STATE OF NORTH CAROLINA

COUNTY OF WAKE

ENVIRONMENTAL MANAGEMENT COMMISSION

In Re REQUEST FOR DECLARATORY RULING by COL. FRANCIS X. DE LUCA USMCR (RET)	)))))

BRIEF OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

The Department of Environmental Quality ("DEQ"), by and through its undersigned counsel, hereby submits this brief to the Environmental Management Commission ("Commission"). As set forth below, DEQ requests that the Commission decline to decide the request for declaratory ruling captioned above for good cause. In the alternative, DEQ urges the Commission to issue a declaratory ruling that (a) the special order by consent provisions under N.C.G.S. §143-215.2 do not apply to injunctive actions under N.C. Gen Stat. §143.215.6C and (b) DEQ's pursuit of injunctive relief did not violate the NPDES Memorandum of Agreement between the State of North Carolina and EPA.

PROCEDURAL HISTORY

This matter is before the Commission on the request ("Request") of Col. Francis X. De Luca USMCR (Ret) ("Petitioner") dated October 5, 2017. The Request references an injunctive action by DEQ against The Chemours Company FC, LLC, in Bladen County Superior Court, Case Number 17 CVS 580, wherein the complaint, motion for temporary restraining order, and motion for preliminary injunctive relief were filed on September 7, 2017. DEQ's motion for temporary restraining order was set for hearing on September 8, 2017, and the Superior Court entered a Partial Consent Order presented by the parties on the same date. On September 27,

2017, Petitioner filed a petition for contested case hearing in the North Carolina Office of Administrative Hearings regarding the same matter.

STATEMENT OF FACTS

Petitioner has failed to follow the requirement of 15A NCAC 2I .0602(c) to file "a statement of the specific facts to a given factual situation and documentation supporting those facts." DEQ has attached hereto a copy of the documents it understands to be relevant to the Request, which include:

- Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunctive Relief, 17 CVS 580 (Sept. 7, 2017, Bladen County), attached hereto as Exhibit A.
- Partial Consent Order, 17 CVS 580 (Sept. 8, 2017, Bladen County), attached hereto as Exhibit B.
- National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of North Carolina and the United States Environmental Protection Agency Region 4, Oct. 2017, attached hereto as Exhibit C.

A copy of 40 C.F.R. § 123.27, Rule 24 of the North Carolina Rules of Civil Procedure, and Rule 24 of the Federal Rules of Civil Procedure have also been attached hereto as Exhibits D, E, and F for ease of reference. The attached documents speak for themselves.

To the extent Petitioner's Request incorporates specific facts, DEQ denies all of Petitioner's erroneous allegations and characterizations incorporated in the Request, including without limitation the following:

- DEQ denies Petitioner's allegation that DEQ engaged in "fraudulent" representations to the Bladen County Superior Court. As addressed in more detail below, DEQ has legal authority to file for injunctive relief and to enter into judicially-approved consent orders. There is no legal requirement that such judicially-approved consent orders be subject to public notice and comment.
- DEQ denies Petitioner's allegation that DEQ filed its Complaint in a "conspiracy" with Chemours "to deny Petitioner his right to a hearing in [f]ederal [c]ourt." This allegation is baseless. Further, DEQ is responsible for enforcing the State's water quality laws and it filed an action in Superior Court to do so. DEQ's complaint resulted in a judicially-approved consent order that requires Chemours to eliminate discharges of certain compounds into the Cape Fear River.
- DEQ denies Petitioner's allegation that the Partial Consent Order "waives all rights [for the State] to pursue damages and fines from Chemours." Nothing in the Partial Consent Order precludes DEQ from pursuing civil penalty assessments. In fact, N.C.G.S. § 143-215.6C explicitly allows DEQ to pursue civil penalties regardless of the injunctive action.

POSITION OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

I. Background on Declaratory Rulings

Declaratory rulings are authorized by the North Carolina Administrative Procedure Act pursuant to N.C.G.S. § 150B-4. Using this process, a "person aggrieved" may request that an agency, in relevant part, "issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order

of the agency." N.C.G.S. § 150B-4(a); see also N.C.G.S. § 150B-2(6) (defining "person aggrieved").

