STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF GRAHAM	14 EHR 03870

DAVID FRANK CRISP, Petitioner, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, NCDENR Respondent.	)	**FINAL DECISION**

This matter came before Administrative Law Judge Donald W. Overby in Waynesville, North Carolina on January 8, 2015, April 9, 2015, and April 10, 2015. The case involved the appeal of a compliance order with administrative penalty. Respondent assessed Petitioner an administrative penalty in the amount of $14,625.00 and investigative costs of $2,103.41 for violations of N.C. Gen. Stat. §§ 130A, Article 9, The Solid Waste Management Act, and the Rules promulgated thereunder at 15A N.C.A.C. 13B.

At the conclusion of the evidentiary hearing, the parties were given an opportunity to present a proposed decision including findings of fact and conclusions of law within thirty days of receiving a copy of the transcription of the hearing. Respondent timely and appropriately submitted a proposed Order. Petitioner has presented no proposed findings of fact and conclusions of law, or other proposal for consideration.

APPEARANCES

For Petitioner:
Eric W. Stiles
260 Bryson Walk
P. O. Box 1565
Bryson City, NC 28713

And

Russell L. McLean, III
244 North Main Street
Waynesville, NC 28786

For Respondent:
Teresa L. Townsend
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUES

1. Whether Respondent has jurisdiction to issue septage management permits and to enforce any violations of those permits on property owned by the Tennessee Valley Authority?

2. Whether Petitioner violated N.C. Gen. Stat. § 130A-291.1(d) by disposing of septage into Fontana Lake rather than at a wastewater system approved by the Respondent or at a site permitted by the Department for disposal?

3. Whether Petitioner violated 15A N.C.A.C. 13B .0832(a)(6) by failing to follow conditions of his permit by allowing septage to flow into the surface waters of Fontana Lake, including not notifying Respondent of a spill event that contacted surface waters?

4. Whether Petitioner violated 15A N.C.A.C. 13B .0841(e) by failing to maintain his septage detention facility to ensure that leaks or the flow of septage are prevented from flowing into the surface waters of Fontana Lake?

5. Whether Petitioner violated 15A N.C.A.C. 13B .0841(j) by failing to transfer septage to a detention system in a safe and sanitary manner so that septage, including septage in pipes used for transferring waste, flowed into the surface waters of Fontana Lake?

6. Whether Petitioner met his burden of proving that Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule?

7. Whether Respondent acted properly in assessing a $14,625.00 penalty and $2,103.41 investigative costs against Petitioner for violations of N.C. Gen. Stat. § 130A, Article 9, and its attendant rules?

STATUTORY SECTIONS IN QUESTION

N.C. Gen. Stat. § 130A, Article 9, Solid Waste Management Act, 15A N.C.A.C. 13B, and the Administrative Procedure Act, Article 3, N.C. Gen. Stat. §§ 150B-22 through 150B-37.

EXHIBITS RECEIVED INTO EVIDENCE

PETITIONER:

Petitioner's 6	Photograph of cut off valve at facility platform
Petitioner's 7	Photograph of pipe at facility platform
Petitioner's 8	Photograph of pipe at facility platform
Petitioner's 9-16	Photographs of jon boat tank
Petitioner's 17-20	Photographs of pipes and platform of facility
Petitioner's 21-22	Photographs of pipes attached to tank of facility
Petitioner's 23	Photograph of facility
Petitioner's 24	Receipt for Graham County Sanitation
Petitioner's 25	Open Burning Permit for lumber
Petitioner's 26	e letter to Troy Harrison re: May 12, 2010 Notice of Violation
Petitioner's 27	Fontana Lake Waste Recovery, Inc. June, 2005 Facility Plans

RESPONDENT:

Respondent's 1	Resume of Michael Scott
Respondent's 2	May 8, 2014 Compliance Order issued to Petitioner
Respondent's 3-1	Photograph of Crisp Boat Dock floating platform/septage detention facility
Respondent's 3-2	Aerial photograph of Lake Fontana
Respondent's 3-3	Photograph of pipe from tank of facility over platform to Lake Fontana
Respondent's 4	October 21, 2013 Facility Compliance Inspection Report & Notice of Violation
Respondent's 5	Petitioner's Response to Notice of Violation dated November 7, 2013
Respondent's 6	Investigative Costs Worksheet
Respondent's 7	Roane Photographs of Petitioner at facility/floating platform showing septage flow on June 27, 2013 (3)
Respondent's 7A	Roane Photograph of facility/floating platform on June 27, 2013
Respondent's 8	Resume of Martin Gallagher
Respondent's 9	Permit to Operate a Septage Detention and Treatment Facility issued to Crisp Boat Dock/Fontana Lake Waste Recovery, Inc. on July 17, 2012
Respondent's 10	Application for a Permit to Operate a Septage Detention or Treatment Facility signed by Petitioner on November 18, 2011
Respondent's 11	15A NCAC 13B .0702 Standards
Respondent's 12	Solid Waste Section Penalty Computation Worksheet for Mr. David Crisp d/b/a Crisp Boat Dock
Respondent's 13	Penalty Computation Procedure Guidance Document for Penalty Computation Worksheet
Respondent's 14	April 28, 2010 Notice of Violation for Open Burning issued by Division of Air Quality to Mr. David Crisp
Respondent's 15	May 12, 2010 Notice of Violation for operating an open dump issued by the Solid Waste Section, Division of Waste Management to Mr. David Crisp
Respondent's 16	August 2, 2011 Compliance Order with Administrative Penalty and Penalty Worksheet issued to Claude Ferguson, d/b/a C.W. Ferguson Pumping and Septic Tank Service
Respondent's 17	July 6, 2011 Compliance Order with Administrative Penalty and Penalty Worksheet issued to Mr. Gary Mitchell Scott, d/b/a Scott Septic Ser.
Respondent's 18	June 25, 2010 Compliance Order with Administrative Penalty and Penalty Worksheet issued to Mr. and Ms. White, d/b/a K-N-J Mobile Home Park

JURISDICTION ISSUE

At the beginning of the contested case hearing, Petitioner raised the issue of whether or not Respondent has jurisdiction to issue septage management permits and to enforce any violations of those permits on property owned by the Tennessee Valley Authority? Both parties presented argument, and the issue was taken under advisement.

Lake Fontana is a man-made reservoir in Graham and Swain Counties in North Carolina and is impounded by the Fontana Dam on the Little Tennessee River. Over 90 percent of the land surrounding the lake is owned either by the National Park Service or the U.S. Forest Service.

The Tennessee Valley Authority ("TVA") was established in 1933 by the U.S. Congress primarily to reduce flood damage, improve navigation on the Tennessee River, provide electric power, and promote "agricultural and industrial development" in the region. The TVA, under the Act, is entrusted with the possession, operation, and control of the dams and all related buildings, machinery and lands with the exception of the navigation locks which are operated by the U.S. Army Corps of Engineers. The Act specifically provides "that nothing in this section shall be construed to … affect any right of a State or a political subdivision thereof to exercise civil and criminal jurisdiction on or within lands or facilities owned or leased by the Corporation (TVA)."

In December, 2001, a Memorandum of Agreement for Concurrent Jurisdiction at TVA units within the State of North Carolina was executed between the Governor of North Carolina and TVA which provides that "… both the United States and the State of North Carolina will concurrently exercise law enforcement jurisdiction within those units of the TVA system … and that within such units local services of the State government shall be available."

In as much as the issue was under advisement, both parties were to present briefs and case law for consideration within ten days of the conclusion of the evidentiary hearing. Respondent properly and timely filed its brief and case law. Petitioner did not submit anything to this Tribunal for consideration and to substantiate his argument and thus Petitioner is deemed to have abandoned this issue.

Based upon careful consideration of the testimony, evidence, arguments, and legal briefs received during the contested case hearing, as well as the entire record of this proceeding, including pleadings, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner is the owner and operator of a Septage Detention and Treatment Facility ("SDTF") doing business as Crisp Boat Dock on Fontana Lake in Graham County, North Carolina.

2. Respondent is a State agency established pursuant to N.C. Gen. Stat. §§ 143B-279.1 *et. seq*. Pursuant to N.C. Gen. Stat. § 143B-279.2(1b), the Respondent Department shall "provide for the protection of the environment and public health through the regulation of solid waste and hazardous waste management and the administration of environmental health programs."

3. The Division of Waste Management is a division of Respondent Department created by statutory mandate pursuant to N.C. Gen. Stat. § 130A, Article 9 to promote and preserve an environment that is conducive to public health and welfare. The Department is tasked with establishing and maintaining a statewide solid waste management program. N.C. Gen. Stat. § 130A-291.

4. At all times relevant to this action, Petitioner owned and operated Crisp Boat Dock which is located at 1095 Lower Panther Branch Road, Almond, North Carolina.

