

EXHIBIT 1

BEFORE THE NORTH CAROLINA
DEPARTMENT OF ENVIRONMENTAL QUALITY

CAPE FEAR RIVER WATCH,
Petitioner.

)
)
)
)
)
)
)

FINAL DECISION DENYING REQUEST
FOR DECLARATORY RULING

This matter comes before the North Carolina Department of Environmental Quality (“Department” or “DEQ”) on the Request for Declaratory Ruling (“Request”) submitted by Cape Fear River Watch (“Petitioner”) on May 9, 2018 pursuant to N.C. Gen. Stat. § 150B-4 and § 143-215.3. The Request asks the Department to issue a ruling ordering The Chemours Company FC, LLC (“Chemours”) to immediately discontinue all emissions and discharges of perfluoroalkyl and polyfluoroalkyl substances (collectively, “PFAS”) from its facility known as the Fayetteville Works. Specifically, the Request asks the Department to issue a ruling declaring:

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.

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.

Request p. 1.

For the reasons described below, the Department concludes that this matter is not appropriately resolved through issuance of a declaratory ruling and hereby denies Petitioner’s Request for a Declaratory Ruling.

INTRODUCTION

Since June of 2017, the Department has led a multimedia investigation into the release of PFAS into the environment by Chemours, and its predecessor, E.I DuPont de Nemours & Company, Inc. (“DuPont”), from its Fayetteville Works facility in Bladen County, North Carolina.

This investigation has resulted in, among other actions:

- (1) A pending lawsuit, filed by the Department on September 7, 2017 and amended on April 10, 2018, for injunctive relief in Bladen County Superior Court seeking an order requiring Chemours to “[c]ease and abate all ongoing violations of North Carolina’s water and air quality laws” including violations of North Carolina’s groundwater rules arising from emissions of PFAS into the atmosphere;
- (2) The partial suspension by the Department, effective on November 30, 2017, of Chemours’ National Pollution Discharge Elimination System (“NPDES”) permit, prohibiting Chemours from releasing any process wastewater from its manufacturing areas into waters of the State;
- (3) Issuance of a Notice of Violation by the Department, on February 12, 2018, which required Chemours to take immediate action to terminate all sources of groundwater contamination;
- (4) Issuance by the Department of a notice of intent to modify Chemours’ air quality permit on April 6, 2018 to prohibit the emission of GenX compounds; and
- (5) A notice sent by the Department on May 24, 2018, which requires Chemours to develop a plan to connect all residents whose well water has concentrations of GenX above the provisional health goal set by North Carolina Department of Health and Human Services (“DHHS”) to public water supplies.

Most recently, on June 11, 2018 the Department released for public comment a Draft Proposed Order for Preliminary Injunctive Relief describing the relief that the Department intends to seek in Superior Court to address Chemours’ unlawful releases of GenX Compounds and other PFAS into the environment.

As reflected in the Request, Petitioner has closely followed the Department’s ongoing investigation into PFAS contamination in the Cape Fear region as well as the enforcement actions that the Department has taken against Chemours. Indeed, Petitioner’s Request relies in significant

measure on documents filed by the Department and submitted into evidence in its ongoing lawsuit against Chemours. Petitioner acknowledges in its Request that “the relief requested in this declaratory ruling is similar to that requested by the Department in its recent amended complaint in its Bladen County Superior Court enforcement action.” Request p. 1. Nonetheless, Petitioner contends that the Department should utilize the procedure set forth in N.C. Gen. Stat. § 143-215.3(a)(12) to achieve relief “similar” to that which it is already pursuing in its lawsuit, permitting actions, and enforcement actions.

The Department denies the Request for multiple reasons. First, the Department is currently engaged in actions, outlined above and described in more detail below, directed toward the very issues raised in the Request. As Petitioner acknowledges, these issues are currently the subject of litigation and multiple enforcement and permitting actions being taken by Department. Our courts and our sister agencies have long recognized that issuance of a declaratory ruling under similar circumstances is inappropriate. Second, as detailed below, some of the facts upon which the Request is based are outdated, in dispute, or subject to ongoing review. Therefore, such facts cannot serve as a basis for a declaratory ruling, which applies the law to a *given* set of facts.

