IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

BRENT NIX, et al., Plaintiffs, v. THE CHEMOURS COMPANY FC, LLC, et al., Defendants.	)	No. 7:17-CV-189-D
ROGER MORTON, et al., Plaintiffs, v. THE CHEMOURS COMPANY, et al., Defendants.	)	No. 7:17-CV-197-D
VICTORIA CAREY et al., Plaintiffs, v. E.I. DU PONT DE NEMOURS AND COMPANY, et al., Defendants.	)	No. 7:17-CV-201-D

ORDER

On January 31, 2018, Victoria Carey ("Carey"), Marie Burris ("Burris"), Michael Kiser ("Kiser"), and Brent Nix ("Nix"; collectively "plaintiffs"), on behalf of themselves and others similarly situated, filed a consolidated class action complaint against E.I. du Pont de Nemours and

Company ("DuPont") and The Chemours Company FC, LLC ("Chemours"; collectively "defendants") alleging that defendants discharged toxic chemicals, including perfluoro-2-propoxypropanoic acid ("GenX"), from the Fayetteville Works plant into the Cape Fear River and surrounding air, soil, and groundwater. See Nix v. Chemours Co. FC, No. 7:17-CV-189-D [D.E. 53] (E.D.N.C. Jan. 31, 2018).[1] On March 2, 2018, defendants moved to dismiss plaintiffs' consolidated class action complaint [D.E. 61] and filed a memorandum in support [D.E. 62]. On April 13, 2018, plaintiffs responded in opposition [D.E. 71]. On April 27, 2018, defendants replied [D.E. 74]. On March 26, 2019, the court granted in part and denied in part defendants' motion to dismiss the consolidated class action complaint [D.E. 108]. The court enters this order to explain that decision.

I.

A.

The plaintiffs' claims concern defendants' discharge of wastewater allegedly containing perfluorinated compounds ("PFCs"), notably GenX. See Consol. Class Action Compl. [D.E. 53] ¶¶ 1–2. PFCs are chemical compounds in which carbon-fluorine bonds replace all of the carbon-hydrogen bonds. Cf. id. ¶¶ 19–20. PFCs are classified and named based on the length of the carbon chain in the molecule and any functional group attached to the chain. See id. ¶¶ 20, 23. PFCs degrade slowly under environmental conditions, and plaintiffs allege that some PFCs "persist in the environment for over 2,000 years." Id. ¶ 23; see id. ¶¶ 24–25. PFCs, including GenX and perfluorooctanoic acid ("PFOA"), have been manufactured for use in various commercial products.

[1] Citations to the docket will reflect the docket numbers from Nix v. Chemours Co. FC, No. 7:17-CV-189-D.

See id. ¶¶ 2, 19, 26–27; cf. id. ¶¶ 28–83. In total, plaintiffs allege that defendants discharged 17 different PFCs into the Cape Fear River. See id. ¶ 87.

Plaintiffs allege that "PFCs are highly toxic to humans" and that "[s]cientists have linked PFCs to kidney cancer, testicular cancer, prostate cancer, ovarian cancer, non-Hodgkin lymphoma, liver disease, ulcerative colitis, thyroid disease, hypercholesterolemia, and pregnancy-induced hypertension, among other illnesses." Id. ¶ 21. Plaintiffs outline research concerning the toxicity of PFOA. See id. ¶¶ 26–32, 34–39, 41, 43–44, 51–52. Plaintiffs also discuss studies of GenX's toxicity. See id. ¶¶ 60–62, 65, 68–69, 71–75, 78. Plaintiffs allege that the studies indicate that rodents exposed to GenX developed "liver cell damage that could be a precursor to cancer" and had "a higher incidence of liver tumors, pancreatic tumors, and testicular tumors." Id. ¶¶ 65, 69. Although GenX's toxicity has been studied only in rodents, plaintiffs note that GenX is chemically similar to PFOA, which is toxic to humans. See id. ¶ 79. Plaintiffs also note that the Environmental Protection Agency ("EPA") established a lifetime health advisory level for PFOA and a related compound (perfluorooctane sulfonate or "PFOS") of 70 parts per trillion ("ppt") in drinking water. See id. ¶ 22. Relatedly, the state of North Carolina adopted a preliminary health-based goal of 140 ppt for GenX. Id.; see id. ¶ 92.

B.

The Fayetteville Works plant is located in Fayetteville, North Carolina, and plaintiffs allege that wastewater from the plant is discharged into the Cape Fear River. See id. ¶¶ 2, 17. DuPont constructed the Fayetteville Works plant in the 1970s. See id. ¶ 14. On February 1, 2015, Chemours, which was initially wholly owned by DuPont, acquired the Fayetteville Works plant from DuPont. See id. ¶ 15. In July 2015, Chemours separated from DuPont. See id.

