

FILED

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
Case No. 23 EHR 04121

2023 SEP 26 PM 4:11

OFFICE OF ADMIN HEARINGS

City of Asheboro, North Carolina,

Petitioner,

v.

North Carolina Department of
Environmental Quality, Division
of Water Resources,

Respondent.

MOTION TO INTERVENE

NOW COMES the City of Reidsville (“Reidsville”), by and through undersigned counsel, pursuant to N.C. Gen. Stat. § 150B-23(d) and 26 NCAC 03 .0117, and pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a) or in the alternative N.C. Gen. Stat. § 1A-1, Rule 24(b), and hereby moves the Court to allow it to intervene as a petitioner in this action with all the rights of a party, or to the extent otherwise deemed appropriate by the Administrative Law Judge. In support of its Motion, Reidsville shows the Court as follows:

STATEMENT OF THE CASE

This litigation results from the North Carolina Department of Environmental Quality’s (“DEQ”) and the North Carolina Environmental Management Commission’s (“EMC”) effort to impose 1,4-dioxane discharge limitations on point-source dischargers statewide—including Reidsville—by unlawfully enforcing a 0.35 µg/L 1,4-dioxane in-stream target value as a water quality standard generally applicable to water supply waters statewide (the “Proposed Standard”). Despite DEQ’s representation of the Proposed Standard as a standard of general applicability, the Proposed Standard was never codified through statute or rulemaking nor was it adopted pursuant to the rulemaking procedures required under North Carolina’s Administrative Procedures Act (“APA”).

In issuing NPDES Permit No. NC0026123 to the City of Asheboro (hereinafter the “Asheboro Permit”), the core upon which the above referenced Contested Case is

based, DEQ now seeks to substitute its misapplication of 15A NCAC 02B .0208 (hereinafter referred to as the “Narrative Standard”) in place of a codified rule in violation of N.C. Gen. Stat. § 150B-18. DEQ lacks the authority to impose the Proposed Standard in the Asheboro Permit, or to enforce a statewide 1,4-dioxane water quality standard of general applicability in the permits of other point-source dischargers, including Reidsville.

Substitution of a misapplied regulation in place of a clear statutory mandate is impermissible, and in this case is also foreclosed by the terms and requirements of the Narrative Standard itself. Because of DEQ and EMC’s historical efforts to force the imposition of the Proposed Standard on Reidsville’s own NPDES permit; the agency’s clear strategy to impose the Proposed Standard as a statewide water quality standard; and the direct and immediate impact this litigation will have on Reidsville’s own NPDES permit, finances, and operations, Reidsville has no choice but to intervene in this Contested Case in order to protect its own interests.

HISTORICAL BACKGROUND AND RESULTANT AGENCY STRATEGY

1. Reidsville is a municipal corporation organized under the laws of the State of North Carolina. Reidsville owns and operates a publicly owned treatment works (“POTW”) within the city. Reidsville’s POTW receives and treats wastewater from residential, commercial, and industrial sources before discharging the treated wastewater into the Haw River pursuant to Reidsville’s National Pollutant Discharge Elimination System (“NPDES”) permit issued by the Department of Environmental Quality. Reidsville’s NPDES permit does not contain 1,4-dioxane effluent limitations.

2. Upon information and belief, since 2019, DEQ and EMC have attempted to impose 1,4-dioxane discharge limitations on Reidsville, despite lacking any regulatory authority to do so. Specifically, DEQ and/or EMC have:

- a. Issued a November 18, 2019, Notice of Violation to Reidsville regarding Reidsville’s alleged 1,4-dioxane discharges, and thereafter sought to negotiate a Special Order by Consent with Reidsville that would have imposed a 1,4-dioxane discharge limitation on Reidsville based on the Proposed Standard despite the lack of any codified 1,4-dioxane water quality standard;
- b. Negotiated with Reidsville for voluntary inclusion of a new 1,4-dioxane effluent limitation in Reidsville’s renewed NPDES permit, which limitation would be based on the Proposed Standard despite the lack of any codified 1,4-dioxane water quality standard;
- c. Attempted to withhold an unrelated Authorization to Construct permit which Reidsville was entitled to receive, unless and until

Reidsville consented to include a 1,4-dioxane discharge limitation in Reidsville's renewed NPDES permit, based on the Proposed Standard despite the lack of any codified 1,4-dioxane water quality standard; and

- d. Engaged in failed rulemaking efforts which—had they succeeded—would have provided DEQ with a basis to enforce the Proposed Standard as a numeric water quality standard codified by rule. DEQ's rulemaking efforts would have codified the Proposed Standard in 15A NCAC 02B .0212, .0214, .0215, .0216, and .0218, as part of EMC's 2020-2022 Triennial Review, and as required by N.C. Gen. Stat. § 150B-18 and 15A NCAC 02B .0208. Throughout these rulemaking efforts, Reidsville actively asserted its rights to engage in the rulemaking under the APA.

