

NORTH CAROLINA
BLADEN COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CvS 580

STATE OF NORTH CAROLINA, *ex rel.*,)
MICHAEL S. REGAN, SECRETARY,)
NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)

Plaintiff,)

v.)

THE CHEMOURS COMPANY FC, LLC,)

Defendant.)

**MOTION TO INTERVENE
BY CAPE FEAR PUBLIC
UTILITY AUTHORITY
(VERIFIED)**

COMES NOW Cape Fear Public Utility Authority and moves to intervene in this action as a party pursuant to N. C. Gen. Stat. § 1A-1, Rule 24. In support of this Motion, Cape Fear Public Utility Authority shows the following to the Court:

1. Cape Fear Public Utility Authority (sometimes identified as “CFPUA”) is a public utility authority created by New Hanover County and the City of Wilmington pursuant to North Carolina General Statutes Chapter 162A, and is vested with authority to sue in its own name. N.C. Gen. Stat. § 162A-6. CFPUA exercises public and essential governmental functions to provide for the public health and welfare of its customers by providing potable water for residents of New Hanover County and the City of Wilmington.

2. The Cape Fear Public Utility Authority owns and operates a raw water intake located on the Cape Fear River, downstream of the Defendant’s Fayetteville Works Facility (“Facility” or “Chemours Facility”), and a water treatment plant to provide potable water to CFPUA’s customers. CFPUA currently provides potable water to approximately 200,000 customers within its service area in New Hanover County.

3. Attached to this motion is the Cape Fear Public Utility Authority's proposed Intervenor Complaint alleging the claims that CFPUA seeks to assert in this action.

4. The State of North Carolina commenced this action on September 7, 2017. The original Complaint ("State's Original Complaint") was brought by the State pursuant to its delegated authority under the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, to administer and enforce the National Pollution Discharge Elimination System ("NPDES") program, 33 U.S.C. § 1342, as specified in Article 21 of Chapter 143 of the North Carolina General Statutes. See State's Original Complaint ¶¶ 6-10.

5. In the State's Original Complaint, the State alleged (among other things): (a) the surface water into which Defendant's Fayetteville Works Facility discharges wastewater is used as a public water supply source that serves residents and businesses in several counties [Paragraph 48]; (b) on information and belief, Chemours and its predecessor knew for years that GenX and related compounds were being discharged into surface waters of the State [Paragraphs 56, 88]; (c) water samples collected at various times from the Cape Fear River showed concentrations of GenX were present in the Cape Fear River at levels in excess of the Department of Health and Human Services ("DHHS") health goal [Paragraphs 63, 87]; (d) on information and belief, GenX and related compounds discharged from the Chemours Facility have been and are present in public drinking water supplied to residents and businesses in several counties [Paragraph 55]; (e) from at least the beginning of 2009, Chemours' predecessor was aware of EPA's concern regarding the toxic effects of GenX on human health and the environment [Paragraphs 78-80]; (f) Chemours' continuing violations of North Carolina water quality laws adversely affect the public interest [Paragraph 128]; and (g) the State is entitled to injunctive relief against Chemours to prevent and abate Chemours' unpermitted discharges [Paragraph 129].

6. Pursuant to N.C. Gen. Stat. § 143-215.6C, in an enforcement action asserted by the State, if the Court determines that a violation of the North Carolina water laws or rules has occurred or is threatened, the Court “shall grant the relief necessary to prevent or abate the violation or threatened violation” (emphasis added).

7. On September 8, 2017 – less than 24 hours after the State filed its Original Complaint – a hearing was held at which a Consent Order was entered (“Original Consent Order”), which recites that it “partially resolves this matter.” Original Consent Order at 1.

8. Prior to the State’s commencement of this enforcement action, the Cape Fear Public Utility Authority and its counsel were in frequent contact with various representatives of the North Carolina Department of Environmental Quality (DEQ) to provide information, especially emphasizing the vulnerable population served by CFPUA, and urging the State to take prompt and comprehensive enforcement action. Neither CFPUA nor its counsel were informed by the State (including DEQ) of the filing of this action, the hearing scheduled for September 8, 2017, or the proposed Original Consent Order. CFPUA learned of the action and the Original Consent Order only after the Original Consent Order had been entered and filed.

9. On October 16, 2017, the Cape Fear Public Utility Authority filed its own action against Chemours and its predecessor in interest in federal court in the Eastern District of North Carolina. *Cape Fear Public Utility Authority v. The Chemours Company FC, LLC and E.I. du Pont de Nemours and Company*, 7:17-cv-195, Federal District Court, Eastern District of North Carolina (the “CFPUA Federal Suit”). CFPUA alleged (among other things): (a) Chemours has discharged, directly and via the groundwater, pollutants into the State’s groundwater and the Cape Fear River, in violation of federal and state law and applicable permits; (b) CFPUA is a downstream riparian owner that uses water from the Cape Fear River; (c) the Cape Fear River water is adversely affected by the past and current discharges of pollutants by Chemours; (d) as a riparian owner, CFPUA has

a right to use water from the Cape Fear River whose quality is not unreasonably diminished; (e) the sediments in the river have accumulated the pollutants discharged by Chemours and its predecessor, and this will continue to adversely affect the groundwater and the waters of the Cape Fear River; (f) the current and prior pollutant discharges have caused and continue to cause damages to CFPUA; (g) CFPUA is entitled to damages for the prior pollution, an order requiring Chemours to restore the river and its sediments to an unpolluted state, and prospective relief such that CFPUA does not continue to suffer injury and damages as a result of the actions and inactions of Chemours and its predecessor.

10. Brunswick County filed a similar lawsuit against Chemours and DuPont (7:17-cv-209) in federal district court in the Eastern District of North Carolina. Thereafter, the Brunswick County lawsuit and the CFPUA Federal Suit were consolidated in the Eastern District of North Carolina and a Master Complaint of Public Water Suppliers (the “Master Complaint”) was filed.

11. GenX and related compounds are within a family of chemicals known as per- and polyfluoroalkyl substances or “PFAS.” These chemicals are commonly used in the manufacture of nonstick coatings and stain- and water-resistant products and for other purposes.

12. Beginning the last week of June 2017, the Cape Fear Public Utility Authority has undertaken periodic sampling and analysis of Cape Fear River water, both the intake “raw” river water and treated “finished” water for distribution. A spreadsheet of recent analytical results for samples of raw and finished water is attached to CFPUA’s proposed Complaint as Exhibit A. The spreadsheet reflects that samples of the raw and finished Cape Fear River water have contained at least 23 different specific PFAS compounds in the water samples, 20 of which have been regularly detected. The spreadsheet also shows the continuing large variability of concentrations of PFAS compounds in the raw water and the finished water.

13. As alleged by the State in its Original Complaint [Paragraph 54], CFPUA's water treatment plant does not have the technical capability to consistently treat and remove the PFAS pollutants that currently exist in the Cape Fear River. The cost of designing, constructing, testing, implementing, and operating a treatment system that would be effective to remove the PFAS pollutants from Cape Fear River water would be at least \$70 million over a ten year period.

14. On October 17, 2017, Cape Fear Public Utility Authority filed a Motion to Intervene in this action (the "CFPUA's Original Motion to Intervene"). In that motion: (a) CFPUA asserted it has an interest in the relief granted in this action to assure that such relief adequately protects its interests; (b) CFPUA asserted its ability to obtain relief (including injunctive relief that would compel removal of the sources of on-going PFAS contamination of the Cape Fear River) might be impaired if the State fails to prevail in whole or in part in this action or if the State compromises this action in a manner detrimental to CFPUA; and (c) CFPUA sought intervention to protect its right to notice and opportunity to comment on any future settlement of this action.

15. On November 13, 2017, the State, Chemours, and the Cape Fear Public Utility Authority executed and filed a *Stipulation of All Parties Regarding Settlement Procedures and Withdrawal of Motion to Intervene* in this action. Pursuant to this Stipulation: (a) DEQ agreed (among other things) to provide written notice and at least 30 days for public comment with respect to any proposed settlement between Plaintiff and Defendant of this action; and (b) CFPUA withdrew its Original Motion to Intervene.

16. On or around April 9, 2018, the State of North Carolina filed an Amended Complaint and Motion for Interim Preliminary Relief ("Amended Complaint") in this action. In its Amended Complaint, the State alleged (among other things) many of the same or similar allegations it had alleged in its Original Complaint (as described in Paragraph 5 of this motion) regarding Chemours' knowing discharges of GenX and other PFAS into the Cape Fear River, the

toxic effects of PFAS on human health and the environment, the use of the river water as a public water supply source that serves residents and businesses in several counties, and the presence of PFAS discharged from the Chemours Facility in public drinking water. The State also alleged in its Amended Complaint that: (a) it has obtained additional evidence of the extent of contamination caused by Chemours' release of PFAS into the environment [Paragraph 5]; (b) Chemours has identified the migration of groundwater from the Chemours Facility to the Cape Fear River as the most significant current source of contaminant loading in the river [Paragraph 126]; and (c) a major source of groundwater contamination, both onsite and offsite, is Chemours' air emissions [Paragraph 132].

17. On June 11, 2018, the State published a proposed Order for Preliminary Injunctive Relief for public comment. On July 10, 2018, CFPUA (through its counsel) provided written comments in response to the State's proposed order. The comments generally supported the preliminary relief sought by the State, but also requested revisions to the proposed order that would seek additional information and provide additional preliminary relief. It is likely that other interested parties also provided comments to DEQ on its proposed order.

18. DEQ never responded publicly or privately to the comments from CFPUA's counsel on the State's proposed Order for Injunctive Relief. In particular, DEQ never informed CFPUA whether the proposed Order was being reconsidered, abandoned, or incorporated into settlement discussions with the other existing parties. As far as CFPUA is aware, DEQ never responded publicly to any other person's comments on the proposed Order or took any other action with respect to the proposed Order.