FACTUAL BACKGROUND

I. THE DEPARTMENT’S ACTIONS TO STOP CHEMOURS FROM DISCHARGING GENX COMPOUNDS AND OTHER PFAS INTO THE CAPE FEAR RIVER

Since July of 2015, Chemours has owned and operated a chemical manufacturing facility called the Fayetteville Works (“Facility”) in Bladen County, North Carolina. Prior to that time, the Facility was owned and operated by Chemours’ predecessor, DuPont. Chemours manufactures, among other products, Chemours Nafion® Membrane and Polymer Dispersions, HFPO Monomers and Vinyl Ether Monomers, as well as a Polymer Processing Aid known as GenX.

GenX is the trade name for a chemical called C3 Dimer Acid (also known as HFPO Dimer Acid), which has a Chemical Abstracts Registry or “CAS” number of 13252-13-6. CAS numbers are universally used to provide a unique identifier for chemical substances. C3 Dimer Acid Fluoride (also known as HFPO Dimer Acid Fluoride), CAS No. 2062-98-8, and C3 Dimer Acid Ammonium Salt (also known as HFPO Dimer Acid Ammonium Salt), CAS No. 62037-80-3, convert to GenX in the presence of water. GenX, C3 Dimer Acid Fluoride, and C3 Dimer Acid Ammonium Salt are collectively referred to herein as “GenX Compounds.” GenX Compounds fall within a family of chemicals known as per- and polyfluoroalkyl substances or “PFAS.”

The Department, in consultation with DHHS and the United States Environmental Protection Agency (“EPA”), has been leading a State investigation into the presence of GenX Compounds and other PFAS in the Cape Fear River since June 2017. On June 19, 2017, the Department began collecting water samples from twelve sites along the Cape Fear River. The Department’s analysis showed that concentrations of GenX were present in the Facility’s main outfall at levels as high as 39,000 ng/L. Prior to this discovery, the presence of GenX Compounds in the Facility’s discharge and the health risks associated with them had not been disclosed to the Department by Chemours or DuPont.

Over the course of the summer of 2017 and at the Department’s direction, Chemours took steps to capture process wastewater containing GenX Compounds and other PFAS for offsite disposal. When these steps did not result in sufficient reductions of PFAS concentrations in the Facility’s discharge, the Department took action to require Chemours to halt its unlawful release of these pollutants. First, on September 5, 2017, the Division of Water Resources (“DWR”) provided Chemours with notice of its intent to suspend Chemours’ NPDES permit to prohibit Chemours’ discharge of PFAS into the Cape Fear River. Second, on September 7, 2017, the

Department filed a Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunctive Relief in Bladen County Superior Court, to force Chemours to immediately stop discharging PFAS into the Cape Fear River. That lawsuit resulted in a Partial Consent Order requiring Chemours to take immediate measures to capture additional process wastewater containing GenX Compounds and other PFAS for offsite disposal.

Despite Chemours' diversion of this additional process wastewater for offsite disposal, the Department continued to detect elevated levels of GenX at the Facility's main outfall and in the Cape Fear River. In addition, Chemours failed to report to the Department an October 6, 2017 spill of wastewater, which failure resulted in the issuance of a Notice of Violation. On November 16, 2018, DWR made the decision to partially suspended Chemours' NPDES permit, effective November 30, 2017. As a result of the Department's action, Chemours is currently prohibited from discharging *any* process wastewater from its manufacturing areas into the Cape Fear River.

