UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

WEST VIRGINIA RIVERS COALITION, INC.,

Plaintiff,

v. **Civil Action No. 2:24-cv-00701**

THE CHEMOURS COMPANY FC, LLC,

Defendant.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

DEREK TEANEY
AMANDA DEMMERLE
APPALACHIAN MOUNTAIN ADVOCATES, INC.
P.O. Box 507
Lewisburg, WV 24901
Telephone: (304) 646-1182
Email: dteaney@appalmad.org
ademmerle@appalmad.org

JAMES M. HECKER
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, DC 20036
Telephone: (202) 797-8600
Email: jhecker@publicjustice.net

Counsel for Plaintiff

Table of Contents

INTRODUCTION

Defendant The Chemours Company FC, LLC ("Chemours") discharges wastewater containing per- and polyfluoroalkyl substances ("PFAS"), including hexafluoropropylene oxide dimer acid ("HFPO-DA," sometimes called "GenX"[1]) from its Washington Works Plant in Washington, West Virginia, into the Ohio River, a source of drinking water for millions of people. PFAS, like HFPO-DA, are called "forever chemicals" because of their prolonged persistence in the environment. Ctr. for Env't Health v. Regan, 103 F.4th 1027, 1031 (4th Cir. 2024); see also 89 Fed. Reg. 32532, 32557 (Apr. 26, 2024) ("HFPO-DA is environmentally persistent."). PFAS, including HFPO-DA, are toxic to human health. Id. at 32544. Individuals can be exposed to PFAS in drinking water. Id. at 32543. The U.S. Environmental Protection Agency ("EPA") has established extremely low standards for PFAS concentrations in drinking water, with the HFPO-DA limit set at 10 parts per trillion ("ppt"). Id. at 32532.

Chemours is violating its discharge limits in its current Clean Water Act ("CWA") permit for the Washington Works Plant for several chemicals, including HFPO-DA, by large amounts. In November 2024, Chemours exceeded its average monthly HFPO-DA limit at Outlets 002 and 005 by 454% and 166%, respectively. Ex. 1 at 12–13. That pollution spike was so large that it was noticeable approximately 270 river miles downstream in Cincinnati's drinking water intake—a system which serves over a million people. Ex. 2. Chemours admits that its current treatment system is incapable of ensuring permit compliance and has asked the West Virginia Department of Environmental Protection ("WVDEP") and EPA to give it a three-year compliance schedule to upgrade that system. Ex. 3 at 1–2 (Chemours 2024 Permit App. Att. 25); Ex. 4 at 24 tbl. 10 (Att. 25c). The schedule would

[1] EPA acknowledges that GenX and HFPO-DA are interchangeable terms. See 88 Fed. Reg. 18638, 18643 (Mar. 29, 2023) ("EPA is issuing a preliminary regulatory determination to regulate . . . hexafluoropropylene oxide dimer acid (HFPO–DA) and its ammonium salt (also known as a GenX chemicals).").

begin on the effective date of its new permit, which WVDEP has not yet even drafted. Ex. 4 at 24. It took WVDEP ten years to reissue this permit the last time it expired. Compare Ex. 5 (2003 permit with 2008 expiration date) with Ex. 6 at 12 (2018 permit renewal). In effect, then, such a schedule would allow Chemours to maintain its full manufacturing output and continue violating its permit limits for toxic HFPO-DA for at least three years, and likely for many more. To remedy this unconscionable delay in treatment, while at the same time avoiding any potential conflict with the planned treatment upgrade, Plaintiff asks the Court to issue a preliminary injunction granting a limited form of interim relief to protect the public from additional PFAS exposure.

Chemours's permit provides that "[i]t shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit." Ex. 6 at 97 (Appx. A, Part II.2). Federal regulations contain the same language. 40 C.F.R. § 122.41(c). Chemours's process wastewater discharges at Outlets 002 and 005 are a major contributor of the HFPO-DA in its discharges, and usage of that chemical is under Chemours's control and proportional to amount of fluoropolymers the plant produces. This Court should therefore prohibit Chemours from violating its permit limits for HFPO-DA at Outlets 002 and 005 by any means necessary, including (1) cutting back the production that generates process wastewater containing HFPO-DA, and/or (2) sending process wastewater off-site for disposal by deep-well injection or incineration, as Chemours does for its PFAS-contaminated wastewater at its Fayetteville, NC plant.[2] West Virginians deserve no less protection from PFAS than do North Carolinians. Without an injunction, Chemours will effectively have an unlimited license to pollute the Ohio River and downstream drinking water indefinitely.

[2] EPA, Multi-Industry Per- and Polyfluoroalkyl Substances (PFAS) Study –2021 Preliminary Report at 5-5, available at https://www.epa.gov/system/files/documents/2021-09/multi-industry-pfas-study_preliminary-2021-report_508_2021.09.08.pdf (also attached as Ex. 7).