19. After providing its comments to the State's proposed Order for Preliminary Injunctive Relief, CFPUA made a number of attempts to communicate with DEQ about the facts, claims, and status of this action, both directly and through counsel. DEQ was generally

unresponsive to CFPUA's requests for communication and for information, whether by writing, email, or telephone.

20. On November 21, 2018, the day before Thanksgiving, DEQ announced on its website its proposal to enter into a Consent Order with Chemours and Cape Fear River Watch (an environmental organization that also signed the proposed Consent Order and that seeks to intervene in this action). See <https://deq.nc.gov/news/press-releases/2018/11/21/release-state-officials-require-chemours-provide-permanent-drinking>. DEQ's announcement states, "The proposed consent order is a comprehensive resolution regarding per- and polyfluoroalkyl substances (PFAS) contamination originating from Chemours' Fayetteville Works facility." The announcement also states that DEQ will accept public comment on the proposed Consent Order until December 21, 2018.

21. The Cape Fear Public Utility Authority was unaware that the parties to this action were negotiating or had reached a proposed settlement or had agreed to propose a Consent Order until the proposed Consent Order was published by DEQ on the day before Thanksgiving. CFPUA was not consulted about or notified of the status of the parties' settlement negotiations, the potential terms of a proposed settlement, or the impending publication of the proposed Consent Order. DEQ did not seek input from CFPUA regarding the harms suffered by CFPUA and its customers or how the terms of the proposed settlement might (or might not) provide relief to CFPUA and its customers.

22. The proposed Consent Order does not account for or seek to remedy the ongoing harms inflicted on CFPUA and its customers. The proposed Consent Order includes requirements that seek to reduce future discharges of PFAS pollutants from the Chemours Facility and to prevent current and future consumption of contaminated groundwater by citizens who live around the Facility and obtain potable water from water supply wells in the vicinity of the Facility. But the

proposed Consent Order includes no requirements to prevent the current and ongoing use or consumption of contaminated Cape Fear River water by downstream citizens and other users (including CFPUA) – even though the State acknowledges this harm, acknowledges CFPUA’s current inability to remove these pollutants from Cape Fear River water, and requests relief for this harm in the State’s complaints in this action. This unequal treatment of North Carolina citizens that have suffered similar harm because of the actions and inactions of Chemours and its predecessor is unexplained and arbitrary and capricious.

23. Based on the evidence in this action, the State is aware that: (a) PFAS pollutants exist in the surface water in the Cape Fear River; (b) even if the Chemours Facility immediately ceases all emissions and discharges of PFAS pollutants into the Cape Fear River, those pollutants will continue to contaminate the surface water in the Cape Fear River for decades to come (since pollutants in the vegetation, soils, and groundwater in a large and unknown radius around the Chemours Facility and in river sediments will continue to migrate into the river water through groundwater flow and surface run-off); (c) Cape Fear River water is being used downstream from the Chemours Facility by CFPUA, customers of CFPUA, and other citizens; and (d) downstream utilities like CFPUA do not have the technical ability to consistently remove these pollutants from the drinking water supplied to their customers. Yet the State has shown no interest in communicating with CFPUA or (apparently) other downstream public utilities or in addressing or remedying their harms or the current and ongoing harms to downstream North Carolina citizens who use Cape Fear River water.

24. Even though paragraph 48 of the proposed Consent Decree reserves the State’s right to withdraw and withhold its consent based upon public comments, DEQ Secretary Regan already has forecast DEQ’s reasoning in response to past and future public comments:

(a) The proposed Consent Order “is a ‘very strong first step’ towards cleaning up and protecting the drinking water supply,” and the downstream public utility has filed a federal lawsuit which, together with lawsuits filed by others, are “complimentary efforts” that DEQ considers “the right steps in protecting the people of Wilmington.”

(b) The “state’s responsibility is to comprehensively address the contamination, stop the source of the pollution, and penalize the companies for the actions that they’ve taken.”

(c) “Once the public comment period is over, we’ll take those comments into consideration, hopefully the judge will sign off on this consent order and we’ll begin to move forward with the elements of this order.”

Besides candidly signaling that DEQ’s “consideration” of the public’s comments is a perfunctory formality, DEQ is also announcing that the Cape Fear Public Utility Authority, the other downstream public water utilities, and the downstream water-consuming citizens are on their own; they have their own lawsuits that they can pursue, and the State has no intention to pursue any other remedy for their injury. See <http://www.wect.com/2018/12/05/deq-secretary-proposed-chemours-consent-order-its-very-strong-first-step/>.

25. CFPUA and other parties have submitted comments on the proposed Consent Order and there is a likelihood that other members of the public will submit comments. But it has become clear that a 30-day public comment period is insufficient to protect the rights of, and remedy the harms to, the Cape Fear Public Utility Authority and its customers arising from the PFAS contamination of the Cape Fear River. The State’s own complaints in this action acknowledge that North Carolina citizens and water utilities downstream from the Chemours Facility are using contaminated Cape Fear River water. But DEQ has shown a systematic unwillingness to seek input from or communicate with CFPUA and a deliberate decision not to seek further relief for the harms to CFPUA and its customers. Since DEQ has no intention of seeking abatement for downstream water utilities and their customers, CFPUA is entitled to participate in this action as a full party and to present its claims and evidence to the Court.

26. This motion is timely. DEQ announced the proposed Consent Order on its website on the eve of Thanksgiving (on November 21, 2018). As asserted in this motion, the State provided no forewarning to CFPUA of the status of the litigation or of a proposed settlement prior to its announcement of the proposed Consent Order. Following the announcement, the CFPUA's full board of directors met on December 12, 2018. CFPUA makes significant decisions (such as approving litigation) only by vote of the board. Since DEQ's announcement occurred just before Thanksgiving weekend, since CFPUA had no prior knowledge of the potential settlement or the terms and implications of the potential settlement, and since CFPUA required reasonable time to review and understand the proposed Consent Order, consult with counsel, seek input from other interested parties, and prepare and review comments to the Consent Order, CFPUA has acted promptly and diligently in making this decision to intervene and preparing this motion.

27. At its December 12, 2018 board meeting, the CFPUA board decided to approve the preparation and filing of this Motion to Intervene.

Intervention of Right Pursuant to Rule 24(a)(2).

28. North Carolina law provides that a person may intervene in a lawsuit as a matter of right under certain circumstances:

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(a)(2).

29. North Carolina law requires that a motion to intervene be timely and that the applicant establish 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 Services Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999).

30. *Timeliness of motion.* Whether an application to intervene is timely is left to the discretion of the trial court, which “will consider the following 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.” *Procter v. City of Raleigh Board of Adjustment*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999), *citing State Employees’ Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

31. CFPUA’s motion to intervene is timely in this case. *First*, a motion to intervene is “rarely denied as untimely prior to the entry of judgment....” *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859-60 (2001), *petitions and appeal dismissed*, 355 N.C. 285, 560 S.E.2d 803 (2002). In this action, judgment has not yet been entered.

32. *Second*, there has been no delay by CFPUA in filing this motion. As described in this motion, CFPUA’s board of directors reviewed the proposed Consent Order and considered potential responses and approved the filing of a motion to intervene at its earliest practical opportunity following the State’s announcement of the proposed Consent Order. Under North Carolina law, CFPUA can act in this litigation only by act of its board of directors at properly scheduled board meetings. The first regularly scheduled board meeting following DEQ’s announcement of the proposed Consent Order was on December 12, 2018.

33. *Third*, there is no reasonable argument to deny this motion based on unfairness or prejudice to the existing parties. This motion is made prior to entry of final judgment. Final judgment cannot be entered at this point in the proceedings anyway, because the proposed Consent Order (and the prior stipulation in this case) require a 30-day comment period, and thereafter DEQ

must consider and respond to those comments before seeking final judicial approval of the proposed Consent Order. It is true that the existing parties have undertaken considerable effort in negotiating a proposed settlement and drafting the terms of a complex proposed Consent Order. However, at least since the Cape Fear Public Utility Authority filed its Federal Suit (October 16, 2017) and Original Motion to Intervene (October 17, 2017), all existing parties have been aware of the PFAS pollutants in the Cape Fear River, the harms or threatened harms suffered by downstream public utilities and their customers, and CFPUA's claims arising from the pollutant discharges by Chemours and its predecessor. CFPUA also has undertaken repeated efforts to communicate with and provide input to DEQ, as described in this motion. If the existing parties had desired to consider CFPUA's input or discuss concerns, comments, or potential remedies with CFPUA, they had ample opportunity. The existing parties themselves have chosen to delay consideration of CFPUA's harms, assertions, evidence, and requested relief until now; and so any prejudice to the existing parties arising from CFPUA's motion to intervene is entirely self-inflicted.

34. The Cape Fear Public Utility Authority would be prejudiced if its motion to intervene is denied. Based on the history of DEQ's enforcement decisions and actions, the evidence of the proposed Consent Order, the history of DEQ's lack of communication, and the other evidence in this case, CFPUA will have no meaningful input into the remedial relief to be mandated by the Court unless CFPUA is allowed to intervene as a full party in this action. CFPUA is entitled to intervene and present its own evidence, claims, and arguments to the Court.