II. THE DEPARTMENT'S ACTIONS TO ADDRESS GROUNDWATER CONTAMINATION

The Department has also undertaken significant investigative efforts and ongoing enforcement actions directed toward Chemours' contamination of onsite and offsite groundwater. These efforts have involved collaboration between DEQ's Division of Waste Management ("DWM"), Division of Air Quality ("DAQ"), and DWR. In August 2017, samples gathered from fourteen groundwater monitoring wells at the Facility showed GenX at levels ranging from 519 ng/L to 61,300 ng/L in thirteen of the fourteen wells. More recent data show even higher concentrations of GenX in onsite groundwater beneath the Facility. Chemours' January 31, 2018 Additional Site Investigation Report showed GenX in onsite groundwater at concentrations as high as 640,000 ng/L. The report stated that high concentrations of other PFAS were found in onsite groundwater as well. For example, PFMOAA, CAS No. 674-13-5, was detected at concentrations

of more than 8,000,000 ng/L, PFESA Byproduct 1, CAS No. 29311-67-9, was detected at concentrations of more than 260,000 ng/L, and PFESA Byproduct 2, CAS No. 749836-20-2, was detected at concentrations of more than 76,000 ng/L.

In addition to evaluating onsite groundwater contamination, from September 2017 through the present, DWM has overseen extensive sampling of offsite groundwater in residential water wells. To date, approximately 1,000 offsite wells have been tested. Approximately 225 wells have concentrations of GenX above the DHHS health goal of 140 ng/L and approximately 538 wells have detectable concentrations of GenX at a level lower than 140 ng/L. Concentrations above 140 ng/L were detected in private drinking water wells out to approximately 4 miles from the Facility. As noted above, DWM has required Chemours to submit a plan to connect all residents whose well water has concentrations of GenX above 140 ng/L to public water supplies. At the direction of DEQ, Chemours is also testing the effectiveness of home filtration systems.

The Department has been persistent in compelling Chemours to evaluate and control all sources of groundwater contamination as rapidly as possible. On September 6, 2017, DWM and DWR jointly issued a Notice of Violation against Chemours for unlawful contamination of groundwater. In addition, the Department's Complaint and Motion for Preliminary Injunction filed on September 7, 2017 sought an order requiring Chemours to remove, treat or control any source of PFAS that has the potential to contaminate groundwater in accordance with a plan approved by the Department. The Complaint also sought to require Chemours to complete a site assessment and submit a plan for corrective action to the Department as required by 15A NCAC 2L. 0106.

On December 15, 2017, DWM took further action by ordering the company to "commence immediate interim measures to terminate and control the sources of [groundwater] contamination, and mitigate any hazards resulting from exposure to the pollutants." When DWM found

Chemours' response to this directive inadequate, on February 12, 2018, DWM issued a "Notice of Violation—Immediate Action Required," directing Chemours to "initiate immediate source control measures to control primary and secondary sources of PFAS contamination" or risk further enforcement action. As a result, Chemours has:

- Excavated soil from areas with elevated levels of PFAS in order to reduce runoff of PFAS to surface water during storm events;
- Begun pumping onsite groundwater for offsite disposal in order to reduce migration of contaminated groundwater toward the Cape Fear River and other surface water features;
- Power- and hand-washed certain equipment to reduce runoff of PFAS to surface water during storm events; and
- Provided a plan to permanently line certain ditches and sedimentation ponds.

The Department's investigation has revealed that sources of contamination such as leaks, spills, and infiltration of wastewater conveyances into groundwater only tell part of the story. As noted in the Department's Amended Complaint filed on April 10, 2018, it is now clear that Chemours' emissions of GenX Compounds and other PFAS into the atmosphere represent a significant source of offsite groundwater contamination.

On September 20, 2017, DAQ sent a letter to Chemours requesting information regarding Chemours' air emissions of GenX Compounds and other PFAS. On October 20, 2017, Chemours submitted a revised assessment of those emissions. Those revised estimates and subsequent stack testing have shown that Chemours' air emissions of GenX Compounds far exceed those initially reported to DAQ. DAQ has undertaken measures, including rainwater sampling and air deposition modeling, to determine the fate of GenX Compounds emitted from the Chemours Facility in the environment.