As set forth in N.C.G.S. § 150B-4(a), a declaratory ruling must fall into one of three categories: 1) a request regarding the validity of a rule, 2) a request regarding the application of a statute, rule, or order within the agency's purview "to a given state of facts," or 3) a request to resolve inconsistent interpretations of the agency's rules. With regard to the second category, the statute dictates that declaratory rulings are only available under certain conditions. First, the facts must be settled. In Re Ford, 52 N.C. App. 569, 572, 279 S.E.2d 122, 124 (1981) (noting that the former NCGS 150B-17, with the same language regarding "a given state of facts," "clearly [did] not contemplate an evidentiary proceeding"). Second, the statute, rule, or order to be applied to the given state of facts must be within the agency's purview. When the request pertains to a statute, the agency must administer it, and when the request pertains to a rule or order, the agency must have issued it. N.C.G.S. § 150B-4(a).

As required by the statute, 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.G.S. § 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."

II. "Good Cause" Exists for the Commission to Decline to Issue a Declaratory Ruling

Petitioner has requested that the Commission "direct" DEQ to move to void the Partial Consent Order issued in Bladen County Superior Court Case Number 17 CVS 580. Request pp.

1, 2. Petitioner's Request should not be decided on the merits because it fails to comply with N.C.G.S. § 150B-4 and the Commission's rules in several respects.

First, Petitioner has not made a request that is cognizable under the declaratory ruling statute. Requests for declaratory rulings are limited to the relief the statute allows. They can request only: 1) that the Commission rule on the validity of one of its regulations, 2) that the Commission apply a statute, rule, or order under its purview to a "given state of facts," or 3) that the Commission resolve an inconsistent interpretation of its rules. N.C.G.S. § 150B-4(a). They cannot, however, request that the Commission "direct" DEQ to move to void an order entered in a judicial proceeding, as Petitioner here requests. The Commission has not been granted the authority by the General Assembly to provide such relief, and should decline the Request for this reason.

Second, Petitioner has failed to carry his burden of showing that he is a "person aggrieved" to whom a declaratory ruling may be issued (a concept also known as "standing"). N.C.G.S. §§ 150B-4; 150B-2(6); see also Diggs v. N.C. HHS, 157 N.C. App. 344, 578 S.E.2d 666 (2003) (interpreting the aggrieved person standard in the context of a declaratory ruling request). In particular, Petitioner has failed to identify how his legal rights have been adversely affected by DEQ's actions related to the Chemours facility in Bladen County. Petitioner asserts that he was "deprived . . . of his right to comment on the [Partial] Consent Order." Request at 1. However, Petitioner states that his address is in Raleigh, approximately 83 miles from the Chemours facility. Because Petitioner has provided no further factual basis, Petitioner's interests appear to be of a general nature, which is insufficient for "aggrieved person" status. See Charles Stores Co. v. Tucker, 263 N.C. 710, 717, 140 S.E.2d 370, 375 (1965) (stating that "a general interest common to all members of the public" is insufficient to establish standing); In re Denial

of Request for Full Admin. Hearing, 146 N.C. App. 258, 262, 552 S.E.2d 230, 232 (2001) ("Procedural injury, standing alone, cannot form the basis for aggrieved status under the NCAPA."); Orange County v. North Carolina Dep't of Transp., 46 N.C. App. 350, 361-362, 265 S.E.2d 890, 899 (1980). Furthermore, as explained below, there is no "right" to comment on a consent order in North Carolina. Petitioner next claims that the Partial Consent Order "waives all rights of the State to pursue damages against [Chemours]." Request at 1-2. As noted above, this allegation is false. Nothing in the Partial Consent Order precludes DEQ from pursuing civil penalty assessments. In fact, N.C.G.S. § 143-215.6C explicitly allows DEQ to pursue civil penalties regardless of any injunctive action. Petitioner also states that his ability to initiate a citizens' suit under the Clean Water Act has been preempted by DEQ's action. However, the Clean Water Act does not grant Petitioner an absolute "right" to a hearing in federal court because 33 U.S.C. § 1365(b) contemplates situations in which a state initiates enforcement during the 60-day notice period. The Commission should therefore decline to issue a declaratory ruling because Petitioner has failed to present a given set of facts demonstrating that he is a "person aggrieved" to whom a declaratory ruling is available.

Third, assuming for the sake of argument that the Request could be construed as a request to apply a statute, rule or order, the Request would still not comply with the statutory requirements, except for perhaps with respect to application of the rules and statute governing SOCs. Petitioner appears to allege that DEQ is not abiding by the Memorandum of Agreement between DEQ and the U.S. Environmental Agency, but that document is not a statute, rule, or order. It is therefore not the proper subject of interpretation in a declaratory ruling under N.C.G.S. § 150B-4. Petitioner further appears to allege that DEQ is not complying with 40

