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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF RANDOLPH

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
19 EHR 06050

Glade/Winding Woods Homeowners Group Petitioner, v. NC Department of Environmental Quality Respondent.	**FINAL DECISION**

On May 5, 2020, this matter came on for hearing via videoconference by consent of the parties before Administrative Law Judge J. Randall May on the motions for summary judgment filed by Petitioner and Respondent.

APPEARANCES

For Petitioner: Michele Okoh and James P. Longest, Jr., Duke Environmental Law and Policy Clinic, Box 90360, Durham, NC 27708

For Respondent: T. Hill Davis, III, N.C. Department of Justice, P. O. Box 629, Raleigh, NC 27602

ISSUE

Whether Respondent North Carolina Department of Environmental Quality (DEQ) erred in ceasing expenditures of monies to provide alternative drinking water supplies to Petitioner Glade/Winding Woods Homeowners Group's members, once DEQ determined that the contamination of Petitioner's members' drinking water wells was naturally occurring.

STATUTES AT ISSUE

N.C. Gen. Stat. § 87-98, Bernard Allen Memorial Emergency Drinking Water Fund
N.C. Gen. Stat., Chapter 150B, Administrative Procedure Act

EVIDENCE PRESENTED BY THE PARTIES

FOR PETITIONER:

Submitted with Petitioner's Motion for Summary Judgment

Petitioner 1 Affidavit of Lori Cannon
Petitioner 2 Affidavit of John Murray

Submitted in support of Petitioner's Response to DEQ's Motion for Summary Judgment

Petitioner 3 January 2016 Guidance on Funding Alternative Water Supply
Petitioner 4 June 2018 emails between Amy Axon and Andy Saddlemire
Petitioner 5 November 2017 Guidelines for Provision of Alternate Water Supplies
Petitioner 6 November 2017 Emails between Michael Pfeifer and Vincent Antrilli
Petitioner 7 January 8, 2018 Emails from Vincent Antrilli
Petitioner 8 February 20, 2018 Email from Amy Axon
Petitioner 9 February 14, 2018 Email from Vincent Antrilli
Petitioner 10 Kinetico Home Water Systems Information
Petitioner 11 February 5, 2018 Emails re: Problem with system at 2533 Glade Rd
Petitioner 12 Affidavit of Drema Hill
Petitioner 13 Affidavit of Eula Crawford; including August 16, 2017 Letter from DEQ attached as Exhibit A
Petitioner 14 Affidavit of Johnny Murray
Petitioner 15 Affidavit of Mark Stout
Petitioner 16 Affidavit of Dr. Nancy Lauer
Petitioner 17 Affidavit of Terry Hill

FOR RESPONDENT:

Submitted with Respondent's Motion for Summary Judgment

Respondent 1 Affidavit of Charlotte Jesneck, including the following attachments:
Exhibit 1: June 2018 Notification Letters
Exhibit 2: Summary of Investigation
Exhibit 3: July 2018 Guidelines for Provision of Alternate Water Supplies
Exhibit 4: Arsenic in North Carolina: Public Health Implications

Respondent 2 Excerpts from Petitioner's Discovery Responses

Submitted with Respondent's Response to Petitioner's Motion for Summary Judgment

Respondent 3 October 27, 2017 Letters from DEQ re: Summary of Findings and Status Update
Respondent 4 November 28, 2007 email from Dexter Matthews re: Guidance for Expenditures for Alternative Drinking Water Sources
Respondent 5 January 2016 Guidance on Funding Alternative Water Supply
Respondent 6 February 28, 2020 15-day Letter re: DEQ's Discovery Responses
Respondent 7 DEQ's Responses to Petitioner's First Discovery Requests

FINDINGS OF FACT

Based upon careful consideration of the pleadings, evidence, arguments, and legal briefs received during the contested case hearing, as well as the entire record of this proceeding, including Respondent's and Petitioner's motions for summary judgment and the responses thereto, the Undersigned finds as follows. In making the findings of fact, the Undersigned has viewed all evidence in the light most favorable to the nonmoving party and records these findings only to articulate why certain facts are either not material or are not germane to the contested issues.

Parties

1. Petitioner Glade/Winding Woods Homeowners Group is an unincorporated nonprofit association representing residents of the Glade/Winding Woods neighborhood, located in Randolph County, North Carolina.

