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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
24 EHR 00862, 24 EHR 01469, 24 EHR 01470

City of Asheboro, North Carolina, Petitioner, City of Greensboro, North Carolina, and City of Reidsville, North Carolina, Petitioner-Intervenors v. North Carolina Department of Environmental Quality, Division of Water Resources, Respondent.	**24 EHR 00862**
City of Reidsville, North Carolina, Petitioner, v. North Carolina Department of Environmental Quality, Division of Water Resources, Respondent.	**24 EHR 01469**
City of Greensboro, North Carolina, Petitioner, v. North Carolina Department of Environmental Quality, Division of Water Resources, Respondent.	**24 EHR 01470**

FINAL DECISION ON SUMMARY JUDGMENT

THIS MATTER is before the undersigned, Donald van der Vaart, Chief Administrative Law Judge, upon consideration of Petitioners City of Asheboro, North Carolina ("Asheboro"), City of Greensboro, North Carolina ("Greensboro"), and City of Reidsville, North Carolina's

("Reidsville") (collectively, "Petitioners") and Respondent North Carolina Department of Environmental Quality, Division of Water Resources' ("Respondent" or "DWR") cross-motions for Summary Judgment, each filed pursuant to N.C.G.S. § 1A-1, Rule 56.

This Tribunal, having reviewed the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and other documentary evidence submitted by the parties, the Parties' Joint Stipulations of Undisputed Facts and Documents, filed on April 19, 2024, the memoranda filed by the parties and the amici curiae, and the parties' supplemental memoranda filed at the direction of this Tribunal on June 17, 2024, finds that this matter is now ripe for disposition.

COUNSEL

CRANFILL SUMNER LLP, by R. Robert El-Jaouhari,, Elizabeth C. Stephens, Cameron Virginia Ervin, Emily R. Larrabee, for Petitioner.

NORTH CAROLINA DEPARTMENT OF JUSTICE, by Special Deputy Attorney General Francisco Benzoni, Special Deputy Attorney General Brenda Menard, Assistant Attorney General Taylor Crabtree, and Assistant Attorney General Rachel G. Posey, for Respondent;

WILLIAMS MULLEN, by Ruth A. Levy, Esq. and Sean M. Sullivan, Esq., For Amici Curiae.

PROCEDURAL HISTORY

On September 19, 2023, Asheboro filed a petition for contested case hearing ("Asheboro Petition"). (Case No. 23 EHR 04121). Asheboro's Petition challenged various 1,4-dioxane effluent limitations and conditions contained in its National Pollutant Discharge Elimination System ("NPDES") renewal Permit No. NC0026123 (the "Asheboro Permit") issued by Respondent on August 21, 2023.

On September 26, 2023, Reidsville moved to intervene in the action as a petitioner-intervenor with full party rights pursuant to N.C.G.S. § 1A-1, Rule 24, N.C.G.S. § 150B-23(d), and 26 NCAC 03 .0117. On October 31, 2023, Greensboro moved to intervene in the action as a petitioner-intervenor with full party rights pursuant to N.C.G.S. § 1A-1, Rule 24, N.C.G.S. § 150B-23(d), and 26 NCAC 03 .0117. On November 28, 2023, this Tribunal granted Reidsville's and Greensboro's motions to intervene as petitioner-intervenors with full party rights.

On October 20, 2023, Fayetteville Public Works Commission, Cape Fear Public Utility Authority, and Brunswick County, North Carolina (collectively, the "Downstream Intervenors") moved to intervene in the action pursuant to N.C.G.S. § 1A-1, Rule 24, N.C.G.S. § 150B-23(d) and 26 NCAC 03 .0117. On November 30, 2023, this Tribunal granted the Downstream Intervenors' motion to intervene for the limited purpose of filing an amicus curiae brief.

On January 5, 2024, Petitioner Asheboro and Petitioner-Intervenors Reidsville and Greensboro filed their Motions and Briefs in Support of Summary Judgment. On January 5, 2024, Respondent filed its Motion and Brief in Support of Summary Judgment, along with supporting affidavits, documents, appendices, and exhibits. On the same day, Petitioner, Petitioner-

Intervenors, and Respondent filed their response memoranda. On January 16, 2024, at the request of this Tribunal, Petitioners, Petitioners-Intervenors, and Respondent submitted supplemental memoranda on the issue of whether the documents exclusively relied on by Respondent are entirely consistent with the EPA("EPA") guidance documents specified in 15A NCAC 02B .0208(a)(2)(B). On January 16, 2024, the Downstream Intervenors filed their amicus curiae brief. Also, on January 22, 2024, this Tribunal denied Petitioners', Petitioner-Intervenors', and Respondent's Motions for Summary Judgment.

On February 5, 2024, Asheboro voluntarily dismissed the action without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1), N.C. Gen. Stat. § 150B-22(a), and 26 NCAC 03 .0101(a). Petitioner-Intervenors, Respondent, and the Downstream Intervenors agreed to the voluntary dismissal of the action and the case was closed on February 9, 2024.

On March 8, 2024, Asheboro refiled its petition for contested case hearing ("Asheboro Petition"). Pursuant to N.C. Gen. Stat. §§ 143.215.1 and 150B-23, and N.C. Gen. Stat. § 1A-1, Rule 41, Asheboro again challenged various 1,4-dioxane limitations and conditions contained in the Asheboro Permit on the same grounds its September 19, 2023, petition for contested case hearing. (Case No. 24 EHR 862.)

On March 8, 2024, Asheboro filed a Motion to Stay Enforcement Pending Contested Case Proceedings ("Motion to Stay"). On March 21, 2024, Respondent filed its Response in Opposition to Asheboro's Motion to Stay. On March 26, 2024, this Tribunal denied the Motion to Stay but ordered that "by operation of N.C.G.S. § 143-215.1(e) the permit is not final, and the terms of the permit are not enforceable." On March 27, 2024, Respondent moved this Tribunal for reconsideration of its March 26, 2024, Order. On April 8, 2024, Asheboro submitted a Response in Opposition to Respondent's Motion to Reconsider. Also on April 8, 2024, this Tribunal denied Respondent's Motion to Reconsider. By operation of this Tribunal's March 26, 2024 Order, the Asheboro Permit is not final and is not enforceable pending final adjudication of the issues underlying the Asheboro Petition.

On March 8, 2024, Greensboro and Reidsville moved to intervene in the action as petitioner-intervenors with full party rights pursuant to N.C.G.S. § 1A-1, Rule 24, N.C.G.S. §150B-23(d), and 26 NCAC 03 .0117. On March 21, 2024, Greensboro's and Reidsville's motions to intervene were granted, but this Tribunal declined to permit Greensboro and Reidsville to submit petitions for contested case hearing in this action. On March 27, 2024, Greensboro and Reidsville moved this Tribunal for partial reconsideration of its March 27, 2024, Order through which Greensboro and Reidsville sought permission to file petitions for contested case hearing on their own behalf in this action. This Tribunal now denies Greensboro's and Reidsville's Motion for Reconsideration as moot by virtue of this Tribunal's order granting Greensboro's and Reidsville's petitions for contested case hearing, discussed infra.

On March 28, 2024, the Downstream Intervenors moved to intervene in this action for the limited purpose of filing an amicus curiae brief pursuant to N.C.G.S. § 1A-1, Rule 24, N.C.G.S. § 150B-23(d), and 26 NCAC 03 .0117(d)(1). On April 10, 2024, this Tribunal granted the Downstream Intervenors' motion to intervene for the limited purpose of filing an amicus curiae brief.