3. DEQ's repeated efforts to force Reidsville to accept an unlawful 1,4-dioxane effluent limitation in its NPDES permit based on its Proposed Standard, and to codify the Proposed Standard into rule as required under N.C. Gen. Stat. § 150B-18 and 15A NCAC 02B .0208, were unsuccessful.

4. In light of these failings, DEQ now seeks to impose its Proposed Standard on dischargers, including Reidsville, even though the Proposed Standard has not been adopted as a codified water quality standard of general applicability under the APA's rulemaking procedures.

5. In furtherance of this strategy, on or about August 21, 2023, DEQ issued the Asheboro Permit. Upon information and belief, the Asheboro Permit is the first NPDES discharge permit in North Carolina to include a 1,4-dioxane effluent discharge limitation based on the 0.35 µg/L Proposed Standard.

6. The Asheboro Permit includes effluent limitations for the discharge of 1,4-dioxane based on DEQ's Division of Water Resources' purported finding that Asheboro has a "reasonable potential to exceed the state water supply (WS) ITV in-stream target value of 0.35 µg/L [the Proposed Standard] for 1,4 dioxane at the nearest downstream water supply boundary," which is located approximately 43.5 miles downstream of Asheboro's outfall.

7. DEQ and EMC consistently identify this "state water supply (WS) ITV of 0.35 µg/L for 1,4 dioxane"—the Proposed Standard—as a statewide standard which is generally applicable to all permittees discharging into waters classified as drinking water supplies. For instance:

- a. In its strategy document outlining its plan to eliminate the discharge of 1,4 dioxane into the state's drinking water supply waters, EMC refers to the Proposed Standard as a statewide standard.
- b. DEQ's website states that DEQ's Division of Water Resources "has established 1,4-Dioxane in-stream target values (ITVs) of 0.35 µg/L [the Proposed Standard] *in surface waters* classified as water supplies ... ITVs are developed based on the narrative standard for toxic substances in 15A NCAC 02B .0208 *and are implemented as surface water quality standards.*" (emphases added).
- c. In a report issued by DEQ to EMC, DEQ explained that "[s]ince North Carolina does not currently have 15A NCAC 02B .0200 surface water quality standards for 1,4-dioxane adopted into rule, in-stream target values (ITVs) [the Proposed Standard] were calculated per the narrative standard for toxic substances in 15A NCAC 02B .0208 to provide numeric regulatory values. ... The ITVs [the Proposed Standard] *are implemented as surface water quality standards*" (emphasis added).

8. Despite DEQ's characterization of the Proposed Standard as a statewide water quality standard of general applicability, the Proposed Standard was never adopted by rule as required by N.C. Gen. Stat. § 150B-18, which DEQ acknowledges.

9. Rather than establish the Proposed Standard as a codified rule, as required by N.C. Gen. Stat. § 150B-18, DEQ now seeks to impose the Proposed Standard as a statewide water quality standard of general applicability by instead founding its authority on the Narrative Standard, which authority it does not have.

10. DEQ therefore seeks to enforce its Proposed Standard as a statewide rule of general applicability by using the Narrative Standard as a substitute for the requirements of N.C. Gen. Stat. § 150B-18 and related rulemaking requirements of the APA.

11. Under N.C. Gen. Stat. § 150B-18, "[a]n agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretive statement has not been adopted as a rule in accordance with [the APA]."

12. Neither DEQ nor EMC are exempt from the rulemaking requirements under the APA.

13. Under the APA, a "rule" is defined as:

Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency.

N.C. Gen. Stat. § 150B-(2)(8a).

14. In addition to this unlawful substitution of the agency's Narrative Standard for the statutory mandates of G.S. § 150B-18, DEQ's application of the Narrative Standard is defied by the language and requirements of the Narrative Standard itself, in at least two respects:

- a. First, the relevant portions of the Narrative Standard govern water quality standards related to toxic substances that are identified as *carcinogenic*. Neither the U.S. Environmental Protection Agency ("EPA"), nor the State of North Carolina, have identified 1,4-dioxane as a carcinogen. Rather, EPA identifies 1,4-dioxane only as a "*likely carcinogen*," and DEQ states only that "[a]s one cannot definitively claim that 1,4-dioxane is a non-carcinogen, the implementation of [the Narrative Standard] is appropriate for the protection of downstream drinking water uses."
- b. Second, through the Permit, DEQ asserts that its authority *to protect human health* through the Proposed Standard is derived from the Narrative Standard. However, the Narrative Standard itself expressly states that "[s]tandards *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*." (emphases added). No such standards have been codified through rulemaking under any of the aforementioned rules. Indeed, EMC's efforts to codify the Proposed Standard in these exact same referenced rules failed when rejected by the North Carolina Rules Review Commission in 2022, for failure to comply with the APA's rulemaking requirements.