35. *First requirement of intervention as of right:* The Cape Fear Public Utility Authority has "a direct and immediate interest relating to the property or transaction" involved in this enforcement action. The "property" which is the subject of this action is groundwater and the waters of the Cape Fear River. The Cape Fear Public Utility Authority withdraws raw water from

the Cape Fear River for treatment and distribution of treated water to its 200,000 customers in New Hanover County. For nearly 40 years, Chemours and its predecessor have discharged PFAS pollutants directly into the river and via the groundwater in violation of their NPDES permit, the Clean Water Act, and state law. The quality of the waters of the Cape Fear River is unreasonably diminished by these current and past discharges of pollutants. As a riparian owner, CFPUA has a right to use water from the Cape Fear River whose quality is not unreasonably diminished. In addition, sediments in the river have accumulated the pollutants discharged by Chemours and its predecessor over time, and the contaminated sediments will continue to adversely affect the groundwater and unreasonably diminish the quality of the waters of the Cape Fear River. Chemours also has broadcast PFAS by air emissions over an extensive area surrounding the Facility, and those deposited PFAS contaminants are reaching the Cape Fear River by overland surface run-off and groundwater migration. The current and prior emissions and discharges of pollutants have caused and continue to cause harm to CFPUA, as alleged in CFPUA's Federal Suit and in the attached complaint.

36. A transaction which is the subject of the pending action is the historic and current discharges and emissions of PFAS pollutants by Chemours and its predecessor from the Fayetteville Works Facility in violation of law; the historic, current, and future contamination of the Cape Fear River arising from those emissions and discharges; and the State's effort to obtain relief to abate Chemours' emissions and discharges of pollutants to the Cape Fear River. The Cape Fear Public Utility Authority has a direct and undeniable interest in the State's action (including the relief granted pursuant to this action) to assure that the harms to CFPUA and its customers resulting from Chemours' discharges of pollutants are considered, comprehensive evidence of the harms and potential remedial options are presented and evaluated in their appropriate context, and

any relief obtained in this action adequately protects CFPUA's interests and abates the harms caused to CFPUA.

37. *Second requirement of intervention as of right:* For several reasons, denying intervention to CFPUA would result in the "practical impairment" of CFPUA's ability to protect its interests.

(a) *First*, as explained in this motion, DEQ has given little attention to CFPUA's interests in pursuing this enforcement action or to advocating or negotiating relief for the harms caused by the pollutant discharges that are adversely impacting downstream users of Cape Fear River water. DEQ has announced in public statements that CFPUA must advocate for its own interests.

(b) *Second*, by setting (in the proposed Consent Order) trigger concentrations of certain PFAS compounds known as perfluoroalkyl ether carboxylic acids ("PFECAs") in groundwater in the vicinity of the Chemours Facility which require remedial measures, DEQ arguably has established maximum concentrations of those compounds it has determined to be safe for human consumption and use for water supply (the "PFECA Limit") that other North Carolina citizens (including CFPUA's customers) may rely on and seek to enforce when they request "clean" finished water from CFPUA. If one result of this action will be explicit or implicit creation of PFECA Limits for surface or groundwater contaminated by Chemours' pollutant discharges, CFPUA has a direct interest in participating in evaluating and setting those levels – particularly if CFPUA will be required to treat raw Cape Fear River water to meet those levels.

(c) *Third*, 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.” 15A NCAC 2B .0211(12). One designated use of the Cape Fear River surface water segment from which CFPUA withdraws water is “a source of water supply for drinking.” 15A NCAC 2B .0216(1). CFPUA has a direct and immediate interest in the State’s enforcement of its water quality standards, including this particular standard, since (i) CFPUA treats and distributes drinking water, (ii) the PFAS pollutants discharged into the Cape Fear River are injurious to public health and impair the Cape Fear River water for its use as drinking water, and (iii) CFPUA’s ability to provide safe drinking water will be undermined if DEQ is unable or unwilling to seek or accomplish enforcement of the State’s drinking water standards.

(d) *Fourth*, the remedies required by the proposed Consent Order contemplate ongoing State action to implement the remedies, including issuing or modifying future air, water, and waste permits. CFPUA has a direct interest in DEQ’s evaluation of future permit limits, conditions, and modifications to ensure that (i) the interests of CFPUA and its customers are considered and evaluated during the permit process and (ii) and permit terms and conditions protect the Cape Fear River as a source of drinking water.

(e) *Fifth*, in its Federal Suit, CFPUA seeks damages from Chemours and its predecessor for their pollutant discharges, injunctive relief to restore the Cape Fear River and its sediments to an unpolluted state, and prospective relief such that CFPUA does not continue to suffer harms and damages as a result of the actions and inactions of Chemours and its predecessor. CFPUA’s ability to obtain relief in the Federal Suit may be impaired if the State either fails to prevail (in whole or in part) in this enforcement action or if the State compromises this underlying action in a manner detrimental to CFPUA’s interests.

38. *Third requirement for intervention as of right*: It is clear now that CFPUA’s interests are not adequately represented by the State in this action.

(a) *First*, the State's complaints in this enforcement action acknowledge the contamination of the Cape Fear River and the harm to downstream river water users, including public water utilities. Based on the State's complaints and the State's statutory duty to protect the environment of North Carolina and to seek enforcement for environmental violations on behalf of the State's citizens, CFPUA had the reasonable expectation (at least at the outset of this action) that the State would seek to remedy all the significant harms caused by the PFAS pollutant discharges, not just some of them. Yet the proposed Consent Order does not require any prompt cleanup of the contamination in the raw Cape Fear River water, nor does it provide any relief to CFPUA to assist with its treatment of raw Cape Fear River water. The relief provided in the proposed Consent Order is not adequate to protect CFPUA's interests or remedy CFPUA's harms. To the contrary, the proposed Consent Order, if entered, appears to establish PFECA Limits that, if requested by or encouraged for other citizens who may be facing the same PFAS exposure, CFPUA's treatment processes cannot now meet.

(b) *Second*, the relief provided in the proposed Consent Order is not adequate to enforce the State's water quality standards. Those standards require that discharges of deleterious substances to surface water (such as the Cape Fear River) be limited to amounts that do not injure public health or impair the water's use as a source of drinking water. But because the relief described in the proposed Consent Order does not require prompt abatement of the contamination in the raw or finished Cape Fear River water, the water quality standard cannot be met in the foreseeable future and the ongoing, unremediated contamination of the Cape Fear River will continue to impair the river's use as a source of drinking water for CFPUA's customers.

(c) *Third*, some of the assessment and abatement requirements in the proposed Consent Order do not apply comprehensively to all PFAS. For example, the proposed Consent Order requires Chemours to undertake health studies of only a very limited number of PFAS. A resolution of this enforcement action that does not encompass all PFAS contaminants does not protect the interests of CFPUA or other downstream water users.

(d) *Fourth*, while the proposed Consent Order would provide specific, immediate relief to some citizens (those exposed to PFAS-contaminated groundwater), DEQ has asserted in public statements that CFPUA should rely on its private right of action for damages to achieve a similar result for other citizens (those exposed to PFAS-contaminated surface water). A private action is subject to different defenses and legal constraints than a State enforcement action; and, in any event, DEQ's decision to abandon any effort to seek relief for CFPUA and its customers means, by definition, DEQ's interests have diverged from CFPUA's interests in this enforcement action.

It may be that CFPUA has interests unique to public water supply providers which DEQ did not adequately consider or account for in negotiating and concluding a proposed settlement with the existing parties. In any case, CFPUA's interests are not addressed or protected by the relief sought by the State or required in the proposed Consent Order.

39. In sum, the protection of CFPUA's interests in the remediation of the Cape Fear River and the use of river water for drinking purposes are impaired by the State's decision not to seek adequate relief for the harm arising from the current and future PFAS pollution of the Cape Fear River (as reflected in the proposed Consent Order and DEQ's explanation of its decision),

and CFPUA's interests are no longer adequately represented by the State. CFPUA therefore is entitled to intervene in this enforcement action pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2).

Rule 24(b)(2), Permissive Intervention.

40. In the alternative, the Cape Fear Public Utility Authority should be allowed to intervene pursuant to Rule 24(b) of the North Carolina Rules of Civil Procedure, which allows intervention:

When an applicant's claim or defense and the main action have a question of law or fact in common. ... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

N.C. Gen. Stat. § 1A-1, Rule 24(b)(2).

41. CFPUA's claims asserted in the attached proposed Complaint involve the proper administration and enforcement of the North Carolina water protection laws and the CWA on the facts alleged in the State's Amended Complaint, and they involve the same pollutant impacts to the Cape Fear River and the appropriate remedies for those impacts as are the subject of the State's Amended Complaint. As such, the same questions of law and fact are involved. Furthermore, CFPUA's intervention will not unduly delay or prejudice the adjudication of the rights of the existing parties, for the reasons stated in paragraphs 31-33 of this motion.

Prayer for relief.

For the foregoing reasons, the Cape Fear Public Utility Authority requests that the Court grant the following relief prior to the Court's review and consideration of the proposed Consent Order:

(a) the Court's consideration of and ruling on this motion to intervene;

(b) an order granting this motion to intervene authorizing CFPUA to participate in this action as a party as a matter of right; or, in the alternative an order granting this motion allowing CFPUA to intervene permissively as a party in this action;

(c) an order authorizing CFPUA to file the attached proposed Complaint; and

(d) the Court's consideration of the claims in the attached proposed Complaint, and an opportunity for CFPUA to present evidence and argument to the Court regarding its claims and the relief provided (and not provided) pursuant to the proposed Consent Order and the potential impacts of the proposed Consent Order on the interests of CFPUA and its customers.

CFPUA also requests that the Court: (i) grant such other and further relief as the Court deems just and proper, and (ii) tax the cost of this action, including attorneys' fees, if allowable, against the Plaintiff and/or Defendant.

Respectfully submitted this the 20th day of December, 2018.

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VERIFICATION

James R. Flechtner, PE, having been duly sworn, deposes and says that he is Executive Director of the Cape Fear Public Utility Authority (the proposed intervenor in this action), that he has read the foregoing MOTION TO INTERVENE BY CAPE FEAR PUBLIC UTILITY AUTHORITY (VERIFIED), that he is familiar with and has knowledge of the facts stated in Paragraphs 2, 8, 12-13, 18-19, 21, and 26-27 of the foregoing MOTION, and those facts are true of his own personal knowledge.