On April 18, 2024, Reidsville and Greensboro filed petitions for contested case hearing challenging Respondent's authority to (1) include various 1,4-dioxane limitations and conditions in the Asheboro Permit; and, (2) enforce 1,4-dioxane limitations and conditions against Greensboro and Reidsville. (Case Nos. 24 EHR 1469 and 24 EHR 1470.) On April 18, 2024, Reidsville and Greensboro both filed Petitions to Consolidate with Case No. 24 EHR 00862. On April 23, 2024, this Tribunal ordered Case Nos. 24 EHR 01469 and 24 EHR 01470 consolidated with Case No. 24 EHR 00862.

On April 30, 2024, Respondent moved to dismiss Greensboro's and Reidsville's petitions for contested case hearing. (Case Nos. 24 EHR 01469 and 24 EHR 01470.) On May 13, 2024, Greensboro and Reidsville filed their joint Response in Opposition to Respondent's Motions to Dismiss. On May 14, 2024, this Tribunal denied Respondent's Motions to Dismiss. As a result, Asheboro's, Greensboro's, and Reidsville's petitions for contested case hearing are now pending before this Tribunal and are resolved herein.

On April 19, 2024, Petitioners and Respondents filed the Parties' Joint Stipulations of Undisputed Facts and Documents. On May 24, 2024, Petitioners and Respondent filed Motions for Summary Judgment and Briefs in Support, along with supporting affidavits, documents, and exhibits. Petitioners' joint Response in Opposition to Respondent's Motion for Summary Judgment, along with exhibits, was filed on May 31, 2024. Respondent's Response in Opposition to Petitioners' Motion for Summary Judgment, along with supporting affidavits, documents, and exhibits, was filed on May 31, 2024. The Downstream Intervenors filed their Amicus Curiae Brief on May 31, 2024.

On June 17, 2024, at the request of this Tribunal, the parties submitted supplemental memoranda on the issue of whether the current (2019) version of 15A NCAC 02B .0208 had been approved by the EPA.

UNDISPUTED FACTS

1. There is no numeric water quality standard for 1,4-dioxane codified in 15A NCAC 02B .0212, .0214, .0215, .0216, or .0218. Additionally, no 0.35 µg/L (or 0.80 µg/L) water quality criterion is codified in 15A NCAC 02B .0208, .0212, .0214, .0215, .0216, or .0218.
2. DWR asserts the derived numeric criterion of 0.35 µg/L for 1,4-dioxane was calculated pursuant to 15A NCAC 02B .0208(a)(2)(B).
3. DWR asserts the 1,4-dioxane effluent limitations contained in the Asheboro Permit are based on the derived numeric criterion of 0.35 µg/L for 1,4-dioxane calculated pursuant to 15A NCAC 02B .0208(a)(2)(B).
4. DWR asserts that 15A NCAC 02B .0208(a)(2)(B) is an enforceable statewide water quality standard.
5. 15A NCAC 02B .0208(a)(2)(B) references EPA document FR 51 (185) 33992-34003 which states "[t]he EPA classification system for the characterization of the overall weight of evidence for carcinogenicity…" as:

   Group A – Carcinogenic to Humans
   Group B – Probably Carcinogenic to Humans

Group C – Possibly Carcinogenic to Humans
Group D – Not classifiable as to Human Carcinogenicity
Group E – Evidence of Non-carcinogenicity for Humans

6. The EPA has characterized 1,4-dioxane as "likely to be carcinogenic to humans." The EPA has not characterized 1,4-dioxane as "carcinogenic to humans." 2013 IRIS at page 138.
7. Respondent did not use a "Linearized Multistage Model" when developing the cancer potency factor ("CPF") value for 1,4-dioxane. 2013 IRIS at page 138
8. The log-logistic model was used by the EPA to develop the CPF value for 1,4-dioxane ("CPF") in the 2013 IRIS Report. The log-logistic model is not referenced in EPA documents FR 51 (185): 33992-34003 or FR 45 (231 Part V): 79318-79379.
9. DWR exclusively relied on the CPF set forth in the 2013 IRIS Report to develop the derived numeric criterion of 0.35 µg/L for 1,4-dioxane. DWR did not independently verify the accuracy of the CPF for 1,4-dioxane as set forth in the 2013 IRIS Report.
10. Outside of DWR's conclusion which is at issue in this litigation (i.e.,, that 1,4-dioxane is a carcinogen for purposes of 15A NCAC 02B .0208), DWR has not determined that 1,4-dioxane is a human carcinogen and is not aware of an agency or division of an agency of the State of North Carolina that has determined that 1,4-dioxane is a human carcinogen.
11. 1,4-dioxane is not designated as a "toxic pollutant" under Section 307(a)(1) of the Clean Water Act or under 40 CFR 401.15.
12. DWR issued the 2023 Asheboro Permit on August 21, 2023. The Asheboro Permit is the subject of this contested case.
13. DWR included a 1,4-dioxane effluent discharge limitation in the Asheboro Permit.
14. DWR asserts the 1,4-dioxane effluent discharge limitation included in the Asheboro Permit was calculated using the derived numeric criterion of 0.35 µg/L for 1,4-dioxane.
15. Neither the Department of Environmental Quality, the Division of Water Resources nor the Environmental Management Commission ("EMC") are exempt from the rulemaking procedures set forth in Chapter 150B, North Carolina General Statutes.
16. DWR previously issued an NPDES permit to Asheboro in 2011.
17. Asheboro's 2011 NPDES permit did not include a 1,4-dioxane effluent discharge limitation.
18. In 2015, Asheboro timely submitted its application to DWR to renew its NPDES permit.
19. In 2018, DWR publicly noticed a draft NPDES permit for Asheboro that included a 1,4-dioxane effluent discharge limitation. DWR did not ultimately issue this draft NPDES permit to Asheboro.
20. Greensboro received a Notice of Violation ("NOV") for "…elevated discharges of 1,4-dioxane" in November 2019. (Greensboro Motion to Intervene #4)
21. Greensboro entered into a Special Order by Consent limiting 1,4-dioxane levels in 2021. (Greensboro Motion to intervene)

22. Greensboro received a draft NPDES permit that has been pending since 2018. "The Draft Permit contains a 1,4-dioxane discharge limitation based on the Proposed Standard, with related monitoring and reporting requirements." (Greensboro Motion to Intervene)

23. Reidsville received an NOV for "…Reidsville's alleged 1,4-dioxane discharges…" on November 18, 2019. "[T]hereafter sought to negotiate a Special Order by Consent with Reidsville that would have imposed a 1,4-dioxane discharge limitation on Reidsville's POTW based on the Proposed Standard." (Reidsville Motion to Intervene (2)(a))

24. Respondent proposed the inclusion of a 1,4-dioxane limitation in Reidsville's draft NPDES permit issued on or about September 22, 2020 (the "Draft Permit"). (Motion to Intervene (5)(h))

25. In 2021, through its 2020-2022 Triennial Review, the EMC, initiated rulemaking procedures through which it proposed codifying 0.35 µg/L as the generally applicable statewide defined numeric water quality standard for water supply waters for 1,4-dioxane in 15A NCAC 02B .0212, .0214, .0215, .0216, and .0218 ("1,4-dioxane Rulemaking").

