STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF BLADEN	17 CVS 580

STATE OF NORTH CAROLINA, *ex rel.*, MICHAEL S. REGAN, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, Plaintiff,	)
CAPE FEAR RIVER WATCH, Plaintiff-Intervenor,	)
v.	)
THE CHEMOURS COMPANY FC, LLC, Defendant.	)

PLAINTIFF'S RESPONSE IN OPPOSITION TO CAPE FEAR PUBLIC UTILITY AUHTORITY'S RENEWED AND AMENDED MOTION TO INTERVENE

NOW COMES Plaintiff the State of North Carolina *ex rel.* Michael S. Regan, Secretary, the North Carolina Department of Environmental Quality ("Plaintiff" or "DEQ") and files this response in opposition to Cape Fear Public Utility Authority's ("CFPUA") Renewed and Amended Motion to Intervene. CFPUA's motion should be denied because it is not timely, and because it fails to meet the requirements for either intervention as of right or permissive intervention under Rule 24 of the North Carolina Rules of Civil Procedure.

Introduction

CFPUA has filed a third motion to intervene in a case that was resolved through entry of a Consent Order by this Court over one and a half years ago. In this third motion to intervene, CFPUA asks this Court to declare this Court's own Order unconstitutional and prevent the parties from amending a single paragraph in the Consent Order through a proposed Addendum. This proposed Addendum requires implementation of measures that will result in cleaner drinking water

for downstream communities, including CFPUA's customers. CFPUA's motion should be denied for multiple reasons.

First, CFPUA's motion to intervene is untimely. This case that was brought more than three years ago, and was resolved through entry of a Consent Order more than one and a half years ago. The submission of a proposed Addendum that was expressly required by that Order in order to amend a single paragraph does not reopen the case such that CFPUA can now seek to overturn the Consent Order and prevent entry of the proposed Addendum.

Second, neither the entry of the original Consent Order nor the entry of the proposed Addendum impairs CFPUA's rights in any way. Far from it. In fact, the Parties' proposed Addendum requires additional measures to reduce PFAS loading from residual contamination of soil and groundwater—measures that would benefit both CFPUA and other downstream users including fishermen who fish in the lower Cape Fear River, farmers who use water from the lower Cape Fear River for irrigation and livestock, and others like CFPUA's customers who use the river for drinking water. Moreover, CFPUA is already separately seeking relief in its prior pending lawsuit against Chemours in federal court. *Cape Fear Public Utility Authority v. The Chemours Company FC, LLC et al.*, 7:17-CV-00195-D & 7:17-CV-00209-D, ECF No. 49 (E.D.N.C. Apr. 13, 2018) ("*CFPUA v. Chemours*"). As counsel for CFPUA has argued in federal court and acknowledged before this Court, the Consent Order and the proposed Addendum in *no way* impair CFPUA's rights to pursue its claims. (*See* Transcript from February 25, 2019 Hearing ("Tr.") p. 32, excerpts attached hereto as **Exhibit 1**)

Third, CFPUA's actions would significantly prejudice the rights of DEQ in that it would delay and threaten to upend DEQ's aggressive efforts to protect North Carolina's natural resources and the health and well-being of its citizens, especially those downstream of the Facility.

At bottom, CFPUA's motion seeks to derail the hard fought relief secured by DEQ for downstream communities as leverage to secure relief it is already pursuing in its own litigation.[1] To be clear, NCDEQ supports CFPUA's efforts to be made whole for any damages it has incurred as a result of Chemours' and DuPont's actions at the Facility. However, NCDEQ strongly objects to CFPUA's efforts to pursue those interests at the expense of all downstream users and the critical pollution reduction measures required under the proposed Addendum.

Background

On September 7, 2017, DEQ filed its Complaint in this matter. On October 17, 2017, CFPUA filed its first motion to intervene. In its first motion, CFPUA sought a 30-day public notice and comment period before any proposed settlement between DEQ and Chemours was entered by the Court. DEQ agreed to such a 30-day public notice and comment period, and CFPUA withdrew its First Motion to Intervene. *See* Stipulations of All the Parties ¶¶ 1-2.

As noted above, CFPUA has also filed its own lawsuit against Chemours. Chemours attempted to have that lawsuit stayed based on DEQ's enforcement action. In response, CFPUA explained, in no uncertain terms, that CFPUA's litigation was separate and distinct from DEQ's.

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[1] In CFPUA's comments on the proposed Addendum, CFPUA states that the State should require Chemours to fund relief in the form of individual stipends and facility upgrades. In apparent contradiction to its court filings, CFPUA insists that such relief is "*not in lieu of but in addition to* what is being done to address the PFAS contamination emanating from Chemours' highly contaminated industrial site." (CFPUA's Comments on the Proposed Addendum, p. 4, attached hereto (without attachments) as **Exhibit 2** (emphasis in original)) If such relief was truly in addition to, and not in lieu of, the measures required in the proposed Addendum, CFPUA would not be attempting to derail implementation of these measures, asking for "deferral of the Court's review of and decision on the proposed Addendum." 3d Mot. to Intervene, p. 24, Prayer for Relief, ¶ d. Nor would CFPUA be requesting that the Court find the Addendum "arbitrary and capricious" and "unconstitutional." Intervenor Compl., Prayer for Relief ¶¶ 1-2. CFPUA cannot have it both ways—either (1) it is seeking to hold hostage the measures required in the Addendum until its own demands are met or (2) it supports the entrance of the Addendum while also seeking to press its own demands. Only the first interpretation comports with the relief it is seeking in its court filings.

CFPUA explained that "DEQ is not authorized to determine the validity of individual tort claims or award money damages to third parties injured by a polluter's actions." *CFPUA v. Chemours*, CFPUA's Mem. in Opp'n to Def's Mot. to Dismiss ("CFPUA Federal Br.") p. 28, attached hereto as **Exhibit 3.** CFPUA further stated that ***"No statute or regulation authorizes DEQ to provide the specific relief that Plaintiffs [including CFPUA] seek."*** *Id.*, p. 29 (emphasis added). CFPUA characterized DEQ's Amended Complaint as follows: ***"DEQ's lawsuit against Chemours seeks site-specific actions to end and prevent further contamination."*** *Id.* (emphasis added). CFPUA concluded that ***"[n]one of Plaintiffs' claims overlap with agency action or require agency intervention."*** *Id.*, p. 30 (emphasis added).

On June 11, 2018, DEQ put a draft order out to public notice and sought public comments. On July 10, 2018, CFPUA submitted comments on this draft order. (CFPUA's Comments on Draft Order, attached hereto as **Exhibit 4**) Although it requested certain minor modifications, CFPUA stated that it "supports the efforts of DEQ in seeking injunctive relief against Chemours." (CFPUA Comments on Draft Order, p. 1)

After receiving public comments, DEQ further strengthened the draft order. Cape Fear River Watch also entered into the negotiations with Chemours. On November 21, 2019, after months of additional work, the parties reached agreement, and DEQ put out to public notice a proposed consent order for a 30-day public comment period. In response to public comments, DEQ made further revisions, including new provisions to address the concerns of downstream users, such as the requirement that Chemours submit a report analyzing PFAS contributions from the Facility to the raw water intakes of downstream public water utilities, and develop and implement a plan for assessing the nature and extent of PFAS sediment contamination originating from the Facility. Additionally, the proposed consent order added language clarifying that it does

not hinder any third party such as CFPUA from seeking additional relief of any injury caused by Chemours, expressly providing that "[n]othing in this Consent Order releases Chemours from any liability it may have to any third parties arising from Chemours' actions." Consent Order ¶ 36.

On December 20, 2018, CFPUA filed its second motion to intervene, and noticed its motion for hearing. On January 10, 2019, CFPUA withdrew its notice of hearing. On February 25, 2019, DEQ brought on for hearing its Motion for Entry of the Consent Order. At the February 25 hearing, counsel for CFPUA stated that the Consent Order "does address many of the concerns, if not most of the concerns, [CFPUA] initially raised . . . ." (Tr. p. 30) The Court inquired, "if I were to go ahead and enter the order today, then the Cape Fear Public Utility Authority still has the ability to pursue any type of litigation . . . ." (Tr. pp. 31-32) Counsel for CFPUA agreed, responding that "none of our claims are released [by the Consent Order] against any parties in this matter, and we still have those claims . . . ." (Tr. p. 32) He further explained that "the requirements of the order are beneficial to the public." (Tr. p. 33) The Court entered the Consent Order.

Paragraph 12 of the Consent Order requires measures to address the most significant ongoing source of PFAS loading—that from residual contamination—on an aggressive, expedited basis. Though cleanup of residual contamination is usually a long, slow process often spanning a decade or more, Paragraph 12 required Chemours to submit to DEQ and Cape Fear River Watch a plan demonstrating the maximum feasible reductions in PFAS loading to surface waters that can be achieved within a two-year period. Chemours could propose, in addition, up to five years for implementation if significantly greater reductions could be achieved. After months of negotiation between DEQ, Cape Fear River Watch and Chemours, the parties agreed on the proposed Addendum to achieve these goals. This proposed Addendum is now before the Court.

At least since the date the Consent Order was entered, February 25, 2019, CFPUA has been

aware of the requirements of Paragraph 12. On September 27, 2019, CFPUA even commented on Chemours' proposed plan to comply with Paragraph 12. *See* Exhibit D to 3d Mot. to Intervene. At CFPUA's request, DEQ met with CFPUA on September 30, 2019. Moreover, on July 17, 2020, while the parties were negotiating the Addendum, DEQ again met with representatives of CFPUA and provided a high-level overview of the relief sought in the Addendum.

On September 8, 2020, despite already having taken advantage of multiple opportunities to comment, despite meeting with DEQ on at least two occasions, despite counsel for CFPUA representing in open court that the Consent Order addressed "many of the concerns, if not most of [CFPUA's] concerns" (Tr. p. 30), despite CFPUA seeking its own relief in a prior pending federal litigation, and despite the express reservation of rights for third parties like CFPUA to recover separately for any injury caused by Chemours, CFPUA seeks to intervene for yet a third time to vacate a Consent Order that it previously described as "beneficial to the public."

ARGUMENT[2]

I. CFPUA'S MOTION TO INTERVENE SHOULD BE DENIED BECAUSE IT IS UNTIMELY.

"Timeliness is the threshold question to be considered in any motion for intervention." *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985);

[2] In this brief, DEQ will focus on the factors relevant to CFPUA's intervention argument, and will not attempt to address in detail its myriad mischaracterizations and misunderstandings. Such mischaracterizations and misunderstandings include, for instance, CFPUA's assertion that DEQ "intends to allow Chemours to discharge of combined concentration of 964 ppt of three PFAS compounds." 3d Mot. to Intervene ¶ 47. The "discharge" that CFPUA is alleging DEQ would "allow" is flow from a heavily contaminated stream that *currently* flows *untreated* to the Cape Fear River—not a new discharge as CFPUA implies. DEQ is requiring Chemours to treat that flow and remove PFAS at a minimum removal efficiency of 99%, with numeric limits as a ceiling that Chemours cannot exceed. CFPUA also asserts that DEQ has "fail[ed] to place any controls over . . . 56 PFAS compounds." *Id.* ¶ 45. CFPUA appears not to understand that the same control technology that removes the three indicator parameters (GenX, PMPA, and PFMOAA) is expected to remove all other PFAS at the same minimal removal efficiency of 99%.

see also State ex rel. Easley v. Philip Morris, Inc., 144 N.C. App. 329, 332, 548 S.E.2d 781, 783, *disc. review denied*, 354 N.C. 228, 554 S.E.2d 831 (2001) ("N.C. Gen. Stat. § 1A-1, Rule 24 . . . requires that an application to intervene be 'timely.'"). The determination of timeliness is left to the sound discretion of the trial court. *Taylor v. Abernethy*, 149 N.C. App. 263, 268, 560 S.E.2d 233, 236 (2002), *disc. review denied,* 356 N.C. 695, 579 S.E.2d 102 (2003). To determine timeliness, North Carolina courts consider five factors: "(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." *Philip Morris*, 144 N.C. App. at 332, 548 S.E.2d at 783 (citation omitted).

Each of these factors weighs heavily against the timeliness of CFPUA's intervention. CFPUA's attempt to defend its delay through recitation of the applicable factors fails: it is mistaken on the status of the case; ignores the extreme prejudice to DEQ if intervention is allowed; fails to offer any justification for its delay; misstates the prejudice to CFPUA if intervention is not allowed; and proffers no "unusual circumstances" that are related to its unjustified delay. Looking briefly at each factor:

> (1) **Status of the case**: CFPUA simply asserts that "judgment has not yet been entered," 3d Mot. to Intervene ¶ 53, despite this Court's entrance of the Consent Order on February 25, 2019;
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> (2) **Possibility of prejudice or unfairness to existing parties**: CFPUA maintains that "there is no risk of unfairness or prejudice" to DEQ, *id.* ¶ 55, despite seeking to derail DEQ's aggressive enforcement of North Carolina's environmental law, postpone implementation of measures to reduce PFAS loading to the Cape Fear River, and vacate a Consent Order that this Court entered more than one and a half years ago;
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> (3) **Reason for the delay**: CFPUA insists that "there has been no delay by CFPUA," *id.* ¶ 54, but offers no justification for waiting over eighteen months after entry of the Consent Order CFPUA now seeks to dissolve to seek intervention;
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> (4) **Potential prejudice to the applicant**: CFPUA asserts that there is prejudice to CFPUA "by not being a party to this action," *id.* ¶ 55, despite (a) the fact that the CFPUA has admitted the relief it seeks is unrelated to the proposed Addendum, which "seeks site-

specific actions to end and prevent further contamination," CFPUA Federal Br. at 29-30 and (b) the fact that CFPUA has a prior pending federal lawsuit seeking its desired relief, a lawsuit which CFPUA has admitted is not impaired by entry of the Consent Order; and

(5) **Unusual circumstances**: CFPUA states that there are "unusual circumstances" in that DEQ's enforcement agenda purportedly does not include "immediate and certain relief for CFPUA and its customers" and DEQ has "exclude[d]" CFPUA from negotiations, *id.* ¶ 55; these assertions are completely unrelated to any "unusual circumstances" *that justify CFPUA's extended delay*.

CFPUA's motion to intervene should be denied as untimely as shown in more detail below.

A. The Case Status Supports Denial of the Motion Because This Case Was Filed More Than Three Years Ago, the Consent Order Was Entered More Than a Year and a Half Ago, and Substantive Allegations Are No Longer at Issue.

The first factor, the status of the case, focuses on the proximity to judgment and weighs heavily against CFPUA's intervention. "Motions to intervene made after judgment has been rendered are disfavored and are granted only after a finding of extraordinary and unusual circumstances or upon a strong showing of entitlement and justification." *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985); *see also Philip Morris*, 144 N.C. App. at 332, 548 S.E.2d at 783.

