ORAL ARGUMENT NOT YET SCHEDULED

Case No. 22-2287

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE CHEMOURS COMPANY FC, LCC,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petition for Review of Action by Environmental Protection Agency

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RESPONDENTS' MOTION TO DISMISS

Dated: September 15, 2022

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GLOSSARY

APA	Administrative Procedure Act
EPA	U.S. Environmental Protection Agency
GenX Chemicals	Hexafluoropropylene Oxide Dimer Acid and its Ammonium Salt
MCL	Maximum Contaminant Level
MCLG	Maximum Contaminant Level Goal
PFAS	Per- and Polyfluoroalkyl Substances
SDWA	Safe Drinking Water Act

Petitioner Chemours Company FC, LLC, presents the first ever challenge to a health advisory issued by the U.S. Environmental Protection Agency ("EPA") under the Safe Drinking Water Act ("SDWA"). This Court lacks jurisdiction over the petition for two independent reasons. First, "health advisories (which are not regulations)," 42 U.S.C. § 300g-1(b)(1)(F), are not subject to judicial review because they are not "final action," *id.* § 300j-7(a)(2). As its name suggests, a health advisory is merely advisory; it is an *informational* document imposing no obligations or legal consequences, and as such, it is not final agency action under *Bennett v. Spear*, 520 U.S. 154 (1997). Second, Chemours does not have standing to challenge EPA's health advisory for so-called "GenX chemicals." Chemours has not identified any injury supporting its standing, let alone one that is fairly traceable to EPA's publication of the GenX Advisory itself. The petition accordingly should be dismissed.

BACKGROUND

I. The Safe Drinking Water Act

Congress enacted the SDWA to protect the quality of the Nation's drinking water. The statute authorizes EPA to promulgate national primary drinking water regulations, which are enforceable standards that place limits on contaminants in public water systems. The SDWA also authorizes EPA to develop and disseminate information about *un*regulated contaminants to serve as a resource for the public.

In particular, several unregulated contaminants, including the GenX chemicals at issue in this case, must be monitored for their incidences in public water systems. Finally, the SDWA allows EPA to issue health advisories for contaminants that are not subject to regulation under the SDWA, like the health advisory for GenX chemicals challenged here. EPA has issued approximately 200 health advisories, which are purely informational documents that lack legal effect. The SDWA allows direct appellate review only of "final action[s]." 42 U.S.C. § 300j-7(a).

A. Regulated Contaminants Are Governed by Enforceable Standards.

The SDWA authorizes EPA to promulgate national primary drinking water standards to regulate contaminants in public water systems. 42 U.S.C. § 300g-1(b)(1)(E); *see also id.* § 300f(4), (6) (defining "public water system" and "contaminant," respectively). Congress prescribed the factors that EPA must consider when deciding whether to regulate a contaminant: whether its presence in drinking water may adversely affect human health, whether its frequency and level of incidence in public water systems poses a public health concern, and whether regulation under the SDWA can meaningfully address that concern. *Id.* § 300g-1(b)(1)(A), (b)(1)(B)(ii). The statute provides that a decision not to regulate a contaminant is "final agency action … subject to judicial review." *Id.* § 300g-1(b)(1)(B)(ii)(IV).

If EPA does decide to regulate a contaminant under the SDWA, the agency must establish a maximum contaminant level goal ("MCLG") and national primary drinking water regulation for that contaminant. *Id.* § 300g-1(a)(3), (b)(1)(A). An MCLG is a non-enforceable public health goal representing the level of a contaminant in drinking water below which "no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." *Id.* § 300g-1(b)(4)(A). MCLGs represent the best available science, and EPA must provide notice and opportunity for public comment on a proposed MCLG before issuing it. *Id.* § 300g-1(a)(3), (b)(3)(A). The SDWA specifically subjects MCLGs to judicial review. *Id.* § 300j-7(a)(1).

