

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

CAPE FEAR RIVER WATCH,)
)
 Petitioner,)
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 v.)
)
 NORTH CAROLINA DEPARTMENT OF)
 ENVIRONMENTAL QUALITY,)
)
 Respondent.)
)
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PETITION FOR JUDICIAL REVIEW

Petitioner Cape Fear River Watch respectfully seeks review, pursuant to N.C. Gen. Stat. § 150B-4, § 150B-43, and § 150B-45, of a Final Decision Denying Request for Declaratory Ruling issued by the North Carolina Department of Environmental Quality (“DEQ”) (“decision”) on June 15, 2018.¹ In the decision, DEQ affirms that Chemours Company FC, LLC and E.I. du Pont have caused widespread air and water pollution and that immediate action is necessary to protect public health. Yet the agency denied the request to formalize those findings and fulfill its statutory obligation to reduce or eliminate the pollution. Cape Fear River Watch now appeals DEQ’s decision.

NATURE OF THE CASE

1. In this action, Petitioner seeks a declaration of law applying the clear mandate of N.C. Gen. Stat. § 143-215.3(a)(12), which requires DEQ to take immediate protective action if it determines that there is (1) a “generalized condition of water or air pollution which is causing imminent danger to the health or safety of the public,” and that (2) “it creates an emergency

¹ N.C. Dept. of Environmental Quality, Final Decision Denying Request for Declaratory Ruling (June 15, 2018) (hereinafter “NC DEQ Final Decision”), included as Exhibit 1. On June 8, 2018, Petitioner stipulated to a seven-day extension of the thirty-day time limit for DEQ to make its written decision to grant or deny Petitioner’s Request under N.C. Gen. Stat. 150B-4(a1)(1).

requiring immediate action to protect the public health and safety or to protect fish and wildlife.”²

2. The Chemours Company FC, LLC (“Chemours”) and E.I. du Pont de Nemours and Company (“DuPont”)³ (collectively, “the companies”) have knowingly polluted North Carolina’s public water sources with GenX⁴ and other toxic perfluoroalkyl and polyfluoroalkyl substances (collectively, “PFAS compounds”) for nearly four decades, causing widespread and dangerous contamination of the state’s surface and groundwaters.⁵ Despite nearly a year of DEQ investigation and enforcement actions, GenX and other PFAS compounds continue to be released into the water, air, and soil through Chemours’ stack emissions, stormwater and wastewater conveyance ditches and pipes, unlined sedimentation basins, contaminated equipment, and numerous leaks and spills.

3. On March 7, 2018, Cape Fear River Watch filed a Request for Declaratory Ruling with the DEQ Secretary.⁶ The request asked DEQ to issue a ruling declaring that:

- a. Previous and ongoing activities of Chemours Company FC, LLC and E.I. du Pont de Nemours and Company at the Fayetteville Works Facility have caused, and continue to cause, a generalized condition of water and air pollution which is causing imminent danger to the health and safety of the public.
- b. In order to protect public health and safety, Chemours Company FC, LLC must immediately discontinue all air emissions as well as all surface water, groundwater, and/or stormwater discharges of perfluoroalkyl and polyfluoroalkyl substances from the Fayetteville Works Facility.⁷

² N.C. Gen. Stat. § 143-215.3(a)(12).

³ E.I. du Pont de Nemours and Company owned and operated the Fayetteville Works facility from the 1970s until the company formed Chemours, and transferred ownership to Chemours in 2015. Amended Complaint, N.C. Dept. of Environmental Quality v. Chemours, 17 CVS 580, 14 (N.C. Super. 2018) (hereinafter “NC DEQ Amended Complaint”).

⁴ GenX is the trade name for a chemical known as C3 Dimer Acid (also known as HFPO Dimer Acid), which has a “Chemical Abstracts Registry” or “CAS” number of 13252-13-6.

⁵ See NC DEQ Amended Complaint.

⁶ Petitioner’s Request for Declaratory Ruling attached 88 documents—many of which are several hundred pages in length. Those documents are part of the Administrative Record before DEQ and will be filed with briefing. This Petition cites to that supporting material. However, for the sake of brevity, Petitioner has not attached those documents to this Petition.

⁷ See Petitioner’s Request for Declaratory Ruling, May 7, 2018, included as Exhibit 2.

4. DEQ denied Petitioner's request on June 15, 2018. In its final decision, DEQ affirmed that there exists a generalized condition of water or air pollution, that there is an imminent danger to the health or safety of the public, and that there is an emergency requiring immediate action.⁸ DEQ denied the request primarily due to ongoing litigation in Bladen County Superior Court, where the agency is seeking relief similar to that requested in the Request for Declaratory Ruling.

PARTIES

5. Petitioner Cape Fear River Watch was a party to the request that led to DEQ's decision and is an appropriate party to this Petition for Judicial Review pursuant to N.C. Gen. Stat. § 150B-4.

6. The Cape Fear River Watch is a § 501(c)(3) nonprofit public interest organization headquartered in Wilmington, North Carolina that engages residents of the Cape Fear watershed through programs to preserve and safeguard the river. The organization has 1,100 members, including members who live near, fish, swim, and boat on, and who drink water from, the Cape Fear River downstream of Chemours' facility. As demonstrated in the affidavits included in Exhibit 5, members of Cape Fear River Watch who live near and downstream of the Fayetteville Works Facility have been devastated by Chemours' PFAS contamination. For decades, they and their families have been exposed to air and water that has been contaminated by Chemours. They now live in fear of how much the pollution has affected the health of their families and communities, and frustration that the company continues to release it into their environments. Cape Fear River Watch's mission is "to protect and improve the water quality of the Lower Cape Fear River Basin through education, advocacy and action." In order to fulfill that mission, the

⁸ See NC DEQ Final Decision at 3-6, 10, 15.

organization works to protect the entire Cape Fear River from pollution, including the toxic PFAS compounds that have been released from the Fayetteville Works Facility for decades, and continue to be pumped into the environment at alarming rates. Cape Fear River Watch's members are substantially and adversely impacted by DEQ's denial of its request for declaratory ruling. Cape Fear River Watch represents its members' interests in this action and is a "person aggrieved" under the North Carolina Administrative Procedure Act.

7. Among other tasks, the North Carolina Department of Environmental Quality is responsible for "declar[ing] an emergency when it finds that a generalized condition of water or air pollution which is causing imminent danger to the health or safety of the public," and for "order[ing] persons causing or contributing to the water or air pollution in question to reduce or discontinue immediately the emission of air contaminants or the discharge of wastes."⁹

FACTUAL BACKGROUND

I. Chemours and DuPont Have Caused, and Chemours Continues to Cause, a Generalized Condition of PFAS Air and Water Pollution.

8. DEQ has recognized that Chemours has "caused significant and widespread groundwater contamination," and that Chemours "continues to contaminate North Carolina's air, surface water and groundwater through the release of GenX."¹⁰

9. DEQ's investigation into the facility began in June of 2017.¹¹ At the time, GenX levels at Chemours' outfall into the Cape Fear River reached levels of up to 39,000 parts per trillion ("ppt"), and GenX levels in the finished drinking water from the Cape Fear Public Utility Authority's Sweeney Water Treatment Plant reached levels of up to 1,100 ppt.¹² Chemours'

⁹ N.C. Gen. Stat. § 143-215.3(a)(12).