C.F.R. 123.27(d).[1] Because this federal rule was not adopted by the Commission, it is also not within the scope of a declaratory ruling pursuant to N.C.G.S. § 150B-4(a). However, Petitioner has also referenced N.C.G.S. § 143-215.2 and 15A NCAC 2H .1200 governing special orders by consent ("SOCs"), which are within the Commission's purview. In case the Commission construes the Request to ask for application of N.C.G.S. § 143-215.2 and 15A NCAC 2H .1200 to a given set of facts, this issue is addressed in Section III below. As explained further below, the SOC statute and rules are inapplicable to the facts at hand, as DEQ has utilized the separate and independent authority granted directly to DEQ under N.C.G.S § 143-215.6C to pursue enforcement through a civil action for injunctive relief. With regard to any laws and documents cited other than those governing SOCs, the Commission is without authority to interpret how any of them would apply to a given set of facts, and should decline to issue any declaratory ruling regarding those subjects.

Finally, Petitioner has failed to file the mandatory "statement of the specific facts . . . and documentation supporting those facts" with his request as required by 15A NCAC 2I. 0602(c). Petitioner notes that he has filed a contested case regarding these same issues. As noted above, the Commission's declaratory ruling authority cannot be invoked for settling disputes of fact. However, the Office of Administrative Hearings can decide issues of fact. Because Petitioner has instituted a contested case and has not clearly presented a statement of specific facts and supporting documents, Petitioner has failed to provide a "given state of facts" to which the Commission's declaratory ruling authority could be applied. If any of the facts necessary to

[1] The Request makes no reference to N.C.G.S. § 143-215.6C, which provided the authority for DEQ's pursuit of injunctive relief against Chemours. However, to the extent that the Request is interpreted as asking for application of that statute to a given set of facts, the statute is not administered by the Commission. Instead, it is administered by DEQ. The application of this statute is therefore not within the scope of a declaratory ruling under N.C.G.S. § 150B-4.

resolution of Petitioner's Request require resolution by an evidentiary hearing, the Commission is without authority to issue a declaratory ruling.

III. The Provisions Regarding Special Orders by Consent Do Not Apply to Consent Orders or Judgments Issued by a Superior Court Judge

A civil action for injunctive relief pursuant to N.C.G.S. § 143-215.6C and a special order by consent issued under the Commission's authority pursuant to N.C.G.S. § 143-215.2 are two separate and distinct enforcement mechanisms governed by different statutes. Special Orders under N.C.G.S. § 143-215.2 are administrative orders, whereas injunctive relief under N.C.G.S. § 143-215.6C is a judicial remedy. Accordingly, procedures applicable to special orders by consent pursuant to N.C.G.S. § 143-215.2 have no application whatsoever to a civil action for injunctive relief commenced pursuant to N.C.G.S. § 143-215.6C.

The Commission has the discretion to issue SOCs "to any person whom it finds responsible for causing or contributing to any pollution of the waters of the State within the area for which standards have been established." N.C.G.S. § 143-215.2(a). The SOC may direct that the applicant take whatever action "the Commission deems necessary and feasible in order to alleviate or eliminate the pollution." Id. The Commission has promulgated rules regarding special orders in 15A NCAC 2H .1200. A process for notice and comment on special orders by consent is set forth in 15A NCAC 2H .1203, as required by N.C.G.S. § 143-215.2(a1).

Special orders by consent are an enforcement mechanism available to the Commission and to DEQ by delegation, 15A NCAC 2H .1204, but are not the exclusive means of enforcing the State's water quality laws. Contrary to Petitioner's claim that DEQ acted "with the authority delegated to it by the [Commission]," DEQ has been directly vested with the authority to file

civil actions for injunctive relief pursuant to N.C.G.S. § 143-215.6C.[2] In an injunctive action, the complaining party, referred to as the "plaintiff," initiates the action by filing a complaint. This complaint may request that the court enjoin the violator, or "defendant," from unlawful conduct, and may include a request for immediate relief in the form of a temporary restraining order ("TRO") or preliminary injunction.[3] N.C.G.S. § 143-215.6C ("Upon a determination by the court that the alleged violation of the provisions of this Part or the regulations of the Commission has occurred or is threatened, the court shall grant the relief necessary to prevent or abate the violation or threatened violation."). The parties to an injunctive action may enter into orders or judgments by consent, subject to the court's approval, and neither the North Carolina Rules of Civil Procedure nor the State's water quality laws require public notice and comment. In the context of an injunctive action, a consent order or consent judgment is a common and accepted means of resolving claims. See, e.g., McRary v. McRary, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948) (explaining the nature of consent judgments).

The process and requirements for SOCs do not apply to injunctive actions. Petitioner cites no authority to the contrary. Although Petitioner cites to the DEQ's Memorandum of Agreement between DEQ and the U.S. Environmental Protection Agency, this document does not support Petitioner's argument.

