STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV032664-910

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER QUALITY,

Petitioner,

v.

CITY OF ASHEBORO, CITY OF GREENSBORO, and CITY OF REIDSVILLE,

Respondents.

ORDER

THIS MATTER coming on to be heard by the undersigned Superior Court Judge upon Petitioner's Petition for Judicial Review, pursuant to N.C.G.S. § 150B-43, filed 11 October 2024. After considering the filings and the matters contained therein, briefs and arguments of counsel and having reviewed the record proper and court file, the Court grants Petitioner's petition for judicial review, reverses the decision of the Office of Administrative Hearings ("OAH") and enters summary judgment accordingly for Petitioner.

Petitioner is a division of the North Carolina Department of Environmental Quality—the state agency that is authorized to implement and enforce North Carolina's statutes and rules for the protection of water quality. The United States Environmental Protection Agency ("EPA") delegated Petitioner the authority to issue National Pollutant Discharge Elimination System ("NPDES") permits pursuant to

the Clean Water Act ("CWA") through the Environmental Management Commission ("EMC"). 15A N.C. Admin. Code 2H .0107, .0112. Additionally, the North Carolina General Assembly conferred Petitioner with the necessary authority to administer a complete water program, which includes the federal NPDES permits, and intended "that the powers and duties of the Environmental Management Commission ("EMC") and Department of Environmental Quality be construed so as to enable the Department and Commission to qualify to administer federally mandated programs of environmental management[.]" N.C.G.S. § 143-211(c).

On 21 August 2023, Petitioner issued a final permit for the Asheboro Wastewater Treatment Plant ("Asheboro Permit") which included monthly average and daily maximum limits for 1,4-dioxane and a five-year compliance schedule to allow City of Asheboro ("Asheboro") to meet the final 1,4-dioxane limits. Respondents contend that Petitioner exceeded its statutory and regulatory authority by imposing a 1,4-dioxane water quality-based effluent limit ("WQBEL") in Asheboro's NPDES permit without an underlying 1,4-dioxane water quality standard. Respondents argue Petitioner circumvented North Carolina law by implementing the WQBEL without adhering to the proper rulemaking process required to adopt and implement water quality standards. On 19 September 2023, Asheboro filed a Petition for a Contested Case Hearing in OAH, case number 23 EHR 04121, challenging the 1,4-dioxane conditions in the Permit. On 28 November 2023, the City of Greensboro ("Greensboro") and City of Reidsville ("Reidsville"), both as upstream dischargers of 1,4-dioxane intervened. On 5 January 2024 the parties filed cross-motions for

summary judgment; however, on 5 February 2024, Asheboro filed a voluntary dismissal pursuant to Rule 41 of the North Carolina Rules of Civil Procedure.

On 8 March 2024, Asheboro refiled its Petition for Contested Case Hearing, 24 EHR 00862 ("Second Contested Case"). On 21 March 2024, Greensboro and Reidsville again intervened. On 12 September 2024, Administrative Law Judge Donald R van der Vaart issued a Final Decision Order Granting Summary Judgment in favor of Respondents. Petitioner appealed.

In cases appealed from administrative tribunals, this Court reviews questions of law de novo and questions of fact under the whole record test. *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386 (2006); N.C.G.S. § 150B-51(c). "When the trial court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *N.C. Dep't of Env't & Nat. Res. V. Carroll*, 358 N.C. 649, 662 (2004). Here, the ALJ decided the underlying case on summary judgement, therefore, a de novo standard of review is applied. *See Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257 (2016). Under a de novo review, the court "consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment." *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 388-89 (1999).

Summary judgment must be granted "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 a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). Further, "In reviewing a final decision allowing judgment on the pleadings or summary judgment, the court

may enter any order allowed by N.C.G.S. § 1A-1, Rule 12(c) or Rule 56." N.C.G.S. § 150B-51(d).