¹⁰ NC DEQ Amended Complaint at 1 (quotations omitted).

¹¹ NC DEQ Press Release, "DEQ, DHHS investigating reports of unregulated chemical in Cape Fear River," Jun. 14, 2017.

¹² June 19 to July 25, 2017 GenX Surface Water Sampling Results.

early sampling of GenX in groundwater monitoring wells at the site showed GenX at concentrations of up to 61,300 ppt.¹³

10. Within two weeks of the company's agreement with the agency to stop discharging its PFAS-laden wastewater, DEQ had to order the company to provide bottled water to 11 homeowners near the facility.¹⁴

11. Since then, DEQ has been trying to determine how far the contamination has spread from the facility, consuming significant staff resources.¹⁵

12. From September to December of 2017, DEQ found at least 33 different PFAS compounds, including GenX, Nafion By-products 1 and 2, PFOA, and PFOS, in private drinking water wells around the facility.¹⁶ Within those four months, DEQ issued seven press releases stating that 100 homeowners would need to rely on bottled water instead of the contaminated well water they and their families had been drinking for decades.¹⁷ Robeson County started its own testing of wells, and as of April 26, 2018, had found GenX in 33 of the wells it tested.¹⁸

13. By the time Petitioner submitted its request to DEQ on May 7, 2018, GenX had been found in at least 690 private wells up to 5.5 miles away from the facility's border, in levels as high as 4,000 ppt—28 times the state's health goal of 140 ppt, and 400 times GenX's

¹³ "Chemours Preliminary Data, August 2017."

¹⁴ NC DEQ Press Release, "State directs Chemours to provide residents with bottled water after GenX found in preliminary well tests," Sept. 21, 2017.

¹⁵ NC DEQ Presentation to House Select Committee on North Carolina River Quality, Sep. 28, 2017; NC DEQ Presentation to House Select Committee on North Carolina River Quality, Oct. 26, 2017; NC DEQ Presentation to House Select Committee on North Carolina River Quality, Nov. 30, 2017; NC DEQ Presentation to Science Advisory Board, Dec. 4, 2017; NC DEQ Presentation to House Select Committee on North Carolina River Quality, Feb. 21, 2018; NC DEQ Presentation to House Select Committee on North Carolina River Quality, Mar. 22, 2018 (hereinafter "NC DEQ Mar. 22 Presentation").

¹⁶ NC DEQ, "Expanded PFAS Analysis on DEQ Collected Private Wells Associated with Chemours-Fayetteville."

¹⁷ NC DEQ, GenX News Releases, *available at* <https://deq.nc.gov/news/hot-topics/genx-investigation/genx-news-releases> (last visited on Apr. 5, 2018).

¹⁸ NC DEQ Presentation to House Select Committee on North Carolina River Quality, Apr. 26, 2018 (hereinafter "NC DEQ Apr. 26 Presentation"), at slide 9.

applicable groundwater standard, or 10 ppt.¹⁹ Robeson County’s health director has stated that the presence of GenX in Robeson County likely indicates that Chemours’ contamination has spread into the Lumber River basin and even the Pee Dee River in South Carolina.²⁰

14. Groundwater sampled at the site of the facility has contained concentrations of GenX up to 640,000 ppt—over 4,500 times the state’s health goal, and over 64,000 times GenX’s applicable groundwater standard.²¹

15. The problem continues. DEQ has determined that “the flow of onsite groundwater directly to the Cape Fear River” is “the most significant source of contaminant loading in the River.”²² Polluted groundwater is discharging north of Chemours’ facility into Willis Creek, where GenX has been detected at levels of up to 450 ppt, and south of the facility into Georgia Branch, where GenX has been detected at levels of 690 ppt.²³ Both Willis Creek and Georgia Branch connect with the Cape Fear River, so the company’s pervasive pollution of the groundwater has resulted in continuing levels of GenX in the Cape Fear River.²⁴

16. Scientists at the University of North Carolina in Wilmington have also found GenX, along with a number of other PFAS compounds, in the sediment of the Cape Fear River over 40 miles away from the plant, and have determined that sediments in the river are likely

¹⁹ NC DEQ Apr. 26 Presentation at slides 9-10; NC DEQ Amended Complaint at 10-22; *see also* Exhibit 23 of NC DEQ Amended Complaint, “Sample Results of Residential Well Groundwater Testing.” DEQ states in its complaint that “GenX is not permitted in groundwater at concentrations at or above the [practical quantitation limit]” as defined in N.C. Admin. Code 2L .0102(15).

²⁰ Steve DeVane, “Robeson County testing for GenX near St. Pauls,” *the Fayetteville Observer*, Feb. 2, 2018.

²¹ NC DEQ Amended Complaint at 10-22, 24-25.

²² NC DEQ Amended Complaint at 26; *see also* Exhibit 22 of NC DEQ Amended Complaint, “Focused Feasibility Study Report – PFAS Remediation.”

²³ NC DEQ Amended Complaint at 26.

²⁴ *Id.* at 26 (“Concentrations of GenX in effluent being released from Outfall 002 continue, with higher levels occurring during or after rain events.”).

“acting as a repository of GenX that may be released into the overlying water column, potentially impacting sensitive estuarine ecosystems as well as drinking water utilities...”²⁵

17. GenX is not only in the ground and surface water and the underlying sediments. DEQ has found that “a primary source of surface water and groundwater contamination [...] is Chemours’ ongoing emission of GenX and related compounds into the atmosphere and the deposition of those compounds onto the land and waters ...”²⁶ Despite Chemours’ agreement to stop discharging GenX-laden wastewater directly into the Cape Fear River, DEQ has found GenX in several other unexpected locations, including in rainwater, spring-fed lakes, and honey.

18. For the past several months, DEQ has been sampling rainwater for GenX. The agency stated that “[e]ach time” it sampled, it “found that GenX was present in rainwater above [10 ppt] *and at increasingly greater distances from the Chemours facility.*”²⁷ DEQ has found the chemical in rainwater at levels as high as 810 ppt five miles from the facility, and *as far as 7 miles* from the facility.²⁸ DEQ has also found GenX in spring-fed recreational lakes far from the facility—at levels of up to 620 ppt in Camp Dixie, a lake about two miles away from the plant that is drained about once a year,²⁹ and at levels of 915 ppt in Marshwood Lake, about a mile away, and upstream, from the plant.³⁰ Last December, GenX was found in local honey at 2,070 ppt—nearly 15 times higher than the state’s health goal.³¹

²⁵ “Report to the Environmental Review Commission from the University of North Carolina at Wilmington Regarding the Implementation of Section 20(a)(2) of House Bill 56 (S.L. 2017-209);” University of North Carolina in Wilmington Presentation to House Select Committee on North Carolina River Quality, “Sediments and GenX in the CFR,” Feb. 21, 2018, slide 3.