2. Respondent Department of Environmental Quality is a State agency established pursuant to N.C. Gen. Stat. §§ 143B-279.1 through 143B-344.23 and is vested with the statutory authority to enforce the State's environmental laws, including laws enacted to regulate groundwater.

Statute at Issue

3. The Bernard Allen Memorial Emergency Drinking Water Fund ("Bernard Allen Fund" or "Fund") is a fund established by the North Carolina General Assembly to provide assistance to individuals whose drinking water wells may be impacted by groundwater contamination. N.C.G.S. § 87-98.

4. The Bernard Allen Fund is under the direction and control of DEQ. N.C.G.S. § 87-98(a). Spending of monies from the Fund is left to the discretion of DEQ. N.C.G.S. § 87-98(b). However, any money that is expended from the Fund must fall within one of the following general categories:

a. Notification to persons and businesses whose private drinking water wells are at risk from known sources of groundwater contamination;

b. Testing (and retesting) of private drinking water wells or improved springs where contamination is suspected;

c. The temporary or permanent provision of alternate drinking water supplies to persons whose drinking water wells or improved springs are in fact contaminated and whose income is not greater than 300% of the federal poverty level, including the monitoring of filtration systems used in connection with such temporary or permanent alternative drinking water supplies.

N.C.G.S. § 87-98(b)-(c).

DEQ may also use a portion of the monies in the Fund to pay for personnel and other direct costs associated with implementation of the Fund. N.C.G.S. § 87-98(c4).

5. The current annual budget of the Bernard Allen Fund is approximately $400,000, which is appropriated annually by the North Carolina General Assembly. DEQ spends the majority of this money every year, keeping a portion in reserve for unforeseen events that may require testing of wells where contamination is suspected; and/or may require notification of the public of such contamination; and/or require alternate water supplies before the next appropriation is received. (Resp's 1, Jesneck Aff. ¶ 4).

Evidence Presented

6. Around April 2017, certain of Petitioner's members approached DEQ with concerns about contamination of groundwater resulting from the alleged disposal of coal ash on property near Petitioner's neighborhood that was believed to be the former site of a brick manufacturer. (Jesneck Aff. ¶ 5).

7. In response to these concerns, DEQ sampled the wells of those of Petitioner's members who gave permission for sampling. When some of these wells showed amounts of arsenic and/or vanadium at levels greater than the applicable drinking water standards, DEQ provided alternate water for these homes while DEQ initiated a site investigation. Doing so was consistent with DEQ's typical practice to initiate provision of alternate water to homes affected by suspected contaminant discharges. At first, DEQ provided bottled water to these homes. Subsequently, DEQ paid for the installation of reverse-osmosis treatment systems on the wells at these homes. DEQ paid for maintenance costs of these systems while DEQ continued its on-going **investigation** (emphasis added). (Jesneck Aff. ¶ 6).

8. Twelve of Petitioner's members' homes were provided with alternate water by DEQ. Of these twelve homes, ten had their alternate water supply paid for with monies from the Bernard Allen Fund. Two homes had their alternate water supply paid for by monies from the Inactive Hazardous Sites Fund, as these households had incomes greater than 300% of the federal poverty level and so were ineligible to receive funding for alternate water through the Bernard Allen Fund. (Jesneck Aff. ¶ 7).

9. DEQ conducted a thorough investigation to determine the source of contamination of Petitioner's members' wells. DEQ took soil samples in the area to determine if any coal ash was present. DEQ sampled the wells in Petitioner's neighborhood whose members gave permission for such sampling. DEQ sampled wells upgradient from the suspected former location of the brick company to determine the naturally occurring background amounts of metals in the area's groundwater. DEQ consulted research articles, the findings of other state and federal agencies regarding the geology and hydrogeology of the area, and water supply well data collected by Randolph County representatives from across the county. DEQ conducted sampling of exposed bedrock and sediment in the area to determine its physical and chemical properties and conducted investigatory borings in areas indicated by residents where coal ash allegedly was disposed. (Jesneck Aff. ¶ 8). The "Summary of Investigation", included with the letters to Petitioner's members sent on June 18, 19, and 25, 2018 is an accurate description of this investigation. (Resp.'s

1, Ex. 2). The extent of the investigation in this case was thorough and exceeded what is typical in similar investigations by virtue of the multiple lines of evidence that were developed, as stated above. (Jesneck Aff. ¶ 8).

