from [the] henhouses)] at Petitioner/Plaintiff's Hyde County Farm is exempt from the NPDES permit requirements of the Clean Water Act pursuant to the agricultural stormwater exemption, 33 U.S.C. § 1362(14)." RAF Motion for Stay ¶¶ 4, 7.

ARGUMENT

OAH Should Not Delay This Proceeding on the Basis of an Improper Attempt to Embroil a Federal Court in this Longstanding Case

The present contested case was filed by RAF in October 2010, challenging the requirement that it operate under a Clean Water Act permit. Now, three and a half years into the

contested case, RAF seeks to pull the rug out from under the administrative process by filing a federal lawsuit seeking a declaratory judgment that reaches a different legal conclusion than the Superior Court reached in January 2013, when it ruled in this proceeding that the "agricultural [stormwater] 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." *Rose Acre Farms Inc.*, 2013 WL 459353 ¶ 55.

For reasons of federalism, comity, and claim preclusion, there can be little doubt that the District Court for the Eastern District of North Carolina will dismiss RAF's improperly-brought federal action. First, the *Rooker-Feldman* doctrine, which prohibits federal district courts from reviewing state court decisions, necessarily bars the District Court from exercising jurisdiction over RAF's suit. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). "[A] party losing in state court" – like RAF – "is barred from seeking what in substance would be appellate review of the state judgment in a United States district court." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). RAF's federal suit consequently will be dismissed for lack of subject matter jurisdiction. *See, e.g., Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194 (4th Cir. 2000).

Even if the District Court had jurisdiction over RAF's action, the court would be obligated to abstain from deciding RAF's suit under the principle set forth in *Younger v. Harris,* 401 U.S. 37 (1971), and its progeny, which prohibit federal courts from interfering in pending state administrative actions. *See Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986) (applying *Younger* to state administrative proceedings). "[F]undamental notions of comity and federalism" underlie the *Younger* abstention doctrine. *Martin Marietta Corp. v. Md. Comm'n on Human Relations*, 38 F.3d 1392, 1396 (4th Cir. 1994). Here, because the

present proceeding before the Office of Administrative Hearings is pending upon remand from the Superior Court; the proceeding implicates important state interests in exercising the state's delegated authority under the Clean Water Act; and RAF had an adequate opportunity to present its federal claims in the state proceedings, the *Younger* abstention doctrine applies and the District Court will be barred from considering RAF's claims.

Moreover, RAF's federal action fails because res judicata, or claim preclusion, bars RAF from relitigating a claim that already has been decided. *See, e.g.*, *Pueschel v. United States*, 369 F.3d 345, 355 (4th Cir. 2004). This doctrine "protect[s] litigants from the burden of relitigating an identical issue with the same party or his privy" and "[promotes] judicial economy by preventing needless litigation." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 162 (4th Cir. 2008) (quoting *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 (1979)). Here, the Superior Court plainly already has concluded as a matter of law that any pollutants from RAF's confinement houses are not subject to the Clean Water Act's agricultural stormwater exemption and that DENR has authority under the Clean Water Act to require RAF to operate under a NPDES permit if these pollutants result in a discharge to waters. *See Rose Acre Farms Inc.*, 2013 WL 459353 ¶¶ 55-56. RAF is therefore precluded under the doctrine of res judicata from seeking to relitigate the same issue before a federal court. In short, OAH should not delay resolution of a proceeding that was filed in this forum by the movant in 2010 simply because RAF has improvidently sought a "second opinion" from the federal court on a final legal decision.

Finally, it is worth noting that there is no validity to RAF's contention in the federal case that the decision by the United States District Court for the Northern District of West Virginia in *Alt v. EPA* alters the Superior Court's conclusion that if there are discharges from the RAF

facility to navigable waters, RAF must operate under a NPDES permit, and no exemption applies. As a preliminary matter, it is evident that the *Alt* decision is not controlling law since it was issued by a federal court in a different jurisdiction, and it is not the final word even in the Northern District of West Virginia as it is currently on appeal to the U.S. Court of Appeals for the Fourth Circuit. In addition, the *Alt* court's decision that a NPDES permit was not required in that case is factually distinguishable. The crux of the *Alt* case is whether "*precipitation related* discharges containing manure and litter emanating from Ms. Alt's farmyard are exempt agricultural stormwater discharge." *Alt,* 2013 WL 5744778 at *3 (emphasis added). Here, however, RAF's experts admit that pollutants from the RAF facility are deposited in surrounding areas through both wet and dry deposition, meaning by both precipitation and by gravity. *See* Lowry A. Harper et al., *Fate of Ammonia Emissions from Rose Acre Farm* (attached hereto as Exhibit A) ("Ammonia (NH_3) released from a source into the atmosphere contains nitrogen (N) that may be deposited . . . through wet and dry deposition."). Even if the discharges from the RAF facility due to precipitation (wet deposition) could be exempt agricultural stormwater discharges – *which Judge Sermons definitively ruled that they are not* and which the Fourth Circuit may find that they are not – by definition, discharges due to gravity (dry deposition) cannot be agricultural stormwater discharges because they do not result from precipitation, and thus are not "stormwater."

For the foregoing reasons, the currently pending proceeding before the Office of Administrative Hearings must take primacy. There is no validity to RAF's claim that resolving this contested case is not urgent because it is operating under a NPDES permit issued in 2004. DENR issued RAF a revised and strengthened permit in 2010, which triggered the instant

contested case, and the delay in implementing that permit should not extend indefinitely. Accordingly, a schedule should be set to bring this matter to a final decision.

CONCLUSION

For all the reasons set forth above, RAF's Motion for Stay should be denied.

Respectfully submitted on this 9th day of May, 2014,

Jerome R. Eatman, Jr.
NC Bar 10312
Lynch & Eatman, LLP
4130 Parklake Avenue, Suite 100
Raleigh, NC 27612-4463
(919) 571-9714

Eve C. Gartner
Hannah Chang
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
(212) 845-7376

Counsel for Environmental Intervenors Pamlico-Tar River Foundation, Waterkeeper Alliance, and Friends of Pocosin Lakes National Wildlife Refuge

STATE OF NORTH CAROLINA COUNTY OF HYDE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 10 EHR 6501
ROSE ACRE FARMS, INC. Petitioner, and NORTH CAROLINA POULTRY FEDERATION, INC., Petitioner-Intervenor v. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, Respondent. and PAMLICO-TAR RIVER FOUNDATION, ET AL., Respondent-Intervenors	OPPOSITION TO PETITIONER'S MOTION FOR STAY

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition to Petitioner's Motion for Stay was served upon the following counsel by electronic mail, on this 9th day of May, 2014:

R. Sarah Compton, Esq.
P.O. Box 12728
Raleigh, NC 27605
rscompton@nc.rr.com

Gary H. Baise, Esq.
Anson M. Keller, Esq.
Olsson, Frank, Weeda
600 New Hampshire Ave., NW
Washington, DC 20037
gbaise@ofwlaw.com
akeller@ofwlaw.com

Joseph A. Miller, Esq.
General Counsel
Rose Acre Farms, Inc.
P.O. Box 1250
Seymour, In. 47274
jmiller@goodegg.com

Anita LeVeaux
Assistant Attorney General
Environmental Division
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ALEVEAUX@ncdoj.gov

Henry Jones, Esq.
Jordan Price Wall Gray Jones & Carlton
1951 Clark Avenue
P.O. Box 10669
Raleigh, NC 27605-0669
HJones@jordanprice.com

Jerome R. Eatman, Jr.