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STATE OF NORTH CAROLINA | IN THE OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF BLADEN | 22 EHR 03913

THE CHEMOURS COMPANY FC, LLC

PETITIONER,

v.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY,

RESPONDENT.

PETITIONER'S OPPOSITION TO CAPE FEAR PUBLIC UTILITY AUTHORITY'S MOTION TO INTERVENE

INTRODUCTION

This proceeding relates to an Addendum to a Consent Order entered by the Superior Court for Bladen County in 2020 (supplementing a 2019 Consent Order) in an action brought by the North Carolina Department of Environmental Quality ("DEQ") against Chemours. In that Addendum, Chemours agreed to take a number of actions to further reduce legacy loadings of certain chemicals referred to as per- and polyfluoroalkyl substances ("PFAS") from Chemours's Fayetteville Works facility to the Cape Fear River. These actions would be in addition to very substantial reductions already achieved by Chemours prior to the original Consent Order and under that Consent Order.

One of the core projects required under the Addendum was for Chemours to prevent PFAS-containing groundwater from migrating to the River through the design and construction of an underground barrier wall more than a mile long, and the installation of a network of wells upgradient of that wall to capture groundwater which would then be treated to remove PFAS prior to discharge to the River. The Addendum required the treatment system to be designed to remove at least 99% of three indicator PFAS compounds. Chemours designed precisely such a

system and that design has been approved by DEQ. Chemours has begun construction of the project and is ready to complete that construction and commence operations of the designed system.

This present proceeding relates to DEQ's September 15, 2022 issuance of a required National Pollutant Discharge Elimination System ("NPDES") permit authorizing the discharge of the treated groundwater to the River, and its decision between the proposed permit and the final permit to require levels of treatment that exceed what the system was designed to achieve.

Cape Fear Public Utility Authority ("CFPUA") seeks to intervene in this proceeding. This is the fourth time that CFPUA has sought without merit, to intervene in proceedings between Chemours and DEQ, concerning reducing discharges of PFAS compounds into the Cape Fear River. While litigation was pending between Chemours and DEQ in the Bladen County Superior Court, CFPUA submitted—and then later withdrew—two different motions to intervene. Then, eighteen months after entry of the February 25, 2019 Consent Order resolving the litigation, CFPUA filed a *third* motion to intervene. The Superior Court denied that motion, *State v. The Chemours Co. FC, LLC*, No. 17 CVS 580, 2020 WL 11185836, at *8 (N.C. Super. Nov. 30, 2020), and the North Carolina Court of Appeals affirmed, *State ex rel. Biser v. The Chemours Co. FC, LLC*, 2022-NCCOA-413, ¶ 47.[1] CFPUA does not even mention those decisions.

CFPUA's motion to intervene rehashes virtually all of the same arguments from its third motion to intervene, and should be denied as well. CFPUA still does not meet any of the three

[1] As noted below, the Superior Court held that CFPUA's motion was untimely, and, in the alternative, that CFPUA lacked the authority to intervene either by right or permissively. *See Chemours*, 2020 WL 11185836, at *8. The North Carolina Court of Appeals affirmed on the grounds of untimeliness, and did not reach the merits of CFPUA's motion. *Chemours*, 2022-

elements required to justify intervention as of right: it has not shown that (1) it has a direct and immediate interest in this contested case, (2) denying intervention would impair its interests, or (3) DEQ does not adequately represent its interests. Moreover, allowing CFPUA to intervene permissively would be deeply prejudicial to Chemours and result in unnecessary delay. Indeed, CFPUA's motion contains numerous misstatements regarding Chemours's substantial actions to reduce PFAS loadings to the Cape Fear River—further indicating that allowing CFPUA to intervene would undermine "the laudable purpose of Rule 24 intervention . . . to promote efficiency and avoid delay." *Holly Ridge Assocs., LLC v. N. Carolina Dep't of Env't & Nat. Res.*, 361 N.C. 531, 540, 648 S.E.2d 830, 837 (2007). CFPUA's motion should be denied.