Based on the evidence collected by DAQ during this investigation, on April 6, 2018, DAQ issued a letter to Chemours notifying Chemours of DAQ's intent to modify Chemours' air permit

to prohibit the emission of GenX Compounds unless Chemours demonstrates that it can operate in a manner that will not result in its emissions causing or contributing to unlawful groundwater contamination. The letter directed Chemours to respond to DAQ's notice by April 27, 2018. In addition, the Department amended its Complaint in Bladen County to include claims relating to Chemours unlawful air emissions of GenX Compounds and other PFAS, and the impact of these emissions on groundwater.

On April 27, 2018, the Department received Chemours' response. On May 11, 2018, after reviewing this response and the accompanying attachments, the Department sent Chemours a request for clarification and additional information. On May 18, 2018, Chemours responded to that letter. On June 11, 2018 the Department released for public comment a Draft Proposed Order for Preliminary Injunctive Relief describing the relief that the Department intends to seek in Superior Court to address Chemours' violations of North Carolina's water quality laws.

III. THE REQUEST FOR DECLARATORY RULING

a. Facts Set Forth in the Request

On May 9, 2018, approximately halfway into the sixty-day notice period for modifying Chemours' air permit and in the midst of the Department's ongoing investigation into air emissions of GenX Compounds and other PFAS, Petitioner served the Department with a Request for Declaratory Ruling pursuant to N.C. Gen. Stat §§ 150B-4 and 143-215.3(a)(12). The Request asks the Department to take action "similar" to that which it is already taking in the injunction action in Bladen County Superior Court and other enforcement actions, and to issue a ruling ordering Chemours to immediately discontinue all emissions and discharges of PFAS from the Facility.

As an initial matter, the Department notes that the Request does not include a statement of a "given" set of facts that Petitioner contends form the basis for the declaratory ruling that

Petitioner seeks. Rather, the Request makes various factual assertions—some supported, others unsupported—in what Petitioner styles as the “Argument” section of its Request. It is unclear from the Request whether Petitioner believes the Department should consider the totality of the “Argument” section to be the set of facts upon which the Department’s Declaratory Ruling should be based, including the arguments of counsel contained therein, or whether Petitioner is asking the Department to make factual findings based on the arguments of counsel.

The Argument section consists of four main parts. First, it discusses the health risks associated with GenX and other PFAS, which form the basis for Petitioner’s contention that PFAS pollution threatens public health and safety. This section includes various citations to health studies, government reports, news articles, and documents prepared by the Department as part of its investigation, including its Amended Complaint. This section acknowledges that DHHS has developed a health goal of 140 ng/L for GenX, but alleges that the health goal is not sufficiently protective because the health goal was developed before certain studies of human health risks associated with PFAS had been published. Nevertheless, the Request does not contend that any of the information cited in the Request would require setting a different health goal or that the underlying basis for the health goal is no longer valid. The Request also does not acknowledge that the DHHS health goal is currently being reviewed by the Secretaries’ Science Advisory Board (“SAB”) using all currently available health information.

Second, the Request discusses the extent of contamination caused by the Facility. This section of the Request relies, for the most part, on information gathered by the Department during its investigation. The Request also cites research conducted by other institutions such as the University of North Carolina Wilmington, which has identified GenX in downstream sediments of the Cape Fear River. The Request notes that GenX and other PFAS have been detected in

groundwater, surface water, rainwater, sediment, fish tissue, and agricultural products throughout a broad geographic region. The 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 existing contamination.

Third, the Request describes what Petitioner understands to be the current sources of PFAS contamination in the Cape Fear River and in groundwater. In light of the Department's suspension of Chemours' NPDES permit, the Request focuses on the few known remaining sources of contamination at the site, namely, the migration of contaminated onsite groundwater into the Cape Fear River and the deposition of air emissions of PFAS into groundwater and surface water described in the Department's Amended Complaint.

