

NORTH CAROLINA
BLADEN COUNTY

FILED
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
2017 OCT 17 P 12 05 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.)

BLADEN COUNTY, C.C. 11

AW

**MOTION TO INTERVENE
BY CAPE FEAR PUBLIC
UTILITY AUTHORITY**

COMES NOW Cape Fear Public Utility Authority (“CFPUA”) and moves to intervene pursuant to N. C. Gen. Stat. § 1A-1, Rule 24. In support of this Motion, CFPUA shows the following to the Court:

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. The Authority 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 CFPUA’s customers.

2. Attached hereto is CFPUA’s proposed Intervenor Complaint setting forth the claims which CFPUA seeks to assert in this action. Specifically, CFPUA is seeking declaratory relief:

- a. That CFPUA has a right to at least thirty (30) days' advance notice and an opportunity to make comments on any proposed settlement (partial, total, interim, or final) prior to the settlement being consummated.
- b. That the Partial Consent Order entered in this action on September 8, 2017 ("Consent Order") is not a settlement of any of the State's underlying substantive claims.

3. The original Complaint ("State Complaint") in this action was brought by the State of North Carolina pursuant to its delegated authority under the federal Clean Water Act ("CWA"), 33 USC § 1311, to administer and enforce the National Pollution Discharge Elimination System ("NPDES") program, 33 USC § 1342, as specified in Article 21 of Chapter 143 of the North Carolina General Statutes. *See* State's Complaint §§ 6-10.

4. State administration of the NPDES program was delegated to North Carolina in accordance with the Memorandum of Agreement ("MOA") referenced in paragraph 8 of the State's Complaint.

5. Pursuant to and in accordance with that MOA, the State is committed to enforce the NPDES program "in accordance with State statutes, the CWA, 40 CFR § 123.27, and as outlined in Section VI of this MOA." Section III, A6 (emphasis added).

6. As provided in 40 CFR § 123.27, by accepting the federally delegated CWA and NPDES authority, the State of North Carolina agreed to and is required to provide one of two methods "for public participation in the State enforcement process":

Any State administering a program shall provide for public participation in the State enforcement process by providing either:

- (1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or
- (2) Assurance that the State agency or enforcement authority will:

- (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26(b)(4);
- (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and
- (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

40 CFR § 123.27(d) (emphases added).

7. Section VI of the MOA does not address public participation in State enforcement actions.

8. North Carolina has not provided by statute, regulation, or rule the “[a]uthority which allows intervention as of right in any civil or administrative action to obtain remedies” set out in subsection (d)(1) quoted above.

9. Accordingly, the State is obligated to provide the “assurances” required by the second alternative in 40 CFR § 123.27 (public notice and opportunity to comment on any proposed settlement).

10. The State has failed to memorialize such required “assurances” in any enforceable structure (legislation or regulations).¹

11. The State commenced this action on September 7, 2017. Less than twenty-four (24) hours later, a hearing was held at which the Consent Order was entered, which recites that it “partially resolves this matter”. Order at 1. Prior to the commencement of this action, CFPUA and its counsel were in frequent contact with various representatives of the North Carolina Department of Environmental Quality to provide information, especially emphasizing the vulnerable

¹ By comparison, North Carolina has adopted regulations mandating public notice and comment opportunities and public hearings with respect to the granting of NPDES permits. 15A NCAC 2H .0109 and .0111. In the enforcement context, the legislature has also provided for public notice and comment opportunities with respect to special orders, including consent special orders, issued by the Environmental Management Commission. N.C. Gen. Stat. §§ 143-215.2 and -215.110. *See also* 15A NCAC 2H .1200 *et seq.* No similar provisions were adopted with respect to settlement of NPDES enforcement actions such as the present case.

population served by CFPUA, and urging the State to take prompt and vigorous enforcement action. Neither CFPUA nor its counsel were informed by the State of the filing of this action, the hearing scheduled for September 8, or the proposed Consent Order. CFPUA learned of the action and the Consent Order only after the Consent Order had been entered and filed.

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

12. Intervention of right is available to CFPUA under subsection 2 of Rule 24(a):

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).

13. The property which is the subject of the pending action is the State's groundwater and the Cape Fear River, into which Defendant has discharged, directly and via the groundwater, pollutants in violation of its NPDES permit, the CWA, and state law. CFPUA is a downstream riparian owner using water from the Cape Fear River, which water is adversely affected by the current discharges of pollutants by the Defendant The Chemours Company FC, LLC ("Chemours"). As a riparian owner, CFPUA has a right to use water from the Cape Fear River whose quality is not unreasonably diminished. Further, the sediments in the river have accumulated the pollutants discharged by Defendant and its corporate predecessor E.I. du Pont de Nemours and Company ("DuPont") over the last thirty (30) years, which will continue to adversely affect the groundwater and the waters of the Cape Fear River. Said current and prior discharges have caused and continue to cause damages to CFPUA, as alleged in a separate action (the "Federal Suit")

brought by CFPUA in the United States District Court for the Eastern District of North Carolina² against both Chemours and DuPont.

