IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JARROD JOHNSON, individually, and on Behalf of a Class of persons similarly situated, Plaintiff, v. 3M *et al.*, Defendants.	:	CIVIL ACTION NO. 4:20-cv-8-AT

ORDER

Dalton, Georgia has been dubbed the "Carpet Capital of the World." But Dalton's carpet commerce, according to Plaintiff, has resulted in serious harm to individuals that live in the surrounding area because certain chemicals heavily used in carpet production, PFAS, are both toxic and everlasting. Plaintiff alleges that the numerous defendants here — who are chemical suppliers, carpet manufacturers, intermediaries, the City of Dalton d/b/a Dalton Utilities ("Dalton Utilities"), and the Dalton Whitfield Sold Waste Authority ("DWSWA") — have contributed to or caused the discharge of these chemicals into North Georgia waterways around Dalton. As a result, the discharged PFAS have contaminated water supplies downstream of Dalton, specifically the water supplies for the City of Rome and Floyd County, thereby injuring Plaintiff and others similarly situated.

Now before the Court are a deluge of motions to dismiss, 12 total, drowning the Court in more than 900 pages of briefing.

In this odyssey of an Order, the Court first outlines the basic factual background and legal standard in Sections I and II. The Court then addresses Plaintiff's request to file his Fourth Amended Complaint in Section III. In Section IV, the Court discusses the Clean Water Act ("CWA") claims against Dalton Utilities and DWSWA, finding that Plaintiff has stated CWA claims against both defendants. The remaining claims are state law claims, brought on behalf of the putative class. In Section V, the Court discusses asserted defenses common to multiple defendants and/or multiple claims: specifically, the economic loss rule, the free public services doctrine, and the specific sovereign immunity asserted by Dalton Utilities and DWSWA. Then in Section VI, the Court analyzes the claim-specific defenses to the negligence, negligence *per se*, nuisance, and punitive damages claims. Finally, in Section VII, the Court addresses other miscellaneous issues including certain individual-defendant motions to dismiss that were filed separate and apart from the group motions.

For the reasons detailed at length below, the Court rules on the twelve pending motions as follows:

Doc. No.	**Motion**	**Ruling**
472	Americhem's Motion to Dismiss	**DENIED**
473	Manufacturer Defendants' Motion to Dismiss	**DENIED** in full
474	Dalton Utilities Motion to Dismiss	**DENIED** with respect to the CWA and abatement of nuisance claims; **GRANTED** with respect to

		nuisance (damages) claim (Count VI)
475	DWSWA Motion to Dismiss	**DENIED** in full
476	Polyventine LLC Supplemental Motion to Dismiss	**DENIED**
477	Columbia Recycling Corp. Motion to Dismiss	**DENIED**
478	DyStar Motion to Dismiss	**DENIED**
479	Supplier Defendants' Motion to Dismiss	**GRANTED** with respect to negligence claim; **DENIED** with respect to nuisance claims and punitive damages claim
481	INV Performance Surfaces, LLC Motion to Dismiss	**GRANTED** with respect to negligence and negligence *per se* claim; **DENIED** with respect to nuisance and abatement claims, and punitive damages claim
482	Chemours Supplemental Motion to Dismiss	**DENIED**
483	Daikin Supplemental Motion to Dismiss	**GRANTED** with respect to negligence *per se* claim; **DENIED** with respect to nuisance and abatement claims, and punitive damages claim
484	MFG Chemical, LLC Motion to Dismiss	**DENIED**

Additionally, in an effort to avoid the consequences of unintelligible acronym soup, the Court provides the following acronym guide, which is also attached as an exhibit to this Order:

CWA	Clean Water Act, 33 U.S.C. §§ 1251, *et seq*.
DWSWA	Dalton-Whitfield Solid Waste Authority
EPA	United States Environmental Protection Agency
EDP	Georgia Department of Natural Resources, Environmental Protection Division
FCWD	Floyd County Water Department
PSC	Georgia Public Service Commission
GWQCA	Georgia Water Quality Control Act, O.C.G.A. § 12-5-20, *et seq*.

LAS	Land Application System, *i.e.*, the approximately 9,800-acre land application system operated by Dalton Utilities, where effluent from wastewater treatment is sprayed onto the surface.
NPDES Permit	National Pollution Elimination Discharge System Permit, *i.e.*, a permit issued by the United States Environmental Protection Agency or an authorized state agency for the discharge of pollutants into the waters of the United States, subject to conditions established within the permit and by applicable federal and state statutes and regulations. See 33 U.S.C. § 1342.
PFAS	Per- and polyfluoroalkyl Substances, *i.e.*, a group of man-made chemicals that Plaintiff alleges have been discharged directly or indirectly into rivers, streams, and other watersheds upstream of the City of Rome.
PFOA	Perfluorooctanoic acid, a certain PFAS chemical
PFOS	Perfluorooctanesulfonic acid, a certain PFAS chemical
POTW	Publicly Owned Treatment Works, *i.e.*, any devices and systems, which are owned by a state or municipality, used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature. *See* 33 U.S.C. § 1292 and 40 C.F.R. § 403.3.
ppt	parts per trillion
RWSD	Rome Water and Sewer Division
SURR	Dalton Utilities' Sewer Use Rules and Regulations, which "Sets forth policies for the administration and operation of the Dalton Utilities Publicly Owned Treatment Works (POTW)" and establishes "[u]niform requirements for direct and indirect dischargers of pollutants from non-domestic sources into the POTW . . . to enable Dalton Utilities to comply with all applicable State and Federal laws. . . ."
UGA	University of Georgia
WPCP	Water Pollution Control Plant, *i.e.*, A general term used by Georgia EPD for sewage or wastewater treatment plants, including POTWs.

Before diving into the facts, the Court also provides the below chart of the various Defendants in this action, for reference:

Manufacturing Defendants (including alleged dischargers directly involved with the carpet manufacturing industry): Aladdin Manufacturing Corporation Americhem, Inc. ("Americhem") Arrowstar, LLC Chem-Tech Finishers, Inc. Color Express, Inc. Columbia Recycling Corp. Cycle Tex, Inc. DyStar, L.P. ("DyStar") Engineered Floors, LLC Fibro Chem, LLC IMACC Corporation INV Performance Surfaces, LLC (INVISTA) JB NSD, Inc. MFG Chemical, LLC Milliken & Company Mohawk Carpet, LLC Mohawk Industries, Inc. Oriental Weavers USA, Inc. Polyventine LLC ("Polyventine") Secoa Technology, LLC Shaw Industries Group, Inc. Shaw Industries, Inc. Tarkett USA, Inc. The Dixie Group, Inc.	**Supplier Defendants**: 3M Company Daikin America, Inc. ("Daikin") E.I. du Pont de Nemours and Company The Chemours Company ("Chemours") **City of Dalton d/b/a Dalton Utilities ("Dalton Utilities")** **Dalton-Whitfield Solid Waste Authority ("DWSWA")**

Finally, the Court provides the below Table of Contents as a frame for the analysis below.

Table of Contents

I. FACTUAL BACKGROUND

The Chemicals

Per- and polyfluoroalkyl substances ("PFAS") are a group of synthetic chemicals that repel oil and water and are resistant to heat and chemical reactions. (Third Am. Complaint ("Compl."), Doc. 418 ¶ 52.) Due to their chemical stability and oil and water repellent properties, PFAS have been widely used in carpet and textile production to provide water and stain resistance. (*Id.*) These same properties also make PFAS persistent in the environment once introduced, and there is no known environmental breakdown mechanism. (*Id.* ¶¶ 52–53.) PFAS are toxic and have been linked to adverse health effects, including cancer, immunotoxicity, thyroid disease, ulcerative colitis, and developmental defects to fetuses. (*Id.* ¶¶ 55, 56.) Because PFAS are water soluble and highly mobile, contaminated drinking water is a meaningful source of human exposure to PFAS. (*Id.* ¶ 53.) In May 2016, the EPA issued lifetime Drinking Water Health Advisories of 70 parts per trillion ("ppt") for perfluorooctanoic acid ("PFOA") and 70 ppt for

perfluorooctanesulfonic acid ("PFOS"),[1] two Long-Chain PFAS chemicals that have largely been phased out of manufacturing processes but continue to persist in the environment. (*Id.* ¶¶ 60, 54.) As alleged in the Complaint, the Long-Chain PFOA and PFOS have been replaced by substitute PFAS, including Short-Chain PFAS. (*Id.* ¶ 94.)

Plaintiff alleges that Defendants caused these PFAS chemicals to be discharged to surface waters in North Georgia, thereby contaminating the drinking water supplies of the City of Rome and Floyd County. (*Id.* ¶¶ 1-3.)

The Parties and Tracing the Flow of PFAS

Plaintiff and the proposed Class Members are water subscribers and ratepayers with the Rome Water and Sewer Division and/or the Floyd County Sewer Division who have, and continue to, suffer harm to their person and property through the contamination of their drinking water with PFAS and the payment of surcharges to recoup the costs of removing the contamination. (*Id.* ¶¶ 3, 15-16, 104, 136, 178.)

Defendants are all alleged to have contributed to the discharge of PFAS into the Upper Coosa River Basin, upstream of the City of Rome and Floyd County. (*Id.* ¶ 1.) The Defendants can be broken down into four main groups.

First, the Supplier Defendants are companies that manufacture and supply PFAS to the carpet manufacturers. (*Id.* ¶¶ 4, 18, 21, 26, 32, 37, 40, 45, 49, 51.)

[1] When both PFOA and PFOS are found in drinking water, the Health Advisory for the combined concentration is 70 ppt. (Compl. ¶ 60.)

Plaintiff alleges that these Supplier Defendants have for many years known of the dangers of PFAS. (*Id.* ¶¶ 67-82.)

Second, the Manufacturing Defendants are carpet manufacturing companies and others directly connected to the carpet industry that use PFAS at their facilities and discharge industrial wastewater containing PFAS. (*Id.* ¶¶ 4, 19, 20, 22-25, 31, 33-36, 38-48, 50.) These PFAS chemicals are discharged in the City of Dalton's Publicly Owned Treatment Works ("POTW"), as described below. (*Id.* ¶ 83.)

The third relevant entity defendant is the Dalton Whitfield Solid Waste Authority ("DWSWA"), an "enterprise fund" created by the City of Dalton and Whitfield County to manage the solid waste needs of the City and County. (*Id.* ¶ 29.) The DWSWA operates at least two landfills, the Old Dixie Highway Landfill and the Carpet Landfill, and has for many years discharged landfill leachate[2] — which can be considered industrial wastewater — to the City of Dalton POTW. (*Id.*) In 2013, the DWSWA installed a forced sewer main to send its landfill leachate directly from the landfills to the Dalton POTW. (*Id.*)

Finally, the fourth important entity is the City of Dalton, Georgia, acting through its Board of Water, Light, and Sinking Fund Commissioners, d/b/a Dalton Utilities ("Dalton Utilities"), which operates the City of Dalton's Publicly Owned Treatment Works ("POTW"). (*Id.* ¶¶ 1, 4, 27.) The POTW, consists of various wastewater collection and treatment facilities as well as the Riverbend Land

[2] Leachate is water that has percolated through a solid and leached out some of the constituents.

Application System ("LAS"). (*Id.* ¶¶ 27, 1, 84.) In operating the POTW, Dalton Utilities collects wastewater from industrial and nonindustrial users, treats the wastewater at various water pollution control plants, and applies the treated wastewater, using approximately 19,000 sprayheads, to the 9,800-acre LAS. (*Id.* ¶¶ 82–83.) According to the EPA, approximately 90% of the wastewater which enters Dalton Utilities' treatment facilities for ultimate disposal at the LAS originates from industrial sources, primarily carpet manufacturers. (*Id.* ¶ 84.)

The Dalton LAS borders the Conasauga River and its tributaries and is upstream of the Oostanaula River, the source of drinking water for the City of Rome, Georgia. (*Id.* ¶¶ 67, 84.) Dalton Utilities' LAS operations are governed by its LAS Permit No. GAJ020056 ("LAS permit"), which requires the LAS be maintained as a "no discharge" system with no discharges of pollutants to surface waters. (*Id.* ¶ 85.) Dalton Utilities also has a National Pollutant Discharge Elimination System General Stormwater Permit GAR050000 ("NPDES permit"), which prohibits stormwater discharges of "process wastewater, industrial wastewater, and contaminated stormwater" from the LAS. (*Id.* ¶ 86.) To enforce pretreatment standards for industrial discharges, Dalton Utilities enacted local Sewer Use Rules and Regulations ("SURR"), which incorporate federal and state pretreatment requirements for industrial users discharging wastewater to the Dalton Utilities POTW. (*Id.* ¶ 125.) Section 2.4.1 of the SURR prohibits industrial users from discharging any pollutant or wastewater that causes "Pass Through." (*Id.* ¶ 127.) "Pass Through" occurs when industrial user discharge reaches surface

waters and causes a violation of any requirement of Dalton Utilities' LAS Permit. (*Id.*)

Thus, when the Manufacturing Defendants and DWSWA discharge their industrial wastewater (containing PFAS), it is sent to the Dalton Utilities POTW. (*Id.* ¶ 83.) The PFAS resist degradation during treatment processing at the POTW and accumulate in the LAS. (*Id.* ¶¶ 4, 87.)

Plaintiff alleges that Dalton Utilities' discharges of PFAS from the LAS to the Conasauga River or its tributaries occurs both overland and through hydrologically connected groundwater. (*Id.* ¶¶ 109–10.) In addition, Plaintiff also asserts that Dalton Utilities has discharged raw sewage containing PFAS via "Spills" on at least 24 different occasions without a NPDES Permit authorizing it to do so in violation of § 301(a) of the CWA. (*Id.* ¶¶ 96, 116.)

Relevant Studies and Sampling

Plaintiff alleges that all Defendants, including Dalton Utilities, have known for years that PFAS cannot be removed from the industrial wastewater and that the conventional treatment processes and land application do not remove these chemicals prior to discharge to the Conasauga River and its tributaries in and around the LAS. (*Id.* ¶ 87.) For years, dangerously high levels of PFAS have been detected in the soil, compost, sewage sludge, groundwater, and wastewater effluent at the Dalton Utilities LAS. (*Id.* ¶ 89.) Sampling of surface waters has also demonstrated elevated levels of PFAS in surface waters downstream of the LAS. (*Id.* ¶¶ 91–94.) Multiple entities including the EPA, the University of Georgia

("UGA"), and the Georgia Environmental Protection Division ("EPD") have conducted sampling, which has identified industrial wastewater originating from Defendants' manufacturing facilities — then sent to the POTW and discharged at Dalton Utilities' Riverbend LAS — as the source of PFAS contamination in the Conasauga, Oostanaula, and Coosa Rivers. (*Id.* ¶ 90.) As noted, the Oostanaula River is the source of the City of Rome's water supply. (*Id.*)

The UGA Study, conducted in 2006, found extremely high levels of PFAS downstream of the LAS, including PFOA levels as high as 1150 ppt and PFOS as high as 318 ppt. (*Id.* ¶ 91.)[3] The UGA Study found that these concentrations were among the highest ever recorded in surface waters. (*Id.*) The United Steelworkers Union also sampled waters downstream of the LAS in 2006 and found PFOA and PFOS levels as high as 526 ppt and 923 ppt respectively. (*Id.* ¶ 92.) In 2009 and 2010, Dalton Utilities conducted sampling downstream of the LAS, yielding similar results. (*Id.* ¶ 93.) In 2012, the EPA conducted a Conasauga River Study. The study's analytical results showed elevated levels of PFAS downstream of the LAS as compared to samples taken upstream of the LAS, with downstream PFOA and PFOS levels as high as 210 ppt and 180 ppt. (*Id.* ¶ 94.) Additional sampling of specific locations along the Conasauga and Oostanaula Rivers revealed high levels of PFAS on a number of specific dates between June 19, 2016 and June 18, 2020. (*Id.* ¶ 95.) Other sampling showed that Dalton Utilities discharged raw sewage

[3] As a reminder, in May 2016, the EPA issued lifetime Drinking Water Health Advisories of 70 ppt for PFOA and 70 ppt for PFOS. (*Id.* ¶ 60.)

containing PFAS on more than 20 occasions between December 2, 2015 and June 17, 2020. (*Id.* ¶ 96.)

As early as 2009, sampling showed that the drinking water for the City of Rome, downstream of the LAS, was contaminated with PFAS at dangerously high levels. (*Id.* ¶ 97.) Leading up to the May 2016 EPA Health Advisories, testing by the City of Rome revealed levels of PFOA and PFOS in the water supply that exceeded the EPA's 70 ppt limit; additionally, the City of Rome's testing found other Long-Chain and Short-Chain PFAS in the water supply. (*Id.* ¶ 98.)

The City of Rome's Attempts to Address the PFAS Problem

In 2016, the City of Rome's existing water treatment filtration system was not capable of removing or reducing the levels of PFAS found in the water. (*Id.* ¶ 99.) As a result, after the EPA Health Advisories, the City of Rome took emergency measures to implement a *temporary* filtration process to remove only Long-Chain PFAS, and draw additional water from the Etowah River to blend with water from the Oostanaula. (*Id.*) As it stands, Rome requires a new permanent filtration system. (*Id.* ¶ 100.) To recoup the costs of these emergency measures, the City of Rome implemented a surcharge on the price of water for all ratepayers and estimates that the rate will increase at least 2.5 % each year for the foreseeable future. (*Id.* ¶ 101.)

Harm to Plaintiff and the Proposed Class Members

As noted above, Plaintiff alleges that the level of toxic PFAS that has made its way into the City of Rome and Floyd County water supplies has caused harm to

him and the prospective Class Members. Specifically, Plaintiff alleges that the contaminated water supply and ingestion of PFAS causes harm and threatens the health and well-being of Plaintiff, the proposed Class Members, and every individual who consumes PFAS contaminated drinking water. (*Id.* ¶ 178.) Plaintiff also alleges that he has been injured in the use and enjoyment of his property, and that his property rights have been interfered with, as a direct result of the contamination of the Rome water supply. (*Id.* ¶¶ 16, 156, 178.) Finally, Plaintiff alleges that he and proposed Class Members have suffered economic harm in being forced to pay heightened water rates and surcharges to acquire water for themselves and their families. (*Id.* ¶¶ 156, 162 174, 178.)

Procedural History and Claims

Plaintiff originally filed this putative class action in the Superior Court of Floyd County on November 26, 2019. (Doc. 1-1.) Plaintiff's original complaint included some similar allegations to those raised by the City of Rome against the Defendants in a separate lawsuit filed on November 19, 2020, *City of Rome v. 3M Co. et al.* No. 19CV02448JFL003 (Floyd Super. Ct. Nov. 26, 2019). (Doc. 1-2.) Defendant 3M removed Plaintiff's case to this Court on January 10, 2020 based on the Class Action Fairness Act, 28 U.S.C. §1332(d) ("CAFA"). The Court *sua sponte* questioned whether this case should be remanded pursuant to the exceptions to CAFA or an abstention doctrine on February 11, 2020. (Doc. 104.) After reviewing the Parties' arguments in support of jurisdiction, the Court discharged its show

cause order (Doc. 119), and later appointed Carlos A. González, esq. as Special Master with the Parties' consent. (Doc. 195.)

Plaintiff filed an Amended Complaint on August 27, 2020 which reorganized existing claims and added new claims under the CWA against Dalton Utilities and DWSWA. (Doc. 236.) Plaintiff later filed a Second Amended Complaint on September 25, 2020 to correct misnomers and further clarify which Defendants Plaintiff alleges are subject to the Negligence *Per Se* (Count Four) claim. (Doc. 282.)

Then, on December 14, 2020, Plaintiff filed the instant Third Amended Complaint to add certain Defendants, substitute others, add subsequently noticed violations of the Clean Water Act ("CWA"), and name Dalton Utilities and DWSWA as defendants to existing claims. (Compl. n.1.)

In the Third Amended Complaint, Plaintiff brings claims under the Clean Water Act ("CWA") against Dalton Utilities and DWSWA under the CWA's citizen suit provision. Plaintiff also brings state-law claims on behalf of a prospective class for negligence, negligence *per se*, punitive damages, nuisance, and abatement of the nuisance against various defendants. The chart below illustrates which claims are brought against which defendants under the current Third Amended Complaint:

PLAINTIFF'S INDIVIDUAL CLAIMS		
Count	**Claim**	**Defendant**
Count 1	**CWA**: Discharge of Pollutants to Surface Waters Without an NPDES Permit in Violation of the Clean Water Act	Dalton Utilities
Count 2	**CWA**: Industrial User Pass Through Discharges of Pollutants in Violation of Federal Prohibitions, Dalton Utilities' Sewer Use Rules and Regulations, and the Clean Water Act	DWSWA
CLASS CLAIMS		
Count 3	Willful, Wanton, Reckless, or Negligent Misconduct	All Defendants *except* Dalton Utilities
Count 4	Negligence *Per Se*	All Defendants *except* Dalton Utilities and Supplier Defendants
Count 5	Punitive Damages (and bad faith attorney's fees)	All Defendants *except* Dalton Utilities
Counts 6 & 7	Public Nuisance & Claims for Abatement and Injunction of Public Nuisance	All Defendants

II. LEGAL STANDARD

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a "plausible" claim for relief. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555-556 (2007); Fed. R. Civ. P. 12(b)(6). The plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *See Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)); Fed. R. Civ. P. 8(a). In ruling on a motion to dismiss, the court must accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *See Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003).

A claim is plausible where the plaintiff alleges factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff is not required to provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. The plausibility standard requires that a plaintiff allege sufficient facts "to raise a reasonable expectation that discovery will reveal evidence" that supports the plaintiff's claim. *Id.* at 556. A complaint may survive a motion to dismiss for failure to state a claim even if it is "improbable" that a plaintiff would be able to prove those facts and even if the possibility of recovery is extremely "remote and unlikely." *Id.*

III. PLAINTIFF'S MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT

On July 30, 2021, Plaintiff sought leave to file a Fourth Amended Complaint. (Doc. 600.) Plaintiff stated that the "sole purpose of the amendment is to add additional factual allegations based on evidence adduced in discovery demonstrating the Supplier Defendants' direct involvement in, and knowledge of, the Manufacturer Defendants' use and disposal of PFAS." (*Id.* at 1) The proposed amendment specifically seeks to bolster Plaintiff's negligence and nuisance claims against the Supplier Defendants. (*Id.* at 2.)

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend its pleading (A) once as a matter of course within 21 days after serving it, or

(B) 21 days after service of a motion or responsive pleading. Fed. R. Civ. P. 15(a)(1). If a party seeks to amend its pleading outside these time limits, it may do so only by leave of court or by written consent of the adverse party. Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.*; *accord Foman v. Davis*, 371 U.S. 178, 182 (1962); *Shipner v. E. Air Lines, Inc.*, 868 F.2d 401, 406-407 (11th Cir. 1989). Rule 15(a)'s liberal policy of "permitting amendments to facilitate determination of claims on the merits circumscribes the exercise of the district court's discretion; thus, unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Id.* at 407. Thus, the Court should deny leave to amend only where the amendment will result in undue delay, bad faith, undue prejudice, a repeated failure to cure deficiencies by amendments previously allowed, or futility. *Foman*, 371 U.S. at 182; *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004) ("[D]enial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal.") (quoting *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999)).

A complaint is futile, *inter alia*, if it would be subject to dismissal for failing to state a claim for which relief can be provided. *See Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1015 (11th Cir. 2005) (affirming district court's denial of leave to amend a *qui tam* relator's FCA complaint because proposed amendments "failed to plead specific instances of fraudulent submissions to the government"); *see also*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("Determining whether a complaint

states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). *Iqbal* requires more than facts that are "merely consistent with a defendant's liability" to achieve plausibility. *Id.* at 678 (internal quotations omitted). Whether to permit amendment is a legal determination for the Court, subject to *de novo* appellate review. *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1236 (11th Cir. 2008).

The Court has reviewed Plaintiff's additional facts and evidence provided in Plaintiff's Motion (Doc. 600) as proposed additional allegations against the Supplier Defendants. After thorough review, the Court concludes that Plaintiff's proposed amendment is futile as to the negligence claim against the Supplier Defendants. As reasoned below in Section VI.A, Plaintiff's allegations against the Supplier Defendants are insufficient to show that the Suppliers had a duty to him under Georgia law. Plaintiff has pointed to no Georgia legal authority supporting that the Supplier Defendants had a duty to Plaintiff under comparable circumstances. The new facts and allegations do not change this dearth of legal authority supportive of Plaintiff's claim. Accordingly, Plaintiff still fails to plausibly plead the duty element of their negligence claim against the Supplier Defendants, and therefore the Court finds the proposed amendment futile. *See Corsello,* 428 at 1015.

As to the nuisance claim, the Court finds that the new facts and allegations are unnecessary. As detailed below, Plaintiff states claims for public nuisance and abatement of public nuisance against the Supplier Defendants. Plaintiff can of

course cite to these new facts as evidence in support of his nuisance claim as the case proceeds.

Accordingly, Plaintiff's Motion for Leave to File a Fourth Amended Complaint [Doc. 600] is **DENIED**.[4]

IV. COUNTS I AND II: CLEAN WATER ACT CLAIMS

A. Counts I and II: Plaintiff's CWA Notice of Intent to Sue Letter Satisfies the Statutory Requirement

Dalton Utilities and DWSWA both argue that Plaintiff's CWA claim should be dismissed because Plaintiff's Notice Letters failed to comply with the CWA notice requirements.

The CWA citizen suit requires citizens to give 60 days-notice of their intent to sue to the alleged violator (as well as to the Administrator of the EPA and the state) prior to bringing suit for violations under the CWA. 33 U.S.C. § 1365(b)(1)(A); *Nat'l. Env't. Found. v. ABC Rail Corp.*, 926 F.2d 1096, 1097 (11th Cir.1991) (noting that the 60–day notice requirement of §1365(b) is a mandatory condition precedent to the filing of a citizen suit under the CWA). The purpose of this notice requirement is: (1) to give the alleged violator an opportunity to bring itself into compliance with the Act, rendering unnecessary a citizen suit, and (2) to allow the EPA or state agency the first opportunity to bring suit. *Gwaltney*, 484 U.S. at 60; *Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, 734 F.3d 1297, 1302 (11th Cir. 2013); *Boring v. Pattillo Indus. Real Estate*, 426 F. Supp.

[4] The Court, however, **GRANTS** Plaintiff's related Motion to File Matters Under Seal [Doc. 602].

3d 1341, 1344 (N.D. Ga. 2019). The failure to provide pre-suit notice requires dismissal of the action. *Nat'l. Env't. Found.*, 926 F.2d at 1097–98.

The required contents of a pre-suit notice under the CWA are provided by regulation. A CWA notice letter:

> shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3.

1. Dalton Utilities

Plaintiff sent Dalton Utilities a Notice Letter on June 24, 2020 ("June Notice") and a Supplemental Notice Letter on August 4, 2020 ("August Notice"). (Doc 418-1; Doc. 418-3.) The Notice Letters aggregate 16 pages of substantive content, were timely sent, and were attached to the Third Amended Complaint. The relevant parts of the Letters indicate the following:

1. Plaintiff intends to sue Dalton Utilities as owner and operator of the wastewater collection/treatment facility and the Riverbend Wastewater Land Application System ("LAS") located on Riverbend Road in Whitfield and Murray Counties, Georgia for longstanding and ongoing violations of the Clean Water Act arising out of illegal discharges of per- and polyfluoroalkyl ("PFAS") from the LAS into the Conasauga River and its tributaries. (Doc. 418-1 at 1.)

2. The illegal discharges by Dalton Utilities have contaminated the Conasauga River and the Oostanaula River as well as the City of Rome's drinking water supply with toxic chemicals known collectively as PFAS. (*Id.* at 2.)

3. Dalton Utilities operates the Riverbend, Loopers Bend, and Abutment Road Water Pollution Control Plants ("WPCPs") as well as the Riverbend LAS. After collection/treatment of wastewater at these WPCPs, the wastewater effluent is applied to the 9,800 LAS using approximately 19,000 sprayheads. (*Id.*)

4. The treatment technology utilized by these mechanical preapplication WPCPs cannot remove PFAS from the wastewater prior to the application of this effulent to the LAS. (*Id.* at 3.)

5. Dalton Utilities' wastewater collection and disposal system is a 'no discharge' system. The LAS permit (GAJ020056) authorizes Dalton Utilities to discharge wastewater effluent to the LAS but expressly prohibits any discharge from the LAS to surface waters. Despite this prohibition, EPA has determined that a "significant amount" of the effluent sprayed onto the LAS leaves the LAS via surface waters and enters the Conasauga River. (*Id.*)

6. PFAS resist degradation during the treatment process at Dalton Utilities' WPCPs, and human exposure to PFAS through contaminated drinking water can cause an array of serious health effects and diseases including certain cancers, immunotoxicity, thyroid disease, liver disease, high cholesterol, pregnancy-induced hypertension, and ulcerative colities. (*Id.*)

Under the heading, "Violations of the Clean Water Act," the Notice Letters state:

1. Dalton Utilities is in violation of Section 301(a) of the CWA, 33 U.S.C. § 3133(a), due to unpermitted discharges of PFAS, including, but not limited to, perfluorooctanoic acid ("PFOA") and perflurorooctane sulfonic acid ("PFOS") from the LAS to the Conasauga River and/or its tributaries. (*Id.* at 4.)

2. The requirement for an NPDES Permit authorizing these discharges arose at the time that Dalton Utilities first knew or should have known that pollutants were being discharged into surface waters, and each day since that time is a violation of the CWA. (*Id.*)

3. Section 301(a) of the CWA, 33. U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source to waters of the United

States except in compliance with an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Each discharge that is not authorized by a permit constitutes a separate violation of the CWA. 33 U.S.C. § 1319(d). (*Id.* at 5.)

4. Dalton Utilities has, since as early as 2006, and every day since at least June of 2015 been in continuous violation of Section 301 of the CWA by discharging PFAS from the LAS, the sprayheads located thereon, and/or ditches and drainage channels that flow from the LAS to surface waters and into the Conasauga River and/or its tributaries, which constitute waters of the United States, without an NPDES Permit authorizing such discharges as required by 33 U.S.C. § 1342. (*Id.*)

5. Dalton Utilities has also violated Section 301 of the CWA by discharging PFAS from the LAS, the sprayheads located thereon, and/or ditches and drainage channels that flow into the groundwater beneath the LAS, which is hydrologically connected to the Conasauga River and/or its tributaries, and constitutes the functional equivalent of direct discharges to these surface waters. (*Id.* at 5-6.)

6. Dalton Utilities has, without a permit and in violation of Section 301 of the CWA, discharged raw sewage from the various wastewater collection/treatment facilities associated with the LAS into waters of the State ("spills"), including the Conasauga River and tributaries thereto on specified dates from December 2015 through June 2020. (Doc. 418-3 at 4-5.)

7. Georgia's Water Quality Control Act, O.C.G.A. § 12-5-30, *et seq.* requires that "where necessary reasonable usage of the waters of the state and reasonable treatment of sewage, industrial wastes, and other wastes prior to their discharge into such waters," and provides that "it shall be unlawful to use any waters of the state for disposal of sewage, industrial wastes, or other wastes." O.C.G.A. § 12-5-29(a) Because Dalton Utilities' conventional treatment technology cannot remove PFAS from its wastewater prior to application at the LAS, Dalton Utilities has also violated the GWQCA and the CWA by using waters of the State for disposal of sewage, industrial wastes, or other wastes. (*Id.* at 7.)

8. Dalton Utilities has violated several conditions of its LAS Permit as well as state and local laws. The LAS Permit violations include,

> but are not limited to, discharging PFAS from the Riverbend LAS to the Conasauga River and/or its tributaries in violation of the LAS Permit's "no-discharge to surface waters" effluent limitation, failing to maintain and operate the LAS in such a manner as to prevent the discharge of PFAS, failing to notify EPD of the location and nature of ongoing PFAS discharges into waters of the State, failing to require compliance with applicable pretreatment standards and permits, failure to prevent and/or enforce prohibited discharges, failure to revise local limits to prevent Pass-Through of pollutants, and PFAS in particular, through the Dalton collection and disposal system and the LAS as well as the contamination of municipal sludge with PFAS, and failing to halt or prevent discharges of PFAS into the POTW which present an imminent and substantial endangerment to the public health and welfare. (*Id.* at 8–10.)

As for the timing of the violations, the Notice Letters state that violations have occurred "since as early as 2006, and every day since at least June of 2015." (Doc. 418-1 at 5.) Specifically, the June and August Notice Letters reference sampling dates on which Defendant Dalton Utilities discharged PFAS in violation of 33 U.S.C. § 1311 on at least the following: June 19, 2016; June 20, 2016; June 21, 2016; June 22, 2016; June 23, 2016; June 24, 2016; July 20, 2016; July 21, 2016; November 20, 2019; November 21, 2019; and June 18, 2020. (Doc. 418-1 at 6-7; 418-3 at 3-4.) The August Notice Letter states that Dalton Utilities discharged thousands of gallons of raw sewage from the various wastewater collection/treatment facilities associated with the LAS into waters of the State ("spills"), in violation of 33 U.S.C. § 1311 on at least the following: December 2, 2015; February 21, 2016; February 24, 2016; March 29, 2016; July 15, 2016; November 8, 2016; December 18, 2016; December 23, 2016; April 3, 2017; June 15, 2017; June 21, 2017; September 22, 2017; December 20, 2017; April 16, 2018,

August 4, 2018; August 22, 2018; February 22, 2019; May 11, 2019; September 3, 2019; October 30, 2019; October 31, 2019; November 9, 2019; January 1, 2020; and June 17, 2020.