5. The renewal application for a permit to operate a septage detention or treatment facility was filed with Respondent on November 18, 2011. The renewal application lists Petitioner David Crisp as applicant with Crisp Boat Dock, as well as the contact person for the site operation. Petitioner signed the Application as owner, certifying that 1) the information provided on the application was true, complete, and correct to the best of his knowledge; 2) he had read and understood the NC Septage Management Rules; and 3) he was aware of the potential consequences, including penalties and permit revocation, for failing to follow all applicable rules and the conditions of a Septage Detention or Treatment Facility permit. (Rsp. Ex. 10)

6. The renewal application had a notation on the back signed by Tony Sherrill with FLWR and dated 11/21/11. FLWR, the initials for Fontana Lake Waste Recovery, Inc., attached a "Major Spill Contingency Plan" to the application. Also attached to the application is a purported authorization from the United States Department of Agriculture which authorizes the necessities for the sewage collection process. (Rsp. Ex. 10) Neither Tony Sherrill nor FLWR are listed as applicants in any regard on the application. Petitioner contends that Sherrill paid the filing fee for the application and that he, Mr. Crisp, did not pay nor file the application.

7. The November 18, 2011 Application specified the type of septage to be stored or treated as "portable toilet waste." Petitioner described the detention facility as a "containment tank, flotation unit and security structure" with a 1,000 gallon containment tank on a flotation unit. The pump-out boat used to discharge into the facility is equipped with a 450 gallon holding tank attached to a gas powered pump. The pump is used to remove the septage from houseboats into the holding tank on the pump boat and then pump into the containment tank. (Rsp. Ex. 10)

8. Respondent's application asks the applicant to explain how any leaks or spills will be handled, an acknowledgement that leaks and spills are a likely occurrence. The question is not "if" they will occur, but what does the operator do "when" they occur.

9. Respondent issued a renewal permit to "Crisp Boat Dock" and "Fontana Lake Waste Recovery, Inc." to operate a septage detention and treatment facility on July 17, 2012, some eight months after the application was turned in. As noted above, FLWR appended some matters to the application but Fontana Lake Waste Recovery, Inc. (FLWR) did not sign as the applicant on this application. Although not a signatory to the application, FLWR was a co-permittee. FLWR should have been cited along with the Petitioner in this matter.)Rsp. Ex. 9)

10. The renewal permit states that the storage facility and pumping devices will be operated under the supervision of "Prince Boat Dock Staff." There is no evidence of who "Prince" is or how such entity came to be listed on the permit when he/it was not on the application at all. If Prince has an undisclosed part in this operation, then Prince too should have been cited and noticed of the violations. Respondent erred in either listing Prince in the permit or failing to notice them of the violation.

11. The Petitioner and FLWRs permit states that the operations are to be conducted in accordance with the representations made in the application, with all conditions attached to the permit, and with the provisions of the Septage Management Rules at 15A NCAC 13B .0800. By the terms of the permit, the Department is given the authority for various sanctions and penalties for operation outside the terms of the permit, including the penalties provided in Chapter 130A, Article 1, Part 2 of the North Carolina General Statutes. (Rsp. Ex. 9)

12. The permit also states that "[a]ny back flow of water from the storage tank to adjacent surface waters shall be considered a violation of the N.C. septage management rules." (Rsp. Ex. 9)

13. Mr. Troy Harrison is an Environmental Senior Specialist with the Division of Waste Management of DENR. Mr. Harrison has been in that position for 8 years. Prior to that employment, he worked with the federal forest service and with the North Carolina Division of Air Quality. Mr. Harrison has a Bachelor of Arts degree from Warren Wilson College where he double-majored in environmental studies and business and economics. Further, he has continued his education by taking various training sessions at DENR, including septage training sessions.

14. As an Environmental Senior Specialist, Mr. Harrison inspects for compliance with all state solid waste management regulations related to the handling, storage, treatment and disposal of septage in the Western part of North Carolina. His job duties include inspecting for compliance with regulations, investigating suspected violations of regulations, recording observations and interviewing people as part of those investigations, and assisting with enforcement of regulations.

15. Mr. Harrison first received a complaint on September 11, 2013 concerning the location of the septage detention and treatment platform near boat docks and swimming platforms. Mr. Harrison visited the site where Petitioner had located his floating platform with the septage treatment and detention containment tank on three occasions in 2013: September 20, 2013, October 11, 2013, and October 16, 2013.

16. Upon his initial inspection on September 20, Mr. Harrison determined that the platform was not located at the original latitude and longitude of the permitted area, which was the basis of the original complaint.

17. On that initial inspection of September 20, Mr. Harrison observed that the roof of the building on the floating platform showed severe deterioration with portions of the roof system being missing. From the photographs it appears that roughly half of the tin roof is missing on one side. Based on photographs taken on June 27, 2013 which he received later, it would appear that the roof had been in a deteriorated condition for at least three months.

18. According to Mr. Harrison, the missing portions of the roof could have caused infiltration of storm-water into/onto the tank and secondary containment areas of the facility. At the inspection, there is no report that there actually was any infiltration or that there was any threat of a spill or other danger. The design of the interior holding tank was such that rain water could not have gotten into that tank despite the condition of the roof.

19. Mr. Harrison's first trip to the area was concerning the location of the platform. On that occasion, he spoke with Petitioner. He asked Petitioner whether any spillage had occurred at the floating platform and Petitioner indicated that a small amount had spilled into his boat. On that first trip to the platform, Mr. Harrison did not take any water samples and did not observe anything in the water out of the ordinary. Mr. Harrison did not inquire about how any of the process worked. He did not write his report that day.

20. Mr. Harrison was aware that Mr. Crisp had been one of the primary people responsible for cleaning up Fontana Lake. Houseboats had been dumping their septage holding tanks straight into the lake making it perhaps the dirtiest lake in the state of North Carolina. Petitioner, and a very few others, were responsible for establishing the process at issue here in, which included working through the federal government process for approval and even obtaining federal grants to fund the project. Their efforts ultimately have made Fontana Lake one of the cleanest lakes in the state.

21. On Fontana Lake, even today, there is no prohibition on houseboats dumping their waste water, including sewage, straight into the lake.

22. On October 10, 2013, Mr. Harrison visited Petitioner's SDTF facility and took photographs of the floating platform with its damaged roof and other photographs of the facility from various positions and other residences located on Fontana Lake as part of his inspection duties. Mr. Harrison later obtained an aerial photo of the Lake and a GIS from Graham County to pinpoint the location of the SDTF facility platform, as well as the residences of some of the neighbors located near the platform.

23. On October 10, 2013, Mr. Harrison met with the original complainant, Ms. Hawkins and other residents of Fontana Lake at her residence. On that date, Mr. Harrison first met Mr. and Mrs. Larry Roane who told him what they observed on June 27, 2013, gave him the photographs they had taken of the discharge incident, and agreed to give eyewitness testimony if it became necessary.

24. Mr. and Mrs. Larry Roane live on Fontana Lake. According to Mr. Roane, on June 27, 2013 and throughout the spring and summer of 2013, Petitioner had tied the floating platform containing his septage and detention containment tank directly across from Mr. Roane's residence.

25. According to Mr. Roane, on the morning of June 27, 2013, he was working in his yard and observed Petitioner pull up to the platform by boat, tie the boat to the platform, get out of the boat, hook a hose from the boat to the floating platform's pipe that extends out of the tank, turn the valve on the pipe, get back into the boat, and start the pump on the boat. When the pump was engaged, the hose "blew off or came off." Mr. Roane observed a brownish-orange liquid coming out of the pipe into the Lake and smelled an odor "kind of like rotten eggs." Mr. Roane observed that Petitioner was in the boat and had his back to the platform as the pump was running and the discharge was flowing into the lake.

26. Upon observing the discharge, Mr. Roane stepped into his house and asked his wife to retrieve the camera. Mrs. Roane stepped out to see what had occurred and then went back into the house to find the camera. After a couple of minutes, she returned with the camera and proceeded to take pictures of Petitioner and the discharge. Mr. Roane estimated that at least three minutes elapsed between the time he first observed the discharge and the time his wife returned with the camera. He then observed Petitioner leave the boat and get up onto the platform to turn the valve and to stop the flow.

27. According to Mrs. Roane, on the morning of June 27, 2013, her husband asked her to retrieve their camera. She first stepped out to see what was happening, saw the discharge and then returned to the house, located the camera and upon attempting to turn it on, discovered that it would not operate because of a low battery. She then sought out batteries, put them in the camera, checked that it was working, then went back outside. Mrs. Roane testified that it took approximately five minutes before she got the camera operational and returned outside.

28. Upon returning outside, Mrs. Roane took four photographs of Petitioner and the discharge and one of the platform itself, which showed the deterioration of the roof on June 27, 2013. She further testified that she not only observed the discharge but that it smelled like "poop," or "feces."

29. Mr. Roane says that he had his wife take the photographs because his children and grandchildren swim within 30 feet of the floating platform and he considered it a safety hazard. Following the incident, he would not let the grandchildren into the Lake to swim for about a month and warned his neighbors of the spill. It is worthy of note that there had been a disagreement for some time between Mr. Crisp and Mr. and Mrs. Roane concerning fees Mr. Crisp was seeking to collect for harbor rights.

