IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

STATE OF GEORGIA

Columbus Water Works, *Petitioner* v. **Richard Dunn**, Director, Environmental Protection Division, Georgia Department of Natural Resources, *Respondent* and **Chattahoochee Riverkeeper, Inc.,** *Intervenor-Respondent*	**Civil Action File No.: SU-2021-CV-002023** *Appeal from* 2114835-OSAH-BNR-WQC-106-Walker

ORDER

The above-styled case came before the Court upon a Petition for Judicial Review by Columbus Water Works ("Columbus") of an Order on Motions for Summary Determination ("the Order") dated September 14, 2021 by an Administrative Law Judge ("ALJ") of the Office of State Administrative Hearings ("OSAH"). In the Order, the ALJ denied Columbus' Motion for Summary Determination, and granted the Cross-Motion of the same of the Environmental Protection Division, Georgia Department of Natural Resources ("EPD"). The Order thus affirmed EPD's issuance of a permit to Columbus to operate its Combined Sewer Overflow ("CSO") system. Columbus, EPD, and Intervenor-Respondent Chattahoochee Riverkeeper, Inc. ("CRK") submitted briefs to the Court and oral argument was heard via Zoom on March 31, 2022. Having considered the Parties' briefs and arguments, the Administrative Record below, and the applicable law, the Court hereby **DENIES** Columbus' Petition for Judicial Review and **AFFIRMS** the Order of the ALJ.

Factual & Procedural Background

The lengthy administrative record in this case thoroughly explains the legal and procedural framework that brings this case before the Court today. However, for purposes of this Order, the Court has provided a brief summary of its understanding of the history of this case which results in the decision Ordered today.

In the early 1990's, Columbus in conjunction with EPD and associated agencies, worked together to solve an issue with overflow of the Water Works and the effect of same on the health of the Chattahoochee River. Collaboratively, a plan was proposed, approved, and effectuated, resulting in the issuance of a permit for the operation of the Combined Sewer Overflow system in Columbus Georgia at a cost that exceeded $100,000,000.00 (the Long-Term Control Plan, or LTCP). By all accounts, the system has worked without fail since its inception, and has been nationally recognized as a successful CSO, in line with state and federal guidance.

The NPDES permit issued to Columbus for the operation of this CSO is renewed every 5 years and continued administratively should the permitting process take longer. The first Permit was issued to Columbus in 1998, and reissued in 2010. Between those two permits, there were minor, if any, changes in the permitting requirements. However, in 2020, a new permit was issued that imposed a brand new "end-of-pipe" limit on fecal coliform discharges from the CSO into the Chattaoochee River, rather than a midstream measurement as had been included in previous two permits. Columbus asserts that the retrofitting necessary for this change would cost tens of millions of dollars, and, based on past performance, is unnecessary. EPD asserts that all systems and LTCPs are designed and constructed with the understanding that changes to the system may be required over the life of the system, and that this change was necessary to bring

Columbus' CSO into compliance with all applicable federal and state regulations and requirements.

When Counsel for EPD was asked why this change was not made part of the 2010 permit, in light of the 2008 revisions to Total Maximum Daily Loads for this portion of the Chattahoochee, he responded that it was a "mistake." In fact, it is the position of the EPD that this requirement should have been included in the initial plans for the CSO. When further questioned about the fact Columbus acted in good faith in developing plans with EPD and other agencies and that it appeared that EPD was wrong in approving the plans to begin with, at which time the end-of-pipe limit may have been more economically included in the plans, it was simply brushed off as a mistake. It is a mistake that may now be costing the utility tens of millions of dollars. The Court finds this more than a little bit concerning.

However, the issue before this court is a review of the order from the ALJ. In that order, she affirmed the issuance of the permit as promulgated by the EPD by granting Summary Determination to EPD as to all counts and denying the same to Columbus. Over the life of Columbus' appeal to the ALJ, certain counts and arguments were dropped, and ultimately, the only Count that was brought before the ALJ on Summary Determination was the end-of-pipe limit imposed on fecal coliform. In their filings and at oral argument, the parties agreed that no material facts were in dispute, a threshold requirement to seek summary determination under Office of State Administrative Hearings ("OSAH") Rule 15(1). Ga. Comp. R. & Regs. 616-1-2-.15. In defending its Motion, Columbus assured the ALJ that it "sought summary determination on purely legal grounds. As a result, any disputes of fact do not otherwise impact the relief sought by Columbus in its Motion." (R. at 1387, 2714). When the ALJ twice asked Columbus's

attorney whether material facts were in dispute at the July 14, 2021 oral argument, the answer both times was no. (R. at 4774, 4781).