In *State ex rel. Easley v. Philip Morris, Inc.*, the Court of Appeals affirmed the trial court's order denying as untimely a motion to intervene filed seventy-seven days after a consent order ("Phase II") had been entered. 144 N.C. App. at 330-31, 548 S.E.2d at 782-83. That consent order, which created a private trust to benefit tobacco growers and quota owners, was entered as part of the court's continuing jurisdiction to implement an initial consent order ("Phase I"), which, among other things, directed the creation of a non-profit corporation to control 50% of all monies received under that consent order. *Id.* at 330-31, 548 S.E.2d at 782. Prospective intervenors argued that since the Phase II consent order had been filed only an hour after the complaint, their delay was reasonable. The court rejected this argument, holding that prospective intervenors "failed to demonstrate the 'extraordinary and unusual circumstances' or to make the 'strong showing of

entitlement and justification' necessary . . . to warrant the granting of a motion to intervene *after a final judgment has been entered.*" *Id.* at 334, 548 S.E.2d at 784 (emphasis added). Although prospective intervenors alleged certain unusual circumstances, the court found that they "fail[ed] to indicate how the various unusual circumstances they describe relate to the issue of timeliness." *Id.* In a concurring opinion, Judge Greene addressed prospective intervenors' argument that its motion was timely because it was filed within seventy-seven days of the Phase II consent order, explaining:

> Phase II was not the result of a new complaint; rather, it was a consequence of the single complaint filed by the State and, indeed, was contemplated in the [Phase I consent order]. Thus, the timeliness of intervenors' motion must be judged in the context of Phase I. In that context, there was more than a ten month delay in the filing of the motion to intervene.

Id. at 334, 548 S.E.2d at 784 (Judge Greene concurring).

Remarkably, CFPUA asserts that "[i]n this action, judgment has not yet been entered. Rather, the State has negotiated and is administering a Revised Consent Order, and has now proposed an Addendum under the continuing oversight of this Court . . . ." 3d Mot. to Intervene ¶ 53. On its face, this argument is without merit. This Court entered judgment in the form of a Consent Order on February 25, 2019, over eighteen months ago. *See Philip Morris*, 144 N.C. App. at 334, 548 S.E.2d at 784 (holding that the entrance of a consent order was a final judgment). CFPUA seeks to overthrow that Consent Order and to prevent entry of an amendment—the proposed Addendum—that is expressly *required* by that Consent Order. CFPUA's delay must be measured from entrance of the Consent Order over eighteen months ago. *See id.* (clarifying that entrance of a second order contemplated by the original consent order does not re-start the clock) (Judge Greene concurring). There are no extraordinary or unusual circumstances that justify CFPUA's long delay.

Since judgment has been entered and all that remains is for the Court to determine whether to enter an amendment that was required by the Court's own Order, the status of the case weighs strongly against the timeliness of CFPUA's motion to intervene. *See Philip Morris,* 144 N.C. App. at 334, 548 S.E.2d at 784.

B. Intervention Would Prejudice the Existing Parties.

The second factor, the possibility of unfairness or prejudice to the existing parties, also militates strongly against the timeliness of CFPUA's motion.

CFPUA asserts that "there is no risk of unfairness or prejudice to the existing parties." 3d Mot. to Intervene ¶ 55. This assertion borders on absurdity. CFPUA's intervention would be highly prejudicial to DEQ, especially given the extraordinary relief that CFPUA seeks—specifically, a judgment declaring the Consent Order arbitrary and capricious, and unconstitutional. *See, e.g.,* Intervenor Compl. Prayer for Relief ¶¶ 1-2. Intervention would strike at the heart of DEQ's aggressive efforts to protect North Carolina's natural environment and the health and well-being of its citizens, especially those downstream of the Facility. DEQ technical staff and management have devoted countless hours towards implementation of the Consent Order, reviewing data; performing site visits; evaluating submissions; fielding questions from the public; holding numerous public meetings; and fulfilling numerous other responsibilities under the Consent Order. DEQ experts have expended tremendous resources to gain an in-depth understanding of the hydrogeology underlying the Facility, and the ways that PFAS historically and currently enter the environment from the Facility (whether from direct wastewater discharge, air emissions, spills, contaminated soil, contaminated groundwater, or leaking pipes).

With respect to the proposed Addendum,[3] CFPUA's puzzling opposition is prejudicial to DEQ because it again threatens to thwart DEQ's efforts to enforce North Carolina's environmental laws, protect the environment and the health and safety of North Carolinians, and require Chemours to aggressively and expeditiously reduce PFAS loading from residual contamination to the Cape Fear River. This opposition could delay—and perhaps derail—relief for CFPUA's own customers as well as for the many thousands of North Carolinians who stand to benefit from the measures required in the proposed Addendum. Like the Consent Order, the proposed Addendum is the product of a time-intensive analysis and investigation involving numerous DEQ experts across several divisions. DEQ's experts have also devoted substantial time and effort to understanding the most effective methods for cutting off the residual source of PFAS contamination and rapidly reducing PFAS contamination to the Cape Fear River from these sources, especially contaminated groundwater flowing from the Facility. CFPUA seeks to undo DEQ's substantial commitment of resources and the significant achievements in reducing PFAS contamination. *See Philip Morris*, 144 N.C. App. at 334, 548 S.E.2d at 784 (affirming the trial court's finding that untimely intervention would "seriously prejudice and delay the rights of the original parties").

[3] The proposed Addendum contains an intricate, complex set of requirements as well as a series of deadlines that Chemours must meet. For instance, under the proposed Addendum, Chemours must meet aggressive deadlines to reduce PFAS loading by at least 80% from four heavily contaminated streams, called "seeps," that are fed by groundwater from under the Facility before entering the Cape Fear River. The first seep treatment system must be installed in November 2020 with the final system installed in April 2021, less than 6 months from now. The Addendum also requires that, in less than two and a half years, Chemours install a massive barrier wall approximately a mile and a half long together with a groundwater extraction system to prevent contaminated groundwater from migrating from under the Facility to the Cape Fear River. CFPUA seeks to derail this proposed Addendum, and delay implementation of its provisions.

For both the Consent Order and the proposed Addendum, CFPUA ignores the well-established principle that an intervenor cannot block a settlement between the original parties merely because the intervenor disagrees with the relief the settlement provides. *See Gates Four Homeowners Ass'n v. City of Fayetteville*, 170 N.C. App. 688, 691, 613 S.E.2d 55, 57 (2005) (holding that "under the second factor dealing with prejudice to the existing parties, intervention would prejudice the City and the Gates Four community by destroying their settlement."); *see also Charles Schwab & Co. v. McEntee*, 225 N.C. App. 666, 675-76, 739 S.E.2d 863, 869 (2013) ("Permitting intervention under the circumstances might have eradicated the Family Settlement Agreement and delayed adjudication of the rights of the Named Parties, potentially to the detriment of the creditors and other beneficiaries of the Estate."). Despite this principle, in its Intervenor Complaint, CFPUA seeks to have the Consent Order and proposed Addendum declared unconstitutional and arbitrary and capricious. Intervenor Compl., Prayer for Relief ¶¶ 1-2. CFPUA also seeks a trial in this matter. *Id.* ¶ 4. This extraordinary and unusual relief as well as the request for a trial, assuming *arguendo* that such a request is allowable, would result in significant delay and upend an agreed upon settlement, prejudicing the existing parties.

CFPUA's attempted derailment of the Consent Order and proposed Addendum is extraordinarily prejudicial to DEQ in that it seeks to delay DEQ's aggressive enforcement of North Carolina's environmental laws, and, by extension, prejudicial to the citizens of North Carolina affected by PFAS contamination from Chemours' facility.

C. CFPUA Has No Legitimate Reason for Having Delayed its Motion for Intervention.

The third factor, the reason for the delay, also weighs against the timeliness of CFPUA's motion. CFPUA alleges that "there was no delay by CFPUA in filing this motion," stating that it has been continuously monitoring implementation of the Consent Order and its impacts on PFAS

levels in the Cape Fear River. 3d Mot. to Intervene ¶ 54. CFPUA offers no support for its assertion that it did not delay, and its argument is belied by the facts.

The proper starting point for measuring delay is when the prospective intervenor first learns that its interests diverge from the parties and that its rights might be affected. *See Procter v. Raleigh Bd. of Adjustment*, 133 N.C. App. 181, 184, 514 S.E.2d 745, 747 (1999) (measuring delay from the time when the intervenor learned of the plaintiff's change in position); *see also Philip Morris*, 144 N.C. App. at 334, 548 S.E.2d at 784 (clarifying that delay is measured from the time the first order, which contemplated entrance of the second order, was entered) (Judge Greene concurring). When an intervenor is on notice of how the plaintiff seeks to resolve the case, the announcement of a proposed consent order consistent with that approach does not excuse delay in moving to intervene. *See Bloomington v. Westinghouse Elec. Corp.*, 824 F.2d 531, 535 (7th Cir. 1987)[4] (holding that a motion to intervene filed after a consent order had been announced was untimely because the parties had publicly announced the intended direction of the settlement discussions eleven months earlier and the ultimate consent decree was consistent with those statements).

Instead of directly addressing this factor by explaining the reasons for its long delay, CFPUA directs attention elsewhere. For instance, CFPUA states that "[t]here can be no question now that the relief to CFPUA is inadequate, as DEQ itself has acknowledged in publishing the proposed Addendum." 3d Mot. to Intervene ¶ 54. This *non sequitur* is grossly inaccurate. The proposed Addendum is expressly required by Paragraph 12 of the Consent Order, which requires Chemours to address residual contamination flowing to the Cape Fear River from the Facility on

[4] North Carolina courts look to federal cases addressing intervention as persuasive authority; "[w]ith only minor exceptions, Federal Rule 24 and North Carolina Rule 24 are substantially the same." *Ellis v. Ellis*, 38 N.C. App. 81, 84, 247 S.E.2d 274, 277 (1978).

an expedited basis. For at least eighteen months, CFPUA has known the requirements of Paragraph 12 and the type of relief that would be required. Indeed, on September 27, 2019, CFPUA offered comments on the plan Chemours submitted in August 2019, which contained the broad outlines of measures included in the proposed Addendum. The Consent Order expressly *requires* that the parties come back to the Court to seek an amendment for the purpose of addressing residual contamination on an expedited basis.

In fact, the Consent Order was structured with the express purpose of affording CFPUA input into the amendment process, providing that when Chemours submits its plan demonstrating maximum feasible reduction in PFAS loading from the Facility to DEQ and Cape Fear River Watch, Chemours "shall simultaneously transmit the plan to downstream public water utilities." Consent Order ¶ 12(a). CFPUA was also offered the opportunity to meet with DEQ, an opportunity of which it availed itself. CFPUA understood all of this when the Consent Order was entered eighteen months ago. It chose not to pursue intervention at that time.

CFPUA has articulated no legitimate reason for its delay in seeking intervention. CFPUA was aware of the general contours of the proposed Addendum since they are spelled out in the Consent Order itself.[5] Under these circumstances, CFPUA's delay weighs heavily against the timeliness of its Second Motion to Intervene. *See Philip Morris,* 144 N.C. App. at 334, 548 S.E.2d at 784; *Bloomington*, 824 F.2d at 535.

D. CFPUA Will Not Suffer Prejudice from Being Denied Intervention.

CFPUA will suffer no prejudice from being denied intervention.

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[5] CFPUA in its own federal filing accurately described the sort of relief that DEQ is seeking in this litigation, stating that "DEQ's lawsuit against Chemours seeks site-specific actions to end and prevent further contamination." CFPUA Federal Br. at 29-30. The Addendum is the next step in these site-specific action to end and prevent further contamination.

First, the proposed Addendum protects the interests of downstream communities, which CFPUA claims to represent. More specifically, the proposed Addendum requires Chemours to achieve maximum feasible reductions of PFAS contributions from residual sources at the Facility to the Cape Fear River on an expedited basis. This process will be implemented under the supervision of DEQ, Cape Fear River Watch and the Bladen County Superior Court. Downstream communities, including CFPUA and its customers, will be the primary beneficiaries of this accelerated remediation.

Second, counsel for CFPUA stated in open court that that the Consent Order "address[es] many of the concerns, if not most of the concerns, [CFPUA] initially raised . . . ." (Tr. p. 30) Counsel for CFPUA also acknowledged that "the requirements of the order are beneficial to the public." (Tr. p. 33). It is inconsistent for CFPUA to assert (1) that the Consent Order addresses many, if not most, of its concerns and is beneficial to the public and (2) that it is somehow prejudiced by the proposed Addendum which directly addresses PFAS loading to the Cape Fear River from residual contamination, the most significant current source of contamination.

Third, CFPUA is already asserting its own interests in a prior pending federal litigation, seeking money damages against Chemours. Such an award of money damages is not contemplated in DEQ's Amended Complaint or in the Consent Order, which defines the parameters of the proposed Addendum. As CFPUA explained in federal court, "DEQ's lawsuit against Chemours seeks site-specific actions to end and prevent further contamination." CFPUA Federal Br. at 29. Most importantly, the Consent Order and proposed Addendum do not in any way impair CFPUA's efforts to vindicate its interests in its separate federal litigation. To the contrary, the Consent Order (a) only releases claims brought by DEQ; (b) expressly provides that Chemours is not released from any liability it may have to any third parties arising from Chemours' actions; and (c) expressly

provides that no other entities, including DuPont (a defendant in CFPUA's federal lawsuit), are released from any liability. Consent Order ¶¶ 34-36. As CFPUA has expressly acknowledged, "[n]one of [CFPUA's] claims overlap with agency action or require agency intervention." CFPUA Federal Br. at 30. And, again in open court, counsel for CFPUA stated the Consent Order "makes clear . . . that none of our claims are released against any parties in this matter, and we still have those claims, as you understand." (Tr. p. 32)

The Consent Order and proposed Addendum in no way prejudices CFPUA, and this factor weighs heavily against the timeliness of its third motion to intervene.

E. There Are No Extraordinary or Unusual Circumstances Justifying Late Intervention, but Such Circumstances Do Weigh Against the Timeliness of This Intervention.

CFPUA asserts that "there are 'unusual circumstances' here." 3d Mot. to Intervene ¶ 56. However, the "unusual circumstances" that it lists (e.g., that DEQ's enforcement agenda allegedly does not include "immediate and certain relief" for CFPUA) are unrelated to its long delay and are irrelevant to its failure to timely move for intervention. *See Phillip Morris*, 144 N.C. App. at 334, 548 S.E.2d at 784 (holding that when purported "unusual circumstances" are unrelated to justifying delay, they are not relevant to the analysis).

While extraordinary or unusual circumstances are generally analyzed to support a late motion to intervene, *see e.g.*, *Procter*, 133 N.C. App. at 184, 514 S.E.2d at 747, here, there are unusual circumstances here that warrant *denying* the motion to intervene as untimely. Unlike most settlements, both the Consent Order and the Addendum were publicly noticed, allowing CFPUA and other members of the public a chance to be heard on both documents prior to entry by the Court. Moreover, the Consent Order also expressly provided downstream utilities, including CFPUA, with a unique role in the process that led to development of the Addendum. Specifically,

Chemours was required to share its plan under Paragraph 12 with CFPUA and other utilities and required DEQ to make relevant staff available to meet with CFPUA to discuss their comments on Chemours' plan. And finally, the nature of this particular proposed Addendum also constitutes an unusual circumstance favoring the denial of the motion to intervene. This is no ordinary settlement. The proposed Addendum addresses an issue of paramount importance to the citizens of North Carolina—the requirement of significant reductions of PFAS loading from residual sources at the Facility. CFPUA should not be permitted to hold this amendment hostage to address its own demands.