BASIS FOR INTERVENTION

15. Reidsville has a direct and immediate interest in the property or transaction which is the subject of this action because:

- a. Reidsville's current NPDES discharge permit expired on April 30, 2016, and Reidsville timely applied for renewal of this NPDES permit on October 28, 2015. Reidsville's timely application for renewal allows it to continue to discharge pursuant to its existing NPDES permit.
- b. In the nearly-eight years since Reidsville's timely-submitted 2015 application for renewal of its NPDES permit was submitted, DEQ has not acted on that application.
- c. Like Reidsville, Asheboro's most recent NPDES permit expired in 2016, and Asheboro timely applied for renewal of its NPDES permit, allowing Asheboro to continue discharges pursuant to its prior NPDES permit until a new NPDES permit was finally issued.
- d. Upon information and belief, DEQ's failure to act on Reidsville's application for renewal of its NPDES permit, and DEQ's long-delayed action on Asheboro's permit, are both due to DEQ and EMC having no codified 1,4-dioxane surface water rule or standard of general applicability in place for regulating discharges of 1,4-dioxane into water-supply waters. Indeed, there is presently no codified 0.35 µg/L 1,4-dioxane water quality standard for water-supply waters, and DEQ acknowledges that no water quality standard for 1,4-dioxane has been adopted by rule.
- e. As is clear from the history of DEQ's and EMC's regulatory efforts in this regard, the Asheboro Permit and this litigation concern DEQ's authority to regulate 1,4-dioxane discharges by dischargers statewide, including Reidsville, by applying the Narrative Standard as a substitute for G.S. § 150B-18 and that statute's requirement to codify water quality standards.
- f. DEQ and EMC have previously asserted the authority concerned in this litigation—namely, the authority to apply the Narrative Standard as a substitute for the requirements of § 150B-18—in those matters directly involving Reidsville set forth above in paragraph 2.
- g. In the event this Court, or any court on judicial review or appeal, finds that DEQ has the authority to enforce its Proposed Standard using the Narrative Standard as a substitute for APA rulemaking, then upon information and belief DEQ will impose a 1,4-dioxane effluent discharge limitation based on the Proposed Standard in Reidsville's renewed NPDES permit.

16. The disposition of this action will impair or impede Reidsville's ability to protect these interests because:

- a. DEQ's attempt to establish the basis of its authority to regulate Reidsville's 1,4-dioxane discharges through permitting based on the Narrative Standard, as set forth above, rather than through APA rulemaking, deprives Reidsville of the significant substantive and procedural safeguards afforded by the rulemaking process and, as a result, denies Reidsville of a meaningful opportunity to ensure that regulations, with which it may be forced to comply, are lawfully imposed.
- b. In the event this Court, or any court on judicial review or appeal, finds that DEQ has the authority to enforce its Proposed Standard using the Narrative Standard as a substitute for APA rulemaking, that authority either will be asserted as persuasive precedent regarding DEQ's authority which Reidsville will be impaired in contesting, or will be asserted as binding precedent regarding DEQ's authority, which Reidsville will be barred from contesting, once DEQ finally responds to Reidsville's 2015 application for renewal of its NPDES permit.
- c. Absent intervention, Reidsville will therefore lose, or have impaired or impeded, its ability to contest DEQ's authority to include a 1,4-dioxane discharge limitation based on DEQ's Proposed Standard in Reidsville's own NPDES permit, by direct operation and effect of any judgment issued in this litigation.
- d. If on the basis of this newfound authority, DEQ thereafter imposes a 1,4-dioxane permit limitation in Reidsville's permit, as DEQ has forecasted it will do, Reidsville will likely be forced to expend millions of dollars to upgrade its POTW and supporting infrastructure, and otherwise be forced to bear a significant compliance burden, without the opportunity to avail itself of the protections against said burdens afforded under the APA.

17. Reidsville's interests are not adequately represented by the existing parties because:

- a. Although they would be based on what DEQ asserts is a statewide standard under the Proposed Standard, individual 1,4-dioxane discharge limitations for individual NPDES permittees are calculated based upon factors individual to each discharger (such as capacity, flow, distance from water-supply waters or drinking water

sources, the level of impairment in the respective receiving waters, and proximity to, and discharges by, other nearby dischargers). There are significant differences in these factors for Asheboro and Reidsville.