FACTUAL BACKGROUND

I. The February 25, 2019 Consent Order, the October 12, 2020 Addendum, and CFPUA's First Three Motions to Intervene

Chemours owns and operates Fayetteville Works, a chemical manufacturing facility located in Bladen County. *Chemours*, 2022-NCCOA-413, ¶ 2. On September 7, 2017, the State (on behalf of DEQ) filed a Complaint against Chemours in Bladen County Superior Court. *Id.* ¶ 3. The Complaint alleged violations of North Carolina law based on discharges of PFAS from Fayetteville Works into groundwater and the Cape Fear River. *Id.* The next day, Chemours and the State entered into a Partial Consent Order, under which Chemours agreed to "prevent the discharge" of certain compounds into the Cape Fear River. *Id.*

CFPUA is a local public utility authority that provides potable water to residents and businesses in New Hanover County. *Id.* ¶ 2. It operates a raw water intake on the Cape Fear River, downstream from Fayetteville Works, and a plant that treats Cape Fear River water. *Id.*

NCCOA-413, ¶ 47. Chemours does not contest the timeliness of CFPUA's motion in this proceeding.

On October 16, 2017, CFPUA filed its own action against Chemours in the United States District Court for the Eastern District of North Carolina, also seeking relief for Chemours's alleged discharges of PFAS into the Cape Fear River. *See* Complaint, *Cape Fear Public Utility Authority v. The Chemours Co. FC, LLC*, No. 7:17-CV-00195-D (E.D.N.C.), ECF 1 (the "Federal Action"). In the Federal Action, CFPUA seeks "compensatory and punitive damages" and "such prohibitory and mandatory injunctive relief as is necessary to prevent continuing injury." *Id*. at 31, ¶ 2.[2] CFPUA's Federal Action is ongoing.

On October 17, 2017, CFPUA filed its first motion to intervene in the Bladen County litigation. *Chemours*, 2022-NCCOA-413, ¶ 5. CFPUA argued that it had an interest in the action "to assure that [any] relief adequately protects CFPUA's interests," and it insisted that its "ability to obtain relief may be impaired if the State either fails to prevail (in whole or in part) . . . or if the State compromises this underlying action in a manner detrimental to CFPUA." *Id.* CFPUA withdrew its motion on November 15, 2017, after Chemours, the State, and CFPUA "stipulated that the State would provide notice and comment procedures 'with respect to any proposed settlement between' the State and Chemours." *Id.* ¶ 6.

The State filed an Amended Complaint on April 9, 2018. *Id.* ¶ 7. On November 26, 2018, the State published notice of a Proposed Consent Order that would address the alleged violations in the Amended Complaint. *Id.* ¶ 8. CFPUA commented on the Proposed Consent Order on December 17, 2018. *Id.*

On December 20, 2018, CFPUA filed its Second Motion to Intervene. *Id.* ¶ 9. CFPUA argued that "the Proposed Consent Order did not 'account for or seek to remedy the ongoing

[2] On May 7, 2019, CFPUA amended its complaint in the Federal Action, raising largely the same allegations and seeking similar relief. *See id.*, ECF 75 ("Amended Master Complaint").

harms inflicted on CFPUA and its customers.'" *Id.* CFPUA set its Second Motion to Intervene for hearing, but it removed its motion from the court's calendar on January 10, 2019. *Id.*

The Superior Court entered the Final Consent Order on February 25, 2019. *Id.* ¶ 10. Paragraph 12 of the Final Consent Order required Chemours to submit "a plan demonstrating the maximum reductions in PFAS" discharges from Fayetteville Works "to surface waters . . . that are economically and technologically feasible." *Id.* ¶ 11. On August 17, 2020, following additional negotiation between the parties, the State published a Proposed Addendum for public comment, pursuant to Paragraph 12 of the Final Consent Order. *Id.* ¶ 13.