26. As part of this Triennial Review, Respondent prepared a document entitled "Regulatory Impact Analysis (RIA)" the stated purpose of which was to "provide an analysis of the fiscal impacts associated with the proposed [1,4-dioxane rule]." Parties' Joint Stipulations of Undisputed Facts and Documents, Exhibit C, p.D-2

27. In the RIA, Respondent describes the scope of the proposed rule as applying "to all freshwaters of the state…." Parties' Joint Stipulations of Undisputed Facts and Documents, Exhibit C, p.D-15

28. In September 2022, the EMC requested the return of the 1,4-dioxane Rulemaking from the North Carolina Rules Review Commission ("RRC") in response to RRC's objection to the rule. The 1,4-dioxane Rulemaking was unsuccessful in promulgating a numeric water quality standard for 1,4-dioxane being codified in 15A NCAC 02B .0212, .0214, .0215, .0216, or .0218, nor in the 0.35 µg/L water quality criterion being codified in 15A NCAC 02B .0208, 0212, .0214, .0215, .0216, or .0218.

29. The RIA states that the "ITVs" calculated from "15A NCAC 02B .0208(a) are implemented and enforced as standards in NPDES permits". Parties' Joint Stipulations of Undisputed Facts and Documents, Exhibit D, p. AD103

30. The RIA states the "…ITVs are calculated in accordance with models and other factors authorized by the EPA and specified in Rule 15A NCAC 02B .0208." Parties' Joint Stipulations of Undisputed Facts and Documents, Exhibit C, p. D-14.

31. Notwithstanding the enforcement of ITVs as "standards" the RIA explains that rule-making will serve to "codify existing ITVs as standards for freshwater fish consumption and water supply waters." *Id*., p. D-2.

32. The stated purpose of the RIA is to "provide an analysis of the fiscal impacts associated with proposed amendments to the surface water quality standards…" The document states that the costs for controlling 1,4-dioxane "…are anticipated to be prohibitively expensive for local governments and the citizens served by public utilities." The document also states that "codification of the ITVs into the NC administrative code…" should not lead to "…additional costs to existing or future NPDES wastewater permittees and no change in health and

environmental benefits as a direct result of the codification of the ITVs into the NC administrative code." Further, "however it is worth acknowledging that the *ongoing* costs and benefits associated with the monitoring and treatment of 1,4-dioxane are likely to be considerable" [emphasis in the original] *Id*., p D-17.

33. The RIA it states "…1,4-dioxane is already being regulated via DEQ permitting programs..." Parties' Joint Stipulations of Undisputed Facts and Documents, Exhibit D, p. AD-104.

34. The RIA states that DEQ believed Special Orders by Consent (providing up to five years for compliance) will be common due to the high cost of treatment technology. Parties' Joint Stipulations of Undisputed Facts and Documents, Exhibit C, p.D-16.

35. According to the RIA the proposed [but ultimately unsuccessful] rule-making "will reflect the requirements and processes already being enforced. For this reason, we did not attempt to monetize costs or benefits for 1,4-dioxane." Notwithstanding the claim made in the RIA that the proposed rule's requirements were already being enforced, the RIA also stated that DWR had "very limited data upon which to expand on this topic [costs and benefits of regulating 1,4-dioxane] as DEQ began incorporating 1,4-dioxane into permits only recently. Id., p. D-17.

36. The RIA for the proposed (but unsuccessful) rule-making listed the economic impacts of including a 1,4-dioxane standard as none for the various water use classifications. It also listed the benefit, or environmental impact of the rule-making as not attributable to the rule-making. Parties' Joint Stipulations of Undisputed Facts and Documents, Exhibit D, p. AD-101.

37. On December 9, 2022, DWR issued its notice of intent to issue the Asheboro Permit, which is the subject of this contested case.

STIPULATIONS OF DOCUMENTS

38. The document attached as Exhibit A is a true and accurate copy of the Asheboro Permit and its accompanying cover letter from Respondent.

39. The document attached as Exhibit B is a true and accurate copy of the fact sheet for the Asheboro Permit.

40. The document attached as Exhibit C is a true and accurate copy of the Regulatory Impact Analysis prepared by EMC in connection with EMC's 2020- 2022 Triennial Review.

41. The document attached as Exhibit D is a true and accurate copy of the March 10, 2022, "Report of Proceedings to the Environmental Management Commission on the Proposed Changes to the Surface Water Quality Classifications and Standards for the Protection of Surface Waters Regulations Triennial Review." ("Triennial Review")

42. The document attached as Exhibit E is a true and accurate copy of the August 17, 2023, "Hearing Officer's Report and Recommendations, City of Asheboro – Asheboro Wastewater Treatment Plant, NPDES Permit Number NC0026123, Randolph County."

43. The document attached as Exhibit F is a true and accurate copy of the EPA's 2013 Toxicological Review of 1,4-Dioxane (with Inhalation Update) In Support of Summary Information on the Integrated Risk Information System (IRIS).

44. The document attached as Exhibit G is a true and accurate copy of the EPA's IRIS Chemical Assessment Summary regarding 1,4-dioxane.

45. The document attached as Exhibit H is a true and accurate copy of the EPA's 2017 Technical Fact Sheet regarding 1,4-dioxane.

46. The document attached as Exhibit I is a true and accurate copy of amendments to 15A NCAC 02B .0208 proposed by DWR through the 2023-2025 Triennial Review.

47. The document attached as Exhibit J is a true and accurate copy of EPA document FR 45 (231 Part V): 79318-79379.

48. The document attached as Exhibit K is a true and accurate copy of EPA document FR 51 (185): 33992-34003.

49. The document attached as Exhibit L is a true and accurate copy of the 2018 publicly noticed NPDES permit for Asheboro WWTP.

ISSUES FOR SUMMARY JUDGMENT

I. Whether Petitioners were substantially prejudiced by Respondent's issuance of the Asheboro Permit containing effluent units based on water quality standards for 1,4-dioxane of 0.35 µg/L for water supply waters and of 80 µg/L for Class C waters ("the 1,4-dioxane Water Quality Standard").

II. Given EPA's classification of 1,4-dioxane as a "probable" or "likely" carcinogen, whether 15A NCAC 02B .0208(a)(2)(B) applies to 1,4-dioxane.

III. Assuming *arguendo* that 1,4-dioxane is a "carcinogen" and is therefore regulated under 15A NCAC 02B .0208(a)(2)(B), whether Respondent correctly applied the methods and equations as stated by the plain language of 15A NCAC 02B .0208(a)(2)(B).

IV. Assuming *arguendo* that 1,4-dioxane is a "carcinogen" under 15A NCAC 02B .0208(a)(2)(B), and that Respondent correctly applied the methods and equations as stated by the plain language of 15A NCAC 02B .0208(a)(2)(B), whether Respondent erred in interpreting 15A NCAC 02B .0208(a)(2)(B) to authorize enforcement, through permitting or otherwise, of the 1,4-dioxane Water Quality Standard.

V. Assuming *arguendo* that 1,4-dioxane is a "carcinogen" under 15A NCAC 02B .0208(a)(2)(B), and that Respondent correctly applied the methods and equations as stated by the plain language of 15A NCAC 02B .0208(a)(2)(B), but that Respondent erred in interpreting 15A NCAC 02B .0208(a)(2)(B) to allow enforcement, through permitting or otherwise, of the 1,4-dioxane Water Quality Standard, whether Respondent violated §150B-18, §143-241.(d) or other procedural safeguards afforded by the NC APA.

CONCLUSIONS OF LAW

Preliminary Matters

1. All parties to these consolidated contested cases are properly before the Office of Administrative Hearings and there are no questions as to joinder or misjoinder. The issue of who is a proper party to these consolidated contested case proceedings was resolved by this Tribunal's prior orders, which were not appealed.

Summary Judgment

2. Petitioners and Respondents have filed cross-motions for summary judgment seeking judgment as a matter of law on all claims.