30. Following the incident, Mr. Roane did not immediately report the spill to anyone. He contends that he did not know whom to contact about the spill. Approximately two weeks later, Mr. Roane contacted Graham County. At some later time, but not the same day, Mr. Roane contacted TVA. Neither entity seemed concerned. Apparently, none of the neighbors he allegedly told of the spill contacted Respondent either.

31. On October 10, 2013, Mr. Roane met Mr. Harrison when he came to a meeting with Ms. Hawkins. Mr. Roane told Mr. Harrison about the discharge and provided Mr. Harrison with the photographs that his wife had taken. The current enforcement action by the Solid Waste Section followed shortly thereafter.

32. After being told of the spill, Mr. Harrison did not attempt to test the water in any regard. There had been an intervening period of several months and, presumably, any problem would have abated.

33. The Roanes version of the incident is not in accord with the more believable testimony of Petitioner, which is borne out by the photographs. If the hose had blown off after the pump was first engaged the matter would have continued to be blown out of the holding tank on

the boat through the pump. There is no evidence that the pump continued to pump the matter from the holding tank.

34. According to Petitioner, after he had finished unloading into the floating dock tank, he inadvertently did not engage the shut-off valve, which would have prevented a spill. By leaving the valve open, when he removed the hose, which connected the boat tank to the 1 ½ inch PVC pipe to the holding tank, then the substance in the pipe emptied.

35. The amount of the back flow would be only the amount in the pipe, approximately 15 feet total length. The design of the detention facility was such that it would not be pulling from the tank itself. Respondent's witnesses acknowledge that the amount would be less than ten gallons.

36. Having received the photographs from the Roanes and knowing of the discharge that occurred on June 27, 2013, on October 16, 2013 Mr. Harrison inquired of Petitioner as to whether any spills had occurred. Petitioner denied that septage had discharged into Fontana Lake. Mr. Harrison then showed Petitioner the photographs taken by Mrs. Roane. Petitioner then recanted his denial and admitted that a discharge had occurred, but stated that it was only a small amount of septage. He further stated that he had not reported it because it was such a small amount.

37. On October 21, 2013, Mr. Harrison sent a Facility Compliance Inspection Report and Notice of Violation to Petitioner, d/b/a Crisp Boat Dock/Fontana Lake Waste Recovery, Inc., SDTF-38-01, requiring that Petitioner immediately repair the deteriorated roof, and noticing Petitioner of violations for allowing the disposal of septage into the waters of Fontana Lake and for not informing the Solid Waste Section of the spill event as required under Petitioner's permit. The Petitioner repaired the roof on the floating dock immediately.

38. On November 8, 2013, Petitioner sent a written response to Mr. Harrison in which he admitted that on June 27, 2013, "when I was pumping from my boat to the storage tank, I unhooked the line and forgot to turn off the cut off valve. Most of the sewage in the 15 feet of 1.5 inch line ran back into the boat. Only a small amount ran into the lake, maybe 2-3 gallons."

39. Based on Petitioner's admission of being responsible for septage flowing into Fontana Lake, the photographic evidence of the spill event into Fontana Lake, and the eyewitnesses, Mr. and Mrs. Roane's agreement to testify, Mr. Harrison prepared a compliance package and sent it to the Section's Central Office in Raleigh, North Carolina for further enforcement.

40. Mr. Harrison explained the method he used for calculating the costs associated with his investigation. The total of all of the investigative costs was $2,103.41. The method used, the items included and the amounts used to determine the costs were both reasonable and appropriate.

41. Mr. Michael Scott is the Deputy Director of the Division of Waste Management of the North Carolina Department of Environment and Natural Resources and has worked for the Division of Waste Management for the past 13 years. Prior to employment as the Deputy Director, he served as the Section Chief for the Solid Waste Section in the Division of Waste Management

for three years. As Section Chief, he reviewed every request for enforcement regarding the Solid Waste Management Act and its regulations and rules. Mr. Scott made the final decision regarding the issuance of any Compliance Order and the amount of any Administrative Penalty considered by any of the branches of the Solid Waste Section after reviewing all documentation provided by an inspector, as well as all applicable regulations. During his term as Section Chief, he reviewed 25 compliance orders, 15 of which issued as Compliance Orders with Administrative Penalties, and with over 50% of those dealing with septage management violations.

42. Prior to his position as Section Chief, Mr. Scott was the Branch Head for the Composting and Land Application Branch of the Solid Waste Section for 4 years. As Branch Head, he was supervisor of the septage management program and was responsible for issuing over 2,000 septage management-related permits, including permits for septage detention and treatment facilities, for supervising all septage management enforcement, for inspecting for compliance, and for conducting training for site operators regarding the management of septage. As Deputy Director, Section Chief, and as Branch Head, he is/was a supervisor responsible for the enforcement of the Solid Waste Management Act and its attendant regulations and rules.

43. Mr. Scott has a Bachelor of Science and Masters of Science degrees from North Carolina State University in agronomy and crop science, is a graduate of the Natural Resources Leadership Institute, and is a licensed Soil Scientist. Mr. Scott is an expert in septage management permitting, septage management enforcement, and the determination of solid waste administrative penalty assessments by virtue of his education, training, and experience.

44. According to Mr. Scott, there are two permits related to this matter. One was issued to Petitioner d/b/a Crisp Boat Dock/Fontana Lake Waste Recovery, Inc. as a septage detention and treatment facility (SDTF-38-91) and one to Fontana Lake Waste Recovery, Inc. as a septage management firm (NCS-01004). The septage management firm (Fontana Lake Waste Recovery, Inc.) is an operational permit that covers the boat (operated by Petitioner) that is used to pump the waste from the houseboats, then that waste is transferred from the boat by Petitioner to the floating septage detention and treatment facility owned and operated by Petitioner d/b/a Crisp Boat Dock. Permit SDTF-38-91 is the only permit at issue in this contested case, which covers the detention facility. No evidence was introduced concerning the permit with FLWR. Petitioner had no knowledge of the second permit until evidence was presented in this hearing.

45. During the conduct of this hearing, a question was raised concerning the legal status of Fontana Lake Waste Recovery, Inc. and whether or not it continued to exist as a viable legal corporation or whether it remained in business at all. While this was a renewal application, apparently there is no attempt to even find out if the applicants are viable corporations, or what the legal status of any applying individual or company may be. There is no evidence before this Tribunal to determine the viability of the business at all and its status is unknown.

46. Mr. Scott contends that every permit contains conditions designed to ensure that the requirements of the Administrative Code and the statutory requirements for septage management are met and to ensure the protection of public welfare and the environment are maintained. In the case of septage permits, the conditions ensure that waste or septage does not

come into contact with humans or wildlife that could carry that material elsewhere and potentially contaminate others or the environment.

47. Mr. Scott offered his definition of septage as a solid waste that is comprised of liquid and solid fractions of human and domestic origin that originate from wastewater systems. Septage is defined by statute. "Grey water" is a material that must be properly managed in a septic system or in a municipal sewer and may not be directly discharged. In this case, Petitioner's septage detention and treatment facility is permitted to receive septage; any other material other than septage placed in the facility would be a violation of Petitioner's permit. Under the solid waste regulations, when any other material such as grey water is mixed into a septage waste-hauling vehicle, it becomes septage.

48. According to Mr. Scott, septage has the potential for pathogens and viruses. It contains heavy metals and other contaminants that the agency does not want introduced into the waters of the state or to come into contact with wildlife or domestic animals because of its potential for spreading disease or viruses.

49. In that regard, the Respondent treats septage the same as the most toxic substances known to man, including substances for which dissemination is a crime in this state; for example, antifreeze. *See* N. C. Gen. Stat. 14-401.

50. Despite the toxicity of septage and the purported concern of Respondent, there is no control over the houseboats discharging directly into Fontana Lake or any other lake in North Carolina, which lead to the deplorable conditions in Fontana to begin with. Any single houseboat emptying its holding tank would pump considerably more septage into the lake than did Petitioner in this instance.

51. Mr. Scott correctly observes that the volume of septage that went into Fontana Lake is not the determining factor of whether or not a violation occurred. Petitioner's permit specifies that any discharge into a surface water like Fontana Lake constitutes a violation. There is no question that there was a backflow from the pipe on the floating dock into Petitioner's boat and into the water of Fontana Lake. However, quantity or volume should be an important factor in determining the amount of the penalty.

52. According to Mr. Scott, Section Chief of the Solid Waste Section, in conformity with the standard procedure, he received the enforcement request in this case from Mr. Harrison and his direct supervisor. Mr. Scott received and reviewed the electronic paper file, which included Mr. Harrison's inspection report, the notice of violation, Petitioner's response to the notice of violation, Petitioner's compliance history, photographs taken by Mr. Harrison, photographs taken by the Roanes, and the Roanes' eyewitness report to Mr. Harrison.