STATUTORY BACKGROUND

The CWA prohibits any person from discharging any pollutant without specific authorization. 33 U.S.C. § 1311(a). The purpose of the CWA is to "restore and maintain the . . . integrity of the Nation's waters." County of Maui v. Haw. Wildlife Fund, 590 U.S. 165, 170 (2020) (citation omitted). The CWA does this "by insisting that a person wishing to discharge any pollution into navigable waters first obtain EPA's permission to do so." Id. (citations omitted). Under the CWA, permittees who violate their National Pollutant Discharge Elimination System ("NPDES") permits are subject to federal and state enforcement action. 33 U.S.C. §§ 1319, 1342(b)(7). In addition, citizens may sue any person who violates any term or condition in an NPDES permit, subject to two limitations. Id. §§ 1365(a)(1), (f)(6). First, the citizen must give 60 days' advance notice of his intent to file suit to EPA, the State, and the violator. Id. § 1365(b)(1)(A). Second, a citizen may not sue if EPA or the State bring certain types of judicial or administrative enforcement actions. Id. §§ 1365(b)(1)(B), 1319(g)(6)(A). Assuming those limitations are satisfied, citizens can seek both injunctive relief from the district court and civil penalties from the polluter.

STATEMENT OF FACTS

Chemours holds WV/NPDES Permit Number WV0001279, which regulates discharges into the Ohio River from its Washington Works Plant in Washington, West Virginia. Ex. 6. That permit was reissued in 2018, has been administratively extended since 2023, and is still in effect. Ex. 8. In the fact sheet accompanying that permit, WVDEP stated that "Outlets 002 and 005 in WV/NPDES Permit No. WV0001279 contain the process wastewaters associated with the HFPO-DA compound and the previously used PFOA compound." Ex. 9 at 14. WVDEP further explained that it was basing the HFPO-DA permit limits on a drinking water health goal of 140 ppt "to be protective of the State's narrative water quality criteria for human health and the designated uses of the Ohio River." Id. at 15.

In the second half of 2024, Chemours consistently violated its average permit limit for HFPO-DA at Outlets 002 and 005, as shown by its DMRs (Ex. 1) and Chemours's own admissions (Ex. 10). Those violations are summarized in the following table:

Month	Outlet	Limit (ug/l)	DMR (ug/l)	% Limit
May	002	1.4	2.63	88
June	002	1.4	1.47	5
July	002	1.4	1.47	5
Aug	002	1.4	1.79	28
Nov	002	1.4	7.76	454
Dec	002	1.4	2.05	46
*	*	*	*	*
July	005	1.1	1.36	24
Aug	005	1.1	2.09	90
Sept	005	1.1	1.52	38
Oct	005	1.1	1.43	30
Nov	005	1.1	2.93	166
Dec	005	1.1	2.55	132

The Greater Cincinnati Water Works ("GCWW") utility, which supplies drinking water to 1.1 million customers and is 270 river miles downstream from Chemours's outlets on the Ohio River,[3] has detected increased levels of HFPO-DA in every intake sample since July 2024, with concentrations as high as 17 ppt. Ex. 2 ¶ 7 (Swertfeger Decl.). Those increased concentrations correspond to increased Chemours HFPO-DA discharges during that same time period. Id. ¶ 10, figs. 1–2. GWCC's treatment system is much less effective at removing HFPO-DA than other PFAS, and GWCC is concerned that the increase in HFPO-DA discharges "may present an increased public health risk to communities . . . that utilize the Ohio River as the source of their drinking water." Id. ¶¶ 11–12. Louisville, which is

[3] Chemours's Outlets 002 and 005 are at Ohio River Mile 190.2 and 190.8, respectively. Ex. 6 at 1. Cincinnati's drinking water intake is at River Mile 460. See ORSANCO, Assessment of Ohio River Water Quality Conditions at 27 (Mar. 2022), available at https://www.orsanco.org/wp-content/uploads/2016/07/ORSANCO_2022_305b_Report.pdf (also attached as Ex. 11).

over 400 river miles downstream,[4] has experienced a similar increase in HFPO-DA levels in the fourth quarter of 2024, with levels reaching 52 ppt at one point in December. See Ex. 12 (Goodmann Decl.). Louisville has also attributed the increase in HFPO-DA concentrations in the Ohio River at its intake to Chemours's discharges. Id. ¶¶ 8–9.

In its December 2024 application for a renewed and modified NPDES permit, Chemours states that it plans to upgrade its wastewater treatment systems to reduce its maximum permissible discharges of HFPO-DA from 225 pounds a year to 74 pounds a year. Ex. 13 at 6 tbl. 4 (Att. 25b); Ex. 14 at 9 (Att. 25f). As a part of that application, Chemours submitted the following mass loading analysis of its HFPO-DA discharges:

Table 4. Allowable Permitted Site Loading by Outlet

Outlet	Existing 95th Monthly Average Flow (MGD)	Current HFPO-DA AML (ng/L)	Current PFOA AML (ng/L)	Permitted HFPO-DA Load (lbs/yr)	Permitted PFOA Load (lbs/yr)
005	50	1,100	300	168	46
002	6.4	1,400	2,000	27	39
007	1.8	1,400[1]	2,000[1]	7.7	11
003	4.4	1,400[1]	2,000	19	27
011	0.018	33,000[3]	600[3]	1.8	0.03
001	0.19	1,400	2,000	0.85	1.2
006	0.10	140	70[2]	0.043	0.021
030, 031, 032, 033, 034, 036, 016, 019	0.018	7,500[3]	930[3]	0.42	0.051
022, 023, 025	0.048	990[3]	280[3]	0.14	0.041
Total	**63**	-	-	**225**	**124**

Ex. 13 at 6 tbl. 4. According to that analysis, Outlets 002 and 005 comprise most of the average discharge flow from the plant—56.4 million gallons per day ("MGD") out of a total of 63 MGD, or 89.5%. Id. Those two outlets are also responsible for most of the permitted loading of HFPO-DA that can be discharged from the plant—195 pounds out of the total of 225 pounds, or 86.7%. Id.