²⁶ NC DEQ Amended Complaint at 3.

²⁷ NC DEQ, NC Division of Air Quality, Letter to Chemours, “60-Day Notice of Intent to Modify Air Quality Permit No. 03735T43, Apr. 6, 2018, 3 (hereinafter “NC DAQ 60-Day NOI”).

²⁸ NC DAQ 60-Day NOI at 3; NC DEQ Amended Complaint at 2.

²⁹ Lisa Sorg, “It’s even been found in honey: Mysteries deepen about extent, risks of GenX contamination,” *NC Policy Watch*, Dec. 5, 2017.

³⁰ NC DEQ Press Release, “Latest test results show concentrations of GenX in Camp Dixie’s lake, Marshwood Lake and Hall Park baseball field’s well,” Nov. 7, 2017.

³¹ Adam Wagner, “How did GenX end up in a jar of honey? DEQ is investigating,” *StarNews Online*, Dec. 4, 2017.

19. GenX's ability to travel far in our atmosphere has been recently confirmed by scientists at the University of North Carolina in Wilmington, who have found GenX in concentrations over 500 ppt in the rainwater as far as Wilmington—about 80 miles from the facility.³²

20. At the time Petitioner submitted its request to DEQ on May 7, 2018, DEQ was in the process of testing for GenX in sediment and fish tissue,³³ and analyzing studies of Chemours plants in the Netherlands which have revealed high concentrations of GenX and other PFAS compounds in vegetable gardens nearby.³⁴

21. Scientists at the University of North Carolina in Wilmington have also expressed concern that Chemours' PFAS compounds have collected in water towers, water heaters, and even the bacteria that coat the inside of pipes which pump treated drinking water.³⁵

22. Chemours' toxic pollution of the environment does not only involve GenX. For decades, Chemours and DuPont have released numerous other PFAS compounds into the environment.³⁶

23. In 2015, a study conducted by Mark Strynar at the U.S. Environmental Protection Agency and a team of researchers found “a large increase in number and magnitude [...] of

³² UNCW Presentation to House Select Committee on North Carolina River Quality, “Report from The University of North Carolina at Wilmington Regarding the Implementation of Section 20.(a)(2) of House Bill 56 (S.L. 2017-209),” Apr. 26, 2018, slide 15.

³³ NC DEQ March 22 Presentation at slide 15.

³⁴ Lisa Sorg, “State officials struggle to keep up as GenX pollution issues spread, grow more complex,” *NC Policy Watch*, Mar. 20, 2018.

³⁵ Cheryl Hogue, “What’s GenX still doing in the water downstream of a Chemours Plant,” *c&en*, Feb. 12, 2018.

³⁶ Mei Sun et al., “Legacy and Emerging Perfluoroalkyl Substances Are Important Drinking Water Contaminants in the Cape Fear River Watershed of North Carolina,” 3 *Environ. Sci. Technol. Let.* 415 (2016) (hereinafter “Sun 2016 Study”); EPA, “Laboratory PFAS Results for NC DEQ Cape Fear Watershed Sampling,” Aug. 21, 2017; Mark Strynar et al., “Identification of Novel Perfluoroalkyl Ether Carboxylic Acids (PFECAs) and Sulfonic Acids (PFESAs) in Natural Waters Using Accurate Mass Time-of-Flight Mass Spectrometry (TOFMS),” 49 *Environ. Sci. Technol. Let.* 11622 (2015) (hereinafter “Strynar 2015 Study”).

unknown compounds” downstream from the facility.³⁷ At the time, the team identified at least twelve PFAS compounds.³⁸

24. In 2016, Dr. Detlef Knappe of North Carolina State University found that seven PFAS compounds were downstream, but not upstream, of Chemours’ facility.³⁹ Knappe’s study cautions that this is not an exhaustive list of PFAS compounds being discharged by Chemours: “Other [PFAS compounds] were present in water samples [downstream of the facility] but could not be quantified and were therefore not included...”⁴⁰

25. After DEQ began its investigation into GenX, the agency has found extensive evidence that Chemours’ contamination of the air, water, and soil includes numerous other PFAS compounds—some of which are being discharged and emitted at far higher rates than GenX.

26. Numerous other PFAS compounds have been found in onsite groundwater wells—one of which has appeared in concentrations above 8 million ppt.⁴¹

27. From September to December of 2017, DEQ found at least 33 different PFAS compounds in private drinking water wells outside of the facility.⁴²

28. Other PFAS compounds also persist in public drinking water supplies. The Cape Fear Public Utility Authority, which services over 200,000 customers in North Carolina, reported sampling results from its finished drinking water on March 23, 2018:

GenX is not the only emerging contaminant in the Cape Fear River. [The Cape Fear Public Utility Authority] has tested water samples from the Sweeney Plant for a wide array of unregulated compounds [...] *GenX only accounts for only a small percentage* of these compounds. Results from a screening of the twenty different [PFAS] compounds with testing standards shows combined levels

³⁷ Strynar 2015 Study at E.

³⁸ See generally Strynar 2015 Study.

³⁹ Mei Sun et al., “Legacy and Emerging Perfluoroalkyl Substances Are Important Drinking Water Contaminants in the Cape Fear River Watershed of North Carolina—Supporting Information” (2016).

⁴⁰ *Id.* at 6.

⁴¹ NC DEQ Amended Complaint at 25-26.

⁴² NC DEQ, Expanded PFAS Analysis on DEQ Collected Private Wells Associated with Chemours-Fayetteville.

consistently above health goals for legacy compounds and for GenX. [...] To date, there are *at least five new [PFAS compounds], not reported in the literature*, that have been detected in both raw and finished drinking waters.⁴³

29. During its presentation to the House Select Committee on North Carolina River Quality on April 26, 2018, the Cape Fear Public Utility Authority emphasized that even an upgraded treatment system will not eliminate PFAS compounds in finished drinking water, and that the only way to effectively address the contamination is by controlling the source of the compounds.

II. Chemours' Toxic PFAS Pollution Threatens Public Health and Safety.

30. Of the commonly studied PFAS compounds, perfluorooctanoic acid (“PFOA”) and perfluorooctyl sulfonate (“PFOS”) have been found to cause developmental effects to fetuses and infants, kidney and testicular cancer, liver malfunction, hypothyroidism, high cholesterol, ulcerative colitis, lower birth weight and size, obesity, decreased immune response to vaccines, and reduced hormone levels and delayed puberty.⁴⁴

31. PFOA and PFOS have been found in the air and dust, surface water and groundwater, and soil and sediment.⁴⁵ They are extremely resistant to breaking down in the environment, can travel long distances, and have even been found in the Arctic and in the open ocean.⁴⁶ They take years to leave the human body, and instead slowly accumulate over time.⁴⁷

⁴³ Cape Fear Public Utility Authority, “HB56 GenX Reponse Measures- Cape Fear Public Utility Authority (CPFUA) Final Report,” Mar. 23, 2018, 2 (emphasis added).