James R. Flechtner

Subscribed and sworn to before me

this the ____ day of December, 2018

Notary Public

My Commission Expires: _____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing MOTION TO INTERVENE BY CAPE FEAR PUBLIC UTILITY AUTHORITY (VERIFIED) was served upon the parties in this action by depositing a copy of the same in the United States Mail, First Class Postage Prepaid, addressed as follows:

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101 North Tryon Street
Suite 1900
Charlotte, NC 28246

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This the 20th day of December, 2018.

Joseph A. Ponzi

NORTH CAROLINA
BLADEN COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CvS 580

STATE OF NORTH CAROLINA, *ex rel.*,
MICHAEL S. REGAN, SECRETARY,
NORTH CAROLINA DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Plaintiff,

v.

THE CHEMOURS COMPANY FC, LLC,

Defendant.

CAPE FEAR PUBLIC UTILITY
AUTHORITY,

Intervenor-Plaintiff,

v.

STATE OF NORTH CAROLINA, *ex rel.*,
MICHAEL S. REGAN, SECRETARY,
NORTH CAROLINA DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Defendant.

**INTERVENOR COMPLAINT
BY CAPE FEAR PUBLIC
UTILITY AUTHORITY FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

COMES NOW Cape Fear Public Utility Authority (“CFPUA”), through counsel, and alleges and says:

BACKGROUND FACTS

1. CFPUA is a public utility authority created by New Hanover County and the City of Wilmington pursuant to North Carolina General Statutes Chapter 162A, and is vested with authority to sue in its own name. N.C. Gen. Stat. § 162A-6. CFPUA exercises public and essential

governmental functions to provide for the public health and welfare of its customers by providing potable water for residents of New Hanover County and the City of Wilmington. CFPUA owns and operates a water intake located on the Cape Fear River, downstream of the Defendant's Fayetteville Works Facility, and a water treatment plant to provide potable water to 200,000 North Carolinians and the schools, hospitals, industry, and other businesses and institutions that serve them.

2. Defendant The Chemours Company FC, LLC ("Chemours") is a corporation organized and existing under the laws of Delaware, and registered to do business as a foreign corporation in the State of North Carolina. Chemours currently owns and operates the Fayetteville Works Facility, located at 22828 NC Highway 87 W., Fayetteville, North Carolina.

3. The State's original Complaint ("State's Original Complaint") in this action was brought on behalf of the Department of Environmental Quality ("DEQ"), an agency of the State of North Carolina, pursuant to its delegated authority under the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, to administer and enforce the National Pollution Discharge Elimination System ("NPDES") program, 33 U.S.C. § 1342, as specified in Article 21 of Chapter 143 of the North Carolina General Statutes. *See* Original Complaint ¶¶ 6-10.

4. As alleged in the State's Original Complaint in this action, this matter arises out of Defendant's operation of the Fayetteville Works Facility (the "Facility"), a chemical manufacturing facility located adjacent to the Cape Fear River just south of Fayetteville, North Carolina.

5. In the State's Original Complaint, the State alleged (among other things):

- a. The surface water into which Defendant's Fayetteville Works Facility discharges wastewater is used as a public water supply source that serves residents and businesses in several counties [Paragraph 48];
- b. Chemours and its predecessor knew for years that GenX and related compounds were being discharged from the Facility into surface waters of the State, in violation of North Carolina water quality laws [Paragraphs 56, 88];
- c. Water samples collected at various times from the Cape Fear River showed concentrations of GenX were present in the Cape Fear River at levels in excess of the health goal established by the North Carolina Department of Health and Human Services ("DHHS") [Paragraphs 63, 87];
- d. GenX and related compounds discharged from the Facility have been and are present in public drinking water supplied to residents and businesses in several counties [Paragraph 55];
- e. On information and belief, public water supply treatment plants are ineffective at removing GenX and related compounds from Cape Fear River water [Paragraph 54];
- f. From at least the beginning of 2009, Chemours' predecessor was aware of EPA's concern regarding the toxic effects of GenX on human health and the environment [Paragraphs 78-80];
- g. Chemours' continuing violations of North Carolina water quality laws adversely affect the public interest [Paragraph 128]; and
- h. The State is entitled to injunctive relief against Chemours to prevent and abate Chemours' unpermitted discharges [Paragraph 129].

6. GenX and related compounds are within a family of chemicals known as perfluoroalkyl and polyfluoroalkyl substances or “PFAS.” These chemicals are commonly used in the manufacture of nonstick coatings and stain- and water-resistant products and for other purposes.

7. On October 16, 2017, the Cape Fear Public Utility Authority filed its own action against Chemours and its predecessor in interest, E. I. du Pont de Nemours (“DuPont”) in federal court in the Eastern District of North Carolina. *Cape Fear Public Utility Authority v. The Chemours Company FC, LLC and E.I. du Pont de Nemours and Company*, 7:17-cv-195 (“CFPUA’s Federal Suit”). Following a similar action initiated by Brunswick County against Chemours and DuPont, 7:17-cv-209, the two actions were consolidated and a Master Complaint of Public Water Suppliers (the “Master Complaint”) was filed, in which Town of Wrightsville Beach and Lower Cape Fear Water & Sewer Authority joined.

8. The claims alleged in the Master Complaint are common law claims arising under State law. As alleged in the Master Complaint and in CFPUA’s Notice to Conform to Master Complaint:

- a. Chemours and DuPont have discharged PFAS, directly and via the groundwater and air emissions, into the State’s groundwater and the Cape Fear River, in violation of federal and state law and applicable permits;
- b. CFPUA is a downstream riparian owner that uses water from the Cape Fear River;
- c. The quality of the waters of the Cape Fear River water is unreasonably diminished by the past and current discharges and other releases of PFAS by Chemours;
- d. As a riparian owner, CFPUA has a right to use water from the Cape Fear River whose quality is not unreasonably diminished;

- e. PFAS discharged by Chemours and its predecessor have accumulated in the sediment of the Cape Fear River, the groundwater that feeds the River, and in deposits in the watershed from the air emissions from the Facility, and this will continue to unreasonably diminish the quality of the waters of the Cape Fear River;
- f. CFPUA's water treatment plant does not have the technical capability to treat and remove the PFAS pollutants that currently exist in the Cape Fear River;
- g. The current and prior PFAS discharges have caused and continue to cause harm and damages to CFPUA;
- h. CFPUA is entitled to damages for the prior pollution caused by Chemours and its predecessor and to injunctive relief to prevent and abate continuing harm and damages to CFPUA.

9. On or around April 9, 2018, the State of North Carolina filed an Amended Complaint and Motion for Interim Preliminary Relief ("Amended Complaint") in this action. In its Amended Complaint, the State alleged (among other things) many of the same or similar allegations it had alleged in its Original Complaint (as described in Paragraph 5 of this Complaint) regarding Chemours' knowing discharges of GenX and other PFAS into the Cape Fear River, the toxic effects of PFAS on human health and the environment, the use of the river water as a public water supply source that serves residents and businesses in several counties, and the presence of PFAS discharged from the Chemours Facility to the public drinking water. The State also alleged in its Amended Complaint that: (a) it has obtained additional evidence of the extent of contamination caused by Chemours' release of PFAS into the environment [Paragraph 5]; (b) Chemours has identified the migration of groundwater from the Chemours Facility to the Cape Fear River as the most significant current source of contaminant loading in the river [Paragraph

126]; and (c) a major source of groundwater contamination, both onsite and offsite, is Chemours' air emissions [Paragraph 132].

10. On June 11, 2018, the State published a proposed Order for Preliminary Injunctive Relief for public comment. On July 10, 2018, CFPUA (through its counsel) provided written comments in response to the State's proposed Order. The comments generally supported the preliminary relief sought by the State, but also requested revisions to the proposed Order that would seek additional information and provide additional preliminary relief. On information and belief, other interested parties also provided comments to DEQ on its proposed Order.

11. DEQ never responded publicly or privately to the comments from CFPUA's counsel on the State's proposed Order for Injunctive Relief. In particular, DEQ never informed CFPUA whether the proposed Order was being reconsidered, abandoned, or incorporated into settlement discussions with the other existing parties. On information and belief, DEQ never responded publicly to any comments on the proposed Order, nor did it ever calendar its motion for preliminary injunctive relief for hearing in this Court.

12. After providing its comments to the State's proposed Order for Preliminary Injunctive Relief, CFPUA made a number of attempts to communicate with DEQ about the facts, claims, and status of this action, both directly and through counsel. DEQ was generally unresponsive to CFPUA's requests for communication and for information, whether by writing, email, or telephone.

13. On November 21, 2018, DEQ announced on its website it had agreed to a proposed Consent Order with Chemours and Cape Fear River Watch (an environmental advocacy organization). See <https://deq.nc.gov/news/press-releases/2018/11/21/release-state-officials-require-chemours-provide-permanent-drinking>. DEQ's announcement states, "The proposed

consent order is a comprehensive resolution regarding per- and polyfluoroalkyl substances (PFAS) contamination originating from Chemours' Fayetteville Works facility.” The announcement also states that DEQ will accept public comment on the proposed Consent Order until December 21, 2018.

14. The Cape Fear Public Utility Authority was unaware that the parties to this action had reached a proposed settlement or had agreed to propose a Consent Order until the proposed Consent Order was published by DEQ on the day before Thanksgiving. CFPUA was not consulted about or notified of the status of the parties' settlement negotiations, the potential terms of a proposed settlement, or the impending publication of the proposed Consent Order. DEQ did not seek any input from CFPUA regarding how the harms suffered by CFPUA and its customers might or might not obtain relief under the Consent Order.