On September 8, 2020, CFPUA filed a Third Motion to Intervene. *Id.* ¶ 14. "CFPUA again alleged that the Consent Order, and further alleged that the Proposed Addendum, provided disparate standards for groundwater users near the Facility and surface water users downstream of the Facility." *Id.* CFPUA sought to intervene as of right under N.C. Rule of Civil Procedure 24(a), or, in the alternative, permissively under N.C. Rule of Civil Procedure 24(b). *See id.* ¶ 1.

On October 12, 2020, the Superior Court entered the Proposed Addendum as an Addendum to Consent Order Paragraph 12. *Id.* ¶ 15. Then, on November 30, 2020, the Superior Court denied CFPUA's Third Motion to Intervene, ruling that the motion was untimely and that CFPUA had no authority to intervene either by right or permissively. *Id.* ¶ 15. On June 21, 2022, the North Carolina Court of Appeals affirmed the Superior Court's decision that CFPUA's motion was untimely, "without reaching CFPUA's arguments that the trial court erred by denying intervention as of right and abused its discretion by denying permissive intervention." *Id.* ¶ 47.

II. The September 15, 2022 NPDES Permit

The October 12, 2020 Addendum requires Chemours to construct a barrier wall and groundwater extraction and treatment system at its Fayetteville Works facility. Pet. 1. The Addendum states that "[t]he system shall be designed so that extracted groundwater shall be treated through a treatment system that removes PFAS compounds . . . at a minimum removal efficiency of 99%." *Id.* Because the system will discharge treated water to the Cape Fear River, Chemours must obtain a NPDES permit to operate the system. *Id.*

Chemours designed a treatment system that would meet the minimum 99% removal efficiency requirement. *Id.* at 1-2. In June 2021, Chemours submitted a NPDES permit application for the treatment system to DEQ. *Id.* at 2. The application was based on the design for 99% removal efficiency. *Id.*

In March 2022, DEQ issued a draft NPDES permit related to the treatment system for public comment. *Id.* The draft permit set effluent limits for HFPO-DA (GenX), PMPA, and PFMOAA based on the 99% removal efficiency requirement. *Id.* On May 2, 2022, CFPUA submitted extensive comments regarding the draft permit.[3]

On September 15, 2022, DEQ issued the final NPDES Permit. *Id.* The issued permit includes new limits some of which DEQ has acknowledged represent an estimated removal efficiency of greater than *99.9%*. *Id.* These limits go well beyond the 99% removal efficiency requirement in the Consent Order Addendum and those limits in the draft NPDES permit. *Id.*

On October 14, 2022, Chemours filed the present appeal of DEQ's NPDES Permit. *Id.* at 3. Chemours contends that the limits in DEQ's NPDES Permit are inconsistent not only with the Consent Order Addendum but also with applicable statutes, regulations, and guidance. *Id.* at 2.

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[3] *See* https://www.cfpua.org/DocumentCenter/View/14669/cfpua-comments-5-2-2022.

Chemours further contends that these permit limits are without technical basis and may be technically infeasible to meet. *Id.* Chemours continues to remain committed to constructing and operating the treatment system pursuant to the Consent Order Addendum, but Chemours cannot do so pursuant to a permit that is or may be technically infeasible to comply with and at the risk of potential permit violations beyond its control. *Id.*

III. CFPUA's Fourth Motion to Intervene

On October 27, 2022, CFPUA filed its instant, fourth motion to intervene. Similar to its prior motions, CFPUA contends that it is entitled to intervene because it is "the direct recipient and user of PFAS-contaminated river water," and because DEQ does not "adequately represent CFPUA's interests." Mot. at ¶¶ 25, 43. CFPUA neglects to mention its withdrawn First and Second Motions to Intervene, and as well as the fact that the Superior Court denied its Third Motion to Intervene, in a decision affirmed by the North Carolina Court of Appeals.