14. The transaction which is the subject of the pending action is the State's effort to obtain injunctive relief to abate alleged violations. CFPUA has an interest in the injunctive relief granted to assure that such relief adequately protects CFPUA's interests. CFPUA also has an interest in assuring that the Consent Order is not characterized as or given the weight of a partial settlement of the underlying State claims.

15. As "a practical matter," the disposition of the underlying action may "impair or impede" CFPUA's ability to protect its interests. In addition to seeking a cessation of the discharges (as the State also seeks here), CFPUA seeks in the Federal Suit damages for the prior pollution, orders 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 DuPont. The ability to obtain relief may be impaired if the State either fails to prevail (in whole or in part) in this underlying action or if the State compromises this underlying action in a manner detrimental to CFPUA.

16. Under the CWA, CFPUA has a right³ to bring its own CWA claims in a "citizen's suit" if the State fails to "diligently prosecut[e]" the present action. 33 U.S.C. § 1365(b)(1)(B). If a diligent prosecution is commenced, the CWA grants CFPUA the right to intervene in any action

² CFPUA also has the right to bring a citizen's suit against Chemours and DuPont for violation of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, after the expiration next month of a statutorily required notice period, unless the State diligently prosecutes an action for such violations. That claim can only be brought in Federal court, and, if and when appropriate, CFPUA would amend the Federal Suit to add that claim so that all of its substantive claims would be in one action.

³ CFPUA has already satisfied the statutory requirement of sixty (60) days' notice of intent to file such action.

in any “court of the United States”⁴, *id.*, as a means of assuring that its rights will be protected and that it will have prompt notice if the prosecution is no longer diligent, at which point CFPUA’s right to sue independently will arise. To protect its CWA inchoate enforcement rights, CFPUA should be allowed to be informed of the proceedings in this action, particularly any proposed settlement.

17. CFPUA’s interests are not adequately represented by the State in this action for several reasons. First, CFPUA’s Federal Suit asserts interests unique to a public water supply authority which are not addressed or protected by the relief sought by the State in the present action.

18. Second, CFPUA’s contingent right to sue under the CWA cannot be adequately protected by the State since such right will only ripen if the State fails in its duty to diligently prosecute the present action. The State is not an adequate watchdog of its own diligence.

19. Finally, CFPUA’s interests are not adequately represented by the State in this action because the State has not provided the required “assurances” that CFPUA will have thirty (30) days’ notice and the opportunity to comment on any proposed settlement of the underlying action. By obtaining the Consent Order without public notice and opportunity to comment, the State has acted in this case in such a way as to call into question whether the State recognizes CFPUA’s rights. While CFPUA does not seek to set aside the Consent Order, it does object to the extent the

⁴ The CWA’s “court of the United States” provision has been interpreted to mean only United States federal courts, not state courts. *See, e.g., Friends of the Earth v. Laidlaw Envtl. Servs.*, 890 F. Supp. 470, 487 *n.10 (D.S.C. 1995) (“...under general principles of federalism and state sovereignty, Congress likely would have no authority directly to provide citizens the right to intervene in state-court enforcement actions.”) and *State ex rel. v. Pegasus Gold*, 1994 Mont. Dist. LEXIS, *12-13 (Mont. 1st D. Ct., May 10, 1994) (“If this were a court of the United States, the author of this opinion would be receiving approximately two times the amount of money he is currently being paid. Since the author of this opinion knows that he is not, this is not a court of the United States and IMP has no statutory right to intervene in this matter.”).

Consent Order may hereafter be relied on by either party as a “settlement” and seeks by this intervention to protect its right to notice and opportunity to comment on any future settlement, be it partial, interim, or final.

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

20. CFPUA also seeks to intervene pursuant to Rule 24(b) of the North Carolina Rules of Civil Procedure, which allows intervention:

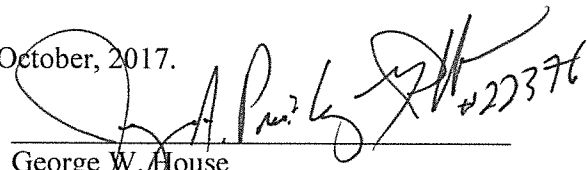
When an applicant's claim or defense and the main action have a question of law or fact in common. ... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

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

21. CFPUA’s claims asserted in the Proposed Intervenor Complaint involve the proper administration and enforcement of the CWA on the facts alleged in the State Complaint. As such, the same questions of law and fact are involved. There is no likelihood of unduly delaying or prejudicing the adjudication of rights of the original parties in this action.