15. Beginning the last week of June 2017, the Cape Fear Public Utility Authority has undertaken periodic sampling and analysis of Cape Fear River water, both the intake “raw” river water and treated “finished” water for distribution. A spreadsheet of recent analytical results for samples of raw and finished water is attached to this Complaint as Exhibit A. The spreadsheet reflects that samples of the raw and finished Cape Fear River water have contained at least 23 different specific PFAS compounds in the water samples, 20 of which have been regularly detected. The spreadsheet also shows the continuing large variability of concentrations of PFAS compounds in the raw water and the finished water.

16. CFPUA's water treatment plant does not have the technical capability to consistently treat and remove the PFAS pollutants that currently exist in the Cape Fear River. The cost of designing, constructing, testing, implementing, and operating a treatment system that would

be effective to remove the PFAS pollutants from Cape Fear River water would be at least \$77 million over a ten year period.

17. The proposed Consent Order does not account for or seek to remedy the ongoing harms inflicted on CFPUA and its customers. The proposed Consent Order includes 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. But the proposed Consent Order includes no requirements to remediate the downstream PFAS contamination in the Cape Fear River, the PFAS-contaminated sediment of the River, or the existing off-site PFAS air depositions that will continue to impact the water of the Cape Fear River. Even if Chemours implements the measures required in the proposed Consent Order over the next five years, no particular level of Cape Fear River water quality improvement is required or specified.

18. In sharp contrast, the proposed Consent Order includes requirements to immediately prevent current and future consumption of PFAS-contaminated groundwater by citizens who live around the Facility and obtain potable water from water supply wells in the vicinity of the Facility. In particular, the proposed Consent Order includes a drinking water abatement requirement applicable to the PFAS compounds identified on Attachment C to the proposed Consent Order, all of which are perfluoroalkyl ether carboxylic acids (“PFECAs”) that have been or are being released from the Facility by Chemours. The provision requires Chemours to provide filtration systems to any household, business, school, or public building with a drinking water supply well contaminated with either combined PFECA concentrations above 70 parts per trillion (“ppt”) or an individual PFECA concentration above 10 ppt (the “PFECA Limit”). By establishing (in the proposed Consent Order) trigger concentrations of these particular PFAS compounds in groundwater in the vicinity of the Chemours Facility which require remedial

measures, DEQ arguably has established maximum concentrations of those compounds it has determined to be safe for human consumption and use for water supply.

19. CFPUA testing of its raw and finished water shows that the Cape Fear River water entering and leaving its water supply treatment facility is regularly contaminated with these same PFECA compounds (i.e., those compounds identified on Attachment C to the proposed Consent Order) in concentrations in excess of the PFECA Limit. But the proposed Consent Order includes no requirements to prevent the current and ongoing contamination of Cape Fear River water that results in downstream citizens and other users (including CFPUA) having to use and consume water contaminated above the maximum concentrations of those compounds DEQ has determined to be safe for human consumption and use for a water supply—even though the State acknowledges this harm and seeks relief for it in its complaints in this enforcement action.

20. CFPUA has submitted its comments on the proposed Consent Order, attached hereto as Exhibit B (the “CFPUA Comments”). Among other things, CFPUA’s Comments identify the failure by DEQ to adequately address off-site PFAS contamination that will continue to impact the Cape Fear River, as well as its unequal treatment of North Carolina citizens in the lower Cape Fear River basin. CFPUA’s Comments also note omissions of information necessary to evaluate the adequacy of the proposed Consent Order—for instance, designs of control technologies and details of health studies—and request that DEQ provide the omitted information and allow additional time for further public comment thereafter.

21. DEQ Secretary Regan already has forecast DEQ’s reasoning in response to past and future public comments:

The proposed Consent Order “is a ‘very strong first step’ towards cleaning up and protecting the drinking water supply,” and the downstream public utility has filed a federal lawsuit which, together with lawsuits filed by

others, are “complimentary efforts” that DEQ considers “the right steps in protecting the people of Wilmington.”

See <http://www.wect.com/2018/12/05/deq-secretary-proposed-chemours-consent-order-its-very-strong-first-step/>.

22. In other words, the Cape Fear Public Utility Authority, the other downstream public water utilities, and the downstream water-consuming citizens are on their own; they have their own lawsuits that they can pursue, and the State has no intention to pursue any other remedy to abate the continuing harm to the hundreds of thousands of North Carolinians, including CFPUA’s customers, who rely on the Cape Fear River downstream of the Fayetteville Works for their drinking water supply in spite of the mandatory obligations to act under N.C. Gen. Stat. § 143-215.6C.

23. As evidenced by, among other things, the State’s complaints and the proposed Consent Order, the State is aware that: (a) PFAS pollutants are in the surface water in the Cape Fear River; (b) even if Chemours immediately ceases all discharges of PFAS from its Facility into the Cape Fear River, those pollutants will continue to contaminate the surface water in the Cape Fear River for decades to come (since pollutants in the vegetation, soils, and groundwater in a large and unknown radius around the Chemours Facility and in river sediments will continue to migrate into the river water through groundwater flow and surface run-off); (c) Cape Fear River water is being used downstream from the Chemours Facility by CFPUA, customers of CFPUA, and other citizens; and (d) current downstream water treatment plants do not have the technical capability to remove PFAS compounds from the drinking water supplied to their customers or to consistently reduce concentrations to the PFECA Limit in the proposed Consent Order. Nevertheless, the State has shown no interest in communicating with CFPUA or (on information

and belief) other downstream public utilities or in addressing or remedying their harms or the current and ongoing harms to downstream North Carolina citizens who use Cape Fear River water.

Mandatory abatement of violations under N.C. Gen. Stat. § 143-215.6C

24. As alleged in the State’s Amended Complaint, the past and ongoing unpermitted discharges and releases of PFAS by Chemours violate the State laws implementing the Clean Water Act. Am. Compl. ¶¶ 145–164.

25. The State further alleged that North Carolina has the authority to take enforcement action against violations of the Clean Water Act and the implementing State laws, which prohibit the discharge of unpermitted pollutants. Am. Compl. ¶ 14.

26. Water from the Cape Fear River is withdrawn by CFPUA and treated in its treatment plant, and the treated water is then distributed to its customers for drinking and other public uses. The relevant stream segment of the Cape Fear River from which the water is withdrawn by CFPUA is classified WS-IV CA.

27. One State water quality standard applicable to all fresh surface waters is: “Oils, deleterious substances, colored, or other wastes: *only* such amounts as *shall not* render the waters injurious to public health, secondary recreation, or to aquatic life and wildlife, or adversely affect the palatability of fish, aesthetic quality, or impair the waters for any designated uses.” 15A NCAC 2B .0211(12) (italics added). One designated use of class WS-IV surface water segments is “a source of water supply for drinking.” 15A NCAC 2B .0216(1). The PFAS pollutants discharged and released into the Cape Fear River by Chemours and its predecessor: (a) are deleterious substances within the meaning of this water quality standard; (b) are injurious to public health; and (c) impair the Cape Fear River waters for its designated use.

28. Under North Carolina's water quality laws implementing the Clean Water Act, DEQ is authorized to institute a civil action for injunctive relief to restrain and abate violations of the applicable water quality laws. N.C. Gen. Stat. § 143-215.6C. Upon a determination by the Court that an alleged violation "has occurred or is threatened, the court shall grant the relief necessary to prevent or abate the violation." *Id.* (emphasis added); Am. Compl. ¶ 46.

29. DEQ expressly brought the Amended Complaint under, *inter alia*, N.C. Gen. Stat. § 143-215.6C.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment-Consent Order is Arbitrary and Capricious)

30. The allegations set forth in the preceding paragraphs are realleged and incorporated by reference.

31. Pursuant to the Declaratory Judgments Act, N.C. Gen. Stat. § 1-253 *et seq.*, and for the reasons stated above, CFPUA seeks an order declaring that the State's decision to settle this enforcement action on the terms stated in the proposed Consent Order is arbitrary and capricious and an abuse of discretion under the North Carolina Administrative Procedure Act.

32. *First*, the proposed Consent Order fails to provide effective remedial requirements for off-site PFAS contamination in the Cape Fear River, river sediment, and air depositions in the soil and groundwater, which will continue to impact the waters of the Cape Fear River and the downstream users of the Cape Fear River for decades into the future. Instead, the State has explicitly abandoned CFPUA and other downstream users to the uncertainties and expense of private litigation, to vindicate their rights on their own, and has thereby abandoned its obligations to enforce the State's environmental laws (including the State's water quality standards) on behalf of all citizens of the State.

33. *Second*, the proposed Consent Order implicitly establishes drinking water remedial requirements (to the PFECA Limit) for residents in the vicinity of the Fayetteville Works Facility whose groundwater is impacted by PFAS, but does not establish the same requirements for everyone downstream whose drinking water is also impacted by the same PFAS contaminants. The State’s decision to resolve this enforcement action in a manner that mandates unequal treatment of North Carolina citizens is arbitrary and capricious, irrational, and an abuse of discretion.

34. An actual controversy exists based on the State’s decision not to address the harms to CFPUA and its customers.

35. CFPUA has no adequate or effective administrative remedy against the State or its agency DEQ. The subject of this Complaint is the underlying historic and ongoing releases of PFAS by Chemours, the public health and environmental harms caused by those releases, and the State’s efforts to seek relief for the violations of North Carolina water quality laws in this enforcement action. Jurisdiction to consider and determine the outcome of this action lies in Bladen County Superior Court, over which the Office of Administrative Hearings (“OAH”) has no authority. In addition, the State has not yet submitted its proposed Consent Order for entry, nor has it yet been entered by this Court—so CFPUA is not yet a “person aggrieved” as required to bring a contested case under N.C. Gen. Stat. § 150B-23. Once those actions occur, any administrative remedy is already lost, since OAH would have no authority to undo the Consent Order. Thus, there is no adequate administrative remedy available to CFPUA, and bringing an administrative claim to OAH would be futile.