3. A trial court may grant summary judgment "pursuant to a motion made in accordance with [Rule 56 of the North Carolina Rules of Civil Procedure]." N.C. Gen. Stat. § 150B-34(e). "Under Rule 56, summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to … judgment as a matter of law.'" N.C. Dep't of Revenue v. Graybar Elec. Co., Inc., 373 N.C. 382, 387, 838 S.E.2d 627, 630 (2020) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)); *see also* Harrington v. Perry, 103 N.C. App. 376, 378, 406 S.E.2d 1, 2 (1991). Such determinations are based on "the evidence that is presented or available to the agency during the review period." Britthaven, 118 N.C. App. at 382. "Pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials may be considered." Caldwell Mem'l Hosp., Inc. v. N. Carolina Dep't of Health & Hum. Servs., 264 N.C. App. 134, *2 (2019)

4. Based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and other documentary evidence submitted by the parties, the Parties' Joint Stipulations of Undisputed Facts and Documents filed on April 19, 2024, the memoranda filed by the parties and the amici curiae, and the parties' supplemental memoranda filed at the direction of this Tribunal on June 17, 2024, this Tribunal concludes that Petitioners are entitled to summary judgment on each of their claims for the reasons set forth herein.

5. In considering an agency's interpretation of its own regulations, the majority opinion in *Sound Rivers vs. N.C. Dep't of Environmental Quality*, 385 N.C. 1, 891 S.E. 2d 83 (2023) noted that rather than deferring to the agency, the administrative law judge was correct when he engaged in his own plain meaning analysis of the rule and concluded that the agency's interpretation matched the plain meaning of the rule. *Id* at 51. The dissent also noted that an agency interpretation of a rule receives no deference if it is "plainly erroneous or inconsistent with the regulation." *Id* at 13*,* 891 S.E.2d 83, 91 (dissent).

Introduction

6. This case challenges the lawfulness of Respondent's inclusion of the 1,4-dioxane water quality standard through issuance of the Asheboro Permit.

7. In issuing the Asheboro Permit with 1,4-dioxane effluent limitations and conditions pursuant to the 1,4-dioxane water quality standard, Respondent asserts authority under 15A NCAC 02B .0208(a)(2)(B) to calculate, develop, and enforce 1,4-dioxane water quality criteria of 0.35 µg/L applicable to all water supply waters, and of 80 µg/L applicable to all Class C waters (the "Standard"), without engaging in rulemaking.

Calculation of North Carolina Water Quality Standards

8. The General Assembly, in enacting the applicable organic statutes at issue in this dispute, stated its express intent that the EMC "shall adopt rules … [f]or water quality standards … pursuant to G.S. 143-214.1 and G.S. 143-215." N.C. Gen. Stat. § 143B-282(a)(2)(b). The

General Assembly expressly authorized the EMC to "develop and adopt … the [water quality] standards applicable to each … [water] classification … ." N.C. Gen. Stat. § 143-214.1(a)(1); *see also* N.C. Gen. Stat. § 143-215 ("The Commission is authorized and directed to develop, adopt … effluent standards or limitations …."); *see also* N.C. Gen. Stat. § 143B-282(a)(2)b. ("The Environmental Management Commission shall adopt rules [f]or water quality standards … pursuant to G.S. 143.214.1 … .") (emphasis added). Neither the General Assembly, nor the EMC, has delegated to Respondent the authority to independently develop statewide water quality standards of general applicability. *See* N.C. Gen. Stat. §§ 143-214.1, 143-215.1, 143B-282.

9. In revising or adopting new statewide water quality standards through the rulemaking process, the EMC is required to consider, inter alia, "the economic and social costs necessary to achieve the proposed standards, [and] the economic and social benefits of such achievement … ." N.C. Gen. Stat. § 143-214.1(d)(4). Prior to adopting a statewide water quality standard, "the Commission shall give due notice of public hearings regarding water quality … standards in accordance with the requirements of … G.S. 143-214.1 and G.S. 150B-21.2 and … shall consider the provisions of G.S. 143-214.1… before taking final action with respect to the assignment of … any applicable [water quality] standards … ." 15A NCAC 02B .0101. The Commission's adoption of water quality standards is further governed by the N.C. Administrative Procedure Act (NCAPA), including its substantive and procedural requirements. N.C. Gen. Stat. § 143-214.1(e). Neither the EMC, nor the DWR, is exempt from the procedural requirements of the NC APA. N.C. Gen. Stat. §§ 150B-1(c)–(d); Parties' Joint Stipulations of Undisputed Facts and Documents ("Stipulated Facts") ¶ 19. As a result, any rule developed by the EMC and enforced by the EMC or the DWR must comply with the substantive and procedural rulemaking requirements set forth under the NC APA.

Rule 15A NCAC 02B .0208

10. Central to this dispute is 15A NCAC 02B .0208, and more particularly, 15A NCAC 02B .0208(a)(2)(B). Rule 15A NCAC 02B .0208 ("Rule .0208") is described as a "narrative" standard which includes an algorithm (sometimes referred to as a "translator" equation) that prescribes the calculations that DWR must use when determining the maximum concentration of toxic substances that protect human health through various exposure routes. Rule .0208 describes formulae and mathematical methods to use when determining these levels for both non-carcinogens and carcinogens through both water consumption and fish tissue consumption routes. In particular, are the levels calculated according to Rule .0208 criteria to be used in setting enforceable standards or are they enforceable standards simply by being calculated under Rule .0208.

11. More specifically, Rule .0208 provides as follows, in relevant part:

> (a) Toxic Substances: the concentration of toxic substances, either alone or in combination with other wastes, in surface waters shall not render waters injurious to aquatic life or wildlife, recreational activities, or public health, nor shall it impair the waters for any designated uses. Specific standards for toxic substances to protect freshwater and tidal saltwater uses are listed in Rules .0211 and .0220 of this Section, respectively. The narrative standard for toxic substances and numerical standards applicable to all waters shall be interpreted as follows:

(2) The concentration of toxic substances shall not exceed the level necessary to protect human health through exposure routes of fish tissue consumption, water consumption, recreation, or other route identified for the water body. Fish tissue consumption shall include the consumption of shellfish. These concentrations of toxic substances shall be determined as follows:

(A) For noncarcinogens, these concentrations shall be determined using a Reference Dose (RfD) as published by the EPA pursuant to Section 304(a) of the Federal Water Pollution Control Act as amended, a RfD issued by the EPA as listed in the Integrated Risk Information System (IRIS) file or a RfD approved by the Director after consultation with the State Health director. Water quality standards or criteria used to calculate water quality based effluent limitations to protect human health through the different exposure routes shall be determined as follows:

(i) Fish tissue consumption:
WQS = (RfD x RSC) x Body Weight / (FCR x BCF)
where:
WQS = water quality standard or criteria;
RfD = reference dose;
RSC = Relative Source Contribution;
FCR = fish consumption rate (based upon 17.5 gm/person day);
BCF = bioconcentration factor or bioaccumulation factor (BAF), as appropriate;
WCR = water consumption rate (assumed to be two liters per day for adults).