As noted, any delay in entering the proposed Addendum could postpone the implementation of the expedited measures to significantly reduce PFAS loading to the Cape Fear River, potentially harming all downstream users, including fishermen, farmers, and customers of public water utilities. By seeking just such a delay and requesting "deferral of the Court's review of and decision on the proposed Addendum," 3d Mot. to Intervene, Prayer for Relief ¶ d, CFPUA appears to be willing to derail measures intended to benefit its own customers to create leverage for its separate litigation against Chemours. Because every factor considered by North Carolina courts weighs heavily against the timeliness of CFPUA's motion to intervene, this Court should deny the motion as untimely.

II. CFPUA IS NOT ENTITLED TO INTERVENE AS OF RIGHT BECAUSE THE PROPOSED RELIEF CONTEMPLATED IN THE ADDENDUM DOES NOT IMPAIR ITS INTERESTS.

Even assuming CFPUA's motion to intervene was timely, it is not entitled to intervene of right. Pursuant to N.C. Rule of Civil Procedure 24(a), a party must be allowed to intervene:

> (1) When a statute confers an unconditional right to intervene; or
> (2) When 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.

CFPUA has pointed to no statute that confers an unconditional right to intervene, so it is only entitled to intervene of right if it can demonstrate that "(1) it 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, 515 S.E.2d 675, 683 (1999).

As to the second factor, CFPUA's four alleged bases for its contention that failing to allow intervention would impair its interests, 3d Mot. to Intervene ¶ 59, are without merit. First, CFPUA asserts that because the parties negotiated and reached an agreement "on a proposed Addendum whose implementation directly impacts CFPUA[,] CFPUA deserves a seat at the table and cannot adequately protect its interests without a seat." 3d Mot. to Intervene ¶ 59(a). This position is contradicted by CFPUA's own support for an earlier draft order that provided *less* protection for downstream users. *See* CFPUA's Comments on Draft Order, at 1. Assuming that CFPUA's interests are coincident with those of downstream users, the proposed Addendum powerfully protects those interests, requiring Chemours to make maximum feasible reductions in PFAS loading from residual sources at the Facility to the Cape Fear River on an expedited basis. *See* Consent Order ¶ 12; Proposed Addendum. In the face of the clear and unambiguous text of the proposed Addendum, CFPUA cannot make a credible claim that the proposed Addendum does not further the interests of downstream users. In fact, even in its Intervenor Complaint, CFPUA admits that the Consent Order as proposed "included requirements that seek to reduce future releases of PFAS from the Fayetteville Works Facility and that mandate remediation of PFAS-contaminated

groundwater in the vicinity of the Facility." Intervenor Compl. ¶ 20. Given that residual contamination is the most significant source of current PFAS contamination to the Cape Fear River from the Facility, the requirements in the proposed Addendum do not, and cannot, impede CFPUA's ability to protect its interests in lowering PFAS contamination from Chemours' facility to the Cape Fear River. On the contrary, these requirements directly further CFPUA's purported interests.

Second, CFPUA contends that by setting trigger concentrations of certain PFAS in groundwater in the vicinity of the Chemours Facility which require permanent replacement water supplies, "DEQ arguably has established maximum concentrations of those compounds it has determined to be safe for human consumption and use for water supply." 3d Mot. to Intervene ¶ 57(b). In this puzzling assertion, CFPUA is, to all appearances, objecting that the Consent Order provides *too much* relief to those near the Facility whose groundwater has been impacted. Regardless, CFPUA's stated concern that it should participate in evaluation and setting of drinking water standards is irrelevant because the Consent Order set no such "implicit or explicit" standards. *See* 3d Mot. to Intervene ¶ 59(c).

CFPUA is also mistaken in treating groundwater and surface water as equivalent. With regard to this litigation, these two media are categorically different and it is appropriate to treat them as such. Groundwater contamination and surface water contamination are different problems that have different applicable regulatory regimes with different standards, and require different approaches. *Compare* 15A NCAC 2L .0101 *et seq.*, *with* 15A NCAC 2B .0101 *et seq.* As CFPUA has publicly recognized on multiple occasions, the most effective method for lowering concentrations of PFAS in surface water is to control PFAS contamination at its source. For instance, CFPUA explained, "As CFPUA and others work to address this problem [of PFAS

contamination], we must remember that *the most effective solution is source control.*" CFPUA 2018 Annual Report at 13 (available at https://www.cfpua.org/Archive.aspx?ADID=774) (last accessed October 3, 2020) (emphasis added).[6]

This approach—controlling PFAS at its source—is precisely the approach adopted in the proposed Addendum to address surface water contamination, making CFPUA's resistance to the proposed Addendum (and, more generally to the Consent Order) all the more puzzling. However, this approach (i.e., source control) is often not as effective for groundwater which has been contaminated over decades, moves much more slowly than surface water, and can be re-contaminated by contaminated soils. These differences make it appropriate that the Consent Order requires permanent alternate water supplies for those with contaminated drinking water supplies drawn from groundwater. Additionally, individual homeowners do not have an intermediary such

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[6] CFPUA has repeated this position on numerous occasions. For instance:

- In a letter to its customers, CFPUA explained that "because we know little about their [i.e., PFAS compounds] health effects, CFPUA believes the compounds *should be stopped at the source*—which is why we are working with NCDEQ to keep GenX and other per-fluorinated compounds out of the Cape Fear River." Letter to Customers (available at https://www.cfpua.org/DocumentCenter/View/9333/A-Letter-to-Our-Customers_FINAL) (last accessed October 3, 2020) (emphasis added).
- In its presentation to the House Select Committee on NC River Quality, CFPUA stated, "*Controlling contaminants at the source remains the only option* to:
    - maintain drinking water quality
    - protect public health
    - safeguard the environment
    - ensure associated costs are paid by discharger, not downstream communities." Update on Response to Emerging Contaminants to the House Select Committee on NC River Quality, Slide 3 (available at https://www.ncleg.gov/documentsites/committees/house2017-185/Meetings/7 - April 26 2018/Flechtner CFPUA Final Rpt.pdf) (last accessed October 3, 2020) (emphasis added).

See also CFPUA 2017 Annual Report at 15 (available at https://www.cfpua.org/Archive.aspx?ADID=630) (last accessed October 3, 2020).

as CFPUA that exists for the purpose of ensuring their drinking water meets applicable standards. CFPUA's reliance on the false equivalency between contaminated groundwater and contaminated surface water to support its motion for intervention fails because there are relevant differences between them as clarified above.

The proposed Addendum powerfully protects the interests of downstream users by requiring maximum reductions in PFAS loading to the Cape Fear River on an expedited basis. To the extent that CFPUA's interests are aligned with those of downstream users, it cannot credibly claim that the Consent Order or the proposed Addendum impairs its ability to protect these interests. The fact that the Consent Order requires treatment of groundwater for those near Chemours' facility does not impair CFPUA's ability to protect its interests.

Third, CFPUA contends that "one water quality standard applicable to fresh surface water that DEQ must enforce pursuant to the Clean Water Act and state law is: deleterious substances may be discharged '*only*' in such amounts that will 'not render the waters injurious to public health . . . or impair the waters for any designated uses.'" 3d Mot. to Intervene ¶ 59(d) (citing and quoting 15A NCAC 2B .0211(12)). CFPUA then argues that its ability to protect its interests will be impaired if DEQ is unable or unwilling to adequately enforce the State's water quality standards. *Id.* This argument is without merit. The Consent Order in fact *prohibits* the discharge of *any* wastewater from Chemours' manufacturing facility until Chemours obtains an NPDES permit. Consent Order ¶ 10. CFPUA cannot credibly maintain that its interests are impaired by an order prohibiting the discharge of all process wastewater from Chemours' manufacturing facility. To the contrary, this prohibition protects and furthers the interests of downstream users, and, by extension, the purported interests of CFPUA.

Fourth, CFPUA asserts that "CFPUA's ability to obtain relief in its Federal Suit may be impaired if the State compromises this underlying action in a manner detrimental to CFPUA's interest." 3d Mot. to Intervene ¶ 57(e). This reasoning is both entirely circular and entirely irrelevant. In essence, CFPUA claims that its interests will be impaired by the Consent Order if its interests are impaired by the Consent Order. But the argument's necessary predicate never arises—the terms of the Consent Order make emphatically clear that it in no way adversely affects CFPUA's interests or its ability to pursue its own claims. CFPUA has acknowledged as much in its federal lawsuit and in open court. CFPUA Federal Br. at 29; Tr. at 32; Consent Order ¶¶ 34-36. Because this alternate avenue for protecting its interest remains available to CFPUA unencumbered by the Consent Order or the proposed Addendum, CFPUA is not entitled to intervention as of right.

III. CFPUA SHOULD NOT BE ALLOWED TO PERMISSIVELY INTERVENE BECAUSE THE DELAY WOULD PREJUDICE THE EXISTING PARTIES.

A court may allow a party to intervene permissively "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common." N.C. Gen. Stat. § 1A-1, Rule 24. When deciding whether to allow permissive intervention, the court must consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

Here, as explained above, allowing CFPUA to intervene would unreasonably delay resolution of the proceedings, to the prejudice of the current parties. Furthermore, even if CFPUA were allowed to intervene, it would have no power to prevent the proposed Addendum from being approved. No intervenor—whether they have intervened with the full rights of a party or not—may prevent two parties from settling by the mere fact of their objection. *See Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 528-29 (1986) ("It has

never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes . . . .") To the extent that CFPUA simply wishes to be heard regarding its objections to the proposed Addendum, DEQ has already provided a mechanism for being heard—CFPUA may file comments, as it has.

CFPUA's request for permissive intervention should be denied.

CONCLUSION

For the reasons set forth above, DEQ asks this Court to deny CFPUA's third motion to intervene filed more than a year and a half after this Court entered a Consent order resolving this case. The motion is untimely and fails to demonstrate that CFPUA should be allowed to intervene either permissively or as of right.

Respectfully submitted, this the 7th day of October, 2020.

JOSHUA H. STEIN
Attorney General

By: _____

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CERTIFICATE OF SERVICE

The undersigned certifies that this PLAINTIFF'S RESPONSE IN OPPOSITION TO CAPE FEAR PUBLIC UTILITY'S RENEWED AND AMENDED MOTION TO INTERVENE were served on counsel listed below electronically and by depositing a copy in the United States Mail, first class postage prepaid, addressed as follows:

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The undersigned certifies that this PLAINTIFF'S RESPONSE IN OPPOSITION TO CAPE FEAR PUBLIC UTILITY'S RENEWED AND AMENDED MOTION TO INTERVENE were served on counsel listed below electronically:

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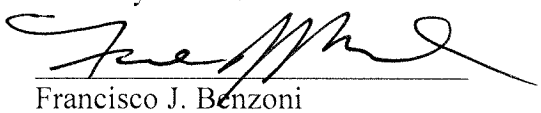
This the 7th day of October 2020.

JOSHUA H. STEIN
Attorney General

By: 

Francisco J. Benzoni
Special Deputy Attorney General

Exhibit 1

NORTH CAROLINA GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

****

STATE OF NORTH CAROLINA, *ex rel.*, MICHAEL S. REGAN, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, Plaintiff, v.	)	COUNTY of BLADEN
THE CHEMOURS COMPANY, FC LLC, Defendant.	)	17-CVS-580

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TRANSCRIPT, Volume I of I
Monday, February 25, 2019

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Monday, February 25, 2019, 2.1 Special Session

Honorable Douglas B. Sasser, Judge Presiding

MOTION FOR ENTRY OF REVISED PROPOSED CONSENT ORDER

APPEARANCES

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on behalf of Cape Fear Public Utility Authority

Ranae McDermott, RMR, CRR
Official Court Reporter - Division II - Rover
Post Office Box 1114
Wrightsville Beach, North Carolina 28480

02:44:00 We agree wholeheartedly with the presentation that
02:44:02 Mr. Benzoni gave earlier today and would also respectfully
02:44:07 request that you enter the order.
02:44:10 On our motion to intervene, we filed a consent
02:44:13 motion to intervene on December 12th, 2018. And as you've
02:44:18 heard, we are a party to the consent order we have been
02:44:21 discussing.
02:44:22 As contemplated or memorialized in paragraphs 37
02:44:27 and 38 of the consent order, the parties contemplated that
02:44:31 the Cape Fear River Watch would intervene to enforce many of
02:44:35 the provisions in the order and also to resolve its pending
02:44:40 claims against the Department of Environmental Quality in
02:44:42 state court and against Chemours in federal court.
02:44:46 Therefore, we respectfully request that you grant
02:44:48 our consent motion to intervene.
02:44:50 THE COURT: Thank you, ma'am.
02:44:51 MS. MOSER: Thank you.
02:44:56 THE COURT: And, counsel, I'll just --
02:44:58 Oh, yes, sir.
02:45:00 MS. HOUSE: Yes, Your Honor. I'm George House. I
02:45:01 represent the Cape Fear Public Utility Authority.
02:45:05 THE COURT: Yes, sir.
02:45:06 MS. HOUSE: And would you like to hear from us on
02:45:08 our motion to intervene?
02:45:09 THE COURT: Yes, sir.

02:45:11 MS. HOUSE: The Cape Fear Public Utility Authority
02:45:14 approaches this from a slightly different perspective. We
02:45:16 have 200,000-plus customers who have been drinking this
02:45:20 water for more than 30 years.
02:45:23 When this began, as the chart shows you, the
02:45:27 amount of GenX that our customers were drinking was over a
02:45:31 thousand parts per trillion. The health standard, which
02:45:36 the -- the department came out with -- not this department,
02:45:39 but DHS came out with -- was 140. How many years we have
02:45:44 been drinking that amount or more in the past 30 years that
02:45:49 Chemours says they have been discharging this is utterly
02:45:54 unknown to man and will be determined by studies going on in
02:45:58 the future.
02:46:00 When the original consent order was brought
02:46:03 forward, Cape Fear had not seen it before the day it was
02:46:07 filed. When Cape Fear looked at it, to us it contained a
02:46:13 substantial number of gaps. It contained some confusion,
02:46:16 and it contained some great concerns that we felt for other
02:46:23 customers.
02:46:24 Subsequent to that, we filed a motion to intervene
02:46:28 in the case and set fourth our public comments that were
02:46:33 sent to DEQ, and that was attached as far as our desire to
02:46:37 intervene.
02:46:38 Subsequent to that motion to intervene, we did
02:46:40 enter into discussions with DEQ and the Department of

02:46:44 Justice. They were good discussions. They were productive
02:46:48 discussions. We had no discussions with Chemours at the
02:46:51 time.
02:46:54 I'm at a slight disadvantage, Your Honor, in that
02:46:57 the order was published last Wednesday and we had not seen
02:47:01 the revised order before it was published.
02:47:06 State boards can only meet at prescribed
02:47:09 increments. We gave notice of a -- of a meeting for next
02:47:14 Tuesday, and then Your Honor planned the hearing for today.
02:47:18 We actually could not meet before next Tuesday.
02:47:22 I'm before you today to tell you that I do agree
02:47:25 with Mr. Benzoni and I do agree with Mr. Savarese that there
02:47:29 has been great progress made here. We are not denying that.
02:47:34 There is great good that has occurred over the last year in
02:47:38 the reduction of these PFAS compounds.
02:47:41 We are still learning about PFAS compounds.
02:47:45 UNCG -- UNCW -- excuse me. I'm in the right place -- has
02:47:49 done work and provided information on five new additional
02:47:52 compounds which have yet to be analyzed. This is a
02:47:57 continuing process.
02:47:59 The -- I will say to you that I, as a lawyer, have
02:48:03 read the new consent order and -- and believe it has great
02:48:09 improvement. It is a much, much better document. It does
02:48:12 address many of the concerns, if not most of the concerns,
02:48:15 we initially raised; maybe not by value, but by number.