- b. The Petitioner's and Reidsville's interests in DEQ's authority to regulate 1,4-dioxane through enforcement of the Proposed Standard are also different and distinct on account of their distinct locations within the Cape Fear River basin and their distinct constituents which discharge water to the municipalities' POTWs for treatment.
- c. As a result, Reidsville's 1,4-dioxane discharge limitation in its own NPDES permit could be substantially more stringent than Asheboro's limitation.
- d. Despite being similarly situated with regard to the authority upon which 1,4-dioxane discharge limitations would be based, Asheboro therefore has separate and distinct interests from Reidsville, with regard to Asheboro's own actual calculated 1,4-dioxane discharge limitations in its NPDES permit, and Asheboro's needs for its renewed NPDES permit itself.
- e. Thus, Asheboro may, as a practical matter, decide that different discharge limitations included in its NPDES permit—based upon the same authority and purported standard from DEQ which is at issue in this litigation—are acceptable or unacceptable according to Asheboro's own unique circumstances and needs.
- f. As a result, Asheboro has litigation interests and needs different from Reidsville when it comes to litigation over DEQ's underlying authority to include 1,4-dioxane discharge limitations in NPDES permits based on DEQ's Proposed Standard.
- g. As a further result, Asheboro may litigate, make litigation decisions, develop the record, or develop arguments in this matter with lesser degrees of need or interest than Reidsville must, or may abandon its challenge or come to agreements with DEQ concerning this litigation or its resolution which may be acceptable to Asheboro, but would be adverse to Reidsville and which would impair, impede, or foreclose Reidsville's ability to protect against DEQ's assertions of authority to regulate 1,4-dioxane discharges statewide (and therefore against Reidsville) based on DEQ's Proposed Standard.

- h. Thus, Asheboro may have little incentive to use its resources to seek redress beyond what is necessary to satisfy its own particular needs in its NPDES permit, without regard to the needs of other municipalities, such as Reidsville, who will be impeded or bound as a direct result of a judgment in this action.

18. In addition to the foregoing:

- a. Dissatisfied third parties are statutorily authorized to commence contested case proceedings pursuant to N.C. Gen. Stat. § 143-215.1(e), and there are no conditions upon this statutory right;
- b. As set forth above, Reidsville is a third party dissatisfied with DEQ's effort to unlawfully enforce its Proposed Standard and to establish the Proposed Standard as an enforceable regulation without satisfying mandatory APA procedure for doing so; and
- c. Reidsville seeks to intervene in this action as a petitioner, and is therefore statutorily authorized to so petition pursuant to N.C. Gen. Stat. § 143-215.1(e).

19. Reidsville's claims and Reidsville's defenses to DEQ's assertion of authority concerned herein, and the main action, have questions of law and fact in common, including, *inter alia*:

- a. Whether or not DEQ has authority to impose 1,4-dioxane effluent discharge limitations in NPDES permits based on DEQ's Proposed Standard, especially in the absence of a water quality standard codified in statute or rule, as a common question of law.
- b. Whether the agency's Narrative Standard can serve as a substitute for a codified water quality standard of general applicability, as is required by N.C. Gen. Stat. § 150B-18, as a common question of law.
- c. The facts upon which DEQ relies in asserting, developing, or calculating its Proposed Standard, and upon which DEQ relies in asserting its authority to enforce the same Proposed Standard as if it were a codified surface-water standard, as common questions of fact.

20. Intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Asheboro's underlying petition was submitted on September 19, 2023, no prehearing statements have been submitted, no discovery has been conducted, and trial has not begun.

21. Under the APA, “[a]ny person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24.” N.C. Gen. Stat. 150B-23(d).

22. N.C. Gen. Stat. § 1A-1, Rule 24(a), of the North Carolina Rules of Civil Procedure, mandates a right to intervene in an action when either (i) an unconditional right to intervene is conferred by statute or (ii) when the proposed intervenor “claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

23. N.C. Gen. Stat. § 1A-1, Rule 24(b), of the North Carolina Rules of Civil Procedure, also allows intervention in an action when either (i) an unconditional right to intervene is conferred by statute or (ii) “[w]hen an applicant’s claim or defense and the main action have a question of law or fact in common.”

24. In addition, under the APA, “any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.” N.C. Gen. Stat. § 150B-23(d).

25. A copy of Reidsville’s Petitioner-Intervenor’s Petition for a Contested Case Hearing is attached hereto as **Exhibit A** to this motion.