53. Based on a review of the evidence, Mr. Scott determined that a Compliance Order with Administrative Penalty should be issued to Petitioner, d/b/a Crisp Boat Dock, as the owner and operator of the septage detention and treatment facility where the violation occurred.

54. Mr. Scott explained, in his opinion, why each of the violations in the Compliance Order were cited:

a) 15A NCAC 13B .0841 (e) requires that each detention and treatment facility be designed, constructed and maintained in a manner to prevent leaks or the flow of septage out of the facility into any surface water; in this case, a violation occurred because the manner in which the facility was maintained did not prevent waste from leaving the facility and flowing into the lake.

b) 15A NCAC 13B .0841(j) requires that septage be transferred to and from the septage detention system in a safe and sanitary manner that prevents leaks or spills of septage, including septage in pipes used for transferring waste to and from vehicles, in this case, a violation occurred because septage left the inlet side of the septage detention and treatment facility and entered the lake.

c) 15A NCAC 13B .0832(a)(6) requires that all conditions for permits be followed, in this case, a violation occurred because Petitioner did not contact the Solid Waste Section of the spill as required under his permit. Mr. Scott explained that the notification of a septage spill into a surface water is required so that the Section can coordinate what, if any, clean-up activities would be required. Without notification, the Section was unable to take any action to address the potential consequences, and any suggestion of what might have been required is pure speculation. It is quite possible that no action would have been required. Once the Respondent had knowledge of the spill, the Section immediately proceeded to enforcement.

d) N.C. Gen. Stat. § 130A-291.1 (d) requires that septage be treated and disposed only at a wastewater system approved by the Department under rules adopted by the Commission, or at a site permitted by the Section. In this case, a violation occurred because Fontana Lake is not an approved location for the disposal of septage.

55. According to Mr. Scott, as Section Chief he was responsible for the amount of the penalty assessed and how that amount was determined. The maximum authority of the solid waste section to assess penalties is $15,000 per day, per violation. In calculating the penalty, Mr. Scott stated that he referred to the Administrative Code standards found in 15A NCAC 13B .0702; and utilized the Section's penalty computation worksheet and the Section's penalty computation procedure that were all entered into evidence as exhibits at the hearing. In addition to these standards and documents, Mr. Scott stated that he also reviewed Petitioner's previous compliance history.

56. Strict liability is a prospective approach to encourage adherence to certain standards so that our environment will be protected. It is used to act as a deterrent to future repetition of like conduct. The assessment of penalties or any type of "punishment" is a look back at events after the fact and when there has been a violation. Use of a penalty assessment matrix such as the one developed and used by Respondent is a well-accepted practice. It may be a useful tool designed to insure consistency in meting out civil penalties. The Penalty Computation Procedure is a guidance tool. It is for guidance, not rigid application.

57. Mr. Scott has on other occasions assessed a penalty for each violation cited, but in this case, he only assessed a penalty for one consolidated violation, not for four violations. He contends that his penalty assessment in this matter was consistent with other civil penalties he has assessed for similar violations. Respondent introduced three cases as examples of other instances where the Respondent contends the penalty assessed was consistent with the penalties assessed in this case and that the violations were similar to this case.

58. According to Mr. Scott, the first part of the penalty computation worksheet addresses the potential for harm to the environment and/or public health. The first section of Part One deals with the type of waste involved. Mr. Scott testified that septage is a very dangerous type of waste and warrants the highest point value of three on the penalty computation worksheet as opposed to other less dangerous solid wastes such as brick or inert material.

59. In the computation guidance manual, which translates to the worksheets, Part One is for consideration of "potential for harm to the environment and/or public health." Question one is to assess the type of waste. In these instances, for all of the three cases cited, as well as Mr. Crisp, septage is at issue. Thus, all should receive a "3" for that question.

60. In justifying the assignment of the "3", Mr. Scott notes that Mr. Crisp did not report and that he did not admit. Mr. Harrison contradicts this and admitted that Mr. Crisp was cooperative in the investigation and that Mr. Crisp's rationalization for not reporting was because of the very small amount of the spillage. The contention that the quantity is unknown is true but it is known that the amount is extremely small. The amount of the spill could have been calculated because of the amount of the backflow was only what was in the PVC pipe about 15 feet in length and 1 ½ inches in diameter. Respondent made no effort to do that calculation. Respondent acknowledged the amount as small, no more than 10 gallons, possibly 5 gallons or less and especially since most of the backflow went into Petitioner's boat.

61. According to Mr. Scott, the second section of Part One deals with site variables and the increased potential for harm. In reviewing this section, he testified that this violation posed a potential for harm both to the environment and to public health due to the septage being discharged into a recreational lake where people swim, fish, and have private boat docks, as well as, the risk of people and animals, including Petitioner's dog, coming into contact with this untreated waste and spreading the pathogens to others. Mr. Scott, therefore, warranted another high point value of 3 on the worksheet.

62. The second question in Part One refers to site variables and the increased potential for harm. Part b) would be applicable to Mr. Crisp because the floating dock is a permitted site. The issue is over the spillage into the lake which would be unpermitted. In addressing the "size of site" it is not clear whether or not it refers to, in this instance, the entire lake or just the size of the spill site. If it is referring to the entire lake then the amount of the spill would of necessity have to be considered at some point because a spill of even 10 gallons is infinitesimal in relationship to the entirety of the lake. Whereas, a spill of 10,000 gallons could make a considerable impact. Quantity was not considered at all. According to Mr. Scott, quantity does not matter at all in these spills.

63. The question speaks of potential for harm by the spill, but in this instance it was clear that no actual harm had occurred and would not occur.

64. The floating dock was located close to other private docks at the time Mr. Harrison took his pictures; however, there is no evidence of where the floating dock was located on the date of the spill or how close it was to other "receptors." It is obvious from Mr. Harrison's pictures and those from the Roanes that there was considerable more water in the lake in June than in October. Thus, this factor reasonably should have been a "0".

65. The last consideration in question two is completely discretionary. By the time Mr. Roane even started calling there was no interest to come see the sight because the spill would have dissipated. By the time the Respondent started investigating, Mr. Harrison took no measurements because it would have been a waste of time. There was no evidence of harm to wildlife or fish, so the "potential" for harm was negligible. By the time the Respondent got around to the calculations, these quantities were known. It would not have been unreasonable to assign a "0" or a "1" for question 2.

66. The third section of Part One of the worksheet deals with responsive measures taken by the violator. In reviewing Petitioner's responsive measures, Mr. Scott testified that he considered the fact that Petitioner did eventually turn off the valve and ultimately stopped the flow of further waste into the lake and therefore gave that section a medium point value of two on the worksheet.

67. The question relates to the response of Mr. Crisp. When the spill occurred, he immediately got out of the boat and closed the shut-off valve. He and his dog were in the boat and much of the back-flow went into his boat. He immediately went to his dock and got bleach and came back to the site and poured the bleach in the water. There were no solids of any kind in the water from the spill.

68. Mr. Crisp did exactly as he should have done. The renewal application had a handwritten note from Mr. Sherrill which described what should be done in a spill, and Mr. Crisp followed those instructions.

69. The guidance manual states that a "0" should be given if the violator "took a good, effective action to correct the violation. There was nothing else Mr. Crisp could have done. The manual also states that a "1" or "2" should be given if the person took some action but "did not respond as ultimately directed." There is zero evidence that Mr. Crisp failed in any regard to respond as ultimately directed; however, Mr. Crisp was given a "2".

70. The guidance manual Part Two is titled "Intent"; however on the worksheet it is labeled "Nature of Past and Current Violations." The guidance manual speaks of "lower to higher degree of negligence" but the worksheet makes no reference to negligence at all. Intentional acts are only referenced specifically for unpermitted sites. There is no language which applies to unintentional acts such as in this case. Thus, the fact that this was an unintentional spill is given no consideration at all.

71. Part Two, question one in the manual speaks to the deviation from the rules. The guidance manual lumps any spill without regard to amount into "primary violation" which is scored a "3". The Respondent scored Mr. Crisp a "3" but justifies it based on prior history and without regard to the actual factors in the manual. Question one has nothing to do with prior history.

72. Mr. Scott notes that Part Two of the worksheet addresses the nature of past and current violations, with the first section dealing with the type of the violation and the deviation from the rules, which is not in accord with the manual. In reviewing the first section of Part Two, Mr. Scott noted that Petitioner had received two notices of violation for operating an open dump and for open burning of waste at two separate sites on his property and, therefore, accorded him a point value of three for those violations which demonstrated a propensity to deviate from the rules. The fact that someone has had a prior indiscretion of any sort does not in and of itself demonstrate a propensity to deviate from the rules, laws or social mores.

73. In reviewing the second section of Part Two dealing with the cause or degree of control over the violation, Mr. Scott noted that the release of the septage into the lake could have easily been prevented with the proper operation and maintenance of the valve by Petitioner and thus warranted a point value of three. Thus, Mr. Crisp is assigned the highest value for a minor, unintentional spill.