The Fayetteville Works plant has at least five manufacturing areas dedicated to fluoromonomers/Nafion, polymer processing aid, Butacite, SentryGlas, and polyvinyl fluoride. See id. ¶ 16. Plaintiffs allege that, from the 1950s until the early 2000s, DuPont "relied heavily on PFOA . . . to make Teflon and other non-stick products." Id. ¶ 26. Initially, DuPont purchased PFOA from the 3M Company ("3M"). See id. ¶¶ 34, 44. Both DuPont and 3M investigated the toxicological properties of PFOA during this time. Plaintiffs allege that DuPont was aware of safety risks associated with PFOA as early as the 1960s, well before DuPont opened the Fayetteville Works plant. See id. ¶¶ 29–33. Nevertheless, DuPont discharged wastewater containing PFOA and other PFCs into the Cape Fear River and into "unlined biosludge settlement lagoons" that DuPont "knew or should have known . . . would flow into the Cape Fear River." See id. ¶¶ 33, 37.

By 2000, plaintiffs allege that 3M had decided to stop manufacturing PFOA because of PFOA's toxicity, and DuPont began manufacturing PFOA at the Fayetteville Works plant itself. See id. ¶¶ 44, 47. Plaintiffs allege that DuPont misrepresented facts to the North Carolina Department of Environmental Quality ("DEQ") about PFOA in re-applying for its National Pollutant Discharge Elimination System ("NPDES") permit. See id. ¶¶ 45–46, 48–50. For example, DuPont represented that it did not discharge wastewater from the Fayetteville Works plant into the Cape Fear River. See id. ¶ 49. Moreover, plaintiffs allege that DuPont continued to discharge PFOA into the Cape Fear River even after the results of "the first comprehensive study of the effects of PFOA on human health . . . confirmed that PFOA causes cancer and a host of other health problems in humans." Id. ¶ 51. Plaintiffs also allege that DuPont did not report numerous PFOA spills that occurred between 2011 and 2013. See id. ¶ 54.

As the EPA learned of the dangers associated with PFOA, DuPont began to search for a replacement for PFOA. See id. ¶ 58. DuPont selected GenX as the replacement for PFOA. See id.

Plaintiffs allege that DuPont had been discharging GenX into the Cape Fear River since the 1980s. See id. ¶¶ 55–57. In 2009, DuPont and the EPA "reached a consent order pursuant to the Toxic Substances Control Act" to replace PFOA with GenX. Id. ¶ 59. DuPont represented that GenX would be safer than PFOA because it would biodegrade more quickly than PFOA. See id. As part of the consent order, DuPont had to investigate the toxicological properties of GenX and to "recover and capture (destroy) or recycle GenX from all the process wastewater effluent streams and air emissions . . . at an overall efficiency of 99%." Id. (quotation and alteration omitted).

On March 15, 2010, DuPont submitted a study to the EPA showing that GenX, like PFOA, was not biodegradable. See id. ¶ 60. In July 2010, DuPont submitted the results from animal studies that showed that rodents exposed to GenX experienced numerous adverse health consequences, including birth defects, liver necrosis, and cellular deformation indicative of liver disease and early-stage cancer. See id. ¶¶ 61–62. DuPont conducted additional studies, and plaintiffs allege that each study indicated that GenX was likely toxic to humans. See id. ¶¶ 65–66, 68–75. Despite the results of the studies and the requirements of the consent order, plaintiffs allege that DuPont and later Chemours continued to discharge GenX into "the Cape Fear River, the groundwater, and the air surrounding the Fayetteville Works plant." Id. ¶ 63; see id. ¶¶ 64, 81, 83.

As part of a study of PFCs in Wilmington's water supply, Dr. Detlef Knappe ("Knappe"), a professor at North Carolina State University, collected water samples from the Cape Fear River. See id. ¶ 84. On May 3, 2016, Knappe contacted the Cape Fear Public Utility Authority ("CFPUA") and informed the CFPUA that he detected GenX and other PFCs in the water "at the CFPUA intake" at an average concentration of 631 ppt. Id. On November 10, 2016, Knappe and his co-authors published the results of the study. See id. ¶ 85. On November 23, 2016, Knappe shared his research with DEQ and "a number of city and county water treatment plants" and noted that "levels of GenX

were very high in Wilmington and that none of the newly discovered compounds being discharged by the Chemours plant were being removed by the city's . . . treatment plant." Id. ¶ 86; see id. ¶ 87 (listing the seventeen PFCs detected in the Cape Fear River watershed). In response to Knappe's research, the state of North Carolina set the preliminary health goal for GenX of 140 ppt. See, e.g., id. ¶ 92.