EPA establishes the national primary drinking water regulation for a contaminant simultaneously with the MCLG through notice-and-comment rulemaking. *Id.* § 300g-1(a)(3), (b)(1)(E). EPA typically sets these standards using the maximum contaminant level ("MCL"), defined as "the maximum permissible level of a contaminant in water which is delivered to any user of a public water system."[1] *Id.* § 300f(3); *see also id.* § 300g-1(b)(4)–(6). An MCL must be "as close to the [MCLG] as is feasible," considering cost and available technology. *Id.* § 300g-1(b)(4)(B), (D). National primary drinking water

[1] In certain circumstances, EPA may promulgate a standard requiring use of specific treatment techniques in lieu of establishing an MCL. 42 U.S.C. § 300g-1(b)(7).

regulations apply to and may be enforced against public water systems, *id.* § 300g-3(a), not companies like Chemours that do not operate public water systems. These regulations are final actions subject to judicial review. *See id.* § 300j-7(a)(1).

The SDWA does not preempt states from regulating drinking water or public water systems. *Id.* § 300g-3(e). Indeed, the statute instructs EPA to cede primary enforcement responsibility for public water systems to any state where EPA determines that the state laws meet certain minimum criteria, most notably adoption of standards for federally regulated contaminants that are no less stringent than EPA's national primary drinking water regulations. *Id.* § 300g-2(a). In making these findings, EPA simply determines whether a state has satisfied the statutory criteria. "[A] requirement of, or permit issued under, an applicable State program for which [EPA] has made [that] determination" is federally enforceable against public water systems. *Id.* § 300g-3(i)(4); *see also id.* § 300g-3(a)(1), (b).

B. GenX Chemicals and Certain Other Unregulated Contaminants Are Subject to Monitoring.

Congress instructed EPA to develop a program through which certain public water systems must monitor the incidence of a limited set of contaminants that EPA does *not* regulate under the SDWA. 42 U.S.C. § 300j-4(a)(2)(A), (B). The information gathered under this program, known as the Unregulated Contaminant Monitoring Rule ("Monitoring Rule"), is published in an agency database, *id.*

§ 300j-4(g)(1), that discloses the incidences of monitored contaminants, *id.* § 300j-4(g)(7), and later informs (but does not dictate) EPA's decision whether to regulate those contaminants, *id.* § 300j-4(g)(3). In 2019, Congress instructed EPA to add GenX chemicals and other unregulated per- and polyfluoroalkyl substances ("PFAS") to the list of unregulated contaminants covered by the Monitoring Rule. 15 U.S.C. § 8911(a). EPA did so in 2021, six months before publication of the health advisory challenged here. 86 Fed. Reg. 73131, 73134, 73141 (Dec. 27, 2021); 40 C.F.R. § 141.40(a)(3) tbl. 1.

C. EPA May Issue Health Advisories for Any Unregulated Contaminant.

The SDWA also provides that EPA "may publish health advisories (which are not regulations) or take other appropriate actions for contaminants not subject to any national primary drinking water regulation." 42 U.S.C. § 300g-1(b)(1)(F). EPA has issued health advisories for approximately 200 contaminants.[2] *See* EPA, 2018 Edition of the Drinking Water Standards and Health Advisories Tables, at 1–9 (Mar. 2018) ("2018 Tables"), https://www.epa.gov/system/files/documents/2022-01/dwtable2018.pdf. Health advisories "describe concentrations of drinking water contaminants at which adverse health effects are not anticipated to occur over specific exposure durations," along with information on a contaminant's

[2] To EPA's knowledge, none of these health advisories has previously been subject to judicial review.

characteristics, exposures, health risks, detection, and treatment techniques. 87 Fed. Reg. 36848, 36849 (June 21, 2022). Health advisories "primarily serve as information to drinking water systems and officials responsible for protecting public health." EPA, "Health Advisories Explained," https://www.epa.gov/sdwa/drinking-water-health-advisories-has.

A health advisory is not enforceable against anyone, and the statute does not require public water system managers or anyone else to take action of any kind upon its publication. A health advisory does not bind EPA in any future regulatory proceedings EPA may undertake for a contaminant. Likewise, health advisories (which EPA cannot issue for regulated contaminants) play no role in EPA's determination whether a state has met the SDWA's criteria to assume primary enforcement responsibility for public water systems. *See* 42 U.S.C. § 300g-2(a). The SDWA's sole reference to health advisories beyond authorizing their publication is a requirement (added in 2015) that EPA, as part of a one-time report to Congress on algal toxins, establish a schedule for determining whether to issue health advisories for those particular contaminants. *Id.* § 300j-19(a)(1)(D)(i).