Within those two outfalls, process water comprises 4.6 MGD of the 56.4 MGD, or 8.2%. Ex. 13 at 4 tbl. 3. As shown in the table below, that process water contributes an average of 75.6

[4] Louisville's drinking water intake is at River Mile 600. See Ex. 11 at 27.

pounds/year of the total loading of 195 pounds/year of HFPO-DA, or 38.8%. Thus, this small amount of process water contains a relatively large portion of the total HFPO-DA that Chemours discharges. Those facts are shown by the following excerpts from Attachment 25b, Table 3:

Flow Stream	**95th Percentile Flow (mgd)**	**HFPO-DA Existing Load (lbs/yr)**	**PFOA Existing Load (lbs/yr)**
Bldg. 162 Targeted Process (process wastewater)	0.07	0.6	0.1
B514 W9 Line 1 (process wastewater)	0.2	3.5	0.0
Monomer Neut. Tank (process wastewater)	0.2	1.7	0.3
Dryer Belt Wash Water (process wastewater)	0.3	0.5	0.0
Other Process Water	2.0	3.9	1.7
B22 Sump (process wastewater)	0.06	38	0.2
Granular Sump (process wastewater)	0.16	16.9	0.1
B184 Sump (process wastewater)	0.16	2.8	0.0
FP KO Pot (process wastewater)	0.0	2.7	0.0
W9 Permeate (process wastewater)	0.26	4.0	0.0
Other Process Water	1.2	1.0	8.0
Total	**4.6**	**75.6**	**10.4**

Ex. 13 at 4 tbl. 3.

Chemours uses HFPO-DA to manufacture fluoropolymers:

> Chemours uses HFPO-DA and its ammonium salt as a patented polymerization aid in the manufacture of fluoropolymers. . . . HFPO-Dimer Acid is an aid used in the fluoropolymer manufacturing process to reduce the surface tension in the process, allowing the polymer particles to grow larger. The process is completed through heating or chemical treatment to remove residual HFPO-Dimer Acid (polymerization aid). The majority of the HFPO-Dimer Acid is then recovered and recycled for use in subsequent fluoropolymer polymerization processes. . . . HFPO-Dimer Acid is a critical part of the manufacturing process for Chemours' fluoropolymers.

Ex. 15. Thus, Chemours can control how much HFPO-DA it uses and how much it recovers. By reducing the amount of fluoropolymers that it manufactures, Chemours could simultaneously reduce its use of HFPO-DA, thereby also reducing discharges of that chemical to the Ohio River. Eliminating

or reducing the load of HFPO-DA in process water flowing to Outlets 002 and 005 would significantly reduce the overall amount of HFPO-DA discharged by the Plant.[5]

The remaining HFPO-DA discharged by Chemours is contained in stormwater discharges that are related to the amount of rain falling on the site. Possible interim reductions in stormwater contributions may need further investigation. But the process wastewater discharges are entirely within Chemours's control. That water is generated by its manufacturing processes and can be reduced or eliminated until those upgrades are completed, either by reducing production or sending the water off-site for disposal, as Chemours does at its Fayetteville, NC plant.[6]

EPA issued an Administrative Order on Consent ("AOC") in April 2023 against Chemours Washington Works for its PFAS discharges in violation of the CWA. Ex. 18. That AOC did not impose any penalties but required, among other things, that Chemours submit a compliance plan within 120 days. Id. Chemours timely submitted its proposed plan, Ex. 16, but a year later EPA still had not approved it and PFAS violations were continuing. As a result, Plaintiff notified Chemours, WVDEP, and EPA in April 2024 that it intended to file a citizen suit. Plaintiff then learned that EPA and Chemours were engaging in settlement discussions. But with no resolution to that process in

[5] In 2024, Chemours constructed a treatment system expected to remove 99% of the HFPO-DA loading from its Building 22 ("B22"), which it estimates to be 38 pounds per year. Ex. 3 at 3; Ex. 13 at 4; Ex. 4 at 11. But even when operational, the B22 System will not be sufficient to achieve permit compliance by itself. Ex. 16 at 31.

[6] According to EPA, Chemours's Washington Works is one of six U.S. facilities that manufacture PFAS. See Ex. 7 at 5-3. That plant manufactures fluoropolymers and fluorotelomers. Id. At its Fayetteville, NC plant, which also manufactures PFAS, Chemours captures and disposes of all of its PFAS-contaminated process water off-site by deep well injection or incineration. Id. at 5-5. In its Consent Order Progress Report for Fourth Quarter 2024 for that plant, Chemours stated that "Chemours does not discharge its process wastewater and instead collects and ships its process wastewater offsite for disposal or recycles treated water internally within several manufacturing processes." Chemours, Consent Order Progress Report For Fourth Quarter 2024 at 5, available at https://www.chemours.com/en/-/media/files/corporate/fayetteville-works/28_ncdeq_4q2024-quarterly-co-progress-report_01232025.pdf?rev=b8f936cd299c4af982662f66ee28d5b1&hash=5F41AF406CA64CCAFA2C5D1E3AE40904 (also attached as Ex. 17).