Dalton Utilities argues that the Notice Letters are "blanket assertion[s]" insufficient to allow it to identify the precise dates and locations of the alleged violations. (Dalton Utilities Mot., Doc. 474 at 25–26.) It further argues that the August Notice fails to indicate what the spills entailed, whether they were point sources or if they reached waters of the United States or if they released sewage overland or underground. (*Id.* at 26.) Dalton Utilities asserts Plaintiff's notice is insufficient based on the Eleventh Circuit's direction that "notice requirements are strictly construed to give the alleged violator the opportunity to correct the problem before a lawsuit is filed." *Kendall v. Thaxton Rd. LLC*, 443 F. App'x 388, 392 (11th Cir. 2011) (quoting *Nat'l Parks & Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 502 F.3d 1316, 1329 (11th Cir. 2007).[5]

Dalton Utilities' arguments are unconvincing. The notice requirement does not demand that a citizen plaintiff "list every specific aspect or detail of every alleged violation." *Nat'l Parks & Conservation Ass'n, Inc.*, 502 F.3d at 1329 (quoting *Pub. Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1248 (3d Cir. 1995)). Rather, it requires that the notice letter provide "enough information to permit the [recipient] to identify the allegedly violated

[5] In *National Parks*, though, the Eleventh Circuit held notice was insufficient where the notice letter alleged only that the defendant had violated an entire regulatory subpart (that itself had multiple subparts) and did not allege any specific violations.

standards, dates of violation, and relevant activities," with sufficient specificity. *See id.* "In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit." *Carney v. Gordon County, Georgia*, 2006 WL 4347048, at *5 (N.D. Ga. Sept. 12, 2006) (quoting *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997)).

In *National Parks*, the Eleventh Circuit held that the plaintiff's notice letter was inadequate where the notice letter alleged only that the defendant had violated an entire regulatory subpart (that itself had multiple subparts) and did not allege any specific violations or activities:

> Rather than identifying the "specific standard" allegedly violated, National Parks' letter broadly alleged that the operation of Colbert Unit 5 violated "all of the requirements of Subpart D." Subpart Da sets emissions standards for several pollutants including sulfur dioxide, nitrogen oxide, and particulate matter. National Parks and the Sierra Club eventually discovered that TVA was in compliance with the standards for nitrogen oxide and particulate matter, and their ultimate New Source Performance Standards claim alleged only that TVA violated the standards for sulfur dioxide—a much narrower claim than the letter's broad allegations of constant violations of the entirety of Subpart Da. Similarly, the allegation that TVA has "failed every day" to comply with EPA regulations since its modification of Unit 5 in 1983 does not identify specific activities that violate the Act, and, while the letter does date these violations to a nearly 20–year span of time, this provides little guidance to TVA in identifying the violations of which it was accused.

502 F.3d at 1329-30.

Here, Plaintiff did more than *generally* state dates and locations of the alleged violations. *California Sportfishing Prot. All. v. City of W. Sacramento*, 905

F. Supp. 792, 796, 799 (E.D. Cal. 1995) (finding a notice letter insufficient when it stated, "[f]or the previous five years on hundreds of occasions you have violated your NPDES permit.") Plaintiff lists specific sampling locations and pinpoints actual dates as well as date ranges identifying when and where the alleged violations were occurring. (Doc. 418-1; Doc. 418-3.) As to the spills, Plaintiff's Letters allege that they were discharges from Dalton Utilities wastewater collection system and list the date of each spill. (Pl. Res. Br., Doc. 511 at 24; Doc. 418-3 at 4–5.) Plaintiff's letter complied with the requirements of 40 C.F.R. § 135.3 and identified the specific statutory provisions and standards allegedly violated, the nature of the alleged violations, and the dates of the alleged violations. Therefore, the contents of the Notice Letters were sufficient to put Dalton Utilities on notice.

2. DWSWA

Plaintiff sent DWSWA a Notice Letter on June 26, 2020 ("June Notice") and a Supplemental Notice Letter on August 17, 2020 ("August Notice"). (Doc 418-2; Doc. 418-4.) Similar to the Notice Letters Plaintiff sent to Dalton Utilities, the June and August Notices aggregate eight pages of substantive content, were timely sent and attached to the Third Amended Complaint. The relevant parts of the Letters indicate the following:

> 1. Plaintiff intends to sue the Dalton- Whitfield Solid Waste Authority as owner and operator of the Old Dixie Highway Landfill and Carpet Landfill located at 4189 Old Dixie Highway, SE in Dalton, Georgia for violations of the CWA arising out of its provision of solid waste management services, including the operation of the landfills, and its associated discharges of industrial/process wastewater containing PFAS to the City of Dalton's sewage system operated by Dalton Utilities and consisting of three Water Pollution Control Plants

("WPCPs") that discharge into the Riverbend LAS, collectively referred to as the Dalton POTW. (Doc. 418-2 at 1.)

2. DWSWA's discharges of PFAS into the Dalton POTW constitute prohibited discharges that violate the national pretreatment standards promulgated under Section 307 of the CWA, 33 U.S.C. § 1317, Dalton Utilities' Sewer Use Rules and Regulations ("SURR"), and the Georgia Water Quality Control Act. (*Id.* at 2.)

3. DWSWA's discharges of PFAS into the Dalton POTW cause "Pass Through," as they are not susceptible to treatment by the Dalton POTW and are discharged from the LAS into waters of the State of Georgia and the United States contaminating those waters with PFAS causing violations of Dalton Utilities' CWA permits, including its LAS Permit and its NPDES General Stormwater Permit. (*Id.*; *see also* Doc. 418-4 at 2.)

4. DWSWA is aware of the fact that the treatment technology utilized by Dalton Utilities cannot remove PFAS from the wastewater prior to application of this effluent to the LAS. (Doc. 418-2 at 3.)

5. Dalton Utilities' wastewater collection and disposal system is a "no discharge" system governed by an LAS Permit. The LAS is also covered by and subject to the NPDES Industrial General Permit GAR050000 which authorizes certain storm water discharges from the LAS. However, Part 1.1.4 of the NPDES Permit expressly prohibits "Non-Stormwater Discharges," which are discharges of stormwater mixed with non-stormwater and include discharges of process wastewater, industrial wastewater, and contaminated stormwater. (Doc. 418-4 at 3.)

Under the heading, "Violations of the Clean Water Act," the Notice Letters state:

1. DWSWA has violated, and continues to violate, the national pretreatment standards promulgated under Section 307 of the CWA, 33 U.S.C. § 1317, by discharging PFAS into the Dalton sewerage system. 40 C.F.R. § 305(a)(1) provides that a "User shall not introduce into a POTW any pollutant(s) which cause Pass Through or Interference." (Doc. 418-2 at 4; Doc 418-4 at 4.)

2. "Pass Through" is defined by the CWA as a discharge which "exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or

discharges from other sources is a cause of a violation of any requirement of the POTW's NPDES permit." 40 C.F.R. § 403.3(p). (*Id.*)

3. Because the treatment technology used by the Dalton POTW cannot remove PFAS from the wastewater prior to its application at the LAS, DWSWA's discharges of industrial/process wastewater containing PFAS into the Dalton POTW have been and continue to be discharged from the LAS along with stormwater into waters of the State and waters of the United States, including the Conasauga River and tributaries thereto. These "non-stormwater" discharges result in violations of the LAS Permit and the NPDES Permit which prohibit such discharges. (Doc. 418-2 at 4; Doc 418-4 at 4.)

4. DWSWA's discharges of PFAS into the Dalton POTW cause Pass Through in violation of Dalton Utilities' LAS Permit, NDPES Permit, § 2.4.1 of the SURR, and federal and state laws. (*Id.*)

5. "As the DWSWA continues to receive and dispose of PFAS in Dalton, its illegal and prohibited discharges of PFAS into the Dalton POTW are ongoing and likely to recur." (*Id.*)

6. The City of Dalton enacted the SURR to incorporate federal and state pretreatment standards for discharges of industrial wastes into the Dalton POTW, so that Dalton Utilities could "comply with all State and Federal laws, including the Clean Water Act, the General Pretreatment Regulations, the Georgia Water Quality Control Act, and Georgia Department of Natural Resources Rules." SURR, at § 1.1. Section 2.4.1 of the SURR provides that "No User shall contribute or cause to be contributed directly or indirectly to the POTW any Pollutant or Wastewater that causes Pass Through or Interference." (*Id.* at 4-5.)

7. DWSWA has violated and continues to violate the Georgia Water Quality Control Act and the CWA "by using waters of the State for disposal of industrial wastes and failing to notify the division of these PFAS discharges or to immediately take all reasonable steps to prevent injury to the health or property od downstream users." (*Id.* at 6.)

The Notice Letters state that the violations have occurred "since at least 2015" and are "ongoing and likely to recur." (*Id.* at 4–6.) The Notice Letters also cite to a specific sampling event on June 21, 2016 documenting DWSWA's industrial discharge of PFAS to the Dalton POTW in violation of the national pretreatment standards and the CWA. (*Id.* at 4)

DWSWA generally argues that the notice requirement is strictly construed, and the Notice Letters' lack of specificity makes it impossible to identify where and when the alleged violations occurred. (DWSWA Mot., Doc. 475 at 21–22.) (citing *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 28 (1989)). More specifically, DWSWA argues that Plaintiff did not identify enough information regarding how discharges containing PFAS are violations or how DWSWA caused violations of Dalton Utilities' permits. (*Id.* at 22; DWSWA Reply, Doc. 532 at 4.) Additionally, DWSWA contends that Plaintiff's failures to identify violations of Dalton Utilities' NPDES Permit in the June Notice and to attach the August Notice to the Second Amended Complaint are not cured by his "belated" attachment to the Third Amended. (*Id.*)

Again, the Court finds DWSWA's arguments unpersuasive. First, Plaintiff served DWSWA with the August Notice on August 17, 2020, and filed the Third Amended Complaint on December 14, 2020, well after the 60 days required by 40 C.F.R., Part 135. (Pl. Res. Br., Doc 512 at 24. *See* Third Am. Compl., Doc. 418 ¶ 8; Doc. 418-4.) DWSWA misconstrues *Hallstrom*. The Supreme Court in *Hallstrom v. Tillamook Cty.*, 493 U.S. 20 (1989) held that the 60-day time requirement is strictly construed, not the specificity of the content. *Id.* at 26. Courts in this District

have held that the notice must be "sufficiently specific to inform the alleged violator about what it is doing wrong." *Carney v. Gordon County, Georgia*, 2006 WL 4347048, at *5 (N.D. Ga. Mar. 14, 2007) (quoting *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997). *See, Pub. Interest Research Grp. Of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1247 (3d. Cir. 1995) (finding sufficient notice when a citizen provided an alleged violator with the statute and parameter violated, the party involved, and the date of violation because the notice provision "does not require the citizen identify every detail of a violation"). Here, Plaintiff clearly explains how DWSWA's alleged discharges of industrial wastewater containing PFAS into the Dalton POTW since at least June 2015, and specifically on June 21, 2016, are "Pass Through" discharges in violation of Dalton Utilities' permits, national pretreatment standards, the SURR, and the CWA. (Doc. 418-4 at 1–2, 5.)

Finally, Plaintiff identified how DWSWA's industrial wastewater discharges containing PFAS caused violations of Dalton Utilities' NPDES Permit and their LAS Permit's prohibition on such discharges. (Doc. 418-4 at 4–5; Doc. 418-2 at 4–5.) The Court agrees with Plaintiff's contention that any more information is deemed unnecessary because DWSWA has control over their industrial discharges, not the design and operation of the LAS. (Pl. Res. Br., Doc. 512 at 26.) Overall, the Letters provided DWSWA with sufficient information so it could identify what it was doing to result in Pass Through and non-stormwater industrial discharges in

violation of Dalton Utilities Permits in order to take corrective action. Accordingly, Plaintiff complied with the pre-suit requirements of the CWA.

B. Count I: Discharge of Pollutants to Surface Waters Without an NPDES Permit in Violation of the Clean Water Act against Dalton Utilities

Count I of the Complaint is brought against Dalton Utilities for violations of the Clean Water Act. Dalton Utilities marshals a series of arguments, all of which are fruitless, as reasoned below.

1. Plaintiff's CWA claim against Dalton Utilities is not barred as an improper collateral attack

In Count I of the Complaint, Plaintiff claims the Dalton Utilities is discharging PFAS from its Land Application System ("LAS") to the Conasauga River and its tributaries without the required National Pollutant Discharge Elimination System ("NPDES") Permit. As alleged, industrial wastewater from the Manufacturing Defendants, containing PFAS, is discharged into the Dalton POTW, where it is treated before being pumped to the 9,800-acre LAS for land application and disposal using approximately 19,000 sprayheads. PFAS resist degradation during treatment at Dalton Utilities' POTW and increase in concentration as they accumulate over time in the LAS. Defendants are aware that conventional treatment processes and land application will not remove PFAS prior to their discharge to the Conasauga River and its tributaries adjacent to the LAS. The operation of the Dalton POTW — including the wastewater collection and treatment facilities and the LAS — is governed by the State of Georgia issued Land Application System Permit No. GAJ020056 ("LAS permit"). The LAS is also

subject to coverage under the NPDES General Stormwater permit which authorizes certain point source stormwater discharges from the LAS. Neither of these permits authorize discharge of PFAS from the wastewater collection system or the LAS to surface waters. Rather, Plaintiff alleges a separate NPDES permit is required for discharges of PFAS.

Dalton Utilities argues that Plaintiff's CWA claim is barred as an improper collateral attack on Georgia Environmental Protection Division's ("EPD") regulatory authority and permitting decisions. Dalton Utilities acknowledges in its Motion to Dismiss that "the LAS Permit explicitly prohibits the point source discharge of waste from the LAS," but asserts that Dalton Utilities "strictly complies with all LAS Permit conditions," is not in violation of either of its permits, and Plaintiff has not alleged that Dalton Utilities has failed to comply with its permits. (Dalton Utilities Mot., Doc. 474-1 at 5, 22, 24.) Dalton Utilities asserts (without any specific authority) that because the POTW is regulated by EPD and because EPD issued Dalton Utilities the LAS permit, "EPD has indicated that an NPDES permit for land-applied wastewater is unnecessary," and that "EPD has already made the determination that the LAS is a fully permitted nonpoint source." (*Id.* at 24) (emphasis added). Dalton Utilities contends that:

> the LAS Program regulates only nonpoint source discharges. Indeed, the applicable regulations make clear that "[o]wners of land disposal or land treatment systems which employ overland flow, subsurface drain fields, or other techniques which result in one or more point discharges into surface waters of the State, must obtain an NPDES permit and *will not be issued* a land disposal system permit." Ga. Comp. R. & Regs. 391-3-6-.11(3) (emphasis added). The boundaries

> are clear: point source discharges are regulated through NPDES permits; nonpoint source discharges (of land-applied waste) are regulated through the LAS Program.

(*Id.* at 26.)

Dalton Utilities further asserts that Plaintiff's CWA claim should be dismissed because Plaintiff did not participate in the public comment process and did not avail himself of EPD's procedures for appealing the issuance of the permits. Dalton Utilities characterizes Plaintiff's claim as a request to have this Court insert itself into EPD's technical permitting process.

Dalton Utilities' arguments are meritless.

First, Dalton Utilities mischaracterizes the nature of Plaintiff's CWA claim. Plaintiff is not challenging the issuance of Dalton Utilities' permits. Rather, Plaintiff has brought a citizen enforcement action for alleged unpermitted point source discharges of PFAS from the LAS and its wastewater collection system in violation of the CWA.

Second, the CWA citizen suit provision does not require a Plaintiff to exhaust state administrative remedies prior to bringing an action for violations of the CWA. The citizen suit provision authorizes a citizen to bring a civil action "against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under [the Act] or (B) an order issued by the Administrator or a State

with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). The only relevant statutory prerequisites and limitations imposed on citizen suits are that:

> (1) no action may be brought "(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the [EPA] Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order," and
>
> (2) no action may be brought if [EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order."

33 U.S.C. § 1365(b).

Third, Dalton Utilities asserts without any authority that the LAS is a fully compliant and permitted nonpoint source. Dalton Utilities' position that the LAS is a nonpoint source is contradicted by its simultaneous authorization for coverage under the NPDES General Permit for Stormwater Discharges Associated with Industrial Activity, which expressly provides "[i]n accordance with the provisions of ... the Clean Water Act . . . all new and existing stormwater point sources within the state of Georgia that are required to have a permit, upon submittal of a Notice of Intent, are authorized to discharge stormwater associated with industrial activity ... in accordance with the limitations, monitoring requirements and other conditions set forth" therein. (Ex. C to Motion to Dismiss) (emphasis added). Dalton Utilities has not cited any governing authority to support the contention that the CWA and Georgia's LAS are mutually exclusive regulatory programs. (*See* Doc. 474-1 at 25.)

The distinction between point source and nonpoint source is critical because the Plaintiff's CWA claim in Count I is based on Section 301's prohibition of discharges of pollutants to point sources. "The Clean Water Act forbids the 'addition' of any pollutant from a 'point source' to 'navigable waters' without the appropriate permit from the Environmental Protection Agency (EPA)." *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S.Ct. 1462, 1468 (2020); 33 U.S.C. §§ 1311(a), 1362(12)(A). The purpose of the Clean Water Act is to "restore and maintain the … integrity of the Nation's waters," and the Act insists "that a person wishing to discharge any pollution into navigable waters first obtain EPA's permission to do so." *Hawaii Wildlife Fund*, 140 S.Ct. at 1468.

The National Pollutant Discharge Elimination System, or NPDES, requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters. *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 101 (2004); *see also City of Guyton v. Barrow*, 828 S.E.2d 366, 371-72 (Ga. 2019) ("The CWA protects water quality through two measures. First, the CWA authorizes the federal Environmental Protection Agency ("EPA") to establish 'effluent limitations' to restrict the quantity, rate, and concentration of specified substances from point sources. Second, the CWA also requires states to establish 'water quality standards' for all waters within their boundaries. The CWA enforces these effluent limitations and water quality standards by making it unlawful to discharge any pollutant through a point source without a permit issued under the National Pollutant

Discharge Elimination System ('NPDES').") (citations omitted). "Georgia, as do most states, administers the NPDES program within its borders subject to EPA oversight of the permit-issuing procedures." *City of Guyton v. Barrow*, 828 S.E.2d at 372.

The CWA defines a "point source" as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Courts interpret the term "point source" broadly. *Parker*, 386 F.3d at 1009 (holding that debris and construction equipment that collected water, which then flowed into stream, qualified as a point source under the CWA). As the Third Circuit has noted, "[t]he concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 300 (3d Cir. 1997) (quoting *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)), *cert. denied*, 522 U.S. 1052 (1998). In discussing the meaning of "point source," the Tenth Circuit has opined that "it contravenes the intent of the [Clean Water Act] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). In holding that "a point source need not be the original source of the pollutant; it need only convey the pollutant to "navigable waters," the Supreme Court noted that one of the Clean Water Act's

"primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants." *South Fla. Water Mgmt. Dist.*, 541 U.S. at 105. The Supreme Court further noted that Section 1314(f)(2)(F) of the CWA, which concerns nonpoint sources, "does not explicitly exempt nonpoint pollution sources from the NPDES program if they also fall within the 'point source' definition." *Id.* at 106.

Several courts have found that both land application systems and sprayheads are point sources, as discussed below.

In a similar CWA citizen suit brought by the Flint Riverkeeper in the Middle District of Georgia, the district court found that industrial wastewater contaminated with high levels of pollutants discharged from the defendant's land application system and industrial wastewater treatment plant were point source discharges. *Flint Riverkeeper, Inc. v. Southern Mills, Inc.*, 276 F.Supp.3d 1359, 1367-68 (M.D. Ga. 2017) (finding that the plaintiffs' allegations that the defendant's overland wastewater enters tributaries of the Flint River "via ditches, runnels, seeps, and other discrete conveyances" on defendant's property were sufficient to state a claim that the defendant discharges wastewater overland from a point source and finding that plaintiffs' allegations that defendant's spraying of wastewater into its LAS fields through a series of spray heads were from a point source because a spray apparatus can be a discernable, confined, and discrete conveyance, and other district courts have found spray apparatuses are point sources).

In *United States v. Earth Sciences, Inc.*, the Tenth Circuit examined a system specifically designed to prevent polluted runoff from entering an adjacent creek. 599 F.2d 368, 370 (10th Cir. 1979). The defendant in that case operated a gold leaching operation where a toxic solution containing cyanide was sprayed over a 3 and ½ to 4-acre pile of gold ore to aid in separating the gold from the ore. The toxic solution leached down through the gold ore and collected beneath the pile on a plastic liner, where it drained into a sump, and then was pumped into a processing trailer, before being sprayed back onto the pile. The system of sprayers, pumps, and sumps was intended to be a closed, circulating system that would not result in any discharge of the toxic solution. *See id.* When this system overflowed due to heavy snow melt, the toxic solution was discharged into the nearby creek on several occasions. *See id.* The court stated that it had "no problem finding a point source here." *Id.* at 374. First, it viewed "the combination of sumps, ditches, hoses and pumps … as a closed circulating system *to serve the gold extraction process with no discharge*." *Id.* (emphasis added). The court further found that:

> When [the system] fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source. Although the source of the excess liquid is rainfall or snow melt, this is not the kind of general runoff considered to be from nonpoint sources under the [Clean Water Act].

Id.

In *Reynolds v. Rick's Mushroom Service, Inc.*, the defendants utilized a system designed to prevent the discharge of pollutants. This system was designed

in conjunction with state authorities, and consisted primarily of land gradations, berms around the waste material, a sedimentation basin, a wastewater impoundment, and a sprayer system. It was designed to channel the wastewater from the defendants' property, collect the wastewater, and ultimately to irrigate grass fields without releasing the pollutants into the nearby stream or any other waters. While utilizing the wastewater as a source of nutrients, the grass fields were intended to serve the purpose of filtering the pollutants from the wastewater. Yet, when the system breaks down, as it did due to leaks in the berms, or when the system is used improperly, it results in a discharge of polluted wastewater into the nearby stream. The district court therefore concluded that the defendants' operation was clearly the kind of system that Congress intended to include within the definition of "point source." 246 F.Supp.2d 449, 457 (E.D. Penn. 2003). The court found that the defendants' system of wastewater collection and spraying was very similar to systems implemented at "Concentrated animal feeding operations," or CAFOs, which are regulated point sources subject to NPDES permitting requirements[6] under the CWA where the operators often spray wastewater and manure onto grass fields, a practice sometimes called "land application."[7] *Id.*

[6] *See* 68 Fed.Reg. 7176, 7196 (Feb. 12, 2003) (relevant portion to be codified at 40 C.F.R. § 122.23(e)) ("Today's rule clarifies that runoff from the application of CAFO manure, litter, or process wastewaters to land that is under the control of a CAFO is a discharge from the CAFO and subject to NPDES permit requirements."). EPA reasoned that the system of pipes and applicators are integral parts of the CAFO, and thus should be included within the definition of "point source." *See id.*

[7] "Concentrated animal feeding operations" are expressly included in the statutory definition of point source. 33 U.S.C. § 1362(14).

Accordingly, the Court **DENIES** Dalton's Motion to Dismiss on the grounds that Plaintiff's claim is an improper collateral attack, and that the LAS is a fully compliant and permitted nonpoint source.

2. Plaintiff's CWA claim is not barred on due process grounds

In a similar vein, Dalton Utilities argues that given the extensive regulation of the LAS by EPD through a comprehensive permitting program and Dalton Utilities' compliance therewith, it would be fundamentally unfair for this Court to find that the alleged discharges violate the CWA. Dalton Utilities argues that Plaintiff's CWA claim is barred on due process grounds because: (1) the LAS is extensively regulated by EPD through the LAS Permit and the General Stormwater Permit, (2) Plaintiff makes no allegation that Dalton Utilities has failed to comply with either permit, and (3) by issuing the LAS permit, EPD has indicated that an NPDES permit for land-applied wastewater is unnecessary.

These arguments are not effectively supported and are unpersuasive.

First, Dalton makes numerous "factual" contentions that counter the allegations of the Third Amended Complaint.[8] As the Court cannot resolve evidentiary conflicts at the motion to dismiss stage, it would not be appropriate for the Court to accept Dalton's representations regarding determinations that EPD has purportedly made as to Dalton's regulatory compliance.

[8] *See, e.g.*, (Dalton Utilities Mot., Doc. 474-1 at 16 ("Dalton Utilities has faithfully adhered to the requirements of the regulatory program"); 18 ("Dalton Utilities is not in violation of either permit"); 20 ("EPD has indicated that an NPDES permit … is unnecessary"); 20-21 ("EPD has … made the determination that the LAS is a fully permitted nonpoint source")).

Second, the case Dalton Utilities relies on as support for its due process argument is distinguishable and non-binding. In *Wisconsin Resources Council v. Flambeau Mining Co.*, 727 F.3d 700 (7th Cir. 2013), the Seventh Circuit, following summary judgment litigation, addressed whether Flambeau Mining Company was entitled to protection under the CWA's permit shield provision in defending against a citizen suit alleging it was in violation of the CWA by discharging pollutants without a permit. Flambeau initially operated pursuant to a Wisconsin Pollutant Discharge Elimination System ("WPDES") Permit in conjunction with its Mining Permit. Later, the Wisconsin Department of Natural Resources decided to terminate Flambeau's separate WPDES permit and instead regulate Flambeau's storm water discharge under its Mining Permit. According to the summary judgment record, all of Flambeau's subsequent storm water discharges complied with the Mining Permit.

The CWA's permit shield provision, 33 U.S.C. § 1342(k), specifies that if a NPDES permit holder discharges pollutants precisely in accordance with the terms of its permit, the permit will "shield" its holder from CWA liability. *See* 33 U.S.C. § 1342(k) (providing that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance[ ]" for purposes of the federal compliance provision and the citizen suit provision); *Coon v. Willet Dairy, LP*, 536 F.3d 171, 173 (2d Cir. 2008) (noting that, under the permit shield, "compliance with an authorized permit is deemed compliance with the CWA, so as long as [the defendant] was acting in accordance with its permit it could not be liable in a citizen suit for CWA

violations"). The Supreme Court has explained that the permit shield's purpose is "to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, [the permit shield] serves the purpose of giving permits finality." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n. 28 (1977).

According to Plaintiff, Dalton Utilities, unlike the defendant in *Flambeau*, does not hold a valid NPDES permit for the point source discharges of PFAS alleged in the Complaint, and thus cannot make a permit shield argument. There is no evidence or indication in the record that that EPD has taken the position that Dalton Utilities' LAS permit is a valid NPDES permit, or that EPD "has indicated that an NPDES permit for land-applied wastewater is unnecessary" as Dalton Utilities asserts. In fact, the regulation on which Dalton Utilities relies for its argument makes clear that "[o]wners of land disposal or land treatment systems which employ overland flow, subsurface drain fields, or other techniques which result in one or more point discharges into surface waters of the State, must obtain an NPDES permit." Ga. Comp. R. & Regs. 391-3-6-.11(3) (emphasis added). As the Georgia Supreme Court recently noted about the regulation of land application systems,

> The terms 'land disposal system' and 'land application system' are identically defined as 'any method of disposing pollutants in which the pollutants are applied to the surface or beneath the surface of a parcel of land and which results in pollutants percolating, infiltrating, or being absorbed into the soil and then into the waters of the State.' Ga. Comp. R. & Regs. rr. 391-3-6-.11 (2) (b) (land disposal system) and 391-3-6-.19 (2) (a) (land application system). A 'land disposal system'

> applies to pollutants generally and a 'land application system' applies specifically to wastes. Ga. Comp. R. & Regs. rr. 391-3-6-.11 (1) and 391-3-6-.19 (1). Moreover, a 'land disposal system' excludes landfills but includes 'ponds, basins, or lagoons used for disposal of wastes or wastewaters, where evaporation and/or percolation of the wastes or wastewaters are used or intended to be used to prevent point discharge of pollutants into the waters of State,' and **such systems will require an NPDES permit (rather than a land disposal permit) when the system will employ a technique resulting in "one or more point source discharges into surface waters of the State**." *Id.* r. 391-3-6-.11 (2) (b), (3).

City of Guyton v. Barrow, 828 S.E.2d 366, 373 n.6 (Ga. 2019) (emphasis added).

As counsel for Dalton Utilities acknowledged to the Court during oral argument on its motion, EPD issued the LAS permit based on Dalton Utilities' representation that its LAS was a "no discharge system." Plaintiff's Complaint adequately alleges that the LAS system does not operate according to its design as a "no discharge system," but instead Dalton Utilities' operation of the LAS system results in discharges of PFAS to the Conasauga River and its tributaries.

Accordingly, the Court **DENIES** Dalton Utilities' Motion to Dismiss on due process grounds.

3. The Court should not abstain from asserting jurisdiction over Plaintiff's CWA claim

Dalton Utilities also argues that the Court should abstain from asserting jurisdiction to avoid disrupting the State's carefully delineated permitting program. Dalton Utilities contends that *Burford* abstention applies here because: (1) Plaintiff's CWA claim is predicated on the belief that the LAS is an unpermitted point source, (2) EPD has already made the determination that the LAS is a fully

permitted nonpoint source, and (3) Plaintiff's claim requires this Court to examine whether EPD "has misapplied its lawful authority."

Dalton Utilities relies on three cases to support its *Burford* abstention argument. Each of these cases is distinguishable because there was a pending state administrative action against the defendant when the citizen suit was filed. *See Nat. Res. Def. Council, Inc. v. BP Products N. Am.*, 2009 WL 1854527 (N.D. Ind. 2009) (abstaining from exercising jurisdiction over CAA citizen suit where there was a parallel petition to review the state agency's permit decision pending in the Office of Environmental Adjudication, a state agency that handles permit appeals); *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188 (6th Cir. 1995) (finding *Burford* abstention required dismissal of RCRA citizen suit filed after the plaintiffs abandoned ongoing state administrative proceedings concerning the permitting issue); *Starlink Logistics, Inc. v. ACC, LLC*, 2013 WL 212641 (M.D. Tenn. 2013) (abstaining from exercising jurisdiction over CWA and RCRA citizen suit pending the final adjudication of Chancery Court proceeding involving plaintiff's challenge to an Amended Consent Order entered into between defendant and state department of environmental compliance regarding defendant's violations because the plaintiff's request for injunctive relief would invite the court to second-guess the policy decisions reached by the state in negotiating the consent order).

On the other hand, courts in the Eleventh Circuit have consistently found *Burford* abstention inapplicable to environmental citizen suits. *See Culbertson v. Coats American Inc.*, 913 F. Supp. 1572, 1578 (N.D. Ga. 1995) (holding that the

CWA statutory scheme contemplates citizen suits as a supplement to state government action and, therefore, the *Burford* abstention doctrine is not implicated by a CWA citizen suit); *Flint Riverkeeper, Inc. v. Southern Mills, Inc.*, 276 F. Supp. 3d 1359, 1370 ("*Burford* abstention does not apply to citizen suits brought under the CWA"); *Franklin v. Birmingham Hide & Tallow Co., Inc.*, 1999 WL 35235824, at *12 (N.D. Ala. April 22, 1999) (relying on *Culbertson* and refusing to abstain from hearing CWA citizen suit); *Anderson v. TLC Dev. Group, Inc.*, 2006 WL 3949173, at *1, *4 (M.D. Ga. Aug. 18, 2006) (denying abstention in CWA citizen suit). In *College Park Holdings, LLC v. Racetrac Petroleum, Inc.*, then-district Judge Beverly Martin noted an overriding reason for the court to hear environmental citizen suits:

> Congress has told the court to do so. 42 U.S.C. § 6972(a)(1)(A). In fact, RCRA provides for the judicial enforcement of environmental standards through the combined efforts of state agencies, federal agencies, and private citizens. 42 U.S.C. § 6972. RCRA explicitly empowers citizens to enforce its provisions and precludes citizen suits in certain instances of state or federal action. 42 U.S.C. § 6972(b)(1)(B). The statutory scheme thus contemplates citizen suits as a supplement to state government action, and the court could not, in good faith, unilaterally strip United States citizens of rights given them by their government.[9]

Coll. Park Holdings, LLC v. Racetrac Petroleum, Inc., 239 F. Supp. 2d 1322, 1328–29 (N.D. Ga. 2002) (internal citations omitted).

[9] The RCRA citizen suit provision discussed by the Court in *College Park Holdings* is identical to the CWA provisions in every material respect.

Accordingly, the Court rejects Dalton Utilities' argument that the Court should abstain from exercising jurisdiction under *Burford* abstention and **DENIES** Dalton Utilities' Motion to Dismiss on this basis.

4. Plaintiff's Third Amended Complaint does not state a claim for a violation of the General Stormwater Permit

Count I of the Third Amended Complaint alleges that Dalton Utilities "has violated Section 301 of the CWA, 33 U.S.C. § 1311(a), by discharging PFAS from the LAS into the Conasauga River and/or its tributaries, directly or through hydrologically connected groundwater beneath the LAS, without an NPDES Permit authorizing such discharges." (Third Am. Compl. ¶ 115.) Dalton Utilities asserts that any attempt to recover for alleged violations of the General Stormwater Permit must fail because "neither the General Stormwater Permit nor any allegation related to stormwater is included in Plaintiff's CWA claim or referenced in the Notice Letter."