CFPUA's motion also contains numerous misstatements. For example, CFPUA insists that although "the Consent Order Addendum set forth deadlines for Chemours to complete construction of PFAS treatment systems at four different groundwater seeps," "Chemours has failed to comply with the required construction schedule for each of [those] seeps." Mot. ¶ 22. CFPUA argues that Chemours's failure to meet these deadlines "demonstrate[s] a lack of commitment to address the release of PFAS from Fayetteville Works into the environment." *Id.* Nothing could be further from the truth. The seep remediation project, which involved the installation of flow-through treatment cells within the seeps has been fully operational for over a year, and operates at an average PFAS removal efficiency of 99.6%, as compared to the 80%

minimum requirement in the Addendum.[4] As to the schedule on which the project was implemented, which extended a few months beyond the initial schedule, CFPUA neglects to mention that Chemours was unable to meet the initial schedule due to permitting delays and major *force majeure* flooding events beyond Chemours's control. CFPUA also neglects to mention that Chemours kept DEQ apprised of the situation, and that DEQ granted Chemours extensions on implementing the project as a result.[5]

In addition, CFPUA inaccurately claims that "Chemours has refused to take any significant action to protect downstream river water users from exposure to PFAS in the Cape Fear River," insisting that Chemours's PFAS-reduction efforts "have resulted in only a small reduction in the PFAS loading." Mot. at ¶¶ 26, 33. To the contrary, Chemours's actions to date have substantially reduced air and water emissions from the facility. These actions have included continued operation of the thermal oxidizer facility, which is destroying over 99.99% of all PFAS air emissions routed to it, continued cessation of process wastewater discharge, and continued operation of the capture and treatment system for the Old Outfall (Outfall 003), the

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[4] *See* Geosyntec Consultants, *Interim Seep Remediation Operation and Maintenance Report #10: Chemours Fayetteville Works* (Sep. 30, 2022), https://www.chemours.com/en/-/media/files/corporate/fayetteville-works/interim-seep-remediation-om-report-10.pdf?rev=5fab617404ae41da8c903457c9df7a1a&hash=EF19D829EFFC66D5022FB71F33988AB7, at ES-1.

[5] *See* Letter from Brian D. Long to Sheila Holman & Kemp Burdette (Oct. 16, 2020), https://edocs.deq.nc.gov/WasteManagement/DocView.aspx?id=1609451&dbid=0&repo=WasteManagement; Letter from Francisco Benzoni & Geoff Gisler to Joel Gross (Nov. 19, 2020), https://edocs.deq.nc.gov/WasteManagement/DocView.aspx?id=1609455&dbid=0&repo=WasteManagement; Letter from Joel Gross to Francisco Benzoni & Geoff Gisler (Jan. 14, 2021), https://edocs.deq.nc.gov/WasteManagement/DocView.aspx?id=1609456&dbid=0&repo=WasteManagement; Letter from Joel Gross to Francisco Benzoni & Geoff Gisler (Apr. 8, 2021), https://edocs.deq.nc.gov/WasteManagement/DocView.aspx?id=1609457&dbid=0&repo=WasteManagement.

flow-through cell systems for Seeps A, B, C, and D, as well as the Monomers/IXM stormwater capture and treatment system.[6]

ARGUMENT

I. CFPUA Is Not Entitled to Intervene as of Right

An intervenor seeking to intervene as of right must show 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." N.C. Gen. Stat. § 1A-1, Rule 24(a)(2); *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999). CFPUA "bears the burden of demonstrating" all three elements. *Charles Schwab & Co. v. McEntee*, 225 N.C. App. 666, 672, 739 S.E.2d 863, 868 (2013). CFPUA could not demonstrate these elements at the time of its third motion to intervene, and it cannot demonstrate them now.