10. When DEQ's investigation was complete, DEQ found no evidence that there was ever coal ash disposed of in Petitioner's vicinity. The investigation was never questioned. DEQ further determined that there was no contamination of Petitioner's members' well-water that was attributable to coal ash. Without any indication of coal ash DEQ determined, based on the area's geology and the sampling of other wells in the area, that the elevated levels of arsenic and vanadium found in some of Petitioner's members' wells were the result of naturally occurring conditions. (Jesneck Aff. ¶ 9; Resp.'s 1, Ex. 2). **Petitioner has put forward no evidence to show that the contamination of its members' wells is the result of coal ash. Likewise, Petitioner has not put forward any evidence or facts that the contamination in this case was not naturally occurring.**

11. By letters dated June 18, 19, and 25, 2018, DEQ informed Petitioner's members of the conclusions of its investigation, described above. (Resp.'s 1, Ex. 1). By these same letters, DEQ also informed Petitioner's members who had received reverse-osmosis treatment systems from DEQ that DEQ would no longer pay for the maintenance costs of these systems. This is because DEQ does not use monies from the Bernard Allen Fund (or the Inactive Hazardous Sites Fund) to pay for alternate water supplies where individuals' drinking water wells are contaminated as the result of naturally occurring conditions. Although the letter dated June 25, 2018 appears to be a modification of the letter of June 19, 2018, the later letter of June 25 seems to merely extend the response date to July 13, 2018 rather than the impossible response date of May 31, 2018 as given in the former letter. Although a bit confusing, these letters gave Petitioner's members the opportunity to keep their reverse-osmosis systems free of charge, or to have DEQ uninstall the systems at no charge. If Petitioner's members chose to keep these treatment systems, they would be responsible for the costs of future maintenance. Some of Petitioner's members chose to keep the treatment systems, and some chose to have DEQ uninstall these systems. (Jesneck Aff. ¶ 10; Resp.'s 1, Ex. 1).

12. The statements in the June 2018 letters, including the ceasing of expenditures on behalf of Petitioner's members once the contamination was found to be naturally occurring, were consistent with DEQ's statements in letters sent to Petitioner's members in October 2017, around the time the treatment systems were installed. (Resp.'s 3).

13. DEQ has longstanding criteria regarding the expenditure of monies from the Bernard Allen Fund. These criteria go back to the Fund's inception, although they have been modified somewhat over the subsequent years. Since the first criteria regarding expenditures from the Bernard Allen Fund were developed shortly after the Fund's inception, it has been DEQ's policy to use monies from the Fund to provide alternate water supplies only for wells that are contaminated by non-naturally occurring sources. (Jesneck Aff. ¶¶ 11-13; Resp.'s 1, Ex. 3; Resp.'s 4-5).

14. By way of explanation of North Carolina's geology, there are many areas of the state where naturally occurring contamination of drinking water wells is common. If monies from

the Bernard Allen Fund were used to provide alternate water supplies for all wells with naturally occurring contamination above drinking water standards, the Fund would be quickly depleted and yet would not be sufficient to provide alternate water for all of these wells. This would not leave any money in the Fund to sample wells where contamination is suspected but not proven; to provide notice to the public of sources of contamination that may be impacting drinking water wells; or to provide alternate water where non-naturally occurring contamination exceeds drinking water criteria. (Jesneck Aff. ¶ 13; Resp.'s 1, Ex. 4).

15. Petitioner's members' complaints in this case were specifically related to possible contamination resulting from coal ash. Because there are thousands of hazardous chemicals that could contaminate groundwater, DEQ's investigations are focused on the complaint that triggers the investigation. A global screen for all potential hazardous contaminant is not feasible given the constraints of DEQ and the Bernard Allen Fund. (Jesneck Aff. ¶ 14).

16. The Bernard Allen Fund does not have the resources to address naturally occurring contamination in drinking water wells. Providing reverse-osmosis treatment systems to twelve of Petitioner's members cost roughly $196,000, which is nearly half of the yearly appropriation for the Fund. For comparison, as of 2009 more than 2 million North Carolinians obtained water from private wells. (This does not include the number of North Carolinians on public water supply wells.) In Randolph County, where Petitioner is located, almost half of the county's population—more than 65,000 people—uses well water, and 4.5% of sampled wells have shown arsenic at levels above the U.S. EPA standard. (Jesneck Aff. ¶ 16; Resp's 1, Ex. 4 p 7.)