Knappe's research raised awareness of defendants' practices at the Fayetteville Works plant. Plaintiffs allege that, on June 15, 2017, Chemours admitted to state and local regulators that it had been discharging GenX into the Cape Fear River for approximately four decades. See id. ¶ 93. On June 19, 2017, DEQ tested water samples from 13 locations along the Cape Fear River in Wilmington and Fayetteville, and DEQ found that "finished water from four water treatments plants had GenX concentrations exceeding the state's [health goal] of 140 ppt." Id. ¶ 95. On July 10, 2017, DEQ received data from a third party laboratory in Colorado that detected GenX concentrations exceeding 39,000 ppt in raw water and exceeding 790 ppt in finished water. See id. ¶ 97. On August 31, 2017, the EPA announced that it had discovered two additional PFCs, byproducts of defendants' manufacturing of Nafion, at concentrations exceeding the EPA's health advisory level of 70 ppt for long-chain PFCs. See id. ¶ 98. Around the same time, the North Carolina Department of Water Resources ("DWR") tested 14 groundwater-monitoring wells, and DWR detected GenX at high concentrations in 13 of the wells. See id. ¶ 99. One of the wells was upstream of the Fayetteville Works plant, which plaintiffs allege suggests that defendants discharged GenX and other PFCs into the air. See id. In sum, plaintiffs allege that defendants have discharged GenX into the Cape Fear River and the soil, air, and groundwater surrounding the Fayetteville Works plant since at least 1980. See, e.g., id. ¶ 2.

On September 5, 2017, DWR filed a notice of intent to suspend Chemours's NPDES permit because "Chemours misrepresented and failed to disclose fully all relevant facts." Id. ¶ 100 (quotation and alterations omitted). Later that month, Chemours and DEQ tested private wells within a one-mile radius of the Fayetteville Works plant, and DEQ ordered Chemours to supply bottled drinking water to individuals whose private wells contained GenX at concentrations exceeding the state's health goal of 140 ppt. See id. ¶ 102. On November 3, 2017, DEQ inspected the Fayetteville Works plant and learned that Chemours had spilled an unknown quantity of a chemical precursor to GenX in October 2017 and had not disclosed the event. See id. ¶ 103. On November 16, 2017, DEQ moved to partially suspend Chemours's NPDES permit. See id. ¶ 104. DEQ subsequently learned of additional pollution events, and plaintiffs allege that additional testing indicated that GenX and other PFCs had contaminated both the Cape Fear watershed and the surrounding airshed. See id. ¶¶ 105–06. For example, investigators have found GenX in plants, vegetables, and honey. See id. ¶¶ 105, 107.

C.

Plaintiffs are individuals who reside in counties "that use the Cape Fear River as a primary source of drinking water." Id. ¶ 3. Carey resides in Leland, North Carolina, which is in Brunswick County. See id. ¶¶ 10, 116. Burris resides in Bunnlevel, North Carolina, which is in Harnett County, and owns property that she previously resided in and currently rents out in Fayetteville, North Carolina, which is in Cumberland County. See id. ¶¶ 11, 120. Kiser and Nix reside in Wilmington, North Carolina, which is in New Hanover County. See id. ¶ 12. Plaintiffs filed this class action "on behalf of the thousands of residents and business owners who have experienced, and will continue to experience, serious personal injury, property damage, and emotional injury caused by [d]efendants' conduct." Id. ¶ 6.

Carey alleges that she and her husband have resided in Leland, North Carolina, and regularly used water from the Cape Fear River since 2002. See id. ¶ 117. Carey had her home tested for PFCs and found GenX present in concentrations that exceeded North Carolina's preliminary health goal. See id. ¶ 118. Additionally, Carey has been diagnosed with thyroid nodules, a goiter, hyperthyroidism, and an idiopathic immune condition, and her husband has been diagnosed with a similar thyroid condition. See id. ¶ 119. Plaintiffs allege that these illnesses comport with those caused by exposure to PFCs including GenX. See id.

Burris alleges that she resided in Fayetteville, North Carolina, near the Fayetteville Works plant for eleven years. See id. ¶ 120. In 2015, Burris moved to Bunnlevel, North Carolina, and she now rents out the property in Fayetteville. See id. In October 2017, the DEQ informed Burris that the drinking water at her Fayetteville property contained GenX at a concentration of 322 ppt. See id. ¶ 121. DEQ recommended that the current resident not drink the water, and the resident now relies on bottled water that Chemours provides. See id. ¶ 122.

Kiser has resided in Wilmington, North Carolina since 1993. See id. ¶ 123. Kiser has been diagnosed with colon cancer and stomach cancer. See id. Kiser also suffers from ulcers and cysts on his liver and intestines. See id. Plaintiffs allege that these illnesses comport with those caused by exposure to PFCs including GenX. See id.

Nix has resided in Wilmington, North Carolina, since approximately 2011. See id. ¶ 124. Nix is a triathlete and consumes "a great deal of water." Id. ¶ 125. Since learning about GenX, Nix only drinks bottled water, which costs him approximately $100 per month. See id. In addition, Nix was diagnosed with ulcerative colitis and diverticulitis. See id. ¶ 126. Plaintiffs allege that these illnesses comport with those caused by exposure to PFCs including GenX. See id.

Plaintiffs request to represent the class of individuals who have resided in the counties surrounding the Fayetteville Works plant since 1980 (the "class"). See id. ¶ 127. Plaintiffs allege that the injuries that they suffered are typical of the class and include personal injury and harm to property. See id. ¶ 130. As for harm to property, plaintiffs allege that, because it "will be very difficult to remove [GenX and other PFCs] from North Carolina residents' pipes, fittings, and fixtures," plumbing and fixtures must be replaced inside homes and businesses, bottled water must be provided until water is safe to drink, and water filtration systems must be installed to filter GenX and other PFCs. See id. ¶¶ 109–15. Plaintiffs also allege that there is currently no way to filter GenX or other PFCs from the water supply. See id. ¶ 114.