December 2024, Plaintiffs filed this action. After doing so, Plaintiff learned that Chemours sought a three-year compliance schedule in its new permit application, Ex. 4 at 24, the Biden EPA rejected Chemours's April 2023 proposed compliance plan, Ex. 19, and the Trump EPA froze all environmental enforcement actions. Plaintiff also learned that Louisville and Cincinnati have recently begun detecting Chemours's HFPO-DA discharges downstream in their drinking water intakes such that their source water exceeds the 10 ppt drinking water standard set by EPA. Exs. 2, 12. In light of those alarming developments, a preliminary injunction is necessary.

ARGUMENT

I. Plaintiffs Have Standing to Sue

Section 505(g) of the CWA authorizes the filing of a citizen suit by "any person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). This provision confers standing to the limits of the U.S. Constitution. PIRG v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 70 n.3 (3d Cir. 1990); see also Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 16 (1981). To have constitutional standing, a plaintiff must suffer an actual or threatened injury-in-fact that is fairly traceable to the challenged action by the defendant and is likely to be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000).

A. Plaintiff's Member Has Suffered an Actual or Threatened Injury in Fact

Environmental plaintiffs satisfy constitutional standing requirements when their members have suffered an injury to their aesthetic, health, environmental or recreational interests. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 154 (4th Cir. 2000); see also Laidlaw, 528 U.S. at 183. A threatened injury is sufficient. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013). Plaintiff's member Charlise Robinson obtains her household domestic water from the Lubeck Public Service District water system, which is downstream from Chemours's plant. Ex. 20 ¶¶ 4, 7

(Robinson Decl.). Since 2018, she has refrained from drinking and cooking with that water, but uses it to a limited extent for brushing her teeth and cleaning. Id. ¶¶ 16–17. In its permit application, Chemours used Lubeck as the compliance point to define its proposing mixing zone and protect public drinking water. Ex. 3 at 5; Ex. 21 at 2–3 (Attachment 25d). Ms. Robinson is suffering ongoing and threatened injury from past and continuing exposure to PFAS in her household water from Chemours's unlawful discharges.

B. Plaintiff's Member's Injuries Are "Fairly Traceable" to Defendant's Conduct

To satisfy the traceability prong, the Fourth Circuit has explained that "a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kind of injuries alleged in the specific geographic area of concern." Gaston Copper, 204 F.3d at 161 (internal quotation marks omitted). As this Court has recognized, the traceability prong for standing is met when plaintiff's member claims that her injuries result from excessive pollutants in the same stream into which defendant discharges those pollutants. OVEC v. Marfork Coal, No. 5:12-cv-1464, 2013 WL 4509601, at *5 (S.D. W. Va. Aug. 23, 2013). Ms. Robinson's injuries are fairly traceable to Chemours's excessive HFPO-DA discharges into the Ohio River because Chemours admits that its HFPO-DA treatment and compliance strategy is designed to protect Lubeck's public water supply downstream from those discharges. Ex. 3 at 5; Ex. 21 at 2–3.

C. Plaintiff's Member's Injuries Are Redressable by a Favorable Ruling from This Court

An environmental plaintiff satisfies the redressability prong of standing when it shows that it is likely that injunctive relief will remedy its injury. Gaston Copper, 204 F.3d at 154. Importantly, however, it need not show that an injunction would restore the watershed to a pristine state. OVEC v. Hobet Mining, LLC, 702 F. Supp. 2d 644, 652 (S.D. W. Va. 2010) (citing Student Pub. Int. Rsch. Grp. of N.J., Inc. v. Ga.-Pac. Corp., 615 F. Supp. 1419, 1424 (D.N.J. 1985)). It is enough that the risk of injury is reduced. Massachusetts v. EPA, 549 U.S. 497, 521 (2007). Plaintiff satisfies the

redressability requirement because reducing HDPO-DA in Chemours's discharges will reduce the risk of exposure to that chemical in its member's household water.

D. Plaintiff Has Representational Standing to Sue on Behalf of Its Member

An organization has representational standing when (1) at least one of its members would have standing to sue in his or her own right, (2) the organization's purpose is germane to the interests it seeks to protect, and (3) there is no need for the direct participation of the individual members in the action. Gaston Copper, 204 F.3d at 155. Charlise Robinson is a member of the West Virginia Rivers Coalition ("WVRC"). Ex. 20. The action is germane to WVRC's purposes. Id. Lastly, because this action is one for injunctive and declaratory relief and not for monetary damages, individual members are not required to participate in the action. PIRG, 913 F.2d at 70; OVEC v. Fola Coal Co., 274 F. Supp. 3d 378, 387 (S.D. W. Va. 2017).

II. This Court Has Subject Matter Jurisdiction Over Chemours's Permit Violations

Plaintiff also satisfies the jurisdictional prerequisites for the commencement and prosecution of a citizen suit against Chemours for its CWA violations. Plaintiff sent the required 60-day notice letter in April 2024 (Ex. 22) and waited more than 60 days thereafter to file suit in December 2024 (ECF No. 1). See 33 U.S.C. § 1365(b)(1)(A). No federal or state agency has filed a judicial action against Chemours for the same violations. Ex. 23 (Demmerle Decl.). EPA's April 2023 AOC against Chemours does not meet the requirements for preclusion under § 1319(g)(6) of the CWA because it did not impose any penalties. See United States v. Smithfield Foods, Inc., 191 F.3d 516, 526 (4th Cir. 1999); Sierra Club v. Powellton Coal Co., 662 F. Supp. 2d 514, 523–31 (S.D. W. Va. 2009); Save Our Bays & Beaches v. City & County of Honolulu, 904 F. Supp. 1098, 1128–29 (D. Haw. 1994).