Plaintiff agrees that Count I currently does not plead a claim for violations of the General Stormwater Permit. The Complaint does allege that Dalton Utilities' operation of the LAS is subject to coverage under the General Stormwater Permit, and that, contrary to the prohibition in the permit, "stormwater discharges contaminated with PFAS … pollute the Conasauga River and its tributaries as they flow past/through the LAS." (Third Am. Compl. ¶¶ 86, 89, 130.) Plaintiff states in response to Dalton Utilities' motion that "as discovery in this matter progresses, Plaintiff reserves his right to seek leave of Court to amend his Complaint to add

violations of the CWA against Dalton Utilities based violations of the General Stormwater permit."

Accordingly, the Court **DENIES AS MOOT** Dalton Utilities' Motion to Dismiss a claim for violation of the General Stormwater Permit as Plaintiff's Third Amended Complaint does not plead such a claim.

5. Plaintiff's Complaint adequately alleges a CWA claim based on sewage spills

Plaintiff's Complaint also alleges that Dalton has:

> discharged PFAS from its wastewater collection system via "Spills," which are defined as any unpermitted discharge of untreated or raw sewage to waters of the State, in the specific amounts and locations as set out in the August Notice attached hereto as Exhibit "C" and incorporated by reference herein. Specifically, Defendant Dalton Utilities has discharged raw sewage containing PFAS from its collection system to waters of the State and United States on at least the following occasions: December 2, 2015; February 21, 2016; February 24, 2016; March 29, 2016; July 15, 2016; November 8, 2016; December 18, 2016; December 23, 2016; April 3, 2017; June 15, 2017; June 21, 2017; September 22, 2017; December 20, 2017; April 16, 2018; August 4, 2018; August 22, 2018, February 22, 2019; May 11, 2019; September 3, 2019; October 30, 2019; October 31, 2019; November 9, 2019; January 1, 2020; June 17, 2020.

(Third Am. Compl. ¶ 96); (*see also* ¶ 116) ("Dalton Utilities has violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging raw sewage containing PFAS from its collection system to waters of the State and United States without an NPDES Permit authorizing such discharges.")

Dalton Utilities argues that Plaintiff's claim regarding alleged sewage Spills must be dismissed because the Complaint failed to allege that the Spills are tied to "waters of the United States" or to "point sources" as required to bring a suit under

the CWA. Dalton Utilities contends that Plaintiff's Spill claim arises from fines issued by EPD for sewage releases into "waters of the State" which may or may not also be waters of the United States. Dalton Utilities further contends that Plaintiff's allegation that the Spills came from Dalton Utilities' "wastewater collection system" is insufficient to allege the Spills were discharged from a point source.

Dalton Utilities' concern that "waters of the State" may or may not also be "waters of the United States" does not warrant dismissal of Plaintiff's claim related to the alleged sewage spills. Plaintiff's Complaint alleges that Dalton Utilities "has discharged raw sewage containing PFAS from its collection system to waters of the State **and** United States" in violation of Section 301(a) of the CWA. (Third Am. Compl. ¶¶ 96; 116.) Plaintiff's August, 2020 Notice Letter, incorporated by reference in the Third Amended Complaint, states that the sewage discharges were made into the "Conasauga River and tributaries thereto," and more specifically identifies the alleged receiving waters as follows:

- December 2, 2015
  - 900 gallons to Unnamed Tributary to Tar Creek at 815 East Willow Park Drive
- December 2, 2015
  - 2,415 gallons to Unnamed Tributary to Mill Creek at West Tyler St. and Trammell Street
- February 21, 2016
  - 24,000 gallons to Mill Creek at 1310 C&L Drive
- February 24, 2016
  - 2400 gallons to McClellan Creek near 205 N. Tibbs Road Overpass and I-75

- March 29, 2016
  - 150 gallons to Hamilton Creek at 309 Elk Street
- July 15, 2016
  - 1200 gallons to Unnamed Tributary to Mill Creek near 420 West Tyler Creek
- November 8, 2016
  - 2500 gallons to McClellan Creek near 205 N. Tibbs Road Overpass and I-75
- December 18, 2016
  - 900 gallons to Unnamed Tributary to Mill Creek at 1212 Applewood Drive
- December 23, 2016
  - 525 gallons to Farrar Branch at 1510 Coronet Drive
- April 3, 2017
  - 5,235 gallons to Schwab Branch near 1360 Pleasant Grove Road
- June 15, 2017
  - 8,425 gallons to Mill Creek near 1615 Hickory Street
- June 21, 2017
  - 650 gallons to UT to Logan Creek at 226 Cherry Bark Way
- September 22, 2017
  - 6,745 gallons to Mill Creek at Underwood Lift Station
- December 20, 2017
  - 6,060 gallons to Tar Creek at 1714 South Dixie Highway
- April 16, 2018
  - 1200 gallons to Tributary to Swamp Creek at lift station near 3580 Corporate Drive
- August 4, 2018
  - 2,325 gallons to Tributary to Mill Creek at 1500 Cleo Way
- August 22, 2018
  - 4200 gallons to Tributary of Mill Creek at 1228 N. Thornton Avenue
- February 22, 2019
  - 1300 gallons to Unnamed Tributary to Mill Creek at 514 Chattanooga Drive

- February 22, 2019
  - 200 gallons to Tar Creek at 907 Lakemont Drive
- February 22, 2019
  - 3065 gallons to McClellan Creek at 230 Tibbs Road
- May 11, 2019
  - 1460 gallons to Unnamed Tributary of McClellan Creek at 881 College Drive
- September 3, 2019
  - 7500 gallons to Unnamed Tributary to Mill Creek at corner of Piedmont Lane and Boundary Street
- October 30, 2019
  - 2,170 gallons to Mill Creek at 2300 Maddox Chapel Road
- October 31, 2019
  - 150 gallons to Unnamed Tributary of Mill Creek at intersection of Trammell and Clark Street
- November 9, 2019
  - 200 gallons to Unnamed Tributary of Mill Creek at intersection of N. Selvidge Street and Chattanooga Avenue
- January 1, 2020
  - 1625 gallons to unnamed Tributary of Mill Creek at 1625 Elkwood Drive
- June 17, 2020
  - 500 gallons to Unnamed Tributary of Mill Creek at 1812 Kimberly Park Drive

(Third Am. Compl. ¶ 96; Ex. C to Third Am. Compl.) Plaintiff has alleged that the waters where these alleged spills occurred are both waters of the State and waters of the United States, which the Court must accept as true on a motion to dismiss.[10]

Plaintiff's Complaint alleges that the spills were discharged from Dalton Utilities' wastewater collection, disposal, and land application system, including approximately 19,000 sprayheads. (Third Am. Compl. ¶¶ 84-85, 90, 96, 109, 116.)

[10] The CWA regulates "navigable waters" which are defined as "waters of the United States." 33 U.S.C. § 1362(7). The term "navigable waters" includes "tributaries of waters that can be navigated." *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004). Streams and creeks are "navigable waters" if they possess a "significant nexus" to waters that are "are or were navigable in fact or that could reasonably be so made." *See United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007) (quoting *Rapanos v. United States*, 547 U.S. 715 (2006)). Whether a waterbody satisfies the significant nexus test cannot be determined on a motion to dismiss.

More specifically, the Complaint alleges that Dalton Utilities' Water Pollution Control Plants ("WPCPs") treat industrial wastewater containing PFAS before it is pumped to the approximate 9,800-acre Riverbend LAS for land application using approximately 19,000 sprayheads. (*Id.* ¶ 84.)[11] According to the Complaint, "EPA, the University of Georgia ("UGA"), and the Georgia Environmental Protection Division ("EPD") have identified industrial wastewater originating from Defendants' manufacturing facilities, and ultimately discharged from the Riverbend LAS, as the source of PFAS contamination in the Conasauga River, the Oostanaula River, the City of Rome's water supply, and the Coosa River." (*Id.* ¶ 90) (emphasis added). And, the Complaint alleges that "UGA conducted surface water sampling in March of 2006 to determine the presence and distribution of PFAS in the Conasauga River above and below the LAS near Dalton ("UGA Study"). Based on extremely high concentrations of PFAS downstream of the LAS, including PFOA at levels as high as 1150 parts per trillion ("ppt") and PFOS as high as 318 ppt, the UGA study concluded that the LAS is an "important point source of [PFAS] contamination." The UGA Study further found these concentrations of PFAS were among the "highest ever recorded in surface waters." (*Id.* ¶ 91) (emphasis added).

Finally, Plaintiff alleges that Dalton Utilities' "discharges of PFAS from the LAS, the sprayheads located thereon, and/or ditches and drainage channels that flow from the LAS, into the Conasauga River or its tributaries, constitute the

[11] The Complaint alleges that the POTW is made up of the Riverbend, Loopers Bend, and Abutment Road Water Pollution Control Plants and Riverbend Land Application System. (Third Am. Compl. ¶ 84.)

discharge of a pollutant from a point source requiring an NPDES Permit authorizing such discharge. (*Id.* ¶ 109) (emphasis added). Consistent with the above discussion of the CWA's statutory text and case law interpreting the term "point source," Plaintiff has adequately alleged that Dalton Utilities' alleged spills were discharges from point sources.

Accordingly, the Court **DENIES** Dalton Utilities' Motion to Dismiss Plaintiff's CWA claims related to alleged sewage spills.

6. Plaintiff's claim is not barred by the statute of limitations

While the heading of Dalton Utilities' motion states that "Plaintiff's claim" is barred by the statute of limitations, the text of argument asserts only that "the law bars claims for any discharge that did not occur 'within five years' of the lawsuit, i.e., on August 27, 2015 or later." (Dalton Utilities Mot., Doc. 474-1 at 36.) Plaintiff agrees that the default limitations period of five years contained in 28 U.S.C. §2462 is applicable to his CWA claims, and that a claim accrues on the date of each of Dalton Utilities' unpermitted discharges. (Doc. 511 at 38, n. 18) (citing *Nat'l Parks and Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007)).

According to Plaintiff, the five-year period actually extends back from the service of the sixty-day notice, not the filing of the lawsuit, because the service of a sixty-day notice tolls the five-year statute of limitations contained in 28 U.S.C. § 2462. (*Id.* at 39) (citing *Pub. Int. Research Group of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 75 (3d Cir. 1990) (since pre-suit notice is a

jurisdictional prerequisite to a CWA citizen suit, "equitable considerations" favor tolling the statute of limitations during the sixty days while EPA and the state agency consider whether to prosecute); *Sierra Club v. Chevron, U.S.A., Ltd.*, 834 F.2d 1517, 1523 (9th Cir. 1987); *Harpeth River Watershed Assoc. v. City of Franklin, Tennessee*, 2016 WL 827584, at *7-8 (M.D. Tenn. Mar. 3, 2016) (collecting cases).

Plaintiff's June 24, 2020 Notice Letter alleges multiple violations related to discharges of PFAS from the land application system and wastewater collection system that occurred on or after June 24, 2015 and are therefore not barred by the statute of limitations. Similarly, Plaintiff's August 4, 2020 Notice Letter alleges sewage spills that occurred on or after August 4, 2015 and are therefore not barred.

Accordingly, the Court **DENIES** Dalton Utilities' Motion to Dismiss Plaintiff's CWA claim as barred by the statute of limitations.

C. Count II: CWA Claim against DWSWA

1. Plaintiff has adequately alleged that DWSWA's PFAS discharges caused a violation of Dalton Utilities' NPDES Stormwater Permit and the federal pretreatment regulations and the Sewer Use Rules and Regulations

In Count 2 of the Complaint, Plaintiff claims the Dalton/Whitfield Regional Solid Waste Authority ("DWSWA") has discharged, and continues to discharge, dangerously high levels of PFAS into the Dalton POTW, where these chemicals resist treatment and cause Pass Through, resulting in their discharge from the Riverbend Land Application System ("LAS") to the Conasauga River and its tributaries in violation of federal pretreatment standards, Dalton Utilities' Sewer

Use Rules and Regulations, and Section 307(d) of the Clean Water Act. The PFAS then migrate downstream and contaminate the Oostanaula River, the source of the City of Rome's domestic water supply.

The DWSWA operates two landfills serving Dalton and Whitfield Counties, including a separate Carpet Landfill. Plaintiff alleges that in 2013, the Solid Waste Authority installed a forced sewer main to pump its landfill leachate directly to the Dalton POTW. Sampling of the DWSWA's industrial discharge to the Dalton POTW on June 21, 2016 showed numerous PFAS chemicals – both long-chain and short-chain – at dangerously high levels. Plaintiff alleges that these discharges are in violation of the terms of Dalton's LAS and General Stormwater Permits, thereby subjecting the DWSWA to liability under Section 307 of the CWA.

Plaintiff alleges that to implement EPA's pretreatment rules for industrial wastewater pretreatment programs under the CWA, Dalton Utilities has adopted Sewer Use Rules and Regulations ("SURR") and requires industrial dischargers, such as the DWSWA, to obtain discharge permits to discharge into the POTW. Dalton Utilities' LAS permit, which authorizes Dalton Utilities to apply up to 30 million gallons per day of wastewater effluent at the LAS, expressly prohibits any discharge from the collection system or the LAS to surface waters. The LAS Permit further provides that if a toxic chemical is "discharged into such waters, or is so placed so that it might flow, be washed, or fall into them," Dalton Utilities is required to "take all reasonable and necessary steps to prevent injury to property and downstream users." In addition, the NPDES General Stormwater Permit for

Dalton Utilities' system prohibits discharges of stormwater mixed with non-stormwater, including discharges of "process wastewater, industrial wastewater, and contaminated stormwater."

Plaintiff alleges that the DWSWA causes violations of these rules, the conditions of the Permits, and Section 307(d) of the CWA by discharging industrial wastewater contaminated with PFAS into the Dalton POTW where these chemicals pass through and are discharged from the LAS into the Conasauga River and its tributaries.

Sections 307(b)-(e) of the CWA establish the federal pretreatment program for regulation of industrial discharges into publicly owned treatment works (POTWs). 33 U.S.C. § 1317. Section 307(b) authorizes EPA to establish pretreatment standards to, among other things, "prevent the discharge of any pollutant through [POTWs], which pollutant interferes with, passes through, or is otherwise incompatible with such works." *USEPA v. City of Green Forest, Arkansas*, 921 F.2d 1394, 1398 (8th Cir. 1990) (quoting 33 U.S.C. § 1317(b)) (emphasis added); *see also* 40 C.F.R. § 403.5(a)(1) (providing that industrial users "may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference ...."). "Pass Through" is defined as:

> A discharge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation).

40 C.F.R. § 403.3(p). Similarly, Dalton Utilities' Sewer Use Rules and Regulations ("SURR") which incorporate federal and state pretreatment standards for discharges of industrial wastes into the Dalton POTW provides that:

> (1) "No User shall contribute or cause to be contributed directly or indirectly to the POTW any Pollutant or Wastewater that causes Pass Through or Interference," (SURR Section 2.4.1;);
>
> (2) and defines "Pass Through" as a "discharge that exits any point from the Wastewater Treatment Plants into the waters of the State of Georgia containing quantities or concentrations, which, alone or in conjunction with a discharge or discharges from other sources, are a cause of a violation of any requirement of Dalton Utilities' LAS Permit, including an increase in the magnitude or duration of a violation." (SURR Section 1.4).

(Compl. ¶ 127.) Under Section 307(d) of the CWA, "it is unlawful for an indirect discharger to operate in violation of any 'effluent standard or prohibition or pretreatment standard'" promulgated under Section 307. 33 U.S.C. § 1317(d); 33 U.S.C. § 1311(a) ("Except in accordance with this section and section[ ] ... 1317 ... the discharge of any pollutant by any person shall be unlawful"); *Int'l Union, United Auto. Aerospace & Agr. Implement Workers of Am., AFL-CIO v. Amerace Corp., Inc.*, 740 F. Supp. 1072, 1079 (D.N.J. 1990). The term "Indirect Discharge or Discharge" means the introduction of pollutants into a POTW from any non-domestic source regulated under section 307(b), (c) or (d) of the CWA. 40 C.F.R. § 403.3(i). The term "Industrial User or User" means a source of Indirect Discharge. 40 C.F.R. § 403.3(j).

The Eighth Circuit's decision in *Arkansas Poultry Fed'n v. U.S.E.P.A.* explains the POTW industrial wastewater collection, treatment and disposal process clearly:

> After the POTW treats the wastewater, the POTW discharges the treated wastewater into the nation's waters. For purposes of the Act, the POTW is a "direct" discharger and its discharge must meet certain conditions, or effluent limitations, contained in a permit issued under the National Pollutant Discharge Elimination System (NDPES), 33 U.S.C. § 1342. *See id.* §§ 1311(b)(1)(B), (C), 1314(d)(1). Similarly, the sludge, or sewage residue that is a by-product of the POTW's treatment processes, must meet certain requirements governing its use or disposal.
>
> Most municipal sewage systems, or POTWs, were designed and built to treat domestic sewage and other similar biological waste. However, industrial users of POTWs may discharge wastes in concentrations or volumes that cannot be adequately treated by the receiving POTW. How indirect industrial discharges can adversely affect the operation of the receiving POTW was summarized by the EPA in the supplementary information accompanying the 1987 definitions.
>
> Industrial users' discharges can inhibit or disrupt a POTW and thereby cause POTW noncompliance [with its NPDES permit limits] by physically disrupting the flow of wastewater through the POTW's system, by chemically or physically inhibiting the treatment processes, or by hydraulically overloading the plant so that proper settlement does not occur or wastes are retained for too short a time to receive adequate treatment before discharge. Pollutants discharged by industrial users which cannot be treated by the POTW may pass through the POTW in amounts or concentrations that exceed the POTW's NPDES permit limits and may also contaminate the sewage sludge that is a by-product of the POTW's treatment processes and thereby prevent the POTW from complying with requirements governing its chosen sewage sludge use of disposal practices.

852 F.2d 324, 326 (8th Cir. 1988) (citing General Pretreatment Regulations, 52 Fed. Reg. 1,586, 1,590 (1987)).

Defendant DWSWA does not quibble with the fact that "Congress recognized that the pollutants which some indirect dischargers release into POTWs could interfere with the operation of the POTWs or could pass through the POTWs without adequate treatment." (DWSWA Mot., Doc. 475-1 at 7); *see also Arkansas Poultry Fed'n v. U.S.E.P.A.*, 852 F.2d at 326. Instead, DWSWA argues that it cannot be liable for a violation of the CWA because there is "no evidence" that its discharge of PFAS caused a violation of either Dalton's LAS Permit or the NPDES General Stormwater Permit, and because Plaintiff "cannot show a causal link" between any alleged discharge by the Solid Waste Authority and any alleged permit violation.

DWSWA's causation argument is flawed.

First, the DWSWA argues that because Plaintiff has not asserted a claim against Dalton Utilities for violations of either the LAS Permit or the General Stormwater Permit, Plaintiff cannot bring a "pass through claim" against the DWSWA "as such a claim requires proof of discharge in violation of a permit." Rather than asserting a claim for violations of the LAS Permit or the General Stormwater Permit, Plaintiff's claim is that Dalton Utilities discharged PFAS from the LAS "without a permit authorizing such discharges." (*See generally*, Compl.; *id.* ¶ 1.) While Plaintiff has elected not to assert claims against Dalton Utilities at this time for violations of the LAS Permit or the General Stormwater Permit, the Third Amended Complaint does allege that the DWSWA's discharges of PFAS and contaminated industrial wastewater into the Dalton POTW have exited the LAS in

quantities or concentrations which are a cause of violations of Dalton Utilities' permits, and these allegations must be accepted as true on a motion to dismiss.

Second, the DWSWA next argues that the CWA claim in Count 2 must be dismissed because:

> The NPDES Stormwater Permit violation identified by Plaintiff is the alleged mixing of stormwater and industrial wastewater which then is discharged from [the Dalton POTW] into a protected body of water. This violation is not caused by the presence of any one particular pollutant or chemical such as PFAS in the wastewater, and instead is caused by the discharge of the mixture. Because the violation of the NPDES Stormwater Permit identified by Plaintiff occurs regardless of the presence of PFAS, PFAS cannot be said to be a cause of such violation.

(Def.'s Mot., Doc. 475-1 at 12.) The DWSWA asserts there is no causal link because: (1) the permit violation alleged by Plaintiff is not a violation of a set effluent limitation or other numerical standard contained in the NPDES Stormwater Permit and Plaintiff has identified no permit, regulation, statute, or other law which sets a limitation on the discharge of PFAS by a POTW; and (2) the only violation Plaintiff identified is an alleged violation of the blanket prohibition on discharging stormwater mixed wastewater.

These arguments are not persuasive and the DWSWA's "causation defense" is premature on a motion to dismiss in light of the Complaint's actual allegations.

First, Plaintiff is not required to allege a violation of a specific numerical effluent limitation or standard to bring a claim under Section 307(d). EPA has promulgated two types of national pretreatment standards that are applicable to indirect discharges. First, under 40 C.F.R. § 403.5, the Administrator has

promulgated the prohibited discharges standard which establishes "a general prohibition [*i.e.*, nonnumerical limit] on the release of any pollutants by any nondomestic source if those pollutants interfere with or pass through a POTW." *National Ass'n of Metal Finishers v. EPA*, 719 F.2d 624, 634 (3d Cir.1983), *rev'd on other grounds, Chemical Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116 (1985); *Int'l Union, United Auto. Aerospace & Agr. Implement Workers of Am., AFL-CIO v. Amerace Corp., Inc.*, 740 F. Supp. 1072, 1079 (D.N.J. 1990) (emphasis added). This standard "serves as a back-up standard to address localized problems that occur." 52 Fed. Reg. 1586 (1987); 40 C.F.R. § 403.5(a). This standard also "establishes specific prohibitions which apply to all non-domestic users and are designed to guard against common types of pollutant discharges that may result in interference and pass through (e.g., no discharge of flammable, explosive, or corrosive pollutants)." 52 Fed. Reg. at 1586; 40 C.F.R. § 403.5(b). Second, under 40 C.F.R. § 403.6, the Administrator has promulgated national categorical standards. These standards apply to specific categories of industrial users and "establish numerical, technology-based discharge limits derived from an assessment of the types and amounts of pollutants [sic] discharges that typically interfere with or pass through POTWs with secondary treatment facilities." 52 Fed. Reg. at 1586. Plaintiff has sufficiently alleged a violation of the pretreatment standard under 40 C.F.R. § 403.5 which prohibits the "release of any pollutants by any nondomestic source if those pollutants interfere with or pass through a POTW."

Second, the DWSWA's assertion that there is no causal link between the alleged discharge of PFAS by the DWSWA and a violation of the General Stormwater Permit is entirely conclusory:

> By its nature, the water being sprayed on the LAS is industrial wastewater and, as Plaintiff alleges, 90% of the water which enters the POTW for ultimate disposal at the LAS originates from industrial users. (TAC, ¶ 84). Thus, the very purpose of the LAS is to spray wastewater on the ground and the mere fact that there is PFAS in the wastewater sprayed on the LAS is not a violation of any permit. Instead, the permit violation identified by Plaintiff occurs when there is a discharge of the mixture of stormwater and wastewater. However, DWSWA's alleged PFAS does not cause the presence of wastewater on the LAS. DWSWA's alleged PFAS does not cause wastewater and stormwater to mix together on the LAS. DWSWA's alleged PFAS does not cause the discharge of any such mixture from the LAS. Instead, any such discharge is caused by the operation of the LAS and Plaintiff cannot establish any causal link between DWSWA's discharge and the permit violation at issue.

(Def.'s Mot., Doc. 475-1 at 15-16.) Plaintiff's claim in Count II is not for discharges of "wastewater" mixed with stormwater. Plaintiff's claim is that the DWSWA's discharges to the POTW result in PFAS being passed through the POTW in violation of Section 307 of the CWA. Plaintiff's Complaint alleges that discharges of PFAS, in contrast to other pollutants, are occurring because PFAS are environmentally persistent and highly mobile chemicals that readily contaminate surface waters when released onto land. The DWSWA's contention runs counter to the very language of the pretreatment standards and the regulatory definition of "pass through" as a "discharge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a

discharge or discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation). 40 C.F.R. § 403.3(p) (emphasis added); *see also* USEPA, Office of Wastewater Management, Introduction to National Pretreatment Program, June 2011, at iii ("Certain industrial discharge practices can interfere with the operation of POTWs, leading to the discharge of untreated or inadequately treated wastewater into rivers, lakes, and other waters of the United States. In particular, some pollutants are not amenable to biological wastewater treatment at POTWs and pass through the treatment plant untreated, thereby affecting the receiving water and causing deleterious effect.") (emphasis added). As the Eighth Circuit held, "an industrial user may be held liable even if its discharge is only a cause of the POTW's NPDES permit violation. [The CWA] does not require that the discharge be the sole cause of the POTW's NPDES permit violation in order to hold the industrial user liable. EPA's determination that the industrial user's discharge need only be 'a cause' of the POTW's NPDES permit violation, even though another factor, such as the POTW's operation difficulties, or discharges from domestic or other industrial sources, whether alone or in combination, are independent causes of such violation, is reasonable and consistent with the Act." *Arkansas Poultry Fed'n v. U.S.E.P.A.*, 852 F.2d at 328 (internal citations omitted).

Plaintiff alleges that as a result of the DWSWA's Pass Through industrial discharges, PFAS are present in substantial concentrations at the LAS, and readily

mix with stormwater prior to being discharged from the LAS, causing the violations of Dalton Utilities' General Stormwater permit. (Third Am. Compl. ¶¶ 89, 130). Thus, contrary to the Authority's assertion, Plaintiff has alleged that violations of the General Stormwater permit are caused by the presence of the PFAS from the DWSWA's discharges to the POTW and the LAS.

Finally, DWSWA's argument that "this type of general allegation of violation due to the mixing of stormwater and industrial wastewater [is not] the kind of permit violation contemplated by the pass through/pretreatment standards" is false and misleading. Although the General Stormwater Permit does not have numeric effluent limitations for specific toxic pollutants, the permit clearly prohibits the discharge of "non-stormwater" which includes "any other type of process wastewater, industrial wastewater, and contaminated stormwater." As Plaintiff points out in his response, while the language of the Stormwater Permit may be general, Plaintiff has alleged that the DWSWA's specific discharges of PFAS to the POTW are causing specific violations of the permits due to PFAS being discharged from the LAS into the Conasauga River and its tributaries. And while discharges of industrial wastewater by Dalton may, in and of themselves, constitute a violation of the permits, Plaintiff is complaining of discharges of PFAS contaminated wastewater specifically. The violations of the General Stormwater permit alleged by Plaintiff are discharges of stormwater mixed with "industrial wastewater containing PFAS." (Compl. ¶ 130.)

DWSWA makes identical arguments regarding the alleged violation of the Sewer Use Rules and Regulations which were enacted by Dalton Utilities as local pretreatment standards. As noted above, Dalton Utilities' Sewer Use Rules and Regulations ("SURR"): (1) provide that "[n]o User shall contribute or cause to be contributed directly or indirectly to the POTW any Pollutant or Wastewater that causes Pass Through or Interference," (SURR Section 2.4.1); and (2) define "Pass Through" as a "discharge that exits any point from the Wastewater Treatment Plants into the waters of the State of Georgia containing quantities or concentrations, which, alone, or in conjunction with a discharge or discharges from other sources, are a cause of a violation of any requirement of Dalton Utilities' LAS Permit including an increase in the magnitude or duration of a violation" (SURR Section 1.4).

The Authority asserts that Plaintiff's claim fails because he cannot show the discharge of PFAS by the DWSWA was a cause of any alleged LAS permit violation because:

> the LAS permit is a no discharge permit which "expressly prohibits any discharge from the LAS to surface waters." (TAC ¶ 85). Because this is a no discharge permit, a permit violation occurs when any wastewater is discharged out of the LAS. The cause of any purported LAS violation is the discharge itself and the violation is not tied in any way to the contents of the wastewater leaving the no-discharge system. Indeed, with or without PFAS from DWSWA, a discharge from the LAS into surface waters is a violation of the permit.

(Def.'s Mot., Doc. 475-1 at 18-19.)

In response, Plaintiff correctly argues that the definition of "Pass Through" again supports the plausibility of the allegation of causation, because it focuses on "the introduction of pollutants into a POTW," which then exit the POTW causing a violation of Dalton's permits. *See* SURR, § 1.4. It is not, as DWSWA argues, that unspecified wastewater is being discharged from the LAS in violation of Dalton Utilities' LAS permit. Instead, the violation (and causal connection) is DWSWA's alleged introduction of PFAS into the POTW, which passes through, causing discharges of wastewater containing PFAS from the LAS.

Accordingly, the Court **DENIES** Defendant DWSWA's Motion to Dismiss on these grounds.

V. STATE LAW CLASS CLAIMS: DEFENSES COMMON TO ALL OR MULTIPLE CLAIMS

The state-law claims alleged in the Third Amended Complaint are for: negligence, negligence *per se*, punitive damages, public nuisance, and abatement of public nuisance. This section addresses defenses that are common to all or to some of the state-law claims.

A. The Economic Loss Rule Does Not Bar Plaintiff's Claims

All Defendants argue that Plaintiff's state-law tort claims should be dismissed because the economic loss rule bars Plaintiff from recovering damages on these claims. (Supplier Mot., 479-1 at 10-15); (Manufacturer Mot., Doc. 473-1 at 7-16); (Dalton Utilities Mot. at n. 8.); (DWSWA Mot. at 29.) In particular, Defendants argue that Plaintiff alleges only economic damages — paying a surcharge to filter and remove PFAS from his water supply — and that these

damages are not recoverable under the rule. In response, Plaintiff contends that the economic loss rule does not apply here, where Plaintiff has alleged that Defendants polluted Plaintiff's water supply with toxic chemicals, because (1) Plaintiff has alleged injury to person and property and (2) Defendants owe Plaintiff statutory and common law duties. (*See e.g.*, Pl. Resp. to Manufacturers, Doc. 514 at 13.)

"The 'economic loss rule' generally provides that a contracting party who suffers purely economic losses must seek his remedy in contract and not in tort." *Gen. Elec. Co. v. Lowe's Home Ctrs., Inc.*, 608 S.E.2d 636, 637 (Ga. 2005); *Murray v. IGL Technologies, LLC*, 798 F. App'x 486, 490 (11th Cir. 2020) ("The economic loss rule limits the ability of individuals to recover in tort for negligence where the duty breached arises solely out of a contract"); *Hanover Ins. Co. v. Hermosa Const. Group, LLC*, 57 F. Supp. 3d 1389, 1395-96 (N.D. Ga. 2014) ("The economic loss rule provides that a plaintiff may not recover in tort for purely economic damages arising from a breach of contract.").

The policy consideration underlying Georgia's economic loss rule is "to prevent a plaintiff from recovering duplicative damages for the same wrongdoing." *Luigino's Intern., Inc. v. Miller*, 311 F. App'x 289, 292 (11th Cir. 2009); *Gen. Elec. Co.*, 608 S.E.2d at 639 (explaining that the economic loss rule "avoids the unfairness to defendants that would come with duplicative liability for the same damage"). Specifically, "the purpose of the rule ... is to distinguish between those actions cognizable in tort and those that may be brought only in contract." *Murray*,

798 F. App'x at 490 (citing *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 949 (11th Cir. 1982)).

"The rule has its foundation in cases limiting the ability of *contracting parties* to sue one another, and it originally emerged in the area of products liability." *Murray*, 798 F. App'x at 490 (emphasis added); *see e.g.*, *Long v. Jim Letts Oldsmobile, Inc.*, 217 S.E.2d 602 (Ga. Ct. App. 1975) (holding, in action against the manufacturer and seller of a new car, that, while plaintiffs may recover in tort for personal injuries and damage to property other than the at-issue product, recovery for the loss of value or cost of repairing the product itself is not permitted; instead, a plaintiff must rely on a contract action to recover the "benefit of his bargain"). As the district court in *Murray* explained, in the products liability arena, "[t]he rationale behind the economic loss rule is that the purpose of products liability actions in tort is to redress physical injuries and not the losses of bargains by disgruntled customers, which are best addressed through contract and warranty law." *Murray v. ILG Technologies, LLC*, 378 F. Supp. 3d 1227, 1242 (S.D. Ga. 2019) (internal citations omitted) *aff'd* 798 F. App'x 486.

Although it originated in cases involving products liability, the economic loss rule "has been expanded to bar recovery in all negligence-based tort actions where a plaintiff seeks to recover purely economic losses, regardless of contractual privity." *Murray*, 798 F. App'x at 490. (citing *City of Atlanta v. Benator*, 714 S.E.2d 109, 116 (Ga. Ct. App. 2011)) (applying economic loss rule to bar plaintiffs' negligence claims against City of Atlanta contractors who allegedly negligently

installed meter reading technology that resulted in plaintiffs being overcharged for water consumption).

In *General Electric Co. v. Lowe's*, the Georgia Supreme Court, on a certified question from the Eleventh Circuit, held that Lowe's could not recover lost profits as a result of the contamination of property Lowe's did not own, but on which it had planned to build one its superstores. 608 S.E.2d at 637 ("Under the economic loss rule, a plaintiff can recover in tort only those economic losses resulting from injury to *his person or damage to his property*; a plaintiff cannot recover economic losses associated with injury to the person or damage to the property *of another*.") (emphasis added).