On January 31, 2018, plaintiffs filed a consolidated class action complaint alleging negligence, gross negligence, negligence per se, public nuisance, private nuisance, trespass, and unjust enrichment [D.E. 53]. Plaintiffs seek compensatory damages, punitive damages, and injunctive relief including repairs to private property, funding of an epidemiological study to investigate GenX and other PFCs, and "establishment of medical monitoring to provide health care and other appropriate services to [c]lass members for a period of time deemed appropriate." Id. at 46–47.

II.

A motion to dismiss under Rule 12(b)(6) tests the complaint's legal and factual sufficiency. See Ashcroft v. Iqbal, 556 U.S. 662, 677–80 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–63 (2007); Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 566 U.S. 30 (2012); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). To withstand a Rule 12(b)(6) motion, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is

plausible on its face." Iqbal, 556 U.S. at 678 (quotation omitted); see Twombly, 550 U.S. at 570; Giarratano, 521 F.3d at 302. In considering the motion, the court must construe the facts and reasonable inferences "in the light most favorable to the [nonmoving party]." Massey v. Ojaniit, 759 F.3d 343, 352 (4th Cir. 2014); see Clatterbuck v. City of Charlottesville, 708 F.3d 549, 557 (4th Cir. 2013), abrogated on other grounds by Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). A court need not accept as true a complaint's legal conclusions, "unwarranted inferences, unreasonable conclusions, or arguments." Giarratano, 521 F.3d at 302 (quotation omitted); see Iqbal, 556 U.S. at 678–79. Rather, a plaintiff's allegations must "nudge[ ] [his] claims," Twombly, 550 U.S. at 570, beyond the realm of "mere possibility" into "plausibility." Iqbal, 556 U.S. at 678–79.

The motion to dismiss requires the court to consider the plaintiffs' state-law claims, and the parties agree that North Carolina law applies. Accordingly, this court must predict how the Supreme Court of North Carolina would rule on any disputed state-law issues. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 369 (4th Cir. 2005). In doing so, the court must look first to opinions of the Supreme Court of North Carolina. See Stahle v. CTS Corp., 817 F.3d 96, 100 (4th Cir. 2016). If there are no governing opinions from that court, this court may consider the opinions of North Carolina Court of Appeals, treatises, and "the practices of other states." Twin City Fire Ins. Co., 433 F.3d at 369 (quotation omitted).[2] In predicting how the highest court of a state would address an issue, this court "should not create or expand a [s]tate's public policy." Time Warner Entm't-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp., 506 F.3d 304, 314 (4th Cir. 2007) (alteration and quotation omitted); see Wade v. Danek Med., Inc., 182 F.3d 281, 286 (4th Cir. 1999). Moreover, in predicting how the highest court of a

[2] North Carolina does not have a mechanism to certify questions of state law to its Supreme Court. See Town of Nags Head v. Toloczko, 728 F.3d 391, 397–98 (4th Cir. 2013).

state would address an issue that it has not yet resolved, this court must "follow the decision of an intermediate state appellate court unless there [are] persuasive data that the highest court would decide differently." Toloczko, 728 F.3d at 398 (quotation omitted).

III.

A.

In count one, plaintiffs allege that defendants negligently discharged chemicals from the Fayetteville Works plant [D.E. 53] ¶¶ 136–45. Plaintiffs allege that defendants owed a duty of reasonable care to plaintiffs and that defendants breached their duty by allowing contaminants to be released into the Cape Fear River, the groundwater, and the air around the Fayetteville Works plant. See id. ¶ 138. Additionally, plaintiffs allege that defendants breached their duty of reasonable care by (1) discharging chemicals including GenX from the Fayetteville Works plant even after defendants learned of potential dangers associated with the chemical(s), (2) failing to contain, remediate, or eliminate chemical contamination, and (3) failing to provide plaintiffs with usable water. See id. ¶¶ 138–40. Defendants respond that plaintiffs have failed to allege a cognizable injury and that contamination alone is not sufficient to state a claim. See [D.E. 62] 10–14.

Under North Carolina law, "[n]egligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." Dunning v. Forsyth Warehouse Co., 272 N.C. 723, 725, 158 S.E.2d 893, 895 (1968); Moore v. Moore, 268 N.C. 110, 112, 150 S.E.2d 75, 77 (1966); Coulter v. Catawba Cty. Bd. of Educ., 189 N.C. App. 183, 185, 657 S.E.2d 428, 430 (2008). To state an actionable claim, a plaintiff must plausibly allege that "(1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." Whisnant v. Carolina Farm Credit, 204 N.C. App. 84,

93–94, 693 S.E.2d 149, 156 (2010); see Ward v. Carmona, 368 N.C. 35, 37, 770 S.E. 2d 70, 72 (2015); Bridges v. Parrish, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013); Fussell v. N.C. Farm Bureau Mut. Ins. Co., 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010).