Here, the question is whether the ALJ erred in granting Respondent's motion for summary judgment and determining that Petitioner acted erroneously, failed to act as required by law or rule, and acted arbitrarily and capriciously by: (1) considering 1,4-dioxane as a "carcinogen" for the purposes of 15A NCAC 02B .0208(a)(2)(B); (2) 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; (3) interpreting 15A NCAC 02B .0208(a)(2)(B) to authorize the establishment of an enforceable 1,4-dioxane Water Quality Standard; and (4) violating the NC APA and N.C.G.S. § 143-214.1(d)(4) by including the 1,4-dioxane Water Quality Standard in Asheboro's Permit.

Petitioner did not err when considering 1,4-dioxane as a carcinogen for purposes of 15A NCAC 02B .0208(a)(2)(B). A carcinogen is "a substance or agent causing cancer." Carcinogen, Merriam-Webster, https://www.merriam-webster.com/dictionary/carcinogen (last visited 14 January 2025). The EPA utilizes a classification system for carcinogens, which, based on the toxicological data and weight of the evidence of human carcinogenicity, results in a compound being labeled as: "Human Carcinogen;" "Probable Human Carcinogen;" "Possible Human Carcinogen;" "Not Classifiable as to Human Carcinogenicity;" and "Evidence of Non-Carcinogenicity for Humans." The ALJ interpreted 15A NCAC 02B .0208(a)(2)(B) as incorporating the EPA's defined classification system; however, this is incorrect. "For

carcinogens, the concentration of toxic substances shall not result in unacceptable health risks and shall be based on a Carcinogenic Potency Factor ("CPF")." 15A N.C. Admin. Code 02B .0208(a)(2)(B)(2019) (emphasis added). The term carcinogen, appears in lowercase, indicating a term of general usage rather than a defined term or term of art, such as Carcinogenic Potency Factor, which is capitalized. The EPA Technical Fact Sheet – 1,4-dioxane states "1,4-Dioxane is a likely human carcinogen…" and that "EPA has classified 1,4-dioxane as 'likely to be carcinogenic to humans' by all routes of exposure." U.S. Env't. Prot. Agency, Technical Fact Sheet - 1,4-Dixoane (2017) (citing U.S. Env't. Prot. Agency IRIS (2013). The technical fact sheet did not use the EPA's classification system yet still concluded 1,4-dioxane to be likely carcinogenic to humans. As the term carcinogen appears in its ordinary meaning, Petitioner did not err when considering 1,4-dioxane to be a carcinogen as this interpretation complies both with 15A NCAC 02B .0208(a)(2)(A) and (B) as well as the EPA's classification of the substance.

Likewise, Petitioner did not err by calculating the Water Quality Criterion of 1,4-dioxane as the calculation complied with the statutory guidance provided in 15A NCAC 02B .0208(a)(2)(B). "The CFP 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 U.S. Environmental Protection Agency Guidelines…." 15A N.C. Admin. Code 02B .0208(a)(2)(B)(2019) (emphasis added). Further, the code provides "Water quality standards . . . for water quality-based effluent limitations shall be calculated

using the procedures given in this Part and in Part (A) of this subparagraph." *Id.* The CWA provided three options[1] for generating numeric criteria for water quality; North Carolina adopted a combination of options 2 and 3, while adding a translator mechanism for other carcinogens and threshold chemicals. *See* State Compliance with Clean Water Act Requirements for Adoption of Water Quality Criteria for Toxic Pollutants, 55 Fed. Reg. 14350, 14353 (April 17, 1990). In 1991, the EPA approved North Carolina's regulations for toxic pollutants under the 1987 amendment to section 303(c)(2)(B) of the CWA. 1991 EPA Amendments to Water Quality Standards Regulation, 56 FR 58420, 58462 (Nov. 19, 1991) (to be codified at 40 C.F.R. pt. 131). Petitioner utilized this translator mechanism to calculate the Water Quality Criterion for 1,4-dioxane for the Asheboro Permit, which directly complied with EMC's approved procedures. Therefore, as Petitioner properly employed a mechanism provided by statute, approved by the EPA, and mandated by the EMC, Petitioner did not err when calculating the Water Quality Criterion of 1,4-dioxane in the Asheboro Permit.