36. CFPUA seeks an order declaring that the State’s decision to resolve this enforcement action pursuant to the terms of the proposed Consent Order is arbitrary and capricious,

irrational, and an abuse of discretion under the North Carolina Administrative Procedure Act since it (a) does not abate the harm to downstream Cape Fear River water users and (b) implicitly establishes differing and irrational levels of PFAS contamination that are safe for human consumption and use depending on whether a user's exposure to PFAS contaminants arises from use of surface water or groundwater.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment–Equal Protection Violation)

37. The allegations set forth in the preceding paragraphs are realleged and incorporated by reference.

38. The proposed Consent Order implicitly establishes two different sets of drinking water safety levels – one set (the PFECA Limit) for residents in the vicinity of the Fayetteville Works Facility whose groundwater is impacted by PFAS, and a different set with higher PFECA levels for everyone downstream whose water is also impacted by PFAS, including CFPWA and its customers.

39. With regard to the safety of their drinking water supply, CFPWA and its customers are similarly situated to residents in the vicinity of the Fayetteville Works Facility who rely on potable water from water supply wells that are contaminated with PFAS, in that: (a) both groups of residents reside in the area of PFAS impact from the Fayetteville Works Facility; (b) both groups of residents rely on drinking water supplies contaminated with PFAS; (c) the drinking water used by both groups of residents has been contaminated by PFAS discharges and releases from the same Facility; and (d) without relief, the drinking water of both groups of residents will continue to be contaminated with PFAS for decades into the future.

40. While the proposed Consent Order requires Chemours to remediate or replace the water supply of nearby residents whose groundwater is contaminated with certain PFAS

compounds above the PFECA Limit, the proposed Consent Order includes no similar requirement for downstream users whose water supply is also contaminated with the same PFAS compounds from the same Facility.

41. The proposed Consent Order's disparate treatment of North Carolinians exposed to PFAS-contaminated drinking water supplies constitutes discrimination in that the proposed Consent Order's protections do not apply equally to all similarly situated persons, do not reflect a rational distinction between such persons, and therefore, violate equal protection as guaranteed by the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

42. Upon information and belief, the proposed Consent Order's distinctions between nearby and downstream groups of residents are not related to a legitimate purpose.

43. CFPUA seeks a judgment declaring that the proposed Consent Order cannot be entered in its current form since entry of the Consent Order would constitute a violation of the United States and North Carolina Constitutions.

THIRD CLAIM FOR RELIEF
(Declaratory Judgment-Abatement of Violation)

44. The allegations set forth in the preceding paragraphs are realleged and incorporated by reference.

45. Under North Carolina's statutes and rules implementing the Clean Water Act, DEQ is authorized by N.C. Gen. Stat. § 143-215.6C to request the Attorney General to institute a civil action for injunctive relief to restrain and abate a violation of the State's water quality laws. Pursuant to this statute, the Attorney General instituted this enforcement action on behalf of the State. Upon a determination by the Court that the alleged violation "has occurred or is threatened,

the court shall grant the relief necessary to prevent or abate the violation.” N.C. Gen. Stat. § 143-215.6C (emphasis added); Am. Compl. ¶ 46.

46. The Amended Complaint expressly seeks to enforce, and requests relief pursuant to, N.C. Gen. Stat. § 143-215.6C.

47. Although the Amended Complaint and the terms of the proposed Consent Order are premised on violations of North Carolina’s water quality laws by Chemours, which resulted in widespread PFAS contamination in the Cape Fear River, the proposed Consent Order does not prevent or abate the violation. In particular, the proposed Consent Order fails to provide effective relief for off-site PFAS contamination in the Cape Fear River, river sediment, air depositions, and possible future surface water discharges which will continue to impact the waters of the Cape Fear River and the downstream users of the Cape Fear River for decades into the future.

48. An actual controversy exists based on the State’s failure to seek effective abatement of the violations of Chemours. As a result, the waters of the Cape Fear River will continue to be impacted by PFAS historically released by Chemours, in violation of North Carolina water quality laws, which will reach CFPUA’s intake within the river and affect the quality of CFPUA’s finished water, and thereby cause current and future harm to CFPUA and its customers.

49. The State’s Amended Complaint alleges the basis for the Court’s jurisdiction under N.C. Gen. Stat. § 143-215.6C, and the record shows that the facts alleged by the State will be proved by the evidence that will be presented in this case. However, the State’s decision to seek to settle this enforcement action on the basis of the proposed Consent Order irrationally and arbitrarily fails or refuses to seek the “relief necessary to prevent or abate the violation[s]” alleged in the Amended Complaint. The State’s proposed settlement, if entered and implemented, would

irrationally and arbitrarily and without justification preclude the Court from entering the “relief necessary” as required by the enforcement statute under which this action was instituted.

50. Pursuant to the Declaratory Judgments Act, N.C. Gen. Stat. § 1-253 *et seq.*, and for the reasons stated above, CFPUA seeks an order of the Court declaring that: (a) the statutory and regulatory violations alleged by the State in this action have occurred or are threatened; and (b) the proposed Consent Order fails to meet the mandate of N.C. Gen. Stat. § 143-215.6C, to prevent or abate the violations of North Carolina’s water quality laws and rules by Chemours; and (c) the State’s decision to agree to the proposed Consent Order is irrational, arbitrary, and unsupported by the record in this case in not seeking or accomplishing the “relief necessary to prevent or abate the violation” and thereby purporting to prevent the Court from ordering the “relief necessary” as required by N.C. Gen. Stat. § 143-215.6C.

FOURTH CLAIM FOR RELIEF
(Injunctive Relief – DEQ to Fully Consider Comments)

51. The allegations set forth in the preceding paragraphs are realleged and incorporated by reference.

52. DEQ, as an administrative agency of North Carolina, is subject to procedural requirements under North Carolina law. Among other things, DEQ cannot act in a manner that is arbitrary and capricious.

53. In undertaking many of its administrative actions such as permitting, rulemaking, or enforcement actions, DEQ is obligated to provide notice to the public of the action and allow the public an opportunity to comment.

54. In particular, in undertaking an enforcement action of the State laws implementing the Clean Water Act, such as the present action, DEQ is required to “[p]ublish notice of and

provide at least 30 days for public comment on any proposed settlement of a State enforcement action.” 40 C.F.R. § 123.27(d)(2)(iii).

55. After soliciting public comment, DEQ is then obligated to fully consider any comments it receives and take appropriate action in response.

56. Contrary to Secretary Regan’s public declaration that DEQ intends to submit to the Court the proposed Consent Order as-is, DEQ is required to fairly consider comments from the public, give them the weight they are due, and make decisions and undertake action in response in a rational and reasoned manner. DEQ’s actions and statements in this case indicate that, prior to its receipt and review of public comments, the agency already has predetermined its view of the proposed Consent Order and of its responses to the public comments that it has received and will receive. DEQ’s prejudged decision to submit the proposed Consent Order for the Court’s approval without due consideration of the public comments and a reasoned response thereto is an arbitrary and capricious action by the agency and renders the entire comment process illusory.

57. CFPUA seeks an order requiring DEQ to fully and fairly consider and appropriately respond to the public comments that are timely received by the agency, and to explain its responses in a reasoned manner and in appropriate written form.

PRAYER FOR RELIEF

WHEREFORE, Intervenor CFPUA respectfully prays the Court for the following relief:

1. A judicial declaration, pursuant to N.C. Gen. Stat. § 1-253 *et seq.*, that the State’s decision to execute the proposed Consent Order in its current form was arbitrary and capricious;
2. A judicial declaration, pursuant to N.C. Gen. Stat. § 1-253 *et seq.*, that the proposed Consent Order, if entered by the Court, violates the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the

Fourteenth Amendment to the United States Constitution to the extent it arbitrarily and irrationally treats similarly situated citizens differently for purposes of addressing and abating PFAS discharges or releases to drinking water;

3. A judicial declaration and determination, pursuant to N.C. Gen. Stat. § 1-253 *et seq.*, that: (a) the statutory and regulatory violations alleged by the State in this action have occurred or are threatened; and (b) the proposed Consent Order fails to meet the mandate of N.C. Gen. Stat. § 143-215.6C, to prevent and abate the violations of North Carolina’s water quality laws and rules by Chemours; and (c) the State’s decision to agree to the proposed Consent Order is irrational, arbitrary, and unsupported by the record in this case in not seeking or accomplishing the “relief necessary to prevent or abate the violation” and thereby preventing the Court from ordering the “relief necessary” as required by N.C. Gen. Stat. § 143-215.6C.

4. An order, following the trial of this case and pursuant to N.C. Gen. Stat. § 143-215.6C, granting the relief necessary to prevent and abate Chemours’ violations of the water quality laws of this State;

5. An order requiring DEQ to fully and fairly consider and appropriately and substantively respond to the public comments on the proposed Consent Order that are timely received by the agency and to explain its responses in a reasoned manner and appropriate written form;

6. Such other and further relief as to the Court may seem just and proper.

Respectfully submitted this the ____ day of _____, 2019.

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EXHIBIT A

[illegible]

EXHIBIT B

December 17, 2018

Via email to: comments.chemours@ncdenr.gov

Via First Class Mail to:
Assistant Secretary Sheila Holman
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Re: Chemours Public Comments

Dear Assistant Secretary Holman:

This firm represents the Cape Fear Public Utility Authority (“CFPUA”) with regards to the perfluoroalkyl and polyfluoroalkyl substances (“PFAS”) contamination in the Cape Fear River. We write to provide comments on behalf of CFPUA to the proposed Consent Order published for comment in *DEQ v. The Chemours Company FC, LLC*, 17 CVS 580, Bladen County Superior Court (the “Enforcement Action”).