⁴⁴ The Madrid Statement on Poly- and Perfluoroalkyl Substances (PFASs), A 107 (May 2015) (hereinafter “The Madrid Statement”); U.S. Environmental Protection Agency (“EPA”), Fact Sheet on PFOA & PFOS Drinking Water Health Advisories, 2; *see also* EPA, Health Effects Support Document for Perfluorooctane Sulfonate (PFOS) (2016); EPA, Health Effects Support Document for Perfluorooctanoic Acid (PFOA) (2016); EPA, Drinking Water Health Advisory for Perfluorooctane Sulfonate (PFOS) (2016); EPA, Drinking Water Health Advisory for Perfluorooctanoic Acid (PFOA) (2016).

⁴⁵ U.S. Dep’t of Health and Human Services, Agency for Toxic Substances and Disease Registry, Draft Toxicological Profile for Perfluoroalkyls, 2 (Aug. 2015) (hereinafter “2015 ATSDR Report”).

⁴⁶ 2015 ATSDR Report at 2; *see also* EPA, Technical Fact Sheet - Perfluorooctane Sulfonate (PFOS) and Perfluorooctanoic Acid (PFOA) (Nov. 2017); The Madrid Statement at A 107.

⁴⁷ 2015 ATSDR Report at 3.

32. Before GenX, DuPont manufactured PFOA.⁴⁸ DuPont had known about the dangers of PFOA since the early 1960s, secretly conducting studies that showed the chemical caused liver damage, was resistant to degradation, and could cause birth defects.⁴⁹ Nearly four decades later, information about PFOA's toxicity began to rise to the surface, and in 1999, the first of over 3,500 personal injury lawsuits were filed against DuPont for knowingly poisoning thousands of people.⁵⁰ Concerned about the extensive health effects of PFOA and PFOS, in 2016, the U.S. Environmental Protection Agency ("EPA") established a lifetime health advisory of 70 parts per trillion ("ppt"), or nanograms per liter ("ng/L"), for the *combined* concentrations of PFOA and PFOS in drinking water.⁵¹

33. DuPont manufactured PFOA at the Fayetteville Works Facility until 2013.⁵² In 2009, DuPont also began manufacturing GenX,⁵³ a structurally similar compound, to eventually replace its production of PFOA.⁵⁴ Long before it began manufacturing GenX for commercial purposes, since 1980, DuPont knowingly discharged GenX as a byproduct into the Cape Fear River—a public drinking water supply.⁵⁵ At some point in time, the companies also began releasing numerous other PFAS compounds, including Nafion Byproduct 1 and 2, into the river.⁵⁶

⁴⁸ See Nathaniel Rich, "The Lawyer Who Became DuPont's Worst Nightmare," *N.Y. Times*, Jan. 6, 2016.

⁴⁹ *Id.*

⁵⁰ *Id.*; Kris Maher et al., "DuPont Settlement of Chemical Exposure Case Seen as 'Shot in Arm for Other Suits,'" *Wall Street Journal*, Feb. 13, 2017.

⁵¹ EPA, Fact Sheet on PFOA & PFOS Drinking Water Health Advisories at 2.

⁵² Final Phase III RCRA Facility Investigation Report for DuPont Fayetteville Works, 36-37 (2014) (hereinafter "2014 RCRA Investigation").

⁵³ NC DEQ Amended Complaint at 15.

⁵⁴ Brooks Pierce Letter to NC DEQ, "GenX in the Cape Fear River," June 23, 2017; *see also* DuPont, DWM, and DWQ Meeting Summary, Aug. 26, 2010.

⁵⁵ "Notes from Chemours meeting with local, state officials," *StarNews*, Jun. 15, 2017; *see also* NC DEQ Amended Complaint at 16.

⁵⁶ Sun 2016 Study; EPA, "Laboratory PFAS Results for NC DEQ Cape Fear Watershed Sampling," Aug. 21, 2017; Strynar 2015 Study.

34. Instead of being a long unbroken chain of several carbon atoms, GenX, also known as HFPO Dimer Acid, and many other new PFAS alternatives have shorter chains of carbon atoms and ether (oxygen) linkages.⁵⁷ Therefore, they are often referred to as “short-chain” PFAS compounds.⁵⁸ Two other PFAS compounds that have been emitted by Chemours, HFPO Dimer Acid Fluoride and HFPO Dimer Acid Ammonium Salt, convert to GenX in the presence of water.⁵⁹

35. DEQ has stated that “GenX and related compounds” from Chemours’ facility meet the state’s definition of toxic substances.⁶⁰ North Carolina defines toxic substances as:

any substance or combination of substances (including disease-causing agents), which after discharge and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, has the potential to cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions or suppression in reproduction or growth) or physical deformities in such organisms or their offspring.⁶¹

36. DuPont’s own studies of GenX, which it began as early as 1963, showed that GenX had health effects in laboratory animals consistent with the effects of other PFAS compounds, such as cancers in multiple organs, including the liver, pancreas, and testicles.⁶² As DEQ has stated, “DuPont was aware that [GenX and related compounds] had potential toxic

⁵⁷ See Melisa Gomis et al., “Comparing the toxic potency in vivo of long-chain perfluoroalkyl acids and fluorinated alternatives,” 113 *Environ. International* 1 (2018) (hereinafter “Gomis 2018 study”).

⁵⁸ *Id.*

⁵⁹ NC DEQ Amended Complaint at 15.

⁶⁰ *Id.* at 32-33.

⁶¹ 15A N.C. Admin. Code 2B .0202(64).

⁶² See Data reported in Lisa Craig, “H-28548: Combined Chronic Toxicity/Oncogenicity Study 2-Year Oral Gavage Study in Rats”—Laboratory Project ID: DuPont-18405-1238” (MPI Research, Inc., Mattawan, Michigan 2013) (sponsored By E.I. du Pont de Nemours and Company); see also North Carolina Department of Health and Human Services (“NC DHHS”) Presentation to Secretaries’ Science Advisory Board, “GenX Health Studies and Health Advisories,” Jan. 29, 2018.

effects prior to submitting its 2012 Permit Application to DWR,” and “when it was spun off as an independent business from DuPont.”⁶³

37. In DuPont’s 2009 Toxic Substances Control Act Consent Order for GenX, which the company entered into with the Environmental Protection Agency, the EPA warned DuPont that the agency had human health concerns about GenX because the chemical is “structurally similar” to other heavily studied PFAS compounds, such as PFOA, that are known to persist in the environment and bioaccumulate in humans.⁶⁴ The EPA further voiced concerns that GenX “could bioaccumulate and be toxic ... to people, wild mammals, and birds,” that they “are expected to be absorbed by all routes of exposure,” that they are expected “to be highly persistent in the environment,” and that “there is high concern for possible environmental effects over the long-term.”⁶⁵

38. In its Consent Order with DuPont, the EPA ultimately concluded that “[t]he Company should make every effort to minimize or prevent any release to the environment of these substances,” and “that uncontrolled manufacture [...] and disposal of [GenX] may present an unreasonable risk of injury to human health and the environment.”⁶⁶ Due to these concerns, the EPA ordered DuPont to “recover and capture (destroy) or recycle [GenX] at an overall efficiency of 99% from all the effluent process streams and the air emissions (point source and fugitive).”⁶⁷

⁶³ NC DEQ Amended Complaint at 32-33.