EPA's regulations under the SDWA likewise refer to health advisories only once. In its rules governing the annual consumer confidence reports that community water systems must issue to customers, EPA "encourages" (but does not require) systems to report any monitoring results "which may indicate a health

concern," including any detection "above a proposed MCL or health advisory level." 40 C.F.R. § 141.153(e)(3). These reports are purely informational.

II. The GenX Advisory

In June of this year, EPA published notice in the Federal Register announcing the availability of health advisories for four PFAS chemicals. 87 Fed. Reg. at 36848. Chemours challenges only the advisory for hexafluoropropylene oxide dimer acid and its ammonium salt, together commonly known as "GenX chemicals."[3] EPA, Drinking Water Health Advisory: Hexafluoropropylene Oxide (HFPO) Dimer Acid (CASRN 13252-13-6) and HFPO Dimer Acid Ammonium Salt (CASRN 62037-80-3), Also Known as "GenX Chemicals," EPA-822-R-22-005 (June 2022), ECF 1-1 at 14–81 ("GenX Advisory"). Chemours uses GenX chemicals to manufacture various Teflon™ products. *Id.* at vii.

EPA's GenX Advisory summarizes the best available scientific information regarding the occurrence, health effects, detection, and treatment of GenX chemicals in drinking water. *See id.* at vii-ix. The GenX Advisory also calculates a "health advisory level" of 10 parts per trillion, representing the concentration of GenX chemicals in drinking water at or below which EPA believes adverse health

[3] A few weeks after Chemours filed this petition, the American Chemistry Council sought review in the D.C. Circuit of two of the other PFAS health advisories issued concurrently with the GenX Advisory. *Am. Chem. Council v. EPA*, No. 22-1177 (D.C. Cir. filed July 29, 2022). EPA is moving to dismiss American Chemistry Council's petition on grounds similar to those presented in this motion.

effects are not anticipated to occur, with an adequate margin of safety. *See id.* at 1, 13.

Publication of the advisory did not affect GenX chemicals' status as unregulated contaminants subject to the Monitoring Rule. Consistent with Congress's direction that health advisories "are not regulations," the GenX Advisory explains:

> This document is not a regulation and does not impose legally binding requirements on EPA, states, tribes, or the regulated community. This document is not enforceable against any person and does not have the force and effect of law. No part of this document, nor the document as a whole, constitutes final agency action that affects the rights and obligations of any person. EPA may change any aspects of this document in the future.

Id. at 1 n.2. The GenX Advisory, like all such advisories, "provide[s] information that tribal, state, and local government officials and managers of public water systems (PWSs) can use to determine whether actions are needed to address the presence of a contaminant in drinking water." *Id.* at 1.

ARGUMENT

The SDWA permits this Court to directly review only certain "final action" of EPA. 42 U.S.C. § 300j-7(a). The requirement of finality limits this Court's jurisdiction,[4] as does Article III's requirement of standing. Chemours cannot meet

[4] The Court has stated that the Administrative Procedure Act's ("APA") finality requirement is *not* jurisdictional because that statute does not confer subject-matter jurisdiction; instead, the federal-question statute, 28 U.S.C. § 1331, confers

either requirement, so its petition must be dismissed. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) ("[T]he party asserting federal jurisdiction when it is challenged has the burden of establishing it.").

I. The GenX Advisory Is Not Reviewable Final Action.

The SDWA authorizes this Court to directly review only "final action of the Administrator." 42 U.S.C. § 300j-7(a). While the statute does not define "final action," that term has a well-established meaning in the law of judicial review of administrative action under the APA, and the Supreme Court has applied that meaning in cases interpreting other statutes' analogous direct-review provisions. *See, e.g.*, *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 483 (2004) (applying APA's finality standard to Clean Air Act case); *see also Territorial Court of U.S.V.I. v. EPA*, 54 Fed. App'x 339, 340–41 (3d Cir. 2002) (applying APA's standard to SDWA petition for review).