74. While question two speaks of negligence in the unpermitted sites, nothing really fits the situation here. Respondent assessed a "3" using the language for permitted sites for failing to properly operate the floating platform. Nothing addresses inadvertence or lack of intent. The instructions in the manual even state that there is no "zero" in this part; thus, even if lack of intent was to be considered, it would of necessity have to be assigned a numerical value if following the manual.

75. For question three of Part Two, Mr. Scott uses the scoring for permitted sites and gives Petitioner a "3". Mr. Scott noted that he had two Notices of Violations for noncompliance with two separate regulators within the three years prior to this violation and assigned him a point value of 3, which is labeled "considerable history." While Mr. Crisp did indeed have a notice of violation (NOV) from SWS and a separate NOV from the Division of Air Quality, both NOVs were for the same act, i.e. one "occurrence" of burning. Mr. Crisp had obtained two burning permits, including one from the State of North Carolina, Division of Forestry, just not from every agency he needed to.

76. Mr. Crisp found it more economical to merely pay the assessments than to contest them; however, paying the assessment acts as admission.

77. Assuming the Respondent would have used the "permitted sites" in considering this factor, then at most he should have received "2." However, according to the manual, question three has a third category for consideration wherein the reviewer is to consider specific facts about the prior instances. In this case, the previous violation by Mr. Crisp was not similar at all to this violation. There had been an intervening three years between the two occurrences. There was only

one event though it spawned two NOVs, and the violation was for burning a dilapidated building on his own property for which he had obtained some permits. He complied with everything asked of him and there have been no repeat of that violation. It appears discretionary and that these matters can be considered in mitigation as well as aggravation. Mr. Crisp could reasonably have received a "0" or a "1" based upon those considerations.

78. Part three of the manual and thus the worksheet addresses "duration of the violation." The manual notes "It is rarely practical to increase penalties per day of violation for the types of case handled by the Solid Waste Section." While it is not known, a reasonable assumption would be that the "practical" consideration is monetary. However, the practical effect, as in this case, is that someone who unintentionally spills septage for a matter of a few minutes at most and who spills only a maximum of 10 gallons is treated the exact same as someone who spills 10,000 gallons on purpose for monetary gain over an extended period of time—a gross inequity.

79. Rhetorically, why have "duration" as a consideration at all if it is not going to be used. It is obvious that if it is not going to be used in the similar cases cited by Respondent then it is not going to be used at all.

80. In speaking of whether or not to use the "duration" multiplier, the manual makes reference to the base penalty being a deterrent. The concept of deterrent is the very basis for the entire penalty scheme—to serve as a deterrent to future violations and damages to our state's environment.

81. In this particular instance, the violator, Mr. Crisp, is a person who spent considerable time, energy and his own money to clean up this very lake. Prior to the efforts of Mr. Crisp and a few others, the uncontroverted evidence is that Fontana Lake was the dirtiest lake in the state, primarily because of the unregulated dumping of houseboats emptying their holding tanks straight into the lake. Because of the involvement of TVA in the lake, Mr. Crisp had to work through the United States government in order to get approval of the project and in order to seek and obtain federal grant money to begin the project. As a result of the efforts of Mr. Crisp and those few others, the lake became one of the cleanest lakes in the state. It is inconceivable that someone who has devoted so much of his life to make this lake clean would do anything to harm the lake. This is a person whose violation was unintentional and he does not need any deterrent. His biggest indiscretion was failure to report the incident.

82. When Mr. Scott placed those values as he determined them to be in his sole discretion within the matrix, the amount of the penalty was determined to be $14,625.00.

83. Respondent introduced three examples of other instances where the Respondent contends that the penalty assessed was consistent with the penalties assessed in this case and that the violations were similar to this case. Two of the three were signed off on by Mr. Scott. In actuality, these three cases show the great degree of discretion exercised in determining the amount of the civil penalties.

84. The first similar case was concerning Ferguson Pumping and Septic Tank Service. On at least one occasion, Mr. Ferguson emptied his pump truck of sewage onto the ground

without a permit to do so. The septage was flowing onto the property of another landowner. At one point Mr. Ferguson did own up to some culpability, but he was not cooperative with the solid waste section investigation. He did not self-report to SWS. Ferguson tried to clean up the mess but did not do so completely. (Rsp. Ex. 16)

85. The numbers assigned to Mr. Ferguson on the computation worksheet were 8 points for Part 1 and 6 points for Part 2. Mr. Crisp was given 8 points for Part 1 and 9 points for Part 2. Part 3 was left blank for the duration of the violation for both.

86. By contrast, Mr. Crisp did have a permit. He did not do anything intentionally as Mr. Ferguson did. Mr. Crisp was responsible for 10 gallons at the absolute maximum whereas Mr. Ferguson emptied an entire pump truck load on the ground which ran onto another's property. An accidental dump, which at the most lasted a few minutes, is equated with the conscious and intentional dumping of a pump truck load of septage.

87. The guidance manual states that a "0" should be given if the violator "took a good, effective action to correct the violation." Mr. Ferguson was given a "0" because he made a statement that the pumping of the septic tanks and the repairs would be made—prospectively, and they were not. Mr. Crisp did everything he was supposed to do and was given a "2".

88. Ferguson's penalty was $13,125.00, approximately $1500 less than Mr. Crisp's.

89. The second case similar to Mr. Crisp's case is concerning Scott Septic. In this case, Mr. Scott was pumping septage into woodland areas near a creek and a pond and in close proximity to several residential water wells. He had no permit, thus the pumping was for his personal gain. There were at least five dump sites with twelve discharges. Respondent's witness Mr. Michael Scott actually went to this site and he testified that at least 10,000 gallons of septage was pumped on the ground, which is noted on the worksheet. It was noted in the report that the amount of septage pumped in this case was sufficient to constitute a felony. There were documented instances of fish and turtles being killed. Mr. Scott consistently and continuously lied to the SWS investigators and was never cooperative with the investigation. He did not self-report and was dishonest. Mr. Scott even continued to pump on the ground after being ordered by SWS to cease. He made no effort to clean up the mess. (Rsp. Ex 17)

90. Two different computation worksheets were used and Mr. Scott was given 9 points on Part 1 and 6 points on Part 2 on each of them, less than Mr. Crisp's points. As with Mr. Crisp and Mr. Ferguson, Part 3 was left blank. Although Part 3 offers the Respondent the ability to increase the penalty because of the duration of the violation, none was assessed Scott's case despite the fact that it had obviously been going on for some time and in substantial quantities.

91. Contrasting with Mr. Crisp, Mr. Crisp had a permit whereas Scott did not. Crisp's discharge was accidental and Scott's was intentional. Crisps' spill lasted a few minutes while Scott's took place over a considerable length of time and over several locations. Scott continued even after being ordered to stop and Crisp's was an isolated incident. In Scott's case, there was documented damage to wildlife and none in Crisp's case. Crisp spilled a maximum of 10 gallons and Scott purposefully dumped 10,000 gallons. Scott did not self-report and was uncooperative

with the SWS investigation. Scott did the illegal pumping for personal financial gain; Crisp did not. Thus, an accidental spill of 10 gallons is equated to an intentional dumping of 10,000 gallons. Mr. Michael Scott actually testified with a straight face that Crisp's spill was worse because it was in water.

92. Scott Septic's civil penalty was $13,500 for each worksheet.

93. The third case presented by Respondent as similar to Mr. Crisp's is regarding Mr. and Mrs. White dba as K-N-J Mobile Home Park. Problems had existed with the septic systems for some extended period of time, seemingly for years. There was no permit. Places around the park stayed wet for extended periods of time. The smell was awful. There were numerous problems with various septic tanks in the park. The maintenance worker for the park would routinely pump the septic tanks into the woods and ditches around the park. Neither the maintenance man nor the Whites ever owned up to the pumping. Neither the maintenance man nor the Whites ever cooperated with the SWS investigators. The pumping was for the economic gain of the Whites. The pumping continued after Mr. White had told SWS that the pumping would stop. (Rsp. Ex. 18)

94. Two different computation worksheets were used. On the first worksheet the Whites were given 9 points on Part 1 and 6 points on Part 2. On the second worksheet they were given 6 points on Part one and 6 points on Part 2. On each of the worksheets, they scored less than Mr. Crisp's points. As with Mr. Crisp, Mr. Ferguson and Mr. Scott, Part 3 was left blank. Although Part 3 offers the Respondent the ability to increase the penalty because of the duration of the violation, none was assessed in the White's case despite the fact that it had obviously been going on for some time and in substantial quantities.