Finally, the Request describes some of the Department's enforcement efforts to date and explains why Petitioner believes those enforcement efforts are not fully addressing the contamination caused by the Facility. Petitioner offers two main critiques of the Department's efforts. First, while Petitioner acknowledges that the relief it is seeking in its Request is "similar" to the relief sought by the Department in its lawsuit against Chemours, Petitioner contends that the Department should instead use its separate and additional authority (with the concurrence of the Governor and in conjunction with a hearing process conducted by the Environmental Management Commission, neither of whom are a party to this Request) to achieve the desired results. *See* N.C. Gen. Stat. § 143-215.3(a)(12). Second, Petitioner—incorrectly—contends that the Department has focused its enforcement actions on GenX Compounds to the exclusion of other PFAS, which Petitioner contends also pose a risk to the health and safety of the public.

b. Outdated, Disputed, or Inaccurate Information Contained in the Request

The Department's review of the Request shows that numerous factual matters discussed in the Request are outdated, in dispute, or simply incorrect, particularly with respect to sources of groundwater and surface water contamination and the means by which those sources of contamination can be addressed. This is understandable, as the facts described in the Request are based on incomplete information and reflect only a snapshot in time during what is an ongoing fact-intensive and highly technical investigation. Before discussing the Department's decision to deny this Request, the Department addresses some of the factual inaccuracies contained in the Request.

Other PFAS Contaminants. Petitioner mischaracterizes of the Department's investigation as being focused on GenX Compounds to the exclusion of other PFAS. Petitioner states, "Instead of acting to eliminate Chemours ongoing release of other PFAS compounds, the Department merely states in its complaint that it 'continues to investigate the extent of, and environmental risks associated with these contaminants.'" See Request p. 26. Petitioner's characterization of the Department's investigation and enforcement actions is inaccurate. For instance, Petitioner is incorrect that the relief sought in the Amended Complaint is limited to GenX Compounds. Rather, the Amended Complaint requests that the Court issue an injunction that will require Chemours to "Cease and abate *all* ongoing violations of NC's water and air quality laws." Amended Complaint p. 35 (emphasis added). As described in the Amended Complaint, the detection of *any* PFAS in groundwater above the practical quantitation limit constitutes a violation of North Carolina's Groundwater Rules. See 15A NCAC 2L .0202. Indeed, the same data that Petitioner relies upon to criticize the Department for not taking action to address other PFAS contaminants are cited in and

incorporated by reference into the Amended Complaint. *See, e.g.*, Amended Complaint, Exhibit 21 (Additional Site Investigation Report).

To the extent the Department has prioritized GenX Compounds in its investigation, this prioritization reflects the Department's exercise of its own pollution control expertise and its analysis of currently available methods for testing and removing PFAS from the environment. Importantly, based on the data and information the Department has collected and analyzed in its investigation, the Department has reason to believe that the air and water pollution control technologies available to address GenX Compounds will also be effective at reducing other PFAS. This prioritization also reflects the fact that analytical methods used for detecting GenX in the environment—such as stack testing methods—are now established, whereas methods for detecting many other PFAS are currently in development. The Request has not provided any new information or analysis that would alter the Department's application of its expertise and professional judgment under these circumstances.

Petitioner's problematic discussion of the connection between PFAS emissions and groundwater contamination. Petitioner's discussion of the relationship between air emissions and groundwater contamination suggests that Petitioner may be misinterpreting the data. In particular, Petitioner notes that a specific PFAS compound, C₃F₆O (also known as "Hexafluoropropylene oxide" or "HFPO") is being emitted at a rate of "over 72,000 pounds in one year, or 221 pounds per day." Request p. 25. Petitioner then gives the mistaken impression that the same volume of emissions is contaminating groundwater at and around the Facility. Request p. 26. Based on the information DEQ has gathered in its investigation, it is unlikely that HFPO is being transmitted from the air to groundwater. The Department has required Chemours to conduct an analysis of the fate of HFPO in the environment and, to this point, the Department has not

identified any evidence – and Petitioner has pointed to none – indicating that HFPO is contributing to groundwater contamination. Petitioner’s reference to this particular PFAS compound to discuss the relationship between air emissions and groundwater contamination appears to reflect a misunderstanding regarding the relationship between air emissions data and groundwater data. Additionally, Petitioner’s reference to emissions through leaks in pumps, valves, and connectors as estimated at 314 pounds recites outdated information. Based on additional testing and analysis, Chemours now estimates that these leaks are only responsible for 10 pounds of annual emissions. The Department is in the process of reviewing Chemours’ updated analysis to verify its reliability.