As for duty, defendants owed to plaintiff a duty to exercise ordinary care. See Fussell, 364 N.C. at 226, 695 S.E.2d at 440. "The duty of ordinary care is no more than a duty to act reasonably." Id., 695 S.E.2d at 440. Plaintiffs have plausibly alleged that defendants failed to act reasonably in operating the Fayetteville Works plant (e.g., by discharging chemicals into the Cape Fear River even after learning of potential adverse health consequences associated with the chemicals). As for proximate causation, defendants may be held liable only for injuries "that were reasonably foreseeable and avoidable through the exercise of due care." Id., 695 S.E.2d at 440. Plaintiffs have plausibly alleged that defendants could reasonably foresee that discharging chemicals from the Fayetteville Works plant would harm plaintiffs' property and health. Additionally, plaintiffs have plausibly alleged that they suffered personal injury as a result of exposure to PFCs that defendants discharged. Accordingly, the court denies defendants' motion to dismiss count one.

B.

In count two, plaintiffs allege that defendants' alleged discharge of chemicals from the Fayetteville Works plant constitutes gross negligence [D.E. 53] ¶¶ 146–51. Defendants argue that plaintiffs have not established that defendants' alleged discharge of chemicals caused any personal injury and that plaintiffs have not established any harm or injury to their personal property. See [D.E. 62] 10, 12.

"[T]he difference between ordinary negligence and gross negligence is substantial." Yancey v. Lea, 354 N.C. 48, 53, 550 S.E.2d 155, 158 (2001). "An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to

others, i.e., a conscious disregard of the safety of others." Id., 550 S.E.2d at 158 (emphasis omitted); see Ray v. N.C. Dep't of Transp., 366 N.C. 1, 13, 727 S.E.2d 675, 684 (2012); Green ex rel. Crudup v. Kearney, 217 N.C. App. 65, 70–71, 719 S.E.2d 137, 141 (2011). "Gross negligence is determined based on the facts and circumstances of each case . . . ." Ray, 366 N.C. at 13, 727 S.E.2d at 684. Two factors are especially relevant: purposeful conduct and disregard for the safety of others. See id., 727 S.E.2d at 684; Yancey, 354 N.C. at 53, 550 S.E.2d at 158.

Plaintiffs have eked across the line and plausibly alleged that defendants purposefully discharged chemicals in disregard for the safety of others. Plaintiffs also have plausibly alleged that defendants' conduct caused plaintiffs' personal injuries and harm to plaintiffs' property. Accordingly, the court denies defendants' motion to dismiss count two.

C.

In count three, plaintiffs contend that defendants' conduct is negligent per se [D.E. 53] ¶¶ 152–55. Plaintiffs contend that defendants' conduct violates various federal and state public safety statutes and regulations, including the Clean Water Act ("CWA"), the Resource Conservation Recovery Act ("RCRA"), the Safe Drinking Water Act ("SDWA"), and the Solid Waste Disposal Act ("SWDA"). See id. ¶ 154; [D.E. 71] 17–18. Defendants argue that plaintiffs have failed to allege "any specific statutory or regulatory standard that [d]efendants violated" and that plaintiffs have made only conclusory allegations that do not satisfy plaintiffs' pleading burden. See [D.E. 62] 15; [D.E. 74] 10–11.

"Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." Dunning, 272 N.C. at 725, 158 S.E.2d at 895. To establish actionable negligence, a plaintiff must show "(1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the

circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." Whisnant, 204 N.C. App. at 93–94, 693 S.E.2d at 156; see Ward, 368 N.C. at 37, 770 S.E.2d at 72; Bridges, 366 N.C. at 541, 742 S.E.2d at 796.

A statute or regulation may provide the required standard of care for individuals such that violation of the statute or regulation is negligent per se (i.e., conclusively establishes both duty and breach of duty in a plaintiff's prima facie case). See, e.g., Hart v. Ivey, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992); Estate of Coppick ex rel. Coppick v. Hobbs Marina Props., LLC, 240 N.C. App. 324, 328, 772 S.E.2d 1, 5–6 (2015). To prevail on a claim of negligence per se, a plaintiff must show:

> (1) a duty created by a statute or ordinance; (2) that the statute or ordinance was enacted to protect a class of persons which includes the plaintiff; (3) a breach of the statutory duty; (4) that the injury sustained was suffered by an interest which the statute protected; (5) that the injury was of the nature contemplated in the statute; and (6) that the violation of the statute proximately caused the injury.

Rudd v. Electrolux Corp., 982 F. Supp. 355, 365 (M.D.N.C. 1997); see Baldwin v. GTE S., Inc., 335 N.C. 544, 546–47, 439 S.E.2d 108, 109–10 (1994); Hardin v. York Mem'l Park, 221 N.C. App. 317, 326, 730 S.E.2d 768, 776 (2012).