⁶⁴ EPA, Consent Order and Determinations Supporting Consent Order for PMN Substances P-08-508 and P-08-509, vii (2009).

⁶⁵ *Id.* at vii, xi, xii.

⁶⁶ *Id.* at xiv-xv.

⁶⁷ *Id.* at 36.

39. After the EPA found that more research needed to be conducted on the chronic and carcinogenic effects of GenX, in particular, a 2-year Chronic Toxicity/Carcinogenicity study,⁶⁸ DuPont conducted such a study and found the following effects in rats:

- Livers exhibited severe liver damage via degeneration and necrosis (cell death),
- Kidneys exhibited papillary necrosis (acute cell death) and chronic progressive nephropathy (chronic progressive degradation of kidney functions),
- Uteri exhibited stromal polyps (cell tumors),
- Stomachs exhibited non-glandular mucosal hyperplasia (increased cellular growth),
- Pancreases exhibited acinar cell tumors and equivocal acinar cell hyperplasia (increased cellular growth),
- Testes exhibited interstitial cell tumors and hyperplasia (increased cellular growth),
- Lungs exhibited histiocytosis (chronic scarring of lung tissue),
- Tongues exhibited mucosal hyperplasia/inflammation (increased cellular growth).⁶⁹

40. The hyperplasia, or increased cellular growth, that Chemours found in many of the organs is a known precursor to cancer.⁷⁰ Necrosis, which was found in both livers and kidneys, is the irreversible death of cells that happens when there is severe damage to cell membranes so that the contents of the cells leak out and the cell itself is ultimately dissolved.⁷¹

41. In May of 2015, two hundred researchers and scientists warned government officials, manufacturers, and the public not to underestimate the danger of short-chain PFAS alternatives, including GenX. They wrote that these alternatives

are still as environmentally persistent as long-chain substances or have persistent degradation products. Thus, a switch to short-chain and other fluorinated

⁶⁸ *Id.* at ix.

⁶⁹ DuPont and Chemours' TSCA filing to EPA, "8EHQ-06- 1643 6/8EHQ-06- 16478," Jan. 8, 2013.

⁷⁰ "[I]n many cases pathologic hyperplasia constitutes a fertile soil in which cancers may eventually arise. For example, patients with hyperplasia of the endometrium are at increased risk of developing endometrial cancer." Excerpt explaining "hyperplasia" from Vinay Kumar et al., *Robbins basic pathology* 4 (9th ed. 2013).

⁷¹ "Necrosis is the type of cell death that is associated with loss of membrane integrity and leakage of cellular contents culminating in dissolution of cells, largely resulting from the degradative action of enzymes on lethally injured cells." Excerpt explaining "necrosis" from Vinay Kumar et al., *Robbins basic pathology* 9 (9th ed. 2013).

alternatives may not reduce the amounts of PFASs in the environment. In addition, because some of the shorter-chain PFASs are less effective, larger quantities may be needed to provide the same performance.⁷²

42. Numerous studies have been conducted since then—all of which indicate that short-chain PFAS alternatives, such as GenX, possess the same dangerous qualities as PFOA and PFOS.⁷³

43. The California Department of Toxic Substances Control reviewed recent scientific literature on PFAS compounds, including short-chain PFAS alternatives and, in February 2018, released a draft report that discussed the human health risks of short-chain PFAS compounds, such as GenX.⁷⁴ The report concluded that short-chain PFAS compounds take just as long to break down in the environment, and can even travel more readily than long-chain PFAS compounds such as PFOA, which have been found as far as the Arctic:

[f]luorinated ethers were thought to degrade easily, but recent studies found they also persist indefinitely in the environment. Shorter-chain PFASs are marketed as less toxic compared to the longer chains, [but instead] are equally persistent and more mobile in the environment than the chemicals they are replacing...⁷⁵

44. The California Department of Toxic Substances Control also found that short-chain PFAS compounds “showed the highest potential to translocate to and bioaccumulate in edible plants, thus entering the terrestrial food chain.”⁷⁶

⁷² The Madrid Statement at A 107; *see also* Scheringer et al., Helsingor Statement on poly- and perfluorinated alkyl substances (PFASs) (2014).

⁷³ *See* Gomis 2018 study; Gloria Post et al., “Key scientific issues in developing drinking water guidelines for perfluoroalkyl acids: Contaminants of emerging concern,” 15 *PLoS Biol* e2002855 (2017); Melissa Gomis, “From emission sources to human tissues: modelling the exposure to per- and polyfluoroalkyl substances,” (2017); Nan Sheng et al., “Cytotoxicity of novel fluorinated alternatives to long chain,” 92 *Archives of Toxicol.* 359 (2017); J.M. Rae et al., “Evaluation of chronic toxicity and carcinogenicity of ammonium 2,3,3,3-tetrafluoro-2-(heptafluoropropoxy)-propanoate in SpragueDawley rats,” 2 *Toxicol. Rep.* 939 (2015); *see also* Melisa Gomis et al., “A modeling assessment of the physicochemical properties and environmental fate of emerging and novel per- and polyfluoroalkyl substances,” 505 *Sci. of the Total Environ.* 981 (2014).

⁷⁴ California Department of Toxic Substances Control, “Product – Chemical Profile for Perfluoroalkyl and Polyfluoroalkyl Substances (PFASs) in Carpets and Rugs” (2018) (hereinafter “CDTSC 2018 Report”).

⁷⁵ *Id.* at 6.

⁷⁶ CDTSC 2018 Report at 42.

45. Citing a 2018 study which compared short and long-chain PFAS compounds, the report ultimately found that the short-chain alternatives, in particular GenX, could be more toxic than the compounds they are replacing:

PFECAs and shorter-chain PFAAs may have *similar or higher toxic potency* than the longer-chain PFAAs they are replacing. Using a toxicokinetic model and existing toxicity data sets, a recent study found that PFBA, PFHxA, and PFOA have the same potency to induce increased liver weight, *whereas GenX is more potent*. The authors concluded that previous findings of lower toxicity of fluorinated alternatives in rats were primarily due to the faster elimination rates and lower distribution to the liver compared to PFOA and other longer-chain PFAAs.⁷⁷

46. Therefore, GenX only *appeared* to be less toxic than long-chain PFAS compounds, such as PFOA, because it was leaving the bodies of animal test subjects more readily than long-chain compounds. For humans, however, GenX and other short-chain PFAS compounds “could likely be intrinsically as potent as their predecessors.”⁷⁸ As explained by the 2018 study cited by the California Department of Toxic Substances Control, “short-chain PFASs that are rapidly excreted in a species such as the rat may not reach internal concentrations sufficient to result in toxic effects that it could in other species with a longer half-life, such as humans.”⁷⁹ Therefore, short-chain PFAS compounds are likely to stay in the human bodies long enough to cause severe toxic effects. GenX and other PFAS compounds created to replace PFOA and PFOS could be as harmful, if not more harmful, than the compounds they were created to replace.