To protect sensitive groups, exposure shall be based on a 10 Kg child drinking one liter of water per day. Standards may also be based on drinking water standards based on the requirements of the Federal Safe Drinking Water Act, 42 U.S.C. 300(f)(g)-1. For noncarcinogens, specific numerical water quality standards have not been included in this Rule because water quality standards to protect aquatic life for all toxic substances for which standards have been considered are more stringent than numerical standards to protect human health from noncarcinogens through consumption of fish. Standards to protect human health from noncarcinogens through water consumption are listed under the water supply classification standards in Rule .0211 of this Section. The equations listed in this Subparagraph shall be used to develop water quality based effluent limitations on a case by case basis for toxic substances that are not presently included in the water quality standards. Alternative FCR values may be used when it is necessary to protect localized populations that may be consuming fish at a higher rate;

(B) For carcinogens, the concentrations of toxic substances shall not result in unacceptable health risks and shall be based on a Carcinogenic Potency Factor (CPF). An unacceptable health risk for cancer shall be more than one case of cancer per one million people exposed (10<-6> risk level). The CPF is a measure of the cancer causing potency of a substance estimated by the upper 95 percent confidence limit of the slope of a straight line calculated by the Linearized Multistage Model or other appropriate model according to EPA Guidelines, FR 51(185): 33992

34003; and FR 45 (231 Part V): 79318 79379. Water quality standards or criteria for water quality based effluent limitations shall be calculated using the procedures given in this Part and in Part (A) of this Subparagraph. Standards to protect human health from carcinogens through water consumption are listed under the water supply classification standards in Rules .0212, .0214,.0215, .0216, and .0218 of this Section. Standards to protect human health from carcinogens through the consumption of fish (and shellfish) only shall be applicable to all waters as follows:

(i) Aldrin: 0.05 ng/l;
(ii) Arsenic: 10 ug/l;
(iii) Benzene: 51 ug/l;
(iv) Carbon tetrachloride: 1.6 ug/l;
(v) Chlordane: 0.8 ng/l;
(vi) DDT: 0.2 ng/l;
(vii) Dieldrin: 0.05 ng/l;
(viii) Dioxin: 0.000005 ng/l;
(ix) Heptachlor: 0.08 ng/l;
(x) Hexachlorobutadiene: 18 ug/l;
(xi) Polychlorinated biphenyls (total of all identified PCBs and congeners): 0.064 ng/l;
(xii) Polynuclear aromatic hydrocarbons (total of all PAHs): 31.1 ng/l;
(xiii) Tetrachloroethane (1,1,2,2): 4 ug/l;
(xiv) Tetrachloroethylene: 3.3 ug/L;
(xvi) Trichloroethylene: 30 ug/l;
(xvii) Vinyl chloride: 2.4 ug/l.

The values listed in Subparts (i) through (xvii) of this Part may be adjusted by the Commission or its designee on a case by case basis to account for site specific or chemical specific information pertaining to the assumed BCF, FCR, or CPF values or other data.

12. 15 NCAC 02B .0208(a)(2)(B). Rules 15A NCAC 02B .0211, .0212, .0214, .0215, .0216, and .0218 set forth water quality standards as applied to Class C waters (.0211) and water supply waters (.0212, .0214, .0215, .0216, and .0218).

There is no numeric water quality standard for 1,4-dioxane codified in 15A NCAC 02B .0212, .0214, .0215, .0216, .0218 or any other 15A NCAC 02B rule.

I. Whether Petitioners were substantially prejudiced by Respondent's issuance of the Asheboro Permit containing effluent units based on water quality standards for 1,4-dioxane of 0.35 µg/L for water supply waters and of 80 µg/L for Class C waters ("the 1,4-dioxane Water Quality Standard").

13. As a threshold matter, all three Petitioners are "persons aggrieved" under N.C. Gen. Stat. §150B-2. Asheboro received a final permit containing limitations on 1,4-dioxane the authority of which Asheboro disputes. Greensboro is currently subject to a Special Order by Consent that contains limitations on 1,4-dioxane, has received a draft permit containing

limitations as well as has received a Notice of Violation (NOV) for discharging 1,4-dioxane. Similarly, Reidsville has received a draft permit containing limitations on 1,4-dioxane and received a NOV for discharging 1,4-dioxane. Respondent has made attempts to negotiate an SOC with Reidsville. The inclusion of the 1,4-dioxane water quality standard in the Asheboro Permit coupled with statements made by Respondent in the RIA the Respondent intended to apply the standard to all surface waters of the State meant Greensboro and Reidsville were "directly or indirectly affected substantially …by an administrative decision." N.C. Stat. §150B-2. As a wastewater treatment plant operator for which Respondent has drafted permits and issued NOVs that included limitations that Respondent has now made final in the Asheboro Permit, Greensboro and Reidsville "may be expected to suffer from whatever adverse … consequences…" the issuance of the Asheboro Permit might have. Empire Power v. NCDEHNR, 337 N.C. 569, 589 (1994).

14. For a petitioner to be entitled to relief, a petitioner must allege and prove that an agency has "ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights," and that "the agency has acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule." Britthaven, Inc. v. N.C. Dep't of Hum. Res., 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995).

15. Asheboro was substantially prejudiced by Respondents' inclusion in the Asheboro Permit of 1,4-dioxane limitations and conditions based on the 1,4-dioxane water quality standard. By Respondent's own words, costs of controlling 1,4-dioxane "…are anticipated to be prohibitively expensive for local governments and the citizens served by public utilities." RIA p. 107.

16. Respondent substantially prejudiced the rights of Greensboro and Reidsville by (1) including limitations in draft permits based on the In-stream Threshold Value ("ITV") for 1,4-dioxane, and (2) issuing NOVs to both Petitioners based on alleged discharges of 1,4-dioxane, and (3) in the case of Greensboro, developing and executing a Special Order by Consent that contained 1,4-dioxane limitations, and in the case of Reidsville, seeking to negotiate a SOC for the same. All of these measures implement the 1,4-dioxane water quality standard that Respondent admits, "…are anticipated to be prohibitively expensive for local governments and the citizens served by public utilities." RIA p. 107.

17. This Tribunal concludes that Respondent substantially prejudiced all three Petitioners through the issuance of the Petitioner Asheboro Permit.

II. Respondent erred by applying Rule .0208 to 1,4-dioxane because 1,4-dioxane is not a carcinogen.

18. Respondent argues that when Rule .0208 states "For carcinogens,…" it should be interpreted to include not just carcinogens, but also likely carcinogens and probable carcinogens.

19. The plain language of Rule .0208 limits applicability to carcinogens. Expanding the applicability of the rule to include compounds classified as qualified carcinogens (e.g., "probably" or "possibly") as Respondent's interpretation would, leads to absurd results. If qualified levels of carcinogenicity were included, there would be no cognizable means to

limit applicability. EPA's classification system referenced in Rule .0208 itself includes the classifications "probably carcinogenic," "possibly carcinogenic, "not classifiable as to human carcinogenicity," and "evidence of non-carcinogenicity for humans in addition to "carcinogenic."[1] Respondent's interpretation would apply Rule .0208 to compounds in all of these classifications.

20. Respondent argues that 1,4-dioxane is a human carcinogen for purposes of North Carolina's water quality standards because the EMC has promulgated rules for some toxic substances classified by the EPA as probable or likely human carcinogens as "carcinogens" for the purposes of North Carolina's water quality standards, as seen in the following 15A NCAC 02B rules: 15A NCAC 02B .0208(a)(2)(B)(i)-(xvii); 15A NCAC 02B .0212; 15A NCAC 02B .0214; 15A NCAC 02B .0215; 15A NCAC 02B .0216; and, 15A NCAC 02B .0218. Nothing prevents the EMC from establishing water quality standards through rulemaking for compounds with qualified classifications of carcinogenicity. Evidence of this EMC power is Respondent's (unsuccessful for other reasons) attempt to regulate 1,4-dioxane through rule-making. While Respondent is required to use the specific methodology contained in Rule .0208 for carcinogens, it is not bound to do so for compounds with qualified classifications of carcinogenicity (e.g., 1,4-dioxane). This allows the EMC the flexibility to not pursue the CFP *vs* RMD approach, the specific modeling approaches required in the rule (e.g., "EPA Guidelines, FR 51(185): 33992 34003; and FR 45 (231 Part V): 79318 79379.") or to use an increased cancer risk of one in a million as threshold to determine the criteria.[2]

21. Respondent acted arbitrarily and capriciously by applying Rule .0208 to 1,4-dioxane.

III. Assuming *arguendo* that 1,4-dioxane is a "carcinogen" under Rule .0208, the Respondent incorrectly applied the methods and equations required by the plain language of Rule .0208.