02:48:22 I believe it is important for the board to
02:48:28 reconsider its decision to intervene in this case. As you
02:48:33 know, we had not scheduled the intervention motion. We were
02:48:36 thinking it was going to be March the 25th.
02:48:39 I -- I have to speak to the board. I can't speak
02:48:42 for the board, neither can the directors speak for the
02:48:45 board. This is a very strong board with great divergent
02:48:50 views. They -- when we discuss this matter in executive
02:48:55 session, it goes on for a long time.
02:48:57 I cannot tell you today what the board would do.
02:48:59 What I would ask Your Honor to do is to withhold your
02:49:03 signature on this until I have a chance to meet with the
02:49:05 board tomorrow and to obtain their view on whether they
02:49:12 should withdraw the petition -- motion to intervene or not.
02:49:17 I have no way of expressing it other than I cannot
02:49:21 answer for the board without the board meeting to vote.
02:49:25 THE COURT: Let me inquire. There's not a
02:49:28 pending -- at this point, it has not been calendared for --
02:49:33 MS. HOUSE: I have not calendared it, Your Honor,
02:49:34 because, again, I -- when we entered into discussions with
02:49:36 DEQ, I removed it from the calendar indicating good faith.
02:49:41 But, believe me, that if it were to be entered again, we
02:49:45 would have time to answer and address the motion to
02:49:47 intervene before we had this hearing.
02:49:50 THE COURT: But, certainly, if I were to go ahead

02:49:52 and enter the order today, then the Cape Fear Public Utility
02:50:00 Authority still has the ability to pursue any type of
02:50:02 litigation, any -- it's -- it's -- at this point, this
02:50:05 doesn't prohibit you from going forward with any legal
02:50:08 rights. It's just at this point, you haven't signed off on
02:50:13 this agreement.
02:50:14 MS. HOUSE: I believe that is true, Your Honor.
02:50:15 I believe one of the clarities in this
02:50:17 agreement -- that this agreement did, I do -- the law is
02:50:20 keep them separated, the judicial from the administrative.
02:50:23 That separation, clear separation is good.
02:50:25 I do believe the order makes clear, if you read
02:50:28 that none of our claims are released against any parties in
02:50:33 this matter, and we still have those claims, as you
02:50:36 understand.
02:50:36 THE COURT: Yes, sir.
02:50:39 MS. HOUSE: All I can say to Your Honor is I
02:50:41 haven't calendared it because I didn't know we were going to
02:50:43 have the hearing, and I can't give you an answer because I
02:50:45 can't meet with the board until tomorrow.
02:50:48 THE COURT: And -- and, certainly, I understand
02:50:50 that. And if I decide to go ahead and go forward today,
02:50:53 it's certainly not that I don't appreciate the board and
02:50:56 their input. However, again, understanding that from what
02:51:02 I'm hearing is anticipating that this could be a very good

02:51:05 resolution of this matter and the sooner it's signed, the
02:51:08 sooner it goes into effect, and it starts the timetable
02:51:12 running on that. So...
02:51:14 MS. HOUSE: It -- it -- but the -- the
02:51:17 requirements of the order are beneficial to the public.
02:51:20 THE COURT: Thank you. Thank you, sir.
02:51:24 All right. And, counsel, I do want to say one
02:51:30 thing. About a year and a half ago when I first had some of
02:51:33 you folks up here in front of me, it wasn't an admonition,
02:51:38 but I think just an encouragement. I think we went back in
02:51:41 chambers and talked before the hearing, and --
02:51:43 MR. BENZONI: Yes, sir.
02:51:43 THE COURT: -- my encouragement was we had some
02:51:46 very bright folks and hard-working folks in the room and
02:51:50 that the people of North Carolina deserve good jobs and safe
02:51:53 water. And I think my words were to you was, "I trust you
02:51:56 can figure out a way that we can have both."
02:51:59 And from what I've seen of the proposed consent
02:52:02 order, folks, I think you have worked hard in the past year
02:52:05 and a half, and the court is satisfied as to the terms and
02:52:10 conditions of the proposed consent order.
02:52:13 I do have one question, however. Under this
02:52:17 agreement, the court will retain jurisdiction. So unless
02:52:20 the Chief Justice decides to put in somebody else, I've got
02:52:23 it for probably about another four years at least.

Exhibit 2

Cape Fear Public Utility Authority
Stewardship. Sustainability. Service.

James R. Flechtner, PE
Executive Director
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910-332-6669
jim.flechtner@cfpua.org

September 17, 2020

Assistant Secretary's Office
RE: Chemours Public Comments
1601 Mail Service Center
Raleigh, NC 27699-1601

Re: Public Comments on Proposed Addendum to Paragraph 12 of Chemours Consent Order

To NCDEQ:

On August 13, 2020, Cape Fear Public Utility Authority (CFPUA) was told that the State had negotiated changes to the Consent Order governing actions Chemours must take to address the damage done by decades of PFAS releases from Chemours' Fayetteville Works Plant.

Changes being proposed in the Addendum to Paragraph 12 of the Consent Order (the Addendum) relate mainly to measures meant to address the flow of highly contaminated groundwater and stormwater from Chemours' industrial site into the Cape Fear River, the source of drinking water for hundreds of thousands of North Carolinians, including CFPUA's customers. CFPUA's comments on the Addendum are outlined and detailed below.

1. The Addendum proposes relief for downstream water users that is neither as timely nor as certain as that provided to private well owners near Chemours' plant. Most would say the measures offered to well owners are appropriate to protect human health. Can the State now say the measures being proposed in the Consent Order will reduce PFAS in the Cape Fear River to levels that are protective of human health?

We and our community arguably have far more at stake in the outcome of these discussions than any of the three parties negotiating the terms of the Consent Order: More than 200,000 New Hanover County residents depend on CFPUA for drinking water, the majority of which is sourced from the Cape Fear River. We and our community bear the burdens for Chemours' pollution of the river. Yet we have been excluded from the discussions that have shaped the Consent Order and the Addendum. This may explain why – as in the case of other measures that have been proposed to mitigate or remediate Chemours' contamination – remedies in the Addendum that the State and Cape Fear River Watch say will provide CFPUA's customers relief continue to be less immediate and less definitive than those the State is rightly forcing Chemours to take for a few thousand private well owners near the Fayetteville works.

In a nutshell: Chemours must provide clean water – bottled water within three days and a permanent solution within six months – to owners of private wells where PFAS is detected at 10 parts per trillion (ppt) for one PFAS compound or 70 ppt for a combination of PFAS compounds (the 10/70 level). For

many of these well owners, this relief already has occurred. Meanwhile, CFPUA consistently detects PFAS in concentrations exceeding the 10/70 level in raw, untreated water it withdraws from the Cape Fear River. Our relief is coming, we are told, though each time this relief is revealed, it is nowhere near as immediate or as certain as what the State has secured for the private well owners. We have repeatedly expressed these concerns to the State. As expressed in CFPUA's Motion to Intervene and the proposed Complaint, which are attached to and incorporated into these comments, the State has the authority and right to require action by Chemours to immediately abate harm to its residents. The Complaint filed by the State in Bladen County Superior clearly set forth that the State is aware of such harm and has the authority to act. To date, including at a September 1, 2020, meeting with the State, we have received no satisfactory explanation for why hundreds of thousands of North Carolina residents downstream who rely on the Cape Fear River for drinking water are being treated unequally. We have asked the State if the measures being proposed in the Consent order and the Addendum will reduce PFAS concentrations in the Cape Fear River to levels the State believes are protective of human health, absent the measures CFPUA is undertaking at our ratepayers' expense to treat Chemours' PFAS in our community's drinking water. To date, we and our community have received no satisfactory answer. This question is not rhetorical, and if the State cannot provide confident affirmation, we must conclude the actions taken thus far and those being proposed are inadequate and incomplete.

2. Chemours has until late 2021 to prove the interim seep remediation system can remove 80 percent of the PFAS flowing into the Cape Fear River at concentrations in the hundreds of thousands of parts per trillion (ppt). What is known about the system's design raises doubts about the likelihood of reaching this goal. Any alternative measure would come months after the completion of the additional filters at Sweeney Water Treatment Plant under construction specifically to treat Chemours' PFAS – and funded by CFPUA's ratepayers.

To be sure, the most significant projects being proposed in the Addendum sound positive, at least in terms of the reductions in PFAS loading from the Chemours facility into the Cape Fear River.

The first of these projects is a "seep remediation system" Chemours says will remove 80 percent of PFAS from groundwater reaching the river from four seeps. According to sample data[1] provided to the State by Chemours, each day, each of these seeps pollutes the river with anywhere from more than 91,000 gallons to almost 250,000 gallons of water with PFAS concentrations ranging as high as 340,000 ppt. (It should be noted that these PFAS totals take into account only 20 specific compounds. Chemours recently told[2] the state it had found 21 as-yet-unknown PFAS compounds in water that likely migrates to the river; none of these is accounted for in the sampling analysis on the seeps. The remediation system is to be completed by April 5, 2021. Chemours then has four months to show it can achieve the promised 80 percent removal efficiency. The State, however, will grade Chemours' work on a curve, since removal efficiency will be measured for only three compounds: GenX, PMPA, and PFMOAA.

But what happens if the interim seep remediation system is not successful? This is not idle speculation. Based on the limited technical information available on the interim seep remediation system and the proposed volume and depth of granular activated carbon (GAC) in its filter system, we have serious

[1] "2020 Q1 MLM Assessment" https://files.nc.gov/ncdeq/GenX/consentorder/coaddendumsubmittals/2020-Q1-MLM-Assessment.xlsx

[2] "PFAS Non-Targeted Analysis and Methods Interim Report" https://www.chemours.com/en/-/media/files/corporate/fayetteville-works/pfas-nontargeted-analysis-and-methods--interim-report-20200630.pdf

concerns about their ability to achieve the 80 percent removal efficiency given the extremely high concentrations of PFAS in water flowing through the seeps. In a tacit admission of this uncertainty, the Addendum gives the State until March 31, 2022, to determine that any individual seep system has failed to live up to its promise. By that time, the $43 million GAC filters under construction at the Sweeney Plant should be online and effectively treating Chemours PFAS in our customers' drinking water. Chemours has paid none of the $43 million or the millions of CFPUA ratepayer dollars already spent to address Chemours' pollution. Chemours has no plans to pay any of millions of dollars to operate the filters that will be removing its PFAS.

We noted that the Addendum states that the Alternate System, including "ex situ capture and treatment," must be completed within eight months. The PFAS removal goal for the Alternate System is 99 percent compared with 80 percent for the interim remediation seep remediation system. It is unclear what advantages the interim seep remediation system offers downstream water users over the Alternate System, which is supposed to be more effective at PFAS removal and can be installed within a comparable timeframe. Why not require the Alternate System in the first place and stipulate the less-effective interim seep remediation system as Plan B?

3. The project promising the most significant reduction in PFAS loading of the Cape Fear River is a Barrier Wall and Groundwater Extraction System. This project is sketched only in broad outlines, with details to "be determined." Even assuming it is not "technically impracticable in light of geological and other site conditions that are unknown," as the Addendum states, the barrier wall and groundwater extraction system does not have to be completed until March 2023 – more than a year after the GAC filters at Sweeney will be effectively protecting CFPUA's customers.

The second significant project in the Addendum is a "Barrier Wall and Groundwater Extraction System." This "permanent" measure combines a 1½-mile underground wall, meant to keep the Chemours facility's PFAS-laden groundwater from migrating to the river, with a series of wells, from which groundwater is to be extracted and treated before discharge. This system is supposed to reduce the PFAS load in the Cape Fear River coming from Chemours' contaminated groundwater by at least 99 percent – once it is completed in March 2023, more than a year after Sweeney's GAC filters have begun operation. If Chemours determines that building this barrier wall system is "technically impracticable,", it must propose an alternate system by June 30, 2021, that will reduce PFAS loading by the "maximum extent possible" by March 15, 2023.

We have seen very little information about the barrier wall. Perhaps the State has not seen much information about it either, since the Addendum states: "It is understood that the precise contours, locations, and structure of the barrier wall will be determined as part of the design and will be subject to DEQ approval".

Essentially, once again, we and our customers are being asked to wait years for an uncertain outcome. The message from Chemours to our community seems to be: "Trust us." If so, our response is: "When it comes to Chemours, we trust only what we can verify for ourselves."

Moreover, to date the State has not been able, or even tried, to assure CFPUA and its customers that if Chemours achieves the efficiency goals measured in these percentages, PFAS levels in the Cape Fear River will remain low enough for our community to receive water that meets the 10/70 level without the

interim treatment measures ongoing and the permanent GAC filters under construction at the Sweeney Plant, which we must pay for.

4. Mention of potential PFAS contamination related to DuPont raises concerns about the other companies operating at the Fayetteville Works.

The Addendum includes a number of other measures, from completing the decommissioning of a terracotta pipe (a project under discussion for more than a year), implementing an industrial Stormwater Pollution Prevention Plan (somewhat surprising that this would not be standard operating procedure), and completing an investigation of "significant remaining sources of PFAS loading" of the river.

In particular, we have some concerns about an investigation into whether non-contact cooling water from DuPont's operations at the Fayetteville Works is "causing groundwater containing PFAS to infiltrate the outfall channel." Previous documents submitted in connection with the Consent Order have mentioned PFAS contamination found near the operations of the third tenant at the site, Kuraray[3]. Given that both DuPont and Kuraray continue to discharge process wastewater under Chemours' NPDES permit, we would ask the State and Chemours to provide more details about these items, as well as results of sampling of DuPont's and Kuraray's discharges.

5. The State should require Chemours to provide relief for CFPUA's customers that is equivalent to and just as timely and certain as the relief it is requiring for private well owners – *not in lieu of but in addition to* what is being done to address the PFAS contamination emanating from Chemours' highly contaminated industrial site.