Superior Court Standard of Review

O.C.G.A. § 50-30-19-(h) states the standard of review of agency decisions. It provides:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> 1. In violation of constitutional or statutory provisions;
> 2. In excess of the statutory authority of the agency;
> 3. Made upon unlawful procedure;
> 4. Affected by other error of law;
> 5. Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> 6. Arbitrary or capricious or characterized by abuse of discretion clearly unwarranted exercise of discretion."

Per this standard, this Court must review the ALJ's findings of fact to determine whether they were clearly erroneous and must review her conclusions of law *de novo*. The clearly erroneous standard of review prevents a *de novo* determination of evidentiary questions, leaving only a determination of whether facts found by the ALJ were supported by any evidence. *Commissioner of Ins. v. Stryker*, 218 Ga. App. 716 (1995).

Under the Administrative Procedure Act ("APA"), the superior court "must accept the factual findings of the [ALJ] if there is any evidence to support them" and must construe the evidence in favor of the decision rendered. *Ga. Power Co. v. Ga. Public Svc. Comm.*, 196 Ga. App. 572 (1990). In reviewing the decision of the superior court under the Appellate Practice Act, the appellate courts do "[not] review whether the record supports the superior court's decision but [rather] whether the record supports the initial decision of the ... administrative agency." *Gwinnett County v. Lake Lanier Ass'n*, 265 Ga. App. 214 (2004), reversed in part on

other grounds and remanded, *Hughey v. Gwinnett County*, 278 Ga. 740 (2004). Absent an application to the court for leave to present additional evidence, appellate review of administrative decisions is limited to the record. *Quarterman v. Edwards*, 169 Ga. App. 300, 312 S.E.2d 643 (1983).

Legal Discussion

In its Petition for Judicial Review, Columbus asserts that the ALJ erred by applying the incorrect standard of review and by resolving the case through summary determination. It argues that there were genuine issues of material fact necessitating an evidentiary hearing. In response, EPD and CRK argue that the ALJ ruled correctly, the case was ripe for summary determination, and Columbus should be barred from relief in this Court under various appellate and equitable principles.

Standard on Summary Determination

Summary determination in an Administrative proceeding is governed by OSAH Rule 15, which provides, in relevant part: "A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination." Ga. Comp. R. & Regs. 616-1-2-.15(1); see generally *Piedmont Healthcare, Inc, v. Ga. Dep't of Human Res.*, 282 Ga. App. 302, 304-05 (2006) (noting summary determination is "similar to summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary determination). Further, pursuant to OSAH Rule 15:

> "When a motion for summary determination is supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by

affidavit or other probative evidence, that there is a genuine issue of material fact for determination."

Ga. Comp. R. & Regs. 616-1-2-.15(3).

Facts necessary for summary determination that are a matter of expert opinion may be resolved on the basis of *uncontroverted* affidavits or testimony of expert opinion. Ga. Comp. R. & Regs. 616-1-2-.15(4) (emphasis added). Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *First Nat. Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968).

Columbus repeatedly cites Ga. Comp. R. & Regs. 616-1-2-.21 ("OSAH R. 21") for the standard of review, which states in relevant part, "In a hearing conducted under this Chapter, the [ALJ] shall make an independent determination on the basis of the competent evidence presented at the hearing." This matter was before the ALJ under OSAH R. 15, which governs summary determination. Ultimately, under either rule, the ALJ was required to review *de novo* the competent evidence presented and the law and to make an independent determination on the merits of the claims before her. Thus, to the extent Columbus relies on OSAH R. 21 for that proposition, that is the correct standard of review. However, to the extent it relies on OSAH R. 21 to imply that a full evidentiary hearing is always required before an ALJ may rule, the mere existence of OSAH R. 15 demonstrates the inaccuracy of that position. *See* Ga. Comp. R. & Regs. 616-1-2-.15; *see also Piedmont Healthcare*, 282 Ga. App. at 305. An ALJ clearly may resolve a case on summary determination, without holding a full evidentiary hearing, assuming summary determination is appropriate.

Columbus incorrectly argues that the ALJ applied the wrong standard of review by improperly resolving genuine issues of material fact, affording EPD deference, and failing to

hold an evidentiary hearing. The record below contradicts Columbus's argument. As discussed in greater detail below, the ALJ was faced with a narrow argument, on which EPD presented evidence that Columbus did not "directly refut[e]." See Ga. Comp. R. & Regs. 616-1-2-.15. The record shows that the ALJ applied the correct standard of review and complied with OSAH R. 15 by relying solely on uncontested facts, analyzing those facts in the context of the relevant law, and reaching a well reasoned decision. In doing so, she did not resolve disputes of fact or afford deference, and thus made her decision within the proper bounds of her authority under OSAH R. 15. See id.

