

NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 EHR 04121

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

MOTION TO INTERVENE

NOW COMES Fayetteville Public Works Commission (“FPWC”), Cape Fear Public Utility Authority (“CFPUA”), and Brunswick County, North Carolina (collectively, the “Downstream Intervenors”), pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 24, 150B-23(d), and 26 NCAC 03 .0117, and hereby move to intervene as Respondents in this contested case, though their positions are not fully aligned with that of the North Carolina Department of Environmental Quality, Division of Water Resources (together, “DEQ” or the “Department”). In support of this Motion, the Downstream Intervenors show the Tribunal the following:

INTRODUCTION

This litigation concerns the safety of drinking water for over half a million North Carolinians. Since 2017, the people of southeastern North Carolina have been waiting for DEQ to address the City of Asheboro’s (“Asheboro”) discharges of 1,4-dioxane (a known human carcinogen) into the Cape Fear River Basin. Finally, after six years, DEQ issued an NPDES permit to Asheboro (the “Permit”) to begin the process of controlling those discharges. DEQ’s progress on eliminating 1,4-dioxane from the Cape Fear River Basin has been too slow, and the Department has – for too long – not protected a resource that is vital to the people of Fayetteville, Cumberland

County, Fort Liberty, Pender County, New Hanover County and Brunswick County. Thus, the Downstream Intervenors must intervene in this proceeding, to ensure DEQ satisfies its statutory mandate.

The Permit establishes limits for discharges of 1,4-dioxane under the authority provided by 15A NCAC 02B.0208(a)(2)(B). For water supply surface waters, this provision prohibits the in-stream concentration of any carcinogen from being higher than the concentration that would result in an increase in lifetime cancer risk greater than one in a million (the “Carcinogens Standard”). The Environmental Management Commission published a notice of proposed rulemaking regarding this provision on April 3, 1989,¹ and it published a notice of final rulemaking regarding this provision on October 2, 1989.² Federal regulations, which have been incorporated by reference into the North Carolina Administrative Code, require DEQ to establish effluent limits for the discharge of a carcinogen if that discharge could reasonably be expected to cause a violation of the Carcinogens Standard. *See* 40 C.F.R. § 122.44(d)(1), 15A NCAC 02B .0104. However, despite this long-standing authority and obligation under federal law, DEQ failed to issue an NPDES permit limiting Asheboro’s 1,4-dioxane discharges until six years after it determined Asheboro had a reasonable potential to cause such a violation. In addition, the Permit allows Asheboro five more years to come into compliance with its final effluent limit, and it fails to require Asheboro to perform sufficient in-stream monitoring for 1,4-dioxane.

The Downstream Intervenors have a distinct interest in assuring that the Department begins to abide by its obligation to implement the Carcinogens Standard. The health of their respective customers is directly affected by the presence of 1,4-dioxane in drinking water. The Downstream

¹ 4:1 N.C. Reg. at 31.

² 4:13 N.C. Reg. at 705.

Intervenors each face the prospect of installing and operating costly treatment systems to remove 1,4-dioxane discharged by an upstream source. Indeed, the Department's failure to take timely action to address the 1,4-dioxane in Asheboro's discharges demonstrates the absence of the Downstream Intervenors' concerns from DEQ's decision-making, and it shows why the Department cannot adequately represent the Downstream Intervenors' interests.

THE DOWNSTREAM INTERVENORS

FPWC is a North Carolina Water and Sewer Authority created pursuant to N.C. Gen. Stat. Chapter 162A. FPWC provides water, electric, and wastewater services to Cumberland County, Fayetteville, portions of Hoke County, as well as water service to Fort Liberty. Discharges from Asheboro's facility contribute to the presence of 1,4-dioxane at the location of FPWC's drinking water intake on the Cape Fear River. FPWC has incurred costs in the form of ongoing sampling of surface waters and will continue to incur costs in the form of additional monitoring and the cost to install, operate and potentially modify treatment technology as a result thereof. Asheboro's discharges of 1,4-dioxane directly affect the health of FPWC's customers.