For administrative action to be "final" and reviewable under the APA (or, as in this case, the SDWA), it must both (1) "mark the consummation of the agency's decisionmaking process," and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at

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original jurisdiction on district courts to hear Administrative Procedure Act claims. *Chehazeh v. Att'y Gen.*, 666 F.3d 118, 125 n.11 (3d Cir. 2012). Because no comparable statute vests the courts of appeals with general jurisdiction to review administrative action, this Court's original jurisdiction is defined and limited by the terms of the SDWA.

177–78 (cleaned up). The touchstone of the second prong of this finality test is whether the action has "direct and appreciable legal consequences." *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 598 (2016).

This Court has identified five "pragmatic considerations" that it considers "relevant to whether agency action is final":

> (1) whether the decision represents the agency's definitive position on the question; (2) whether the decision has the status of law with the expectation of immediate compliance; (3) whether the decision has immediate impact on the day-to-day operations of the party seeking review; (4) whether the decision involves a pure question of law that does not require further factual development; and (5) whether immediate judicial review would speed enforcement of the relevant act.

Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 249 (3d Cir. 2011); *see also Del. Dep't of Nat. Res. & Env't Control v. EPA*, 746 F. App'x 131, 134 (3d Cir. 2018) (describing five factors as "analogous—but not identical" to the Supreme Court's two-prong test).

The only "decision" that a SDWA health advisory "consummates" is EPA's decision to issue the advisory itself. Whatever role the information contained in a health advisory might later play in the Agency's process of determining whether to regulate the contaminant—or take any other action under the SDWA—the advisory manifestly does not consummate *that* process. Thus, a health advisory cannot be "final action" unless the advisory itself carries direct and appreciable legal consequences. It does not.

Finding health advisories reviewable would thwart Congress's design, as the SDWA could scarcely have been clearer on this point: Health advisories "are not regulations" but merely "appropriate actions for contaminants not subject to any national primary drinking water regulation." 42 U.S.C. § 300g-1(b)(1)(F); *id.* § 300j-7(a)(1) (specifically making MCLGs, but not health advisories, reviewable). A health advisory is not final action, but a "purely informational" document that "compel[s] no one to do anything." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.). The function of an "advisory" is to convey "advice," not legal obligations. *See* Oxford English Dictionary, "advisory" (2d ed. 1989). EPA publishes these documents to provide "technical information to assist Federal, state and local officials, as well as managers of public or community water systems in protecting public health." 87 Fed. Reg. at 36849. Health advisories do not compel these officials, water systems, or anyone else to take or refrain from taking any action. *See W.R. Grace & Co. v. EPA*, 261 F.3d 330, 334 n.1 (3d Cir. 2001) (noting a health advisory is "not a legally enforceable Federal standard").

EPA describes SDWA health advisories—and related advisories under other statutes, *see, e.g.*, 10 U.S.C. § 2704(d)(2)—in exclusively informational terms. *See New Jersey v. U.S. Nuclear Regul. Comm'n*, 526 F.3d 98, 102 (3d Cir. 2008) (giving weight to agency's characterization of its own action in finality analysis). In this instance, the GenX Advisory states clearly that it is only an informational

tool for public officials and public water system managers that lacks independent legal effect. 87 Fed. Reg. at 36849; GenX Advisory at 1 (noting document provides EPA's "non-enforceable, non-regulatory" evaluation of the best available science related to GenX chemicals in drinking water). It even notes that the lifetime health advisory concentration EPA calculated may not be appropriate to use in all exposure scenarios. GenX Advisory at 26.

To be sure, EPA may consider the same *scientific information* that underlies a health advisory in deciding whether to regulate a contaminant and, ultimately, in developing the MCLG, MCL, and national primary drinking water standard for the contaminant. But publication of a health advisory does not dictate any, much less all, of those regulatory steps. EPA has published health advisories for many contaminants that the agency has not yet determined whether to regulate or else has affirmatively determined *not* to regulate. *See* 2018 Tables at 1–9; 68 Fed. Reg. 42898, 42904 (July 18, 2003) (determining not to regulate manganese); EPA, "Drinking Water Health Advisory for Manganese," EPA-822-R-04-003 (Jan. 2004), https://www.epa.gov/sites/default/files/2014-09/documents/support_cc1_magnese_dwreport_0.pdf.