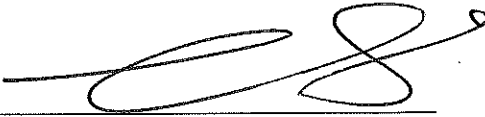
WHEREFORE, the City of Reidsville respectfully prays that the presiding Administrative Law Judge:

1. GRANT its Motion to Intervene in this action with all the rights of a party to the action, or with the rights and to the extent otherwise deemed appropriate by the Administrative Law Judge;
2. Enter an ORDER directing the City of Reidsville to file its Intervenor-Petitioner’s Petition for a Contested Case Hearing, or such other pleading as the Administrative Law Judge deems appropriate, in the above-captioned Contested Case within five days of the entry of the Order; and
3. GRANT any further relief as the presiding Administrative Law Judge deems just and proper.

[executed on following page]

This the 26th day of September, 2023.

CRANFILL SUMNER LLP

BY: 

R. Robert El-Jaouhari

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Elizabeth C. Stephens

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Attorneys for the City of Reidsville

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the foregoing *Motion to Intervene* was served to the persons named below at the electronic address shown below, by electronic service as defined in 26 NCAC 03.0501(4) and by depositing a copy of it with the United States Postal Service via certified mail with sufficient postage affixed:

Alexander Elkan
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Attorney for Petitioner

and it was served on the State agency or board named below by depositing a copy of it with the United States Postal Service via certified mail with sufficient postage affixed:

Teia Matthews
NC Department of Justice, Environmental Division
Office of Legal Affairs
9001 Mail Service Center
Raleigh, NC 27699
Respondent

Mr. Bill Lane
Registered Agent and General Counsel
NC Department of Environmental Quality
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Respondent

This the 26th day of September, 2023.

CRANFILL SUMNER LLP

BY: 

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Attorneys for the City of Reidsville

Exhibit [A]

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
Case No. 23 EHR 04121

City of Asheboro, North Carolina)
)
 Petitioner,)
)
City of Reidsville, North Carolina)
)
 Petitioner-Intervenor,)
)
v.)
)
North Carolina Department of)
Environmental Quality, Division of)
Water Resources,)
)
 Respondent.)

PETITIONER-INTERVENOR'S
PETITION FOR A CONTESTED
CASE HEARING

COMES NOW Petitioner-Intervenor, the City of Reidsville, North Carolina ("Reidsville"), by and through undersigned counsel, and brings this petition against Respondent Department of Environmental Quality, Division of Water Resources ("DEQ" or "DWR" or "Respondent") in response to Respondent's issuance of NPDES Permit No. NC0026123 (the "Asheboro Permit" or "Asheboro's Permit") to the City of Asheboro ("Asheboro"), which permit includes 1,4-dioxane effluent discharge limitations based upon DEQ's unlawful imposition of a 0.35 µg/L 1,4-dioxane in-stream target value for water supply waters (the "Proposed Standard") as if the Proposed Standard were an actual, codified state water quality standard of general applicability adopted pursuant to the rulemaking procedures in North Carolina's Administrative Procedures Act ("APA").

There is no such codified standard. In issuing the permit upon which this

Contested Case is based, DEQ now seeks to substitute its misapplication of 15A NCAC 02B .0208 (hereinafter referred to as the "Narrative Standard") in place of the statutory requirements of N.C. Gen. Stat. § 150B-18, as the basis for enforcing the Proposed Standard as a statewide 1,4-dioxane water quality standard of general applicability applicable to other NPDES permit holders, including the City of Reidsville. Substitution of a regulation in place of a clear statutory mandate is impermissible, and in this case is also foreclosed by the terms and requirements of the Narrative Standard itself.

Respondent has thereby, and in the manner, including, but not limited, to those set forth below, substantially prejudiced Reidsville's rights, has exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law and rule.

JURISDICTION AND VENUE

1. The Office of Administrative Hearings has subject matter and personal jurisdiction over this matter, pursuant to Chapter 150B, Article 3 of the North Carolina General Statutes.

2. Venue is proper and in accordance with N.C. Gen. Stat. § 150B-24.

PARTIES

3. Petitioner-Intervenor, the City of Reidsville, is a municipal corporation organized under the laws of the State of North Carolina. Reidsville owns and operates a publicly owned treatment works ("POTW") within the city. Reidsville's POTW receives and treats wastewater from residential, commercial, and industrial sources

prior to discharging the treated wastewater into the Haw River pursuant to an NPDES permit issued by the Department of Environmental Quality, Division of Water Resources.

4. Respondent Department of Environmental Quality is an administrative agency of North Carolina, operating under the laws of the State of North Carolina.