Petitioner’s outdated information on sources of groundwater contamination. One of the central theories of the Request is that immediate action is required to address the continuous leaching of PFAS contaminants into the groundwater through unlined wastewater conveyance ditches. *See, e.g.*, Request p. 22. Here, Petitioner relies primarily on the January 31, 2018 Additional Site Investigation Report and February 28, 2018 Focused Feasibility Study Report prepared by Chemours. These reports theorized that PFAS contaminants formerly discharged into a cooling-water channel at the Facility known as the “Nafion Ditch” were a major source of PFAS contamination in the perched zone aquifer directly beneath the Nafion manufacturing area. After receiving these reports, DWR sent a letter to Chemours requesting information regarding the prior discharge of process wastewater into the Nafion Ditch. As a result of DWR’s inquiry, Chemours conducted further analysis into the source of contamination in the perched zone aquifer. On April 9, 2018, Chemours responded to DWR’s letter stating 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 and that the Nafion Ditch may not be as significant a source as initially believed. The terracotta pipe, which was cut and capped in November of 2017 as a

result of DEQ's permitting action suspending Chemours' ability to discharge manufacturing process wastewater, no longer carries process wastewater. This terracotta pipe is currently being investigated by DWR. Thus, Petitioner's analysis of the major source of onsite groundwater contamination is outdated.

Misleading factual assertions about health studies. Finally, Petitioner's use of a recent DHHS study, prepared as a result of the ongoing investigation into GenX, is misleading. This study, attached to the Request as Attachment 45, compared rates of pancreatic, liver, uterine, testicular and kidney cancers in Bladen, Brunswick, New Hanover, and Pender Counties with the statewide rates over a 20-year period (1996-2015) with separate analyses for each 5-year period. The study concluded that "[o]verall, cancer rates in the four counties were similar to state rates." Request, Attachment 45 at 1. There were two exceptions where the rates were higher and four exceptions where the rates were lower. The two exceptions were cases in which rates were higher for testicular and liver cancer in New Hanover County. For testicular cancer, the 20-year average was higher than the state rate, though "[r]ates were *not* significantly different from the state rate when examined for any of the individual 5-year periods." *Id.* at 2. For liver cancer, the 5-year rate for the years 2006-2010 was higher than the state rate, "but was similar to the state rate in 1996-2000, 2001-2005, and 2011-2015." *Id.* In fact, the study points out that "[d]uring the most recent five-year interval (2011-2015), no county-specific cancer rates examined were significantly higher than state rates." *Id.*

Petitioner states that this study found that "residents in New Hanover County consistently had significantly higher rates of testicular cancer from 1996-2016." Request p. 22. However, the study states that "[r]ates [of testicular cancer] were not significantly different from the state rate

when examined for any of the individual 5-year periods.”¹ Request, Attachment 45 at 2 (emphasis added). Petitioner further states that “[f]rom 2006-2010, liver cancer rates in New Hanover County were over 30 percent higher than the state average,” Request p. 22, but fails to acknowledge that the rate “was similar to the state rate in 1996–2000, 2001–2005, and 2011–2015,” Request, Attachment 45 at 2. Finally, Petitioner draws the unsupported conclusion that “[t]he prevalence of these diseases in the communities surrounding Chemours’ Facility demonstrates the dangers caused by the company’s past and ongoing PFAS pollution,” Request p. 22, apparently ignoring the study’s express warning that “only a comprehensive research study can provide information about whether a specific exposure might be associated with increased rates of cancer.” Request, Attachment 45 at 1 and 3. Petitioner’s selective use of these statistics is misleading.