Likewise, for those contaminants that EPA does decide to regulate, a health advisory does not determine the ultimate contents of any regulations. By law, EPA must set the enforceable MCL for a contaminant using the "maximum contaminant

level goal," or MCLG, established by EPA—not any health advisory level—accounting for cost and feasibility. 42 U.S.C. § 300g-1(b)(4)(B), (D) (stating MCL must be "as close to the [MCLG] as is feasible"). And a health advisory does not predetermine the level of a contaminant's MCLG, which must be set through notice-and-comment rulemaking and is subject to judicial review. *Id.* §§ 300g-1(b)(1)(E), 300j-7(a)(1). EPA must independently support the MCLG on its own record and may set the MCLG at a different level than the health advisory based on input from public comments, scientific advances, or changes in EPA's assumptions. *See New Jersey*, 526 F.3d at 102 (finding guidance was not final where it provided information on how to satisfy license requirements but had no independent authority in individual licensing proceedings); *see also* 2018 Tables at 6, 7 (listing some contaminants with different MCLGs and health advisory levels).

Applying this Court's "pragmatic" finality considerations leads to the same result. *Minard Run*, 670 F.3d at 249. A health advisory does not "represent[] the agency's definitive position on the question" what level of the contaminant public water systems cannot exceed. *Id.* EPA's health advisory neither "has the status of law with the expectation of immediate compliance" nor "has immediate impact on the day-to-day operations" of Chemours or anyone else. *Id.* The petition does not raise only "pure question[s] of law," *id.*; indeed, Chemours's first argument posits that the GenX Advisory is "scientifically flawed" and "grossly overstates the risk

presented by" GenX chemicals. Pet. 9. Lastly, there is no respect in which this Court's "immediate judicial review" of this advisory "would speed enforcement of" the SDWA. *Minard Run*, 670 F.3d at 249. On the contrary, as discussed, a health advisory is not even enforceable under the SDWA.

Chemours points to the role of health advisories within SDWA's monitoring program as evidence of "significant legal consequences." Pet. 7 & n.10. Properly understood, however, neither the SDWA nor implementing regulations assign legal significance to issuance of the GenX Advisory. The petition suggests the existence of the health advisory will affect whether GenX chemicals are subject to the Monitoring Rule, *id.*, but at Congress's direction, EPA already added GenX chemicals to the list of contaminants subject to that rule six months before the advisory's publication.[5] 86 Fed. Reg. at 73141 Exhibit 4. Chemours also observes that EPA "strongly encourages" community water systems to inform their customers when contaminant levels exceed health advisory levels. Pet. 7 n.10; *see also* 40 C.F.R. § 141.153(e)(3). Yet the recipients of that encouragement "are free to ignore it" without legal consequence. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.). And in any event, community water

[5] Even when Congress does not mandate inclusion of a contaminant, EPA considers the availability of health-effects information more generally (not specifically the issuance of health advisories) as one of many factors when determining whether to require monitoring for an unregulated contaminant under the Monitoring Rule. *See* 42 U.S.C. § 300j-4(a)(2).

systems already must include detections of GenX chemicals in their reports by virtue of those contaminants' inclusion in the Monitoring Rule. *See* 40 C.F.R. § 141.153(d)(1)(ii), (d)(7). Lastly, Chemours notes that "EPA also includes health advisory levels as related 'Health Information' in materials describing [monitored] contaminants." Pet. 7 n.10 (citing webinar presentation by EPA officials). No law requires that the agency include health advisories in those materials, and, more fundamentally, EPA's recitation of already-public information is not an appreciable legal effect that could render a health advisory "final action."