Furthermore, Plaintiff satisfies the jurisdictional standard set forth in Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, 484 U.S. 49 (1987). In that case, the Supreme Court held that, to invoke the jurisdiction of the federal courts, citizen plaintiffs must "allege a state of either

continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." Id. at 57. On remand from the Supreme Court in Gwaltney, the Fourth Circuit held that the plaintiffs could establish jurisdiction under this standard "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." 844 F.2d 170, 171–72 (4th Cir. 1988).

Plaintiff filed its complaint on December 5, 2024. ECF No. 1. The DMR for that month shows both average and daily maximum limit violations for HFPO-DA at Outlets 002 and 005. Ex. 1 at 14–16. The sampling that establishes those violations occurred on December 5 and 19, 2024. Ex. 10 at 19. The DMR for January 2025 also shows average and daily maximum limit violations for HFPO-DA at Outlet 005. Ex. 1 at 17. The first Gwaltney test is therefore satisfied and this Court has subject matter jurisdiction over Chemours's HFPO-DA violations.

III. This Court Should Enjoin Chemours's Ongoing Violations of the Clean Water Act

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009). All four factors are satisfied here.

A. Plaintiff Is Likely to Succeed on the Merits

Section 505(a)(1) of the CWA authorizes citizens to bring suit for violation of any "effluent standard or limitation." 33 U.S.C. § 1365(a). Section 505(f)(7), in turn, defines "effluent standard or limitation" to include "a permit or condition thereof issued under Section 402." Id. § 1365(f)(7). The Court has the power to require compliance with those permit conditions. Id. § 1365(a).

Enforcement of the CWA is "intentionally straightforward." OVEC v. Bluestone Coal Corp., No. 1:19-cv-576, 2020 WL 4284804, at *5 (S.D. W. Va. July 27, 2020) (internal quotation omitted).

The CWA's legislative history shows that Congress intended to expedite enforcement actions, such as this one. The Senate report on the 1972 CWA stated that "[e]nforcement of violations of requirements of this Act should be based on a minimum of discretionary decisionmaking or delay" and that "the issue before the courts would be a factual one of whether there had been compliance." S. Rep. No. 414, 92nd Cong., 2nd Sess. (1972) at 64, 80 reprinted in 1972 U.S. Code Cong. & Ad. News at 3730, 3746.

The CWA achieves the goal of expedited enforcement in two ways. First, it places the burden of measuring and reporting pollutant levels on permit holders. See, e.g., Powellton Coal Co., 662 F. Supp. 2d at 516. Enforcement is thus made easy and inexpensive because evidence of violations must be compiled and documented by the permit holders themselves. Bluestone Coal, 2020 WL 4284804, at *5 (internal citation omitted). Second, the CWA imposes strict liability for permit violations. See, e.g., Sierra Club v. W. Va. Dep't of Env't Prot., 64 F.4th 487, 503 (4th Cir. 2023). A discharger's culpability or good faith does not excuse a violation. United States v. CPS Chem. Co., 779 F. Supp. 437, 442 (E.D. Ark. 1991). Consequently, a violation of a permit requirement by a discharger is an automatic violation of the CWA. PIRG v. Rice, 774 F. Supp. 317, 325 (D.N.J. 1991). When determining liability under the CWA, "[a]ll the court . . . is called upon to do is compare the allowable quantities of pollution listed in the permits with the available statistics on actual pollution.'" OVEC v. Hobet Min., LLC, 723 F. Supp. 2d 886, 896 (S.D. W. Va. 2010).

As established above, Chemours has reported violating its permit limits for HFPO-DA at Outlets 002 and 005 throughout 2024 and at Outlet 005 in January 2025. Exs. 1, 10. DMRs are binding admissions that may be used to establish liability under the CWA. Hobet Min., 723 F. Supp. 2d at 923. Consequently, Plaintiff is all-but-certain to succeed on its claim that Chemours's HFPO-DA exceedances are violations of its NPDES permit and the CWA.

B. Plaintiff and the Environment Are Likely to Suffer Irreparable Harm If a Preliminary Injunction Is Not Granted

Plaintiff and the environment are likely to suffer irreparable harm without a preliminary injunction. Because Congress has expressly granted citizens a right of action to enforce the CWA and Plaintiff has shown "a distinct and palpable injury," Plaintiff "may invoke the general public interest in support of their claim." Warth v. Seldin, 422 U.S. 490, 501 (1975). Here, Plaintiff is protecting the general public interest in the Ohio River and clean drinking water. See Powell Duffryn, 913 F.2d at 73.

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987); see also Sierra Club v. U.S. Army Corps of Eng'rs, 981 F.3d 251, 264 (4th Cir. 2020) (same). PFAS are "long duration" pollutants. EPA has explained that "PFAS tend to break down slowly and persist in the environment, and consequently, they can accumulate in the environment . . . over time." 89 Fed. Reg. at 32532. As the Fourth Circuit has recognized, they are "known as forever chemicals." Regan, 103 F.4th at 1031. That characteristic of persistence applies to HFPO-DA—EPA specifically found that HFPO-DA has "similar persistence in the environment as longer chain PFAS, such as PFOA and PFOS."[7] Chemours, too, admits that "HFPO-DA . . . has been documented to persist in the environment."[8] Additionally, EPA found that HFPO-DA is "more mobile than longer chain PFAS, leading to the potential to result in exposure at greater distances than legacy PFAS in off-site transport or in ground water." Ex. 24 at 2.