Yet, despite this broadening application, the economic loss rule bears its qualifications. In particular, it does not apply to claims where a plaintiff seeks to recover damages for "personal injury or damage to other property." *Vulcan Materials Co., Inc. v. Driltech, Inc.*, 306 S.E.2d 253, 254 (Ga. 1983) ("[S]everal courts have carefully distinguished economic loss from physical harm or property damage."). *See e.g., Rowe v. Akin & Flanders, Inc.*, 525 S.E.2d 123, 126 (Ga. Ct. App. 1999) (finding that economic loss rule did not bar claims based on negligent paving work that led parking lot to collapse and injure property of owner); *Silverpop Systems, Inc. v. Leading Market Technologies, Inc.*, 641 F. App'x. 849, 853 (11th Cir. 2016) ("Where a party to a contract suffers damage to property that is not the subject of the contract, Georgia courts allow for recovery in tort on the premise that 'the duty breached in such situations generally arises independent of

the contract.'") (citing *Bates & Assoc., Inc. v. Romei*, 426 S.E.2d 919, 921 (Ga. Ct. App. 1993)).

In addition, the rule has no application where the defendant breaches a duty imposed by law or arising from a special relationship. *See* O.C.G.A. § 51-1-11(a) (providing "if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract . . . ."); *Unger v. Bryant Equip. Sales & Servs., Inc.*, 335 S.E.2d 109, 111 (Ga. 1985) (finding that economic loss rule did not apply where the plaintiff has asserted "a claim in tort which does not arise from the contract, but is independent of it"); *Unified Svcs. v. Home Ins. Co.*, 460 S.E.2d 545 (Ga. Ct. App. 1995) ("While a tort action cannot be based on the breach of a contractual duty only, it can be based on conduct which, in addition to breaching a duty imposed by contract, also breaches a duty imposed by law."); *Luigino's Intern., Inc.*, 311 F. App'x at 292-93 (noting that Georgia law recognizes an exception to the economic loss rule for injuries that occur independently of a contract).

Even where the rule would otherwise apply, Georgia Courts have acknowledged two exceptions: (1) a negligent misrepresentation/fraud exception and (2) an "accident exception," which applies where the conduct of the defendant poses an unreasonable risk of injury to other persons or property. *Home Depot U.S.A., Inc. v. Wabash Nat. Corp.*, 724 S.E.2d 53, 59 (Ga. Ct. App. 2012)

(explaining that for purposes of this exception, "[a]ccident in this context means a sudden and calamitous event which, although it may only cause damage to the defective product itself, poses an unreasonable risk of injury to the other persons or property."); *see also*, *Roberts & Co. Assoc. v. Rhodes-Haverty Partnership*, 250 Ga. 680, 681 (1983) (adopting negligent misrepresentation exception to the economic loss rule).

Here, Plaintiff argues that the economic loss rule does not apply at all because he has alleged injury to person and property, and because Defendants owed Plaintiff a duty based on statutory and common law.

1. Plaintiff has adequately alleged injury to person or property

Plaintiff argues that the economic loss rule does not bar his state-law claims because he has alleged harm to his person and his property. The Complaint alleges the following injuries:

(¶ 16)	"Plaintiff receives his domestic water supply and drinking water from the [Rome Water and Sewer Division], and thus has a particular interest in protecting the water quality of the Conasauga River and its …. **Plaintiff has been, and will continue to be, directly and substantially injured in his use and enjoyment of his property as a direct result of … the contamination of the Rome water supply in particular**."
(¶ 104)	"As a direct and proximate result of Defendants' contamination of the … water supplies with PFAS, **Plaintiff and the Proposed Class Members have suffered damages, including, but not limited to, property damage** and losses for the payment of surcharges to filter and remove PFAS from the Rome and Floyd County water supply, and other compensatory damages to be proven at trial."
(¶ 136)	"Plaintiff and the Proposed Class Members are water subscribers … **who have been in the past, and will be in the future, harmed, injured, and damaged through the contamination of their**

	drinking water with PFAS and the payment of surcharges to recoup the costs of removing this contamination."
(¶ 156, 162)	"As a direct, proximate, and foreseeable result of Defendants' conduct, practices, actions, omissions, and inactions, Plaintiff … **ha[s] been caused to suffer, and will continue to suffer damage to property** and losses for the surcharges incurred as ratepayers for the costs of filtering PFAS from their drinking water and other damages to be proved at trial."
(¶¶ 167-68)	"Defendants knew or should have known that their discharge of toxic PFAS chemicals **would result in contaminated surface waters and domestic water supplies thereby endangering human health and the environment**. Defendants acted, or failed to act, with the specific intent to cause harm, and did, and **continue to, cause harm and injury to the Plaintiff**…"
(¶ 174)	"Defendants have created a continuous, public nuisance by their discharge of PFAS … into the Conasauga, Oostanaula, and Coosa Rivers and related tributaries and watersheds, **which has caused, and continues to cause, contamination of these waters and Plaintiff's and Proposed Class Members' water supplies, thereby proximately causing the public and Plaintiff and Proposed Class Members past, present, and future harm, injury**, inconvenience, and increased water rates and surcharges…"
(¶ 178)	"The levels of toxic chemical contamination found in the … water supply, directly caused by the Defendants' pollution, **has created a condition that has threatened, and continues to threaten, the health and well-being of the Plaintiff, and Proposed Class Members, and everyone who consumes PFAS contaminated drinking water supplied by the RWSD and/or the FCWD. This ingestion of PFAS causes concern, inconvenience, and harm to the Plaintiff**. It was reasonably foreseeable, and in fact known to the Defendants, that **their actions would cause interference with the property rights of Plaintiff and Proposed Class Members and would place, have placed, and continue to place, them at increased risk of physical harm,** as well as cause them to incur additional, otherwise unnecessary expense to acquire drinking water for themselves and their families."

(Compl.) (emphases added). In the face of these pleadings, Defendants maintain that Plaintiff has not alleged damage to his property. (*See e.g.*, Manufacturers' Reply, Doc. 529 at 3-6.)

In part, Defendants argue that any allegations of harm to the water supply do not constitute harm to the Plaintiff but instead only *potentially* constitutes harm *to the City of Rome*. (*Id*. at 3-4) ("At best, the allegations in the TAC suggest the Manufacturing Defendant's may have damaged Rome's water supply—not Plaintiff's.") But this argument assumes, without justification or legal support, that Plaintiff *never* has a property right in the household water he has paid for, even when it comes out of the faucet in his kitchen. This strains credulity. Georgia law defines "real estate" as "any interest existing in, issuing out of, or dependent upon land or the buildings thereon," O.C.G.A.§ 44-1-2(a)(3). Georgia law also provides that "[t]he property right of the owner of real estate extends downward indefinitely and upward indefinitely." *Id*. § 44-1-2(b); *see also*, *Pope v. Pulte Home Corp*., 539 S.E.2d 842, 843 (Ga. Ct. App. 2000) ("The term 'property' includes not only the land possessed, but also the rights of the owner in relation to that land."); *Duffiled v. DeKalb County*, 249 S.E.2d 235, 237 (Ga. 1978) ("The term property comprehends not only the thing possessed, but also, in strict legal parlance, means the rights of the owner in relation to land or a thing; the right of a person to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from the use.") (quoting *Bowers v. Fulton County*, 146 S.E.2d 884 (Ga. 1966) (cleaned up).

This property right includes groundwater, such that contamination of groundwater is damage to the owner's property. *Boardman Petroleum, Inc. v. Federated Mut. Ins. Co*., 498 S.E.2d 492, 495 (Ga. 1998) ("[C]ontamination of on-site groundwater alone is damage to the insured's own property.") Defendant has

provided no basis for differentiating between on-site groundwater and on-site household water found in sewers and pipes.[12] Further, despite Defendants' arguments in their briefs, the Supplier Defendants, at least, admitted at the hearing that Plaintiff has a property right in the water after it passes through the meter. (*See*, Hearing Tr. p. 44:13-15) ("[I]t doesn't become the plaintiff's water until it passes through his water meter.")

Defendants next argue that, even if Plaintiff has a property right in his water, he could not have suffered harm to property because, once the water reached Plaintiff, it had been remediated by the City of Rome, and therefore was no longer damaged. (Manufacturer Reply at 4.) But this argument rests on the assumption that the City of Rome has adequately and fully cleansed the water of PFAS. This assumption contradicts the pleadings, (*see* Compl. ¶¶ 97-100) (alleging that the City of Rome water supply was contaminated with PFAS at dangerously high levels), and strays beyond them, implicating issues of fact not appropriately addressed on a motion to dismiss. Indeed, illustrative is Plaintiff's allegation that

> Due to the high levels of PFOA and PFOS found in its water supply, *and due to the presence of Short-Chain PFAS*, the City's water supply requires a new and permanent filtration system, which is necessary to provide a safe, long-term supply of water which will meet the EPA health advisories and provide safe water for the public.

[12] The principle that an individual has a property right in household water is supported by the fact that theft of water is a property crime. See *Reynolds v. State*, 115 S.E.2d 214, 217 (Ga. Ct. App. 1960) (describing theft of water as a property crime and the object of larceny). Authority from other states supports the Court's conclusion. *Strawberry Water Co. v. Paulsen*, 207 P. 3d 654, 660 (Ariz. 2008) (explaining that, separate from a usufructuary right in groundwater, there is a separate personal property right to water when it is possessed and controlled) (citing 1 *Waters and Water Rights: A Treatise on the Law of Waters and Allied Problems* § 53.2, at 349 (Robert Emmet Clark ed., 1967) (quoting Wiel, *Running Water,* 22 Harv. L.Rev. 190 (1909)).

(Compl. ¶ 100) (emphasis added). Defendants acknowledge that the City of Rome is suing Defendants to pay for a new filtration system. (See Supplier Mot. at 14) ("[T]he City of Rome itself has already filed suit in state court to recover the costs of its new filtration system."). If the City of Rome's current filtration system were adequately cleaning the water supply of PFAS, a new filtration system would not be necessary.

Additionally, the legal authority upon which Defendants rely in support of their economic loss rule arguments is distinguishable. In *Lowe's*, the Georgia Supreme Court held that the economic loss rule barred Lowe's from recovering lost profits resulting from damage to property *that it did not own* but planned to lease from a third party. 608 S.E.2d at 638. ("Existing case law makes clear that parties can recover in tort only for damage to *their own* property under the economic loss rule.") (emphasis added). Here, as detailed above, Plaintiff has adequately alleged damage to his own property — his household water — and the use and enjoyment thereof.

City of Atlanta v. Benator, 714 S.E.2d 109 (Ga. Ct. App. 2011) is also inapposite. There, the plaintiffs did not allege damage to property; instead, "the only specific damages alleged by plaintiffs [were] overpayments" resulting from a software malfunction that caused meters to miscalculate usage leading to the plaintiffs being overcharged. *Id.* at 117. Again, this is different than what Plaintiff has alleged here, which includes contamination of his household water, in which he has a property right, and also personal harm in the form of "ingestion of PFAS"

that causes "concern, inconvenience, and harm to the Plaintiff" and constitutes a continuous threat to his health. (Compl. ¶ 178.)

Defendants also contend that, regardless of whether Plaintiff sufficiently pled injury to his person or property, his damages specifically for water rate surcharges are "economic losses" not recoverable under the rule. In support, Defendants argue, that the economic loss rule "prevents a plaintiff who purchases an item from recovering in tort for (1) damage to that item itself or (2) the cost of repairing the damaged item." (Manufacturer Mot. at 13) (citing *McGaffin v. Cementos Aergos S.A.*, 2016 WL 150501 (S.D. Ga. Oct. 20, 2016)).

McGaffin was a products liability case in which the district court held that the economic loss doctrine barred the plaintiffs' damages for the cost of remedying and replacing defective concrete. *Id.* at *1. In a footnote, the *McGaffin* Court explained that the plaintiffs could, however, recover the cost of repairing or replacing the concrete *to make it safe*, "as a measure for damage to other property." *Id.* at n. 3 (citing *Shooshanian v. Wagner*, 672 P.2d 455, 464 (Alaska 1983) (holding that economic loss rule did not bar plaintiffs' damages to repair and replace insulation that was dangerously defective and emitted toxic substance into their building which had physically altered the property in a manner which made it harmful to them)).

McGaffin's holding relies on the Georgia Supreme Court's decision in *Vulcan Materials Co. v. Driltech,* 306 S.E.2d 253 (Ga. 1983). In *Vulcan*, also a products liability case, a part in a drilling machine fractured and caused the

machine to release hydraulic fluid, thereby causing a fire which destroyed the machine but caused no personal injury or other property damage. *Id*. at 254. The court ultimately found that the accident exception precluded the application of the economic loss rule. However, before so finding, the *Vulcan* Court explained the distinction between economic losses (*i.e*., "the diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold") and loss from physical harm or property damage. *Id*. at 255. Relying on a decision of the California Supreme Court, *Seely v. White Motor Co*., 403 P.2d 145 (Cal. 1965), the *Vulcan* Court explained that there is a difference

> between recovery for the loss of value from a defect in a product, and damage to the product caused by the defect. [Judge Traynor of the California Supreme Court] declared that the first type of injury constituted economic loss that was recoverable only under warranty law, because the activity complained of essentially involved a breach of representations of quality or suitability … When the defect is of a type that creates a safety hazard, such as [a] truck's nonworking brakes, 'physical injury to property is so akin to personal injury that there is no reason for distinguishing them.'

Id. at 255-56. Further, the *Vulcan* Court explained that

> courts have classified the damages consequent to qualitative defects, such as reduced value, return of purchase price, repair and replacement, or lost profits, as economic loss, and have relegated those who suffer such commercial loss to the remedies of contract law.
>
> On the other hand, almost all courts have adopted the view that the benefit-of-the-bargain approach of warranty law is ill-suited to correct problems of hazardous products that cause physical injury. *Accordingly, tort law imposes a duty on manufacturers to produce safe items, regardless of whether the ultimate impact of the hazard is on people, other property, or the product itself*.

Id. at 256. (emphasis in original). In determining whether a particular loss amounts to economic loss or physical injury/property damage, "*the items for which damages are sought, such as repair costs, are not determinative*." *Id.* (emphasis added). Rather,

> the line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular item.

Id.

Relying on this logic and language, the district court in *Corp. of Mercer Univ. v. Nat. Gypsum Co.*, 1986 WL 12447 (M.D. Ga. 1986) held that the economic loss rule did not bar Mercer's negligence claim and request for removal costs against manufacturers of asbestos-containing insulation products that ended up in Mercer's buildings. *Id.* at * 3. The *Mercer* Court reasoned that Mercer did not allege that defendants' products failed to perform their intended function satisfactorily, as in typical economic loss rule cases. Rather, Mercer alleged that "the presence of such products in its university buildings presented an unreasonable personal health risk," and therefore that the cost of removing or replacing the asbestos-containing products (which were "hazardous but not qualitatively deficient") was not barred by the economic loss rule. *Id.* at *2-3. More recently, the Georgia Court of Appeals has reiterated that "'economic loss' means damages for the loss of the value or use of the defective product itself, costs of repair or replacement of the

defective product, or the consequent loss of profits, ***unaccompanied by any claim of personal injury or damage to other property***." *Home Depot U.S.A., Inc. v. Wabash Nat. Corp.*, 724 S.E.2d 53, 59 (Ga. Ct. App. 2012) (emphasis added).

Also significant, the principle upon which Defendants rely — that the economic loss rule prevents plaintiff from recovering the cost of the item itself or cost of repair of the item — arises exclusively in the context of products liability cases. *In that products liability context*, the principle comports with the stated purpose of the economic loss rule: to allow tort claims to "redress physical [or property] injuries and not the losses of bargains by disgruntled customers, which are best addressed through contract and warranty law." *Murray v. ILG Technologies, LLC*, 378 F. Supp. 3d 1227, 1242 (S.D. Ga. 2019) (internal citations omitted) *aff'd* 798 F. App'x 486.

The instant case is of course not a products liability case. Plaintiff's household water, allegedly contaminated with PFAS, is not a product he purchased that failed to perform as expected, for which he seeks damages "consequent to qualitative defects," such as reduced value, return of purchase price, or lost profits—typical economic losses. *Vulcan*, 306 S.E.2d at 256. Plaintiff cannot, and is not attempting to, avail himself of any remedies of warranty or contract law. Instead, this case, in which Plaintiff alleges that his household drinking water was contaminated with PFAS causing a threat to his health and well-being as well as damage to his property, sounds classically in tort.

Under these circumstances, the Court finds that Plaintiff's damages for water rate surcharges — which are, as alleged, accompanied by other property injury and risk to personal health — are not economic losses within the meaning of the rule. *Home Depot,* 724 S.E.2d at 59 ("'economic loss' means damages for the loss of the value or use of the defective product itself, costs of repair or replacement of the defective product, or the consequent loss of profits, *unaccompanied by any claim of personal injury or damage to other property*."). Further, the Court concludes that Defendant's cited principle, that the economic loss rule prevents plaintiff from recovering the cost of the item itself or cost of repair of the item, does not apply. Defendants have pointed to no legal authority in which this principle extends beyond the bounds of products liability. Further, even if this principle did apply, it would not bar Plaintiff's damages for surcharges under the logic of *Vulcan* and *Mercer*. "[T]he line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose." *Vulcan*, 306 S.E.2d at 256. As in *Mercer*, "[t]he nature of the defect is safety, not quality, and the risk involved is personal injury," as well as damage to property and the use and enjoyment thereof. 1986 WL 12447, at *3. Accordingly, "the presence of [the PFAS] in [Plaintiff's household water] presented an unreasonable personal health risk" and damages for the cost of removing the hazardous "product" are not barred by the economic loss rule. 1986 WL 12447, at *3.

2. Plaintiff adequately alleges breach of duty imposed by law as to some Defendants

In addition to finding that the economic loss rule does not apply because Plaintiff has alleged injury to his person and property, the Court finds that the rule is also proscribed in part because certain defendants owed Plaintiff independent duties imposed by statutes and common law. *See* O.C.G.A. § 51-1-11(a) (providing that "if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract . . . ."); *Unger v. Bryant Equip. Sales & Servs., Inc.*, 335 S.E.2d 109, 111 (Ga. 1985) (finding that economic loss rule did not apply where the plaintiff has asserted "a claim in tort which does not arise from the contract, but is independent of it").

As described *infra*, the Manufacturing Defendants and DWSWA owed Plaintiff a duty of care under common law, the CWA, and the Georgia Water Quality Control Act. Under the legal authority cited above, these independent duties of care preclude application of the economic loss rule as to the Manufacturing Defendants and DWSWA for purposes of the negligence and negligence *per se* claims.

B. The Free Public Services Doctrine is Inapplicable in this Case

The Manufacturing Defendants argue that the "public services doctrine" (notably *sans* the "free") bars all of Plaintiff's claims for damages. (Manufacturer Mot. at 20-24.) Dalton Utilities also asserts this argument in a footnote (Dalton

Utilities Mot. at n. 8) and DWSWA adopts the Manufacturer Defendants' arguments. (DWSWA Mot. at 29.)

"Stated succinctly, the [free public services] doctrine provides that absent specific statutory authorization or damage to government-owned property, ***a county*** cannot recover the costs of carrying out public services from a tortfeasor whose conduct caused the need for the services." *Walker Cnty v. Tri-State Crematory*, 643 S.E.2d 324, 327 (Ga. Ct. App. 2007) (emphasis added); *see also, Torres v. Putnam County*, 541 S.E.2d 133 (Ga. Ct. App. 2000) (finding that Putnam County could not recover tort damages against business operators for expenses incurred by the county in sending in the building inspector and sheriff out to the business' property because county could not recover costs to enforce its laws and protect its citizens). Essentially, Defendants argue that water is a free public service and the court should not determine how the City of Rome and Floyd County decide to allocate payment for this service. (Manufacturer Mot. at 21-22.)

In short, Defendants' public services doctrine arguments lack merit because they provide no authority to support that this doctrine serves to deny recovery to *private citizens*, as opposed to governments. Indeed, the "primary rationale behind the doctrine is 'that state legislatures establish local governments to provide core services for the public and pay for these services by spreading the costs to all citizens through taxation.'" *Walker Ctny.*, 643 S.E.2d at 327 (quoting *Baker v. Smith & Wesson Corp.*, 2002 WL 31741522, at *4-5 (Del. Sup. Ct. Nov. 27, 2002)). That rationale doesn't apply in the case of a private plaintiff. *See City*

of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322 (9th Cir. 1983) ("[T]he tortfeasor is fully aware that private parties injured by its conduct, who cannot spread their risk to the general public, will have a cause of action against it for damages proximately or legally caused") (Kennedy, J.).

Defendants' invocation of the free public services doctrine also fails for a second reason: namely, the water that the City of Rome and Floyd County furnish to paying customers is neither free nor public as contemplated by the doctrine. *See, McCrary Eng'g Corp. v. City of Bowdon*, 317 S.E.2d 308, 310 (Ga. Ct. App. 1984) (explaining that "a water works system for its residents (for domestic and commercial purposes) and charging [for its] engagement . . . is a private, non-governmental business"). Unlike services such as police or fire protection, water service to paying customers is not free for all the public, and here, Plaintiff pays for the water provided.

In short, the free public services doctrine does not bar Plaintiff's claims for damages because Plaintiff is a private individual, not a government, and because the service at issue is not free to all the public as contemplated by the doctrine.

C. Dalton Utilities and DWSWA Are Not Entitled to Governmental Immunity

1. Dalton Utilities[13]

Dalton Utilities argues that Plaintiff's nuisance claims are barred by sovereign immunity, relying heavily on the 2014 Georgia Supreme Court decision in *Dept. of Nat. Resources v. Ctr. for a Sustainable Coast*, 755 S.E.2d 184 (Ga. 2014). There, the Georgia Supreme Court reasoned that the "nuisance exception," as discussed in Georgia case law, *see Thomasville v Shank*, 437 S.E.2d 306, 307 (Ga. 1993), was not an exception to sovereign immunity at all. Instead, the "nuisance exception" is "rooted in the concept that the government may not take or damage private property for public purposes without just and adequate compensation." *Sustainable Coast*, 755 S.E.2d at 190. Accordingly, Dalton Utilities argued in briefing and at the hearing that Plaintiff's nuisance claim against it fails because his claim does not implicate eminent domain/inverse condemnation and therefore does not fall within the limited category of viable claims recognized by *Sustainable Coast*.

Plaintiff relies on a long line of authority, pre-*Sustainable Coast*, that allowed plaintiffs to bring nuisance claims against municipalities. *See Shank*, 437 S.E.2d at 307 ("Accordingly, we reaffirm the longstanding principle that a municipality is liable for creating or maintaining a nuisance which constitutes

[13] The only state law claim asserted against Dalton Utilities is abatement of public nuisance. While the Complaint technically names Dalton Utilities as a defendant in Count VI, for public nuisance, Plaintiff concedes that he does not seek damages for public nuisance from Dalton Utilities. (Pl. Resp. to Dalton Utilities, Doc. 511 at 32). In light of this concession, Count VI is **DISMISSED** as to Dalton Utilities.

either a danger to life and health or a taking of property."); *City of Rome v. Turk*, 219 S.E.2d 97, 99 (Ga. 1975) (finding that plaintiff could maintain nuisance claim against city for creating nuisance through its construction of drainage ditch) ("This sewer was and is under the control of the city; if it be a nuisance and the city has not abated it, no one else could; not having abated it, the city may be said to have maintained it and kept it up, and it is thereby a continuing nuisance, for the maintenance of which the city is liable.") (quoting *Smith v. Atlanta*, 75 Ga. 110 (1885)); *City of Waycross v. Houk,* 39 S.E. 577 (Ga. 1901) (explaining that the court had "no hesitancy in holding that" plaintiff was entitled to the relief sought in her equitable petition to enjoin the City of Waycross from maintaining a nuisance through its operation of a sewer main near her property) ("When a municipal corporation is proceeding to lay sewers, and discharge filthy sewage upon the land of a property owner, which may probably cause injury to his health and sickness in his family, and where the nuisance is continuing, and likely to be permanent, and the consequences are not barely possible, but to a reasonable degree certain, a court of equity may interfere to arrest such nuisance before it is completed.") (citing *Butler v. Mayor, etc.*, 74 Ga. 570 (Ga. 1885)).

At the June 4 hearing in this case, the Court and Parties discussed *Sustainable Coast* and its implications at length. Subsequently, however, on June 21, 2021, the Georgia Supreme Court issued an opinion in *Gatto v. City of Statesboro*, ---S.E.2d ---, 2021 WL 2518620 (Ga. June 21, 2021), that directly

confronts this issue and clarifies the language in its earlier *Sustainable Coast* decision.

As the *Gatto* Court explained, "[m]unicipalities performing their governmental functions have long been afforded immunity from civil liability akin to the immunity afforded to the State." *Id.* at *2. "Although originating in the common law, the doctrine of municipal immunity now enjoys constitutional status", and may only be waived by the Georgia legislature. *Id.* (citing Ga. Const. of 1983, Art. IX, Sec. II. Par. IX) On that front, the Georgia legislature has distinguished acts for which the municipality is immune from liability with those acts that do not confer immunity. *See* O.C.G.A. § 36-33-1(b) (explaining that municipalities shall not be liable for governmental functions, such as errors in performing legislative or judicial powers, but shall be liable for the failure to perform or improper performance of their ministerial duties).[14]

Yet, "[e]ven in the exercise of its governmental functions … a municipality does not enjoy immunity from *all* liability." *Gatto*, 2021 WL 2518620 at *3 (emphasis in original). Although a municipality is immune from liability for conduct that constitutes governmental functions in a negligence action, the same is not true for a nuisance action. *Id.* Reaffirming the *Shank* Court's holding, the *Gatto* Court stated:

[14] Unlike governmental functions, ministerial duties are those "involving the exercise of some private franchise, or some franchise … exercise[d] for the private profit or convenience of the [municipal] corporation or for the convenience of its citizens alone, in which the general public has no interest." *Gatto*, 2021 WL 2518620 at *2 (citing *City of Atlanta v. Mitcham*, 769 S.E.2d 320 (Ga. 2015)).

> [a] municipality[,] like any other individual or private corporation[,] may be liable for damages it causes to a third party from *the operation or maintenance of a nuisance*, irrespective of whether it is exercising a governmental or ministerial function. This exception to sovereign immunity is based on the principle that a municipal corporation can not, under the guise of performing a governmental function, create a nuisance dangerous to life and health or take or damage private property for public purpose, without just and adequate compensation being first paid.

Id. at 3-4 (citing *Shank*, 437 S.E.2d at 306) (emphasis added; citations and punctuation omitted).

Traditionally, under Georgia law, a municipality's liability in nuisance was limited to "situations where the alleged injury related to the physical condition of the plaintiff's property or the plaintiff's use and enjoyment thereof." *Id.* at 5. As a result, some of the most common scenarios of municipal liability for nuisance involve "damage to property caused by the construction or maintenance of municipal sewer and drainage systems." *Id.* at 4. (citing *City of Columbus v. Myzka*, 272 S.E.2d 302, 305-06 (Ga. 1980) (affirming nuisance judgment against city for damage to property caused by leaking municipal sewer and insufficient drainage system); *Bass Canning Co. v. MacDougald Constr. Co.*, 162 S.E. 687, 689-90 (Ga. 1932) (finding city could be held liable for nuisance damage caused by faulty municipal drainage system); *Reid v. City of Atlanta*, 73 Ga. 523, 524 (1884); *Langley v. City of Augusta*, 45 S.E.2d 486 (Ga. 1903)).

Other examples include damage to property or the enjoyment of it in the context of a city's operation of airports, power plants, and bridges. *Id.* (citing *Delta Air Corp. v. Kersey*, 20 S.E.2d 245 (Ga. 1942) (finding city could be held liable for

constructing and operating an airport in such a way to endanger the life and health of adjoining landowners); *Mayor & Council of Washington v. Harris*, 86 S.E. 220 (Ga. 1915) (noting city could be held liable in connection with operation of power plant city constructed on lot adjacent to plaintiff's property); *Bentley v. City of Atlanta*, 18 S.E. 1013 (Ga. 1893) (holding city could be held liable in connection with its maintenance of a bridge adjacent to plaintiff's property).

In 1968, the Georgia Supreme Court, in *Town of Fort Oglethorpe v. Phillips*, 165 S.E.2d 141 (Ga. 1968), expanded municipal nuisance liability to situations involving personal injury that did not involve any corresponding property injury. *Id.* at 144 (finding that plaintiff stated nuisance claim against city by knowingly failing to maintain traffic light for more than two weeks causing six accidents, including plaintiff's). The *Town of Fort Oglethorpe* Court explained that the complaint "state[d] facts sufficient to show the active operation and maintenance of a dangerous condition and knowingly allowing such condition to continue to the injury of the plaintiff." *Id.*

Six years later, in 1974, sovereign immunity was "enshrined in the Georgia Constitution" after voters ratified a constitutional amendment preserving the doctrine. *See Bd. of Commissioners of Lowndes Cty. v. Mayor & Council of City of Valdosta*, 848 S.E.2d 857, 859 (Ga. 2020). The sovereign immunity "preserved by the 1974 amendment and the common law doctrine as previously understood by Georgia courts were one and the same and could not be modified by [the Georgia

Supreme] Court." *Id.* (citing *Sheley v. Bd. of Pub. Ed. for City of Savannah*, 212 S.E.2d 627 (Ga. 1975)).

Accordingly, the 1974 amendment preserved the expansion of municipal liability articulated in *Town of Fort Oglethorpe*. The *Gatto* Court acknowledged as much, though expressing concern about this reality. 2021 WL 2518620 at *5, n.6. Consequently, as it stands now, the law allows for a nuisance claim against a municipality for injury to property (or the use and enjoyment thereof) or personal injury.

In so acknowledging, the Supreme Court in *Gatto* highlighted guidelines it had previously provided to "elucidate parameters for this more expansive notion of municipal liability." *Gatto*, 2021 WL 2518620 at *5 (citing *City of Savannah v. Palmerio*, 249 S.E.2d 224 (Ga. 1978); *City of Bowman v. Gunnells*, 256 S.E.2d 782 (Ga. 1979)). In *Palmerio*, the Court instructed,

> To be held liable for maintenance of a nuisance, the municipality must be chargeable with performing a continuous or regularly repetitious act, or creating a continuous or regularly repetitious condition, which causes the hurt, inconvenience or injury; the municipality must have knowledge or be chargeable with notice of the dangerous condition; and, if the municipality did not perform an act creating the dangerous condition … the failure of the municipality to rectify the dangerous condition must be in violation of a duty to act.

Palmerio, 249 S.E.2d at 229. In *Gunnells*, the Court further refined this instruction, setting forth three guidelines, explaining that, in order for a municipality to be liable in nuisance: (1) "[t]he defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence"; (2)

"[t]he act must be of some duration"; and (3) the municipality failed to act "within a reasonable time after knowledge of the defect or dangerous condition[.]" *Gunnells*, 256 S.E.2d at 784.

With this comprehensive understanding of the doctrine of municipal sovereign immunity for nuisance claims, the Court holds that Dalton Utilities is not entitled to sovereign immunity and can be held liable for the actions alleged: namely, performing the "continuous or regularly repetitious act" of discharging PFAS into the Conasauga River for years, with full knowledge and awareness of its consequences, and failing to act to remedy this dangerous condition. Plaintiff alleges that Dalton Utilities has

> since as early as 2006, and every day since at least June of 2015, discharged PFAS from the LAS into the Conasauga River and its tributaries, and has also discharged raw sewage containing PFAS" and that Dalton Utilities "has long known of these dangerous discharges of toxic chemicals, yet has taken no action whatsoever to address them but instead has continued to operate and maintain the Dalton POTW and the LAS in a manner where PFAS cannot be treated or removed, along these illegal discharges to be continuous and ongoing. . .

(Compl. ¶ 175.) Accordingly, as alleged, the degree of misfeasance exceeds mere negligence, the duration alleged spans more than a decade, and Dalton Utilities failed to act even though it had knowledge of the dangers of its discharge of PFAS. These allegations meet the requirements for Plaintiff to state a nuisance claim against Dalton Utilities. *See Palmerio*, 249 S.E.2d at 229; *Gunnells*, 256 S.E.2d at 784.

The Court finds that Plaintiff's Complaint sufficiently alleges a nuisance claim against Dalton Utilities under both the more constrained understanding of the nuisance doctrine, allowing only for nuisance claims based on injury to property or the use and enjoyment thereof, and also under the more expansive post-*Town of Fort Oglethorpe* notion, allowing for claims based on personal injury. As detailed thoroughly above in the Economic Loss Rule Section, the Court determines that Plaintiff has adequately alleged injury to property or the use and enjoyment thereof, as well as additional personal injury harm.

The Court also rejects Dalton Utilities' argument that Plaintiff's claim against it fails based on the *type* of relief sought. In briefing, Dalton Utilities argued that Plaintiff was specifically not entitled to *injunctive relief* under *Sustainable Coast*. But Georgia courts have long allowed an injured plaintiff to seek injunctive relief for nuisance claims against a municipality. *See e.g.*, *Myzka*, 272 S.E.2d 302, 305-06 (Ga. 1980) ("An injunction may be granted to prevent an impending nuisance, continuing in nature, the consequences of which are reasonably certain."); *Duffield*, 249 S.E.2d at 237-38 (reversing grant of summary judgment to county and finding that property owners, who sought injunctive relief and damages, sufficiently alleged that odors and noise from water pollution control plant, interfered with their right to use, enjoy, and dispose of their property); *Mayor & Council of Waycross v. Houk,* 39 S.E. 577 (Ga. 1901) (holding that "[w]e have no hesitancy in holding that under the facts alleged in the plaintiff's petition she was entitled to the equitable relief sought" where plaintiff sought to enjoin city

from extending the location of the mouth of the main sewer at designated point near her premises); *Baranan v. Fulton County*, 209 S.E.2d 188 (Ga. 1974); *City of Gainesville v. Waters*, 574 S.E.2d 638, 645 (Ga. Ct. App. 2002). Dalton Utilities has pointed to no authority overturning this longstanding principle. Indeed, the *Gatto* Court cites a number of the above cases (involving injunctive relief) as examples of situations in which a plaintiff could maintain nuisance claims against a city or county. *See Gatto*, 2021 WL 2518620, at *4.