On September 2, 2020, the N.C. Department of Environmental Quality issued a news release[4] about a meeting with CFPUA Board members and staff. Among those at the meeting were NCDEQ Secretary Michael S. Regan and representatives of the N.C. Attorney General's office.

At that meeting, Secretary Regan asked CFPUA what the State could do for downstream water users such as CFPUA's customers. The answer is plain: Use the 10/70 level to require Chemours to provide both immediate, interim relief and permanent relief measures equivalent to those the Consent Order requires Chemours to provide to private well owners near Chemours' plant.

Immediate, interim relief could take the form of funds from Chemours to provide individual stipends to affected downstream water users to purchase bottled water or install under-the-sink filtration systems until permanent relief is provided. This is equivalent to what is provided to the private well owners.

Permanent relief is apparent: Require Chemours to fully fund the upgrades currently underway at the Sweeney Plant to add GAC filters to effectively treat raw water contaminated by Chemours' PFAS and to pay for the costs to operate them. This also is equivalent to what is provided to private well owners. As noted above, the additional GAC filters at Sweeney will be operational long before Chemours must demonstrate it has successfully achieved the PFAS loading reduction goals for the barrier wall.

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[3] "Outfall 002 Assessment" https://www.chemours.com/en/-/media/files/corporate/ncdeq-cfrw-submission-consent-order-para-12-11-1.pdf

[4] "DEQ Secretary's Statement on PFAS discussion with CFPUA" https://deq.nc.gov/news/press-releases/2020/09/02/deq-secretarys-statement-pfas-discussion-cfpua

Granting these immediate and the permanent measures should in no way relieve Chemours of its responsibility to take any of the actions stipulated in the Consent Order or the Addendum. PFAS deposited by air emissions from Chemours' operations are largely responsible for the contamination of the private wells. The requirement that Chemours provide relief to the owners of those wells did not absolve the company from its responsibility to address the air emissions that caused the problem in the first place. Likewise, providing relief to downstream water users in a timely and direct manner should not absolve Chemours from addressing the groundwater, runoff, discharge, contaminated sediment in the more than 50 miles of riverbed between Chemours and CFPUA's intake at Kings Bluff, and other pathways sending Chemours' PFAS into the Cape Fear River.

Regards,

James R. Flechtner, PE
Executive Director

Attachments

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

CAPE FEAR PUBLIC UTILITY AUTHORITY, Plaintiff, v. THE CHEMOURS COMPANY FC, LLC, et al. Defendants.	)	Case No. 7:17-CV-00195-D
BRUNSWICK COUNTY, et al., Plaintiffs, v. E.I. DUPONT de NEMOURS and COMPANY, et al., Defendants.	)	Case No. 7:17-CV-00209-D

PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

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NATURE OF THE CASE

In their Master Complaint, the water supplier Plaintiffs assert various common law causes of action against the Defendants arising out of the Defendants' long history of releasing toxic perfluoroalkyl substances ("PFAS") into the environment at the Fayetteville Works facility—in violation of the federal Clean Water Act and North Carolina's equivalent legislation—resulting in contamination of the Cape Fear River. In their *Motion to Dismiss Plaintiffs' Master Complaint Under Rule 12(b)(6) or, in the Alternative, For a Stay of Proceedings, and Motion to Strike or Dismiss Notices to Conform* (the "Motion to Dismiss"), Defendants argue that because they have not violated any maximum contaminant levels under the Safe Drinking Water Act, the water supplier plaintiffs cannot have suffered an injury, and no claim against Defendants can be sustained. Defendants, in effect, are seeking to use the absence of a numeric regulatory standard under a single environmental statute to abrogate the entire body of North Carolina common law—all while disregarding their historic and ongoing violations of the Clean Water Act.

The question of harm to Plaintiffs—each of whom are public water suppliers—is not, as Defendants suggest, determined strictly in reference to whether maximum contaminant levels exist for the perfluorinated chemicals that Defendants have long been releasing into the environment. Were that the case, Defendants would have *carte blanche* to release emerging toxic contaminants with impunity simply by staying ahead of the regulatory curve. Indeed, as the water supplier plaintiffs allege in their Master Complaint, that has been exactly the Defendants' strategy to date.

The allegations of the Master Complaint show with particularity that: (1) Defendants have surreptitiously, and in violation of their NPDES Permit, released PFAS into the environment at the Fayetteville Works facility for over 30 years, in concentrations harmful to health and the environment; (2) PFAS released by Defendants have contaminated the water supply and water

systems of Plaintiffs, who are charged with providing potable water to their customers; (3) PFAS released by Defendants remain in soil, sediment, and groundwater, and continue to contaminate the water supply and water systems of Plaintiffs; and (4) conventional water treatment methods such as those currently employed by Plaintiffs are ineffective to remove PFAS from the water. Nevertheless, Defendants argue to this Court that Plaintiffs have suffered no harm because they can still sell water to their customers. But as courts have recognized, it would defy logic to require water suppliers to wait to take action until their water is so contaminated they can no longer sell it. The harms suffered by Plaintiffs—the trespassory contamination of their property, the interference with the use and enjoyment of their property, the diminution in water quality, among others—fit squarely within the state common law claims brought by Plaintiffs.

BACKGROUND

I. REGULATORY FRAMEWORK

Defendants argue that Plaintiffs cannot state a "legally cognizable" injury because the *Plaintiffs are complying* with federal and state regulations under the Safe Drinking Water Act ("SDWA"). Plaintiffs' compliance with SDWA, however, will not absolve Defendants' of their violations of the Clean Water Act, nor will it abrogate Plaintiffs' common law claims. The environmental statutes at issue are described herein to contextualize Defendants' assertions.

A. Safe Drinking Water Act

As public water providers, Brunswick County, Cape Fear Public Utility Authority, and Town of Wrightsville Beach must comply with both federal and state laws governing drinking water. Both the federal Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq*., and the North Carolina Drinking Water Act, N.C. Gen. Stat. § 130A-312, *et seq.*, require water providers to ensure that finished drinking water served to customers does not contain contaminants in concentrations that

exceed maximum contaminant levels ("MCLs"). The federal MCLs are set out in 40 C.F.R. § 141.61, which North Carolina adopted by incorporation. *See* 15A N.C.A.C. 18C .1518. An MCL is intended to "assure that water supply systems serving the public meet *minimum* national standards for protection of public health." *City of Evansville v. Kentucky Liquid Recycling, Inc*., 604 F.2d 1008, 1017 n. 25 (7th Cir. 1979) (emphasis added). Individual states may then impose more stringent statutory and common-law standards if they choose. *International Paper Co. v Ouellette*, 479 U.S. 481, 497 (1987); *City of Milwaukee v. lllinois and Michigan*, 451 U.S. 304, 328 (1981). Since no federal or state MCL currently exists for any PFAS, Defendants' assert they can discharge such chemicals without consequence.

B. Clean Water Act

The purpose of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The "centerpiece" of the Clean Water Act is the National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1311, under which "'the discharge of any pollutant by any person shall be unlawful,'" unless in conformity with a permit for the discharge. *Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d 149, 151 (4th Cir. 2000) (quoting § 1311(a)). The Act defines "pollutant" to include "chemical wastes," 33 U.S.C. § 1362(6), and is so broad as to cover "innumerable individual substances." *Piney Run Pres. Ass'n v. County Comm'rs of Carroll County*, 268 F.3d 255, 271 (4th Cir. 2001). EPA has delegated NPDES permitting authority to North Carolina in light of equivalent State legislation, N.C. Gen. Stat. § 143-211, *et seq.* The NPDES program is administered by the North Carolina Department of Environmental Quality ("DEQ"), Division of Water Resources ("DWR").

In applying for an NPDES permit, an applicant is required to provide "a full disclosure of all known toxic components that can be reasonably expected to be in the discharge." 15A N.C.A.C. 2H .0105(j). "[T]he disclosures made by permit applicants during the application process constitute the very core of the NPDES permitting scheme." *In re Ketchikan Pulp Co*., 7 E.A.D. 605, 1998 WL 284964 at *11 (EPA 1998). DWR is to write the NPDES permit in light of the constituents disclosed by the applicant, and must ensure that State water quality standards are protected. N.C. Gen. Stat. § 143-215.1(b); 15A N.C.A.C. 2H .0112(c). Once issued, the NPDES permit circumscribes the allowable discharges by a permittee. *See* 33 U.S.C. § 1311(a); *Piney Run*, 268 F.3d at 265 (permittees are "required to comply" with the effluent limitations in a permit).

North Carolina also regulates the levels of chemicals in groundwater. The groundwater quality standards—referred to as "2L Standards"—include numerical values for particular chemicals, which are the "maximum allowable concentrations . . . which may be tolerated without creating a threat to human health or which would otherwise render the groundwater unsuitable for its intended best usage." 15A N.C.A.C. 2L .0202. Where there is a chemical for which no standard is specified (such as GenX or any other PFAS), the level of chemical in the groundwater cannot exceed "the practical quantitation limit." *Id*. The "practical quantitation limit" is "the lowest concentration of a given material that can be reliably achieved among laboratories within specified limits of precision and accuracy by a given analytical method during routine laboratory analysis." 2L .0102(15). When any person conducts an activity that discharges a hazardous substance to groundwater, that person must take action "to terminate and control the discharge, mitigate any hazards resulting from exposure to the pollutants." 2L .0106. Additionally, when that activity results in a concentration of a substance in excess of the standard, the person must notify DEQ and implement a corrective action plan to restore groundwater quality. *Id*.

II. STATEMENT OF FACTS

Plaintiffs are public water providers whose drinking water supplies and water systems have been contaminated for decades with PFAS discharged by DuPont and Chemours. Master Complaint of Public Water Suppliers (ECF 35[1]) ¶ 8.

A. Defendants caused PFAS contamination in violation of environmental statutes

Defendants DuPont and Chemours released and continue to release PFAS into the environment at the Fayetteville Works facility, through water discharges, air emissions, spills, and other releases. ECF 35 ¶¶ 31, 40, 43, 45-51. Although GenX is the "headline chemical," Defendants released other related compounds, all referred to here as PFAS. ECF 35 ¶¶ 40, 67-68. Testing of the Cape Fear River has confirmed the presence of many such PFAS. ECF 35 ¶ 68 n. 40 (listing 17 chemicals detected). Defendants historically discharged their effluent into the Cape Fear River while operating under NPDES Permit No. NC003573 issued by DWR (the "NPDES Permit"). ECF 35 ¶ 42. However, Defendants' permit applications omitted PFAS such as GenX as constituents in their effluent. ECF 35 ¶¶ 42-56. Defendants also released PFAS through air emissions, unreported spills, and other releases. ECF 35 ¶¶ 39, 54. Defendants' releases have contaminated the soil, surface water, and groundwater with PFAS, which will continue to leach into the Cape Fear River and contaminate Plaintiffs' water systems. ECF 35 ¶ 104.

Defendants' conduct violates the Clean Water Act, the NPDES Permit, and 2L Standards. ECF 35 ¶¶ 90-93. DWR itself has confirmed Defendants' statutory violations, as follows:

- On September 5, 2017, DWR sued Chemours in Bladen County Superior Court for violations of 2L Standards, NPDES disclosure requirements, and the NPDES Permit.[2] DWR amended its complaint on April 9, 2018 to add Clean Air Act violations.[3]

[1] All ECF references correspond to the docket of Case No. 7:17-CV-00209-D.
[2] *See* Compl., *State of N.C. v. The Chemours Co. FC*, Case No. 17 CVS 580 (Bladen County Super. Ct. Sept. 7, 2017), attached as Ex. 1.
[3] *See* Am. Compl., *State of N.C. v. The Chemours Co. FC*, Case No. 17 CVS 580 (Bladen County Super. Ct. April 9, 2018), attached as Ex. 2.

- On September 5, 2017, DWR issued Chemours a 60-Day Notice of Intent to Suspend NPDES Permit (ECF 21-4) for failure to disclose the PFAS constituents in its effluent.

- On September 6, 2017, DWR issued a Notice of Violation and Notice of Intent to Enforce to Chemours for violations of 2L Standards.[4]

- On November 13, 2017, DWR issued a Notice of Violation to Chemours for violations of the NPDES Permit.[5]

- On November 16, 2017, DWR issued a Notice of Partial Suspension (ECF 21-8), suspending the NPDES Permit for inadequate disclosures and further releases by Chemours.

- On February 12, 2018, DWR issued Chemours a Notice of Violation (ECF 58-7) for violations of 2L Standards and air emissions of PFAS.

B. PFAS are persistent, bioaccumulative, and toxic, and have been found in Plaintiffs' water in concentrations in excess of established health goals.

GenX has been associated with various health effects in animal studies including multiple types of cancer, reproductive and developmental effects, toxicity to multiple organs, and other effects. ECF 35 ¶¶ 82-85. PFOA and PFOS have long been known to be dangerous to human health. In 2006, EPA called for elimination of PFOA production based on the health effects of PFOA. ECF 35 ¶ 76. In 2010, a DuPont study of individuals whose drinking water was supplied by a PFOA-contaminated river concluded that there is a "probable link" between exposure to PFOA in drinking water and serious health conditions including pregnancy-induced hypertension and preeclampsia, high cholesterol, kidney cancer, thyroid disease, testicular cancer, and ulcerative colitis. ECF 35 ¶ 75.

Although no MCLs currently apply to any PFAS, EPA has identified both PFOA and PFOS as candidates for future regulation "because these contaminants are known to occur in drinking

[4] Ex. 3, *available at* https://files.nc.gov/ncdeq/GenX/Notice%20Of%20Violation%20And%20Notice%20Of%20Intent%20To%20Enforce%20-%20Chemours.pdf.
[5] Ex. 4, *available at* https://files.nc.gov/ncdeq/GenX/Chemours%20DWR-NOV%20111317.pdf.

water, are persistent in the environment and in the human body, have shown to be toxic in animal studies and may require regulation." EPA, Notice, Drinking Water Contaminant Candidate List 4-Final. 81 Fed. Reg. 81107 (Nov. 17, 2016); *see also* ECF 35 ¶ 77. EPA also notes that these chemicals are "persistent in the environment and in the human body, which indicates they may be present in water or migrate to drinking water sources even after uses and production have been reduced or ceased, and therefore potential exposure may still be of concern." *Id*.

In light of the potential health effects, EPA established provisional health advisories (PHAs) for short-term exposures to PFOA and PFOS through drinking water, recommending a level of 0.4 ppb (parts per billion) for PFOA and 0.2 ppb (parts per billion) for PFOS. ECF 35 ¶ 77. In 2016, EPA revised these levels to reflect long-term exposure, now recommending that the combined level of these two PFASs in drinking water should not exceed 70 ppt. *Id*. In July 2017, the North Carolina Department of Health and Human Services ("DHHS") released a health goal for exposure to GenX in drinking water of 140 ppt. ECF 35 ¶ 88.