CFPUA respectfully requests the Department of Environmental Quality (“DEQ”) to reconsider the terms of the proposed Consent Order because CFPUA believes the proposed Consent Order is fundamentally flawed in a number of important respects. The proposed Consent Order: (i) fails to require adequate health studies of PFAS that The Chemours Company FC (“Chemours”) is discharging and releasing into the Cape Fear River; (ii) is premised on unwarranted assumptions made by Chemours and apparently accepted by DEQ; (iii) imposes different standards of drinking water quality for residents of the lower Cape Fear River Basin; (iv) potentially allows Chemours to continue hiding PFAS releases from the public, under claims of confidentiality; (v) fails to address off-site PFAS contamination caused by the historic and ongoing activities of Chemours and E.I. du Pont de Nemours and Company (“DuPont”), which continue to impact the Cape Fear River; and (vi) establishes (or risks establishing) future permit conditions without allowing the requisite opportunity for public participation, including the opportunity to challenge such conditions in an administrative action. These and other flaws are summarized below.

A. Air Emissions Provisions (Paragraphs 7–9)

Control Technology Improvements. The proposed Consent Order provides insufficient detail on the types and effectiveness of the pollution control equipment Chemours intends to

install. A Scope of Work (“SOW”) should be provided for each, showing equipment configurations, specifications, processes, effectiveness, and other details of implementation. Further, the proposed Consent Order fails to adequately identify: (i) the process streams at the Facility that result in PFAS emissions; and (ii) the absolute quantities of historic, current, and expected PFAS emissions from each of the process streams at the Facility. With respect to the Second Phase Scrubber and Vinyl Ethers North Adsorber Project, there is no apparent rationale for: (i) applying the efficiency standards to GenX Compounds only; and (ii) omitting similar requirements for the other process streams at the Facility that result in PFAS emissions. Finally, the proposed Consent Order appears to provide terms and conditions for a major modification to Chemours’ Clean Air Act permit, without undergoing the requisite procedures—including opportunities for public participation.

GenX Emissions Reduction Milestones. As with the efficiency standards discussed in the preceding paragraph, there is no apparent rationale that the reduction milestones or the emissions reporting requirements should apply to GenX Compounds only. All PFAS emissions should be subject to reduction milestones, testing, and reporting. Finally, even if the milestones and dates for meeting them are reasonable, it is impossible for the public to adequately evaluate the proposed milestones without the SOWs that were not included with the proposed Consent Order.

Disclosure of PFAS emissions. CFPUA supports mandatory disclosure of all known historic and future PFAS emissions and emission rates, as well as analytical test methods and lab standards. However, the proposed Consent Order does not include an obligation for Chemours to investigate and identify all PFAS either in its ongoing emissions or in new processes that Chemours may undertake. Nor does the proposed Consent Order require Chemours to develop test methods and lab standards, or undertake health studies for all such identified PFAS. Chemours should be obligated to identify all PFAS in its air emissions, and establish safe levels of such emissions, prior to being permitted to continue emitting PFAS to the environment.

B. Surface Water Provisions (Paragraphs 10–15)

Characterization of PFAS in process and non-process wastewater and stormwater. CFPUA supports comprehensive characterization of PFAS in process and non-process wastewater and stormwater at Chemours, and development of test methods and lab standards for all PFAS identified. CFPUA believes the time period allowed in the proposed Consent Order (18 months beyond approval of the sampling plan) is not necessary to complete the required characterization. Regardless, DEQ should not issue an NPDES Permit authorizing discharge of process wastewater until all PFAS constituents are identified and adequate health studies conducted in order to determine safe levels of PFAS that ensure that discharges from Fayetteville Works will not cause violation of any state water quality standard in the Cape Fear River.

Prevention of PFAS Loading to Surface Waters. CFPUA supports maximum reductions in PFAS loading from the Facility to surface waters, including loading from contaminated stormwater, non-process wastewater, and groundwater. This provision, however, is flawed in several respects. *First*, a two year time frame (and up to five years) for implementation of loading reductions is excessive. Interim benchmarks should be established to ensure continuous progress in reduction of PFAS loading, even if two to five years is an appropriate time frame to implement

the complete remedy. *Second*, the concepts of economic and technological feasibility should be discarded. Technological feasibility is an inherent limitation of any plan, and economic feasibility ignores that: (i) Chemours is responsible for the contamination that it caused irrespective of cost to remediate; and (ii) Chemours is a \$7 billion company, with \$747 million in net income in 2017 alone. To the extent that such concepts are left in the final Consent Order, the questions of technological and economic feasibility should be expressly left to the reasonable discretion of DEQ, not Chemours, with disclosure and input from the public. *Third*, the plan to be developed by Chemours, including the supporting modeling, should be published for comment by the public, rather than just Cape Fear River Watch (“CFRW”). Moreover, SOWs should be provided for public review and comment.

Facility Site Visit. The site visit should include representatives of the downstream water utilities and municipal officials.

Health Studies. The proposed health studies are insufficient to provide adequate data from which DEQ can make an informed, reasoned decision regarding safe levels of PFAS discharges, emissions, and other releases to the environment. *First*, by agreeing not to require any studies for the vast majority of PFAS released by Chemours, DEQ abdicates its responsibility to ensure that constituents of Chemours’ releases are safe for human health and the environment and ensure compliance with state water quality standards prior to approving their release. *Second*, as already noted by counsel for the putative class in *Carey v. E.I. du Pont de Nemours*, 7:17-CV-00189 (E.D.N.C.) in their December 6, 2018 letter to the Bladen County Superior Court, both epidemiological studies and toxicity testing to generate dose response data should be required. CFPUA supports the health study comments of the putative class counsel, and concurs that more comprehensive studies and greater detail about the protocol of such studies should be mandated, so that the public can meaningfully review and comment on the adequacy of such studies. Finally, Chemours should provide to DEQ and the public any health studies it has previously conducted on any PFAS that is a constituent of its process wastewater or its air emissions.

Notice to and Coordination with Water Utilities. CFPUA supports the requirement of immediate notice to downstream water utilities and notes that Chemours has never notified CFPUA of a PFAS release at the Facility that resulted in elevated concentrations discharged into the Cape Fear River. The requirements of this paragraph should therefore be subject to a substantial stipulated penalty, to encourage timely notice to the downstream water utilities.

C. Groundwater (Paragraphs 16–18)

Groundwater Remediation. CFPUA supports remediation of the groundwater at the Facility that complies with the requirements of the 2L Rules. However, especially given the longstanding RCRA investigation of groundwater contamination at the Facility, allowing Chemours until December 31, 2019 to submit a Corrective Action Plan, with no specified deadline for implementation of the plan, is an excessive time frame. Additionally, interim maximum allowable concentrations for PFAS that may affect the remediation required under this section should not be established absent adequate health studies to determine safe levels of PFAS concentrations. Although CFPUA supports specific requirements for reduction of PFAS loading to surface water, it is not clear whether a 75% reduction from baseline is adequate to protect health

and the environment. DEQ should require Chemours to provide information sufficient for the public to evaluate the adequacy of the reduction. Finally, while the Corrective Action Plan is required to account for all PFAS for which test methods have been developed, complete characterization of PFAS and development of test methods is not scheduled to be complete until after submission of the Plan. The proposed Consent Order should be revised to ensure that any newly identified PFAS are also accounted for in the groundwater remediation requirements.

D. Replacement of Drinking Water Supplies (Paragraphs 19–25)

PFAS levels in drinking water of all affected consumers should be addressed to ensure that no one is subject to unsafe levels of PFAS as a result of the contamination caused by Chemours and to ensure that the use of the Cape Fear River as a source of drinking water is not impaired. The proposed Consent Order does not accomplish these objectives.

DEQ has apparently determined that Chemours must provide reverse osmosis systems to owners of private wells contaminated with concentrations above certain thresholds of the PFAS listed on Attachment C, which are perfluoroalkyl ether carboxylic acids (“PFECAs”). The requirement is triggered at combined PFECA concentrations in groundwater above 70 ppt or individual concentrations above 10 ppt (the “PFECA Limit”). There are two critical errors with the proposed Consent Order’s implementation of the PFECA Limit.

First, the PFECA Limit appears to accept Chemours’ assertion that Chemours is only responsible for PFECA contaminants. Groundwater at the Fayetteville Works Facility is known to be contaminated with a broad range of PFAS—well beyond just the twelve PFECAs enumerated on Attachment C—and is further known to contribute to PFAS loading of the surface water of the Cape Fear River, as both DEQ and Chemours acknowledge. Furthermore, CFPWA is informed and believes the wastewaters generated by Chemours (before dilution by a factor of 20 from non-process river water) can contain additional PFAS compounds.

Second, the PFECA Limit excludes from its protections all downstream users of the Cape Fear River. DEQ has asserted that: “The way that the order is structured, it will mean that no one in the community will be drinking water with measurable PFAS concentrations above 10 parts per trillion.”¹ DEQ’s statement misconstrues the proposed Consent Order in its current form. While the PFECA Limit applies to the households with contaminated wells in the immediate area of the Fayetteville Works Facility, it does not apply to the 200,000 people served by CFPWA, along with the approximately 100,000 people served by Brunswick County, all of whom are provided drinking water from the Cape Fear River.