As documented by the Department’s Amended Complaint, the Department believes swift action is necessary—and is currently being undertaken—to address the known health risks associated with GenX Compounds and other PFAS, as well as to identify the unknown risks. DEQ’s actions include working with DHHS, the SAB and the EPA to evaluate the latest health studies on PFAS in order to determine the appropriate health-based limit for PFAS in drinking water.

¹ Petitioner also fails to note that liver cancer rates have been increasing in North Carolina and nationwide for the period between 1996-2015 due in part to an aging population. The study points out that residents over age 65 increased as a portion of the population in New Hanover County from 12.8% in 2000 to 16.2% in 2015. Request, Attachment 45 at 1.

DISCUSSION

I. BACKGROUND ON DECLARATORY RULINGS

Declaratory rulings are authorized by the North Carolina Administrative Procedure Act pursuant to N.C. Gen. Stat. § 150B-4. Using this process, a “person aggrieved” may request that an agency “issue a declaratory ruling as to the . . . applicability to a given state of facts of a statute administered by the agency.” N.C. Gen. Stat. § 150B-4(a); *see also* N.C. Gen. Stat. § 150B-2(6) (defining “person aggrieved”). This declaratory ruling provision requires that all relevant facts be settled. *In Re Ford*, 52 N.C. App. 569, 572, 279 S.E.2d 122, 124 (1981) (noting that the former N.C.G.S. § 150B-17, with the same language regarding “a given state of facts,” “clearly [did] not contemplate an evidentiary proceeding”). Our Court of Appeals has recognized that if the facts are unsettled or in dispute, a declaratory ruling is not appropriate, and the matter is best addressed through the courts. *See id.*

In the absence of rules specific to the Department’s declaratory ruling process, the rules of the Environmental Management Commission (“Commission”) are instructive. The Commission has promulgated rules in Section .0600 of Title 15A, Subchapter 2I of the North Carolina Administrative Code governing “the procedure for requesting a declaratory ruling and the circumstances in which rulings shall or shall not be issued.” N.C. Gen. Stat. § 150B-4(a). Pursuant to 15A NCAC 2I .0603(c), “[w]henever the Commission believes for ‘good cause’ that the issuance of a declaratory ruling is undesirable, the Commission may refuse to issue such ruling.” Good cause includes, among other things, “finding that the matter is the subject of a pending contested case hearing or litigation in any North Carolina or federal court.” 15A NCAC 2I .0603(d)(2); *accord* 15A NCAC 3P .0202(f)(3) (rules of the Marine Fisheries Commission); 15A NCAC 4E .0503(f)(5) (rules of the Sedimentation Control Commission); 15A NCAC 5H

.0402(d)(2) (rules of the Oil and Gas Commission); 15A NCAC 10A .0502(5) (rules of the Wildlife Resources Commission).

The North Carolina Court of Appeals has also recognized that it is appropriate to deny a request for declaratory ruling due to pending litigation. In *Equity Sols. of the Carolinas, Inc. v. N.C. Dep't of State Treasurer*, the North Carolina Department of State Treasurer was actively investigating Equity Solutions of the Carolinas, Inc. for unfair or deceptive practices in May of 2010. 232 N.C. App. 384, 386, 754 S.E.2d 243, 246 (2014). The investigation resulted in an enforcement action filed in state court by the State Treasurer on August 13, 2010. *Id.* at 387, 754 S.E.2d at 247. Shortly before the State Treasurer filed its enforcement action, Equity Solutions petitioned the State Treasurer on June 18, 2010 for a declaratory ruling on the same subject. *Id.* at 386-87, 754 S.E.2d at 246-47. The State Treasurer denied the petition, citing its active litigation against Equity Solutions and the need for development of the relevant facts. *Id.* at 387-88, 754 S.E.2d at 247. The North Carolina Court of Appeals unanimously upheld the State Treasurer's denial of Equity Solutions' petition. *Id.* at 397, 754 S.E.2d at 253. The court agreed with the State Treasurer that the factual record submitted by Equity Solutions in its declaratory ruling petition was inadequate, and that the trial court would be in a better position to rule on the matter after full development of the facts in the State Treasurer's enforcement action. *Id.* at 394, 754 S.E.2d at 251.