Testing of the Cape Fear River has detected numerous PFAS. As recently as March 2017, Chemours reported discharging PFOA into the River at a concentration of 10,000 ppt. ECF 35 ¶ 50. A few months later, in August 2017, EPA testing confirmed discharges of two additional PFAS—PFESA Byproduct No. 1 at levels as high as 15,800 ppt and PFESA Byproduct No. 2 at a concentration of 73,900 ppt. ECF 35 ¶ 65. During January and February of 2018, the combined levels of PFAS found in the Cape Fear River—including Gen X and Nafion® Byproducts 1 and 2—have consistently exceeded the EPA health advisory level, reaching over 100 ppt. *Id*.; *see also* Brunswick County Water Test Results: Other Compounds, *available at* http://www.brunswickcountync.gov/genx/. In fact, the most recent testing by Plaintiffs shows that GenX accounts for only a small percentage of PFAS in the Cape Fear River, and that combined

PFAS levels are consistently above the DHHS health goal for GenX and the EPA health advisory level for PFOA and PFOS. *See* HB56 GenX Response Measures, Cape Fear Public Utility Authority Final Report at 2-5 (March 23, 2018) (the "Cape Fear Final Report") (ECF 59-1).

C. Plaintiffs are public water suppliers whose water systems are contaminated with PFAS released by Defendants.

Plaintiffs are each public water suppliers whose water systems have been, and will continue to be, contaminated with PFAS as a result of Defendants' water discharges, air emissions, spills, and other releases.

Plaintiff Lower Cape Fear Water & Sewer Authority ("Lower Cape Fear") owns a parcel of land touching the Cape Fear River. Lower Cape Fear's Notice To Conform To Master Complaint Of Public Water Suppliers (ECF 39) ¶ 6. On that land, Lower Cape Fear operates the Kings Bluff Raw Water Pump Station that draws water from the River. ECF 39 ¶¶ 2, 6. This intake then pumps raw water from the River to wholesale water customers including Brunswick County, and the Cape Fear Public Utility Authority (both Plaintiffs here). ECF 39 ¶ 3. Lower Cape Fear has property interests in use of the River, its raw water supply, and its intake facility, all of which are contaminated with PFAS. ECF 39 ¶¶ 5-7.

Plaintiff Brunswick County owns, operates, and maintains a community water system that purchases raw water from Lower Cape Fear and distributes it as drinking water to approximately 73,000 residential customers and more than 2,000 commercial customers in Brunswick County. Brunswick County's Notice To Conform To Master Complaint Of Public Water Suppliers (ECF 36) ¶ 2. The County has property interests in its raw water supply, its treatment facility, and its distribution system, all of which are contaminated with PFAS. ECF 36 ¶ 3. Sampling has repeatedly detected GenX, PFOA, and PFOS at the King's Bluff intake from

the Cape Fear River and at Brunswick County's Northwest Water Treatment Plant. ECF 35 ¶¶ 94-95.

Because the County's present water treatment systems cannot effectively remove PFAS from raw water before it is served as finished drinking water, Brunswick County residents and utility customers are still being exposed to these chemicals in drinking water. ECF 36 ¶ 6. And they have ingested a combination of these chemicals in unknown amounts over decades. The County must now incur substantial costs to identify, construct, maintain, and operate an appropriate treatment system that can remove Defendants' PFAS and prevent future exposures. *Id*.

Plaintiff Cape Fear Public Utility Authority ("Cape Fear") owns a parcel of land touching the Cape Fear River where it operates a raw water supply intake. *See* Cape Fear's Notice to Conform to Master Complaint of Public Water Suppliers (ECF 37) ¶¶ 1, 7. Cape Fear also owns the Sweeney Treatment Plant that treats water before it is supplied to the public. ECF 37 at 4-5. Cape Fear's water supply, water system, the Plant, its related treatment equipment, and its aquifer storage and recovery system are contaminated with PFAS. ECF 37 at 11. Although the Plant was upgraded in 2012 to be a state-of-the-art facility, it was not designed for, and is ineffective at, removing PFAS from water. ECF 37 ¶¶ 4-5. Cape Fear's customers have ingested a combination of these chemicals in unknown amounts over decades. ECF 35 ¶ 8. As a result of the PFAS contamination, Cape Fear has incurred substantial costs to remove contaminated water from its aquifer storage system, to test its raw and finished water, to identify PFAS in the water, to evaluate and implement treatment systems, and to provide the public with uncontaminated water at no charge. ECF 37 ¶ 11.

Plaintiff Town of Wrightsville Beach ("Wrightsville Beach") owns and operates groundwater wells that draw water from the Pee Dee Aquifer. Wrightsville Beach's Notice to

Conform to Master Complaint of Public Water Suppliers (ECF 38) ¶¶ 1, 3, 4. The Pee Dee Aquifer stores water that is pumped from the Cape Fear River. ECF 38 ¶¶ 4-5. Several sampling events of water from Wrightsville Beach Well #11 (which is drilled into the Pee Dee Aquifer) revealed the presence of GenX at levels as high as 57 parts per trillion. ECF 38 ¶ 4. As a result of Defendants' discharges, Wrightsville Beach has suffered contamination of water drawn from the Aquifer, of Well #11, of its pumping equipment, and its treatment facilities. ECF 38 ¶ 8. Because Wrightsville Beach's present water treatment systems cannot effectively remove PFAS from raw water before it is served as finished drinking water, residents and utility customers are still being exposed to these chemicals in drinking water. ECF 38 ¶ 12. And they have ingested a combination of these chemicals in unknown amounts over decades. ECF 35 ¶ 8. Wrightsville Beach must now incur substantial costs to identify, construct, maintain, and operate an appropriate treatment system that can remove PFAS and prevent future exposures. ECF 38 ¶ 12.

III. LEGAL STANDARD

Because the purpose of Rule 12(b)(6) is to test the legal sufficiency of a complaint, a court "must accept as true all well-pleaded allegations and must construe the factual allegations in the light most favorable to the plaintiff." *Randall v. U.S.*, 30 F.3d 518, 522 (4th Cir. 1994). A motion to dismiss for failure to state a claim should be granted only where "it appears certain that a plaintiff can prove no set of facts which would support its claim and entitle it to relief." *In re Stucco Litigation*, 364 F.Supp.2d 539, 541 (E.D.N.C. 2005) (emphasis added). Where a plaintiff alleges facts to support each element of a cause of action, those allegations are sufficient to state a claim for such cause of action. *See, e.g., J & P Dickey Real Estate Family Ltd. Partnership v. Northrop Grumman Guidance & Electronics Co.,* 2012 WL 925015, at *5 (W.D.N.C. 2012) (not reported).

ARGUMENT

Defendants' primary argument is that Plaintiffs fail to plead an actionable injury under any cause of action because there is no federal or state MCL for any of the chemicals. As a result, they argue, the Plaintiffs are not legally obliged to remove the PFAS, so their costs are not "necessary," and the water providers are not injured. But the limited MCLs under the SDWA do not circumscribe the harms inflicted on Plaintiffs by Defendants' decades of releases of PFAS—illegal under the Clean Water Act and tortious under the common law. For each of their claims, Plaintiffs have met their burden of alleging injuries with particularity, notwithstanding the absence of an MCL violation.

Defendants' second strategy is to prevent any adjudication of Plaintiffs' claims, arguing that Plaintiffs' assertions are better addressed by agency action. To the contrary, the agency can neither adjudicate common law claims nor award damages. This Court is well-equipped to address Plaintiffs' claims, and Defendants' arguments do not warrant a dismissal or stay.

I. PLAINTIFFS' CLAIMS ARE COGNIZABLE UNDER NORTH CAROLINA LAW.

Each of Defendants' arguments in its Motion to Dismiss begins with the same premise: the Plaintiffs can only suffer harm when there is a SDWA violation of a numeric MCL for PFAS. Because no such violation has occurred, Defendants theorize, Plaintiffs have suffered no injury. Defendants have done little more than construct a straw man out of the absence of regulations under the SDWA, while ignoring the actual, cognizable harms that form the bases of Plaintiffs' claims. As the Sixth Circuit recently recognized, MCLs "reach only certain harmful contaminants in drinking water, and do not redress harms caused by many other contaminants that are unregulated by the SDWA." *Boler v. Earley*, 865 F.3d 391, 407 (6th Cir. 2017), cert. denied sub nom. *City of Flint, Mich. v. Boler*, 2018 WL 1369147 (U.S. Mar. 19, 2018).

A. The PFAS contamination of Plaintiffs' properties constitutes "injury."

Many federal and state courts have determined that a public water provider may plead and prove "injury" where there is no MCL set for the contaminant at issue or where the levels of that contaminant never exceed the MCL. Defendants do not cite any of these authorities, leaning instead on opinions arising from private property owners' allegations of injury to private wells.

1) Defendants' cases are inapposite.

Defendants rely primarily on *Brooks v. E.I. Du Pont De Nemours and Co., Inc*., 944 F.Supp. 448 (E.D.N.C. 1996) and *In re Wildewood Litigation*, 52 F.3d 499 (4th Cir. 1995) to support the argument that a water provider is not injured where it has no duty to remove a particular contaminant. Neither case supports that conclusion, because neither case involved public water suppliers or contaminants for which regulatory limits had not been established.

The plaintiff in *Brooks* was a land owner whose groundwater was contaminated with a gasoline additive known as MTBE, though the contamination was below North Carolina's 2L Standard. The *Brooks* court determined that the 2L Standard for MTBE defined the "acceptable" level of groundwater contamination, and held that plaintiffs were therefore not injured. 944 F.Supp. at 449. The court also considered whether the contamination had affected plaintiffs' use of the property. Finding that it did not, the court granted summary judgment for defendants. *Id*.

The Fourth Circuit applied a similar analysis in *In re Wildewood Litigation*, 52 F.3d 499, 501 (4th Cir. 1995) to determine whether private property owners were injured by levels of trichloroethylene in the groundwater on their properties. Because the drinking water was not contaminated, and because the owners presented no evidence that the contamination interfered with their use and enjoyment of the property, the court affirmed a defense verdict. *Id*. at 503.

Unlike the present case, neither *Brooks* nor *Wildewood* involve contamination of a public water supplier's property interests with toxic substances for which numeric regulatory limits do not exist.

2) Numeric water quality standards do not define when public water suppliers are "injured."

A numeric water quality standard is not a precondition to injury to public water suppliers, as Defendants argue. A district court undertook a thorough analysis of what constitutes "injury" to a public water provider in MDL 1358, which consolidated the claims of over 150 public water providers from 17 states who alleged contamination of their water supplies with MTBE. *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 458 F.Supp.2d 149 (S.D.N.Y. 2006). The water providers sued the refiners of gasoline that added MTBE to their products. The refiners argued—as do Defendants here—that because there was no federal MCL for MTBE and state MCLs in only some jurisdictions, water providers were not legally obliged to remove it from drinking water and were not injured by its presence. The court distinguished *Brooks* because it involved individual, private well owners: "The question of whether an individual, private well owner has been injured by contamination below the MCL is a substantially different question than that presented here." *Id*. at 155. The public water providers alleged that contamination at levels below the MCL caused injury by increasing the costs of monitoring and remediating MTBE. *Id*.

Taking up that question, the court rejected the oil refiners' argument that the MCL defined "injury," concluding that "while the MCL may serve as a convenient guidepost in determining that a particular level of contamination has likely caused an injury, the MCL does not define whether an injury has occurred. Although linking injury to the MCL would provide a bright-line rule, it would do little else to promote standing principles." *Id*. at 158 (emphasis in original). The court found that the public water providers "presented sufficient evidence for purposes of standing to

show that they may have been injured—not as a theoretical matter, but rather as a question that is appropriate for judicial resolution." *Id*. at 158

The Second Circuit affirmed that decision and the underlying rationale. *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 105 (2d Cir. 2013). Affirming a jury verdict for the City of New York, the court agreed that "for standing purposes, the MCL does not define whether injury has occurred." *Id*. at 105. Rather, the court noted the City's evidence of the harmful effects of MTBE at levels below the MCL including the "testimony from a toxicologist, who opined that 'even at the lowest levels of exposure . . . in drinking water,' MTBE is a mutagen 'that can cause a mutation which can possibly lead to cancer.'" *Id*. at 106. Moreover, the court commented, "It strikes us as illogical to conclude that a water provider suffers no injury-in-fact—and therefore cannot bring suit—until pollution becomes so severe that it would be illegal to serve the water to the public." *Id*. at 105 (emphasis in original).

Several other courts have since followed *In re MTBE*'s lead. The Southern District of Illinois agreed that "a water provider may demonstrate an injury in fact even if its finished water does not exceed an MCL if its use of the water to meet its statutory obligations to the public becomes more costly because of a defendant's conduct." *City of Greenville, Ill. v. Syngenta Crop Protection, Inc*., 756 F.Supp.2d 1001, 1007 (S.D. Ill. 2010). In that litigation, several public water providers alleged that their raw water supplies were contaminated with an agricultural chemical, atrazine, made by Syngenta, and sought to recover the costs of removing the chemical from drinking water. Syngenta argued in a Rule 12(b)(6) motion to dismiss that the water providers suffered no injury "because they have not been impaired in their ability to provide potable water to the public." *Id*. at 1005. The court criticized Syngenta's theory:

> It is illogical to state that because a public water supplier successfully removes a contaminant from raw water and delivers potable water to the public, the supplier's

> excess costs—no matter how large—caused by a product manufacturer's indiscriminate disregard for the impact of its product on raw water sources cannot be an injury in fact. . . . Furthermore, it seems an extremely bad rule to require a public water supplier to provide overly contaminated water to the public before it can seek redress from one responsible for the contamination.

Id. at 1007. The court denied Syngenta's motion, concluding that the Plaintiffs' "allegations that the presence of Syngenta's atrazine in their water sources has forced them to incur additional expenses in order to provide potable water to the public is sufficient to establish an injury in fact and to demonstrate—at the motion to dismiss stage, at least—that they have standing to sue." *Id*.

Citing *In re MTBE* and *Greenville*, a New York state appellate court reached the same conclusion in *Suffolk County Water Authority v. Dow Chemical Company*: "The MCL is only a regulatory standard which governs conduct in supplying water to the public. . . . Similarly, the MCL does not define whether an injury has occurred, since contamination below that level could result in some injury, such as increased monitoring costs." 991 N.Y.S.2d 613, 618, 121 A.D.3d 50, 56 (N.Y.A.D. 2 Dept. 2014). *See also City of Tulsa v. Tyson Foods, Inc*., 258 F.Supp.2d 1263, 1270 (N.D.Okla. 2003) (vacated due to settlement) (same); *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (petitioner who will be exposed to emissions of sulfur dioxide has standing to challenge the permit allowing those emissions even where levels of sulfur dioxide are within regulatory standards because of potential health risks associated with exposure).

3) Contaminants without numeric water quality standards can cause injury to public water suppliers.