95. Contrasting with Mr. Crisp, again Crisp had a permit and the Whites did not. Crisp's discharge was accidental and the White's was intentional. The Whites were uncooperative. Crisp's spill lasted a few minutes and the White's was over a very lengthy period of time. The White's continued even after being told to stop whereas Crisp's was an isolated incident. Crisp's was a minimal amount and the Whites have to have been a considerable amount even though there is no given amount. The White's pumping was for personal financial gain. Thus, again, a very minimal amount of accidental spill is equated with an extended and extensive intentional pumping.

96. The Whites were assessed a penalty of $13,500 on the first worksheet and $9,000 on the second worksheet.

97. The Penalty Computation Procedure is a guidance tool. It is for guidance, not rigid application with blinders on. On its face there are areas of discretion, and it is obvious from the three examples above that discretion is used in determining what number to assign to a particular block which will increase the amount of the penalty

98. The conclusion that Respondent draws that these three cases are comparable to the spill by Mr. Crisp is incomprehensible when the facts are considered. It does not take a scientist to conclude that a purposeful and intentional pumping of 10,000 gallons of septage over an extended period of time and in several sites for personal gain with reported fish and turtle kills is

not the same, let alone worse, than an unintentional spill of less than 10 gallons for a couple of minutes with no documented hazard to wildlife or humans.

99. Pursuant to N. C. Gen. Stat. 130A-22, investigative costs may be assessed against a violator. Investigative costs, as explained in Mr. Harrison's testimony and confirmed by Mr. Scott totaled $2,103.41. The total amount for the penalty and investigative costs as determined by Mr. Scott was $16,728.41.

CONCLUSIONS OF LAW

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they should be so considered without regard to the given label.

2. All parties are properly before the Office of Administrative Hearings, and the OAH has jurisdiction over the parties and the subject matter.

3. Petitioner raised the issue of jurisdiction. In as much as the issue was taken under advisement, both parties were to present briefs and case law for consideration within ten days of the conclusion of the evidentiary hearing. Respondent properly and timely filed its brief and case law. Petitioner did not submit anything to this Tribunal for consideration and to substantiate his argument and thus Petitioner is deemed to have abandoned this issue. Further, in as much as the facts and case law from the Respondent are the only submissions for consideration, based on those considerations, Respondent's argument prevails and it is concluded as a matter of law that this Tribunal has jurisdiction.

4. Although the majority of Fontana Lake is owned by either the National Park Service, the U.S. Forest Service, or the Tennessee Valley Authority, the State of North Carolina has reserved concurrent jurisdiction within those areas and the Solid Waste Section of the Division of Waste Management, Department of Environment and Natural Resources is vested with the statutory authority to enforce the State's environmental pollution laws, including laws enacted to regulate solid waste, including septage, within those areas.

5. All parties have been correctly designated, and there is no question as to misjoinder or non-joinder.

6. The burden of proof rests on the Petitioner to present evidence showing that the agency acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule.

7. N. C. Gen. Stat. § 130A-290 (35) defines "solid waste."

> (35) "Solid waste" means any hazardous or nonhazardous garbage, refuse or sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, domestic sewage and sludges generated by the treatment thereof in sanitary sewage collection, treatment and disposal systems, and other material that is either discarded or is being accumulated, stored or treated prior to being discarded, or has served its original intended use and is generally discarded, including solid, liquid, semisolid or contained gaseous material resulting from industrial, institutional, commercial and agricultural operations, and from community activities. The term does not include:
>
> N.C. Gen. Stat. § 130A-290(35)

8. N. C. Gen. Stat. § 130A-290 (32) defines "septage" as "solid waste that is a fluid mixture of untreated and partially treated sewage solids, liquids, and sludge of human or domestic origin which is removed from a wastewater system" including "domestic septage, which is either liquid or solid material removed from a septic tank …portable toilet, or similar treatment works receiving only domestic sewage."

9. While the word "septage" is not specifically used in N.C. Gen. Stat. § 130A-290(35), the definition is sufficiently incorporated in the definition of "solid waste" so that "septage" is included in the definition.

10. "Solid waste management" is the purposeful, systematic control of the generation, storage, collection, transport, separation, treatment, processing, recycling, recovery and disposal of solid waste. N. C. Gen. Stat. § 130A-290 (38)

11. A "Solid waste management facility" is land, personnel and equipment used in the management of solid waste. N. C. Gen. Stat. § 130A-290 (39)

12. N.C. Gen. Stat § 130A-291.1 requires that all septage be treated and disposed only at a wastewater system approved by Respondent or at a site permitted by the Department for land application.

13. 15A N.C.A.C. 13B .0841(e) requires that each septage detention and treatment facility be designed, constructed, and maintained in such a manner as to prevent leaks or the flow of septage out of the facility into any surface waters.

14. 15A N.C.A.C. 13B .0841(j) states that "[s]eptage shall be transferred to and from a detention system in a safe and sanitary manner that prevents leaks or spills of septage, including septage in pipes used for transferring waste to and from vehicles."

15. 15A N.C.A.C. 13B .0832(a)(6) states that "All conditions for permits issued in accordance with this Section shall be followed."

16. At all times relevant to this action, Petitioner owned and operated Crisp Boat Dock which is located at 1095 Lower Panther Branch Road, Almond, North Carolina.

17. The Division of Waste Management is a division of Respondent Department created by statutory mandate pursuant to N.C. Gen. Stat. § 130A, Article 9 to promote and preserve an environment that is conducive to public health and welfare. The Department is tasked with establishing and maintaining a statewide solid waste management program. N.C. Gen. Stat. § 130A-291.

18. Petitioner is the owner and operator of the septage detention and treatment facility which is the site of the septage discharge that occurred on June 27, 2013. The permit is issued to Crisp Boat Dock/Fontana Lake Waste Recovery, Inc. Although it is not known if Fontana Lake Waste Recovery, Inc. is a viable corporation, Petitioner has not shown that it is not.

19. Petitioner signed the application for the septage detention and treatment facility as the owner and certified that the applicant was Crisp Boat Dock (David Crisp). Fontana Lake Waste Recovery, Inc. is the permit holder for a septage management firm (NCS-01004) which is the operational permit that covers the jon boat operated by Petitioner that is used to pump the waste from houseboats, then the waste is transferred by the Petitioner from the boat to the floating septage detention and treatment facility owned and operated by Petitioner d/b/a Crisp Boat Dock under permit SDTF-38-91. The Compliance Order with Administrative Penalty was issued to Mr. David Crisp, d/b/a Crisp Boat Dock.

20. Fontana Lake Waste Recovery, Inc. is a co-permittee but was not cited for the violation. There is no explanation from Respondent as to why a co-permittee is not cited or held equally liable. Likewise there is no evidence about Prince Boat Dock as having any authority over Petitioner, and thus some culpability, although the permit specifically states that Prince has some supervision of the operation of the SDTF. The fact that Mr. Crisp was operating the boat at the time of the spill is not the determinative factor. Respondent erred in either listing Prince in the permit or failing to notice them of the violation. If an agency is going to rely on "strict liability" to enforce regulations then it is incumbent on the agency to be correct as well.

21. Respondent committed error by not including Fontana Lake Waste Recovery, Inc., the co-permittee, in the citation and holding it responsible as well.

22. Petitioner is a "person" as defined by N.C. Gen. Stat. § 130A-2(7) who may be assessed a civil penalty pursuant to N.C. Gen. Stat. § 130A-22 for the violations of N.C. Gen. Stat. § 130A, Article 9, and the Rules promulgated thereunder, including 15A NCAC 13B .0841(e), .0841(j), .0832(a)(6), and N. C. Gen. Stat. § 130A-291.1.

23. The waste contained in the septic tank on the boat which was to be pumped into and disposed of at the septage detention and treatment facility was septage under N.C. Gen. Stat. § 130A-290(32). Pursuant to N.C. Gen. Stat. § 130A-290(35) that septage was a "solid waste" subject to regulation by Respondent.

24. N.C. Gen. Stat. § 130A-22 (a) states "The Secretary of Environment and Natural Resources may impose an administrative penalty on a person who violates Article 9 of this

Chapter, rules adopted by the Commission pursuant to Article 9, or any term or condition of a permit or order issued under Article 9." Article 9 is Solid Waste Management.

25. Michael Scott, then Chief of the Solid Waste Section of the Division of Waste Management of the Department of Environment and Natural Resources was apparently designated to assess civil penalties under N.C. Gen. Stat. § 130A, Article 9.

26. Respondent's statutory authority mandates that it protect the public health and the environment and therefore its duty to issue and approve permits for septage storage methods is cautionary. In this case, because Petitioner's septage detention and treatment facility is located on the surface water of Fontana Lake. A condition of Petitioner's permit mandates that no back flow of waste from the "storage tank" to any surface water occur, including Fontana Lake, or it is a violation. (Rsp. Ex. 9)(Emphasis added) Although there is an argument to be made that the back flow was not from the storage tank, it is not necessary to this decision to discuss that point.

STRICT LIABILITY AND PENALTY

27. This condition in the permit imposes a type of strict liability on Petitioner to not discharge any waste into the surface water of Fontana Lake, no matter how small, or it would be a violation of Petitioner's permit and the Solid Waste Management Act authorizing the permit.