Chemours is left to contend that health advisories impose sufficient legal consequences to be "final action" because various states have chosen to incorporate them by reference into their own state laws as binding requirements. Pet. 7 & n.11. But what third parties do with nonbinding advisories cannot turn them into final action. The core question for determining finality is whether the agency action under review "gives rise to '*direct* and appreciable legal consequences.'" *Hawkes Co.*, 578 U.S. at 598 (emphasis added) (quoting *Bennett*, 520 U.S. at 178). To satisfy *Bennett*'s second prong, a legal effect must be "a result of the specific statutes and regulations that govern" the challenged agency decision. *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 637 (D.C. Cir. 2019). Here, the state law obligations cited by Chemours flow from the independent

decisions of state legislatures and regulators, not from the SDWA or its implementing regulations. Any challenge should be pointed at those decisions.

This Court's decision in *Hindes v. Federal Deposit Insurance Corporation*, 137 F.3d 148 (3d Cir. 1998), is instructive. There, the FDIC notified a bank that it was in violation of federal law that the agency was prepared to enforce. *Id.* at 162. Relying on the FDIC's notice, the Pennsylvania Secretary of Banking preemptively decided to close the bank. *Id.* The Court declined to review the FDIC's notice of violation under the APA because it was not final action; "the action that had legal effect was the Secretary's decision to close the bank." *Id.* at 162–63. Here, likewise, the state laws on which Chemours relies result from the independent, voluntary decisions of state actors. And "state action does not convert [a precipitating federal action] into a final agency act." *Id.* at 163; *accord Ocean Cnty. Landfill Corp. v. U.S. EPA, Region II*, 631 F.3d 652, 655–56 (3d Cir. 2011) (holding EPA recommendation to state regarding issue presented in Clean Air Act permit proceeding was not final because any legal consequences would flow from state's ultimate permitting decision, not from EPA's recommendation); *see also Dalton v. Specter*, 511 U.S. 462, 469-70 (1994) (holding agency's base closure recommendations were unreviewable because the only "action that will directly affect" targeted bases would be taken by the President, who had discretion to accept or reject recommendations); *Flue-Cured Tobacco Coop. Stabilization Corp.*

v. EPA, 313 F.3d 852, 860 (4th Cir. 2002) (finding that actions of other federal agencies relying on EPA's purely informational report could not render EPA's report final action).

None of the state laws that Chemours cites, *see* Pet. 7 n.11, imposes legal consequences through the SDWA or its implementing regulations. In fact, these laws—which either apply to "private water systems," Ohio Admin. Code § 3701-28-04(N)(4), or set remedial standards for groundwater cleanup, *see* Iowa Admin. Code r. 567-137.5(4)—are beyond the scope of the SDWA, which is limited to regulation of contaminants in "public water systems." *See* 42 U.S.C. § 300f(1), (4). The cited state laws are not federally enforceable—they are not part of any state's exercise of "primary enforcement responsibility" under the SDWA, which focuses on states' regulation of federally regulated contaminants in public water systems. *See id.* § 300g-2(a). A state's voluntary and independent decision to assign legal effect to EPA's GenX Advisory outside of the SDWA framework cannot subject that otherwise non-final agency action to judicial review.

II. Chemours Lacks Standing to Challenge the GenX Advisory.

Regardless of whether EPA's GenX Advisory is final action, Chemours lacks standing to challenge it because any injury that it could possibly demonstrate could not be fairly traced to EPA's publication of the GenX Advisory.

"To establish Article III standing, an injury must be concrete, particularized,

and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (cleaned up). Chemours asserts that EPA's GenX Advisory "will have … adverse consequences" for the company, Pet. 9, but it now bears the burden to support that assertion with specific facts. *See Prometheus Radio Project v. FCC*, 939 F.3d 567, 579 n.1 (3d Cir. 2019) ("[I]n general materials to establish standing should be submitted promptly once standing is called into question."), *rev'd on other grounds*, 141 S.Ct. 1150 (2021); *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (discussing burden of proof for petitioner seeking review of agency action). Because the GenX Advisory, on its face, does not impose any burdens on Chemours, standing will be substantially more difficult for Chemours to establish. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