II. THE REQUEST IS DENIED BECAUSE THE MATTERS RAISED IN THE REQUEST ARE THE SUBJECT OF PENDING LITIGATION.

The Department is currently engaged in multiple actions that directly address the matters raised in the Request. The Department filed a lawsuit against Chemours in Bladen County Superior Court that precisely addresses the subject of Petitioner's Request. To the extent Petitioner contends that the Department's lawsuit cannot provide a full and complete remedy for Chemours'

violations of North Carolina's water quality laws, the Department disagrees, as the Amended Complaint seeks an injunction requiring Chemours to cease all violations of North Carolina's water and air quality laws. Furthermore, the Bladen County Superior Court will have the benefit of an accurate and up-to-date factual record, allowing the court to order a full and effective remedy to Chemours' contamination of North Carolina's natural resources. As a result, the matter is not properly the subject of a declaratory ruling. *See Equity Sols.*, 232 N.C. App. at 394, 754 S.E.2d at 251.

In addition to the litigation the Department is pursuing in Bladen County, DAQ has issued a notice of its intent to modify Chemours air permit to prohibit its emissions of GenX Compounds unless Chemours can show that it can implement adequate controls to prevent contamination of groundwater. Petitioner's Request was filed in the middle of the sixty-day notice period without the benefit of Chemours' Response, the Department's request for additional information, or Chemours' response to that request. Thus, the matters raised in the Request are currently the subject of an ongoing permitting action aimed at the very issues raised in the Request.

III. THE REQUEST IS DENIED BECAUSE IT RELIES ON OUTDATED, DISPUTED, OR INACCURATE INFORMATION.

As detailed above, the Request is based in part on outdated, disputed and inaccurate information. This is understandable. DEQ has continually pressed Chemours for necessary information, and some of the facts in Petitioner's Request were outdated almost as soon as the Request was delivered to the Department. Given the Department's ongoing investigation into the site's contamination sources and how best to address them, Petitioner's Request presents an inadequate factual record on which to base a declaratory ruling.

To the extent facts are in dispute, as noted above, the authority invoked by Petitioner does not authorize the Department to settle disputes of fact in the context of a declaratory ruling. *See*

In Re Ford, 52 N.C. App. at 572, 279 S.E.2d at 124. However, the Bladen County Superior Court *can* decide issues of fact. The Department has brought its enforcement action in the venue best equipped to resolve factual disputes and order a complete remedy to all the violations based on a full understanding of the sources and extent of the contamination.

Because the facts set forth in Petitioner's Request are outdated, disputed or inaccurate, this matter is not appropriately resolved through a declaratory ruling. Instead, the Department's ongoing litigation, investigation and enforcement actions are addressing Chemours' contamination in the proper venue to ensure protection of North Carolina's air, surface water, and groundwater.

CONCLUSION

After careful consideration and for the foregoing reasons, the Department denies Petitioner's Request for a Declaratory Ruling.²

This the 15th day of June, 2018.

DEPARTMENT OF ENVIRONMENTAL QUALITY

By: Sheila Holman
Sheila Holman
Assistant Secretary for the Environment

² On June 8, 2018, Petitioner stipulated to a seven-day extension of the thirty-day time limit for the Department to make its written decision to grant or deny the Request under N.C.G.S. 150B-4(a1)(1).

CERTIFICATE OF SERVICE

This is to certify that the foregoing decision was served this day upon counsel for Petitioner by placing copies in the United States Mail, first-class postage prepaid and addressed as follows:

Geoff Gisler
Jean Zhuang
Southern Environmental Law Center
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516
919-967-1450
Counsel for Petitioner Cape Fear River Watch

This, the 15th day of June, 2018.



Sheila Holman
Assistant Secretary for the Environment
North Carolina Department of Environmental Quality