47. Aware of the human health risks of GenX, the North Carolina Department of Health and Human Services has issued a health goal of 140 parts per trillion for the chemical.⁸⁰

⁷⁷ *Id.* at 29 (citation omitted and emphasis added).

⁷⁸ Gomis 2018 study at 7-8.

⁷⁹ *Id.*

⁸⁰ NC DHHS, “Questions and Answers Regarding North Carolina Department of Health and Human Services Updated Risk Assessment for GenX (Perfluoro-2-propoxypropanoic acid),” July 14, 2017.

Although the agency's establishment of a health goal validates the threat that GenX poses to public health and safety, compliance with the health goal does not ensure protection of the public, as the agency determined the health goal before many key studies on the human health risks of short-chain compounds had been published.⁸¹

III. Immediate Action Is Necessary to Protect Public Health and Safety.

48. As DEQ states in its final decision, Petitioner's "[r]equest agrees with the Department's well-documented position that this extensive contamination violates North Carolina law and requires *swift action* to (1) prevent ongoing contamination and (2) abate existing contamination."⁸²

49. The agency's actions so far have not stopped Chemours' PFAS releases. While DEQ has been gathering data and studying groundwater contamination and air deposition, the company has continued to release GenX and other toxic PFAS compounds into the air at a rate of nearly 100,000 pounds each year.⁸³

50. In 2012, Chemours emitted over 85,000 pounds of PFAS compounds into the air.⁸⁴ In 2013, Chemours emitted over 96,000 pounds of PFAS compounds into the air.⁸⁵ In 2014, Chemours emitted over 102,000 pounds of PFAS compounds into the air.⁸⁶ In 2015, Chemours emitted over 125,000 pounds of PFAS compounds into the air.⁸⁷ In 2016, Chemours emitted over 89,000 pounds of PFAS compounds into the air.⁸⁸ One of the many PFAS compounds has been released at a rate of over 72,000 pounds in one year, or 221 pounds per

⁸¹ NC DHHS published its GenX health goal of 140 ppt on July 14, 2017. *Id.* Numerous studies on short-chain PFAS alternatives were published after that date. *See supra* notes 73-74.

⁸² NC DEQ's Final Decision at 10 (emphasis added).

⁸³ *See* Chemours' GenX Air Emission Summary; Chemours' other Emerging Compounds Air Emissions Summary.

⁸⁴ *See* Chemours' other Emerging Compounds Air Emissions Summary.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

day.⁸⁹ Although Chemours has begun installing some pollution control technologies, it continues to emit PFAS compounds in significant quantities.

51. Chemours is also polluting drinking water supplies by leaking large amounts of GenX emissions, some of which travel directly into the Cape Fear River. On October 6, 2017, Chemours covered up an air emissions leak that lasted 13 hours, containing 125 pounds of GenX compounds.⁹⁰ The release from the facility's stack was then "deposited onto the ground" and rain carried the chemicals into the Cape Fear River,⁹¹ causing GenX to spike in the river at levels of up to 3,700 ppt—over 26 times the state's health goal,⁹² and to far exceed the health goal at the Bladen Buffs water treatment facility.⁹³ Similar spikes of up to 2,400 ppt have occurred in the Cape Fear River since then.⁹⁴

52. Chemours has also admitted that leaks from pumps, valves, and connectors located on the facility cause GenX compounds to be emitted into the air each year.⁹⁵

53. During DEQ's investigation of GenX, the company has kept multiple unlined wastewater conveyance ditches and basins that continuously leach GenX compounds into ground and surface waters.⁹⁶

54. These include an unlined "ditch" carrying up to 5 to 8 million gallons a day of PFAS contaminated wastewater to groundwater sitting beneath the facility, two unlined

⁸⁹ 72,585 pounds of C₃F₆O, a PFAS compound, were emitted in the year 2015. *Id.*

⁹⁰ DEQ Press Release, "DEQ investigating air emissions leak at Chemours," Nov. 17, 2017.

⁹¹ DEQ Letter to Chemours, "Notice of Violation & Intent to Assess Civil Penalty," Nov. 13, 2017.

⁹² DEQ Press Release, "DEQ will take additional enforcement action against Chemours for unreported spill," Nov. 9, 2017.

⁹³ DEQ Press Release, "Surface water results from October show GenX was above state health goal at one water treatment facility after Oct. 6 spill," Nov. 27, 2017; DEQ Surface Water Sampling Results, Nov. 27, 2017.

⁹⁴ DEQ Press Release, "October, early November data shows high GenX concentrations at Chemours wastewater discharge outfall," Nov. 22, 2017.

⁹⁵ Chemours Letter to NC DEQ, "Chemours – Fayetteville Works – Emissions Test Report," 2, Mar. 12, 2018.

⁹⁶ *See generally* Exhibit 22 of NC DEQ Amended Complaint, "Focused Feasibility Study Report – PFAS Remediation."

sedimentation basins that are also leaching into the groundwater,⁹⁷ and an old outfall which has eroded enough to reach deep groundwater aquifers and channel contaminated water from the aquifers directly into the Cape Fear River.⁹⁸

IV. DEQ Has Provided Additional Facts Demonstrating a Generalized Condition of PFAS Pollution and That Immediate Action Is Required.

55. In its final decision, DEQ updated the number of offsite wells tested to “approximately 1,000 offsite.”⁹⁹ The decision continued, “[a]pproximately 225 wells have concentrations of GenX above the [North Carolina] DHHS health goal of 140 ng/L and approximately 538 wells have detectable concentrations of GenX at a level lower than 140 ng/L.”¹⁰⁰

56. DEQ’s final decision added that “[o]n April 9, 2018, Chemours [...] stat[ed] that its analysis of its site assessment data suggests that a terracotta pipe that formerly carried process wastewater to its wastewater treatment plant was a source of contamination...”¹⁰¹

57. DEQ’s final decision fully agreed with Petitioner’s request that “*swift* action is *necessary* [...] to address the known health risks associated with GenX Compounds and other PFAS...”¹⁰²

58. On June 11, 2018, DEQ issued a draft proposed order in an ongoing enforcement action against Chemours in Bladen County Superior Court.¹⁰³ In its proposed order, DEQ

⁹⁷ Chemours’ Letter to NC DEQ, “Notice of Violation - Immediate Action Required,” Feb. 26, 2018, at 10-12.

⁹⁸ Exhibit 22 of NC DEQ Amended Complaint, “Focused Feasibility Study Report – PFAS Remediation” at 9, Table 2.

⁹⁹ NC DEQ Final Decision at 6.

¹⁰⁰ *Id.* The unit “ng/L,” or nanograms per liter, is equivalent to the unit “ppt,” or parts per trillion, which has been used throughout this Petition.

¹⁰¹ *Id.* at 13.