EPA has also explained the serious danger that PFAS exposure poses to human health:

---

[7] EPA, Human Health Toxicity Assessment for GenX Chemicals Fact Sheet at 2(Mar. 2023), available at https://www.epa.gov/system/files/documents/2023-03/GenX-Toxicity-Assessment-factsheet-March-2023-update.pdf (also attached as Ex. 24).

[8] Chemours, Submission of Site Associated PFAS Fate and Transport Study Pursuant to Consent Order Paragraph 27 at 10 (June 24, 2019) (attached as Ex. 25)

> The adverse health effects associated with exposure to such PFAS include (but are not limited to): effects on the liver (e.g., liver cell death), growth and development (e.g., low birth weight), hormone levels, kidney, the immune system (reduced response to vaccines), lipid levels (e.g., high cholesterol), the nervous system, and reproduction, as well as increased risk of certain types of cancer.

89 Fed. Reg. at 32537. EPA found similar effects from HFPO-DA exposure specifically, including "health effects . . . on the liver, kidneys, the immune system, [and] development of offspring" with the liver being especially vulnerable to HFPO-DA exposure. Ex. 24 at 2. EPA believed "there [wa]s sufficient evidence to list the HFPO-DA . . . on the [Toxics Release Inventory] pursuant to EPCRA section 313(d)(2)(B)(ii) for serious or irreversible reproductive dysfunctions and other chronic effects on the liver, development, hematological system, and immune system after oral exposure." 89 Fed. Reg. 81776, 81785 (Oct. 8, 2024). Moreover, the West Virginia State Legislature has also recognized that PFAS, including HFPO-DA, "are known to cause … adverse health effects." W. Va. Code § 22-11C-1(a)(1).

By Chemours's own admissions, it is discharging excessive amounts of HFPO-DA into the Ohio River and will be for at least the next three years. Exs. 1, 3, 4, 10. HFPO-DA contamination is the quintessential example of harm "of long duration, i.e. irreparable" (Amoco, 480 U.S. at 545), since it lasts "forever." Courts have found irreparable harm in similar circumstances. See, e.g., Idaho Conservation League v. Atlanta Gold Corp., 879 F. Supp. 2d 1148, 1158–60 (D. Idaho 2012) (finding likelihood of irreparable harm from the discharge of "water containing arsenic in amounts well in excess of applicable effluent limitations"); PIRG v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1168 (D.N.J. 1989), aff'd in relevant part, 913 F.2d 64 (3d Cir. 1990). This Court found irreparable harm sufficient to issue an injunction when a mining company was continually violating its limits for toxic selenium, which "contribut[ed] to the degradation of" the watershed. Hobet Min., 723 F. Supp. 2d at 924–25. The same is true here—Chemours is continually violating its limits for HFPO-DA, which EPA and West Virginia acknowledge is a toxic substance. Further, WVDEP set the current

permit limit for HFPO-DA at a level necessary to protect drinking water from the Ohio River and public health. Ex. 9 at 15. Consequently, violations of that limit will cause irreparable harm to the designated use of the Ohio River as a water source for Plaintiff's member and the public at large who use downstream public water systems along the Ohio River.

Chemours's violations of its HFPO-DA limits under the CWA also threaten to make it more difficult and expensive for municipalities to comply with EPA's maximum contaminant level ("MCL") under the Safe Drinking Water Act of 10 ppt for HFPO-DA concentrations in drinking water. See generally 89 Fed. Reg. at 32532. The EPA determined that "people who drink water containing HFPO-DA in excess of the MCL over many years may have increased health risks," like the ones discussed above. See id. at 32620.

Untreated source water from the Ohio River is already close to exceeding or actually exceeding the MCL for HFPO-DA. For instance, in September 2022, Chemours measured HFPO-DA at 14 ppt just upstream of the Lubeck Public Service District's drinking water facility. Ex. 26. In 2023, the Little Hocking Water Association, whose source water is infiltrated by the Ohio River, detected HFPO-DA in its wellfield (before the water enters its treatment system) and found that those levels "have increased over ten-fold since [their] initial detection" in 2018. Ex. 27 at 7. Since the 2018 measurement was 32 ppt, the 2024 measurement was more than 320 ppt, or more than 32 times higher than what EPA has determined is safe.[9] In addition, since July 2024, there is evidence of elevated HFPO-DA levels up to 52 ppt in drinking water intakes in the Ohio River over 270 and 400 miles downstream in Cincinnati and Louisville, respectively. Exs. 2, 12. Such elevated levels of HFPO-DA in source drinking water (before treatment) also indicate that irreparable harm is likely. See Atlanta Gold Corp.,

[9] According to a publicly available EPA document, in 2018, the untreated source water at the Little Hocking Water Association had HPFO-DA levels of 32 ppt. Ex. 28. Little Hocking's treated water is currently below the 10 ppt MCL but only because it uses an expensive granulated activiated carbon ("GAC") system. Ex. 27.