In short, both longstanding and current Georgia legal authority supports the Court's conclusions that Dalton Utilities is not entitled to sovereign immunity and that Plaintiff may maintain a claim for abatable nuisance against Dalton Utilities under the facts alleged in the Complaint.

2. DWSWA

DWSWA moves to dismiss Plaintiff's claims against it on grounds of sovereign immunity. (DWSWA Mot., Doc. 475-1 at 26-26.)

As alleged in the Complaint, DWSWA is an "enterprise fund" created by the City of Dalton and Whitfield County in 1994 to manage the solid waste needs of Dalton and Whitfield County. (Compl. ¶ 29.) DWSWA operates two landfills and has "for many years discharged landfill leachate containing PFAS, which is industrial wastewater, into the Dalton POTW." (*Id.*) In 2013, DWSWA installed a forced sewer main to send its landfill leachate directly to the Dalton POTW. (*Id.*)

The City of Dalton and Whitfield County created DWSWA pursuant to the Regional Solid Waste Management Authorities Act. O.C.G.A. § 12-8-50 *et seq*. The statutory text provides:

> (a) There is created in and for each county and municipal corporation in this state a public body corporate and politic, to be known as the "solid waste management authority" of such county or municipal corporation. No authority shall transact any business or exercise any powers under this part until the governing body of the county by proper resolution of its board of commissioners, or, if a municipal corporation, by proper ordinance or resolution of its council, declares that there is a need for an authority to function in the county or municipal corporation.
>
> (b) Any two or more counties or municipal corporations or a combination thereof may jointly form an authority, to be known as the "regional solid waste management authority" for such counties and municipal corporations. No authority shall transact any business or exercise any powers under this party until the governing authorities of the units of local government involved declare, by ordinance or resolution, that there is a need or an authority to function and until the governing authorities authorize the chief elected official of the unit of local government to enter into an agreement with the other units of local government for the activation of an authority and such agreement is executed.

O.C.G.A. § 12-8-53. Declaring its purpose, the Act further provides that

> Each authority created by this part is created for nonprofit and public purposes; and it is found, determined, and declared that the creation of each such authority and the carrying out of its corporate purposes is in all respects for the benefit of the people of this state and that the authority is an institution of purely public charity and will be performing an essential governmental function in the exercise of its power conferred upon it by this part.

Id. § 12-8-51(a). Also relevant, the Act clearly provides that each authority created shall have certain powers, including to "**bring and defend actions**," *id*. § 12-8-56(1) (emphasis added), to "exercise any power usually possessed by private

corporations performing similar functions," and to "purchase all kinds of insurance, including, without limitation, insurance against tort liability. . ." *id.* § 12-8-56(8).

Finally, the Regional Solid Waste Management Authorities Act includes a provision for limitations on *individual* liability as follows:

> Except for gross negligence or willful or wanton misconduct, neither the members of the authority nor any officer or employee of the authority, acting on behalf thereof and while acting within the scope of his responsibilities, shall be subject to any liability resulting from:
>
> (1) The design, construction, ownership, maintenance, operation, or management of a project; or
> (2) The carrying out of any of the discretionary powers or duties expressly provided for in this part.

O.C.G.A. § 12-8-57.

DWSWA makes two separate immunity arguments. First, citing the provision immediately above, DWSWA contends that all of Plaintiff's state law claims against it must be dismissed to the extent that they do not allege gross negligence or willful/wanton conduct. (DWSWA Mot., Doc. 475-1 at 23.)[15]

This argument is plainly flawed. Plaintiff has alleged claims against DWSWA, not against any of its members or employees. Thus, this provision on individual liability is inapplicable as it only applies to "members of the authority []or any officer or employee of the authority." O.C.G.A. § 12-8-57. It says nothing

[15] DWSWA acknowledges that Count III, for willful, wanton, reckless, or negligent misconduct" at least in part alleges gross negligence, arguing that the "Court must dismiss the portions of this Count other than the allegations that do rise to the level stated in O.C.G.A. § 12-8-57." (DWSWA Mot. at 25.)

about liability against the authority itself. It is not within the Court's purview to expand this provision beyond the plain language of the statute.

Second, DWSWA argues that it is entitled to sovereign immunity similar to the immunity afforded a county or city. Both Parties acknowledge that whether a solid waste authority created under O.C.G.A. § 12-8-53 is entitled to sovereign immunity is an issue of first impression in Georgia.

DWSWA characterizes itself as an "intergovernmental agency" and argues that because it was "created by two entities — the City of Dalton and Whitfield County — which have sovereign immunity," *ipso facto*, it must also have sovereign immunity. (DWSWA Mot., Doc. 475-1 at 26.). In so arguing, DWSWA provides no authority in support of this contention that sovereign immunity is automatically extended to a separate local entity because it is formed by a county or municipality, or both. A review of the Regional Solid Waste Management Authorities Act, O.C.G.A. § 12-8-50 *et seq.,* illustrates the ways in which a solid waste authority exists separate and apart from the city and/or county that formed it. Not only does the solid waste authority have the power to bring and defend actions on its own behalf, *id*. § 12-8-56(1), and purchase its own insurance against tort liability, *id*. § 12-8-56(8), but it can also make and execute its own contracts or leases, adopt its own corporate seal, and pay for projects with contributions from corporations or through user fees, *id*. § 12-8-56(2)-(5).

In addition, while DWSWA relies on the provision of the Georgia Constitution extending sovereign immunity "to the state and all of its departments

and agencies," Ga. Const. of 1983, Art. I, Sec. II, Par. IX (e), DWSWA provides no analysis or argument as to why DWSWA would constitute a department or agency of the state and cites to no authority where Georgia courts have assessed whether such an entity is a "department or agency of the state" entitled to sovereign immunity.[16] (DWSWA Mot. at 26.)

Further, in arguing that it should be treated akin to a county or municipality for purposes of immunity, DWSWA also does not grapple with the differences in immunity afforded to counties and cities. *DeKalb County v. Orwig*, 402 S.E.2d 513 514 (Ga. 1991) (noting that "principles relating to the liability of municipalities do not apply equally to counties").

Similarly, DWSWA argues that because "DWSWA is a department or part of local governments, ante litem notice requirements under Georgia law also apply." (DWSWA Mot. at 28.) But again, DWSWA provides no authority to support that the rules that apply to a county or city automatically apply to a local entity formed by the locality but nevertheless operates separately and apart from it. It is certainly true that an individual suing a municipal corporation or county for money damages must provide notice to the city or county within six months or twelve months respectively, *see* O.C.G.A. § 36-33-5; O.C.G.A. § 36-11-1. But DWSWA is neither a city nor a county.

[16] *See e.g., Kyle v. Georgia Lottery Corp.*, 718 S.E.2d 801 (Ga. 2011); *Miller v. Ga. Ports Authority*, 470 S.E.2d 426 (Ga. 1996); *Gwinnett Rockdale Newton Community Svc. Bd.*, 545 S.E.2d 875, 877 (Ga. 2001).

On top of all this, if DWSWA is entitled to sovereign immunity, Plaintiff has raised a number of legitimate arguments that DWSWA has waived that immunity. Some of Plaintiff's arguments raise questions of fact not properly decided by a court at the motion to dismiss stage. For example, Plaintiff argues that DWSWA has waived sovereign immunity through purchase of liability insurance covering the claims at issue. (Pl. Resp. to DWSWA at 30-32.) DWSWA's initial disclosures demonstrate that it indeed has purchased liability insurance,[17] but discovery may be necessary to determine whether that insurance in fact covers the claims at issue.

In addition, Plaintiff argues that DWSWA's operation of the landfills constitutes a ministerial function but DWSWA contends that it is a government function. *If* DWSWA is entitled to sovereign immunity and *if* that immunity is akin to the immunity afforded to a city, then DWSWA would not have immunity for negligence in the performance of its ministerial duties. *See* O.C.G.A. § 36-33-1. In *City of Atlanta v. Chambers*, 424 S.E.2d 19 (Ga. 1992), the Georgia Supreme Court explained that, while collection of garbage is generally a government function for which a city is granted immunity, "[o]ne exception to this general rule may arise where a city operates a garbage collection service primarily as a business enterprise and source of revenue, rather than primarily as a public service." *Id.* at 21 (citing

[17] In its initial disclosures, DWSWA provided the declarations pages for its recent insurance policies with U.S. Specialty Insurance Company (for coverage from 5/1/2020 to 5/1/2023) and James River Insurance Company (for coverage from 6/1/2020 to 6/1/2021). (See DWSWA Initial Disclosures, Doc. 427 at 20-26.) In the policy documents, DWSWA's "form of business" is described in some places as "Municipality" or "Governmental Entity" and in another as "Corporation." (*Id.*)

Smith v. Mayor of Savannah, 365 S.E.2d 529 (Ga. Ct. App. 1988)); *see also, City of Atlanta v. Whatley*, 289 S.E.2d 541, 543 (Ga. Ct. App. 1982) (denying summary judgment to city where the evidence did not establish whether the city operated the "cleaning up the street campaign" as a quasi-public business and source or revenue or instead as a purely incidental profit). Assuming *arguendo* that DWSWA is entitled to the same immunity as a city, facts obtained through discovery may bear on whether Plaintiff could produce evidence showing that DWSWA's operation of the landfills was a "quasi-public business" and therefore a ministerial function. *Id.*

Despite all of these complicated issues related to sovereign immunity and ante litem notice requirements, DWSWA devotes a scant three pages in its Motion to arguing that it is entitled to sovereign immunity, supported by very little legal authority. As recounted above, the Motion leaves a host of questions unanswered, some which have not been thoroughly briefed by the Parties' and others that require an evaluation of the evidence. The Court declines to dive into complex waters in which the Parties have not yet swum. At this juncture, DWSWA has not established that it is entitled to sovereign immunity. The Court therefore **DENIES** DWSWA's Motion on this issue. However, DWSWA may revisit and renew this issue down the road, with additional argument, legal authority, and evidence in support.

VI. STATE-LAW CLASS CLAIMS: CLAIM-SPECIFIC DEFENSES

Continuing to paddle its way through the issues presented, the Court now turns to the Parties' arguments with respect to specific state-law claims.

A. Count III: Willful, Wanton, Reckless, or Negligent Misconduct (Against All Defendants Except Dalton Utilities)

Count III, for willful, wanton, reckless, or negligent misconduct, is brought against all defendants except for Dalton Utilities. To state a cause of action for negligence in Georgia, Plaintiff must allege: (1) the existence of a duty on the part of the Defendants, (2) a breach of that duty, (3) causation of the alleged injuries, and (4) damages resulting from the alleged breach of the duty. *Rasnick v. Krishna Hosp., Inc.*, 713 S.E.2d 835, 837 (Ga. 2011). Defendants argue that Plaintiff has not alleged the existence of a legal duty or shown that their actions proximately caused Plaintiff's alleged injuries.

1. Whether Defendants owe a legal duty to Plaintiff

Plaintiff alleges that Defendants owed a duty "to Plaintiff and the Proposed Class Members and any other persons who might be foreseeably harmed to exercise due and reasonable care to prevent the discharge of toxic PFAS chemicals" into waters of the State, including the Conasauga and Oostanaula Rivers. (Compl. ¶¶ 152, 164.)

The Manufacturing Defendants, the Supplier Defendants, and DWSWA argue that Plaintiff fails to allege that Defendants owed him a cognizable common

law duty under Georgia law because he has only alleged a duty "to all the world." (Manufacturer Mot. at 24-25); (Supplier Mot. at 15-18); (DWSWA Mot. at 29[18].)

"Negligence is premised on, among other things, a duty owed by the defendant to the plaintiff." *Dep't of Lab. v. McConnell*, 828 S.E.2d 352, 358 (Ga. 2019). A legal duty to exercise ordinary care is the obligation to conform to a standard of conduct under the law for the protection of others against the foreseeable, unreasonable risk of harm from such conduct. *Rasnick*, 713 S.E.2d at 837; *Ellington v. Tolar Constr. Co.*, 227 S.E.2d 336, 339 (Ga. 1976) ("Negligence consists of exposing another to whom one owes a duty to a foreseeable unreasonable probability of harm."); *Hodges v. Putzel Elec. Contractors*, 580 S.E.2d 243, 247 (Ga. Ct. App. 2003) (same). This legal duty "can arise either from valid legislative enactment, that is, by statute, or be imposed by a common law principle recognized in the case law" of this State. *Rasnick*, 713 S.E.2d at 837 (citing *Murray v. Ga. Dep't of Transp.*, 644 S.E.2d 290 (Ga. Ct. App. 2007)). The existence of a legal duty is a question of law for the court. *Id.*; *City of Rome v. Jordan*, 426 S.E.2d 861 (Ga. 1993).

The Georgia Supreme Court recently assessed the contours of common law duty in *Dep't of Lab. v. McConnell*, 828 S.E.2d 352, 358 (Ga. 2019). In *McConnell*, a Georgia Department of Labor ("DOL") employee inadvertently emailed out a spreadsheet containing the personal information, including social security

[18] DWSWA does not devote a section of its brief to this duty argument. Rather, it "joins the motion filed by the 'Manufacturing Defendants' and incorporates the facts, arguments, and citations of authority stated therein. (DWSWA Mot. at 29.)

numbers, of 4,757 Georgia residents, including the plaintiff. *Id*. at 356. The plaintiff brought a claim for negligence, alleging that the Georgia DOL owed a duty to him and other class members to safeguard and protect their personal information. *Id*. at 358. Relying on *Bradley Center v. Wessner*, 296 S.E.2d 693 (Ga. 1982), he argued that this duty was based on a common law duty "to all the world not to subject [others] to an unreasonable risk of harm." *McConnell,* 828 S.E.2d at 358. Disagreeing, the Georgia Supreme Court held that there is no general legal duty "to all the world not to subject [others] to an unreasonable risk of harm." *McConnell*, 828 S.E.2d at 358, n. 4 (disapproving of *Bradley Center*, 296 S.E.2d at 693 and overruling Court of Appeals cases relying on *Bradley Center*'s language). However, in so finding, the *McConnell* Court clarified that it did "not consider whether a duty might arise on these or other facts from any other statutory or common law source, as no such argument has been made here." *Id*. at n. 5.

Georgia and federal courts have since relied on *McConnell* in finding that plaintiffs who failed to show a specific, recognized legal duty under Georgia law as opposed to some generalized duty could not maintain a claim for negligence. *See e.g., Maynard v. Snapchat, Inc*., 851 S.E.2d 128, 131-32 (Ga. Ct. App. 2020) (holding that Georgia law does not impose a general duty to prevent people from committing torts while misusing a manufacturer's product and therefore Snapchat did not owe a duty to prevent users of its speed filter from driving at excessively fast speeds); *Murray v. ILG Technologies, LLC*, 798 F. App'x. 486, 491 (11th Cir. 2020) (finding that software company that provided state bar admissions office

with system to administer bar exam did not owe bar applicants any duty of care beyond what was dictated in contract between state bar and software company); *Stanley v. Garrett*, 848 S.E.2d 890, 894 (Ga. Ct. App. 2020) (holding that there is no duty to control the conduct of third persons to prevent them from causing harm to others, and so doctor who was treating patient for alcoholism had no duty, when patient came to doctor's office after drinking alcohol, to civilly commit patient or take other steps to protect motorist who was killed in driving accident).

Similarly relying on *McConnell* and its progeny, Defendants contend that Plaintiff's allegations are based on a general duty to protect those who might be foreseeably harmed and thus amount to a limitless, all-encompassing duty "to all the world," which is no longer recognized by the Georgia courts.

Plaintiff counters that he is not alleging Defendants had a "general duty to all the world," but rather, that Defendants' duty arises from the foreseeability that their conduct would contaminate downstream water supplies with PFAS chemicals. This alleged duty is not "limitless," as Defendants contend because the foreseeability of the risk of harm circumscribes the scope of the duty. *See Hodges v. Putzel Elec. Contractors*, 580 S.E.2d at 247 (noting that "negligence consists of exposing another to whom one owes a duty to a foreseeable unreasonable probability of harm"). The Supreme Court's decision in *McConnell*, Plaintiff maintains, did not disturb this well-established principle. *See McConnell*, 828 S.E.2d at 358 n. 5. ("We [] do not consider whether a duty might arise on these or other facts from any other statutory or common law source, as no such argument

has been made here."); *T.J. Morris Co. v. Dykes*, 398 S.E.2d 403, 406 (Ga. Ct. App. 1990) (stating negligence is not breach of "an absolute duty to avoid injuring others," but is "'that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances'") (quoting O.C.G.A. § 51-1-2); *Sims v. Am. Cas. Co.*, 206 S.E.2d 121, 127 (Ga. Ct. App. 1974) (stating that A"'negligence' itself is a failure to exercise the degree of care demanded by the circumstances" (emphasis added), *aff'd sub nom. Providence Washington Ins. Co. v. Sims*, 209 S.E.2d 61 (Ga. 1974)).

To establish the requisite duty element to support a claim for negligence, Plaintiff must point to "a duty imposed by a valid statutory enactment of the legislature or a duty imposed by a recognized common law principle declared in the reported decisions of [Georgia] appellate courts." *Dutt v. Mannar & Co., LLC*, 841 S.E.2d 132, 134 (Ga. Ct. App. 2020), *cert. denied* (Nov. 2, 2020); *Rasnick*, 713 S.E.2d at 837. "In the absence of a legally cognizable duty, there can be no fault or negligence." *Dutt*, 841 S.E.2d at 134

Under Georgia law, "neither duty nor negligence exists in a vacuum." *Sims*, 206 S.E.2d at 127. Rather,

> they are entirely dependent upon circumstances involving others or their property. 'Certain duties are inherent in human society. A owes B the duty to so handle his affairs or conduct his business and control the material forces with which he deals as not to injure the person or property of B. A violation of this duty is a wrong which may support an action for damages. 'Negligence' itself is a failure to exercise the degree of care demanded by the circumstances.' With reference to foreseeability of injury, 'The correct rule is that in order for a party to be held liable for negligence, it is not necessary that he should have

> been able to anticipate the particular consequences which ensued. It is sufficient if, in ordinary prudence, he might have foreseen that some injury would result from his act or omission, and that consequences of a generally injurious nature might result.' 'The most common test of negligence is whether the consequences of the alleged wrongful act are reasonably to be foreseen as injurious to others coming within the range of such acts.'

Id. (citations omitted).

The Georgia courts recognize a duty not to engage in conduct that will result in pollution of state waters (including non-navigable streams) rendering them unfit for their ordinary purposes by downstream users. *Roughton v. Thiele Kaolin Co.*, 74 S.E.2d 844, 846 (Ga. 1953) ("Riparian proprietors have a common property right in the waters of the stream, and the necessities of the business of one cannot be the standard of the rights of another, but each is entitled to the reasonable use of the water with respect to the rights of others, and any unlawful interference by one with the enjoyment by another of such common property right gives a cause of action."); *Kingsley Mill Corp. v. Edmonds*, 208 Ga. 374, 374, 67 S.E.2d 111, 112 (1951) ("A lower riparian owner is entitled to have water flow upon his land in its natural state free from adulteration.") (citations omitted); *Cairo Pickle Co. v. Muggridge*, 55 S.E.2d 562, 563–64 (Ga. 1949) ("Running water, while on land, belongs to the owner of the land, but he has no right to divert it from the usual channel, nor may he so use or adulterate it as to interfere with the enjoyment of it by the next owner. The owner of land is entitled to the use of water of a non-navigable stream flowing through his land. Several lower riparian landowners have such a community of interest that they may join in a petition to restrain an upper

proprietor or stranger from adulterating the water. Injuring 'a fishing privilege,' or rendering land less valuable for pasture purposes, by polluting the water of a nonnavigable stream, gives rise to a cause of action.") (citations omitted); *Horton v. Fulton*, 60 S.E. 1059, 1059 (Ga. 1908) ("[A]n upper riparian owner cannot lawfully pollute the water of a stream so as to render it unfit for use by a lower owner"); *N. Georgia Petroleum Co. v. Lewis*, 197 S.E.2d 437, 439 (Ga. Ct. App. 1973) ("As to contamination without use, 'a landowner who is putting his land to a reasonable use is not liable to the owner of neighboring land for the pollution of percolating water unless he has been guilty of negligent conduct.' At least 21 states have recognized that contamination of underground supplies of percolating water by oil or gas render the person responsible liable in damages to the aggrieved landowner.") (citations omitted).

Similarly, the Eleventh Circuit recognized that the Georgia legislature "has expressed a strong interest in deterring environmental pollution and in protecting the rights of property owners 'to have water flow upon [their] land in its natural state free from adulteration.'" *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1333 (11th Cir. 1999) (citing *Kingsley Mill Corp. v. Edmonds*, 67 S.E.2d 111, 112 (Ga. 1951)). This interest in deterring environmental pollution "is evidenced by Georgia's statutory scheme which provides that pollution of a stream is a trespass, O.C.G.A. § 51–9–7, and for civil penalties. O.C.G.A. § 12–5–52 (providing fines of up to $100,00 per day for violators of the Georgia Water Quality Control Act, O.C.G.A. §§ 12–5–20—12–5–53)." *Johansen*, 170 F.3d at n.24.

Additionally, the Georgia Supreme Court has held that "[w]hile as a general rule one is not liable in damages for the natural results from a lawful, proper, and non-negligent use of his property yet where, as here, such uses put in motion conditions that go upon the lands of another and there damage his health or property, such injured person is entitled to relief in equity to abate or terminate such injuries which are alleged to be irreparable and continuous." *Vulcan Materials Co. v. Griffith*, 114 S.E.2d 29, 34 (Ga. 1960) (citations omitted), *overruled in part on other grounds by E. Lands, Inc. v. Floyd Cty.*, 244 Ga. 761, 262 S.E.2d 51 (Ga. 1979) and *Cross v. Hall Cty.*, 238 Ga. 709, 235 S.E.2d 379 (1977).

Georgia law further recognizes that a defendant who conducts an abnormally dangerous activity which proximately causes a plaintiff's injuries should be held liable for those injuries. *Combustion Chemicals, Inc. v. Spires*, 433 S.E.2d 60, 62 (Ga. Ct. App. 1993) (plaintiff sued adjoining landowner whose mining reclamation activities resulted in emission of highly acidic water that polluted plaintiff's creek); *C. W. Matthews Contracting Co. v. Wells*, 249 S.E.2d 281 (Ga. Ct. App. 1978) (holding strict liability is imposed on one who engages in an abnormally dangerous activity); *Black v. City of Cordele*, 293 S.E.2d 557, 559 (Ga. Ct. App. 1982) (agreeing that "the occupier of property has a duty not to injure persons on adjacent premises, and, if a person is injured because of the negligence of the occupier which causes an explosion, the occupier is liable for his injuries . . . "Should, however, the explosion be of illuminating artificial gas which had invaded

the premises through the neglect of unauthorized interference of a third person so that what was otherwise safe became dangerous, the occupier is not liable until he knew, or, in the exercise of reasonable prudence and diligence, should have known, of the altered and dangerous condition, and continues it after such knowledge is so acquired or imputed. [Cits.] Hence, after the occupier or possessor knows or should know of the danger of the artificial condition of the premises to others outside the land, and fails to exercise reasonable care and diligence to make the condition reasonably safe either by removing the danger or by giving adequate warning or by using other effective safeguards, the occupant or possessor becomes liable to persons outside the land for injuries which are the proximate result of such artificial conditions"); *see also Corp. of Mercer Univ. v. Nat'l Gypsum Co.*, *supra*, 1986 WL 12447, at *2 (M.D. Ga. Mar. 9, 1986) (holding that University stated a claim for negligence against manufactures of asbestos-containing products entitling University to damages for cost of removal of asbestos from its buildings and stating "[m]anufacturers are better able to bear the risk or to take action to correct flaws that pose a danger. Accordingly, tort law imposes a duty on manufacturers to produce safe items, regardless of whether the ultimate impact of the hazard is on people, other property, or the product itself").

In *Combustion Chemicals, Inc. v. Spires*, the plaintiff claimed that the defendant negligently conducted its mining reclamation project and negligently maintained the tailing ponds on its property so that they leaked highly acidic water into the creek which ran through plaintiffs' land. 433 S.E.2d at 62. The Georgia

Court of Appeals held that where the activity complained of, as shown by the evidence,

> destroys a creek's ability to sustain normal aquatic life . . . we cannot hold as a matter of law that the activity of holding highly acidic water in ponds which may pollute streams running through the property of adjoining landowners is not a dangerous activity. Neither can we conclude, based on the evidence produced in this case, that the activity is dangerous as a matter of law. The evidence showed that defendant's reclamation activities were subject to supervision by a state environmental agency and it appears from the evidence that if the holding ponds had been properly maintained the acidity level of plaintiffs' creek might not have been affected.

Id.

Here, Plaintiff's claim in Count III alleges that: (1) the Manufacturing Defendants own and operate manufacturing or other facilities related to the carpet industry located in or around Dalton, Georgia that use or have used PFAS in their industrial processes; (2) the Manufacturing Defendants' industrial wastewater contains high levels of PFAS; (3) the Manufacturing Defendants are aware PFAS are toxic to human health and are persistent chemicals for which there are no known environmental breakdown mechanisms and that PFAS leach from soil to groundwater, making groundwater and surface waters particularly vulnerable to contamination; (4) the Manufacturing Defendants discharge their industrial wastewater to the Dalton Utilities POTW; and (5) the Manufacturing Defendants know that PFAS resist degradation during treatment at the Dalton Utilities Water Pollution Control Plants, further increasing in concentration as these chemicals accumulate at the LAS, and that consistent with their chemical properties,

dangerously high levels of PFAS inevitably flow through the LAS into the Conasauga River, travel downstream, and contaminate the Oostanaula River—the source of the City of Rome's domestic water supply.

Similarly, Plaintiff alleges that Defendant DWSWA: (1) has for many years discharged landfill leachate, which is industrial wastewater containing PFAS, directly into the Dalton POTW, and in early 2013, the DWSWA installed a forced sewer main to send its landfill leachate directly to the Dalton POTW; (2) knows that PFAS cannot be removed from its industrial wastewater discharges sent to the Dalton POTW and that Dalton Utilities' conventional treatment processes and land application will not remove these chemicals prior to discharge to the Conasauga River and its tributaries in and around the LAS; and (3) continues to discharge, dangerously high levels of PFAS into the Dalton POTW, where these toxic and persistent chemicals resist treatment, pass through the LAS, and then travel downstream and contaminate the Oostanaula River, the source of the City of Rome, Georgia's domestic water supply.

In sum, Plaintiffs allege that the Manufacturing Defendants and DWSWA knew or should have known that their discharge of toxic PFAS chemicals would result in contamination of surface waters, the Conasauga and Oostanaula Rivers, that provide the source of downstream domestic water supplies, thereby endangering human health and the environment.

After considering the foregoing Georgia authorities, the Court concludes that Plaintiff's Third Amended Complaint sufficiently alleges a duty under Georgia

law necessary to maintain a claim of negligence against the Manufacturing Defendants and the DWSWA. In line with these cases (and in some degree the statutory provisions of the Georgia Water Quality Control Act), the Court finds that the Manufacturing Defendants have a duty to exercise reasonable care in their use and disposal of unreasonably dangerous chemicals such as PFAS and/or products containing PFAS in operating their various carpet manufacturing facilities to avoid pollution of the State's waterways and injury to members of the downstream public who consume the water as part of their public drinking water supply. Plaintiff's allegations establish that the PFAS chemicals and/or products containing PFAS used by the Manufacturing Defendants in the operation of their facilities were not reasonably safe for their intended use and that Defendants knew or should have known of the dangers of PFAS entering the water system. Similarly, the Manufacturing Defendants and DWSWA, as dischargers of PFAS, owed a duty to Plaintiff and the Proposed Class Members to exercise due and reasonable care to prevent the discharge of toxic PFAS chemicals into waters of the State and waters of the United States, and the Conasauga and Oostanaula Rivers in light of the foreseeability of harm posed by the contamination of the downstream public water drinking supply of the City of Rome.

The Court cannot, however, reach the same conclusion as to the Supplier Defendants. The Supplier Defendants are not alleged to have discharged wastewater from manufacturing (or landfill) operations in or around Dalton, Georgia. Rather, Plaintiff seeks to hold these Defendants liable as mere sellers of

PFAS-containing products to the carpet manufacturers. (Third Am. Compl. ¶ 18.) Plaintiff has not cited any authority from Georgia courts that supports a duty on behalf of the Supplier Defendants. Absent such authority that establishes a duty under these circumstances, as noted above in Section III, Plaintiff's proposed amended allegations against the Supplier Defendants are futile.

The Supplier Defendants assert that under Georgia law, "[b]efore negligence can be predicated upon a given act, some duty *to the individual complaining* must be sought and found, the observance of which duty would have averted the injury or damage." *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005) (emphasis added) (quoting *City of Douglasville v. Queen*, 514 S.E.2d 195 (1999)). Plaintiff's Complaint, they contend, suggests only that the suppliers had a *general* duty to the public to "prevent the discharge of toxic PFAS" into the "waters of the United States," including the City of Rome's watershed. (Supplier Defs.' Mot., Doc. 479-1 at 15-16) (citing *McConnell*, 828 S.E.2d at 358). But such an allegation, Defendants argue, does not establish that the suppliers owed a duty *to this Plaintiff*.

Here the PFAS suppliers are not alleged to have polluted the water themselves. Rather, they are alleged to have supplied the chemicals that were used by the manufacturing defendants and disposed of in a manner that polluted the water. Plaintiff has failed to point to any authority from Georgia establishing a duty on the part of a chemical supplier to protect an unknown third-party, rather than its consumer, from harm resulting from the negligent use or disposal of the

chemical. Rather, Plaintiffs rely on authority outside of Georgia to support their position. However, Plaintiff must point to "a duty imposed by a recognized common law principle declared in the reported decisions of [Georgia] appellate courts." *Dutt v. Mannar & Co., LLC*, 841 S.E.2d at 134; *Rasnick*, 713 S.E.2d at 837.

2. Whether Defendants Proximately Caused Plaintiff's Injuries

The Manufacturing Defendants further argue that Plaintiff's negligence claim fails because he has not alleged any facts establishing that the Manufacturing Defendants proximately caused any injury to him.

First, Manufacturing Defendants contend that the Court of Appeals decision in *Alexander v. Hulsey Envtl. Servs., Inc.* is controlling. The plaintiffs in *Alexander* lived near a waste disposal facility that accepted human and commercial waste from various sources. They alleged that upon receipt of the various waste products, the facility operator processed the waste and sprayed the resulting wastewater into the air through a sprinkler system. The plaintiffs claimed that the waste disposal operation generated offensive odors and attracted pests, constituting a nuisance which damaged their ability to use and enjoy their nearby properties. *Alexander v. Hulsey Envtl. Servs., Inc.*, 702 S.E.2d 435, 438 (Ga. Ct. App. 2010). On appeal following the grant of summary judgment to Hulsey Environmental Services ("HES"), a customer that brought waste material to the facility for disposal, the Court of Appeals found that there was no evidence of any damage to the plaintiffs' property caused by HES because "[a]s a customer, it does

not direct or control any conduct of the waste disposal operation." *Id.* Nor was there any indication that HES had actual knowledge that its processed waste would be cast upon the facility's neighboring property. *Id.* at 438-39 (distinguishing *Citizens & S. Trust Co. v. Phillips Petroleum Co., Inc.* 385 S.E.2d 426 (Ga. Ct. App. 1989) on the ground that the defendant gas supplier "deposited gasoline into underground storage tanks [owned by another business] with actual knowledge that the tanks were defective").

At first blush, the plaintiffs' claim in *Alexander* may appear comparable to Johnson's claim here. It is not. Here, Plaintiff does not complain about the annoyance of the dispersal of odors from generalized waste disposal activities. Unlike in *Alexander*, Plaintiff alleges that the Manufacturing Defendants and DWSWA had actual knowledge that their discharges of wastewater containing dangerous levels of toxic PFAS to the Dalton POTW were contaminating the Upper Coosa River Basin and Plaintiff's drinking water supply. Plaintiff alleges that Defendants have actual knowledge that PFAS are toxic to human health and are persistent chemicals for which there are no known environmental breakdown mechanisms. Plaintiff alleges that Defendants have actual knowledge that PFAS resist degradation during treatment at the Dalton Utilities WPCPs and further increase in concentration as these chemicals accumulate at the LAS. Plaintiff alleges that Defendants are aware that, due to their chemical properties, dangerously high levels of PFAS inevitably flow through the LAS into the

Conasauga River, travel downstream, and contaminate the source of the City of Rome's domestic water supply.