The proposed Consent Order effectively abandons the downstream users of the Cape Fear River, leaving them to fend for themselves in private litigation. Inexplicably, this appears to have been a strategic decision by the agency. In defending the proposed Consent Order, DEQ stated:

You also have the complimentary efforts of the federal lawsuit that the local public utility has filed. That is intended to pursue damages. And then you have the class-

¹ See <http://www.whqr.org/post/genx-deq-explains-proposed-consent-order#stream/0>.

action lawsuits that are occurring here as well, so the comprehensive nature of all of those actions are what we consider the right steps in protecting the people of Wilmington.²

Private litigation is not a substitute for DEQ's enforcement of its environmental laws. The agency's enforcement of the PFECA Limit exclusively for private well owners in the vicinity of the Facility is inconsistent with DEQ's responsibility to protect all of the citizens of this State, not just a select few.

Importantly, PFAS testing at the CFPUA water intake, and of the finished water, shows that CFPUA's water regularly exceeds the PFECA Limit that the proposed Consent Order apparently accepts as safe.

Apart from the errors described in this section of comments, it is unclear how the PFECA Limit was derived, whether it is based on the best available health information pertaining to PFECAs, or whether CFPUA should consider it a health advisory standard from the State. DEQ should disclose how the PFECA Limit was reached, including whether it accounts for the cumulative effect of exposure to numerous PFAS—not just PFECAs.

E. Other Compliance Measures (Paragraphs 26–28)

DEQ should identify the purpose of measuring the Total Organic Fluorine (“TOF”), including whether DEQ intends to use the measurement as a substitute for identifying and measuring PFAS in the air emissions and wastewater of Chemours. DEQ should develop requirements for TOF that: require Chemours to identify each substance that contributes to TOF in air emissions and wastewater discharges; complete independently peer-reviewed health and safety studies of each substance; and prohibit emission and discharge of each substance unless independently peer-reviewed health and safety studies provide reliable information that can be used to establish amounts and concentrations of the substance that can safely be discharged or emitted. With regard to discharges and the water quality of the Cape Fear River, the foregoing TOF requirements are essential to reasonably ensure compliance with the deleterious substance water quality standard established by 15A NCAC 2B .0211(12).

CFPUA supports the development of a PFAS fate and transport study. However, the study should be open to public participation, including review of study protocol and findings, to ensure the validity of its evaluation and conclusions. Further, the study of the fate and transport of identified PFAS is scheduled to be completed a year before complete characterization of PFAS being released from the Facility. Following final characterization, the proposed Consent Order should require that the study be updated to account for any newly identified PFAS.

² See <http://www.wect.com/2018/12/05/deq-secretary-proposed-chemours-consent-order-its-very-strong-first-step/>.

F. Compliance Measures – Public Information (Paragraphs 29–30)

Disclosure of the identity, concentrations, and quantities of all PFAS that are or could be released to the environment by Chemours is essential. The proposed Consent Order does not impose this requirement. *First*, Paragraph 29 does not expressly require disclosure of the identity, concentrations, or quantity of PFAS being released. Rather, it requires public notice about a change in Facility operations. *Second*, Paragraph 29 is only triggered by a change in operations. If a previously undisclosed PFAS is continuing to be released into the environment as a result of the usual operations, there is no clear mandate for public disclosure. *Third*, references to the “production” of PFAS at Chemours should expressly include production of PFAS as a byproduct of any process at the Facility.

Most concerning, the proposed Consent Order appears to allow a blanket claim of confidential business information (“CBI”) by Chemours, with little or no opportunity for public participation or knowledge. Chemours and its predecessor DuPont have a history of abusing CBI claims to withhold or hide from the public information about the use, toxicity, and release of PFAS. Chemours should not be offered another opportunity to continue the PFAS shell game that the two companies have played for years. To the extent any PFAS is released to the environment, it ceases being “confidential” and becomes a public concern. Chemours must provide comprehensive, accurate, and timely information to the public regarding the identity, use, quantity, and toxicity of all PFAS released into the environment from the Facility. Moreover, it is critical that such information is disclosed in advance, as part of any permit application submitted by Chemours, so that the public will have an adequate opportunity to review and meaningfully comment on the intended release.

G. Penalties and Investigative Costs (Paragraphs 31–33)

Stipulated penalties should include a substantial penalty for failure to provide timely notice to downstream water utilities of PFAS releases to the environment as described in Paragraph 15.

Even assuming that DEQ undertakes a separate enforcement action against DuPont, the \$12,000,000 civil penalty proposed in the Consent Order is inadequate. *First*, it disregards the gravity of the violation—releasing untold quantities of undisclosed toxic substances into the Cape Fear River, exposing the entire population of the lower Cape Fear River basin to risk of negative health outcomes. Though Chemours’ time operating the Facility is only a fraction of DuPont’s, the facts remain that: (i) Chemours is a spinoff of DuPont, with many of the same officers in the same roles; and (ii) Chemours continued the same reckless and deceptive practices as DuPont, until it was caught.

Second, the relatively low penalty disregards the significant financial strength of Chemours—a \$7 billion company with net income of \$747 million in 2017 alone. A \$12 million penalty is a pittance to a company of that magnitude. Such a small comparative amount incentivizes bad behavior. Even with the penalty, Chemours has assuredly profited off an environmental disaster of its own making. Stronger disincentives must be imposed to discourage similar conduct in the future.

Finally, DEQ should clarify whether it intends to separately impose civil or criminal penalties against DuPont. While a \$12,000,000 penalty is low even for the past three years of PFAS releases, it would be an affront to the citizens of the entire lower Cape Fear River basin if it purported to account for DuPont's 35 years of hidden PFAS releases.

H. Release and Reservation of Rights

A fundamental problem of the proposed Consent Order is that it does not address the downstream PFAS contamination caused by Chemours and DuPont. Even if the PFAS "spigot" at Fayetteville Works is turned off completely, CFPUA will still be subject to large quantities of PFAS being released into the Cape Fear River from contaminated sediment, groundwater, previous deposition from air emissions, and stormwater.

Under these circumstances, the proposed Consent Order nonetheless purports to release Chemours from all claims "relating to the release of PFAS from the Facility that have been or could have been brought." The proposed Consent Order should not release Chemours from remediation of off-site PFAS contamination, and DEQ should clarify whether it intends to pursue further enforcement actions for downstream PFAS contamination, whether against Chemours, DuPont, or both. Lastly, the proposed Consent Order should expressly reserve the right to pursue all claims that may be available against DuPont.

I. Intervention of Cape Fear River Watch

The quarterly progress reports submitted to DEQ and CFRW should be submitted to the water utilities. Similarly, DEQ should make its staff available to the water utilities' staff to meet and discuss the information reflected in the quarterly reports.

J. Miscellaneous

Effect of this Order. The proposed Consent Order must not be construed to be a permit to release PFAS to the environment. The proposed Consent Order should be revised to specify that it does not obligate DEQ to incorporate any terms of the Order into a permit, nor does it preclude full public participation in any permit sought by Chemours under state or federal law, regardless of whether the terms of the permit are consistent with the Consent Order. The public should not, by virtue of the proposed Consent Order, lose the opportunity to challenge any term or condition of a permit that may be sought by or issued to Chemours.

Carbon Filtration Systems. CFPUA questions the purpose and need of this provision. As an initial matter, CFPUA has engaged in its own extensive pilot study of granular activated carbon ("GAC") systems, funded in part by appropriations from the General Assembly, the details of which have been made available to the public at large. CFPUA is surprised to learn that DEQ and Chemours have undertaken their own separate study of similar systems, without notifying, coordinating with, or sharing findings and data with CFPUA.

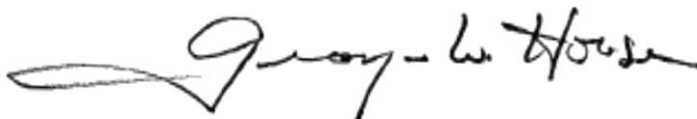
DEQ should disclose the full scope of details related to its "program" for testing the efficacy of GACs, including GAC design, test protocols, results, and projected cost, maintenance,

and lifespan information. Only after such disclosure can the public undertake a meaningful evaluation of the program as designed by DEQ and Chemours.

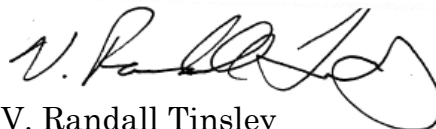
Finally, DEQ's and Chemours' joint "program," showing under "test conditions" that PFAS were reduced to non-detect, cannot support the assumption that installation of a similar system as part of Chemours' wastewater treatment plant will reduce to non-detect PFAS in its effluent being discharged to the Cape Fear River. Chemours cannot shirk its obligation to establish and meet safe PFAS concentrations in its effluent, simply by installing a GAC and making the assumption that PFAS levels have been adequately reduced. DEQ needs to impose science-based PFAS limits on the discharges of Chemours. In order for an NPDES Permit to be issued, Chemours must establish: (i) the identity and quantity of all PFAS in its effluent; (ii) safe levels of discharge for those PFAS; and (iii) the real-world ability to limit its PFAS discharges to safe levels. Installation of a GAC, while likely beneficial, does not prove any of those elements. DEQ has its own legal duty to enforce applicable water quality standards that require that deleterious substances may be discharged legally *only* in an amount that will not render the waters injurious to public health or impair the Cape Fear River for any of its designated uses, including its use as a source of drinking water.

CFPUA appreciates the opportunity to comment on the proposed Consent Order, and reminds DEQ that it must fully consider and address the comments that it receives, in accord with its obligations as a North Carolina administrative agency subject to the Administrative Procedure Act. CFPUA further requests that DEQ provide the relevant information omitted from the proposed Consent Order, modify the proposed Consent Order to address the above concerns, and allow another opportunity for the public to review the supplemental information and modified Consent Order, so that DEQ has the benefit of a meaningful review and comment by the public.

Sincerely,



George W. House



V. Randall Tinsley



Joseph A. Ponzi

cc: Michael S. Regan, Secretary
Bill Lane, General Counsel