Courts have applied the same rationale where, as here, no regulatory standard applies to a particular contaminant. In one case, the City of Redlands sued Shell Oil Company for contamination of the city's drinking water wells with 1,2,3-trichloropropane ("TCP"), an agricultural chemical. Shell argued that "the City can show no damages because it cannot show that Shell contaminated its wells such that the water in its wells contained TCP above the California

Department of Public Health 'MCL' levels . . . simply because the DPH has not yet set any MCL levels for TCP." *See City of Redlands v. Shell Oil Co*., Case No. SCVSS 120627, JCPSS 4435 (Super. Ct. San Bernardino Oct. 6, 2009), at 2 (Ex. 5). The California state court rejected Shell's argument, concluding that neither "language or logic" should protect private corporations from lawsuits by water providers for contamination simply because that contaminant is not yet regulated. *Id.* at 6. The California MCLs, the court explained, applied only to water providers and did not control lawsuits between a water provider and a third party that has contaminated its wells. *Id*. Finding Shell's argument unsupported by any legal authority, the court denied Shell's motion for summary adjudication on the City's claims. *Id*.

Defendants' suggestion that any level of PFAS is acceptable because they are unregulated chemicals has been similarly rejected. In *Baker v. Saint-Gobain Performance Plastics*, a district court held that residents sufficiently alleged property damage arising from PFOA contamination and could seek medical monitoring costs. 232 F.Supp.3d 233 (N.D.N.Y. 2017).

4) Injury to Plaintiffs is a factual inquiry that Plaintiffs have met in their allegations.

The above cases show that courts look to factual evidence demonstrating that a public water provider suffers some actual detriment or impact from the contamination. Water providers have established injury by alleging that: the contaminant is associated with risks to human health at any level of exposure, *In re MTBE*, 725 F.3d at 106; the presence of the contaminant forced it to incur additional expenses to provide potable water to the public, *City of Greenville*, 756 F.Supp.2d at 1007; the contaminant affected the quality of the water supply, requiring costs for assessment and treatment, *City of Tulsa*, 258 F.Supp.2d at 1271; or the provider spent resources to address the contamination, *Suffolk County Water Authority*, 991 N.Y.S.2d at 618, 121 A.D.3d at 56. Plaintiffs here alleged all of the above.

First, the Master Complaint alleges that Defendants discharged GenX and other PFAS into the Cape Fear River. ECF 35 ¶¶ 40, 67-68. Testing of the River confirms the presence of many PFAS. ECF 35 ¶ 68 n. 40 (listing 17 chemicals detected). Further, the Plaintiffs have alleged that these compounds are associated with risks to human health. GenX has been associated with various health effects in animal studies including multiple types of cancer, reproductive and developmental effects, toxicity to multiple organs, and other effects. ECF 35 ¶¶ 82-85. PFOA and PFOS have long been known to be dangerous to human health. ECF 35 ¶¶ 75-76. Other PFASs have sufficiently similar chemical structures and functions to GenX, PFOA, and PFOS that render exposures cumulative for purposes of their toxicity. ECF 35 ¶ 72.

Second, Plaintiffs allege that PFAS affect water quality by rendering the Cape Fear River waters injurious to public health and to aquatic life or wildlife, by impairing its use as drinking water, and preventing its use for recreation and agriculture. ECF 35 ¶ 92. Cape Fear and Lower Cape Fear allege that their riparian rights to water of undiminished quality have been harmed by the PFAS contamination. ECF 35 ¶ 144-45; ECF 37 ¶ 10; ECF 39 ¶ 11.

Third, Plaintiffs allege that they have incurred or will incur costs to address the contamination. Specifically, Brunswick County alleges that it will incur substantial costs to construct and operate a system that will remove PFAS from the drinking water it supplies. ECF 36 ¶ 6. Wrightsville Beach alleges that it, too, will incur substantial costs to identify, construct, maintain, and operate an appropriate treatment system that can remove Defendants' PFAS and prevent future exposures. ECF 38 ¶ 12. Cape Fear alleges that it has incurred substantial costs to remove contaminated water from its aquifer storage system, to test its raw and finished water, to identify PFAS in the water, to evaluate and implement new treatment systems, and to provide the public with an option to obtain uncontaminated water at no charge. ECF 37 ¶ 11.

B. Plaintiffs have stated claims for private and public nuisance (Counts I and II).

Defendants argue that because no MCL was violated, Plaintiffs cannot show an unreasonable interference with the use and enjoyment of their property, as is required to sustain a nuisance claim. Plaintiffs' substantive arguments at I.A., *supra*, address the existence of a cognizable injury. Moreover, the question of unreasonable interference is broader than Defendants suggest, and inherently an issue of fact for the jury.

1) Plaintiffs have alleged a claim for private nuisance.

Plaintiffs "must show an unreasonable interference with the use and enjoyment of their property" to recover in nuisance. *Jordon v. Foust Oil,* 116 N.C. App. 155, 167, 447 S.E.2d 491, 498 (1994). "[A]ny unreasonable use which produces material injury or great annoyance to others, or unreasonably interferes with their lawful use and enjoyment of their property, is a nuisance." *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 617, 124 S.E.2d 809, 814 (1962) (citation omitted). As this Court recently recognized in *In re Swine Farm Nuisance Litigation*, a plaintiff's concern about adverse health effects resulting from exposure to noxious substances can constitute "discomfort and annoyance, for purposes of proving both liability and damages for the nuisance." 2017 WL 5178038, *11 (E.D.N.C. Nov. 8, 2017) (emphasis added).

Whereas Defendants argue that the Court can make a nuisance determination as a matter of law based on the absence of MCLs, North Carolina courts have consistently maintained that the question of unreasonable interference involves a balancing of societal values, and must be made by the jury. "Fundamentally, the unreasonableness of intentional invasion is a problem of relative values to be determined by the jury in the light of the circumstances of the case." *Watts*, 256 N.C. 611, 618, 124 S.E.2d 809, 814 (1962) (allowing nuisance claim to proceed against manufacturer for vibrations caused by its operations). Circumstances for the jury to consider include:

> the surroundings and conditions under which defendant's conduct is maintained, . . . the nature, utility and social value of defendant's operation, the nature, utility and social value of plaintiffs' use and enjoyment which have been invaded, . . . the extent, nature and frequency of the harm to plaintiffs' interest, . . . and other considerations arising upon the evidence.

Id. Defendants have identified a single factor—that Plaintiffs have no affirmative statutory obligation to remove PFAS from the water—and treated it as dispositive. But "[n]o single factor is decisive; all the circumstances in the particular case must be considered." *Id.*

Plaintiffs' water supply and their water systems are now known to be contaminated with toxic chemicals that their current water treatment methods are ineffective at removing. Plaintiffs have alleged a cognizable injury, as described in I.A., *supra*, and it is now up to a jury to determine whether Defendants have created a nuisance.

Contrary to Defendants' arguments, Plaintiffs were also "required by law" to respond to the PFAS contamination. Indeed, the North Carolina General Assembly's House Bill 56 included a section entitled "GenX Response Measures," which obligated Cape Fear, in coordination with the other Plaintiffs, to "study the identification and deployment of water treatment technology to remove GenX from the public water supply," and report to the Environmental Review Commission with their findings. N.C. Sess. Law 2017-209 § 20(a). As directed by the legislature, Cape Fear has undertaken an initial evaluation of the PFAS contamination and submitted a Final Report to the Environmental Review Commission. *See* Cape Fear Final Report, *supra*. Thus, Plaintiffs have even met Defendants' standard for nuisance.

2) Plaintiffs have suffered unique injuries not common to the public.

Defendants flatly assert, without explication, that Plaintiffs have not alleged any unusual or special damages necessary to sustain their claim of nuisance. In fact, North Carolina courts

have made clear that any personal injury is a special injury sufficient to support the claim. Thus, Plaintiffs can still seek relief for the public nuisance caused by Defendants.

Under North Carolina law, "where rights and privileges common to the public or to all the people of the community are injuriously interfered with," an action for public nuisance requires "a showing of unusual and special damage, differing from that suffered by the general public." *Barrier v. Troutman*, 231 N.C. 47, 49, 55 S.E.2d 923, 925 (1949). The North Carolina Supreme Court expounded on the issue of special damage in *Hampton v. North Carolina Pulp Co.*, 223 N.C. 535, 27 S.E.2d 538 (1943), involving a nuisance claim brought by a fishery business against a downstream pulp plant that was illegally discharging deleterious substances into the river. Reversing the trial court's dismissal of the nuisance claim, the *Hampton* Court noted that private recovery on a public nuisance is ordinarily denied because "a purely public right is of such a nature that ordinarily an interference with it produces no appreciable or substantial damage." *Id.* at 544, 27 S.E.2d at 544. Conversely, "an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar." *Id.* (quoting *Wesson v. Washburn Iron Co.*, 95 Mass. 95, 103 (1866)). As stated in *Hampton*, "[t]he law will not permit a substantial injury to the person or property of another by a nuisance, though public and indictable, to go without individual redress . . . ." *Id.* at 547, 27 S.E.2d at 545.

In the present case, Plaintiffs have suffered injury particular to themselves, and distinct from the public, as they are the water suppliers charged with providing potable water to their customers. It is their water supply and water systems which have been contaminated, and it is Plaintiffs who are tasked with investigating the contamination and evaluating treatment methods.

C. Plaintiffs have stated a claim for trespass to real property (Count III).

Defendants' sole argument here is their same "no injury" contention discussed at length above. ECF 50 at 16-17. Plaintiffs allege that the discharges resulted in unauthorized entry of PFAS onto Plaintiffs' real property and that the PFAS contamination has caused injury as discussed above. ECF 35 ¶¶ 116-18; ECF 39 ¶¶ 5-7 (Lower Cape Fear); ECF 36 ¶ 3 (Brunswick County); ECF 37 ¶ 11 (Cape Fear); ECF 38 ¶ 8 (Wrightsville Beach). Plaintiffs incorporate here the substantive argument at I.A., *supra,* regarding the existence of a cognizable injury.

Defendants also mischaracterize the law of trespass, which does not require an injury beyond the invasion itself in order for the claim to be cognizable. "The essence of a trespass to realty is the disturbance of possession. In consequence, every unauthorized entry on land in the peaceable possession of another constitutes a trespass . . . irrespective of whether actual damage is done." *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952). Thus, a plaintiff can recover on a cause of action for trespass "even if it contains no allegations setting forth the character and amount of damages. This is true because an unauthorized entry upon the possession of another entitles him to nominal damages at least." *Id.* Plaintiffs have alleged an unauthorized entry of PFAS contaminants on property in their possession, caused by Defendants. That is all the law requires to state a claim for trespass.

D. Plaintiffs have stated a claim for trespass to chattels (Count IV).

"The basis of a trespass to chattel cause of action lies in 'injury to possession.'" *Fordham v. Eason*, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999) (quoting *Motley v. Thompson*, 259 N.C. 612, 618, 131 S.E.2d 447, 452 (1963). The claim therefore requires a showing of two elements: (1) possession of personalty by the plaintiff; and (2) an unauthorized interference with the property. *Id.* at 155, 157, 521 S.E.2d at 704-05.

Defendants again argue that because the PFAS contamination never exceeded MCLs or required Plaintiffs to stop providing water to the public, no "unlawful interference" with Plaintiffs' property could have occurred. *See* ECF 50 at 17-18. To the contrary, Plaintiffs have alleged that their water systems—which include associated equipment and personalty—have been contaminated with PFAS as a result of Defendants' discharges. ECF 35 ¶ 120. Plaintiffs did not authorize the interference, and have therefore stated a claim of trespass to chattels.

E. Plaintiffs' negligence claims are well pled (Counts V, VI, VII, VIII).

Defendants' argue that Plaintiffs' negligence *per se*, negligence, negligent manufacturing, and failure to warn claims should be dismissed on the premise that Plaintiffs cannot plead a cognizable injury caused by contamination that does not exceed a regulatory standard. ECF 50 at 18-19. Plaintiffs incorporate here the substantive argument at I.A., *supra*, regarding the definition of a cognizable injury.

1) Plaintiffs have stated a claim for negligence.

Plaintiffs allege that Defendants failed to exercise ordinary care to identify the PFAS discharged from their operations, to prevent the release of PFAS, to remediate known releases of PFAS, and to warn Plaintiffs of those releases. ECF 35 ¶ 130. As a result of these failures, PFAS contaminate the Cape Fear River and Plaintiffs' water supplies, causing them to incur costs to respond to the chemicals in the water supply and their water systems. ECF 35 ¶¶ 106-107; ECF 39 ¶¶ 5-7 (Lower Cape Fear); ECF 36 ¶ 3 (Brunswick County; ECF 37 ¶ 11 (Cape Fear); ECF 38 ¶ 8 (Wrightsville Beach). These allegations are sufficient to state "injury" under *In re MTBE*, 725 F.3d at 106, *City of Greenville*, 756 F.Supp.2d at 1007, *City of Tulsa*, 258 F.Supp.2d at 1271, and *Suffolk County Water Authority*, 991 N.Y.S.2d at 618, 121 A.D.3d at 56. Plaintiffs appropriately alleged negligence.

2) Plaintiffs have stated a claim for negligence *per se*.

Plaintiffs allege that they have been harmed by Defendants' discharges and releases of PFAS, which constitute violations of the Clean Water Act, including the NPDES permitting process and North Carolina's 2L Standards. ECF 35 ¶¶ 90-93. As alleged by Plaintiffs, Defendants' conduct constitutes negligence *per se* under North Carolina law.

The North Carolina Supreme Court has established that:

> When a statute imposes a duty on a person for the protection of others . . . it is a public safety statute and a violation of such a statute is negligence *per se* unless the statute says otherwise. A member of a class protected by a public safety statute has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant.

Hart v. Ivey, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992) (citations omitted). This doctrine was expressly applied to NPDES permit violations in *Biddix v. Henredon Furniture Industries*, 76 N.C. App. 30, 331 S.E.2d 717 (1985). The court in *Biddix* allowed an action for damages by a downstream riparian owner against the permittee, finding that "[t]he General Assembly explicitly expressed its intent to 'protect human health, to prevent injury to plant and animal life, [and] to prevent damage to public and private property.'" *Id.* at 41, 331 S.E.2d at 724 (quoting N.C. Gen. Stat. § 143-211). Just as in *Biddix*, Plaintiffs have been harmed by Defendants' statutory violations—including violations of the NPDES Permit and 2L Standards, that were alleged by Plaintiffs and confirmed by DEQ. The Clean Water Act and its State counterpart are intended to protect parties such as Plaintiffs, who have therefore stated a claim for negligence *per se*.

3) Plaintiffs have stated a claim for negligent manufacture and failure to warn.

North Carolina imposes on a manufacturer "the duty to use reasonable care throughout the manufacturing process." *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 530 S.E.2d 321, 326, 138 N.C.App. 70, 75 (2000). Moreover, "[a] manufacturer must execute the 'highest' or 'utmost'

caution, commensurate with the risks of serious harm involved, in the production of a dangerous instrumentality or substance." *Ziglar v. E. I. Du Pont De Nemours & Co.*, 53 N.C. App. 147, 154, 280 S.E.2d 510, 515 (1981). This standard is simply an acknowledgment of the heightened burden of reasonableness imposed when dealing with dangerous substances: "[E]ven though a negligence standard is applied, a manufacturer must be more careful in the manufacture of dangerous articles for his conduct to be deemed reasonable than would otherwise be necessary in the manufacture of products with less dangerous propensities." *Id.* n.5.