This Court concludes that Petitioner acted appropriately in interpreting 15A NCAC 02B .0208(a)(2)(B) to authorize the establishment of Water Quality Standard or criteria for Water Based Effluent Limitations in the Asheboro Permit. The ALJ

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[1] Option 1: A state could adopt "numeric criteria in State water quality standards for all section 307(a) toxic pollutants for which EPA has developed guidance." Option 2: A state could "[a]dopt specific numeric criteria in State water quality standards" for those priority pollutants that are either discharged or expected to be present in the state. Option 3: A state could adopt . . . a translator procedure . . . which would be applied "to narrative water quality standard provision that prohibits toxicity in receiving waters." Such a translator procedure "would be used by the State in calculating derived numeric criteria, which criteria shall be used for all purposes under section 303(c) of the CWA."

determined that Petitioner's use of the translator mechanism to establish a Water Based Effluent Limitation for 1-4, dioxane would produce far reaching implications sufficient to create a new rule. This was not raised by the parties in the underlying action and accordingly was not properly before the court. Nevertheless, the ALJ determined Petitioner to have improperly calculated the value and concluded that Petitioner acted arbitrarily and capriciously in doing so.

15A NCAC 02B .0208 explicitly directs that "[w]ater quality standards or criteria for water quality-based effluent limitations shall be calculated" by the approved options which include the translator mechanism. 15A N.C. Admin. Code 02B .0208(a)(2)(B). This Court finds as a matter of law that Petitioner was not required to resubmit the calculated Water Quality Criterion to the EMC for purposes of rulemaking as Petitioner followed the formula set by the EMC in 15A NCAC 02B .0208(a)(2)(B) and based upon the everyday definition of the term "carcinogen" and the inclusion of toxic substances as carcinogens that have never been categorized as "Human Carcinogen[s]," rather only "likely carcinogenic to humans."

This Court finds that the ALJ erred in finding that Petitioner acted arbitrarily or capriciously when issuing the Asheboro NPDES Permit. To be found acting arbitrarily or capriciously, an agency's action must be "patently in bad faith," or so "whimsical" as to reflect "a lack of fair and careful consideration" or fail to indicate "any course of reasoning and the exercise of judgment." *Mann Media, Inc. v. Randolph County Planning Bd.*, 365 N.C. 1, 16 (2002). Petitioner followed the EMC and EPA protocols in creating the 1,4-dioxane limits and created the criteria for the purpose of

protecting the health and wellbeing of North Carolinians. Compliance with regulations and a desire to maintain or improve public health cannot be said to be a "patently in bad faith" decision. Further, Petitioner, by its own processes of publishing written findings prior to issuing the final permits and providing a full Regulatory Impact Analysis of the proposed criteria, reflects both "fair and careful consideration" of the impacts directly flowing from the Asheboro Permit. Accordingly, this Court finds that Petitioner's actions were not arbitrary or capricious.

Nothing in this order shall be construed to prohibit Greensboro, Reidsville, or future parties subject to NPDES Permits issued by NCDEQ from contesting future NPDES Permits or the water quality standards or criteria for water quality-based effluent limitations calculated pursuant to 15A NCAC 02B .0208 contained in such future permits.

Accordingly, it is therefore ORDERED, ADJUDGED, and DECREED that:

1. Petitioner's petition for judicial review is GRANTED.
2. The Final Decision Order granting summary judgment for Respondents is REVERSED.
3. The Court hereby grants summary judgment for Petitioner; and
4. The stay of the Final Decision Order is moot.

SO ORDERED, this the 5th of February, 2026

Honorable A. Graham Shirley
Superior Court Judge