FACTUAL BACKGROUND

5. Reidsville's current NPDES permit expired on April 30, 2016. Reidsville timely applied for renewal of its NPDES permit on October 28, 2015, which allows Reidsville to continue to discharge treated wastewater pursuant to its expired NPDES permit.

6. Reidsville's NPDES permit does not contain 1,4-dioxane effluent limitations.

7. Since Reidsville's October 28, 2015, application for renewal of its NPDES permit, DEQ has sought to include a 1,4-dioxane effluent limitation in Reidsville's renewed NPDES permit (or otherwise limit the permissible 1,4-dioxane discharge from Reidsville's POTW) based on the Proposed Standard, by several means:

- a. By issuing a November 18, 2019, Notice of Violation to Reidsville regarding Reidsville's alleged 1,4-dioxane discharges, and thereafter pressing for a Special Order by Consent with Reidsville which would have imposed a 1,4-dioxane discharge limitation on Reidsville based on the Proposed Standard;

- b. By pressing Reidsville to voluntarily include a 1,4-dioxane effluent limitation in Reidsville's renewed NPDES permit, which limitation would be based on the Proposed Standard and not based on any authority under the statutes or the rules;
- c. By withholding an unrelated Authorization to Construct permit to which Reidsville was entitled, unless and until Reidsville consented to a 1,4-dioxane discharge limitation in Reidsville's renewed NPDES permit, based on the Proposed Standard not based on any authority under the statutes or the rules; and
- d. By attempting rulemaking to establish the Proposed Standard as a codified rule—and, therefore, as a valid statewide water quality standard of general applicability—in 15A NCAC 02B .0212, .0214, .0215, .0216, and .0218, as part of EMC's 2020-2022 Triennial Review, as the means by which to impose a 1,4-dioxane effluent limitation in Reidsville's renewed NPDES permit.

8. DEQ's efforts to include a 1,4-dioxane effluent limitation in Reidsville's NPDES permit (or otherwise limit the permissible 1,4-dioxane discharge from Reidsville's POTW) failed because:

- a. Despite Reidsville's significant, meaningful advances in reducing the amount of its 1,4-dioxane discharges, Reidsville and DEQ were not able to agree to a numerical 1,4-dioxane effluent limitation in either a Special Order by Consent or in Reidsville's forthcoming NPDES permit;

- b. DEQ ultimately agreed to issue Reidsville's unrelated Authorization to Construct Permit without requiring Reidsville to agree to a new 1,4-dioxane effluent limitation in its NPDES permit; and
- c. EMC's rulemaking to establish the Proposed Standard as a water quality standard of general applicability for water-supply waters failed when it was objected-to by the North Carolina Rules Review Commission ("RRC") for the rulemaking's failure to comply with the rulemaking requirements of the APA.

9. DEQ has not yet issued a renewed NPDES permit to the City of Reidsville.

10. DEQ's and EMC's regulatory history in these respects makes clear that DEQ has not yet issued a renewed NPDES permit to Reidsville because DEQ and EMC have no codified 1,4-dioxane water quality standard of general applicability in place for regulating 1,4-dioxane discharges into water-supply waters. Indeed, DEQ acknowledges that no such water quality standard for 1,4-dioxane has been adopted by rule.

11. There is presently no codified 0.35 µg/L 1,4-dioxane water quality standard of general applicability for water-supply waters.

RESPONDENT UNLAWFULLY ENFORCES THE PROPOSED STANDARD

12. Despite this lack of a codified standard, on or about August 21, 2023, DEQ issued a final NPDES permit to Asheboro (the "Asheboro Permit"). Upon information and belief, the Asheboro Permit is the first and only NPDES discharge

permit in North Carolina to include a 1,4-dioxane effluent discharge limitation based on the 0.35 µg/L Proposed Standard.

13. The Asheboro Permit includes effluent limitations for the discharge of 1,4-dioxane based on DEQ's Division of Water Resources' purported finding that Asheboro has a "reasonable potential to exceed the state water supply (WS) ITV [in-stream target value] of 0.35 µg/L for 1,4 dioxane at the nearest downstream water supply boundary," which is located approximately 43.5 miles downstream of Asheboro's outfall.