Second, the Manufacturing Defendants and DWSWA contend that Plaintiff's Complaint fails to allege that their actions foreseeably caused the alleged injuries because the Complaint "identifies no fewer than seven intervening events that occur after the Manufacturing Defendants allegedly send their industrial wastewater to Dalton Utilities." (Doc. 473-1 at 31.) According to the Manufacturing Defendants and DWSWA, these intervening events include: (1) Dalton Utilities' treatment of the wastewater, (Compl. ¶ 84); (2) Dalton Utilities' application of the treated wastewater onto 9,800 acres of land, (*id.* ¶¶ 84-85); (3) the accumulation of waste on the land, (*id.* ¶¶ 87, 89); (4) natural processes causing runoff to pollute the Conasauga River, (*id.* ¶ 89); (5) the allegedly-contaminated water traveling downstream over 120 river miles from the Conasauga River to the Oostanaula River to Rome's water intake site, (*id.* ¶ 94); (6) Rome upgrading its water treatment facilities, (*id.* ¶ 99); and (7) Rome unilaterally making the decision to charge the ratepayers more for this water to off-set the upgrade expenses, (*id.* ¶ 101). Defendants' argument is premised on its characterization of Plaintiff's injury as purely economic (an increase in Plaintiff's water bill) and stemming from "Rome's unilateral rate-hike [which is simply too far removed—by time, space, and logic—from the actions allegedly taken by the Manufacturing Defendants to be foreseeable. (Manufacturer Mot., Doc. 473-1 at 32.)

Proximate cause "is that which, in the natural and continuous sequence, unbroken by other causes, produces an event, and without which the event would not have occurred." *T.J. Morris Co. v. Dykes*, 398 S.E.2d 403, 406 (Ga. Ct. App. 1990); *Locke v. Vonalt*, 377 S.E.2d 696 (Ga. Ct. App. 1989). "The requirement of proximate cause constitutes a limit on legal liability; it is a policy decision that, for a variety of reasons, e.g., intervening act, the defendant's conduct and the plaintiff's injury are too remote for the law to countenance recovery." *Knight v. Roberts*, 730 S.E.2d 78, 86 (Ga. Ct. App. 2012) (citations omitted).

For an intervening act of a third party to become the sole proximate cause of a plaintiff's injuries, the intervening act *must not have been foreseeable* by defendant, must not have been triggered by defendant's act, and must have been sufficient by itself to cause the injury. *Ontario Sewing Mach. Co., Ltd. v. Smith*, 572 S.E.2d 533, 536 (Ga. 2002); *Williams v. Grier*, 196 Ga. 327, 336, 26 S.E.2d 698 (1943) ("The general rule is that if, subsequently to an original wrongful ... act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote, still if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the causal connection is not broken, and the original wrong-doer is responsible for all of the consequences resulting from the intervening act."). "The liability of a tortfeasor whose actions started the chain of events leading to the

victim's injury is superseded and cut off only if there intervened between the act and the injury a distinct, successive, unrelated, efficient cause of the injury." *Knight*, 730 S.E.2d at 86.

In Georgia, a "[p]roximate cause is not necessarily the last act or cause, or the nearest act to the injury." *Sprayberry Crossing P'ship v. Phenix Supply Co.*, 617 S.E.2d 622, 624 (Ga. Ct. App. 2005) (citation omitted); *see also Principle Sols. Grp., LLC v. Ironshore Indem., Inc.*, 944 F.3d 886, 892 (11th Cir. 2019). Instead, it encompasses "all of the natural and probable consequences" of an action, "unless there is a sufficient and independent intervening cause." *Cowart v. Widener*, 697 S.E.2d 779, 784 (Ga. 2010). An intervening cause is not sufficient and independent if "its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer." *Goldstein Garber & Salama, LLC v. J.B.*, 797 S.E.2d 87, 89 (Ga. 2017) (citation omitted).

It is axiomatic that questions regarding proximate cause are "undeniably a jury question" and may only be determined by the courts "in plain and undisputed cases." *Ontario Sewing Mach. Co., Ltd. v. Smith*, 572 S.E.2d at 536. And it is equally well settled that there may be more than one proximate cause of an injury in cases involving the concurrent negligence of several actors. *Knight v. Roberts*, 730 S.E.2d at 86.

Plaintiff alleges that Defendants discharged PFAS with knowledge of the toxicity and persistence of the chemicals and that that the PFAS cannot be removed from their wastewater discharged into the Dalton Utilities POTW. (Compl. ¶¶ 67,

79, 87-88). These allegations are sufficient to establish a jury question on whether Defendants' discharges were the proximate cause of Plaintiff's injury and resultant damages. Accepting Plaintiff's allegations as true and construing them in his favor, Dalton Utilities' discharge did not break the chain of causation of Plaintiff's injury—the contamination of his drinking water. According to the Complaint, the Manufacturing Defendants are the source of approximately 90% of the wastewater sent to Dalton Utilities' POTW. Plaintiff's allegations are sufficient to establish the plausibility that Defendants' discharge of contaminated industrial wastewater in turn triggered Dalton Utilities' discharge of PFAS from its LAS to the surface waters that serve as Plaintiff's water supply. The reasonable inference to draw from Plaintiff's allegations is that "the extensive PFAS contamination would not have occurred had Defendants properly disposed of their PFAS and ensured it was not in the wastewater they sent to the Dalton POTW." (Pl.'s Resp., Doc. 514 at 11-12.)

Defendants' assertion that proximate cause is lacking because they could not foresee Plaintiff's "economic damages from surcharges and rate hikes" incurred from the City of Rome's filtration efforts does not hold water. Under Georgia law,

> [w]ith reference to foreseeability of injury, 'The correct rule is that in order for a party to be held liable for negligence, it is not necessary that he should have been able to anticipate the particular consequences which ensued. It is sufficient if, in ordinary prudence, he might have foreseen that some injury would result from his act or omission, and that consequences of a generally injurious nature might result.'

Sims v. Am. Cas. Co., 206 S.E.2d 121, 127 (Ga. Ct. App. 1974), *aff'd sub nom. Providence Washington Ins. Co. v. Sims*, 209 S.E.2d 61 (Ga. 1974); *Ellington*, 227

S.E.2d at 339 ("Reasonable foresight does not require of a plaintiff or a defendant that he anticipate exactly what will happen . . . but what the reasonably prudent person would then have foreseen as likely to happen."). The City of Rome's efforts to protect the health and safety of its citizens and its decision to pass on the cost of such efforts to Plaintiff and other rate-payers was not an independent intervening act sufficient to sever Defendants' liability as the source of the contamination which Plaintiff has alleged was reasonably foreseeable. Plaintiff alleges that not only could Defendants foresee the risk of harm associated with their discharges, but that they actually knew such harm was occurring and continued to use and dispose of their PFAS waste at the Dalton POTW which was incapable of removing the chemicals prior to being discharged into the water supply. Although Plaintiff seeks damages as reimbursement for incurring a portion of the cost borne by the City of Rome for its implementation of a filtration system to remediate (to the extent possible) the levels of PFAS in the drinking water supply, as discussed above, Plaintiff's alleged injuries are not limited to purely economic damages.

For these reasons, the Court rejects Defendants' arguments that Plaintiff has failed to adequately allege that Defendants' actions and omissions were the proximate cause of Plaintiff's injuries.

Based on the reasoning above, the requests of the Manufacturing Defendants and DWSWA to dismiss Plaintiff's negligence claim are **DENIED**. However, the Supplier Defendants' motion for dismissal of the negligence claim against them is **GRANTED**.

B. Count IV: Negligence *Per Se* (against the Manufacturing Defendants and DWSWA)

In Count IV of the Third Amended Complaint, Plaintiff asserts a claim for negligence *per se*. Plaintiff alleges that the Manufacturing Defendants and DWSWA owed a duty to Plaintiff and the proposed class members under the CWA "to not discharge pollutants into waters of the United States without a valid permit and to operate their facilities in such a manner as to ensure their industrial discharges into the Dalton POTW did not cause Pass Through or Interference." (Compl., ¶ 158.) Plaintiff further alleges that Defendants owed a duty to Plaintiff and the proposed class members under the Georgia Water Quality Control Act to:

- not use any waters of the State for the disposal of sewage, industrial wastes, or other wastes, O.C.G.A. § 12-5-29(a);
- obtain an NPDES permit for a facility of any type that will result in the discharge of pollutants into waters of the State, O.C.G.A. § 12-5-30;
- immediately notify EPD[19] of the location and nature of PFAS discharges into waters of the State and immediately take all reasonable steps to prevent injury to the health or property of downstream users of waters of the State, O.C.G.A. § 12-5-30.4;
- keep waters of the State free from "industrial wastes or other discharges in amounts sufficient to … interfere with the designated use of the water body," Ga. Comp. R. & Regs. § 391-3-6-.03(5)(b);
- keep waters of the State free from "industrial or other discharges which … interfere with the designated use of the water body," *id.* at § 391-3-6-.03(5)(c); and
- keep waters of the State free from "toxic … substances discharged from … industries or other sources … in amounts, concentrations or

[19] EPD is the agency that implements the GWQCA and the CWA and in Georgia.

> combinations which are harmful to humans, animals or aquatic life[.]" *Id.* at § 391-3-6-.03(5)(e).

(*Id.* ¶ 159.)

The Manufacturing Defendants and DWSWA seek dismissal of Plaintiff's negligence *per se* claim on the grounds that (1) neither the CWA nor the GWQCA imposes any "ascertainable standard of conduct" related to any PFAS that could give rise to a legal duty on the part of Defendants; (2) Plaintiff does not fall within the class of persons these statutes were intended to protect; and (3) Plaintiff does not allege the same harm the statute was intended to guard against. The Manufacturing Defendants and DWSWA further assert that: only non-binding health advisories for two specific PFAS (PFOS and PFOA) have been established; EPD has issued no permits limiting (or otherwise regulating) PFAS discharges under the CWA or GWQCA; and EPD is still trying to determine whether (and how to) best regulate PFAS.

In Georgia, negligence *per se* arises when a defendant violates a statute or ordinance, satisfying, as a matter of law, the first two elements of a negligence claim. *Cent. Anesthesia Associates, P.C. v. Worthy*, 333 S.E.2d 829, 831 (Ga. 1985); *Hubbard v. Dep't of Transp.*, 568 S.E.2d 559, 566 (Ga. Ct. App. 2002); *Amick v. BM & KM, Inc.*, 275 F. Supp. 2d 1378, 1381–82 (N.D. Ga. 2003) ("Once establishing these first two elements through negligence *per se*, the plaintiff must go on to demonstrate that the defendant's statutory breach was the proximate cause of the plaintiff's injury."); *Cardin v. Telfair Acres of Lowndes County, Inc.*,

393 S.E.2d 731, 733 (Ga. Ct. App. 1990) (finding "there is not much room to doubt that a civil cause of action will lie for damages caused by a breach of a legal duty of diligence proscribed by statute").[20] It is well-settled that Georgia law allows the adoption of a statute or regulation as a standard of conduct so that its violation becomes negligence *per se*. *Pulte Home v. Simerly*, 746 S.E.2d 173, 179 (Ga. Ct. App. 2013) (citing *Rockefeller v. Kaiser Foundation Health Plan of Ga.*, 554 S.E.2d 623 (Ga. Ct. App. 2001); *Hubbard*, 568 S.E.2d at 566; *Ledee v. Devoe*, 549 S.E.2d 167, 173 (Ga. Ct. App. 2001) (finding Georgia law is well-settled on the notion that the violation of a state statute resulting in the injury of another person constitutes negligence *per se*).

The statute or regulation relied upon by the plaintiff to establish the legal duty must contain "some ascertainable standard of conduct." *Wells Fargo Bank, N.A. v. Jenkins*, 293 Ga. 162, 744 S.E.2d 686, 688 (Ga. 2013); *Cent. Anesthesia Associates, P.C. v. Worthy*, 333 S.E.2d at 833 (stating that a statute may create a duty recognized by law requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks, the breach of which constitutes negligence); *Bellsouth Telecommunications, LLC v. Cobb Cty.*, 802 S.E.2d 686, 688 (Ga. Ct. App. 2017), *rev'd in part on other grounds,* 305 Ga.

[20] As the court in *Amick* noted, "[t]he same result is reached through application of [O.C.G.A. §] 51–1–6, which provides: When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for breach of such legal duty if he suffers damage thereby." 275 F. Supp. 2d at 1381 (citing *St. Mary's Hosp. of Athens, Inc. v. Radiology Prof'l Corp.*, 421 S.E.2d 731, 736 (Ga. Ct. App. 1992) (stating that, pursuant to section 51–1–6, "a cause of action will lie for breach of a duty arising under a statute or common law")).

144, 824 S.E.2d 233 (2019) ("[T]he alleged duty arising from the other statute must be mandatory and imposed expressly by the statute at issue with specificity.")

Under the common law theory of recovery for negligence *per se*, the fulfillment of the duty and breach elements depends on (1) whether the injured person falls within the class of persons the statute was intended to protect and (2) whether the harm complained of was the type of harm the statute was intended to guard against. *E.g.*, *Schaff v. Snapping Shoals Elec. Membership Corp.*, 767 S.E.2d 807, 810 (Ga. Ct. App. 2014). Therefore, the purpose of the statute or regulation relied on by the plaintiff as creating a legal duty for the defendant is important in assessing claims of negligence *per se*. *Amick*, 275 F. Supp. 2d at 1382. Where the cited statute or regulation does not govern the relationship between the parties, no cause of action for negligence *per se* exists. *See e.g.*, *Brantley v. Custom Sprinkler Sys.*, 461 S.E.2d 592, 593 (Ga. Ct. App. 1995).

Here, Plaintiff alleges that the Manufacturing Defendants and DWSWA's specific violations of the CWA and GWQCA constitute negligence *per se*.

The Court first addresses the negligence *per se* claim as to DWSWA. Defendant DWSWA asserts that Plaintiff's negligence *per se* claim must be dismissed because there was no express and mandatory duty owed by DWSWA to Plaintiff. DWSWA also argues that allegations that it did not follow the CWA and GWQCA are not sufficient to support a claim. Defendant DWSWA cites no authority of its own and instead incorporates the Manufacturer Defendants' motion.

Plaintiff's allegations in Count II of the Third Amended Complaint — that DWSWA is in violation of the Section 307 of the CWA for the Pass Through of industrial wastewater discharges from the Dalton POTW to the Conasauga and its tributaries — are sufficient to support a claim for negligence *per se*.

The duties imposed by the CWA are clear and mandatory:

> The Clean Water Act forbids the "addition" of any pollutant from a "point source" to "navigable waters" without the appropriate permit from the Environmental Protection Agency (EPA) . . . Congress' purpose as reflected in the language of the Clean Water Act is to "'restore and maintain the … integrity of the Nation's waters,'" … [and] [t]he Act restructures federal regulation by insisting that a person wishing to discharge *any* pollution into navigable waters first obtain EPA's permission to do so.

County of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S.Ct. 1462, 1468 (2020); *see also* 33 U.S.C. §§ 1311(a), 1362(12)(A). To put it another way,

> A person violates the Clean Water Act by discharging a pollutant into the waters of the United States without proper authorization. 33 U.S.C. § 1311(a). Generally, any discharge is unlawful unless performed pursuant to and in accordance with a permit issued under the [Act].

State of Ga. v. City of E. Ridge, Tenn., 949 F. Supp. 1571, 1575–76 (N.D. Ga. 1996). And the CWA imposes strict liability on persons who discharge pollutants without a permit or in violation of the terms of a permit. *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990); *City of E. Ridge,* 949 F. Supp. at 1576; *see also* 33 U.S.C. § 1319(d) (imposing civil penalties of up to $25,000 per day for each violation).

Congress passed the CWA to protect water quality through the establishment of: (i) federal "effluent limitations" to restrict the quantity, rate, and concentration of discharges of pollutants to waters of the U.S., and (ii) state "water quality standards" for all waters within state boundaries. *Arkansas v. Oklahoma*, 503 U. S. 91, 101 (1992); *City of Guyton v. Barrow*, 828 S.E.2d 366, 371-72 (Ga. 2019); *see also* 33 U.S.C. § 1313. The CWA enforces these effluent limitations and water quality standards by making it unlawful to discharge any pollutant through a point source without or in violation of a permit issued under the Act. *See Arkansas*, 503 U.S. at 101-02; *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 101 (2004) (noting that the CWA "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters"); *see also City of Guyton*, 828 S.E.2d at 372. "[I]t it is clear the Clean Water Act expressly contemplates stricter state effluent and other limitations deemed necessary by the state to restore the integrity of the waters within the state, allows states to incorporate those limitations into a state-issued permit, and authorizes a citizen suit to enforce those limitations." *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 953 F. Supp. 1541, 1552 (N.D. Ga. 1996).

EPA-approved state permit conditions qualify as "an effluent standard or limitation" under the Act and violations of such state-issued permit conditions are enforceable via the citizen-suit provision of the CWA. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1006 (11th Cir. 2004) ("[T]he text of the statute is

revealing. 'Effluent standard or limitation under this chapter' is defined to include 'a permit or condition thereof issued under section 1342 of this title.' 33 U.S.C. § 1365(f)(6). Section 1342(b), in turn, authorizes states to administer their own permit programs, and thereby issue state permits, after receiving EPA approval. Thus, a plain reading of this statute indicates that state permits and conditions fall within the effluent standards or conditions covered 'under this chapter.'"); *New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC*, 734 F. Supp. 2d 1326, 1338–39 (N.D. Ga. 2010) (holding that state water quality standards are enforceable permit conditions under the CWA; "the textual analysis does not suggest that some conditions of a state permit should be enforceable while others are not"); *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1581–82 (N.D. Ga. 1995) (holding that "the CWA authorizes citizen suits for the enforcement of all conditions of NPDES permits" including those imposed by Georgia law); *see also Env't. Prot. Agency v. California*, 426 U.S. 200, 223–24 (1976) (stating that citizen suits against permit holders under 33 U.S.C. § 1365(f)(6) may be brought if citizen can show violation of "conditions imposed in accordance with EPA promulgated effluent limitations and standards and … those imposed in accordance with more stringent standards and limitations established by a State pursuant to § 510 [of the Clean Water Act, 33 U.S.C. § 1370]").

The Georgia Court of Appeals has held that the standards of conduct established by the CWA and the GWQCA impose actionable duties under Georgia law for purposes of maintaining a claim for negligence *per se*. *Pulte Home Corp.*

v. Simerly, 746 S.E.2d 173, 179 (Ga. Ct. App. 2013) (holding that the "duties imposed by the GWQCA . . . and the CWA fall within the ambit of O.C.G.A. § 51-1-6"); *Bellsouth Telecommunications, LLC v. Cobb Cty.*, 342 Ga. App. 323, 329, 802 S.E.2d 686, 692 (2017) (citing *Pulte Home Corp. v. Simerly*), *rev'd and remanded on other grounds by* 824 S.E.2d 233 (Ga. 2019); *Bruner v. ARP Prod. Co.*, No. 6:14-CV-0618-SLB, 2014 WL 3970204, at *6 (N.D. Ala. Aug. 11, 2014) (dismissing CWA claim for failure to provide required statutory pre-suit notice, but allowing the plaintiff's state-law cause of action based on negligent violations of state and federal water quality standards to proceed).

As discussed above, Section 307 of the CWA regulates industrial discharges to publicly owned treatment works. Plaintiff alleges that by discharging industrial wastewater contaminated with PFAS into the Dalton POTW where these chemicals *pass through* and are discharged from the Dalton's treatment and disposal system into the Conasauga River and its tributaries, DWSWA causes violations of (1) EPA's pretreatment rules for industrial wastewater pretreatment programs under the CWA, (2) the conditions of the City of Dalton's LAS and General Stormwater permits, and (3) Section 307 of the CWA. Section 307 prohibits "the discharge of any pollutant through [POTWs], which pollutant interferes with, *passes through*, or is otherwise incompatible with such works" in violation of pretreatment standards established by the EPA. *See* 33 U.S.C. § 1317(b); *see also* 40 C.F.R. § 403.5(a)(1) (providing that industrial users "may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference ...."); 40 C.F.R. § 403.3(p)

(defining "Pass Through" as "[a] discharge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation)").

Similarly, the GWQCA, O.C.G.A. §§ 12-5-20, *et seq*. and its implementing regulations prohibit, among other things, the use of any waters of the State for the disposal of sewage, industrial wastes, or other wastes. The statute and regulations also require that waters of the State be kept free from (1) "industrial wastes or other discharges in amounts sufficient to … interfere with the designated use of the water body;" (2) "industrial or other discharges which … interfere with the designated use of the water body;" and (3) "toxic … substances discharged from … industries or other sources … in amounts, concentrations or combinations which are harmful to humans, animals or aquatic life[.]" O.C.G.A. § 12-5-29(a); Ga. Comp. R. & Regs. §§ 391-3-6-.03(5)(b); 391-3-6-.03(5)(c); 391-3-6-.03(5)(e).

Based on the foregoing authority, Plaintiff's allegations concerning DWSWA's alleged violations the CWA and GWQCA are sufficient to establish the duty and breach elements of his negligence *per se* claim.

The Court turns to the negligence *per se* claim against the Manufacturing Defendants. Unlike with DWSWA, Plaintiff does not assert a CWA claim against the Manufacturing Defendants. Nonetheless, Plaintiff alleges that the Manufacturing Defendants "owed a duty to Plaintiff and Proposed Class Members

under Sections 301(a) and 307(d) of the CWA, 33 U.S.C. §§ 1311(a) and 1317(d), to not discharge pollutants into waters of the United States without a valid permit and to operate their facilities in such a manner as to ensure their industrial discharges into the Dalton POTW did not cause Pass Through or Interference." (Compl. ¶ 158.)

In his response to the Manufacturing Defendants' Motion to Dismiss, Plaintiff essentially contends that the Manufacturing Defendants are in the same position as DWSWA with respect to their discharges of industrial wastewater contaminated with PFAS to the Dalton POTW, even though he has not asserted a CWA claim against them. (Resp. to Manufacturing Defendants, Doc. 514 at n.10.) Under Section 307(d) of the CWA, "it is unlawful for an indirect discharger to operate in violation of any 'effluent standard or prohibition or pretreatment standard'" promulgated under Section 307. 33 U.S.C. § 1317(d); 33 U.S.C. § 1311(a) ("Except in accordance with this section and section … 1317 … the discharge of any pollutant by any person shall be unlawful"); 40 C.F.R. § 403.3(i) ("'*Indirect Discharge or Discharge' means the introduction of pollutants into a POTW* from any non-domestic source regulated under section 307(b), (c) or (d) of the Act.") (emphasis added); 40 C.F.R. § 403.3(j) ("'Industrial User or User' means a source of Indirect Discharge.").

Thus, like the DWSWA, the Manufacturing Defendants are indirect dischargers within the meaning of Section 307. The Manufacturing Defendants have cited no authority holding or suggesting that a plaintiff must assert a separate

CWA claim in order to support a negligence *per se* claim based on duties set forth in the CWA. Accordingly, for the same reasons the allegations against DWSWA are sufficient, the allegations that the Manufacturing Defendants' actions violated the CWA and GWQCA are similarly sufficient to support the duty and breach elements of Plaintiff's negligence *per se* claim against the Manufacturing Defendants. [21]

The Manufacturing Defendants next argue that Plaintiff's negligence *per se* claim must fail because "non-binding health advisories for two specific PFAS (PFOS and PFOA) have been established" and "EPD has issued no permits limiting (or otherwise regulating) PFAS discharges under the CWA or GWQCA." This argument is not persuasive. As explained above, Section 307(d) of the CWA does not require a violation of a specific numerical effluent limitation or standard to bring a claim under Section 307(d). EPA has promulgated national pretreatment standards that are applicable to indirect discharges, including the "prohibited discharges" standard under 40 C.F.R. § 403.5. This standard establishes "a general prohibition [*i.e.*, nonnumerical limit] on the release of *any* pollutants by any nondomestic source if those pollutants interfere with or pass through a POTW." *National Ass'n of Metal Finishers*, 719 F.2d at 634; *Amerace Corp.*, 740 F. Supp. at 1079. This standard also "establishes specific prohibitions which apply to all

[21] Although the Complaint also alleges that the Manufacturing Defendants owed a duty to not discharge pollutants into waters of the United States without a valid permit under Section 301 of the CWA, the Complaint does not allege any facts to suggest that the Manufacturing Defendants directly discharge pollutants into waters of the U.S. (as opposed to sending their wastewater to the POTW) or were required to obtain NPDES permits. Therefore, the Court finds that Section 301 of the CWA alone does not support a negligence *per se* claim against the Manufacturing Defendants.

non-domestic users and are designed to guard against common types of pollutant discharges that may result in interference and pass through (*e.g.*, no discharge of flammable, explosive, or corrosive pollutants)." 52 Fed.Reg. at 1586; 40 C.F.R. § 403.5(b).

Section 1365 of Title 33 of the United States Code, § 505 of the Clean Water Act authorizes a citizen to bring a civil action against either the federal government or some other governmental agency that is alleged to have violated either (1) an effluent standard or limitation under the Clean Water Act or (2) an order issued by a state or the EPA regarding such a standard or limitation. 33 U.S.C. § 1365(a)(1). A review of the statutory scheme of the Clean Water Act reveals that an effluent standard or limitation under the Clean Water Act includes an effluent standard or limitation established by a state to further the goals of the Clean Water Act.

Finally, the Court rejects the Manufacturing Defendants' argument that neither the CWA nor the GWQCA are intended to protect Plaintiff's interests or the harm he alleges to have suffered in this lawsuit.

"Congress has clearly stated that the purpose of the Clean Water Act is 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, 548 F.3d 986, 990 (11th Cir. 2008) (quoting 33 U.S.C. § 1251(a)); *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 953 F. Supp. 1541, 1552 (N.D. Ga. 1996) The Eleventh Circuit has recognized "that Congress intended that these goals be accomplished by enlisting the resources and assistance of the federal and state

governments and private U.S. citizens, as the Clean Water Act provides enforcement authority to each of these three entities." *Id.* The CWA "establishe[s] the regulatory framework that essentially exists today to protect our Nation's waters." *Black Warrior Riverkeeper,* 548 F.3d at 987–88. The Act fulfills its stated purpose by establishing "a system of effluent limitations, water quality standards, discharge permits, and other regulatory mechanisms to be administered by the federal EPA and the various states in order to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and enabl[ing] a private citizen … to bring a civil action in federal court against any person [who] violate[s] the effluent or limitation requirements of the [CWA]." *Id.* at 988 (internal quotation and citation omitted).

The citizen suit provision strikes "a balance between government and private enforcement by allowing citizens to bring suits against polluters." *Id.*; *Parker*, 386 F.3d 993 ("The CWA citizen-suit provision allows 'any citizen' to sue 'any person … who is alleged to be in violation of … an effluent standard or limitation under this chapter.'") (quoting 33 U.S.C. § 1365(a)(1).) The GWQCA, as implemented through the CWA, expressly recognizes that "[t]he people of the State of Georgia are dependent upon the rivers [and] waters of the state for public and private water supply" and aims to achieve "purity in the waters of the state and an adequate supply of such waters. . . ." O.C.G.A. § 12-5-21(a). As Plaintiff's alleged harm results from the contamination of the public drinking water supply, the Court finds that he has stated a plausible claim for negligence *per se* based on the Manufacturing

Defendant's alleged violations of the federal pretreatment standards for industrial discharges to the Dalton POTW and violations of Georgia's Water Quality Control Act standards.

For these reasons, the Court **DENIES** the Manufacturing Defendants' and DWSWA's Motions to Dismiss Plaintiff's negligence *per se* claim.

C. Counts VI and VII: Public Nuisance and Abatement

Plaintiff asserts claims for public nuisance and abatement of public nuisance against all Defendants.[22] Under Georgia law, a nuisance is defined as:

> anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable [person].

O.C.G.A. § 41-1-1. A public nuisance is "one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals." O.C.G.A. § 41-1-2. However, it is not necessary that "every person in the area must have been actually hurt or injured to show a public nuisance; it is sufficient if the public nuisance injures those of the public who may actually come into contact with it." *Thompson v. City of Fitzgerald*, 548 S.E.2d 368 370 (Ga. Ct. App. 2001). A public nuisance generally gives no right of action to an individual absent a showing of special damage. O.C.G.A. § 41-1-3; *Ga. Chem., etc. Co. v. Colquitt*, 72 Ga. 172 (Ga. 1884).

[22] However, as noted above, because Plaintiff states that he does not seek damages from Dalton Utilities, he only asserts a claim for abatement of the nuisance (Count VII) against Dalton Utilities.

As the various defendants are in somewhat different positions with respect to Plaintiff's nuisance claims, the Court assesses each defendant or group of defendants in turn.

1. Manufacturing Defendants and DWSWA

The Manufacturing Defendants argue that Plaintiff fails to state a claim against them for public nuisance because (1) they did not control any instrumentality of the nuisance; (2) they acted lawfully in sending their wastewater to Dalton Utilities; and (3) Plaintiff cannot show special harm. (Manufacturers Mot. at 32-37.) Defendant DWSWA stands in the same position and thus joins the Manufacturing Defendants' Motion to Dismiss as to these arguments. (DWSWA Mot. at 29-30.)

i. Plaintiff has sufficiently alleged that the Manufacturing Defendants and DWSWA controlled a cause or concurrent cause of the harm

The Manufacturer Defendants argue that because they do not control the wastewater treatment plant or the LAS, there can be no nuisance claim against them. (Manufacturer Mot. at 34) ("Once the Manufacturing Defendants sent their wastewater to Dalton Utilities for treatment pursuant to Dalton Utilities' EPD permit, they no longer had control over any later resulting harm.")

Under Georgia law, "the essential element of nuisance is control over the cause of the harm." *Grinold v. Farist*, 643 S.E.2d 253, 255 (Ga. Ct. App. 2007) (quoting *Fielder v. Rice Const. Co.*, 522 S.E.2d 13, 17 (Ga. Ct. App. 1999)). "The tortfeasor must be *either the cause or a concurrent cause* of the *creation,*

continuance, or maintenance of the nuisance." *Id.* (emphasis added). *See also*, *Sanders v. Henry Cnty., Ga.*, 484 F. App'x 395, 399–400 (11th Cir. 2012) ("The tortfeasor must be either the cause, or at least a concurrent cause, of the creation, continuance, or maintenance of the nuisance."); *Sumitomo Corp. of America v. Deal*, 569 S.E.2d 608, 613 (Ga. Ct. App. 2002) (explaining that a trial court does not err in denying summary judgment where there is any evidence that the defendant created, continued, *or* maintained the nuisance); *City Of Toccoa v. Pittman*, 648 S.E.2d 733, 737 (Ga. Ct. App. 2007) (same).

Ownership of the cause of the nuisance is not required. For example, where property is used to cause harm to others, ownership of the harmful land or property by the tortfeasor "is not an essential element of the cause of action for nuisance." *Sanders*, 484 F. App'x at 399; *Sumitomo,* 569 S.E.2d at 613 ("In order to be held liable for nuisance, ownership of land by the tortfeasor is not an element"); *Bailey v. Annistown Rd. Baptist Church, Inc.*, 689 S.E.2d 62, 72 (Ga. Ct. App. 2009) ("And under Georgia law, liability for a nuisance arises out of responsibility for the continuance or maintenance of a nuisance in addition to the creation of one; and it is control, not ownership, of the relevant property that is at issue."); *Green v. Eastland Homes, Inc.*, 644 S.E.2d 479, 483 (Ga. Ct. App. 2007) ("[T]o be held liable for nuisance, defendant need only be a creator of the nuisance; defendant does not have to be the current landowner") (citing *Sumitomo Corp.*, 569 S.E.2d at 608)); *McMillen Dev. Corp. v. Bull*, 188 S.E.2d 491 (Ga. 1972) ("The fact that, at the time the suit was filed, the defendant had sold his property, from

which the alleged cause of injury arose, does not absolve him from being a continuous wrongdoer or from the responsibility of remedying its cause. The evidence showed that the defendant created the nuisance and that it was continuing. The trial court was authorized to restrain it and to require the defendant to cease and desist from continuing it").

However, while ownership is not required, some Georgia courts have emphasized that, in the case of a continuing nuisance, to be liable, the defendant must at least have a "legal right" to terminate the cause of the injury. *See e.g.*, *Keener v. Addis*, 5. S.E.2d 695, 698 (Ga. Ct. App. 1939) (explaining that complaint stated cause of action for nuisance where plaintiff alleged that defendant cut a ditch on his own land that diverted surface waters into plaintiff's land causing plaintiff's land to be unfit for cultivation of vegetables); *Fielder*, 522 S.E.2d at 17 (explaining that county health department had power to compel developer to abate nuisance but failed to do so, thereby participating in maintenance of the nuisance); *cf. Mercer*, 1986 WL 12447, at *6 (finding that Mercer could not state claim for nuisance against asbestos manufacturers for products placed in its buildings because Mercer failed to allege that defendants had a legal right to abate the nuisance where the manufacturers had no legal right to enter buildings and force repairs or replacement).

On the flipside, a party can be liable for nuisance where it did not create the nuisance but continued or maintained it. *See Annistown Road Baptist Church*, 689 S.E.2d at 72 ("Even though the church may not have caused the initial leak,

may not have owned the matter that leaked, or may not have had any responsibility for the compaction of the soil around the underground utility lines, evidence was presented and the jury found that the initial leak caused a condition on its property in 2004 that in turn caused continued excessive flooding of [plaintiff's] property thereafter."); *Fielder*, 522 S.E.2d at 15-16 (finding that county health department approved company's building of septic tank with awareness of potential problems and then, once provided with notice that the tank was failing, failed and refused to require company to take steps to abate the nuisance); *Roughton v. Thiele Kaolin Co.,* 74 S.E.2d 844 (Ga. 1953) (explaining that owner of property who maintains a nuisance that was created by previous owner, despite requests to abate such nuisance, may be liable).