For the foregoing reasons, CFPUA seeks an order allowing it to intervene in this action to obtain the declaratory relief requested.

Respectfully submitted this the 17th day of October, 2017.



George W. House
N.C. State Bar No. 7426
ghouse@brookspierce.com
William P. H. Cary
N.C. State Bar No. 7651
wcary@brookspierce.com
V. Randall Tinsley
N.C. State Bar No. 14429
rtinsley@brookspierce.com
Joseph A. Ponzi
N.C. State Bar No. 36999
jponzi@brookspierce.com
Attorneys for Third Party Plaintiff

OF COUNSEL:

BROOKS, PIERCE, McLENDON
HUMPHREY & LEONARD, L.L.P.
Post Office Box 26000
Greensboro, NC 27420-6000
Telephone: (336) 373-8850
Facsimile: (336) 232-9114

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STATE OF NORTH CAROLINA, *ex rel.*,)
MICHAEL S. REGAN, SECRETARY,)
NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)
)
Plaintiff,)
)
v.)
)
THE CHEMOURS COMPANY FC, LLC,)
)
Defendant.)
_____)

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

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

NATURE OF THE MATTER BEFORE THE COURT

1. This is a declaratory judgment action brought pursuant to the Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 *et seq.*, and Rule 57 of the North Carolina Rules of Civil Procedure, N. C. Gen. Stat. § 1A-1.

BACKGROUND FACTS

2. Intervenor 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. The Authority 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 CFPUA's customers.

3. The original Complaint ("State Complaint") in this action was brought by the State of North Carolina pursuant to its delegated authority under the federal Clean Water Act ("CWA"), 33 USC § 1311, to administer and enforce the National Pollution Discharge Elimination System ("NPDES") program, 33 USC § 1342, as specified in Article 21 of Chapter 143 of the North Carolina General Statutes. *See* State's Complaint §§ 6-10.

4. 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.

5. As alleged in the State's Complaint in this action, this matter arises out of Defendant's operation of the Fayetteville Works Facility, a chemical manufacturing facility located on the Cape Fear River just south of Fayetteville, North Carolina.

6. Since the 1970s, E.I. du Pont de Nemours and Company ("DuPont") and later Chemours—a DuPont spinoff—have manufactured at the Facility a line of products known as "fluoroproducts." Fluoroproducts consist of, incorporate, or are manufactured using perfluoroalkyl and polyfluoroalkyl substances ("PFASs").

7. In the course of their manufacturing activities, DuPont and Defendant have released harmful PFASs into the environment, contaminating the surrounding soil and groundwater, as well as the Cape Fear River.

8. Defendant's PFAS releases have largely occurred as constituents of process wastewater discharges, for which PFASs were not disclosed to the state permitting agency or authorized by the relevant permit.

9. CFPUA is a downstream riparian owner using water from the Cape Fear River. CFPUA's water system and riparian rights to use of the Cape Fear River are adversely affected by the current and past discharges of PFAS pollutants by the Defendant. These current and prior discharges have caused and continue to cause damage to CFPUA, as alleged in a separate action (the "Federal suit") brought by CFPUA in the United States Court for the Eastern District of North Carolina against both Chemors and DuPont.

Right to Notice and Comment, 40 CFR § 123.27(d)(2)(iii)

10. Pursuant to the NPDES program, CFPUA has a right to notice and comment on any and all proposed settlements between the State and a defendant in an enforcement such as this action.

- a. State administration of the NPDES program was delegated to North Carolina in accordance with the Memorandum of Agreement ("MOA") referenced in paragraph 8 of the State's Complaint.
- b. Pursuant to and in accordance with that MOA, the State is committed to enforce the NPDES program "in accordance with State statutes, the CWA, 40 CFR § 123.27, and as outlined in Section VI of this MOA." Section III, A6 (emphasis added).
- c. As provided in 40 CFR § 123.27, by accepting the federally delegated CWA and NPDES authority, the State of North Carolina agreed to and is required

to provide one of two methods “for public participation in the State enforcement process”:

Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2), or (3) of this section by any citizen having an interest which is or may be adversely affected; or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26(b)(4);

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

40 CFR § 123.27(d) (emphases added).

- d. Section VI of the MOA does not address public participation in State enforcement actions.
- e. North Carolina has not provided by statute, regulation, or rule the “[a]uthority which allows intervention as of right in any civil or administrative action to obtain remedies” set out in subsection (d)(1) quoted above.
- f. North Carolina has not provided the assurances of public notice set out in subsection (d)(2)(iii) quoted above and has to date proceeded in this action without providing such notice and opportunity to participate in the “Partial Consent Order” entered in this action on September 8, 2017 (the “Consent Order”). The Consent Order, which “partially resolves this matter” (*id.* at 1), was entered less than 24 hours after commencement of the action.