17. DEQ provided whole-house reverse-osmosis treatment systems to Petitioner's members because DEQ's (the agency's) engineering consultant indicated this was the needed treatment for contaminants at the site. In addition, DEQ prefers whole-house over point-of-use treatment systems because whole-house reduces risks throughout the residence (i.e. multiple sinks and faucets, showers, laundry, etc.) whereas point-of-use treatment systems only filter out contaminants at a single faucet and thus do not prevent exposure through the remaining sources in the home. (Jesneck Aff. ¶ 17).

18. DEQ provided notice to Petitioner's members of DEQ's decision to cease spending money from the Bernard Allen Fund on their behalf by letters dated June 18, 19, and 25, 2018. These letters did not provide explicit notice of the right, the procedure, or the time limit to file a contested case petition. (Resp.'s 1, Ex. 1). No opportunity for hearing was provided before the decision set forth in the letters was made.

CONCLUSIONS OF LAW

1. This matter is properly before the Office of Administrative Hearings, and the parties received proper notice of the hearing on these motions for summary judgment. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to their given labels.

2. Summary judgment is proper where "there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." N.C.G.S. § 1a-1, Rule 56. A fact is material only "if its resolution would prevent the party against whom it is resolved from prevailing." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Speculation and conjecture are insufficient to prevent summary judgment. King v. N.C. Dept. of Transp., 121 N.C. App. 706, 708, 468 S.E.2d 486, 489 (1996). In evaluating a motion for summary judgment, the facts are considered in the light most favorable to the non-moving party. Bird v. Bird, 363 N.C. 774, 777, 688 S.E.2d 420, 422 (2010).

3. The proper interpretation of a law or rule is a question of law, and an agency interpretation of a statute or rule is not binding on the Undersigned. Nevertheless, "It is a tenet of statutory construction that a reviewing court should defer to the agency's interpretation of a statute it administers so "long as the agency's interpretation is reasonable and based on a permissible construction of the statute." Cnty. of Durham v. N.C. Dept. of Envt. & Natural Res., 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998).

4. DEQ timely provided a 15-day letter in response to Petitioner's discovery requests and timely responded to Petitioner's requests for admission within 30 days of service, consistent with the schedule of reasonable compliance set forth in the 15-day letter. Therefore, DEQ did not admit to the matters set forth in Petitioner's requests for admission, except to the extent provided in DEQ's responses to those requests.

Petitioner's members were not entitled to a pre-decision hearing.

5. The North Carolina Administrative Procedure Act, N.C. Gen. Stat. Chapter 150B, provides for administrative review of final agency decisions after they occur. See N.C.G.S. § 150B-23. This opportunity for hearing satisfies the requirements of due process. See Godfrey Lumber Co. v. Howard, 151 N.C. App. 738, 566 S.E.2d 825 (2002). DEQ was not required to provide a pre-decision hearing to Petitioner's members. See Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507 S.E.2d 272 (1998).

6. DEQ did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by law; or otherwise err in not providing a pre-decision hearing to Petitioner's members.

Petitioner has shown no right to additional relief on its claim of insufficient notice.

7. DEQ provided notice to Petitioner's members of DEQ's decision to cease spending money from the Bernard Allen Fund on their behalf by letters dated June 18, 19, and 25, 2018. However, these letters did not provide explicit notice of the right, the procedure, or the time limit to file a contested case petition. Thus, the normal constraint of statutory immunity does not apply.

8. For this reason, DEQ could not raise a statute of limitations or jurisdictional defense to Petitioner's otherwise untimely filing of its petition for a contested case hearing. N.C.G.S. § 150B-23(f). DEQ did not raise a statute of limitations or jurisdictional defense to Petitioner's filing of its contested case in this matter.

9. Petitioner has not specified what further relief it is seeking regarding the form of DEQ's notice. Regardless, Petitioner has not shown that it is entitled to any additional or affirmative relief based on DEQ's notice, and the Undersigned finds that no such relief is available in this case. See Jordan v. N.C. Dept. of Transp., 140 N.C. App. 771, 774, 538 S.E.2d 623, 625 (2000).

DEQ's decision to cease provision of alternate water to Petitioner's members was lawful.