22. Rule .0208 requires that Respondent calculate the water quality criteria for carcinogenic compounds using a CPF calculated using the methods described in Rule .0208. That is, the CPF is "estimated by the upper 95 percent confidence limit of the slope of a straight line calculated by the Linearized Multistage Model or other appropriate model according to EPA Guidelines, FR 51(185): 33992-34003; and FR 45 (231 Part V): 79318-79379. Thus, the plain language of Rule .0208 requires that a CPF may only be developed in one of three ways: (1) using the Linearized Multistage Model; (2) based on an "appropriate model" set forth in EPA Guideline FR 51 (185): 33992-34003; or (3) based on an "appropriate model" set forth in EPA Guideline FR 45 (231 Part V): 79318-79379.

23. Respondent acknowledges it did not develop the CPF used to develop the 1,4-dioxane Water Quality Criteria according to (1) the Linearized Multistage Model; (2) an "appropriate model" set forth in EPA Guideline FR 51 (185): 33992-34003; or (3) according to an "appropriate model" set forth in EPA Guideline FR 45 (231 Part V): 79318-

[1] While not directly relevant here, the current EPA classification system includes, in addition to carcinogenic, "likely to be carcinogenic," "suggestive evidence of carcinogenic potential," "inadequate information to assess carcinogenic potential," and "not likely to be carcinogenic to humans."

[2] The specificity required under Rule .0208 is not surprising given the severe public health impacts of known carcinogens.

79379. Joint Stipulations at ¶¶ 10–11. Instead, Respondent concedes it relied exclusively on 2013 IRIS to find the CPF it used to calculate the Water Quality Standard. Joint Stipulations at ¶ 11.

24. As discussed supra, Respondent is free to use methods other than those prescribed in Rule .0208 when developing water quality standards for compounds with qualified carcinogenicity. Respondent demonstrated this by using other methods as part of Respondent's attempted rule-making to promulgate a water quality standard for 1,4-dioxane. Only when the compound to be regulated is classified as a carcinogen must the procedure in Rule .0208 be followed.

25. Respondent acted arbitrarily and capriciously by failing to follow the mandatory requirements clearly prescribed in Rule .0208.

IV. Assuming *arguendo* that 1,4-dioxane is a "carcinogen" under Rule .0208, and that Respondent correctly applied the methods and equations as stated by the plain language of Rule .0208, Respondent erred in interpreting Rule .0208 to authorize enforcement, through permitting or otherwise, of the 1,4-dioxane Water Quality Standard.

26. Respondent argues that Rule .0208 is a duly promulgated rule of general applicability. Respondent's position is that the rule prescribes the method used to develop a water quality criterion but that the rule is also an enforceable statewide water quality standard of general applicability. (Parties' Joint Stipulations of Undisputed Facts and Documents at ¶3)

27. The plain language of Rule .0208 prescribes the method of calculating the criterion that, in the case of carcinogens, protects the water quality method for North Carolina. As noted above Respondent admits to not following the prescribed procedure.

28. After the proper calculation of the water quality criterion additional steps are necessary to make the calculated value enforceable. For carcinogens, Rule .0208 contains the following directly after the algorithm

> "Water quality standards or criteria for water quality based effluent limitations shall be calculated using the procedures given in this Part and in Part (A) of this Subparagraph. Standards to protect human health *from carcinogens* through water consumption are listed under the water supply classification standards in Rules .0212, .0214,.0215, .0216, and .0218 of this Section." [Emphasis added.]

29. Petitioner argues that Rule .0208 requires any criterion derived from the algorithm quoted immediately above be added as a standard, through rule-making, to the listed rules corresponding to the various water quality use classifications listed in those five rules. Respondent argues that the statement is merely an historical note. Respondent's reading is erroneous and leads to nonsensical results.

30. Respondent's reading is that Rule .0208 is self-implementing by creating a standard upon calculation using the algorithm given in the rule.

31. Dispositive proof of Respondent's position that Rule .0208 is self-implementing can be found in Respondent's RIA submitted as part of its unsuccessful rule-making attempt to promulgate water quality standards for 1,4-dioxane in 15A NCAC 02B ,0212, .0214, .0215,

.0216, and .0218 pursuant to the NC APA (again, despite arguing here no such NC APA-compliant rule-making is needed). One of the requirements under the NC APA is that Respondent provide a fiscal analysis of a proposed rule.[3] Respondent discussed the fiscal analysis in the RIA explaining that the proposed rule would not provide new health benefits nor impose new costs because 1,4-dioxane was already being regulated through permits so that the benefits and costs were already part of the "regulatory baseline." The RIA makes clear that not all permits that will eventually contain 1,4-dioxane limits have been issued. Nevertheless, Respondent explains, "there should not be additional costs to existing or *future* …permittees" [*emphasis added*]. RIA at pp. 106-107.

32. Despite Respondent's assertion that the costs incurred by even unnamed future permittees are already in the "regulatory baseline," Respondent does admit "…it is worth acknowledging that the *ongoing* costs…are likely to be considerable." [Emphasis in original] It is impossible to comprehend how future permittees are incurring ongoing costs. Instead, those future costs cannot be part of the regulatory baseline.

33. While Respondent's construction of the "regulatory baseline" relies on a self-implementing rule, the plain language of Rule .0208 does not support it. Nevertheless, it is instructive to describe how such a mechanism would work and the absurd results it would lead to.

34. One of the myriad problems with Respondent's interpretation is the *ad libitum* nature of this interpretation. Under Respondent' interpretation, water quality standards spring into existence *whenever* "sufficient information is available." Respondent's Memorandum in Support of its Motion for Summary Judgement at page 15 ("As required by EPA, the EMC made mandatory the application of the translator procedure when sufficient information was available.") A review of the filings in this case reveals that when applying Respondent's interpretation of Rule .0208 even Respondent cannot identify when the 1,4-dioxane standard sprang into effect.

    1997 –Respondent, in response to Interrogatory No. 26 stated based on a March 1, 1997 EPA IRIS publication, that included a CPF of 0.01, the "numeric criteria" calculated using the equations in Rule .0208 would be 3.48 ug/l.

    2010 – In Respondent's 2022 Regulatory Impact Analysis for the Triennial Review for Surface water Standards, the Respondent stated that ITVs (i.e., standards) for 1,4-dioxane have been "in place since about 2010," referring directly to the 2010 IRIS document.

    2013–In Respondent's Memorandum in Support of its Motion for Summary Judgment, Respondent states, "[o]nce the CPF [contained in the 2013 IRIS] and the BCF were published by the EPA , all the required inputs to the translator procedure were known" Respondent's Memorandum in support of its Motion for Summary Judgement at page 2.

    2016 – Interrogatory 19 asked Respondent to "Identify the specific date on which DEQ/DWR established the 1,4-dioxane in stream target value of 0.35 µg/L under 15A

[3] Respondent is subject to a separate requirement under N.C. Gen. Stat. § 143-215.1(d)(1) to provide social and economic costs of a new or amended water quality standard. The RIA does not mention this requirement.