Where the element of control is met, knowledge of a dangerous situation and a failure to remedy that situation within a reasonable time can result in a legal nuisance. *See Horton v. City of Macon*, 241 S.E.2d 311, 314 (Ga. Ct. App. 1977) (finding that evidence presented fact question as to whether defendant city had knowledge of open sewer such that it "had knowledge of a dangerous condition created by a defect and that the City continued its maintenance thereof"); *King Cotton, Ltd. v. Powers*, 380 S.E.2d 481, 486 (Ga. Ct. App. 1989) (finding that jury question existed as to nuisance claim where evidence demonstrated that defendant company may have regularly encouraged drivers of tractor trailers to exit its premises via dangerous field road with knowledge that it was unsafe to do so); *Greenwald v. Kersh*, 593 S.E.2d 381, 385–86 (Ga. Ct. App. 2004) (finding

question of fact as to whether defendants ratified the wrongful acts of their independent contractor, whose grading of their land caused flooding of the neighbor's property, and thus elected to maintain the nuisance instead of stopping it).

Under Georgia law, the discharge or release of harmful pollutants or substances may constitute a nuisance. *See e.g.*, *Roughton v. Thiele Kaolin Co.,* 74 S.E.2d 844 (Ga. 1953) (holding that petition alleging that defendant was continuously adulterating and polluting stream passing through plaintiff's land stated cause of action for nuisance); *Hoffman v. Atlanta Gas Light Co*., 426 S.E.2d 387, 390 (Ga. Ct. App. 1992) (explaining that the "continuing exudation and leaching of chemicals into the ground from the contaminants deposited long ago through leaks" constitutes a nuisance and that damages growing out of this nuisance are the "hurt, inconvenience, or damage" caused by the hydrocarbon contamination, "for which O.C.G.A. § 41-1-1 gives a cause of action"); *Citizens & S. Tr. Co. v. Phillips Petroleum Co*., 385 S.E.2d 426 (Ga. Ct. App. 1989) (finding that former owners of leaking underground gasoline storage tank could be liable for maintenance of continuing nuisance); *New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC*, 734 F. Supp. 2d 1326 (N.D. Ga. 2010) (explaining that owner of wetlands could maintain nuisance claim against neighboring landowner that discharged pollutants into waterway as a result of construction activity); *Tucker v. Southern Wood Piedmont Co.*, 28 F.3d 1089, 1091 (11th Cir. 1994) ("Under Georgia law, a cause of action for a tort that is continuing in nature-for

example, the frequent runoff of contaminated water across land, or (as in the present case) the underground leakage of hazardous waste onto adjoining property…"); *Thrasher v. City of Atlanta*, 173 S.E. 817, 818 (Ga. 1934) (finding that the "unnecessary and improper creation and spreading of dust by the operation" airport which impaired the health of plaintiff's wife and was deposited on plaintiff's property, affecting the use and comfort of his home, would constitute a nuisance); *Scarlett & Assocs., Inc. v. Briarcliff Ctr. Partners, LLC,* 2009 WL 3151089, at *16 (N.D. Ga. Sept. 30, 2009) (recognizing that plaintiff could maintain claim for nuisance based on discharge of tetrachloroethane chemicals from dry cleaning facility in and around shopping center and from surface disposal outside shopping center).

Plaintiff alleges that the Manufacturing Defendants use PFAS at their facilities and, for over a decade, have knowingly discharged a significant amount of wastewater containing PFAS into the Dalton POTW that then contaminates the Conasauga, Oostanaula, and Coosa Rivers and the downriver water supply. (Compl. ¶¶ 4, 67, 155.) These allegations adequately plead that the Manufacturing Defendants exercised control over the nuisance in continuously utilizing PFAS and discharging it to the POTW. These allegations therefore sufficiently plead that these Defendants were at least a "*cause or a concurrent cause* of the *creation, continuance, or maintenance.*" *Fielder*, 522 S.E.2d at 17.

That the Manufacturing Defendants and DWSWA were not the final link in the causal chain does not preclude Plaintiff from stating a claim. Liability may flow

where the defendant is the cause/concurrent cause of the creation *or* maintenance of a nuisance, even if there are subsequent actions involved. *Green,* 644 S.E.2d at 483 (explaining that defendant did not need to be current landowner to be liable for nuisance); *Hoffman*, 426 S.E.2d at 390 (explaining that damages growing out of the nuisance — the continuing contamination of hydrocarbon pollution from petroleum pipeline leaks — were not assuaged by defendant's sale of pipeline to another); *Sprayberry Crossing Partnership v. Phenix Supply Co.*, 617 S.E.2d 622, 624 (addressing nuisance claim brought by owner of shopping center against supplier of chemicals to dry cleaning facility at shopping center and reversing lower court's grant of j.n.o.v. to chemical supplier, noting that, while there was evidence that dry cleaning business may also have contributed to contamination, there was evidence that defendant spilled chemicals on many occasions, thereby contributing to the contamination of the shopping center) ("Proximate cause is not necessarily the last act or cause, or the nearest act to the injury, but such act that has actively aided in producing the injury as a direct and existing cause. And there may be more than one proximate cause of an injury.") (cleaned up)[23].

As the Manufacturing Defendants and DWSWA acknowledge, their arguments about the requisite amount of control over the nuisance are highly

[23] An emerging practice in legal writing, the citation "(cleaned up)" indicates "that internal quotation marks, alterations, and citations have been omitted from quotations." *Joe Hand Promotions, Inc. v. Phillips*, 2020 WL 3404946, n.1 (S.D. Fla. June 19, 2020) (citing *Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1285 (11th Cir. 2020)). *See also*, Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017); *Brownback v. King*, 141 S.Ct. 740, 748 (2021).

linked to their causation arguments. That is, the Manufacturing Defendants and DWSWA contend that because there were subsequent actions and actors between their discharge and Plaintiff's harm, they cannot have caused (concurrently or otherwise) the nuisance. This is the same argument these Defendants have raised in connection with the negligence claim, and which the Court has already addressed in Section VI.A. As with the negligence claim, whether the Manufacturing Defendants' actions in fact caused, or concurrently caused, the creation or maintenance nuisance implicates evidentiary questions not properly addressed on a motion to dismiss. *Terry v. Catherall,* 789 S.E.2d 218, 221 (Ga. Ct. App. 2016) (reversing grant of summary judgment to defendants in nuisance case, explaining "[t]he existence of proximate cause is a question of fact for the jury, except in palpable, clear, and indisputable cases."); *Sprayberry*, *supra*, 617 S.E.2d at 624 (same).

The Court further notes that, even though the Manufacturer Defendants and DWSWA are not alleged to have directly discharged PFAS into North Georgia waterways, Plaintiff has alleged that the Manufacturing Defendants and DWSWA have the legal right and ability to abate the nuisance but have failed, and continue to fail, to take action in the face of the continuing harm. *Fielder*, 522 S.E.2d at 17. For example, the Manufacturing Defendants and DWSWA could abate the nuisance by finding alternative ways to dispose of their wastewater, building a specialized water treatment plant for carpet industry wastewater, or ceasing to use

PFAS chemicals in their facilities. Therefore, they do not lack the ability to abate the nuisance, as in Mercer. *Mercer*, 1986 WL 12447, at *6.

At this stage, Plaintiff's allegations sufficiently allege the control and causation required to state a claim for nuisance.

ii. A nuisance claim can be based on lawful conduct

Second, the Manufacturing Defendants argue that they cannot be liable for nuisance because, in sending their wastewater to Dalton Utilities, they were acting lawfully in accordance with authorized permits. (Manufacturers Mot. at 34).

This argument is plainly without merit. Not only does it ignore the allegations in the complaint to the contrary, (see Compl. ¶ 3) (alleging "*unauthorized* discharges by industrial users"), but it cuts against the plain language of Georgia's statutory definition of nuisance. Under Georgia law, a nuisance is "anything that causes hurt, inconvenience, or damage to another *and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance*." O.C.G.A. § 41-1-1 (emphasis added). As the Georgia Supreme Court articulated in *May v. Brueshaber*, 466 S.E.2d 196 (Ga. 1995)

> [a] thing that is lawful and proper in one locality may be a nuisance in another. In other words, a nuisance may consist merely of the right thing in the wrong place, regardless of other circumstances. "*If one does an act, of itself lawful, being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance*; for it is incumbent on him to find some other place to do that act where it will not be injurious or offensive... To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders enjoyment of life and property uncomfortable.

Id. (emphasis added) (finding question of fact as to whether two chicken houses constituted nuisance). *Galaxy Carpet Mills, Inc. v. Massengill*, 338 S.E.2d 428, 429 (Ga. 1986) is also illustrative. There, a carpet mill argued that it could not be liable for nuisance where its coal-fire burners were operated in compliance with the conditions of its permit issued by the Georgia Environmental Protection Division. *Id.* Disagreeing, the Georgia Supreme Court explained that, while "nothing that is legal in its erection can be a nuisance *per se*", a lawfully-operated business may, "by reason of its location in a residential area, cause hurt, inconvenience, and damage to those residing in the vicinity and become a nuisance per accidens (a nuisance by reason of circumstances and surroundings) ..." *Id.* (collecting cases). *See also, Sumitoto*, 569 S.E.2d at 614 ("[A]lthough [defendant's] construction of the detention pond was arguably done in a lawful manner, that fact did not prevent the pond from becoming a nuisance when the increased water flow caused hurt and inconvenience to the [plaintiffs] and their neighbors."). Here, the Manufacturers' assertion of lawful conduct does not preclude Plaintiff's nuisance claim.

iii. Plaintiff has adequately alleged special harm

Finally, the Manufacturing Defendants argue that Plaintiff fails to state a claim for public nuisance because he has not and cannot allege special harm: that is, harm different from the harm to the general public, as required for a private plaintiff to assert a public nuisance claim. (Manufacturer Mot. at 35-37.)

"A public nuisance is one which damages all persons who come within the sphere of its operation." O.C.G.A. § 41-1-2. "A public nuisance generally gives no right of action to any individual. However, if a public nuisance in which the public does not participate causes special damage to an individual, such special damage shall give a right of action." *Id.* § 41-1-3. Over a century ago, the Georgia Supreme Court thoroughly discussed the distinction between public harm and special harm sufficient to allow a plaintiff to bring a public nuisance claim as follows:

> If one should obstruct a highway, it would be a public nuisance, to be abated as such; but if an individual, in going along the road at night, should drive over the obstruction, and suffer injury as a result, he would be entitled to compensation for the damage done. If another should be specially damaged, he would likewise be entitled to recover. If a dozen individuals in turn were injured, they would each be authorized to sue the wrongdoer for the particular injury inflicted upon them. And for the reason that the defendant had not only created a public nuisance, but that he had likewise specially damaged particular individuals . . .*The private special injury was not merged and lost in the general public injury, of which only the public could complain. If the nuisance results in the impairment of a common right which every one may exercise-such as the use of a street-then the deprivation of that use hinders all persons alike from the enjoyment of the common right. . . . But the public cannot be said to enjoy health or suffer sickness*. In the very nature of things, that can only be predicated on the individual. Whatever affects his health affects him specially, and him alone. Such damage is special damage within the meaning of the Code, and the fact that other citizens suffer similar special damages does not convert his injury into the nature of public damages. *So, too, anything which damages a particular plaintiff's property, or renders it unfit for use, is not lost in the general and public nuisance*.

Savannah, F. & W. Ry. Co. v. Parish, 45 S.E. 280, 280-81 (Ga. 1903) (also noting that a plaintiff does not "los[e] this right because others in the vicinity have similar causes of action. To hold otherwise would be to render the defendant liable for one

injury, and hold him harmless where many were damaged" and "*[n]o matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury*") (emphases added). *See also Thrasher v. City of Atlanta*, 173 S.E. 817, 820 (Ga. 1934); *Moon v. Clark*, 14 S.E.2d 481, 483 (Ga. 1941).

In the Complaint, in briefing, and at the Court's hearing on the motions to dismiss, Plaintiff differentiated between the harm to the general public and the harm suffered by the putative class members. Specifically, the general public harm involves the contamination of the Conasauga, Oostanaula, and Coosa Rivers and the interference with the use and enjoyment of those waters, including the provision of safe drinking water. (*See* Compl. ¶¶ 174, 176, 177) ("All who come into contact with the PFAS released and discharged by Defendant are hurt, inconvenienced, or damaged by, among other things, being exposed to the harmful effects of PFAS"; *see also*, Pl. Resp. to Manufacturers, Doc. 514 at 37). But the putative class members have experienced special harm in the particular harm of having to "pay the added costs of attempting to remove the PFAS contamination by way of increased rates and surcharges they incur as ratepayers." (Compl. ¶ 179) (Pl. Resp. to Manufacturers at 37-38).

In light of this distinction, the Court finds that Plaintiff has adequately alleged that he and the prospective class suffered harm distinguishable from the harm to the general public. At least one federal court in Georgia has recognized that "environmental cleanup costs qualify as special pecuniary damages conferring

standing to maintain a public nuisance claim arising out of environmental contamination." *Briggs & Stratton Corp. v. Concrete Sales & Serv.*, 29 F. Supp. 2d 1372, 1376 (M.D. Ga. 1998); *see also, Sprayberry Crossing Partnership v. Phenix Supply Co.*, 617 S.E.2d 622, 624 (Ga. Ct. App. 2005) (recognizing that plaintiff "incurred cleanup costs in remediating the shopping center, and will continue to incur costs in the future," resulting from defendant's contamination of shopping center property with hazardous chemicals). Additionally, another court facing similar allegations of a PFAS-infected water supply explained that paying to remove PFAS from one's property is "different in kind" than being exposed to PFAS alongside members of the general public who may drink the water, or are otherwise prevented from using or enjoying the contaminated waters. *West Morgan-East Lawrence Water and Sewer Auth. v. 3M Company*, 208 F. Supp. 3d 1227, 1234 (N.D. Ala. 2016) (finding that city authority alleged special damages in the form of incurred costs to test/remediate water supply, and that representative plaintiffs adequately alleged special damages on basis that they consume water in homes, they have had to purchase water filters or bottled water, and their property values have decreased as result of pollution; this harm was different than damage to the general public's ability to use and enjoy the Tennessee River).

The Manufacturing Defendants argue that Plaintiff's attempts to represent a class of thousands in the public nuisance claims necessarily undermines his ability to demonstrate special harm. (Manufacturer Mot. at 36.) In support, the Manufacturing Defendants cite *Rhodes v. E.I du Pont de Nemours & Co.*, 657 F.

Supp. 2d 751, 756 (W.D. Va. 2009). But in that case, which was before the court on summary judgment, not a motion to dismiss, the plaintiffs did not argue that they had suffered any damages in paying to cleanse the water; they alleged only that their drinking water was contaminated. Moreover, the plaintiffs in *Rhodes* argued that they were not required to show special damages at all, effectively conceding the point.

Instead, the Court finds persuasive other authority in similar cases where courts have determined that plaintiffs can show special damages even where they represent a class of thousands. *See West Morgan-East Lawrence Water and Sewer Auth. v. 3M Company*, 208 F. Supp.3d 1227, 1234 (N.D. Ala. 2016); *King v. West Morgan-East Lawrence Water and Sewer Auth.*, 2019 WL 1167787, at *5 (N.D. Ala. Mar. 13, 2019) (holding that class of approximately 10,000 water customers was "not the 'general public'"). This understanding comports with Georgia courts' longstanding interpretation of special damages, that "anything which damages a particular plaintiff's property, or renders it unfit for use, is not lost in the general public nuisance" and "is special damage within the meaning of the Code. . . ." *Parish*, 45 S.E. at 280-81. Indeed, like the highway obstruction example in *Parish*, the contamination of the Conasauga, Oostanaula, and Coosa Rivers constitutes an "impairment of a common right which every one may exercise" — access to clean water — and the "deprivation of that use hinders all persons alike from the enjoyment of the common right." *Id.* at 280. But, like the driver who drives over the highway's obstruction, the putative class of ratepayers

here were specially damaged in the use and enjoyment of their personal property as well as by dint of the economic damages asserted. And, "*[n]o matter how numerous the persons may be who have sustained this peculiar damage*, each is entitled to compensation for [their] injury." *Id.* at 281 (emphasis added) (explaining that a plaintiff is entitled to recover "even though the home of his neighbor is unendurable from the same cause" and that it "is no defense for a wrongdoer to show that by the same act he has inflicted like injures upon numerous other persons").

For the reasons discussed herein, Plaintiff has adequately alleged special damage sufficient to maintain a claim for public nuisance. Accordingly, Plaintiff has stated nuisance claims against the Manufacturing Defendants and DWSWA.

2. Supplier Defendants

The Supplier Defendants marshal two of the same arguments as the Manufacturing Defendants. They contend that Plaintiff cannot maintain a public nuisance claim against them because (1) they did not control a cause of the nuisance and (2) Plaintiff has not alleged special harm. (Supplier Mot. at 26.) This second argument fails for the same reasons the Court articulated immediately above in connection with the Manufacturing Defendants' Motion.

i. Plaintiff has adequately alleged that the Supplier Defendants controlled a cause or concurrent cause of the nuisance

As detailed above, "the essential element of nuisance is control over the cause of the harm." *Grinold v. Farist*, 643 S.E.2d 253, 255 (Ga. Ct. App. 2007)

(quoting *Fielder v. Rice Const. Co.*, 522 S.E.2d 13, 17 (Ga. Ct. App. 1999)). "The tortfeasor must *be either the cause or a concurrent cause of the creation, continuance, or maintenance of the nuisance*." *Id.* (emphasis added).

The Supplier Defendants argue that because the Complaint includes no allegations that the Supplier Defendants maintained control over the PFAS chemicals after selling them to the Manufacturing Defendants, they cannot be liable for nuisance. (Supplier Mot. at 28) ("There can be no claim for nuisance against manufacturers whose products allegedly caused harm after they left the manufacturers' control.")

In response, Plaintiff argues that the Supplier Defendants "had control over the PFAS they continually supplied to PFAS dischargers while knowing their PFAS were being discharged into and were contaminating the Upper Coosa River Basin." (Pl. Resp. to Suppliers, Doc. 513 at 28-29.) Plaintiff also highlights the continuous nature of the Supplier Defendants' involvement, allegedly increasingly contaminating the water with each successive sale. (*Id.*)

In the Complaint, Plaintiff alleges that the various Supplier Defendants manufacture PFAS and then sell or supply PFAS to other defendants, *i.e.*, the Manufacturing Defendants. (*See* Compl. ¶¶ 18, 21, 26, 32, 37, 49.) Plaintiff alleges that the Supplier Defendants engaged and continue to engage in this behavior with decades of knowledge of the dangers of PFAS. (*Id.* ¶¶ 68-74, 79-82.) Plaintiff's allegations also detail tests and sampling from as early as 2006 that find that PFAS have been detected in dangerously high levels at the LAS and in the Conasauga

River (*id.* ¶¶ 89-95), and Plaintiff relatedly alleges that Defendants have known for years that the PFAS cannot be removed from Dalton Utilities' POTW or removed prior to discharge into the Conasauga River (*id.* ¶ 87).

Based on the allegations in the Complaint, Plaintiff has adequately pled that the Supplier Defendants' actions in continuously selling and supplying the PFAS chemicals, while knowing of the downstream contamination, were a "cause or concurrent cause" of the creation and continuance of the nuisance. *Fielder*, 522 S.E.2d at 16; *see supra* at 133-34 (explaining that a nuisance claim does not require that the defendant maintain ownership or physical custody throughout and citing relevant authority).

More analogous here, in. *Phillips, supra*, 385 S.E.2d 426, the plaintiffs brought nuisance claims for damage to their property resulting from gasoline that leaked from underground storage tanks at two nearby service stations. *Id.* at 427. The Court of Appeals reversed the trial court's grant of summary judgment to the gas supplier, explaining

> [the supplier's] only connection with the underground storage tanks during the relevant four-year period was in its capacity as the supplier of the gasoline which was stored in those tanks. "[W]henever ... gas is supplied with actual knowledge on the part of the one supplying it of the defective and dangerous condition of the customer's appliances, he is liable for injuries caused by ... the gas thus supplied for use on such defective and dangerous appliances ..." *Milligan v. Ga. Power Co.*, 22 S.E.2d 662 (1942) ... [A] genuine issue of material fact remains as to [the supplier's] actual knowledge of a defective condition in the storage tanks.

Id. at 428-29. Under the Supplier Defendants' construction of the "control" requirement, the supplier in *Phillips Petroleum* could not have been liable as, according to them, "[t]here can be no claim for nuisance against manufacturers whose products allegedly cause harm after they left the manufacturers' control." (Supplier Mot. at 28.) This is clearly not an accurate representation of Georgia law.

Additionally, while only at the state trial court level, the Court finds persuasive that the Gwinnett County Business Court recently determined that the State of Georgia stated a claim for public nuisance against the suppliers of opioid drugs. There, the court determined that the State "adequately alleged Defendants controlled the cause of the nuisance (the Opioid Crisis) because they controlled the opioids themselves before they were distributed and diverted." *State of Georgia v. Teva Pharmaceutical Indus. Ltd., et al.*, 19-A-00060-4, at 23 (Gwinnett Cnty. Sup. Ct. Oct. 9, 2019). In that case, the complaint specifically alleged that the supplying defendants had the power to shut off the supply (of opioids) or control their flow to lessen or prevent the harm that was occurring. *Id.* at n. 10. Likewise here, Plaintiff has asserted a slew of allegations related to the Supplier Defendants superior knowledge of the hazards of PFAS chemicals, as well as how the chemicals were in fact contaminating the Rome and Floyd County water supplies for years. (Compl. ¶¶ 68-81, 97-104, 152, 155, 178). As in *Phillips Petroleum* and *Teva Pharmaceutical Indus.*, 19-A-00060-4 (Gwinnett Cnty. Sup. Ct. Oct. 9, 2019), it is the continued manufacturing and selling of the harmful substance (PFAS), with knowledge of the consequences, that supports Plaintiff's nuisance claim.

For this reason, the Supplier Defendants' cited authority is distinguishable. In *Mercer*, 1986 WL 12447, Mercer brought a claim for nuisance against the manufacturers of asbestos-containing products that were placed in its buildings years before. *Id.* at *1. The court found that Mercer could not state a nuisance claim against the asbestos manufacturers because the manufacturers lacked the "legal right" to enter the buildings and remove the asbestos-containing products that were installed previously and therefore the defendants lacked the control necessary to abate the nuisance. *Id.* at *6. Similarly, in *Jordan v. Southern Wood Piedmont Co.*, 805 F. Supp. 1575 (S.D. Ga. 1992), property owners in Augusta sued the owners and operators of a wood treatment plant, as well as Dow Chemicals Co., which had sold a pesticide, "penta," to the owners/operators of the wood treatment plant. *Id.* at 1577. After limited discovery, the court granted Dow's motion for summary judgment on the plaintiff's state common law claims, including nuisance, because Dow's involvement was insufficient to associate it with the allegations of improper handling and disposal at the wood treatment plant. *Id.* at 1582. But importantly, the evidence was "undisputed that Dow sold only one shipment of penta to the [wood treatment plant]," *id.* at n. 7, and it was not alleged that Dow had knowledge of the customer's improper disposal.

Under the circumstances, *Mercer* and *Jordan* are distinguishable because, here, the Supplies clearly had a legal right to abate the nuisance—for example, by refusing to sell their chemicals to manufacturers until those manufacturers established and complied with proper disposal methods. Additionally, here, the

sale is still continuously occurring and the Supplier Defendants are alleged to have full knowledge of the consequences of these continuing sales. Plaintiff has therefore stated a nuisance claim against the Supplier Defendants.

3. Dalton Utilities[24]

As discussed in Section V.C.1., Dalton Utilities is not entitled to sovereign immunity on Plaintiff's claim for nuisance abatement. In light of this determination, Plaintiff has stated a claim for abatement of the nuisance against Dalton Utilities based on allegations that Dalton Utilities

> [d]ischarged PFAS from the LAS into the Conasauga River and its tributaries, and has also discharged raw sewage containing PFAS from its collection system into these waters on numerous occasions. Defendant Dalton Utilities has long known of these dangerous discharges of toxic chemicals, yet has taken no action whatsoever to address them but instead has continued to operate and maintain the Dalton POTW and the LAS in a manner where PFAS cannot be treated or removed, allowing these illegal discharges to be continuous and ongoing. As a result, Defendant Dalton Utilities has created and maintained a public nuisance and should be subject to the injunctive relief requested in Count Seven of this Third Amended Complaint.

(Compl. ¶ 175.) Dalton Utilities also briefly argues that Plaintiff cannot support a nuisance claim because Plaintiff has not alleged special harm. (Dalton Utilities Mot. at 39-40.) But the Court has already explained above that Plaintiff has

[24] Dalton Utilities also argues in its brief that, in applying the pending nuisance claim to Dalton Utilities in the Third Amended Complaint (or, put another way, adding Dalton Utilities as a defendant on this claim), Plaintiff violated the Court's scheduling order. (Dalton Utilities Mot. at 31) (citing Scheduling Order, Doc. 192.) DWSWA joins in this argument. (DWSWA Mot. at 30.) The Court has discretion in allowing parties to amend the complaint. Plaintiff's Third Amended Complaint did not add any new claims and neither Dalton Utilities nor DWSWA has been prejudiced by Plaintiff's inclusion of them as to any state-law claims. Indeed, Dalton Utilities and DWSWA have had a full opportunity to argue for dismissal of these claims in briefing and at oral argument. Accordingly, Dalton Utilities' and DWSWA's requests that the strike the Third Amended Complaint are **DENIED**.

adequately alleged special harm. Accordingly, Dalton Utilities' arguments for dismissal of the abatement of the nuisance claim are **DENIED**.

D. Count V: Punitive Damages

The various Defendants argue that Plaintiff is not entitled to punitive damages and attorneys' fees. (Manufacturers Mot., Doc. 473-1 at 38; DWSWA Mot., Doc. 475-1 at 30; Suppliers Mot., Doc. 479-1 at n.5.) The Manufacturing Defendants and DWSWA argue that Plaintiff's allegations do not support punitive damages. (*Id.*)[25]

"Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). "Negligence, even gross negligence, is insufficient to support such an award." *Durben v. Am. Materials, Inc.*, 503 S.E.2d 618, 619 (Ga. Ct. App. 1998) (quoting *Bartja v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 463 S.E.2d 358, 361 (Ga. Ct. App. 1995).

"Whether the tort was sufficiently aggravating to authorize punitive damages is generally a jury question, and a jury may award punitive damages even where the clear and convincing evidence only creates an inference of the

[25] The Supplier defendants do not argue that Plaintiff's allegations are insufficient to support punitive damages. Rather, the Suppliers argue that Plaintiff's punitive damages claim should be dismissed because a punitive damage claim cannot survive where there is no underlying claim. (Supplier Mot. at n.5.) But as stated herein, Plaintiff has stated claims for nuisance and abatement of nuisance against the Suppliers, leaving two substantive claims in tact.

defendant's conscious indifference to the consequences of [its] acts." *Tookes v. Murray*, 678 S.E.2d 209, 213 (Ga. Ct. App. 2009). In the Complaint, Plaintiff alleged that Defendants have shown knowing, willful misconduct; malice; wantonness; oppression; or entire want of care, and acted with specific intent to cause harm. (Compl. ¶¶ 166-68, 154.) Plaintiff has also alleged that Defendants acted in bad faith. (*Id.* ¶ 171.) At this juncture, Plaintiff can maintain the punitive damages claim against all Defendants except for Dalton Utilities, in conjunction with the remaining state-law claims.

VII. MISCELLANOUS ISSUES ARISING FROM INDIVIDUAL MOTIONS TO DISMISS

A number of manufacturer or supplier defendants filed individual motions to dismiss in addition to joining the group motions. The Court addresses these motions below.

A. Daikin's Motion to Dismiss [Doc. 483]

Defendant Daikin, a chemical supplier[26], separately filed a 12(b)(6) motion to dismiss, arguing that (1) the Complaint does not include adequate factual allegations against Daikin and that (2) Plaintiff's claims violate the filed-rate doctrine because they seek to reduce the rate the class paid for water. (Daikin Mot., Doc. 483 at 2-3.) In addition, Daikin argues that it was improperly and inadvertently named in Count IV, for negligence *per se*, a claim that was not asserted against any other supplier. (*Id.* at 10.) Plaintiff does not challenge

[26] Daikin was added as a defendant in the Third Amended Complaint. (Compl. at n. 1.)

Daikin's request to be dismissed as a defendant in Count IV. Accordingly, the Court **DISMISSES Plaintiff's negligence *per se* claim against Daikin**.

Otherwise, Plaintiff argues that (1) he has provided sufficient facts to support his tort claims against Daikin and (2) the filed-rate doctrine is inapplicable because it does not apply to municipal water rates and because Plaintiff is not challenging the reasonableness of his water rates. (*See generally*, Pl. Resp. to Daikin, Doc. 505.)

First, Daikin argues that the Complaint does not plead any facts specific to Daikin and only mentions it twice. Daikin emphasizes that, while the Complaint alleges facts regarding the other chemical suppliers' knowledge of the toxicity of PFAS based on internal company studies, the Complaint does not include such allegations regarding Diakin. (Daikin Mot. at 2-3.)

The Complaint alleges that Daikin manufactured and supplied PFAS to one or more manufacturing defendants in this action, including Shaw Industries and the Dixie Group. (Compl. ¶ 26). The Complaint also alleges that all Defendants have long been aware of the persistence and toxicity of PFAS (*Id.* ¶ 67) and that the Supplier Defendants have known for at least 40 years that PFAS persist in the environment and accumulate in the bodies of humans (*id.* ¶¶ 26, 68). The Complaint also alleges, upon information and belief, that all Defendants have been aware of the persistence and toxicity of PFAS specifically as a result of communications with the Manufacturing Defendants and other users of the chemicals, as well as with the EPA, EPD, and/or UGA. (*Id.* ¶ 79.) As further

support, the Complaint details that information regarding the dangers of PFAS that has been publicly available for years in the form of studies and reports conducted by governmental agencies and independent entities. (*Id.* ¶¶ 56-66.)

The Court finds that the Complaint is adequately pled with respect to Daikin's involvement. "The fact that the defendants are accused collectively does not render the complaint deficient." *Kyle K. v. Chapman,* 208 F.3d 940, 944 (11th Cir. 2000). Under the circumstances of this case – the large number of parties, their alleged overlapping involvement, and the many claims — the Complaint's allegations as to the suppliers' knowledge can be read to include Daikin and thus supplement the allegations that Daikin "has for many years manufactured and supplied PFAS to one or more of the Defendants in this action." (Compl. ¶ 26.) Accordingly, Daikin's arguments for dismissal that the Complaint fails to allege facts specific to it are unavailing, and this aspect of Daikin's Motion [Doc. 483] is **DENIED**. To the extent that Daikin propounds the same arguments asserted in the group Supplier Defendant Motion, (that it did not owe a duty to Plaintiff, for example) the Court has addressed these group arguments above.

Second, Daikin makes an argument made by no other defendant in this action—that the filed-rate doctrine bars Plaintiff's claims because his challenge to the water rate increase is a collateral attack on the service rates established through a statutorily prescribed administrative procedure. (Daikin Mot. at 3-9.)

Because the filed-rate doctrine does not apply to municipal water rates, this argument is without merit.

The filed-rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal [or state] regulatory authority," such as state public service commissions. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Taffet v. Southern Co.*, 967 F.2d 1483, 1490 (11th Cir. 1992) (finding that the filed-rate doctrine applied to rates approved by state regulatory authorities, specifically Georgia and Alabama public service commissions ("PSCs")). "Where a legislature has established a scheme for utility ratemaking, the rights of the rate-payer in regard to the rate he pays are defined by that scheme." *Taffet*, 967 F.2d at 1490. The doctrine therefore "precludes any judicial action which undermines agency rate-making authority." *Patel v. Specialized Loan Servicing, LLC*, 904 F.3d 1314, 1317 (11th Cir. 2018). (quoting *Hill v. BellSouth Telecomms. Inc.,* 364 F.3d 1308, 1317 (11th Cir. 2004)).

In Georgia, the General Assembly has granted the Georgia PSC "exclusive power to determine what are just and reasonable rates and charges to be made by any person, firm, or corporation subject to its jurisdiction." O.C.G.A. § 46-2-23(a); *Taffet*, 967 F.2d at 1491 (explaining that the Georgia PSC has "exclusive power to determine what are just and reasonable electric power rates."). The jurisdiction of the Georgia PSC extends to:

> All common carriers, express companies, railroad or street railroad companies, dock or wharfage companies, terminal or termination station companies, telephone companies, gas or electric light and power companies, and persons or private companies who operate rapid rail passenger service lines within the state. . . .

O.C.G.A. § 46-2-20.[27] Noticeably absent from this list, for current purposes, is *municipal water* rates. Indeed, it has long been established that the Georgia PSC does not have authority to regulate the *municipal* rates at all. *See Georgia Public Service Commission v. City of Albany*, 179 S.E. 369, 371 (Ga. 1935) ("[A] municipal corporation does not become in any sense a public utility, though it be empowered to operate, and does operate, an electric light and water plant."). Rather, "[m]unicipalities operating public utility facilities in Georgia are not subject to the regulations of the Georgia Public Service Commission or any other regulatory body, and can fix and determine rates which it will charge for the services rendered by such municipally-owned facilities." *Couch v. City of Villa Rica, Ga.*, 203 F. Supp. 897, 905 (N.D. Ga. 1962) (citing *City of Albany*, 179 S.E. at 371).