14. DEQ and EMC consistently identify this "state water supply (WS) ITV of 0.35 µg/L for 1,4 dioxane" as a statewide standard which is generally applicable to all permittees discharging into waters classified as drinking water supplies. For instance:

- a. In its strategy document outlining its plan to eliminate the discharge of 1,4 dioxane into the state's drinking water supply waters, EMC refers to the Proposed Standard as a statewide standard;
- b. DEQ's website states that DEQ's Division of Water Resources "has established 1,4-Dioxane in-stream target values (ITVs) of 0.35 µg/L [the Proposed Standard] *in surface waters* classified as water supplies ... ITVs are developed based on the narrative standard for toxic substances in 15A NCAC 02B .0208 *and are implemented as surface water quality standards.*" (emphases added); and

c. In a report issued by DEQ to EMC, DEQ explained that “[s]ince North Carolina does not currently have 15A NCAC 02B .0200 surface water quality standards for 1,4-dioxane adopted into rule, in-stream target values (ITVs) [the Proposed Standard] were calculated per the narrative standard for toxic substances in 15A NCAC 02B .0208 to provide numeric regulatory values. ... The ITVs [Proposed Standard] *are implemented as* surface water quality standards” (emphasis added).

15. Despite DEQ’s characterization of the Proposed Standard as a statewide water quality standard of general applicability, the Proposed Standard was never adopted by rule as required by N.C. Gen. Stat. § 150B-18.

16. Rather than establish the Proposed Standard as a codified rule as required by N.C. Gen. Stat. § 150B-18, DEQ now seeks to impose the Proposed Standard by instead founding its authority on the Narrative Standard.

17. In the Asheboro Permit, DEQ enforces its Proposed Standard as a statewide rule of general applicability by using the Narrative Standard as a substitute for the requirements of N.C. Gen. Stat. § 150B-18 and related rulemaking requirements of the APA. Such substitution is unlawful.

a. Under N.C. Gen. Stat. § 150B-18, “[a]n agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretive

statement has not been adopted as a rule in accordance with [the APA].”

b. Under the APA, a “rule” is defined as:

Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency.

N.C. Gen. Stat. § 150B-2(8a).

- c. The Proposed Standard, as a proposed statewide water quality standard of general applicability in water-supply waters, meets the definition of a rule contained in N.C. Gen. Stat. § 150B-2(8a).
- d. EMC believes that the Proposed Standard, as a proposed statewide water quality standard of general applicability in water-supply waters, meets the definition of a rule contained in N.C. Gen. Stat. § 150B-2(8a), as is evidenced, *inter alia*, by EMC’s (failed) rulemaking efforts to establish the Proposed Standard as a rule in EMC’s 2020-2022 Triennial Review.
- e. EMC and DEQ both believe that the Proposed Standard, as a proposed statewide water quality standard of general applicability in water-supply waters, meets the definition of a rule contained in N.C. Gen. Stat. § 150B-2(8a), as is evidenced by DEQ and EMC both consistently representing the Proposed Standard as a standard or statement of general applicability alleged to be implementing or

interpreting an act of the General Assembly.

- f. A rule is not valid unless it is adopted pursuant to the APA's rulemaking procedures.
- g. Neither DEQ nor EMC are exempt from the rulemaking requirements under the APA.
- h. DEQ must therefore adopt the Proposed Standard as a rule in accordance with the APA before DEQ can enforce the Proposed Standard in any NPDES discharge permit, and this statutory mandate cannot be supplanted by DEQ's implementation of its own regulation in the Narrative Standard.

18. If upheld, DEQ's substitution of the Narrative Standard for the requirements of N.C. Gen. Stat. § 150B-18 in imposing effluent discharge limitations in the Asheboro Permit would establish the Proposed Standard as the statewide 1,4-dioxane water quality standard of general applicability for water-supply waters (i) without having met the requirements of N.C. Gen. Stat. § 150B-18 and the APA, and (ii) through application of the Narrative Standard as a substitute for the mandate of N.C. Gen. Stat. § 150B-18.

19. In addition to this unlawful substitution of the agency's Narrative Standard for the statutory mandate of N.C. Gen. Stat. § 150B-18, DEQ's application of the Narrative Standard is defied by the language and requirements of the Narrative Standard itself, in at least two respects:

- a. First, the relevant portions of the Narrative Standard used by DEQ to calculate the Proposed Standard govern water quality standards related to toxic substances that are identified as *carcinogenic*. Neither the U.S. Environmental Protection Agency (“EPA”), nor the State of North Carolina, have identified 1,4-dioxane as a carcinogen. Rather, EPA identifies 1,4-dioxane as a “*likely carcinogen*,” and DEQ states only that “[a]s one cannot definitively claim that 1,4-dioxane is a non-carcinogen, the implementation of [the Narrative Standard] is appropriate for the protection of downstream drinking water uses.”
- b. Second, through the Asheboro Permit, DEQ asserts that its authority *to protect human health* through the Proposed Standard is derived from the Narrative Standard. However, the Narrative Standard itself expressly states that “[s]tandards *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.*” (emphases added). No such standards have been codified through rulemaking under any of sections 15A NCAC 02B .0212, .0214, .0215, .0216, and .0218. Indeed, EMC’s efforts to codify the Proposed Standard in these exact same referenced rules, as part of EMC’s 2020-2022 Triennial Review, were rejected by the North Carolina Rules Review Commission in 2022 for failure to comply with the APA’s rulemaking requirements.