NCAC 02B .0208." The response demonstrates the folly of Respondent's interpretation of Rule .0208. "Respondent objects that DWR did not 'establish' a 1,4-dioxane in stream value of 0.35 ug/L under 15A NCAC .0208. The derived numeric standard for 1,4-dioxane is calculated using the narrative standard and translator mechanism contained in 15A NCAC .0208(a)(2)(B). The 0.35 µg/L derived numeric value is, in part, based on information from EPA's Toxicological Review of 1,4-dioxane (IRIS 2013). This same carcinogenic potency factor was contained in the EPA's IRIS Toxicological Review of 1,4-dioxane (Final Report, 2010). Subject to and without waiving this objection, the earliest date at which use of 15A NCAC 02B .0208's translator procedure would have resulted in a value of 0.35 µg/L for 1,4-dioxane is approximately 2010. *Responding further, the earliest that any current employee of Respondent became aware of Respondent's calculation of the 1,4-dioxane derived numeric criteria of 0.35 µg/L for water supply waters was approximately 2016*." (*emphasis added*)[4]

2013-2015 – In the Review Fact Sheet, Asheboro Permit at page 7, Respondent states that the study of 1,4-dioxane in the Cape Fear River Basin occurred "during the EPA Third Unregulated Contaminant Monitoring Rule Sampling Program from 2013-2015."

Respondent is unable to establish when the 1,4-dioxane Water Quality Standard took effect. Initially, it asserted that the 1,4-dioxane standard has been "in place since about 2010," but later claim that current employees only became aware of its existence in 2016."

35. Having admitted to not knowing when the 1,4-dioxane standard came into effect, Respondent also leaves open the question of who makes the determination and with what information. It claims it did not establish the 1,4-dioxane standard. Response to Interrogatory 19. ("Respondent objects that DWR did not 'establish' a 1,4-dioxane in stream value of 0.35 ug/L under 15A NCAC .0208. The derived numeric standard for 1,4-dioxane is calculated using the narrative standard and translator mechanism contained in 15A NCAC .0208(a)(2)(B).") The use of the passive voice in the second sentence provides that no person calculated the standard. Respondent's interpretation is that the regulation calculated the standard.[5] Respondent further addresses the question of who establishes the standard in its Memorandum in Support of its Motion for Summary Judgment. In that document, Respondent stated "With this information, [referring to the 2013 IRIS] *any person* can use the translator procedure to arrive at the same value–0.35 µg/L. This value is frequently called the instream target value, or ITV, and is the derived numeric water

[4] Respondent explains that "current" employees "became aware" of the standard no earlier than 2016 despite all of the requisite information existing in "approximately 2010." Rule .0208 cannot be interpreted to allow for the establishment of a standard of compliance which will be prohibitively expensive only when "current" employees of Respondent become "aware" of the standard.

[5] The statement that Respondent did not establish a 1,4-dioxane water quality standard is contradicted in Respondent's Memorandum in Support of its Motion for Summary Judgment at page 15 that states "As relevant here, using the translator procedure adopted by the EMC in 15A NCAC 02B .0208(a)(2), DWR calculated the derived numeric water quality criteria for 1,4-dioxane. Ventaloro Aff. ¶¶ 12-14; 15A NCAC 02B .0208(a)(2)." Either Respondent contradicts itself or Respondent is attempting to make a distinction between "establishing" and "calculating" the 1,4 dioxane standard.

quality criterion [6] " [*emphasis added*] Whether Rule .0208 calculated the standard itself, or whether it left open the possibility for it to be calculated by any person, the remaining question is when is information "sufficient" for the standard to be so calculated. Because Respondent does not define who turns the algorithmic crank in the rule, it is not clear what level of information is sufficient to allow its turning. Under Respondent's interpretation of Rule .0208, there might be multiple equally valid 1,4-dioxane water quality standards.

36. Respondent's interpretation of Rule .0208 is that it is self-implementing such that an enforceable standard springs into being whenever "anyone" has "sufficient information" to perform the calculation contained in the regulation (and assuming those prescribed calculations are actually followed).

37. Finally, Respondent's interpretation of a self-implementing Rule .0208 contradicts the statutory requirement that new and revised standards must be evaluated as outlined in N.C. Gen. Stat. § 143-214.1(d)(4), which provides as follows:

> (4) In revising existing or adopting new water quality classifications or standards, the Commission shall consider the use and value of State waters for public water supply, propagation of fish and wildlife, recreation, agriculture, industrial and other purposes, use and value for navigation, and shall take into consideration, among other things, an estimate as prepared under section 305(b)(1) of the Federal Water Pollution Control Act amendments of 1972 of the environmental impact, the economic and social costs necessary to achieve the proposed standards, the economic and social benefits of such achievement and an estimate of the date of such achievement.

38. Respondent invites this Tribunal to believe that when the EMC adopted Rule .0208 in 1989, it established standards for all future carcinogenic (including, probably, possibly and any other classification of carcinogenicity) compounds—including those like 1,4-dioxane that were not known to be relevant in 1989. These unknown standards, according to Respondent, simply remained dormant until 'sufficient information' became available, at which point either the Rule .0208 equation calculated the standard, or any person did so. Further, under Respondents' interpretation, these new or revised standards are not considered new or revised standards under N.C. Gen. Stat. §143-214.1(d)(4). This Tribunal declines the invitation.

39. Respondent's interpretation of Rule .0208 unfortunately serves to obfuscate, the environmental and public health benefits, as well as, in the "prohibitively expensive" costs of compliance "for local governments and the citizens served by public utilities."

40. Respondent's interpretation that Rule .0208 standards spring into life at some unknown time stands in stark contrast to the purpose of the rulemaking process, that is to provide the regulated community with notice of when a new requirement will come into effect. Just a few examples include N.C. Gen. Stat. § 20-308.17, that mandates that a copy of new rules must be mailed to each motor vehicle dealer licensee and captive finance source 30 days prior to the effective date of such rules. Similarly, N.C. Gen. Stat. § 20-302 requires that the Department of Transportation Commissioner make a copy of new rules and regulations

[6] Respondent uses "standard" and "criterion" interchangeably (*See* RIA p. 95).

available on an agency-maintained website 30 days before they become effective. Additionally, N.C. Gen. Stat. §§ 77-77 and 77-87 emphasize the importance of public notification. These statutes state that the publication and filing of regulations are for informational purposes and are prerequisites to their validity, provided that the public has been notified about the substance of the rules and that a copy of the text is available to any affected person. Respondent's interpretation lacks the finality, notice and certainty of North Carolina's rule-making process.

41. Respondent's interpretation of Rule .0208 provides that in 1989 the EMC enacted a rule that established water quality standards for unknown and unspecified compounds of unlimited number, like 1,4-dioxane, that would spontaneously impose "prohibitively expensive" costs for compliance without affording the citizens of North Carolina the protections of the NC APA and N.C. Gen. Stat. §143-215.1(d). This is not just an instance of hiding an elephant in a mouse hole, this is the hiding of a parade of elephants in a mouse hole. This interpretation is the very definition of arbitrary and capricious.