10. Expenditure of monies from the Bernard Allen Fund are left to DEQ's discretion. See N.C.G.S. § 87-98(b) ("The Fund may be used to pay for . . ." (emphasis added)). Because the decision of whether and when to supply alternate water is left by statute to DEQ, DEQ's exercise of this decision-making authority cannot be overturned absent a showing that the decision was arbitrary and capricious. See N.C. Gen. Stat. § 150B-23(a); see also ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C., 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (reviewing an agency's discretionary decision under the arbitrary and capricious standard and holding that "[t]he reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law."). An agency's decisions may be reversed as arbitrary or capricious only "if they are 'patently in bad faith,' or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'fail to indicate 'any course of reasoning and the exercise of judgment.'" ACT-UP Triangle, 345 N.C. at 707, 483 S.E.2d at 393 (quoting State ex re. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980)).

11. When disbursing monies from the Bernard Allen Fund, N.C.G.S. § 87-98(c7) requires that DEQ "shall give priority to circumstances in which a well is contaminated as the result of occurring groundwater contamination in the area over circumstances in which a well has naturally occurring contamination." Pursuant to this statute and because DEQ has given priority for provision of permanent alternate water supplies to wells where contamination is non-naturally occurring. DEQ does so to prevent the total depletion of the Fund, which would be quickly exhausted if used to provide alternate water to every well in the state with naturally occurring contamination. (Aff. ¶ 16).

12. N.C.G.S. § 87-98(d) states that DEQ "shall establish criteria by which the Department is to evaluate applications and disburse monies from this Fund." DEQ has established such criteria. (Jesneck Aff. ¶¶ 11-13; Resp.'s 1, Ex. 3; Resp.'s 4-5.)

13. Since the Bernard Allen Fund's beginning, DEQ has always had criteria in place restricting Fund expenditures for alternate water supplies to contamination resulting from non-natural sources. (Jesneck Aff. ¶¶ 11-13; Resp.'s 4). This restriction on the use of the Fund is reasonable, and ensures that some money remains to allow for the types of testing performed, e.g. on behalf of Petitioner's members in this case; for the provision of alternate water supplies while this testing occurs; and for notifying the public of any newly discovered sources of contamination. (Jesneck Aff. ¶ 13). If the Fund were depleted, no such testing and notification could occur until the following fiscal year, when Fund monies were again appropriated by the General Assembly.

14. DEQ's policy to limit provision of alternate drinking water supplies to wells impacted by non-naturally occurring contamination is longstanding and is reasonable and based on a permissible construction of the statute. For this reason, DEQ's interpretation of the statute to allow such limitation is not arbitrary or capricious and is entitled to deference. Even in the absence of deference, the Undersigned finds DEQ's interpretation and implementation of the statute and the Bernard Allen Fund to be reasonable and permissible and within the expected usage of the Fund.

15. As stated above and because the statute leaves expenditures from the Bernard Allen Fund to DEQ's discretion, DEQ did not err in ceasing expenditures of monies from the Fund to provide alternate water supplies to Petitioner's members once DEQ determined that the contamination of Petitioner's members' wells was naturally occurring.

16. Further, DEQ did not exceed its authority or jurisdiction; act erroneously, fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by law; or otherwise err in ceasing expenditures of monies from the Fund on behalf of Petitioner's members.

DEQ was not at this time required to promulgate rules governing expenditures from the Bernard Allen Fund.

17. N.C.G.S. § 87-98(d) states that DEQ "may adopt any rules necessary to implement this section." (emphasis added). When the word "may" is used in a statute, it will ordinarily be construed as permissive, not mandatory. In re Hardy, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (citing Felton v. Felton, 213 N.C. 194, 195 S.E. 533 (1938); Rector v. Rector, 186 N.C. 618, 120 S.E. 195 (1923)). In stating that DEQ "may adopt any rules necessary to implement this section," the Legislature has left the adoption of any such rules within DEQ's discretion. There is presently no requirement for DEQ to adopt such rules.

18. While N.C.G.S. § 87-98(d) also states that DEQ "shall establish criteria by which the Department is to evaluate applications and disburse monies from this Fund," DEQ has established such criteria.