879 F. Supp. 2d at 1158–60 (finding sufficient harm to issue an injunction when there is a "significant possibility that harm to human health may result if the discharges continue unabated" and even if "municipal suppliers eventually remove the toxins from the water before it enters household taps."); see also United States v. Hartsell, 127 F.3d 343, 351–52 (4th Cir. 1997) (explaining that the CWA reasonably imposes more stringent limits than those under the SDWA because "the regulated pollutants [under the CWA] could harm waterways and aquatic life, and could introduce chemicals which hamper treatment facilities' ability to treat waste water, even at levels where they might not directly harm humans.").

C. The Balance of Equities Favors Plaintiff

"If [irreparable] injury is sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco, 480 U.S. at 545, cited in S.C. Dep't of Wildlife & Marine Res. v. Marsh, 866 F.2d 97, 100 (4th Cir. 1989). Chemours's HFPO-DA permit limit is based on protecting water quality standards and drinking water uses along the Ohio River. Ex. 9 at 15.[10] Achieving water quality standards is "one of the [CWA's] central objectives." Arkansas v. Oklahoma, 503 U.S. 91, 106 (1992). This Court has found that protecting water uses "is the overriding purpose of West Virginia's water quality standards and the goal of the state's permit requirements." OVEC v. Elk Run Coal Co., 24 F. Supp. 3d 532, 579 (S.D. W. Va. 2014).

Accordingly, the irreparable harm that would result from allowing Defendant to continue to discharge unlawful concentrations of HFPO-DA into the Ohio River outweighs any financial loss that Defendant might incur from compliance with an injunction from this Court. "Mere injuries, however substantial, in terms of money," are rarely cognizable in the equitable balance. See Roe v. Dep't of Def., 947 F.3d 207, 228 (4th Cir. 2020) (cleaned up). "Harm to environment outweighs a defendant's

[10] WVDEP set these limits based on a now-outdated 140 ppt standard for drinking water. Ex. 9 at 14. Thus, Chemours' violations of its 2018 permit limits are particularly concerning in light of the much lower 10 ppt standard set by EPA in 2024 for HFPO-DA in drinking water.

financial interests, particularly where violations are of a longstanding and continual nature." Atlanta Gold Corp., 879 F. Supp. 2d at 1161–62 (CWA citizen suit). As established above, Chemours's HFPO-DA violations are longstanding and continuing. In balancing the equities, financial harms are less important because "[m]oney can be earned, lost, and earned again." OVEC v. U.S. Army Corps of Eng'rs, 528 F. Supp. 2d 625, 632 (S.D. W. Va. 2007). When it enacted the CWA, Congress made the clear choice in favor of protecting the environment even where industry's "capacity to comply would be stretched to the limit." 1972 U.S. Code Cong. & Admin. News at 3711. Congress anticipated that compliance "would cause economic hardship and plant closings." Student Pub. Int. Rsch. Grp. of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528, 1537 (D.N.J. 1984), aff'd, 759 F.2d 1131 (3d Cir. 1985). Accordingly, Congress decided that compliance with water quality based effluent limitations is required regardless of cost. See U.S. Steel Corp. v. Train, 556 F.2d 822, 838 (7th Cir. 1977); OVEC v. Apogee Coal Co., 555 F. Supp. 2d 640, 649 (S.D. W. Va. 2008); cf. United States v. Mun. Auth. of Union Twp., 150 F.3d 259, 266 (3d Cir. 1998) (upholding court order requiring polluter to disgorge profits made from failing to reduce production to comply with CWA permit).

Consistent with this Congressional determination, EPA's NPDES regulations provide that "[i]t shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit." 40 C.F.R. § 122.41(c). Chemours's permit echoes that same language. Ex. 6 at 97 (Appx. A, Part II.2). The Court therefore cannot consider Chemours's economic loss, if any, if it has to halt or reduce production to comply with its permit.

Moreover, a violator's failure to close its plant or slow its production "in the face of undisputed knowledge that continued operation would result in continued violations, reflects a certain degree of willfulness" with respect to its NPDES permit noncompliance. Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1561 (E.D. Va. 1985), aff'd sub nom. 791 F.2d 304 (4th Cir.

1986), vacated, 484 U.S. 49 (1987). "[I]f a regulated entity is incapable of operating in compliance with its permits, the 'one simple and straightforward way . . . to avoid paying civil penalties' is to 'cease[ ] operations until it [is] able to' do so." Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 824 F.3d 507, 526 (5th Cir. 2016) (quoting Atl. States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1141–42 (11th Cir. 1990)). Chemours has done the opposite—instead of reducing or ceasing production to come into compliance with its permit obligations, Chemours has recently increased production by adding a new finishing line with additional PFAS discharges into the Ohio River, Ex. 4 at 21,[11] and intends to add yet another additional line according to its December 2024 permit application, Ex. 3 at 8. Chemours has gotten itself into this position, and "[i]t would seem elementary that a party may not claim equity in his own defaults." Long v. Robinson, 432 F.2d 977, 981 (4th Cir. 1970). The balance of equities therefore favors Plaintiff.

D. A Preliminary Injunction Is in the Public Interest

Finally, this preliminary injunction is in the public interest. Protecting water quality is "a critical public interest that profoundly outweighs a company's bottom line." OVEC v. Fola Coal Co., No. 2:13-21588, 2016 WL 3190255, at *11 (S.D. W. Va. June 7, 2016) (citing Atlanta Gold Corp., 879 F. Supp. 2d at 62). Protecting human health is also undoubtedly in the public interest, and, as discussed above, HFPO-DA has dire human health consequences that downstream water systems are already grappling with. See Exs. 2, 12, 27.[12] But the "forever" nature of HFPO-DA also means that

[11] In December 2024, HFPO-DA concentrations at an internal monitoring point of the effluent from that new finishing line were as high as 132,000,000 ppt, which was only reduced to 25,500 ppt at another internal monitoring point after treatement with GAC. See Ex. 29 (DMRs from Outlets 118 and 108 for WV/NPDES Permit Number WV0117986).