42. The alternative interpretation of Rule .0208 advanced by Petitioners is that the rule provides notice to all parties that, for carcinogenic contaminants, the criterion level necessary to protect the water quality use (*i.e.*, narrative standard) will be calculated using the agreed upon methodology contained in the Rule .0208. Once Respondent calculates the value using the algorithm equation in Rule .0208, the agency proceeds to rule-making to incorporate the value as a standard for each of the water quality classifications under 15A NCAC 02B .0212, .0214, .0215, .0216, .0218 The EMC, the rule-making body, then proceeds to provide notice, along with all other required analysis under the NC APA including the social and economic cost analysis required under N.C. Gen. Stat. §143-215.1, solicits comments from the public. After considering those comments, the EMC establishes an enforceable standard with an known effective date. Respondent's interpretation is the antithesis of this process and results in regulatory chaos.

43. Respondent's interpretation and implementation of Rule .0208 is erroneous, contrary to law, and inconsistent with the plain language of the rule.

V. Assuming *arguendo* that 1,4-dioxane is a "carcinogen" under the Rule .0208, and that Respondent correctly applied the methods and equations as stated plainly in Rule .0208, Respondent erred in interpreting Rule .0208 to authorize enforcement, through permitting or otherwise, of the 1,4-dioxane Water Quality Standard for 1,4-dioxane without the rule-making process under the North Carolina Administrative Procedure Act.

44. The purpose of the NC APA is to "establish[] a uniform system of administrative rule-making and adjudicatory procedures for agencies." N.C. Gen. Stat. § 150B-1(a); N.C. Dep't of Env't Quality v. N.C. Farm Bureau Fed'n, Inc., 291 N.C. App. 188, 192, 895 S.E.2d 437, 441 (2023) (citation omitted).

45. The NC APA confers procedural rights to those individuals and entities to whom the NC APA applies. N.C. Gen. Stat. § 150B-1(b). Since an administrative agency is vested with powers both quasi-judicial and quasi-legislative, such procedural safeguards are essential. Rate Bureau, 300 N.C. at 409.

46. The NC APA defines a "rule" as "[a]ny agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly ... ." N.C. Gen. Stat. § 150B-2(8a). As a result, this Tribunal must determine whether the Water Quality Standard is (1) an agency regulation, standard, or statement; (2) of general applicability; that (3) implements or interprets an enactment of the General Assembly.

47. It is undisputed that the Water Quality Standard is an agency standard and an agency statement of general applicability. Parties' Joint Stipulations of Undisputed Facts and Documents at ¶ 3; Petitioners' Exhibit List (May 24, 2024), Exhibit 2 at Int. Nos. 22–24.

48. Because the Water Quality Standard is a "standard" under the NC APA, this Tribunal need not determine whether the Water Quality Standard is also a "regulation" or "statement." Farm Bureau, 291 N.C. App. at 194. An agency action only needs to be one of the three to satisfy N.C. Gen. Stat. § 150B-2(8a).

49. Respondent concedes that the Water Quality Standard is "being considered for all publicly owned treatment works with a major NPDES permit and all publicly owned treatment works with a minor NPDES permit and a pretreatment program … ." Petitioners' Exhibit List (May 24, 2024), Exhibit 2 at Int. No. 22.

50. Respondent further admits that it does not intend to enforce the Water Quality Standard on an ad hoc or case-by-case basis, and that it has identified at least "five municipal dischargers who will likely receive 1,4-dioxane limits in their NPDES permits [based on the Water Quality Standard]: Asheboro, Reidsville, Greensboro, Burlington South, and High Point East." Petitioners' Exhibit List (May 24, 2024), Exhibit 1 at RFA No. 24.

51. Accordingly, and based on Respondent's own undisputed admissions, this Tribunal finds that the Water Quality Standard is generally applicable for purposes of the NC APA.

52. Respondent acknowledges that it adopted the Water Quality Standard pursuant to the provisions set forth in statutes adopted by the General Assembly. Petitioners' Exhibit List (May 24, 2024), Exhibit 2 at Int. No. 20.

53. Accordingly, this Tribunal concludes that Respondent intended to adopt and enforce the Water Quality Standard for the purpose of implementing or interpreting an enactment of the General Assembly.

54. Based on the foregoing, it is concluded that the Water Quality Standard constitutes a substantive condition that is an agency standard, which implements an enactment of the General Assembly. It is finally concluded that the Water Quality Standard under review is generally applicable, and therefore, meets the statutory definition of a "rule" under the NC APA.

55. By attempting to enforce the 1,4 dioxane Water Quality Standard Respondent arbitrarily and capriciously violated the NC APA and N.C. Gen. Stat. § 143-214.1(d)(4).

FINAL DECISION AND ORDER

1. This Tribunal **GRANTS** Petitioners' motion for summary judgment and **DENIES** Respondent's motion for summary judgment because Respondent:

a acted erroneously, failed to act as required by law or rule, and acted arbitrarily and capriciously by considering 1,4-dioxane as a "carcinogen" for the purposes of 15A NCAC 02B .0208(a)(2)(B);

b acted erroneously, failed to act as required by law or rule, and acted arbitrarily and capriciously failing to comply with the plain language of 15A NCAC 02B .0208(a)(2)(B) in calculating the Water Quality Criterion for 1,4-dioxane.

c acted erroneously, failed to act as required by law or rule, and acted arbitrarily and capriciously in interpreting 15A NCAC 02B .0208(a)(2)(B) to authorize the establishment of an enforceable 1,4-dioxane Water Quality Standard.

d acted erroneously, failed to act as required by law or rule, and acted arbitrarily and capriciously when it violated the NC APA and N.C. Gen. Stat. § 143-214.1(d)(4) by including the 1,4-dioxane Water Quality Standard in Asheboro's Permit.

2. It is further ordered that Asheboro's Permit, Part II. Section B, General Condition 7 ("severability"), the 1,4-dioxane effluent discharge limitations is **VOID AND UNENFORCEABLE.** All other conditions remain enforceable.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of N.C. Gen Stat. § 150B-45, any party wishing to appeal this Final Decision must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the Final Decision was filed.

The appealing party must file the Petition for Judicial Review within 30 days after being served with a written copy of this Final Decision. This Final Decision was served on the parties as indicated by the attached Certificate of Service pursuant to 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. Gen. Stat § 1A-1, Article 2.

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition for Judicial Review and requires service of that Petition on all parties. Under N.C. Gen. Stat. § 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 30 days of receipt of the Petition for Judicial Review. The appealing party must send a copy of the Petition for Judicial Review to the Office of Administrative Hearings at the time the appeal is filed.

STAY OF FINAL DECISION

This Final Decision remains in effect until the person aggrieved moves the reviewing Court for a Stay of the Final Decision and the reviewing Court grants the Stay pursuant to N.C. Gen. Stat. § 150B-48.

IT IS SO ORDERED.

This the 12th day of September, 2024.

Donald R van der Vaart
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 N.C. Admin. Code 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center which will subsequently place the foregoing document into an official depository of the United States Postal Service.

Elizabeth C. Stephens
Cranfill Sumner LLP
estephens@cshlaw.com
Attorney For Petitioner

Robert El-Jaouhari
Cranfill Sumner LLP
rjaouhari@cshlaw.com
Attorney For Petitioner

Brenda Menard
NC Attorney General's Office
bmenard@ncdoj.gov
Attorney For Respondent

Francisco Joseph Benzoni
North Carolina Department of Justice
fbenzoni@ncdoj.gov
Attorney For Respondent

Rachel Gail Posey
North Carolina Department of Justice
rposey@ncdoj.gov
Attorney For Respondent

Taylor Hampton Crabtree
North Carolina Department of Justice
tcrabtree@ncdoj.gov
Attorney For Respondent

Sean Michael Sullivan
Williams Mullen
ssullivan@williamsmullen.com
Attorney for Respondent-Intervenor

This the 12th day of September, 2024.

Julie B. Eddins
Paralegal
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850