19. The case of McCrann v. N.C. Dept. of Health & Human Servs., 209 N.C. App. 231, 704 S.E.2d 889 (2011), cited by Petitioner, is inapposite. The guidance in that case limited the availability of reimbursement for medical expenses that the petitioners were otherwise entitled to receive under the governing statutes and rules of the State Medicaid Program. The statute at issue in the present case is different because expenditure of monies under the Bernard Allen Fund is left to DEQ's discretion. N.C.G.S. § 87-98(b). The statute does not require DEQ to spend the money in any specific way, or for any specific person or group of persons. Petitioner's members thus have no entitlement to expenditure of monies from the Fund on their behalf, even in the absence of the criteria adopted by DEQ. Because expenditures from the Fund are left by statute to DEQ's discretion (administrative adjudication), and because the statute itself does not require DEQ to adopt rules, formal rulemaking was not required.

20. DEQ did not exceed its authority or jurisdiction, act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by law; or otherwise err in failing to promulgate formal rules regarding expenditures from the Bernard Allen Fund.

DEQ did not err in its decision to install whole-house reverse osmosis treatment systems.

21. N.C.G.S. § 87-98(b) states:

> The Fund may be used to pay for:
>
> (4) The temporary or permanent provision of alternative drinking water supplies to persons whose drinking water well or improved spring is contaminated. Under this section, an alternative drinking water supply includes the repair, such as use of a filtration system, or replacement of a contaminated well or the connection to a public water supply.

This language leaves expenditures regarding alternative drinking water supplies from the Bernard Allen Fund to DEQ's discretion ("The Fund may be used to pay for . . .").

22. The statute specifically leaves the source and reason for providing alternative drinking water supplies to DEQ's discretion. DEQ may spend Bernard Allen Fund monies to provide alternative drinking water supplies by "use of a filtration system, or replacement of a contaminated well or the connection to a public water supply." N.C.G.S. § 87-98(b)(4). No specific source of alternative water supply is mandated by the statute, much less a specific treatment or filtration system.

23. Although there was evidence to the contrary demonstrating what alternative water supplies could be used, because the decision of whether and what type of alternative water supply to provide is left by statute to DEQ, this decision cannot be overturned absent a showing that the decision was arbitrary and capricious. See N.C. Gen. Stat. § 150B-23(a); see also ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C., 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (reviewing an agency's discretionary decision under the arbitrary and capricious standard and holding that "[t]he reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law."). An agency's decisions may be reversed as arbitrary or capricious only "if they are 'patently in bad faith,' or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'fail to indicate 'any course of reasoning and the exercise of judgment.'" ACT-UP Triangle, 345 N.C. at 707, 483 S.E.2d at 393 (quoting State ex re. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980)). None of this was raised by Dr. Nancy Lauer's Affidavit.

24. DEQ chose to provide whole-house reverse osmosis treatment systems while its investigation continued for several reasons, chief among these being DEQ's understanding that whole-house treatment systems are the most protective of health. (Jesneck Aff. ¶ 17). Use of reverse-osmosis treatment systems was also recommended by DEQ's engineering consultant.

(Jesneck Aff. ¶ 17). Thus, DEQ's decision to provide whole-house reverse osmosis treatment systems was a reasoned decision based on fair and careful consideration.

25. DEQ did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by law; or otherwise err in choosing to provide whole-house reverse osmosis treatment systems to Petitioner's members.

Other Issues

26. To the extent Petitioner alleges that DEQ caused individualized financial harm to Petitioner's members or seeks to raise estoppel claims on behalf of its members, Petitioner lacks standing to do so. River Birch Assoc. v. Raleigh, 326 N.C. 100, 129-31, 388 S.E.2d 538, 555-56 (1990); Creek Pointe Homeowners' Assoc. v. Happ, 146 N.C. App. 159, 167-68, 552 S.E.2d 220, 226-27 (2001).

27. To the extent Petitioner raised any other challenges to DEQ's decision, the Undersigned has considered those challenges and found them to lack merit.

Conclusion

28. DEQ did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, fail to act as required by law, or otherwise err in its decision to cease expenditures from the Bernard Allen Fund to provide alternate water supplies to Petitioner's members.

29. There are no issues of material fact preventing summary judgment.

30. Petitioner's motion for summary judgment is denied.

31. DEQ's motion for summary judgment is granted.

FINAL DECISION

As explained in greater detail above and based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby **AFFIRMS** DEQ's decision to cease expenditure of monies to provide alternative water supplies to Petitioner's members by granting Respondent's Motion for Summary Judgment and denying Petitioner's Motion for Summary Judgment.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 30th day of June, 2020.

J. Randall May
Administrative Law Judge

CERTIFICATE OF SERVICE

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

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This the 30th day of June, 2020.

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