Columbus also argues more broadly that, regardless of the arguments it advanced, there were disputes of fact reflected in the record and the ALJ thus was required to independently review each of those disputes and independently determine whether they had any bearing on the legality of the permit. That is not the ALJ's duty, however. Nothing in Office of State Administrative Hearings's ("OSAH") rules, the Georgia Administrative Procedure Act, or the statutes governing or administered by EPD creates an affirmative duty for an ALJ to seek out and adjudicate claims not advanced by the parties. Cf. Georgia Pacific, LLC v. Fields, 293 Ga. 499, 504 (2013) (noting that a reviewing court may affirm a grant of summary judgment on different grounds than the trial court ruled, "so long as the movant raised the issue in the trial court and the nonmovant had a fair opportunity to respond." (quotation marks and emphasis omitted)).

In sum, this Court concludes that the ALJ was required to review the law and facts de novo, could not resolve genuine issues of material fact or afford deference to the agency, and had no affirmative duty to raise and rule on issues not advanced by the parties. As discussed in greater detail below, the record demonstrates that the ALJ correctly applied this standard.

No Genuine Issues of Material Fact

Columbus argues that the ALJ erred by resolving genuine issues of material fact in favor of EPD. The record contains no such error. The ALJ relied only on undisputed material facts in reaching her conclusions, there were no unresolved issues of material fact prohibiting her from resolving the case on summary determination, and she ruled correctly as a matter of law.

I. The Reasonable Potential Analysis

Columbus's first assertion of error is that there was a genuine issue of material fact concerning whether it had a reasonable potential to cause or contribute to an excursion above applicable water quality standards ("WQSs").A permitting agency must include in a NPDES permit any requirements necessary to ensure compliance with WQSs. See 40 C.F.R. § 122.44(d). To determine whether an additional requirement is necessary, the agency must perform a reasonable potential analysis ("RPA"). See id. at § 122.44(d)(1)(i) (iii).

The ALJ considered the evidence before her and determined that EPD had presented evidence that it followed the RPA process established in § 122.44(d)(1) and that EPD's analysis determined that Columbus had a reasonable potential to cause or contribute to an excursion above the WQS. R. at 4911–4915. That evidence consisted of the permit itself and EPD's sworn affidavits explaining the process it undertook. Id.

Columbus argues that it presented its own evidence to the ALJ that created genuine issues of material fact concerning EPD's RPA. It relies on its experts' analyses that reached different conclusions concerning Columbus's reasonable potential. However, that evidence does not "directly refut[e]" EPD's evidence that it conducted an RPA, and thus did not create a genuine issue of material fact precluding the ALJ from granting summary determination. See Ga. Comp. R. & Regs. 616-1-2-.15(2)(b)(1). While Columbus's experts' analyses potentially could have

created an issue of fact as to whether certain of EPD's conclusions were correct, that was not the issue that was before the ALJ on summary determination.

Instead, Columbus made clear that its challenge was that EPD did not conduct an RPA at all. Now, on appeal, Columbus attempts to revise that position, but the record is replete with examples of Columbus's categorical position that EPD simply did not conduct an RPA. For example, at the hearing before the ALJ, Columbus alleged that EPD had only performed a "categorical reasonable potential analysis," explaining that "[EPD has] decided that CSO facilities always inherently have a reasonable potential to cause a water quality problem, and therefore, CSO facilities always require some type of limit." R. at 4780. When the ALJ pointed out that EPD also reviewed site specific discharges and monitoring data and asked whether the details of that analysis created an issue of material fact, Columbus replied, "I don't think so, Your Honor...." R. at 4780–81.

Later in the hearing, Columbus reemphasized its position, saying, "There is no analysis -- none was done to say this fecal coliform is present at a level that actually threatens the integrity of the water body. That was not done, and they don't claim to have done it if you read the affidavit." R. at 4791(emphasis added); see also R. at 4790 ("Against [Columbus's performance history], we have nothing. ... [All EPD did was] note that there is fecal coliform in the discharge, and we really think it would be better to have an end of pipe limit." (emphasis added)); R. at 4792. ("[EPD] didn't do a real reasonable potential analysis because it didn't think it had to. ... [I]t didn't do the independent work that it would have needed to actually justify this limit. (emphasis added)); R. at 2598 ("Because EPD relied on ... a categorical reasonable potential 'assumption' that is not facility-specific or based on actual data...."); R. at 2794–95 ("Rather, EPD claims that its 'categorical assumption' was sufficient....").