11. Any settlement between the State and Defendant without notice to CFPUA and the public and the right to comment would violate the terms of the delegation of the NPDES program to the State of North Carolina.

12. Any settlement between the State and Defendant without notice to CFPUA and the public and the right to comment could leave CFPUA's interests completely unprotected. Furthermore, the ability of CFPUA to obtain relief in the Federal suit may be impaired by compromises reached by the State and Defendant in this underlying action.

13. An actual controversy exists based on the State's failure to provide either of the alternatives required by the MOA, incorporating 24 CFR § 123.17.

14. An actual controversy exists based on the State's consent to an order which purportedly "partially resolves this matter."

FIRST CLAIM FOR RELIEF
(Declaratory Judgment-Notice and Comment Rights)

15. The allegations set for in paragraphs 1 through 14 are realleged and incorporated by reference.

16. 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 is required to provide public notice and at least thirty (30) days thereafter in which CFPUA and the public may provide comments with respect to any settlement, regardless of how styled, of all or any portion of the claims or defenses asserted in the pleadings in this case, including any claims or defenses hereafter added by amended or supplemental pleadings, whether such settlement is partial, complete, interim, or final.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment-Consent Order)

17. The allegations set for in paragraphs 1 through 16 are realleged and incorporated by reference.

18. CFPUA and the public were not given notice of the filing of this action or the negotiation of the Consent Order until after the filing of the Consent Order.

19. Under the delegation to North Carolina of authority to administer and enforce the NPDES program, no settlement may be entered without the notice and comment opportunities set out in 40 CFR § 123.27(d)(2)(iii).

20. The Consent Order may properly be read and enforced as interim injunctive relief, pending a final disposition of the State's claims on the merits.

21. The Consent Order should not be interpreted as a settlement of any portion of the merits of the State's claims asserted in its Complaint.

22. 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 Consent Order is not a settlement of any claims asserted in the State's Complaint.

23. If the Court determines that the Consent Order could be interpreted as a partial settlement, CFPUA seeks an amendment of said Consent Order clarifying that it is not a settlement but otherwise continuing the force of the Consent Order with respect to the actions to be taken and continued by Chemours.

PRAYER FOR RELIEF

WHEREFORE, Intervenor 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 is required to provide public notice and at least thirty (30) days thereafter in which CFPUA and the

public may provide comments with respect to any settlement, regardless of how styled, of all or any portion of the claims or defenses asserted in the pleadings in this case, including any claims or defenses hereafter added by amended or supplemental pleadings, whether such settlement is partial, complete, interim, or final;

2. A judicial declaration, pursuant to N.C. Gen. Stat. § 1-253 *et seq.*, that the Partial Consent Order entered into by the State and Defendant on September 8, 2017 in this action is not a settlement;

3. For such other and further relief as to the Court may seem just and proper.

Respectfully submitted this the _____ day of October, 2017.

George W. House
N.C. State Bar No. 7426
ghouse@brookspierce.com
William P. H. Cary
N.C. State Bar No. 7651
wcary@brookspierce.com
V. Randall Tinsley
N.C. State Bar No. 14429
rtinsley@brookspierce.com
Joseph A. Ponzi
N.C. State Bar No. 36999
jponzi@brookspierce.com

Attorneys for Third Party Plaintiff

OF COUNSEL:

BROOKS, PIERCE, McLENDON
HUMPHREY & LEONARD, L.L.P.
Post Office Box 26000
Greensboro, NC 27420-6000
Telephone: (336) 373-8850
Facsimile: (336) 232-9114

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing 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:

Francisco J. Benzoni
Asher P. Spiller
N.C. Department of Justice
Environmental Division
P.O. Box 629
Raleigh, NC 27602

Attorneys for Plaintiff

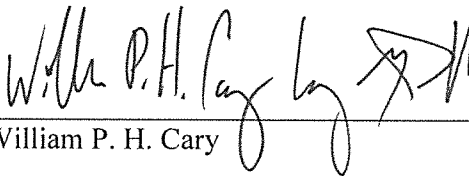
R. Steven DeGeorge
Robinson Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246

Jeffrey M. Wintner
John F. Savarese
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Attorneys for Defendant

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CLERK OF SUPERIOR COURT
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This the 17th day of October, 2017.


William P. H. Cary