¹⁰² *Id.* at 15 (emphasis added).

¹⁰³ Draft Proposed Order for Preliminary Injunctive Relief, *N.C. Dept. of Environmental Quality v. Chemours*, 17 CVS 580 (N.C. Super. 2018) (hereinafter “NC DEQ Proposed Order”), included as Exhibit 3.

includes the following additional facts demonstrating that DEQ must act now in order to require Chemours to immediately reduce its emissions of GenX compounds.

59. “DEQ’s analysis of Chemours’ submissions and all available evidence indicates that significant reductions of Chemours’ emissions will be necessary in order to prevent Chemours from causing or contributing to violations of North Carolina’s groundwater rules.”¹⁰⁴

60. “DEQ’s analysis further indicates that the Chemours’ commitment in its April 27, 2018 response to reduce GenX emissions by 72% by October 2018 and to reduce emissions further by April 30, 2020 is inadequate to address Chemours’ ongoing contamination of groundwater.”¹⁰⁵

61. “DEQ has concluded that, at a minimum, a reduction in facility-wide emissions of GenX Compounds by at least 99% from 2017 Total Reported Emissions is necessary to prevent and abate Chemours’ ongoing contamination of groundwater with GenX Compounds.”¹⁰⁶

62. “Chemours’ submissions to DEQ demonstrate that the technology necessary to achieve these emissions reduction will also control process emissions of other PFAS at a control efficiency of 99.99%.”¹⁰⁷

63. “While the technology necessary to achieve these goals is being implemented, DEQ has concluded that accelerated measures to reduce facility-wide emissions of GenX Compounds is necessary, and that, by August 31, 2018, Chemours must reduce emissions of these compounds facility-wide by at least 97% from 2017 Total Reported Emissions.”¹⁰⁸

¹⁰⁴ NC DEQ Proposed Order at 12.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 13.

LEGAL BACKGROUND

I. The North Carolina Administrative Procedure Act

64. The North Carolina Administrative Procedure Act states that “an agency shall issue a declaratory ruling [...] as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency” when requested by a person aggrieved.¹⁰⁹ “If the agency denies the request, the decision is immediately subject to judicial review.”¹¹⁰

65. “Person aggrieved” includes groups with a common interest, like Petitioner, whose interests are impacted by the requested decision.¹¹¹ Cape Fear River Watch is a “person aggrieved” by DEQ’s final decision and is entitled to judicial review under Article 4 of the North Carolina Administrative Procedure Act.¹¹²

II. The North Carolina Department of Environmental Quality’s Emergency Power to Protect Public Health and Safety.

66. DEQ is *required* by law to take immediate protective action if it determines that there is (1) a “generalized condition of water or air pollution which is causing imminent danger to the health or safety of the public,” and that (2) “it creates an emergency requiring immediate action to protect the public health and safety or to protect fish and wildlife.”¹¹³ In particular, “the Secretary of the Department with the concurrence of the Governor, *shall* order persons causing or contributing to the water or air pollution in question to reduce or discontinue immediately the emission of air contaminants or the discharge of wastes.”¹¹⁴

¹⁰⁹ N.C. Gen. Stat. § 150B-4(a).

¹¹⁰ N.C. Gen. Stat. § 150B-4(a1)(2).

¹¹¹ N.C. Gen. Stat. § 150B-2(6), (7).

¹¹² N.C. Gen. Stat. §§ 150B-2(6), 150B-2(7), 150B-43.

¹¹³ N.C. Gen. Stat. § 143-215.3(a)(12).

¹¹⁴ *Id.* (emphasis added).

PETITIONER'S EXCEPTIONS TO DEQ'S FINAL DECISION

Pursuant to N.C. Gen. Stat. §§ 150B-43, 150B-45, and 150B-46, Petitioner submits the following exceptions to DEQ's Final Decision:

I. DEQ Erred in Determining That There Is Not a Given Set of Facts to Support a Declaratory Ruling.

67. Petitioner repeats and incorporates the allegations in the preceding paragraphs as set forth in full.

68. As DEQ stated in its final decision, this case involves “an ongoing fact-intensive and highly technical investigation.”¹¹⁵ DEQ “conclude[d] that this matter is not appropriately resolved through issuance of a declaratory ruling” because “some of the facts upon which [Petitioner's] Request is based are outdated, in dispute, or subject to ongoing review.”¹¹⁶

69. Although DEQ might have received more information from Chemours since Petitioner made its request, there are no *material facts* that are in dispute. As demonstrated by Petitioner's Factual Background, the undisputed facts within Petitioner's Request for Declaratory Ruling are sufficient to establish that (1) Chemours' toxic PFAS pollution threatens public health and safety, (2) that Chemours and DuPont have caused, and Chemours continues to cause, a generalized condition of PFAS air and water pollution, and (3) that immediate action is necessary to protect public health and safety.

70. The facts that have developed since Petitioner's request have only *strengthened* the argument that DEQ must act immediately. For instance, when Petitioner first made its request on May 7, 2018, GenX had been found in 690 wells.¹¹⁷ DEQ's final decision denying Petitioner's request states that GenX has now been found in 763 private wells outside of the

¹¹⁵ NC DEQ Final Decision at 11.

¹¹⁶ *Id.* at 1, 3.

¹¹⁷ NC DEQ Apr. 26 Presentation at slides 9-10; NC DEQ Amended Complaint at 10-22.

facility.¹¹⁸ DEQ has also since determined that “Chemours’ commitment in its April 27, 2018 response to reduce GenX emissions by 72% by October 2018 and to reduce emissions further by April 30, 2020 is inadequate to address Chemours’ ongoing contamination of groundwater.”¹¹⁹

71. DEQ’s citation to *In Re Ford* is inapplicable to this case. *In Re Ford* involved a dispute over the record before the Superior Court in which petitioner argued that “the record should have contained a narration or summary of his oral presentation before the Board of Trustees of the Retirement System.” 52 N.C. App. 569, 572, 279 S.E.2d 122, 124 (1981). The court concluded that petitioner’s oral statements “did not constitute evidence” and “could not properly be included in the record.” *Id.* This case does not involve a material dispute over the contents of the record, and DEQ erred in denying Petitioner’s request based on the lack of a given set of facts.

II. DEQ Erred in Denying Cape Fear River Watch’s Request Based on the Agency’s Own Factual Determinations.

72. Petitioner repeats and incorporates the allegations in the preceding paragraphs as set forth in full.

73. In the request, Cape Fear River Watch sought a declaratory ruling that pollution from the Chemours facility has “caused, and [will] continue to cause, a generalized condition of water and air pollution which is causing imminent danger to the health and safety of the public.”¹²⁰

74. DEQ’s final decision states, “[t]he [Petitioner’s] Request agrees with the Department’s well-documented position that this extensive contamination violates North Carolina law and *requires swift action* to (1) prevent ongoing contamination and (2) abate

¹¹⁸ NC DEQ Final Decision at 6.

¹¹⁹ NC DEQ Proposed Order at 12.