A. CFPUA Does Not Have a Direct and Immediate Interest in This Case

"[T]he interest of a third party seeking to intervene as a matter of right . . . 'must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment.'" *Virmani*, 350 N.C. at 459, 515 S.E.2d at 682–83 (quoting *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968)). CFPUA claims that it has such an interest because "the PFAS contamination in the Cape Fear River is adversely impacting CFPUA and its customers," and CFPUA "ha[s] as much stake as anyone in the water quality of the Cape Fear River and the terms and conditions of the NPDES Permit that are intended to address and

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[6] *See, e.g.*, Letter From Dawn M. Hughes to Sushma Masemore (Oct. 28, 2022), https://www.chemours.com/en/-/media/files/corporate/fayetteville-works/28_ncdeq_quarterly-progress-report-cover-letter_10282022.pdf?rev=3be92803f5744c9ba12dd546847e3fde&hash=838D1170F48DD5A85F87A11D3513433F.

limit PFAS loading to the river." Mot. ¶ 39. Put another way, then, CFPUA asserts the same interests possessed by citizens generally—namely, protection of the Cape Fear River and obtaining access to clean drinking water. But the Supreme Court has long made clear that an "indirect" or "contingent" interest that is "common to all persons" is insufficient. *Virmani*, 350 N.C. at 459, 515 S.E.2d at 683. CFPUA's "general interest in [the] underlying issue[s] of [this] contested case" simply cannot support its motion to intervene as of right. *Holly Ridge Assocs., LLC v. N. Carolina Dep't of Env't & Nat. Res.*, 361 N.C. 531, 538, 648 S.E.2d 830, 835 (2007).

Indeed, CFPUA's interest in this case is similar to the one asserted in *Holly Ridge*, where a proposed intervenor sought to intervene in a contested case on the ground that it would "suffer economic and environmental losses" from the downstream effects of the defendant's alleged environmental violation. 361 N.C. at 538, 648 S.E.2d at 835-36; *compare, e.g.*, Mot. ¶ 39 ("[T]he reduction in PFMOAA alone will result in operational savings in the range of $3,000,000 a year for the CFPUA GAC plant . . . ."). As the Supreme Court held in rejecting intervention in *Holly Ridge*, the third party's interest may have been sufficient to support a "private claim," but it did not constitute a "direct and immediate interest" sufficient to support intervention in a contested case. 361 N.C. 531 at 538, 648 S.E.2d at 836. The same is true here.

B. Denial of CFPUA's Motion Would Not Impair Its Interests as a Practical Matter

A "prospective intervenor seeking . . . intervention as a matter of right under Rule 24(a)(2) must show that . . . denying intervention would result in a practical impairment of the protection of [its] interest[s]." *Virmani*, 350 N.C. at 459, 515 S.E.2d at 683. CFPUA asserts that denying intervention will "impair and impede its ability to protect its interests" because a decision that modifies the NPDES Permit could theoretically "increas[e] PFAS contamination in the river water taken into CFPUA's system and CFPUA's treatment costs." Mot. ¶ 40. CFPUA

neglects to mention, however, that—as noted above—CFPUA is currently pursuing a federal lawsuit against Chemours that *also* seeks relief for Chemours's alleged discharges of PFAS into the Cape Fear River. This lawsuit was also pending when the Superior Court denied CFPUA's Third Motion to Intervene: the Superior Court rejected CFPUA's argument that "its interests will be impaired absent intervention" because, among other things, "CFPUA has not shown that its own separate [federal] lawsuit is insufficient to protect its interests." *Chemours*, 2020 WL 11185836, at *6. CFPUA *still* has not shown how its federal lawsuit is insufficient to protect its interests, and there is no reason to depart from the Superior Court's well-reasoned conclusion on this issue.

C. <u>The State More Than Adequately Represents CFPUA's Interests</u>

CFPUA explains that it is "seek[ing] to intervene in this contested case proceeding to defend DEQ's issuance of the NPDES Permit." Mot. ¶ 4. But CFPUA concedes that DEQ is *also* "seeking to defend the legality and validity of the NPDES Permit." Mot. ¶ 43. And the Fourth Circuit has explained that, when a State agency has the "same ultimate objective" as a would-be intervenor, there is a "presumption" of adequate representation that cannot be overcome absent "a very strong showing" of "adversity of interest, collusion, or nonfeasance." *Stuart v. Huff*, 706 F.3d 345, 349-52 (4th Cir. 2013) (internal citation omitted).[7] Without this demanding standard, every agency would be "[f]aced with the prospect of a deluge of potential intervenors" and "the business of the government could hardly be conducted." *Id.* at 351.

