



Court Holds Company Was Penalized Twice for Same Violation

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The North Carolina Court of Appeals recently issued an opinion that should help clear up this question: When violations of water quality standards occur because of an unauthorized discharge, may penalties be imposed for both the discharge and the violations of water quality standards?

The case concerned House of Raeford Farms, the operator of a chicken processing facility in Duplin County. After receiving an anonymous odor complaint, NC DENR inspected Beaverdam Branch Creek and found sludge that appeared "visually similar" to the contents of Raeford's wastewater lagoon. Although there was no direct or physical evidence linking Raeford to the discharge, DENR assessed \$75,000 in civil penalties based on circumstantial evidence. That evidence included the close proximity and visual similarity of the sludge in the creek to the contents of Raeford's lagoon, the absence of sludge upstream, and the fact DENR "ruled out" other possible upstream sources. However, the most damaging piece of evidence may have been that Raeford hired a company at a cost of \$20,000 to pump the sludge from the creek into Raeford's lagoon once Raeford became aware of sludge in the creek. According to DENR, such an act is "unheard of" and could only be an admission by Raeford that it was the source of the sludge. The Court of Appeals agreed, but did not agree with the assessment of penalties.

In assessing the civil penalty of \$75,000, DENR assessed \$25,000 for violation of North Carolina's statute prohibiting a discharge to waters of the state in violation of water quality standards. The other \$50,000 was assessed for two separate violations of the state's water quality standards: \$25,000 for violating the dissolved oxygen (DO) standard and \$25,000 for violating the settleable solids and sludge standard. Raeford contested the penalty assessments. The administrative law judge (ALJ) who heard the case decided that imposing penalties for the DO and solids standards was improper since Raeford had already been assessed a penalty for the discharge. Both DENR and Raeford submitted exceptions to the ALJ's report, and the matter was heard by the Environmental Management Commission. It decided to impose a \$25,000 penalty for the discharge violation and one \$25,000 penalty in total for both of the other violations. On further appeal to Duplin County Superior Court, that court agreed with the ALJ and imposed a single \$25,000 penalty for the discharge. It held that Raeford had been penalized "twice for the same violation."

By the time the case arrived in the Court of Appeals, DENR had elected not to pursue a penalty for the DO violation. Nevertheless, DENR continued to argue that a separate penalty for violation of the solids standard should be imposed in addition to the penalty for the discharge violation. The court did not agree. It held that a violation of the solids standard could not occur without violation of the discharge prohibition and that imposing two penalties under those circumstances was "duplicative and impermissible." The court also said that in assessing the \$25,000 penalty for the discharge, DENR failed to take into account the \$20,000 spent by Raeford in responding to the release. It therefore remanded the case with instructions to re-consider the amount of the penalty.

What's the bottom line? Just because a state agency says a company owes multiple penalties does not mean that's the last word. There are times when it makes sense to appeal to a higher authority.

House of Raeford Farms, Inc. v. North Carolina Department of Environment and Natural Resources, No. COA15-47 (July 21, 2015).

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