

STATE OF NORTH CAROLINA  
COUNTY OF BLADEN

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
22 EHR 03913

THE CHEMOURS COMPANY FC, LLC, )  
)  
Petitioner, )  
)  
v. )  
)  
NORTH CAROLINA DEPARTMENT OF )  
ENVIRONMENTAL QUALITY, )  
)  
Respondent. )  
)

**MOTION FOR LEAVE TO FILE A  
RESPONSE TO PETITIONER’S  
OPPOSITION TO CAPE FEAR  
PUBLIC UTILITY AUTHORITY’S  
MOTION TO INTERVENE**

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NOW COMES Cape Fear Public Utility Authority (CFPUA), by and through undersigned counsel, and hereby moves the Office of Administrative Hearings for leave to file a response to Petitioner The Chemours Company FC, LLC’s November 7, 2022 filing styled as *Petitioner’s Opposition to Cape Fear Public Utility Authority’s Motion to Intervene* (Opposition).

In support of this Motion, CFPUA respectfully shows the following:

1. On October 14, 2022, Petitioner (hereinafter Chemours) filed its petition initiating this above-captioned contested case seeking to relax the effluent limits of NPDES Permit NC0090042 issued by Respondent North Carolina Department of Environmental Quality (DEQ) allowing the direct discharge of PFAS contaminants into the Cape Fear River.

2. On October 27, 2022, CFPUA filed a Motion to Intervene seeking to intervene as a party in this contested case, with all of the rights of a party (*i.e.* as a “Respondent-Intervenor”), in order to prevent the relaxing of the Permit effluent limits and to protect its rights and defend NPDES Permit NC0090042 issued on September 15, 2022.

3. On the same day, the Court entered an order directing the initial parties to each file on or before November 7, 2022 a written response setting forth any objections to CFPUA's Motion to Intervene.

4. Chemours filed written objections to the Motion on or about 4:06 p.m. on November 7, 2022 (the Opposition).<sup>1</sup>

5. In its Opposition to CFPUA's Motion to Intervene, Chemours takes the position that CFPUA should not be allowed to intervene in this case. Initially and for the majority of its objections, Petitioner erroneously recasts CFPUA's timely Motion to Intervene as related to a prior enforcement action commenced by DEQ in the Superior Court of Bladen County. In that proceeding, Chemours agreed to pay a \$12 million civil penalty for its historic, unpermitted discharge of PFAS contaminants into the Cape Fear River that jeopardized the health of hundreds of thousands of downstream users of the PFAS contaminated waters.

6. CFPUA sought to intervene in that enforcement action over the objection of DEQ and Chemours because CFPUA did not believe the terms of the Consent Order (essentially a settlement agreement) were sufficiently strong enough to protect its interest and those of the hundreds of thousand people it serves. Ultimately, the North Carolina Court of Appeals affirmed the superior court's decision denying CFPUA's motion to intervene in that proceeding on the grounds of untimeliness, which Chemours concedes is not an issue in this case. Opposition at 2 n.1. This is not an enforcement action and DEQ does not take the position that CFPUA should be denied the right to intervene.

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<sup>1</sup> As noted in CFPUA's Motion to Intervene, DEQ supports CFPUA's intervention in this proceeding and has not filed any written objections to the Motion.

7. This is a permitting action in which Chemours seeks the right to discharge PFAS into a portion of the Cape Fear River specifically designated for use as a public water supply. This Permit is based upon an application made available to the public for review, a draft permit made available for public review and comment, and publication of a final Permit that is subject to the procedures for quasi-judicial and judicial review. CFPUA (and many others) submitted written comments on the draft permit that sought more stringent discharge limits than those in the draft permit. DEQ heeded those public comments, considered whether the draft permit's proposed limits were sufficiently stringent, and issued the final Permit with more stringent effluent limits. Chemours wants less stringent limits because it reduce compliance costs. Chemours simply wishes to transfer the costs of removing Chemours's pollutants from drinking water, sourced downstream of Chemours, to public utilities such as CFPUA.

8. Chemours argues that CFPUA's rights are no more than those of any other downstream water user. Opposition at 7. However, CFPUA is not like every other downstream user. CFPUA is withdrawing up to 44 million gallons a day, treating that water for use as public water supply and distributing that water to 200,000 people for a fee. As CFPUA's Motion states, any further delay in the construction of the remedial measures required by the Addendum to the Consent Order or increase of the effluent limits will cause CFPUA to incur additional treatment costs in the range of \$3 million dollars a year. Motion to Intervene ¶¶ 29, 34, 39. Ignoring this evidence of clear and ongoing harm to CFPUA, Chemours argues that denying intervention would not impair CFPUA's interests as a practical matter because a separate federal lawsuit that CFPUA filed against Chemours is sufficient to protect its interests. The fact that CFPUA has separate claims for damages against Chemours in a different forum does not, as a practical matter, provide the same relief as direct involvement in a permitting action, where CFPUA seeks to prevent future

damages from a more lenient discharge permit. As a practical matter, CFPUA's interests *may* be impaired if it cannot intervene in this permitting action, which is all that Rule 24(a)(2) requires. Chemours argues that the State more than adequately represents CFPUA's interests. Opposition at 11–12. However, DEQ does not make such a claim and in fact supports CFPUA's intervention.

9. And, finally, in what is truly an ironic claim, Chemours argues that allowing CFPUA to intervene permissively would be “deeply prejudicial” to Chemours and result in unnecessary delay. *Id.* at 3. However, it is Chemours that is causing the delay by challenging the Permit terms. CFPUA is seeking to have the Permit upheld as issued, causing Chemours to go forward promptly and immediately with actions required by the Permit—without the delays that would accompany remand and reconsideration of the Permit sought by Chemours. This contested case proceeding has just begun and allowing CFPUA's intervention at this stage would not “unreasonably delay the resolution of the proceedings” as Chemours claims. Opposition at 13. Chemours further claims that CFPUA's Motion contains “numerous misstatements” regarding Chemours's actions to reduce PFAS loading in the Cape Fear River. *Id.* at 3. Chemours's disagreements about how to characterize its past actions are not relevant in deciding whether CFPUA can participate as a party and protect itself and its customers from Chemours being allowed to place upon the downstream public utilities the burden of removing the PFAS it discharges from the Cape Fear River.

10. CFPUA disagrees with the assertions raised in the Opposition. If this Court believes these arguments deserve serious consideration, CFPUA requests and moves the Court to allow it an opportunity to timely and fully respond to Petitioner's erroneous assertions and arguments by a brief filed on or before Monday, November 14, 2022.

11. This Motion is made in good faith and not for the purposes of delay.

NOW THEREFORE, for the reasons stated above, CFPUA requests that the Court grant CFPUA leave to respond to the Opposition on or before Monday, November 14, 2022 if the Court deems such response would be helpful to develop a full record on the question of intervention.

Respectfully submitted, this the 8th day of November, 2022.

/s/ George W. House  
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**CERTIFICATE OF SERVICE**

I certify that on this date the foregoing **MOTION FOR LEAVE TO FILE A RESPONSE TO PETITIONER'S OPPOSITION TO CAPE FEAR PUBLIC UTILITY AUTHORITY'S MOTION TO INTERVENE** has been served by the OAH electronic filing system on counsel for the parties who have appeared in this matter, and by depositing a copy of the same in the United States Mail, First Class Postage Prepaid, addressed as follows:

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This the 8th day of November, 2022.

/s/ Cordon M. Smart