CFPUA, also a statutory Public Water and Sewer Authority, provides water and wastewater services to customers within New Hanover County – including residents of the City of Wilmington – and provides potable water to Pender County and the Town of Wrightsville Beach. Discharges from Asheboro's facility contribute to the presence of 1,4-dioxane at the location of CFPUA's drinking water intake on the Cape Fear River. And, as the furthest-downstream user of the Cape Fear River, CFPUA has consistently asserted the necessity of water quality based effluent limits (“WQBEL”), timelines for achieving compliance, and effluent monitoring for 1,4-dioxane within the Cape Fear River Basin. CFPUA has incurred costs in the form of ongoing sampling of surface waters and the installation of costly treatment technology. It will continue to incur costs in the

form of additional monitoring and the cost to operate (or perhaps, modify) the treatment technology it has already installed. Asheboro's discharges of 1,4-dioxane directly affect the health of CFPUA's customers.

Brunswick operates a Public Enterprise under N.C. Gen. Stat. § 153-274 for water supply and distribution, as well as for wastewater collection, treatment and disposal. As part of its public enterprise system, Brunswick operates the Northwest Water Treatment Plant, which is solely supplied by raw water from the Cape Fear River. That facility has a treatment capacity of 24 MGD, and Brunswick is currently in the process of expanding to 45 MGD. Discharges from Asheboro's facility contribute to the presence of 1,4-dioxane at the location of Brunswick's drinking water intake on the Cape Fear River. Brunswick has incurred costs in the form of ongoing sampling of surface waters and will continue to incur costs in the form of additional monitoring and the cost to install, operate and potentially modify treatment technology as a result thereof. Asheboro's discharges of 1,4-dioxane directly affect the health of Brunswick's customers.

Collectively, the Downstream Intervenors represent more than half a million people whose drinking water is directly affected by Asheboro's discharges of 1,4-dioxane and the Permit's requirements.

ARGUMENT

I. Downstream Intervenors are Entitled to Intervene as a Right.

This Tribunal should grant intervention as a "right" "[w]hen the applicant 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." N.C. Gen. Stat. § 1A-1, Rule 24; N.C. Gen. Stat. § 150B-23(d).

North Carolina has applied a three-prong test to determine whether to grant intervention as a right: (1) the intervenor has a direct and immediate interest relating to the property or transaction; (2) denying intervention would result in a practical impairment of the protection of that interest; and (3) there is inadequate representation of that interest by existing parties. *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459 S.E.2d 675, 683 (1999); *Alford v. Davis*, 131 N.C. App. 214, 217-19, 505 S.E.2d 917, 920 (1998). The Downstream Intervenors meet all three prongs.

This Motion is also timely. Asheboro petitioned the Tribunal for a contested case challenging the inclusion of the Carcinogens Standard in its Permit on September 19, 2023, other parties are still attempting to intervene and no discovery has taken place. *See*, N.C. Gen. Stat. § 1A-1, Rule 24(a) (“Upon timely application anyone shall be permitted to intervene in an action.”); *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859 (2001) (Factors to consider regarding the timeliness of a motion to intervene include “(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied and (5) any unusual circumstances.”).

A. Downstream Intervenors have a Direct and Immediate Interest.

Each Intervenor has a direct and immediate interest in the requirements set forth in the Permit. A direct and immediate interest is one such that an intervenor “will either gain or lose by the direct operation and effect of the judgment....” *Virmani*, 350 N.C. at 459, 515 S.E.2d at 683 (quoting *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968)).

Here, whether DEQ has the authority to regulate 1,4-dioxane discharges by applying the Carcinogens Standard will directly affect the concentration of 1,4-dioxane present in each

Downstream Intervenor's water supply. Discharges of 1,4-dioxane do not break down in the environment nor is 1,4-dioxane removed through the normal drinking water treatment process. The concentration present in the river at each Downstream Intervenor's intake directly affects its need for, and the cost of, treatment technology to remove it. Therefore, the Downstream Intervenor has a direct and immediate interest in ensuring that the Carcinogens Standard in the Permit is found to be enforceable and is applied to this, and every other, discharger of 1,4-dioxane in the Cape Fear River Basin.

This litigation will set binding precedent – one way or another – as to whether DEQ has the authority to implement the Carcinogens Standard in NPDES permits statewide. A decision on this issue directly affects the State of North Carolina's authority to require reductions of 1,4-dioxane discharges and the concentration of 1,4-dioxane present at each Downstream Intervenor's intake.