28. To say that a spill of any size is a violation is correct, but the inquiry does not stop there. There has to be a determination of a commensurate penalty. Running a stop light does not place the driver in jeopardy of being imprisoned as a serious felon simply because he violated a strict liability "criminal" offense. Likewise, in assessing a penalty for an environmental violation the penalty must fit the offense.

29. Strict liability is a prospective approach to encourage adherence to certain standards so that our environment will be protected. Strict liability simply means that any deviation from the regulation will be subject to some form of remonstration. The term "strict liability" standing alone does not determine what the "punishment' will be for any violation; it only means that there will be some form of punishment for violation. There should be an equal regulation establishing the punishment for violation.

30. N.C. Gen. Stat. § 130A-22 is the statutory authority for establishing penalties for violations herein. It states:

> In determining the amount of a penalty under this subsection . . . , the Secretary <u>shall consider all</u> of the following factors:
>
> (1) The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation.
> (2) The duration and gravity of the violation.
> (3) The effect on air quality.

(4) The cost of rectifying the damage.
(5) The amount of money the violator saved by noncompliance.
(6) The prior record of the violator in complying or failing to comply with Article 19 of this Chapter or a rule adopted pursuant to that Article.
(7) The cost to the State of the enforcement procedures.
(8) If applicable, the size of the renovation and demolition involved in the violation.

N.C. Gen. Stat. § 130A-22 (Emphasis added)

31. In this case the degree and extent of harm was negligible or none. The duration of the violation was a few minutes. Numbers 3 and 8 do not apply. The cost of rectifying the damage was zero. The violator did not save any money by the violation. He does have a prior violation for improper burning. Costs were involved in the investigation.

32. N.C. Gen. Stat. Ann. § 130A-291.1(b) is the statutory authority which allows for the adoption of rules governing septage. It states: "For the protection of the public health, the Commission shall adopt rules governing the management of septage. The rules shall include, but are not limited to, criteria for the sanitary management of septage, including standards for the transportation, storage, treatment, and disposal of septage; . . ."

N.C. Gen. Stat. § 130A-291.1

33. Among the rules which have been properly promulgated and adopted and are applicable here is 15A NCAC 13B .0702 "STANDARDS" which states:

In determining the amount of the administrative penalty, the Division shall consider the following standards:

(1) Nature of the violation and the degree and extent of the harm, including at least the following:

(a) For a violation of the Solid Waste Management Act, Article 9 of Chapter 130A of the North Carolina General Statures, and the rules adopted thereunder:
(i) type of violation;
(ii) type of waste involved;
(iii) duration of the violation;
(iv) cause (whether resulting from a negligent, reckless or intentional act or omission);
(v) potential effect on public health and the environment;
(vi) effectiveness of responsive measures taken by the violator;
(vii) damage to private property.

(2) Cost of rectifying any damage.

(3) The violator's previous record in complying or not complying with the Solid Waste Management Act and the regulations promulgated thereunder.

(Respondent's Exhibit 11)

34. Respondent attempts to incorporate the standards of 15A NCAC 13B .0702 in developing the Penalty Computation Procedure which is the matrix used to calculate the penalty assessed against Mr. Crisp. In application or in practice the rule is not followed. For example, "duration" or "negligence" are not given any consideration. Further, the guide for use of the matrix does not coincide with the worksheet. Even if use of the matrix was correct, if the guide and worksheet were consistent and if it had been used correctly, Mr. Crisp's scores and thus penalty should have been lower.

35. The matrix does not in practice account for the volume or amount of the spill. Thus, Mr. Crisp's spill of a few gallons is equated to one who intentionally dumped 10,000 gallons. If volume does not matter then Mr. Crisp's spill is conceivably of the same magnitude of Duke Energy's coal ash spill into the water ways.

36. The Penalty Computation Procedure is a guidance tool. It is for guidance, not rigid application with blinders on. On its face there are areas of discretion, and it is obvious from the three examples of cases that were deemed similar to Mr. Crisp's that discretion is used in determining what number to assign to a particular block which will increase the amount of the penalty.

37. Of paramount importance is the fact that the Penalty Computation Procedure does not have to be followed at all. The mandatory requirements within the statutes and the rules must be taken into account, but looking at the statute and the rule, applying the worksheet to the facts of this case does not fully and appropriately take into account what happened in this particular instance. It does not take into account a very small unintentional spill by a man who has devoted a huge portion of his life cleaning up the Fontana Lake. Obviously he would not do anything to intentionally harm the lake.

38. Respondent's rule-makers envisioned that there would be a fact pattern that did not fit within the confines of 15A NCAC 13B .0702, and thus the matrix. Rule 15A NCAC 13B .0703(d) states:

"The Division or its delegates may modify a penalty upon finding that additional or different facts should have been considered in determining the amount of the assessment or upon finding that the respondent has corrected or mitigated the harm cause by the violation."

39. The assessment of penalties or any type of "punishment" is a look back at events after the fact when there is a violation. Use of a matrix such as the one developed and used by Respondent is a well-accepted practice in determining a penalty. It is a useful tool designed to insure consistency in meting out civil penalties. However, the matrix cannot address every

conceivable set of circumstances that might arise, and 15A NCAC 13B .0703(d) addresses that potentiality.

40. At the heart of any form of punishment meted out in our system of justice is a sense of moral blameworthiness on the part of the offender and that offender committed some act that needs punishment. Basically all theories of punishment center on general deterrence (to deter others), specific deterrence (to deter this particular offender), rehabilitation, incapacitation and retribution.

41. The Penalty Computation Procedure guidance manual affirmatively states that the purpose of assessing penalties and thus punishment is for a deterrence. The use of "deterrence" in the manual implies the assessment is to be a deterrent to the particular violator. In this particular instance, and based on the facts and circumstances of this case, there does not need to be any specific deterrence aimed at this particular offender.

42. Respondent committed error in the computation of the penalty assessed.

ARBITRARY AND CAPRICIOUS

43. The "arbitrary or capricious" standard is a difficult one to meet. *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475, 546 S.E.2d 177, 181 (2001). Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," *id.,* or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'...." *Comm'r of Ins. v. Rate Bureau*, 300 N.C. at 420, 269 S.E.2d at 573 (citations omitted).

44. Other jurisdictions have found that imposing procedural requirements-even those "within the letter of the statut[e]" may be arbitrary and capricious if that imposition "result[s] in manifest unfairness in the circumstances." *Id.* (citing Cooper, 2 *State Administrative Law* 761-69 (1965)). *Lewis v. N. Carolina Dep't of Human Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989)

45. A decision is arbitrary when it is not predicated upon a fair consideration of all necessary facts and factors. Courts have defined arbitrary and capricious as "willful and unreasonable action without consideration or in disregard of facts or without determining principle." *Blacks Law Dictionary* 96 (5th ed. 1979). *See U.S. v. Carmack*, 329 U.S. 230, 243 n.14 (1946). Arbitrary is defined as "without adequate determining principle . . . [or] fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance... decisive but unreasoned.." *Id.*; *Flower Cab Co. v. Petitte*, 658 F. Supp. 1170, 1179 (N.D. Ill. 1987) (defining arbitrary as a decision reached "without adequate determining principle or was unreasoned."); *U.S. v. Euordif S.A.*, 555 U.S. 305, 316 at n.7 (2009)("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."); *Watts-Hely v. U.S.*, 82 Fed. Cl. 615, 615 (Claims Court,

2008)("the very definition arbitrary and capricious action is decision making that ignores the relevant factors critical to the decision.")

46. Under the particular facts and circumstances of this contested case, Respondent put blinders on and applied the matrix to determine the penalty to be assessed "without consideration or in disregard of facts or without determining principle." The rigid application of the matrix indicates "a lack of fair and careful consideration" of the facts and "fails to indicate 'any course of reasoning and the exercise of judgment.'" By the very nature of blindly using the matrix as in this contested case, the Respondent exercises no judgment, contrary to the dictates of administrative rule 15A NCAC 13B .0703(d). This is especially true in light of the fact that use of the matrix is not mandatory as evidenced by the rule. In this contested case, Respondent's decision was made that "ignores the relevant factors critical to the decision."

47. At some point common sense and reason have to prevail—or at the very least be considered—and 15A NCAC 13B .0703(d) is the rule that allows common sense and reason to be applied to these cases.

48. Respondent's decision on the amount of assessed penalty is arbitrary and capricious.

DEFERENCE AND DUE REGARD

49. Respondent contends that it is entitled to particular deference. The Agency's interpretation and application of the statutes and rules it is empowered to enforce are entitled to deference, as long as the agency's interpretation is reasonable and based on a permissible construction of the statute. *Craven Regional Medical Authority v. N.C. Dept. of Health and Human Services,* 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006); *Good Hope Health Sys., L.L.C. v. N.C. Dept. of Health & Human Services, Div. of Facility Services, Certificate of Need Section,* 189 N.C. App. 534, 544, 659 S.E.2d 456, 463 (N.C. Ct. App. 2008), aff'd sub nom. *Good Hope Health Sys., L.L.C. v. N.C. Dept. of Health & Human Services, Div. of Facility Services*, 362 N.C. 504, 666 S.E.2d 749 (2008).