¹²⁰ Petitioner’s Request for Declaratory Ruling, May 7, 2018, at 1, included as Exhibit 2.

existing contamination,” and that “swift action is *necessary* [...] *to address the known health risks* associated with GenX Compounds and other PFAS...”¹²¹

75. DEQ’s proposed order states: “DEQ has concluded that, at a minimum, a reduction in facility-wide emissions of GenX Compounds by at least 99% . . . is *necessary* to prevent and abate Chemours’ ongoing contamination of groundwater with GenX compounds.”¹²² DEQ has further determined that a 97 percent reduction “is necessary” by August 31.¹²³

76. Having determined that “this extensive contamination violates North Carolina law and requires swift action,”¹²⁴ DEQ is obligated to take that action.

77. Under N.C. Gen. Stat. § 143-215.3(a)(12), in such circumstances, “the Secretary of the Department . . . *shall* order persons causing or contributing to the water or air pollution in question to reduce or discontinue immediately the emission of air contaminants or the discharge of wastes.”

78. Given this statutory mandate and DEQ’s own factual findings as presented in the agency’s final decision and June 11, 2018 proposed order, DEQ erred in denying Cape Fear River Watch’s request.

III. DEQ Erred in Denying Cape Fear River Watch’s Request Due to Pending Litigation.

79. Petitioner repeats and incorporates the allegations in the preceding paragraphs as set forth in full.

80. In its final decision, DEQ further “conclude[d] that this matter is not appropriately resolved through issuance of a declaratory ruling” because it “is currently engaged in actions

¹²¹ NC DEQ Final Decision at 10, 15 (emphasis added).

¹²² NC DEQ Proposed Order at 12 (emphasis added).

¹²³ *Id.* at 13.

¹²⁴ NC DEQ Final Decision at 10.

[...] directed toward the very issues raised in [Petitioner's] Request.”¹²⁵ However, DEQ's “actions,” in particular its release of a draft proposed order for preliminary injunctive relief, will not provide Petitioner with the emergency relief that it and its members need.

81. Since DEQ issued its June 11, 2019 draft proposed order, Chemours responded with a court filing on June 20, 2019 indicating the company cannot and will not reduce emissions by 97 percent by August 31, 2018.¹²⁶ The company also challenged the legitimacy of DEQ's filing and the legal basis for Chemours' alleged groundwater violations.¹²⁷ Chemours' June 20, 2018 filing stating that it will not reduce emissions at the rate that DEQ has found is “necessary”¹²⁸ shows that entry of DEQ's proposed order will be heavily litigated.

82. DEQ has also allowed for a 30-day period for public comment on its June 11, 2018 draft proposed order, signifying that the agency will not begin to revise and incorporate comments on the proposed order until mid-July.¹²⁹ Although DEQ announced that it will request a court date for a hearing on the order, upon information and belief, the Bladen County Superior Court has not scheduled a hearing on DEQ's proposed order.

83. Due to Chemours' June 20, 2018 filing and DEQ's public comment schedule, it is clear that the immediate reduction or elimination of PFAS pollution required to protect public health is extremely unlikely from DEQ's current enforcement actions.

84. This case is easily distinguishable from *Equity Solutions of the Carolinas, Inc. v. North Carolina Department of State Treasurer*, cited by DEQ's final decision. In that case, while a company was under investigation by the North Carolina Attorney General for

¹²⁵ NC DEQ Final Decision at 1, 3.

¹²⁶ Chemours' Status Report, N.C. Dept. of Environmental Quality v. Chemours, 17 CVS 580, 8 (N.C. Super. 2018), included as Exhibit 4.

¹²⁷ See Chemours' Status Report, N.C. Dept. of Environmental Quality v. Chemours, 17 CVS 580 (N.C. Super. 2018).

¹²⁸ NC DEQ Proposed Order at 13.

¹²⁹ NC DEQ Press Release, “DEQ files new proposed court order against Chemours,” June 11, 2018, *available at* <https://deq.nc.gov/news/press-releases/2018/06/11/deq-files-new-proposed-court-order-against-chemours>.

racketeering, unjust and deceptive practices, and unjust enrichment, it requested a declaratory ruling from the State Treasurer stating that a relevant statutory provision “does not apply to its business model.” 232 N.C. App. 384, 391, 754 S.E.2d 243, 249 (2014). The company also “did not mention” essential facts and “presented the State Treasurer with an inadequate record.” 232 N.C. App. at 394. Accordingly, the Court of Appeals found that “[i]t would be a waste of administrative resources for the State Treasurer to issue a ruling on a matter” since the Attorney General had brought an ongoing enforcement action against the company. *Id.*

85. First, *Equity Solutions* involved a company’s apparent attempt to interfere with an investigation by requesting a declaratory ruling in its favor. In this case, we are facing a public health crisis that has impacted tens of thousands of angry, frustrated, and worried families in southeastern North Carolina, including many Cape Fear River Watch members. N.C. Gen. Stat. § 143-215.3(a)(12) specifically requires DEQ to act in situations of “emergency” where there is “imminent danger to the health and safety of the public.” DEQ’s pending litigation will not result in the emission reductions by the end of August that the agency has found are “necessary”¹³⁰ and therefore, it will not provide for the “immediate action [required] to protect the public health and safety.”¹³¹ Unlike in *Equity Solutions*, this is not a situation where there is “good cause” not to issue a declaratory ruling.

86. Second, Petitioner has not presented DEQ with an inadequate record as the company did in *Equity Solutions*. While there have been some factual developments since Petitioner’s request, the situation remains the same: Chemours and DuPont have caused, and Chemours continues to cause, a generalized condition of air and water pollution which is causing

¹³⁰ NC DEQ Proposed Order at 13.

¹³¹ N.C. Gen. Stat. § 143-215.3(a)(12).

imminent danger to the health and safety of the public, and there is an emergency requiring immediate action from DEQ to protect public health and safety.

87. DEQ's final decision to rely instead on its enforcement action in Bladen County violates the agency's mandatory obligation to protect public health and safety in emergency situations pursuant to N.C. Gen. Stat. § 143-215.3(a)(12).

REQUEST FOR RELIEF

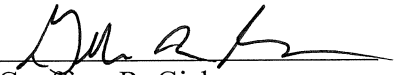
WHEREFORE, Petitioner prays this Court enter the following relief:

1. That the Court reverse the North Carolina Department of Environmental Quality's Declaratory Ruling;

2. That the Court remand the decision to the North Carolina Department of Environmental Quality to enter a declaratory ruling that:

- a. Previous and ongoing activities of Chemours Company FC, LLC and E.I. du Pont de Nemours and Company at the Fayetteville Works Facility have caused, and continue to cause, a generalized condition of water and air pollution which is causing imminent danger to the health and safety of the public.
 - b. In order to protect public health and safety, Chemours Company FC, LLC must immediately discontinue all air emissions as well as all surface water, groundwater, and/or stormwater discharges of perfluoroalkyl and polyfluoroalkyl substances from the Fayetteville Works Facility; and
3. Further relief as the Court deems proper.

This the 13th day of July, 2018.


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