Plaintiffs allege that Defendants in the course of their manufacture, use, storage, and disposal of PFAS failed to meet that burden. ECF 35 ¶¶ 140-41. Further, Defendants failed to warn Plaintiffs of the contamination of the Cape Fear River, the likelihood that PFAS would reach public water systems, the fact that Plaintiffs' water treatment systems would not remove PFAS, and the toxic characteristics of PFAS. ECF 35 ¶¶ 136-137. Additionally with regards to Cape Fear, DuPont had notice that Cape Fear was undertaking a substantial expansion of the Sweeney water treatment plant at a cost of more than $65 million, but failed to warn Cape Fear that its upgraded facility would still be incapable of removing PFAS from the water. ECF 37 ¶¶ 4-5. Plaintiffs appropriately alleged negligent manufacture and failure to warn.

F. Cape Fear and Lower Cape Fear properly alleged interference with riparian rights (Count IX).

Defendants' only argument here is that an injury to riparian rights is not a standalone cause of action. To the contrary, claims for interference with riparian rights are recognized as distinct, as they involve a unique set of usufructuary rights belonging to riparian property owners.

"The riparian right . . . is to have the stream to flow by or through the land in its ordinary purity and quantity without any unnecessary or unreasonable diminution or pollution of the stream by the owners above." *City of Durham v. Eno Cotton Mills*, 141 N.C. 615, 54 S.E. 453, 456 (1906).

Invasion of riparian interests permits "a civil action in nuisance or trespass." *See Biddix*, 76 N.C. App. at 33, 331 S.E.2d at 721. However, courts will also address such claims as distinct causes of action based on the unique rights held by riparian owners. *See, e.g.*, *Dunlap v. Carolina Power & Light*, 212 N.C. 814, 195 S.E. 43, 46-48 (1938) (analyzing riparian rights as standalone claim); *Pine Knoll Ass'n v. Cardon*, 126 N.C. App. 155, 160-61, 484 S.E.2d 446, 449-50 (1997) (addressing trespass and riparian rights claims separately). Thus, at the very least, a claim for interference with riparian rights is a standalone type of nuisance or trespass.

In the present case, each of the water supplier Plaintiffs have alleged claims for nuisance and trespass based on the PFAS contamination caused by Defendants. However, Cape Fear and Lower Cape Fear, as riparian owners, have also alleged a violation of their riparian rights to the natural flow of the Cape Fear River undiminished in quality except by the reasonable use of the water by other riparian owners. ECF 35 ¶¶ 144-45; ECF 37 ¶ 10; ECF 39 ¶ 13. Such a claim is cognizable under North Carolina law.

G. Plaintiffs have stated a claim for punitive damages (Count X).

As with their response to the riparian rights claim, Defendants argue that "punitive damages" is not a standalone cause of action. While Defendants are technically correct, dismissal of the claim—which is predicated on Plaintiffs' other claims—is inappropriate.

Pursuant to N.C. Gen. Stat. § 1D-15(a), Plaintiffs may be awarded punitive damages if they receive compensatory damages under one of their other claims and are able to show an alleged aggravating factor, here willful or wanton conduct by Defendants (ECF 36 ¶ 149). "A punitive damages claim is not technically an independent cause of action, but is instead dependent upon an award of compensatory damages on one of a plaintiff's other claims." *Taylor v. Bettis*, 976 F. Supp. 2d 721, 747 (E.D.N.C. 2013), aff'd, 693 F. App'x 190 (4th Cir. 2017). The claim "has no bearing

on the validity of the cause of action set out in the plaintiff's complaint." *Id.* Thus, so long as a plaintiff's predicate claim survives, dismissal of a claim for punitive damages is "premature." *Id.*

H. The Notices to Conform are appropriate mechanisms to submit a Master Complaint.

On January 24, 2018, prompted by Defendants' own request and agreed to by Plaintiffs, this Court ordered Plaintiffs to file a consolidated Master Complaint. The order did not address the procedure either for extant parties to adopt the Master Complaint (and add unique allegations) or for adding new parties to that Complaint. Plaintiffs determined that notices to conform would be useful mechanisms as a matter of judicial efficiency to address the limited allegations particular to each Plaintiff, and to add two additional public water providers who have been affected by the PFAS contamination.

As Defendants themselves acknowledge, utilizing Notices to Conform for parties to join a master complaint is not a novel approach. ECF 38 at 33-34. Regardless, Defendants put form over substance. Defendants argue that the Notices are not technically a Rule 7 pleading, notwithstanding that the Notices adopt the allegations of the Master Complaint. Defendants suggest that the Notices may open the door to endless new plaintiffs, while disregarding that Pender County Utilities may be the only affected water provider that is not yet part of this action. Finally, Defendants complain about lack of service by the two plaintiffs that are new to this action, when the alternative is to file a new lawsuit and ask this Court to consolidate in each instance. Nevertheless, Plaintiffs will proceed in whatever manner this Court deems appropriate.

II. THE PRIMARY JURISDICTION DOCTRINE DOES NOT SUPPORT A STAY.

Defendants alternatively argue that the tort claims should be stayed under the doctrine of primary jurisdiction. Deferral is appropriate here, they claim, because Plaintiffs' claims would require this Court to perform activities that are within the jurisdiction of DEQ, including:

- determine enforceable regulatory levels of contamination in water,
- monitor discharges of PFAS from the Fayetteville Works plant,
- evaluate those discharges and their impact on the environment and on drinking water,
- evaluate response alternatives,
- monitor response activities, and
- determine when no further action is necessary. ECF 50 at 22.

Defendants' argument is absurd. None of these issues is necessary to adjudicate Plaintiffs' common-law tort claims for monetary relief based on property damage. *See* ECF 35, 36. None of the elements of any of their causes of action require evidence or fact-finding on any of the topics listed above. Nothing in Plaintiffs' Complaint seeks a determination from this Court regarding regulatory levels of particular chemicals or asks that the Court take over DEQ's monitoring of the facility. ECF 35, 36. Defendants also assert that the issues raised by Plaintiffs' claims are already before DEQ, which has filed a civil complaint against Chemours. ECF 50 at 24-25.

The *In re MTBE* court faced a similar motion by oil refiners who argued that public water providers' tort lawsuits should be stayed or dismissed pending stage agency investigation and remedial action. The court denied the motion because "none of the four factors weigh heavily in favor of deference to the state agencies of New York. Moreover, there are no significant advantages to be gained by waiting for the conclusion of an informal administrative process that may not offer plaintiffs the relief they seek." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 476 F.Supp.2d 275, 280 (S.D.N.Y. 2007).

A. Plaintiffs' claims do not raise difficult, technical questions that fall within agency expertise.

Although the topics listed above may fall outside this Court's conventional experience, they are also well outside the scope of Plaintiffs' claims and, therefore, do not provide a reason for stay or deferral. As *In re MTBE* recognized, environmental remediation activities (including those listed in bullet points above) "would remain under the auspices of the [DEQ] which has the

expertise to engage in this complex task." 476 F.Supp.2d at 283. But an order of relief "requires substantially less expertise than remediation, and could be appropriately fashioned by this Court." *Id*. The same is true here. This Court certainly has experience in determining the issues that will arise here—whether Plaintiffs prove the elements of nuisance, negligence, and trespass against Defendants, the extent of Plaintiffs' injury, what measure of damages would compensate Plaintiffs, and whether Defendants are liable for those damages and for punitive damages.

B. Plaintiffs' claims do not implicate decisions that only DEQ can make.

DEQ is tasked with protecting the environment by enforcing environmental protection laws and regulations. N.C. Gen. Stat. § 143B-279.2. DEQ is not authorized to determine the validity of individual tort claims or award money damages to third parties injured by a polluter's actions.

It is well within this Court's purview to determine whether North Carolina law allows public water providers to demonstrate an "injury" absent a regulatory violation and whether Plaintiffs' Complaint has alleged injury. District courts have performed this analysis many times. *See In re MTBE*, 725 F.3d at 106; *City of Greenville*, 756 F.Supp.2d at 1007; *City of Tulsa*, 258 F.Supp.2d at 1271; and *Suffolk County Water Authority*, 991 N.Y.S.2d at 618, 121 A.D.3d at 56. Defendants point to no statute or regulation authorizing DEQ to decide these issues or preempting this Court's authority. Likewise, it is well within this Court's expertise to award monetary damages to parties seeking compensation via the tort system. *See In re MTBE*, 476 F.Supp.2d. at 282 (there is "ample room" for the court's involvement to provide remedies beyond those that the agency can provide).

C. Plaintiffs' claims are not already before DEQ.

DEQ brought an action for injunctive relief "to prevent and abate Chemours' ongoing degradation of North Carolina's natural resources." Am. Compl. ¶ 6 (Ex. 2). As part of its action,

DEQ seeks an injunction requiring Chemours to: remove, treat, or control air emissions of PFAS; remove, treat, or control other sources of PFAS; eliminate discharges of PFAS until DEQ issues a permit with PFAS limits authorizing such discharges; provide an accounting of unauthorized PFAS discharges; and take action to abate violations of its permit and of groundwater standards at the facility. *Id*. at 34-35.

DEQ's lawsuit against Chemours seeks site-specific actions to end and prevent further contamination. Nothing in DEQ's Amended Complaint seeks relief for third-parties who have suffered injury as a result of the contamination. *See generally* Am. Compl. Nor does DEQ ask for a resolution of any factual or legal issues that this Court will determine in adjudicating Plaintiffs' tort claims. Defendants have shown no factual basis for their contention that DEQ's action will resolve any issue presented by Plaintiffs' tort claims. Deferral to agency expertise is appropriate only where the "specific relief sought was—in some form—already being provided through the administrative process." *In re MTBE,* 476 F.Supp.2d at 281. No statute or regulation authorizes DEQ to provide the specific relief that Plaintiffs seek. *See id*. at 282 (there is "ample room" for the court's involvement to provide remedies beyond those that the agency can provide); *see also Martin v. Shell Oil Co*., 198 F.R.D. 580, 587 (D.Conn. 2000) (state environmental agency "does not have the purpose of vindicating individual property rights such as those asserted by the plaintiffs in this case.").

D. Plaintiffs' claims do not pose a risk of inconsistent requirements.

Because DEQ's legal action and Plaintiffs' claims involve the resolution of different legal issues, it is unlikely (if not impossible) that any decision in this Court would "jeopardize DEQ's ability to investigate and respond to" the contamination, as Defendants claim. ECF 50 at 24. "It is also unlikely that any of the relief that this Court might eventually order would interfere with

ongoing [DEQ] proceedings or lead to the type of inconsistencies that the primary jurisdiction doctrine seeks to prevent." *In re MTBE*, 476 F.Supp.2d at 283; *see also Sullivan v. Saint-Gobain Performance Plastics Corp.*, 226 F.Supp.3d 288, 295 (D.Vt. 2016) ("No ruling on issues of negligence, nuisance, trespass, or Plaintiffs' other common-law theories, will necessarily conflict with Vermont's regulatory scheme or process regarding PFOA.").

The Plaintiffs allege damage to their own properties. The ongoing agency investigations will not determine whether Plaintiffs have suffered property damage or whether Defendants are liable in tort, nor will those determinations affect the agency investigations.

CONCLUSION

Because the Plaintiffs alleged facts to support each element of their causes of action, those allegations are sufficient to state a claim so that each cause of action survives Defendants' Rule 12(b)(6) motion. *See In re Stucco Litigation*, 364 F.Supp.2d at 541; *J & P Dickey*, 2012 WL 925015 at *5. In addition, none of Plaintiffs' claims overlap with agency action or require agency intervention. Rather, this Court is well able to adjudicate Plaintiffs' tort claims and need not defer or stay the cases. Plaintiffs respectfully ask this Court to deny Defendants' motion in its entirety.

Dated: April 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record who have made an appearance in the above-captioned cases.

Dated: April 13, 2018

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Exhibit 4

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July 10, 2018

Via Email
comments.chemours@ncdenr.gov

Assistant Secretary's Office
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Re: Chemours Public Comment

To Whom It May Concern:

We write as counsel for Cape Fear Public Utility Authority ("CFPUA") to provide its comments in response to the Draft Proposed Order for Preliminary Injunctive Relief ("Proposed Order") of the North Carolina Department of Environmental Quality ("DEQ") in its Bladen County Superior Court action against Chemours, Case No. 17 CVS 580.

CFPUA supports the efforts of DEQ in seeking injunctive relief against Chemours to minimize or eliminate Chemours' water discharges, air emissions, and other releases (including groundwater releases) of per- and polyfluoroalkyl substances ("PFAS"). Consistent with the relief sought by DEQ, CFPUA agrees that it is critical to identify the full array of PFAS in Chemours' process wastewater and air emissions. DEQ in conjunction with other state and federal agencies should then use that information to develop additional regulatory standards for PFAS based on the available scientific evidence regarding persistence, bioaccumulation and toxicity ("PBT") characteristics of PFAS.

In regulating the release of PFAS to the environment, DEQ should remember that conventional water treatment systems such as those utilized by CFPUA are ineffective at removing PFAS from drinking water, as CFPUA's own pilot studies have shown. CFPUA would also bring to DEQ's attention the June 2018 Draft Toxicological Profile for Perfluoroalkyls of the Agency for Toxic Substances and Disease Registry (the "ATSDR Report"), for the agency's consideration in determining appropriate enforcement steps relating to PFAS.

CFPUA requests that the Proposed Order be revised to account for precursors to PFAS that may degrade to PFAS after being released to the environment. Notably, the ATSDR Report suggests that PFAS concentrations may increase in the course of wastewater treatment processes due to degradation of precursor substances. DEQ's proposed relief both for disclosure of PFAS

in air emissions and for characterization of PFAS in wastewater should therefore be broadened to include PFAS precursors.

CFPUA further requests that the Proposed Order be revised to account for PFAS contamination in the Cape Fear River sediment, which has the potential to be introduced into the drinking water supply, for example following rain events. In particular, the proposed relief requires characterization of the full extent of PFAS contamination of soil, surface water, drinking water wells, and ecological receptors. That relief should be broadened to include downstream sediment in the Cape Fear River.

CFPUA supports the proposed relief requiring Chemours to provide notice to downstream public water utilities of conditions that have the potential to cause a discharge of GenX compounds to the Cape Fear River at concentrations exceeding the health goal established by DHHS. Advance notice of such an event would allow CFPUA to take appropriate response actions, such as additional monitoring of the water supply or use of the Aquifer Storage and Recovery system. However, CFPUA requests that the proposed relief be revised to also require notice in the event of a violation of any other condition in the Proposed Order that could result in the release of additional PFAS to the Cape Fear River.

CFPUA appreciates the opportunity to provide its comments to the Proposed Order, and looks forward to continuing its work with DEQ to address the PFAS contamination in the Cape Fear River.

Sincerely,

George W. House

Joseph A. Ponzi

cc: Bill Lane (bill.lane@ncdenr.gov)
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