As for plaintiffs' claim based on an alleged violation of the CWA and defendants' NPDES permit, even assuming that North Carolina courts recognize a right to sue in negligence based on a violation of a NPDES permit, see Biddix v. Henredon Furniture Indus. Inc., 76 N.C. App. 30, 40–41, 331 S.E.2d 717, 724 (1985); Brinkman v. Barrett Kays & Assocs., P.A., 155 N.C. App. 738, 741, 575 S.E.2d 40, 43 (2003); cf. Springer v. Joseph Schlitz Brewing Co., 510 F.2d 468, 472 (4th Cir. 1975), plaintiffs fail to plausibly allege that defendants violated the NPDES permit and the CWA. Plaintiffs merely conclude that defendants' conduct violates the CWA without further explanation.

Cf. Twombly, 550 U.S. at 555. Plaintiffs' claims based on alleged violations of the RCRA, the SDWA, and the SWDA are similarly conclusory. Cf. [D.E. 53] ¶ 154.

To the extent that plaintiffs attempt to raise in their response brief a claim of negligence per se based on North Carolina's "2L groundwater standards," [D.E. 71] 18, plaintiffs refer generally to Subchapter 2L of Title 15A of the North Carolina Administrative Code. The Subchapter 2L regulations are strict liability regulations, and therefore do not create a standard for reasonable care. See Rudd, 982 F. Supp. at 365–66; 15A N.C. Admin. Code 2L.0106, 2L.0202. It would expand North Carolina public policy to allow plaintiffs to proceed on a negligence per se theory based on an alleged violation of a strict liability regulation. Cf. Time Warner, 506 F.3d at 314. Thus, violation of a Subchapter 2L regulation does not constitute negligence per se. Cf. Hurley v. Miller, 113 N.C. App. 658, 666–67, 440 S.E.2d 286, 291 (1994), rev'd on other grounds, 339 N.C. 601, 453 S.E.2d 861 (1995). Accordingly, the court grants defendants' motion to dismiss count three.

D.

In count four, plaintiffs allege that defendants' operation of the Fayetteville Works plant constitutes a public nuisance [D.E. 53] ¶ 161. Defendants argue that the court should dismiss this claim because plaintiffs have failed to allege special damages. See [D.E. 62] 16.

"A public nuisance exists wherever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights." State v. Everhardt, 203 N.C. 610, 617, 166 S.E. 738, 741–42 (1932) (quotation omitted); Twitty v. State, 85 N.C. App. 42, 49, 354 S.E.2d 296, 301 (1987). "A public nuisance affects the local community generally and its maintenance constitutes an offense against the State." Twitty, 85 N.C. App. at 49, 354 S.E.2d at 301. "Whatever tends to endanger life, or generate disease, and affect the health of the community . . . is generally, at common law, a public nuisance." Everhardt, 203 N.C. at 618, 166 S.E. at 742.

Under North Carolina law, a private plaintiff must have standing to bring a claim for public nuisance. See Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002). Unlike standing under Article III, standing under North Carolina law refers "generally to a party's right to have a court decide the merits of a dispute." Id., 574 S.E.2d at 52 (collecting cases); see, e.g., Stanley v. Dep't of Conservation & Dev., 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973). A private party has standing to bring a public nuisance claim "as long as the party has suffered an injury that cannot be considered merged in the general public right." Neuse River Found., Inc., 155 N.C. App. at 115, 574 S.E.2d at 52; see Barrier v. Troutman, 231 N.C. 47, 49, 55 S.E.2d 923, 925 (1949) ("[N]o action lies in favor of an individual in the absence of a showing of unusual and special damage, differing from that suffered by the general public."); Hampton v. N.C. Pulp Co., 223 N.C. 535, 543–44, 27 S.E.2d 538, 544 (1943); cf. Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88, 97 (4th Cir. 2011) (applying West Virginia law and holding that there is no West Virginia statutory or common law authority suggesting a class action exception to the special-injury rule).

To state a public nuisance claim as private parties, plaintiffs must allege "(1) injury to a protected interest that cannot be considered merged in the general public right; (2) causation; and (3) proper, or individualized, forms of relief." Neuse River Found., Inc., 155 N.C. App. at 116, 574 S.E.2d at 53. Plaintiffs have not plausibly alleged that they suffered "special and unique damage" caused by defendants' alleged interference with plaintiffs' property. See Barrier, 231 N.C. at 50, 55 S.E.2d at 925 (collecting cases); Hampton, 223 N.C. at 544–48, 27 S.E.2d at 544–47 (discussing injury to fishing business); Neuse River Found., Inc., 155 N.C. App. at 116, 574 S.E.2d at 53. Accordingly, the court dismisses the public nuisance claim in count four.

E.