Columbus, who as the petitioner had the right to define its challenge how it chose, made the strategic decision to argue that the flaw in its permit was that EPD did not conduct any RPA. EPD presented evidence, in the form of affidavits and the permit itself indicating that it did perform an RPA meeting all of the legal criteria of § 122.44(d). See R. at 1485–1625. Thus, the ALJ was entitled to rely on the unrefuted fact that EPD conducted an RPA to resolve the challenge Columbus chose to raise. See Ga. Comp. R. & Regs. 616-1-2-.15.
Columbus presented different analyses from its experts that relied on different assumptions and reached different results. See R. at 2191–2233. EPD contended that its analysis was substantively correct. However, in the context of the binary challenge Columbus presented for adjudication, its evidence did not "directly refut[e]" EPD's evidence that it also performed an analysis. See OSAH R. 15.

Columbus also pointed to prior permits that did not contain fecal coliform limits. EPD did not disagree with the fact that those permits did not contain end of pipe limits, but argued that, as a matter of law, it was required to perform an RPA every time it issued a permit, and that when its RPA determined that a permit limit was necessary, it had a legal obligation to impose one, regardless of what may have been done in the past. R. at 2393, 2768. This Court notes that in Oral Argument, EPD acknowledged – for the first time in this proceeding – that it approved the original LTCP, 1998 and 2010 Permits "mistakenly," and now has a legal obligation to correct such mistake. This "mistake," althouth permissible under the law, has the potential to cost Columbus and the ratepayers of Columbus tens of millions of dollars. However, the merits of those prior permits were not the issue before the ALJ, but the permits nevertheless were in the record for her to review to the extent they were informative about the legality of the new permit. R. at 878–921, 923–44. Thus, there was no genuine issue of material fact as to what those

permits said or how they differed from the new permit, and the ALJ did not err as a matter of law in determining that the new permit limit was valid based on the new RPA and the controlling regulations.

Viewing the record as a whole, the ALJ acted within her authority when she looked to EPD's unrefuted evidence that it conducted an analysis, looked to § 122.44(d)(1) to determine whether those unrefuted actions constituted an RPA as a matter of law, and determined that EPD was entitled to summary determination on Columbus's challenge that it did not conduct an RPA.

Certain findings of the ALJ border on determinations of questions of fact, and this Court hesitates in its ruling largely due to the lack of fairness and transparency on the part of EPD.

II. The Total Maximum Daily Load

Columbus's next allegation of error is that there was a genuine issue of material fact as to whether the specific limit EPD imposed was necessary. If a permitting agency conducts an RPA and determines that a facility has a reasonable potential to cause or contribute to a water-quality excursion, then "the permit **must** contain effluent limits for [the relevant] pollutant." 40 C.F.R. § 122.44(d)(1)(iii) (emphasis added). In that scenario, a permitting agency "shall ensure that" the specific limit "is derived from, and complies with all applicable water quality standards; and ... [is] consistent with all assumptions and requirements of any available wasteload allocation...." *Id.* at § 122.44(d)(1)(vii).

Despite Columbus's contention that there was a genuine issue of material fact concerning the precise limit EPD imposed, that rule makes clear that the criteria for assessing a specific permit limit are that it must be derived from and comply with the WQS and be consistent with any available wasteload allocation.[1] *See* 40 C.F.R. 122.44(d)(1)(vii). By setting the standard as

"derived from and compli[ant] with," the law allows permitting agencies flexibility to fashion different limits or even different types of limits as the situation might dictate. *See id.*

In assessing compliance with the standard in § 122.44(d)(1)(vii), the ALJ reviewed the permit limit, the WQS, and the wasteload allocation. R. at 99, 1700, 4911-31; Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(iii)(1). The permit and the wasteload allocation are objective pieces of evidence in the record, and no party disputed their authenticity. *See* R. at 99, 1700. Columbus did challenge the legality of the wasteload allocation in the administrative proceeding, but did not contest the authenticity of the document containing the wasteload allocation. R. at 1872–75. Importantly, because the rule requires that the limit be "derived from" the WQS, but merely "consistent with" the wasteload allocation, a determination that the wasteload allocation was illegal would not have rendered the permit limit invalid based on its mere consistency with that wasteload allocation. See 40 C.F.R. § 122.44(d)(1)(vii)(B). Accordingly, this Court need not assess the legality of the wasteload allocation here, nor review the ALJ's conclusions on that matter.