**THE RESPONDENT HAS SUBSTANTIALLY
PREJUDICED REIDSVILLE'S RIGHTS**

20. DEQ has substantially prejudiced Reidsville's rights by imposing the Proposed Standard as a statewide water quality standard of general applicability for 1,4-dioxane in water-supply waters through permit enforcement based on the Narrative Standard, rather than through required APA rulemaking, for the following reasons:

- a. None of the procedural protections provided to Reidsville under APA rulemaking requirements are available to Reidsville if DEQ is permitted to enforce the Proposed Standard as if it were a codified water quality standard of general applicability, when DEQ's enforcement relies on the Narrative Standard as a substitute for the codification of the Proposed Standard required by N.C. Gen. Stat. § 150B-18;
- b. In the event this Court, or any court on judicial review or appeal, finds that DEQ can enforce Proposed Standard as a statewide water quality standard of general applicability without meeting APA requirements, the history of DEQ's and EMC's efforts to enforce the Proposed Standard make clear that:
 - i. DEQ will impose a 1,4-dioxane effluent limitation in Reidsville's NPDES permit;
 - ii. The 1,4-dioxane effluent limitation in Reidsville's NPDES permit will be imposed by DEQ under the asserted authority

of the Narrative Standard, rather than pursuant to APA rulemaking; and

iii. Any authority awarded by this Court, or any court on judicial review or appeal, either will be asserted as persuasive precedent regarding DEQ's authority which will impair Reidsville from contesting that authority, or will be asserted as binding precedent regarding DEQ's authority, which Reidsville will be barred from contesting.

c. Despite Reidsville's significant and meaningful advances in its reduction of 1,4-dioxane discharges from its treated wastewater, an NPDES discharge permit with 1,4-dioxane discharge limitations based on the Proposed Standard will negatively impact Reidsville and its constituents because Reidsville will likely be forced to expend millions of dollars pursuing upgrades to its POTW and supporting infrastructure (which potential upgrades have their own significant technological limitations), and otherwise be forced to bear a significant compliance burden, without the protections against said burdens that are provided in APA rulemaking; and

d. Other reasons that may be shown through discovery and trial of this action.

THE RESPONDENT HAS EXCEEDED ITS AUTHORITY OR JURISDICTION, ACTED ERRONEOUSLY, FAILED TO USE PROPER PROCEDURE, ACTED ARBITRARILY AND CAPRICIOUSLY, AND FAILED TO ACT AS REQUIRED BY LAW AND RULE

21. In addition to substantially prejudicing Reidsville's rights, DEQ has exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law and rule, in manners including, but not limited to, the following:

- a. DEQ has supplanted the clear statutory mandate of N.C. Gen. Stat. § 150B-18 with the application of its own regulation—the Narrative Standard—in the manner set forth in paragraphs 12 through 18 above;
- b. DEQ has supplanted the clear statutory mandate of N.C. Gen. Stat. § 150B-18 after—and perhaps out of necessity on account of—EMC's failed attempt to satisfy that mandate in its 2020-2022 Triennial Review, as that attempt and failure are more fully described in paragraphs 7(d), 8(c), and 19(b) above;
- c. DEQ has ignored the language and terms of the Narrative Standard itself in attempting to enforce the Proposed Standard, as set forth in paragraph 19 above; and
- d. Other reasons set forth hereinabove or that may be shown through discovery and trial of this action.

CONCLUSION

Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule. As a result, Respondent substantially prejudiced Reidsville's rights.

WHEREFORE, the City of Reidsville prays that the presiding Administrative Law Judge:

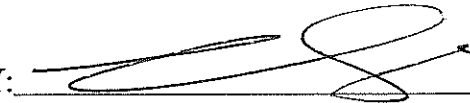
1. Find that the 1,4-dioxane effluent limitations in Asheboro's Permit based upon the unlawful application of the Proposed Standard as if it were a codified water quality standard of general applicability, has no basis in statute or rule;
2. Find that the Respondent substantially prejudiced Reidsville's rights and, in connection therewith, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule;
3. Award to Petitioner, the City of Asheboro, the relief Asheboro seeks in its Petition;
4. Deny the Respondent any authority it seeks to impose the Proposed Standard; and
5. Enter any other judgment or order as the presiding Administrative Law Judge deems just and proper.

[executed on following page]

This the 26th day of September, 2023.

CRANFILL SUMNER LLP

BY: _____



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