Chemours hints at two diffuse injuries that may arise from health advisories generally, neither of which would confer standing on the company. Chemours first suggests that the GenX Advisory triggers monitoring and reporting obligations under the Monitoring Rule and the consumer confidence report program. Pet. 7 n.10. But, as previously discussed, GenX chemicals are *already* covered by these programs because EPA listed them under the Monitoring Rule at Congress's direction six months before issuing the GenX Advisory. *See supra*, pp. 14–15; 86 Fed. Reg. at 73141 Exhibit 4 (adding GenX chemicals to list of Monitoring Rule

contaminants); 40 C.F.R. § 141.153(d)(1)(ii), (7) (requiring consumer confidence reports to include information on Monitoring Rule contaminants). Any injury Chemours might allege from SDWA monitoring requirements thus cannot possibly be traced to the GenX Advisory.

Second, Chemours asserts that some states have voluntarily incorporated health advisories into various state regulatory requirements. Pet. 7 n.11. But of the state laws identified, North Carolina is the only state in which Chemours appears to have a facility.[6] Chemours has not identified any injury it has suffered from the cited North Carolina provision.

Moreover, any such injury would not be fairly traceable to EPA's publication of the GenX Advisory because it would be "the result of the independent action of some third party not before the court"—North Carolina. *Duquesne Light Co. v. EPA*, 166 F.3d 609, 613 (3d Cir. 1999) (quoting *Bennett*, 520 U.S. at 167). In *Duquesne*, this Court held a petitioner lacked standing to challenge EPA's approval of Pennsylvania's "state implementation plan" specifying measures the state used to comply with air-quality standards under the Clean Air Act—measures that were more restrictive than the Clean Air Act required. *Id.* at 611. The Court held that although the petitioner was injured by the

[6] *See Global Reach*, https://www.chemours.com/en/about-chemours/global-reach (last visited Aug. 26, 2022).

plan's more restrictive requirements, that injury was "manifestly the product of the independent action of" the state in adopting that plan, not EPA's approval of the plan, which was nondiscretionary. *Id.* at 613.

As in *Duquesne*, any injury Chemours may claim is "manifestly the product of the independent action of" North Carolina, which has voluntarily decided to give legal effect to health advisories like the GenX Advisory that do not themselves impose any legal consequences. Indeed, the state law Chemours invokes operates entirely outside the framework of the SDWA and is neither incorporated into nor enforceable under federal law. The North Carolina statute applies to "private drinking water wells," N.C. Gen. Stat. § 143-215.2A (2018), not the "public water systems" with which the SDWA is concerned, *compare id.* § 87-85(10a) (2015), *with* 42 U.S.C. § 300f(4). Thus, it bears no relation to North Carolina's eligibility for or exercise of "primary enforcement responsibility" under the SDWA, which is narrowly focused on the state's requirements for federally regulated contaminants in public water systems. *See* 42 U.S.C. § 300g-2(a).

Finally, although the petition does not mention it, Movant-Intervenors assert that one of their number executed a settlement agreement with the North Carolina Department of Environmental Quality and Chemours in which the latter committed to provide alternative drinking water supplies where a private drinking water well is "contaminated by concentrations of GenX compounds in exceedance of … any

applicable health advisory." ECF 9-2 at MA-65 (cited in ECF 9-1 at 15–16). But an injury that Chemours may suffer due to that voluntarily executed agreement is not cognizable under Article III because parties "cannot manufacture standing merely by inflicting harm on themselves." *Clapper*, 568 U.S. at 416; *see also Campeau v. SSA*, 575 F. App'x 35, 38 (3d Cir. 2014) (finding that plaintiff's "purely voluntary decision to travel to Baltimore" was a "self-inflicted injury … not fairly traceable to the Government's purported activities" (cleaned up)).

In sum, Chemours has not demonstrated, and cannot demonstrate, standing to challenge EPA's GenX Advisory.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review.

Respectfully submitted,

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U.S. EPA Office of General Counsel

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the requirements of Fed. R. App. P. 27(d) because it contains 4766 words and is formatted in double-spaced 14-point Times New Roman font.

Dated: September 15, 2022

Respectfully submitted,

/s/ Andrew D. Knudsen
Andrew D. Knudsen

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2022, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Andrew D. Knudsen
Andrew D. Knudsen