The WQS is a properly promulgated rule. Ga. Comp. R. & Regs. 391-3-6-.03(6)(c)(iii)(1). The ALJ had before her EPD's unrefuted evidence that it looked to the WQS in setting the permit limit, in the form of its affidavits. R. at 1528. From Columbus, she had the **legal** argument that the permit limit did not comply with the WQS because it was overly stringent. *See* R. at 2799. Thus, there was not a genuine issue of **fact** as to whether the specific permit limit was derived from the WQS. Instead, there was a dispute of law as to whether it complied with the WQS. That legal determination—whether an uncontroverted fact complied with a promulgated rule—was ripe for summary determination, and the ALJ did not err as a matter of law in her analysis.

III. Compliance with the Clean Water Act and the CSO Control Policy

Columbus argues that there was a genuine issue of material fact concerning whether the permit violated the CSO Control Policy. As an initial matter, whether an agency decision violated a law is a pure question of law. Moreover, the ALJ did not err in concluding that the permit here did not violate the CSO Control Policy.

Columbus's assertion of error stems from the permit's inclusion of an end of pipe fecal coliform limit that was not included in the LTCP. However, the fact that those documents were inconsistent with each other does not mean that either was inconsistent with the CSO Control Policy. The CSO Control Policy contemplates changes to facilities' controls after the approval of an LTCP, noting that "controls should be designed to allow cost effective expansion or cost effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS, including existing and designated uses." 59 Fed. Reg. 18688, 18691 (Apr. 19, 1994).

There is no dispute between the Parties that the LTCP was properly developed and approved. The record reflects no dispute that, in the years after its implementation, the LTCP functioned as it was initially designed to in governing discharges from Columbus's CSO system. Nevertheless, the law requires EPD to look to more than Columbus's conformance with its LTCP alone when considering Columbus's permit. See 40 C.F.R. § 122.44(d)(1) (requiring effluent limitations where a facility's discharges have a reasonable potential to cause "or contribute to an excursion" (emphasis added)). The CSO Control Policy requires an LTCP to be designed to adjust based on later determinations that additional controls are necessary and anticipates that CSO permits may require effluent limits under § 122.44. 59 Fed. Reg. at 18691, 18696. In light of all of this, differences between the LTCP and the new permit do not indicate that either was wrong or violated the CSO Control Policy. Instead, they merely indicate that

circumstances changed, as the law specifically anticipates they might. Further, nothing in the record indicates that the ALJ erred in determining that EPD handled that situation in compliance with the law. Therefore, the ALJ did not err in granting summary determination to EPD because the permit did not violate the CSO Control Policy.

Accordingly, the ALJ did not err in granting summary determination in favor of EPD as there were no genuine issues of material fact as to Columbus's claims and EPD was entitled to judgment as a matter of law on all issues presented. See Ga. Comp. R. & Regs. 616-1-2-.15.

CONCLUSION

EPD's arguments throughout this proceeding have been inconsistent at best. This Court is very aware of, and concerned with, the fact that the changes now being required apparently should have been a requirement of the LTCP from the beginning. The Court is aware that the "mistake" of the EPD in not requiring Columbus to have an EOP mechanism in place from the start will cost Columbus, and its ratepayers, a significant amount of money. To state that any LTCP should be designed with the ability to be modified should the need arise is disingenuous at best when they should not have been allowed to proceed under the option that they chose, again, based on the "mistake" of the EPD. Finally, the Court is of the opinion that the ALJ did not have this information in front of her when she made her determination. Whether or not it would have made a difference is not clear. However, this Court is limited in its consideration to only the record as it came up from the Office of State Administrative Hearings. As charged under the law, this Court is constrained to find that the ALJ did not err in granting summary determination to EPD. Accordingly, Columbus's Petition for Judicial Review is hereby **DENIED**, and the ALJ's decision is **AFFIRMED**.

SO ORDERED, this 27th day of April, 2022.

Hon. Maureen C. Gottfried
Superior Court of Muscogee County
Chattahoochee Judicial Circuit

CERTIFICATE OF SERVICE

I, C. Tristan Danley, Law Clerk, hereby certify upon signature on this day that I promptly Filed the original foregoing ORDER in Civil Action File No. **SU-2021-CV-002023** with the Muscogee County Clerk of Superior Court, and served copies of the same to the recipients listed below:

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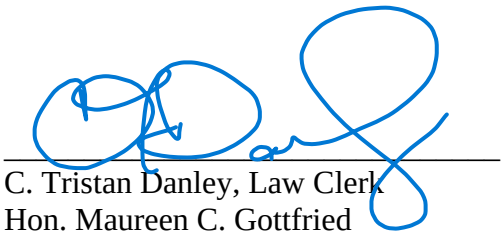
This 27th day of April, 2022.



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