In count four, plaintiffs also allege that defendants' discharge of chemicals from the Fayetteville Works plant constitutes a private nuisance [D.E. 53] ¶¶ 156–61. Under North Carolina law, plaintiffs seeking to recover for a private nuisance must show a substantial and unreasonable interference with the use and enjoyment of their property. See Kent v. Humphries, 303 N.C. 675, 677, 281 S.E.2d 43, 45 (1981); Morgan v. High Penn Oil Co., 238 N.C. 185, 193–94, 77 S.E.2d 682, 689 (1953); Barrier, 231 N.C. at 49–50, 55 S.E.2d at 925; BSK Enters., Inc. v. Beroth Oil Co., 246 N.C. App. 1, 24–25, 783 S.E.2d 236, 252 (2016); The Shadow Grp., LLC v. Heather Hills Home Owners Ass'n, 156 N.C. App. 197, 200, 579 S.E.2d 285, 287 (2003); Jordan v. Foust Oil Co., 116 N.C. App. 155, 167, 447 S.E.2d 491, 498 (1994); Grant v. E.I. du Pont de Nemours & Co., No. 4:91-CV-55-H, 1995 WL 18239435, at *5 (E.D.N.C. July 14, 1995) (unpublished). An interference is substantial when it results in significant annoyance, some material physical discomfort, or injury to plaintiffs' health or property. See Watts v. Pama Mfg. Co., 256 N.C. 611, 617, 124 S.E.2d 809, 813–14 (1962); Pake v. Morris, 230 N.C. 424, 426, 53 S.E.2d 300, 301 (1949); Duffy v. E.H. & J.A. Meadows Co., 131 N.C. 31, 34, 42 S.E. 460, 461 (1902); The Shadow Grp., LLC, 156 N.C. App. at 200, 579 S.E.2d at 287. Reasonableness is judged by an objective standard and balances the relative benefit to defendants and harm to plaintiffs. See Pendergrast v. Aiken, 293 N.C. 201, 217, 236 S.E.2d 787, 797 (1977) (listing factors); Watts, 256 N.C. at 618, 124 S.E.2d at 814 (same); Rainey v. St. Lawrence Homes, Inc., 174 N.C. App. 611, 613–14, 621 S.E.2d 217, 220 (2005).

Plaintiffs have plausibly alleged that defendants have interfered with plaintiffs' use and enjoyment of their property by allegedly discharging chemicals, including GenX, from the Fayetteville Works plant. Plaintiffs have plausibly alleged that the interference was both substantial and objectively unreasonable, even though a "regulatory requirement," [D.E. 62] 16, has not been

established for GenX or other PFCs. But cf. New Mexico v. Gen. Elec. Co., 335 F. Supp. 2d 1185, 1212 (D.N.M. 2004) ("Under New Mexico law, water need not be pristine to be drinkable, and use for drinking water purposes depends upon whether applicable water quality standards are met, not whether the water yet remains in its primordial state, untouched by any of the chemical remnants of the modern age."). Accordingly, the court denies defendants' motion to dismiss the private nuisance claim in count four.

F.

In count five, plaintiffs allege that defendants' alleged discharge of chemicals from the Fayetteville Works plant constitutes a trespass to real property [D.E. 53] ¶¶ 162–67. Defendants argue that plaintiffs have not adequately shown that chemicals entered plaintiffs' properties and that plaintiffs have not alleged injury or damages as a result of defendants' alleged discharge of chemicals. See [D.E. 62] 17.

Under North Carolina law, trespass is "a wrongful invasion of the possession of another." Singleton v. Haywood Elec. Membership Corp., 357 N.C. 623, 627, 588 S.E.2d 871, 874 (2003); State ex rel. Bruton v. Flying 'W' Enters., Inc., 273 N.C. 399, 415, 160 S.E.2d 482, 493 (1968); see Shepard v. Bonita Vista Props., L.P., 191 N.C. App. 614, 631, 664 S.E.2d 388, 399 (2008), aff'd, 363 N.C. 252, 675 S.E.2d 332 (2009) (per curiam); Elec. World, Inc. v. Barefoot, 153 N.C. App. 387, 393, 570 S.E.2d 225, 230 (2002); cf. Matthews v. Forrest, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952) ("The essence of a trespass to [real property] is the disturbance of possession."). A claim of trespass to real property requires "(1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff." Singleton, 357 N.C. at 627, 588 S.E.2d at 874; Fordham v. Eason, 351 N.C. 151, 153, 521 S.E.2d 701, 703 (1999) (quotation omitted); see, e.g., Elec. World, Inc., 153 N.C. App. at 393, 570 S.E.2d

at 230; Jordan, 116 N.C. App. at 166, 447 S.E.2d at 498. Because "every unauthorized entry on land in the peaceable possession of another constitutes a trespass, without regard to the degree of force used and irrespective of whether actual damage is done," a complaint "states a cause of action for the recovery of nominal damages for a properly pleaded trespass to [real property] even if it contains no allegations setting forth the character and amount of damages." Matthews, 235 N.C. at 283, 69 S.E.2d at 555; see Keziah v. Seaboard Air Line R.R., 272 N.C. 299, 311, 158 S.E.2d 539, 548 (1968); Hutton & Bourbonnais v. Cook, 173 N.C. 496, 499, 92 S.E. 355, 356 (1917); Hawkins v. Hawkins, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991) (noting that trespass to real property is among the torts that "do not include actual damage as an essential element"), aff'd, 331 N.C. 743, 417 S.E.2d 447 (1992).