B. Denying Intervention Impairs the Downstream Intervenor's Abilities to Protect Their Various Interests.

Whether an intervenor's right may be impaired involves "factual determinations to be made on a case-by-case basis." *Wichnoski v. Piedmont Fire Prot. Sys. LLC*, 251 N.C. App. 385, 396, 796 S.E.2d 29, 38 (2016). "[T]he harm to the intervenor's interest is to be considered from a 'practical' standpoint, rather than technically. N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) cmt. It is not necessary that the "disposition of an action... 'destroy' or 'eliminate' a proposed intervenor's ability to protect its interest, but only that it *may* as a *practical matter* impair or impede [the proposed intervenor's] ability to protect its interest." *Wichnoski*, 251 N.C. App. at 397, 796 S.E.2d at 38 (emphasis in original) (internal quotations omitted).

The Department has known about the problem of 1,4-dioxane in the Cape Fear River since 2017. DEQ has an obligation under federal law to address that problem through WQBELs in

NPDES permits. Regardless of the reason for DEQ's inaction, the Department's track record makes it clear that it is not sufficiently concerned about 1,4-dioxane. Denying intervention would relegate the Downstream Intervenors – and over half a million of their customers – to the status of a mere bystander while matters central to the safety of their drinking water are litigated by a stand-in whose interest in this problem has been lukewarm at best. In other words, denying intervention would impair the Downstream Intervenors' ability to protect their interest in seeing discharges of 1,4-dioxane into the Cape Fear River Basin reduced.

C. DEQ's and the Downstream Intervenors' Interests are Not Fully Aligned.

DEQ cannot fully represent the Downstream Intervenors' interests in this contested case. Federal case law discussing the “inadequacy of representation” requirement is particularly instructive. *See, e.g., Harvey Fertilizer & Gas Co. v. Pitt County*, 153 N.C. App. 81, 87, 568 S.E.2d 923, 927 (2002) (“Rule 24 of the North Carolina Rules of Civil Procedure is virtually identical to Rule 24 of the Federal Rules of Civil Procedure, [thus] we appropriately look to federal court decisions for guidance.”). Upon seeking intervention, the proposed intervenor's “burden of showing an inadequacy of representation is minimal.” *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976); *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (“The requirement of [Rule 24(a)] is satisfied if the applicant shows that representation of his interest ‘*may be*’ inadequate; and the burden of making that showing should be treated as minimal.” (emphasis added)).

Again, the Department's efforts to get control of 1,4-dioxane discharges into the Cape Fear River Basin have been inadequate, despite the plain language of 40 C.F.R. § 122.44(d)(1). While the Downstream Intervenors do not know why this has been the case, the Downstream Intervenors are not encumbered by the source of DEQ's hesitation – whatever it might be. Their primary focus

is on protecting the health of their customers. Given the Department's lack of effort on this issue to date, DEQ is not positioned to represent the Downstream Intervenors' interests in this proceeding.

II. Alternatively, the Downstream Intervenors Satisfy the Requirements for Permissive Intervention.

A third party may also seek permissive intervention in an action in which the third party's "claim or defense and the main action have question of law or fact in common." N.C.G.S. § 1A-1, Rule 24(b)(2). Whether to allow intervention rests within the sound discretion of the trial court, and the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Virmani*, 350 N.C. at 460, 515 S.E. 2d at 683 (quoting N.C. Gen. Stat. § 1A-1, Rule 24(b)).

Given the current posture of this contested case, allowing the Downstream Intervenors to participate in this litigation with the full rights of a party would not cause undue delay nor prejudice to Asheboro, the Department, or Reidsville, if it is allowed to intervene. Indeed, the converse is true: not to allow intervention here would be to prejudice the Downstream Intervenors' interests.

CONCLUSION

This litigation will be the battleground for the regulation of 1,4-dioxane statewide. FPWC, CFPUA, and Brunswick County, suppliers of drinking water for over half a million North Carolina citizens, should be allowed to intervene to protect the financial, environmental, and human health interests of their residents.

This the 20th day of October, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing MOTION TO INTERVENE has been served on all counsel of record in this action through the OAH electronic filing system at the electronic mailing addresses shown below:

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This the 20th day of October, 2023.

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