First, Petitioner cites Section III.A.6 of the Memorandum of Agreement, which requires DEQ to comply with 40 C.F.R. § 123.27 in any National Pollutant Discharge Elimination System ("NPDES") enforcement action. Request at 1. Pursuant to 40 C.F.R. § 123.27(d), the State must

[2] DEQ has also been directly vested with the authority to pursue enforcement through civil penalty assessments in N.C.G.S. § 143-215.6A. These civil penalty assessments are similarly separate and distinct from SOCs.

[3] Here, DEQ requested both a TRO and a preliminary injunction in its action against The Chemours Company FC, LLC, requesting, among other things, that the company immediately cease the discharge of certain compounds. Exhibit B at 28.

allow public participation in enforcement actions, including those for injunctive relief, through either: 1) intervention as of right under State law for those "having an interest which is or may be adversely affected," or 2) assurance that the State will, among other things, publish any proposed settlements and allow at least 30 days for comment. As the plain language of 40 C.F.R. § 123.27(d) indicates, "[i]mplementation of *either of these options* suffices." Nat. Res. Def. Council, Inc. v. U.S. EPA, 859 F.2d 156, 177 (D.C. Cir. 1988) ("NRDC") (emphasis added). Under the first option, intervention as of right for those who may be adversely affected, all that is required is that the state rule on intervention of right mirror the federal rule. Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc., No. 97-6073-CV-SJ-6, 2000 U.S. Dist. LEXIS 1990, at *61 (W.D. Mo. Feb. 23, 2000) (citing NRDC, 859 F.2d at 177). Here in North Carolina, the rule regarding intervention of right, N.C.G.S. § 1A-1, Rule 24(a)(1), indeed mirrors the federal rule on the same topic. See Virmani v. Presbyterian Health Servs. Corp. (In re Knight Publ'g Co.), 127 N.C. App. 629, 648, 493 S.E.2d 310, 322 (1997) (noting that "[w]ith only minor exceptions, N.C.R. Civ. P. 24 and Rule 24 of the Federal Rules of Civil Procedure are substantially the same"). North Carolina therefore utilizes the first option under 40 C.F.R. § 123.27(d), making the second option unnecessary. DEQ is therefore not required under Section III.A.6 of the Memorandum of Agreement to put any settlement of an injunctive action out to public notice.

Second, Petitioner cites Section IV of the Memorandum of Agreement. Request at 1. However, that section requires public notice and comment for NPDES permits, not for judicially-approved consent orders. As a result, the sections in the Memorandum of Agreement cited by Petitioner do not support his argument.

CONCLUSION

For all of the foregoing reasons, the Commission should decline, for good cause, to issue a declaratory ruling on the merits of this request. In the alternative, the Commission should issue a ruling declaring that DEQ has not violated the requirements for special orders by consent or the Memorandum of Agreement in any way suggested by Petitioner.

Respectfully submitted this the 1st day of November, 2017.

ROY COOPER
Attorney General

By: Brenda Menard
Brenda Menard
Special Deputy Attorney General
N. C. State Bar No.: 35445
N.C. Department of Justice
Environmental Division
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6600
(919) 716-6766 (Fax)
bmenard@ncdoj.gov
FOR THE DEPARTMENT OF
ENVIRONMENTAL QUALITY

EXHIBIT LIST FOR THE DEPARTMENT OF ENVIRONMENTAL QUALITY

1. Partial Consent Order Entered September 8, 2017	Exhibit A
2. Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunctive Relief	Exhibit B
3. National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of North Carolina and the United States Environmental Protection Agency Region 4, Oct. 2007.	Exhibit C
4. 40 C.F.R. § 123.27	Exhibit D
5. Rule 24 of the North Carolina Rules of Civil Procedure	Exhibit E
6. Rule 24 of the Federal Rules of Civil Procedure	Exhibit F

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing BRIEF OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY was served on the following by depositing a copy in the United States Mail, first class, postage prepaid, addressed as follows, with a courtesy copy by electronic mail:

Linda Nelson, Esquire
2110 Buckingham Road
Raleigh, NC 27607
lfnelson82@gmail.com
Attorney for Col. Francis X. De Luca USMCR (Ret)

and served on the Environmental Management Commission, by electronic mail only to

Ms. Lois Thomas
Division of Water Resources
Clerk to the Environmental Management Commission
Archdale Building, 9th. Floor
512 N. Salisbury Street
Raleigh, N.C. 27604
lois.thomas@ncdenr.gov

This the 1st day of November, 2017.

Brenda Menard
Special Deputy Attorney General