

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

ENVIRONMENTAL MANAGEMENT  
COMMISSION

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In Re REQUEST FOR DECLARATORY )  
RULING by COL. FRANCIS X. DE )  
LUCA USMCR (RET) )  
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**DEQ’s Proposed Declaratory Ruling**

The Department of Environmental Quality (“DEQ”) hereby submits this Proposed Declaratory Ruling to the Environmental Management Commission (“Commission”) for its consideration.

THIS MATTER was heard before the Commission at its regularly scheduled meeting on November 9, 2017 in Raleigh, North Carolina. The matter involved the request for a declaratory ruling regarding the application of a certain statute and certain rules of the Commission to a given set of facts pursuant to N.C.G.S. § 150B-4. The request was made by Col. Francis X. De Luca USMCR (Ret) (“Petitioner”).

Pursuant to 15A NCAC 2I .0603, Petitioner and the Department of Environmental Quality (“DEQ”) were given the opportunity to submit written supporting memoranda and each made an oral presentation to the Commission at the November 9, 2017 meeting.

Upon review of the record documents and arguments, the Commission makes the following:

**FINDINGS OF FACT**

1. DEQ filed a civil action for injunctive relief on September 7, 2017 in Bladen County Superior Court against The Chemours Company FC, LLC, Case Number 17 CVS 580. The Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunctive Relief in that action is attached hereto as Exhibit A.
2. 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. The Partial Consent Order is attached hereto as Exhibit B.
3. In October of 2007 DEQ entered into a National Pollutant Discharge Elimination System (“NPDES”) Memorandum of Agreement with the United States Environmental Protection Agency Region 4 (“Memorandum of Agreement”). The Memorandum of Agreement is attached hereto as Exhibit C.

## CONCLUSIONS OF LAW

To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of law are Findings of Fact, they should be so considered without regard to the given labels.

1. The Commission is authorized to issue special orders by consent (“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).

2. DEQ has been directly vested with the authority to file civil actions for injunctive relief pursuant to N.C.G.S. § 143-215.6C. 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).

3. The Memorandum of Agreement is not a statute administered by the Commission, nor is it a “rule or order of the [Commission].” N.C.G.S. § 150B-4(a). Therefore, it is not subject to interpretation by the Commission through a declaratory ruling. However, in the event that the Commission’s position on the application of the Memorandum of Agreement is relevant to any later proceedings, the Commission will address it herein.

4. Section III.A.6 of the Memorandum of Agreement requires DEQ to comply with 40 C.F.R. § 123.27 in any NPDES enforcement action. Pursuant to 40 C.F.R. § 123.27(d), the State must allow public participation in enforcement actions, including those for injunctive relief, through either:

- (1) Authority which allows intervention as of right in any civil or administrative action . . . by any citizen having an interest which is or may be adversely affected; or
- (2) Assurance that the State agency or enforcement authority will[, in relevant part]:
  - ...
  - (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

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).

5. 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.

6. Section IV of the Memorandum of Agreement requires public notice and comment for NPDES permits, not for judicially-approved consent orders.

7. The Memorandum of Agreement does not require that any consent orders or judgments entered into by DEQ in its civil actions for injunctive relief be subject to public notice and comment.

Based on the foregoing Findings of Fact and Conclusions of Law, the North Carolina Environmental Management Commission makes the following:

DECLARATORY RULING

- 1. The process and requirements for SOCs pursuant N.C.G.S. § 143-215.2 and 15A NCAC 2H .1200 to do not apply to injunctive actions instituted pursuant to N.C.G.S. § 143-215.6C.

This the \_\_\_\_ day of November, 2017.

ENVIRONMENTAL MANAGEMENT COMMISSION

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J. D. Solomon, Chairman