50. The question arises as to whether or not the agency is entitled to any particular "deference" in how it has addressed the issues in a particular contested case. It is true that North Carolina law gives great weight to the Agency's interpretation of a law it administers. *Frye Regional Med. Center v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). Further, the Agency's interpretation and application of the statutes and rules it is empowered to enforce are entitled to deference, as long as the Agency's interpretation is reasonable and based on a permissible construction of the statute. *Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463 (2008), *aff'd*, 362 N.C. 504, 666 S.E.2d 749 (2008); *Craven Reg. Medical Authority v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006); *see also Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992)

51. Far and away the majority if not all of appellate cases on "agency deference" speak in terms of the reviewing court looking at what the agency did as a "final decision." These decisions were prior to OAH having final decision making authority.

52. Essentially, so long as the agency gives a reasonable interpretation of statute or rule, then the agency may be afforded "deference". The reviewing appellate court does not have to adopt the agency's interpretation, especially if it is clearly erroneous. The reviewing appellate court does not have to adopt the agency's interpretation if the statute or rule is plain, unambiguous and not subject to interpretation; i.e., the agency is not free to interpret what the General Assembly intended unless there is ambiguity. *See for example*: *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252-3 (2007); *Cashwell v. Dep't of State Treasurer, Ret. Sys. Div.*, 196 N.C. App. 81, 89, 675 S.E.2d 73, 78-79 (2009)*; Hensley v. N. Carolina Dep't of Env't & Natural Res.*, 201 N.C. App. 1, 34, 685 S.E.2d 570, 593-94 (2009) *rev'd sub nom. Hensley v. N. Carolina Dept. of Env't & Natural Res., Div. of Land Res.*, 364 N.C. 285, 698 S.E.2d 41 (2010). *Britthaven, Inc. v. N.C. Dept. Of Human Resources*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 461; *Total Renal Care Of N. Carolina, LLC v. N. Carolina Dept. of Health & Human Services, Div. of Facility* Services, Certificate of Need Section, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005)

53. *Wells v. Consol. Judicial Ret. Sys. of N. Carolina*, 354 N.C. 313, 319-20, 553 S.E.2d 877, 881 (2001) states:

> Nevertheless, it is ultimately the duty of courts to construe administrative statutes; courts cannot defer that responsibility to the agency charged with administering those statutes. This does not mean, however, that courts, in construing those statutes, cannot accord great weight to the administrative interpretation, especially when, as here, the agency's position has been long-standing and has been met with legislative acquiescence. (Internal citations omitted).

54. None of the appellate cases impute deference to staff and the day to day operations of any agency. The interpretation of the policies or rules or statutes by the individual person doing the work is not the concern of the appellate courts in "agency deference." In *Canady v. N. Carolina Coastal Res. Comm'n*, 206 N.C. App. 329, 698 S.E.2d 557 (2010*),* an unpublished opinion, the Court of Appeals acknowledged that typically the deference was to the agency's appellate panel and not the staff. While the unpublished opinion is not cited as legal authority, the Canady case is consistent with the reported cases on agency deference.

55. The methodology used in calculating the amount of penalty is not entitled to any particular deference.

56. A standard which is different from the "deference" standard is found in N.C. Gen. Stat. Ann. § 150B-34 which states that "[t]he administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." It must be emphasized that this statutory directive is to the "facts and inferences" that are particularized to the "specialized knowledge" of the agency.

57. North Carolina law also presumes that the Agency has properly performed its duties. *In re Broad & Gales Creek Community Assoc.*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980); *Adams v. N.C. State Bd. Of Reg. for Prof. Eng. & Land Surveyors*, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998) (stating "proper to presume administrative agency has properly performed its official duties"); *In re Land and Mineral Co.*, 49 N.C. App. 529, 531, 272 S.E.2d 6, 7 (1980) (stating that "the official acts of a public agency ... are presumed to be made in good faith and in accordance with the law.").

58. In rendering the decision herein, due regard has been given to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.

DISPARATE TREATMENT

59. The essence of Respondent's mission is stated in N.C. Gen. Stat. § 130A-291(a), which states:

> For the purpose of promoting and preserving an environment that is conducive to public health and welfare, and preventing the creation of nuisances and the depletion of our natural resources, the Department shall maintain a Division of Waste Management to promote sanitary processing, treatment, disposal, and statewide management of solid waste and the greatest possible recycling and recovery of resources, and the Department shall employ and retain qualified personnel as may be necessary to effect such purposes.

60. Hopefully we all want to preserve the environment, but the Respondent in particular is tasked with doing so for the benefit of the public health and welfare. In this case the uncontroverted evidence is that Petitioner has spent many years, much effort and considerable resources in cleaning up Fontana Lake which had become extremely polluted in some large part due to houseboats dumping their holding tanks straight into the lake. According to Mr. Scott, to his knowledge no section of the North Carolina Department of Environment and Natural Resources attempts to control the straight dumping of septage by houseboats into the public waters. Thus it is left to private citizens such as Mr. Crisp to undertake efforts to control that dumping and keep the lake clean, a task which might more appropriately belong to the state. In this arrangement, the State's only task is to issue permits and punish those who might run afoul of the regulations, exercising no control over the worst polluters.

61. The effect of this arrangement is that Mr. Crisp and others similarly situated are left to do the cleanup and are punished should they violate a regulation, even if unintentional; however, even today a houseboat owner is completely free to continue to dump septage into the waters of the State of North Carolina without consequence. Any dumping by a houseboat of its holding tank is most likely to be more than the spillage by Mr. Crisp.

62. While it is recognized that the State's financial resources are not without limits, this current situation is blatantly unfair in the facts circumstances of this particular case. It is obvious that there is a tremendous disparate treatment between the houseboat owners and Mr. Crisp whose operation is to clean the lake.

63. Further, the manner in which the matrix is applied, including among other things that volume and duration does not matter, creates a disparate treatment in comparing Mr. Crisp's actions to those of the three "similar" cases. Ten gallons is not the same as 10,000 gallons despite what Respondent contends.

64. Petitioner violated N.C. Gen. Stat. § 130A-291.1(d) by having a back flow of septage of ten gallons or less into Fontana Lake. The septage was not disposed at a wastewater system approved by the Respondent or at a site permitted by the Department for disposal. The backflow was human error and was totally unintentional.

65. Petitioner did violate 15A N.C.A.C. 13B .0832(a)(6) by not notifying Respondent of a spill event that contacted surface waters. The rule tracks the provision of GS § 130A-291.1(d), but is cited as a separate violation for the same event for failing to follow a condition of his permit by allowing backflow of septage to flow into the surface waters of Fontana Lake

66. Petitioner did not violate 15A N.C.A.C. 13B .0841(e) by failing to maintain his septage detention facility to ensure that leaks or the flow of septage are prevented from flowing into the surface waters of Fontana Lake. With the exception of the roof problems which he promptly fixed, Mr. Crisp's facility was properly maintained and did not contribute to the spill at all.

67. Petitioner did violate 15A N.C.A.C. 13B .0841(j) by failing to transfer septage to a detention system in a safe and sanitary manner so that septage, including septage in pipes used for transferring waste, flowed into the surface waters of Fontana Lake.

68. Petitioner did violate the statute and rules as concluded above; however, all of the violations were in one event which lasted at most a matter of a few minutes and at most spill less than 10 gallons of septage into a very large body of moving water.

69. Although Petitioner violated the provisions as set forth above, Petitioner met his burden of proving that Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule in assessing a monetary civil penalty.

70. Respondent did not act properly in assessing a $14,625.00 penalty; however, some appropriate penalty should be assessed. Respondent acted properly in assessing $2,103.41 investigative costs against Petitioner for violations of N.C. Gen. Stat. § 130A, Article 9, and its attendant rules?

DECISION

Based upon the facts and circumstances of this particular contested case, the Office of Administrative Hearings upholds the agency's decision that a violation occurred and that a civil penalty should be assessed against Petitioner for violations of the Solid Waste Management Act, N.C. Gen. Stat. §130A, Article 9 and its attendant Rules; however the agency's decision as to the

amount of the civil penalty is **REVERSED**. Under the particular facts and circumstances of this contested case alone, a reasonable civil penalty is assessed in the amount of $1,000, and investigative costs of $2,103.41 are reasonable and appropriate for Petitioner to incur for a total of $3,102.41.

NOTICE

Pursuant to N.C.G.S.§ 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within thirty (30) days after being served with a written copy of the Administrative Law Judge's Decision and Order. Pursuant to N.C.G.S. 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within thirty (30) days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 14th day of August, 2015.

_____
Donald W. Overby
Administrative Law Judge