[12] Although Little Hocking, Cincinnati, and Louisville are known to have HFPO-DA problems, at least 7 other public drinking water systems on the Ohio River between Parkersburg and Lousiville are also at risk—Huntington, WV; Ashland, KY; Ironton, OH; Russell, KY; Portsmouth, OH; Maysville, KY; and Northern Kentucky Water, KY. See Ex. 11 at 27.

Chemours's violations today could also have long-term human health consequences. Thus, preliminarily enjoining Chemours's conduct will protect the public downstream of Chemours until treatment is installed.

Furthermore, when it enacted the PFAS Protection Act, the West Virginia Legislature declared that "[i]t is in the public interest for West Virginia to reduce toxic chemicals such as PFAS chemicals in drinking water supplies to protect the health of West Virginians and strengthen the state's economy." W. Va. Code § 22-11C-1(a)(11).[13] Thus, the West Virginia Legislature has determined that reducing HFPO-DA discharges is in the public interest, both from a health and economic standpoint. That declaration is "well-nigh conclusive." Berman v. Parker, 348 U.S. 26, 32 (1954).

* * *

In sum, all four Real Truth factors support issuing preliminary injunctive relief requiring Chemours to comply with its HFPO-DA limits at Outlets 002 and 005 and eliminate its violations of West Virginia water quality standards.

IV. Only a Nominal Bond Should Be Required

Under Rule 65(c), the Court must fix a bond "in such sum as the court deems proper." The Fourth Circuit has held that a district court has discretion in setting the bond amount, and can even waive it, but "it is not free to disregard the bond requirement altogether." Pashby v. Delia, 709 F.3d 307, 332 (4th Cir. 2013). This Court has set bonds as low as $100. Sogefi USA, Inc. v. Interplex Sunbelt, Inc., 538 F. Supp. 3d 620, 631 (S.D. W. Va. 2021) (Chambers, J.) ($100); Ohio Valley Env't Coalition, Inc. v. U.S. Army Corps of Eng'rs, No. 3:11-cv-0149, 2011 WL 13161422, at *2 (S.D.W. Va. Mar. 9, 2011) (Chambers, J.) ($500); OVEC v. Bulen, No. 3:03-cv-2281, Dkt. No. 39 (S.D. W. Va. Apr. 6, 2004) (Goodwin, J.) ($100). And just last week the U.S. District Court for the District of

[13] The PFAS Protection Act defines "PFAS" to include HFPO-DA, id. § 22-11C-1(a)(1), and explains that PFAS are "known to cause . . . adverse health effects," id. § 22-11C-1(a)(5).

Maryland "set a nominal bond of zero dollars under Rule 65(c)." Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, No. 1:25-cv-00333-ABA, 2025 WL 573764, at *29 (D. Md. Feb. 21, 2025).

Congress empowered the public to enforce NPDES permits through injunctive relief. 33 U.S.C. § 1365(a). Placing a hurdle in the form of a more-than-nominal bond to equitable relief in such cases would be contrary to the public interest. See Moltan Co. v. Eagle-Picher Indus., Inc., 55 F.3d 1171, 1176 (6th Cir. 1995), cited in Pashby, 709 F.3d at 332; Div. No. 1, Detroit, Bhd. of Locomotive Eng'rs v. Consol. Rail Corp., 844 F.2d 1218, 1227 (6th Cir. 1988). Because Plaintiff brings this case in the public interest and to further Congress's express goals, the Court should require only a nominal bond of no more than $500.

CONCLUSION

For these reasons, the Court should issue a preliminary injunction that prohibits Chemours from violating its permit limits for HFPO-DA at Outlets 002 and 005 by any means necessary, including (1) reducing the production that generates process wastewater containing HFPO-DA, and/or (2) sending that wastewater off-site for disposal by deep-well injection or incineration.

DATED: February 25, 2025

Respectfully submitted,

/s/ Derek Teaney
DEREK TEANEY (WVBN 10223)
AMANDA DEMMERLE (WVBN 13930)
APPALACHIAN MOUNTAIN ADVOCATES, INC.
P.O. Box 507
Lewisburg, WV 24901
Telephone: (304) 646-1182
Email: dteaney@appalmad.org
ademmerle@appalmad.org

/s/ James M. Hecker
JAMES M. HECKER (PRO HAC VICE)
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, DC 20036
Telephone: (202) 797-8600
Email: jhecker@publicjustice.net

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

WEST VIRGINIA RIVERS COALITION, INC.,

Plaintiff,

v. **Civil Action No. 2:24-cv-00701**

THE CHEMOURS COMPANY FC, LLC,

Defendant.

CERTIFICATE OF SERVICE

I, Derek O. Teaney, do hereby certify that, on February 25, 2025, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF filing system, which will notify the following participants:

JAMES A. WALLS
SPILMAN THOMAS & BATTLE, PLLC
48 Donley Street, Suite 800
Morgantown, WV 26501
(304) 291-7920
jwalls@spillmanlaw.com

/s/ Derek O. Teaney
DEREK O. TEANEY (WVBN 10223)