[7] *See also, e.g.*, *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2204 (2022) ("[T]he Fourth Circuit has endorsed a presumption of adequate representation where a member of the public seeks to intervene to defend a law alongside the government. There, the Fourth Circuit has reasoned, a court may presume that legally authorized government agents will adequately represent the public's interest in its chosen laws.").

CFPUA does not even *acknowledge*, much less purport to meet, this exceedingly high bar. CFPUA does not allege, let alone make a "very strong showing," that there is some "adversity of interest" between itself and the State. Nor can it possibly contend that there has been "collusion" between the parties or "nonfeasance" by the State. Instead, CFPUA contends simply that "DEQ's interests *are not the same* as CFPUA's," and "CFPUA's interests are both narrower and different in key respects." Mot. ¶ 43 (emphasis added). But a purported intervenor's claim that it has a "stronger and more specific" interest "than the state's general interest . . . cannot be enough to establish inadequacy of representation[,] since would-be intervenors will nearly always have intense desires that are more particular than the state's." *Stuart*, 706 F.3d at 353. CFPUA has therefore put forward nothing to remotely suggest that there is "adversity of interest, collusion, or nonfeasance" here, *id.* 706 F.3d at 349-52. Accordingly, CFPUA has failed to demonstrate that DEQ does not represent its interests in this contested case, and its motion for intervention as of right should be denied.

II. CFPUA's Motion for Permissive Intervention Should be Denied

Under Rule 24(b)(2), a court may allow permissive intervention only: (1) "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common"; and (2) after it "consider[s] 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). The Supreme Court has directed judges to be extremely cautious in allowing permissive intervention. *See Virmani*, 350 N.C. at 460, 515 S.E.2d at 683.

Here, CFPUA argues that it is entitled to permissive intervention because "the claims and arguments of Petitioner, DEQ, and CFPUA have questions of law and/or fact in common." Mot. ¶ 47. CFPUA does, not, however, address the second prong of Rule 24(b)(2)—namely, "whether

the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *See Virmani*, 350 N.C. at 460, 515 S.E.2d at 683 (explaining that "Rule 24(b)(2) *expressly requires*" that courts evaluate prejudice to existing parties in deciding whether to allow permissive intervention (emphasis added)); *see also Holly Ridge*, 361 N.C. 531 at 540, 648 S.E.2d at 837 (holding that an ALJ abused his discretion in allowing parties to intervene permissively in a contested case, "[i]n light of the resulting prejudice" to the petitioner).

As the Superior Court explained in denying CFPUA's Third Motion to Intervene, "allowing CFPUA to intervene would unreasonably delay resolution of the proceedings, to the prejudice of the current parties." *Chemours*, 2020 WL 11185836, at *7. CFPUA's intervention in this contested case would grant it the opportunity to seek discovery and additional briefing, thereby—ironically—potentially causing the very "[d]elay in the construction and operation of the Treatment System" that CFPUA opposes, Mot. ¶ 3. Moreover, "even if CFPUA *were* allowed to intervene, it would have no power to prevent" any settlement between Chemours and DEQ with regard to this contested case, as "no intervenor—whether they have intervened with the full rights of a party or not—may prevent two parties from settling by the mere fact of their objection." *Chemours*, 2020 WL 11185836, at *7 (emphasis added).

Chemours agrees with CFPUA that this contested case should be resolved "in an expedited manner to avoid undue delay," Mot. ¶ 44. Granting CFPUA's motion for permissive intervention would hinder, rather than further, this goal. The motion should be denied.

CONCLUSION

For the foregoing reasons, CFPUA's motion to intervene should be denied.

Date: November 7, 2022

_/s/ R. Steven DeGeorge_______________

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CERTIFICATE OF SERVICE

I certify that on this 7th day of November, 2022, the foregoing **PETITIONER'S OPPOSITION TO CAPE FEAR PUBLIC UTILITY AUTHORITY'S MOTION TO INTERVENE** has been served by email and regular United States mail on the following:

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