Plaintiffs have plausibly alleged a claim of trespass to real property. First, plaintiffs have plausibly alleged that they were in possession of real property. Second, plaintiffs have plausibly alleged that defendants, by knowingly or purposefully discharging chemicals including GenX, have intentionally and unauthorizedly entered their property. See BSK Enters., Inc., 246 N.C. App. at 24–26, 783 S.E.2d at 252–53; Jordan, 116 N.C. App. at 166–67, 447 S.E.2d at 498; Rudd, 982 F. Supp. at 370. Finally, plaintiffs have at least plausibly alleged nominal damages. Accordingly, the court denies defendants' motion to dismiss count five.

G.

In count six, plaintiffs allege that defendants are liable to plaintiffs for unjust enrichment [D.E. 53] ¶¶ 168–70. Plaintiffs allege that they conferred a benefit on defendants, namely by allowing defendants to pollute without incurring the additional costs of containing and properly disposing of waste. See id. ¶¶ 169–70. Defendants argue that plaintiffs have not alleged that they

conferred a benefit on defendants, that defendants accepted any benefit, and that plaintiffs' conferral of a benefit was neither gratuitous or officious. See [D.E. 62] 18.

"[A] person who has been unjustly enriched at the expense of another is required to make restitution to the other." Booe v. Shadrick, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) (quotation omitted). Under North Carolina law, to recover on an unjust enrichment claim, plaintiffs must prove (1) that they conferred a benefit on another party, (2) that the other party consciously accepted the benefit, and (3) that plaintiffs did not confer the benefit gratuitously or officiously (i.e., not conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances). See id. at 570, 369 S.E.2d at 556; Lake Toxaway Cmty. Ass'n v. RYF Enters., LLC, 226 N.C. App. 483, 490, 742 S.E.2d 555, 561 (2013); Se. Shelter Corp. v. BTU, Inc., 154 N.C. App. 321, 330, 572 S.E.2d 200, 206 (2002). A plaintiff that establishes an unjust enrichment claim is entitled to "a restitution-type recovery" and need not have "actual damages." Seraph Garrison, LLC ex rel. Garrison Enters., Inc. v. Garrison, 247 N.C. App. 115, 130, 787 S.E.2d 398, 410 (2016).

It would expand North Carolina public policy to find that plaintiffs conferred a benefit on defendants by defendants allegedly discharging chemicals onto plaintiffs' property. Cf. Little Hocking Water Ass'n v. E.I. du Pont de Nemours & Co., 91 F. Supp. 3d 940, 984–86 (S.D. Ohio 2015). Accordingly, the court grants defendants' motion to dismiss count six.

H.

Defendants move to dismiss plaintiffs' request for an injunction requiring defendants to establish medical monitoring "to provide health care and other appropriate services to [c]lass members for a period of time deemed appropriate by the [c]ourt." [D.E. 53] 47; see [D.E. 62] 18–19. Defendants contend that "[m]edical monitoring has been expressly rejected in North Carolina."

[D.E. 62] 18; see Curl v. Am. Multimedia, Inc., 187 N.C. App. 649, 656–57, 654 S.E.2d 76, 81–82 (2007). In Curl, the North Carolina Court of Appeals rejected an independent cause of action for medical monitoring. See Curl, 187 N.C. App. at 656–57, 654 S.E.2d at 81–82. Similarly, the North Carolina Court of Appeals rejected medical monitoring as an element of damages. Id. at 657, 654 S.E.2d at 81 ("[R]ecognition of the increased risk of disease as a present injury, or of the cost of medical monitoring as an element of damages will present complex policy questions. We conclude that balancing . . . these issues is a task within the purview of the legislature and not the courts. Accordingly, we decline to create the new causes of action or type of damages . . . ."). This court must "follow the decision of an intermediate state appellate court unless there [are] persuasive data that the highest court would decide differently." Toloczko, 728 F.3d at 398 (quotation omitted). Plaintiffs cite no such data. Accordingly, the court grants defendants' motion to dismiss plaintiffs' request for injunctive relief concerning medical monitoring.

As for defendants' argument concerning future medical expenses, "plaintiffs, if entitled to recover at all, are entitled to recover damages for all injuries, past and prospective, sustained as a result of the defendants' wrongful and negligent acts." Dickson v. Queen City Coach Co., 233 N.C. 167, 173, 63 S.E.2d 297, 302 (1951). Plaintiffs have plausibly alleged that they have suffered present personal injury. Accordingly, the court denies defendants' motion to dismiss plaintiffs' request for future medical expenses.

IV.

In sum, the court enters this order to explain why the court GRANTED IN PART and DENIED IN PART defendants' motion to dismiss the consolidated class action complaint [D.E. 61]. The court DISMISSES WITHOUT PREJUDICE counts three and six and the public nuisance claim in count four.

SO ORDERED. This 19 day of April 2019.

JAMES C. DEVER III
United States District Judge