In its Motion, Daikin assumes, without directly confronting the issue, that the filed-rate doctrine applies equally to local rates set by municipalities. (Daikin Mot. at 5.) But Daikin provides no legal authority to support the extension of the doctrine to municipal rates. Moreover, as the Eleventh Circuit has explained, one of the main rationales undergirding the filed-rate doctrine is the "nonjusticiability principle" that "duly-empowered administrative agencies should have exclusive say over the rates charged by regulated entities because agencies are more competent than the courts at the ratemaking process." *Patel*, 904 F.3d at 1321-22. Indeed, the *Taffet* decision details the "elaborate administrative scheme[] to

[27] Interestingly, the statute then explains that it does not have jurisdiction over the operations of the Metropolitan Atlanta Rapid Transit Authority ("MARTA").

ensure that rates for electricity are just and reasonable for the affected utilities and for the public." *Taffet*, 967 F.2d at 1490. Specifically, in Georgia, a utility must file a rate schedule 30 days before a new rate goes into effect and the PSC, upon a written complaint or on its own initiative, may conduct a hearing. *Id*. (citing O.C.G.A. § 46-2-23(a)). The General Assembly has taken steps to ensure that consumers are adequately represented at proceedings affecting utility rates and anyone interested may file a motion to intervene. *Id*. (citing O.C.G.A. § 46-2-59).

But Daikin has not argued or provided any indication that the municipal water rates at issue are governed by any comparable administrative procedures. Thus, no parallel rationale supports the application of the filed-rate doctrine here. Indeed, Plaintiff cites to a case in which the Georgia Supreme Court has examined the reasonableness of municipal water rates without any discussion of the filed-rate doctrine, *see Mcleod v. Columbia Cnty.*, 599 S.E.2d 152 (Ga. 2004), further supporting the Court's conclusion that the doctrine is inapplicable to municipal water rates.

Because the water rates at issue are municipal water rates set by the Rome Water and Sewer Dvision and are not subject to the Georgia PSC's authority or regulation, the filed-rate doctrine is not applicable here. Daikin's Motion is **DENIED** on this issue.[28]

[28] Plaintiff also persuasively argues the filed-rate doctrine does not apply because Plaintiff is not challenging his municipal water rates, pointing out that he is not suing the City of Rome, his water provider. (Pl. Resp. to Daikin at 8-10.) Because the Court determines that the filed-rate doctrine does not apply at all under the present circumstances, it need not address Plaintiff's second argument.

Accordingly, the Court **GRANTS IN PART AND DISMISSES IN PART** Defendant's Motion to Dismiss [Doc. 483]. The Court **DISMISSES** Plaintiff's negligence *per se* claim against Daikin (Count IV) but **DENIES** Daikin's Motion in all other respects.

B. Motions to Dismiss filed by DyStar L.P. [Doc. 478], Americhem, Inc. [Doc. 472], and MFG Chemical LLP [Doc. 484] under Rule 12(b)(1)

Defendants DyStar L.P. ("DyStar"), Americhem Inc. ("Americhem"), and MFG Chemical, LLC ("MFG") each argue in separate motions that Plaintiff cannot meet the injury or redressability requirements necessary to establish standing for his claims and seek to dismiss on that basis under Rule 12(b)(1).

Federal Rule of Civil Procedure 12(b)(1) permits a party to move for dismissal of a case if no subject matter jurisdiction exists. A factual attack under Rule 12(b)(1) "challenge[s] the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.* In the instance of a factual attack, because the court's very power to hear the case is at issue, the court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.*

Americhem, DyStar, and MFG assert a factual attack on jurisdiction, arguing that Plaintiff's alleged injury is not traceable to them because, contrary to the allegations in the Complaint, they do not manufacture, use, or discharge PFAS. (Americhem Mot., Doc., 472-1; DyStar Mot., Doc., 478-1; MFG Mot., Doc., 484-1.)

To show traceability, Defendants Americhem and Dystar assert that a Plaintiff need not show that a defendant is the **only** source of a pollutant, but it must show that the defendant is "**a** source." *New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC*, 734 F. Supp. 2d 1326, 1334 (N.D. Ga. 2010) (emphasis added). Americhem and Dystar contend that Plaintiff's alleged injuries are not fairly traceable to their conduct because neither Americhem nor Dystar are a source of the PFAS at issue in Plaintiff's Complaint. (Americhem Mot., Doc. 472-1 at 7; Dystar Mot., Doc. 478-1 at 8.) MFG separately argues that the traceability prong of standing requires that Plaintiff's injury cannot be the "independent action of some third party not before the court." (MFG Doc. 484-1 at 8) (*quoting Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1265 (11th Cir. 2011)).

Plaintiff argues in response that "a plaintiff need not prove that [his] injury can be traced to specific molecules of pollution emitted by the alleged polluter;" instead, "[i]t is enough that a plaintiff "show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." (Pl. Resp. Br., Doc. 507 at 6) (citing *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engr's*, 781 F.3d 1271, 1280 (11th Cir. 2015) (*quoting Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc))).

1. Americhem

The Complaint alleges that Americhem is the owner and operator of a carpet and synthetic fibers manufacturing company in Dalton, Georgia which has discharged industrial wastewater containing PFAS into the Dalton POTW. (Compl. ¶ 20.) Americhem contends that it has never produced nor used any of the PFAS chemicals referenced in Plaintiff's complaint. (Americhem Mot., Doc. 472-1 at 3; *see also* Declaration of Kathy A. Royle, Doc. 472-2 ¶¶ 6-15.) Americhem further contends that it has never manufactured carpet or other textile products at its Dalton Facility and has never used PFAS in connection with the production of any other product at its Dalton Facility. (*Id.*) Additionally, Americhem asserts that it has never manufactured, purchased, sold, supplied, or used PFAS in its business operations and never contributed to PFAS contamination of the waterways at issue. (*Id.* at 4.)

In response, Plaintiff offers the results from a June 2016 Analytical Report commissioned by Dalton Utilities in the course of its operations. (Ex. A. to Pl.'s Resp., Doc. 503-1.) In 2016, Dalton Utilities conducted sampling of Americhem's industrial wastewater discharges and the results, as depicted in the Analytical Report, indicate that Americhem had discharged various PFAS chemicals into the Dalton POTW, including PFOA and PFOS, as shown below:

Client Sample Results

Client: Dalton Utilities
Project/Site: Dalton PFC Analysis

TestAmerica Job ID: 280-84350-1

Client Sample ID: AMERICHEM
Date Collected: 06/09/16 08:00
Date Received: 06/10/16 09:25

Lab Sample ID: 280-84350-2
Matrix: Water

Method: DV-LC-0012 - Perfluorinated Hydrocarbons

Analyte	Result	Qualifier	RL	MDL	Unit	D	Prepared	Analyzed	Dil Fac
Perfluorobutane Sulfonate (PFBS)	**0.0087**	**J**	0.019	0.0079	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluorobutanoic acid (PFBA)	ND		0.019	0.0093	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluorodecanoic acid (PFDA)	ND		0.019	0.0075	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluorododecanoic acid (PFDoA)	ND		0.029	0.014	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluoroheptanoic acid (PFHpA)	ND		0.029	0.013	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluorohexane Sulfonate (PFHxS)	**0.030**		0.029	0.0066	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluorohexanoic acid (PFHxA)	**0.021**		0.019	0.0028	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluorononanoic acid (PFNA)	ND		0.038	0.017	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluorooctane Sulfonate (PFOS)	ND		0.029	0.013	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluorooctanoic acid (PFOA)	ND		0.019	0.0093	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluoropentanoic acid (PFPA)	**0.015**	**J**	0.029	0.010	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluorotetradecanoic acid (PFTeA)	ND		0.029	0.014	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluorotridecanoic Acid (PFTriA)	ND		0.038	0.017	ug/L		06/18/16 11:20	06/20/16 14:16	1
Perfluoroundecanoic acid (PFUnA)	ND		0.019	0.0066	ug/L		06/18/16 11:20	06/20/16 14:16	1

Surrogate	*%Recovery*	*Qualifier*	*Limits*	*Prepared*	*Analyzed*	*Dil Fac*
13C8 PFOA	*102*		*60 - 155*	*06/18/16 11:20*	*06/20/16 14:16*	*1*
13C8 PFOS	*101*		*45 - 130*	*06/18/16 11:20*	*06/20/16 14:16*	*1*

Method: PFC -FOSA - FOSA in Water (LC/MS/MS)

Analyte	Result	Qualifier	RL	MDL	Unit	D	Prepared	Analyzed	Dil Fac
Perfluorooctane Sulfonamide (FOSA)	ND		0.047	0.0053	ug/L		06/23/16 14:00	06/25/16 04:09	1

(*Id.*)

Plaintiff asserts that these discharges are based on preliminary, publicly available documents, and Plaintiff expects to reveal additional industrial discharges of PFAS by Americhem into the Dalton POTW during discovery in this matter. (Pl.'s Resp., Doc. 503 at 6, n.5.) Plaintiff argues that the sampling results demonstrate Americhem's industrial wastewater discharges into the Dalton POTW contained PFAS, thus conflicting with Americhem's proffered testimony. (Pl. Resp., Doc. 503 at 6.)

Replying, Americhem asserts that the 2016 sampling conducted by Dalton Utilities is inadmissible because it is unauthenticated and therefore Plaintiff has not demonstrated traceability to any of Americhem's conduct as required to

survive dismissal under Rule 12(b)(1). (Americhem Reply, Doc. 528 at 3) (citing *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1275, 1283 (11th Cir. 2009) (assuming, without deciding, that district court erred by ruling that trust agreement was inadmissible at Rule 12(b)(1) because the plaintiff had failed to authenticate all signatures on the agreement); *see also PDVSA US Litig. Tr. v. Lukoil Pan Americas, LLC*, No. 19-10950, 2021 WL 1031834, at *2 (11th Cir. Mar. 18, 2021) (finding that plaintiff had waived argument on appeal that district court erred in finding that document had not been properly authenticated).[29]

These cases do not support Americhem's argument that authentication of evidence is required to prevent dismissal. Indeed, the Dalton Utilities Analytical Report falls into the category of business record evidence and the Court has "broad discretion in ascertaining admissibility of business record evidence." *Garnett*, 122 F.3d at 1018. The sampling results and the Declaration testimony of Ms. Doyle creates "conflicting factual inferences" that cannot be resolved on a motion to dismiss. *See, e.g., Lawrence*, 919 F.2d at 1529 (denying defendant's Rule 12(b)(1) motion to dismiss based on "conflicting factual inferences"). Thus, Plaintiff has adequately established standing at this juncture to assert claims for Americhem's alleged discharges of PFAS contaminated wastewater to the Dalton POTW.

2. MFG

Plaintiff alleges that Defendant MFG is the owner and operator of three chemical manufacturing facilities located in and around Dalton, Georgia, which

[29] Americhem does not claim that these results are erroneous.

have discharged industrial wastewater containing PFAS into the Dalton POTW. (Compl. ¶ 40.) MFG argues that it does not own or operate any carpet manufacturing plants[30]; it has never used PFAS in the manufacturing of carpet and associated processes; it has never manufactured any chemicals or products containing PFAS; and it has never sold or supplied PFAS to any carpet manufacturers' facilities. (MFG Mot., Doc. 484-1 at 9; *see also* Declaration of Charles E. Gavin, Doc. 484-2; Declaration of Darin Gyomory, Doc. 484-4.) MFG also contends that it does not discharge anything into the Conasauga River and instead it legally discharges its wastewater to Dalton Utilities. (*Id.*)

Again, Plaintiff offers results of sampling conducted by UGA and Dalton Utilities documenting the presence of PFAS in MFG's wastewater discharges in 2010 and 2016. In 2010, UGA conducted sampling of the industrial wastewater of approximately 50 of Dalton Utilities' industrial users, including MFG. (Exs. A & B to Pl.'s Resp, Doc. 507-2 and 507-3.) This sampling showed the presence of PFOA at 25.8 parts per trillion (ppt) and PFOS at 61.8 ppt at MFG's Brooks Road Plant. (*Id.*) The sampling also showed the presence of PFOS at 4,170 ppt at MFG's Callahan Road Plant. (Ex. A at 11; Ex. B.) In 2016, Dalton Utilities conducted sampling of all three of MFG's Dalton facilities that showed the presence of various PFAS chemicals at all three plants. (Ex. D to Pl.'s Resp., Doc. 507-4.) In addition, in late December of 2010, Dalton Utilities billed MFG nearly $5,500.00 for a "PFC

[30] According to the Declaration of Charles E. Gavin, III, MFG was a specialty and custom contract manufacturer of varying chemistries serving a wide range of chemical companies and operated three manufacturing facilities located in Dalton, Georgia. (Gavin Decl., Doc. 484-2 ¶ 6-7.)

Discharge Fee," representing MFG's "calculated portion" of the expenses incurred by Dalton Utilities in conjunction with the UGA sampling. (Ex. C to Pl.'s Resp., Doc. 507-3.) As with Americhem, these sampling results plainly contradict MFG's assertions and declarations.

MFG asserts the same argument as Americhem: specifically, that the sampling evidence is inadmissible and also because it is unauthenticated and has not been shown to fall under any exceptions to the hearsay rule. (MFG Reply Br., Doc. 527 at 2; s*ee United States v. Garnett*, 122 F.3d 1016, 1018-19 (11th Cir. 1997) (citing *United States v. Jayyousi*, 657 F.3d 1085, 1113 (11th Cir. 2011); *Mamani v. Bustamante*, 968 F.3d 1216, 1244 (11th Cir. 2020)). The Court has "broad discretion in ascertaining admissibility of business record evidence." *Garnett*, 122 F.3d at 1018. MFG also argues that the sampling results are flawed and unreliable. But this challenge is premature and better suited for summary judgment.

The sampling results and the Declaration testimony creates "conflicting factual inferences" that cannot be resolved on a motion to dismiss. *See, e.g., Lawrence*, 919 F.2d at 1529 (denying defendant's Rule 12(b)(1) motion to dismiss based on "conflicting factual inferences"). At this stage in the proceedings, Plaintiff has adequately established standing to assert claims for MFG's alleged discharges of PFAS contaminated wastewater to the Dalton POTW.

3. DyStar

Plaintiff alleges that Defendant DyStar is the owner and operator of a textile chemical manufacturing facility in Dalton, Georgia. (Compl. ¶ 31.) DyStar

purchased its Dalton facility from Lenmar Chemical Corporation in 2013. (DyStar Mot., Doc. 478-1 at 4.) DyStar asserts that it does not produce or use any PFAS chemicals and that it does not discharge any PFAS chemicals to any water bodies. (*Id.* at 2; *see also* Affidavit of Michael Sims.)

Plaintiff offers testing conducted by UGA and Dalton Utilities documenting that Dystar has discharged PFAS from its Dalton facility into the Dalton POTW.[31] (Pl. Resp. Br., Doc. 506 at 6; Exs. A-C to Pl's Resp., Doc. 506-1, Doc. 506-2, Doc. 506-3.) In 2010, UGA conducted sampling of the industrial wastewater of approximately 50 of Dalton Utilities' industrial users, including Lenmar/Dystar. (*Id.* at Ex. A; Ex. B.) Sampling showed that Lenmar's industrial discharge into Dalton's POTW contained the presence of PFOS at 2,560 ppt. (*Id.*) In 2016, Dalton Utilities conducted sampling of industrial discharge from DyStar's Plant that showed the presence of PFAS chemicals, specifically PFHxA. (*Id.* at Ex. C.)

The sampling results and the Declaration testimony creates "conflicting factual inferences" that cannot be resolved on a motion to dismiss. *See, e.g., Lawrence*, 919 F.2d at 1529 (denying defendant's Rule 12(b)(1) motion to dismiss based on "conflicting factual inferences"). Thus, Plaintiff has adequately established standing at this juncture to assert claims for Dystar's alleged discharges of PFAS contaminated wastewater to the Dalton POTW.

[31] Additionally, Plaintiff points to the affidavit of Mr. Sims that following DyStar's acquisition of Lenmar, DyStar operates the Plant in the "same manner, and produced the same products, as it had before." Doc. 478-2 ¶ 4.

Accordingly, all three motions to dismiss [Docs. 478, 472, 484] under Rule 12(b)(1) are **DENIED.**

C. Chemours' Motion to Dismiss [Doc. 482]

Chemours argues under Fed. R. Civ. P. 12(b)(6) that Plaintiff fails to state a claim against it because Plaintiff "makes no allegations of wrongdoing that directly implicate Chemours" and because Chemours did not exist before 2015. (Chemours Mot., Doc. 482 at 2-3.) On this second point, Chemours acknowledges that the Complaint alleges that Chemours assumed the liabilities of DuPont when it was created in 2015; however, Chemours contends that this allegation is not supported by sufficient detail. (*Id.*)

The Complaint alleges that Chemours has manufactured and supplied PFAS to one or more Defendants in this action. (Compl. ¶ 49.) As noted, Plaintiff also alleges that, in 2015, DuPont "spun off its performance chemicals business (which included the design, manufacture, marketing, and sale of PFAS, as well as the environmental liabilities) to Chemours." (*Id.* ¶ 78.) The Complaint also thoroughly alleges that the Supplier Defendants sold and continue to sell, post-2015, PFAS to the Manufacturing Defendants with knowledge of the harm flowing from their conduct. And as stated previously, "[t]he fact that the defendants are accused collectively does not render the complaint deficient." *Kyle K. v. Chapman,* 208 F.3d 940, 944 (11th Cir. 2000).

In short, Chemours' Motion primarily disputes the accuracy of the allegations in the Complaint. But under Fed. R. Civ. P. 12(b)(6), the Court must

accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *See Hill*, 321 F.3d at 1335. Accordingly, the Complaint alleges sufficient facts that "allow[s] the Court to draw the reasonable inference" that Chemours assumed the environmental liabilities of DuPont and also that it has engaged in the same conduct as the other Supplier Defendants since 2015. *Iqbal*, 556 U.S. at 678. Accordingly, Chemours is in the same position as the other Supplier Defendants and the above rulings regarding the Supplier Defendants apply equally to Chemours. Chemours' separate Motion [Doc. 482] is **DENIED**.

D. Polyventive LLC's Supplemental Motion to Dismiss [Doc. 476]

Polyventive states that it brings its Motion "pursuant to Rules 8, 12(b)(1), and 12(b)(6)." (Polyventive Mot., Doc. 476 at 1.)

First, under Fed. R. Civ. P. 8(a) and Fed. R. Civ. P. 12(b)(6), Polyventive argues that Plaintiff fails to state a claim against it because, while Plaintiff alleges that Polyventive discharged PFAS, Plaintiff's asserts harm resulting from the discharge specifically of PFOA and PFOS. (Polyventive Mot., Doc. 476 at 2-3).

This argument is baseless as it ignores allegations in the Complaint that are taken as true at this stage. The Complaint alleges that Polyventive is the owner and operator of a specialty chemical manufacturing facility in Dalton which has discharged wastewater containing PFAS and that Polyventive has also manufactured and supplied PFAS to other defendants. (Compl. ¶ 45.) With respect to the PFAS versus PFOA/PFOS distinction, the Complaint alleges harm flowing from Defendants' discharge of PFAS. (Compl. ¶ 2) (alleging that Plaintiff and those

similarly situated have been damaged due to discharge of PFAS from Defendants' manufacturing and processing facilities into the POTW). The Complaint also alleges that PFAS is the broader "group of man-made chemicals" but that PFOA and PFOS are the most studied PFAS chemicals and that, "while they have been phased out" by the industry, they persist in the environment and in the LAS specifically, and have since been replaced by substitute PFAS, including "Short-Chain PFAS." (*Id.* ¶¶ 52, 54.) Without doubt, Plaintiff's Complaint gives Polyventive "fair notice" of the claims against it, *see Twombly*, 550 U.S. at 555, and "allows the court to draw the reasonable inference" that Polyventive is potentially liable as a manufacturer, supplier, and discharger of PFAS. *Iqbal*, 556 U.S. at 678.

Polyventive next argues that because PFAS are ubiquitous, Plaintiff fails to state a claim against it. (Polyventive Mot. at 3.) Plaintiff alleges that: 90% of the industrial wastewater discharged to the Dalton Utilities' POTW comes from industrial users like Polyventive, (Compl. ¶ 84); Polyventive's specific wastewater discharge contained PFAS (*id.* ¶ 45); Defendants (including Polyventive) knew that the PFAS could not be removed from the POTW and would therefore be discharged into the LAS and Conasauga (*id.* ¶ 87); and the industrial wastewater from the POTW was ultimately discharged from the LAS and thus contaminated the Upper Coosta River Basin (*id.* ¶¶ 1, 2, 88-94). Taking these allegations as true, Plaintiff plausibly alleges causation. Whether Plaintiff can present evidence to support causation is an issue better suited for summary judgment.

Polyventive also argues that Plaintiff's claim against it should be dismissed because the Complaint "mistakenly alleg[es] Polyventive manufactures PFAS products for the carpet industry." (Polyventive Mot., Doc. 476 at 4.) This argument is made in Polyventive's "failure to state a claim" section. In ruling on a motion to dismiss, the Court must accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *See Hill*, 321 F.3d at 1335. Polyventine is not entitled to dismissal because it disputes the allegations in the Complaint. The Court notes that, although Polyventine references some documents in its Motion — specifically PFOA and PFAS Advisories and a letter written from Polyventive's counsel to Plaintiff's counsel — Polyventive attaches no documents to its initial Motion filed on January 28, 2021. (Doc. 476.) On February 1, 2021 Polyventive filed a supplemental brief (Doc. 487) that appears to be a duplicate copy of their January 28 Motion but this time with the PFAS studies and letter from counsel included. Polyventive does not provide a declaration, affidavit or any *evidence* to dispute Plaintiff's allegations that Polyventive is the owner and operator of a specialty chemical manufacturing facility in Dalton, which has discharged wastewater containing PFAS, and that Polyventive has also manufactured and supplied PFAS to other defendants. (Compl. ¶ 45.)[32]

[32] In his response brief, Plaintiff details sampling studies showing Polyventive discharged PFAS into the POTW and references testing results for three different dates: November 30, 2009; March 10, 2015; and May 19, 2016. (Pl. Resp. to Polyventive, Doc. 510 at 2.) But Plaintiff also appears to have forgotten to attach the relevant exhibits to his response.

Next, Polyventive argues that Plaintiff lacks standing because he "has alleged no injury as to any action by Polyventive" and because his injuries are not redressable as to Polyventive because PFAS are ubiquitous. (Polyventive Mot. at 5-6.) In this section, Polyventive rehashes the exact same arguments already stated above regarding: the PFAS versus PFOA/PFOS distinction; causation; and the ubiquity of PFAS. For the reasons above, under the requisite standard at a motion to dismiss, Plaintiff's allegations provide Polyventive notice of the claims against it, allow the Court to draw the reasonable inference that Polyventive is liable as a manufacturer and discharger of PFAS, and plausibly and sufficiently allege causation. *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678; *see also*, *New Manchester Resort & Golf, LLC v. Douglasville Development, LLC*, 734 F. Supp. 2d 1326, 1334 (N.D. Ga. 2010) ("To establish standing to redress an environmental injury, plaintiffs need not show that a particular defendant is the only cause of their injury…"). And, without question, Plaintiff has adequately alleged cognizable injury in his economic harm, and harm to his property and his health. (Compl. ¶¶ 104, 156.) *See Black Warrior Riverkeeper*, 781 F.3d at 1280 (finding that plaintiffs alleged cognizable injury where they alleged "threats to health by drinking water from using affected areas").

Polyventive also argues that Plaintiff has not established standing because his damages are not fairly traceable to Polyventive. (Polyventive Mot. at 7.) In so arguing, Polyventive again relies on the same argument about the ubiquity of PFAS. However, "a plaintiff need not prove that [his] injury can be traced to

specific molecules of pollution emitted by the alleged polluter;" instead, "[i]t is enough that a plaintiff show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." *Black Warrior Riverkeeper*, 781 F.3d at 1280. As detailed above, Plaintiff sufficiently pleads that Polyventive discharged PFAS into the Dalton Utilities POTW and then is dispersed to the LAS and the Conausaga River, thereby contaminating the downstream water supplies for the City of Rome and Floyd County. (Compl. ¶¶ 1, 45.) Polyventive's reliance on *Upper Chatahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 986 F. Supp. 1406 (N.D. Ga. 1997) is inapposite. In that case, which was before the court on summary judgment, the court found that plaintiffs failed to offer any evidence as to the nature of the source of alleged pollution. *Id.* at 1420. At the motion to dismiss stage, Plaintiff is not tasked with supporting his allegations with evidence (although Plaintiff has already provided a plethora of specific sampling data in this case). Plaintiff's allegations are sufficient.[33]

As its penultimate argument, Polyventive contends that it cannot be liable for PFAS discharges because it has only been in existence since 2015. (Polyventive Mot. at 9.) But the Complaint alleges that Polyventive was formerly known as PSG-Functional Materials, LLC, has "at all times relevant" manufactured and supplied

[33] Polyventive also cites to *New Manchester Resort & Golf, LLC v. Douglasville Development, LLC*, 734 F. Supp. 2d 1326, 1334 (N.D. Ga. 2010) for the proposition that a plaintiff "must show that the defendant is a source." That case was also before the court on summary judgment. Here, Plaintiff has, to repeat once again, alleged that Polyventive is a source of the PFAS discharged into the POTW. (Compl. ¶ 45.)

PFAS to one or more defendants, and is an owner and operator of a chemical manufacturing facility that has discharged wastewater containing PFAS into the POTW. (Compl. ¶ 45.) Plaintiff argues in its response brief that there are questions of fact as to whether Polyventive assumed its predecessor's liabilities. (Pl. Resp. to Polyventive at 10.) As with Polyventive's other arguments, this argument is premature and is better assessed based on a review of the evidence presented on summary judgment.

Finally, Polyventive argues that Plaintiff's injury is not particularized as the rate increase applies to all Rome ratepayers. (Polyventive Mot. at 9.) But Plaintiff alleges injury particular to himself: specifically, that he himself had to pay an increased rate and that he suffered harm to his property and his health. (Compl. ¶¶ 174, 178.) These injuries clearly "affect [] plaintiff in a personal and individual way," *Gardner v. Mutz*, 962 F.3d 1329, 1342 (11th Cir. 2020), and is therefore sufficiently particularized.

Polyventive's Motion [Doc. 476] is **DENIED** in full.

E. Columbia Recycling Corp.'s Motion to Dismiss [Doc. 477]

Columbia Recycling Corp. ("Columbia Recycling") filed its Motion to Dismiss [Doc. 477] pursuant to Fed. R. Civ. P. 8(a)(2) and Fed. R. Civ. P. 12(b)(6). The Complaint alleges that Columbia Recycling is the owner and operator of a carpet fiber recycling facility in Dalton that has discharged industrial wastewater containing PFAS into the Dalton POTW. (Compl. ¶ 24.) In its Motion, Columbia Recycling joins the Manufacturing Defendants' Motion to Dismiss (Doc. 473) but

explains that "it is not a 'manufacturer' and but [sic] rather is a recycler of materials who does not use or apply PFAS or PFOS in any of its recycling activities." (Columbia Recycling Mot., Doc. 477 at 2.)

Because Columbia Recycling moves to dismiss under Rule 12(b)(6), the Court accepts Plaintiff's allegations — that Columbia Recycling "discharged industrial wastewater containing PFAS into the Dalton POTW" (Compl. ¶ 24) — as true. *Iqbal*, 556 U.S. at 678. Taking the allegations as true, Columbia Recycling stands in the exact same shoes as the Manufacturing Defendants. Columbia Recycling's own motion makes this readily apparent, as its motion reiterates, nearly verbatim, the arguments included in the Manufacturer Defendant's group motion. Additionally, the Court finds that the allegations in the Complaint, taken as a whole, adequately advise Columbia Recycling of the claims against it. "The fact that the defendants are accused collectively does not render the complaint deficient," because "[t]he complaint can be fairly read to aver that all [manufacturer] defendants are responsible for the alleged conduct" of discharging PFAS into the Dalton POTW while knowing of the implications of said discharge. *Kyle K.*, 280 F.3d at 944. Accordingly, Columbia Recycling's Motion [Doc. 477] is **DENIED** in full for all the same reasons that the Manufacturer Defendants' Motion is denied in full.

F. INV Performance Surfaces' Motion to Dismiss [Doc. 481]

Defendant INV Performance Surfaces, LLC ("INVISTA") filed its Motion to Dismiss [Doc. 481] under Fed. R. Civ. P. 12(b)(6). As alleged in the Complaint,

INVISTA owns and operates a fiber manufacturing facility located in Dalton, was formerly owned by Defendant DuPont, and is the owner of the Stainmaster® brand of carpets. (Compl. ¶ 37.) Plaintiff further alleges that INVISTA has "for many years manufactured and supplied PFAS to one or more of the Defendants in this action" including, for example, Shaw Industries. (*Id.*) However, the Complaint does not allege that INVISTA *discharged* PFAS in the Dalton area. Yet, INVISTA is named as a defendant in counts III, IV, V, VI, and VII. (Compl.)

While INVISTA joins in with both the Manufacturer and Supplier Defendants (INVISTA Mot. at 3), it filed a separate motion to dismiss, asserting that it is an "intermediary in the supply chain" between the PFAS suppliers and the carpet manufacturers, and thus does not fit in either category. (*Id.* at 2.) In its Motion, INVISTA propounds the same arguments contained in the group motions: namely, that (1) the economic loss rule bars Plaintiff's state law claims; (2) Plaintiff cannot maintain a negligence claim against it because he fails to plead sufficient facts and also fails to plead any legally-recognized duty INVISTA owed to him; (3) Plaintiff's negligence *per se* claim against it fails because INVISTA is not alleged to have discharged PFAS; and (4) Plaintiff's claim fails for "additional reasons set forth in the Primary Briefs." (*See generally*, INVISTA Mot.)

In response, Plaintiff does not argue that INVISTA did in fact discharge PFAS but instead contends that INVISTA is a "PFAS Supplier." (Pl. Resp. to INVISTA at 5.) Because INVISTA is not alleged to have discharged PFAS, its situation is more akin to the Supplier Defendants than the Manufacturing

Defendants. Accordingly, the Court's above analyses as to the Supplier Defendants applies to INVISTA. Thus, for the reasons already stated in section V.A.1, the economic loss rule does not bar Plaintiff's claims against INVISTA. However, as INVISTA is not alleged to have discharged PFAS, Plaintiff cannot establish a negligence *per se* claim against it. Similarly, as detailed above, like the other Supplier Defendants, INVISTA did not owe Plaintiff a cognizable legal duty. Finally, INVISTA's additional arguments, which were merely adoptions of the group briefs, are addressed above.

Consequently, INVISTA's Motion [Doc. 481] is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff's negligence and negligence *per se* claims against INVISTA are **DISMISSED**. However, the motion is denied with respect to the nuisance and punitive damage claims.

VIII. Conclusion

After rowing hard down the river of issues, the Court concludes that the majority of Plaintiff's claims withstand Defendants' flood of motions to dismiss. Plaintiff states CWA claims against both Dalton Utilities and DWSWA. While Plaintiff has not adequately alleged that the Supplier Defendants owed him a cognizable duty and thus does not state a negligence claim against them, he has sufficiently alleged that the Manufacturing Defendants and DWSWA owed such a duty. Likewise, Plaintiff has stated a claim for negligence *per se* against the Manufacturing Defendants and DWSWA based on duties under the CWA and GWQCA. Plaintiff has also adequately stated claims for nuisance and abatement of

the nuisance against all Defendants under Georgia's broad understanding of nuisance. Plaintiff's punitive damages claim, which is dependent on the substantive clams, also remains intact at this juncture.

Accordingly, a recap of the Court's rulings is set forth again in the below table.

Doc. No.	Motion	Ruling
472	Americhem's Motion to Dismiss	**DENIED**
473	Manufacturer Defendants' Motion to Dismiss[34]	**DENIED** in full
474	Dalton Utilities Motion to Dismiss	**DENIED** with respect to the CWA and abatement of nuisance claims; **GRANTED** with respect to nuisance (damages) claim (Count VI)
475	DWSWA Motion to Dismiss	**DENIED** in full
476	Polyventine LLC Supplemental Motion to Dismiss	**DENIED**
477	Columbia Recycling Corp. Motion to Dismiss	**DENIED**
478	DyStar Motion to Dismiss	**DENIED**
479	Supplier Defendants' Motion to Dismiss[35]	**GRANTED** with respect to negligence claim; **DENIED** with respect to nuisance claims and punitive damages claim
481	INV Performance Surfaces, LLC Motion to Dismiss	**GRANTED** with respect to negligence and negligence *per se* claim; **DENIED** with respect to nuisance and abatement claims, and punitive damages claim

[34] This includes the following Defendants: Aladdin Manufacturing Corporation; Americhem, Inc.; Arrowstar, LLC; Chem-Tech Finishers, Inc.; Color Express, Inc.; Cycle Tex, Inc.; DyStar, L.P.; Engineered Floors, LLC; Fibro Chem, LLC; IMACC Corporation; JB NSD, Inc.; MFG Chemical, LLC; Milliken & Company; Mohawk Carpet, LLC; Mohawk Industries, Inc.; Oriental Weavers USA, Inc.; Polyventine LLC; Secoa Technology, LLC; Shaw Industries Group, Inc.; Shaw Industries, Inc.; Tarkett USA, Inc.; The Dixie Group, Inc.

[35] This includes the following Defendants: 3M Company; Daikin America, Inc.; E.I. du Pont de Nemours and Company; The Chemours Company.

482	Chemours Supplemental Motion to Dismiss	**DENIED**
483	Daikin Supplemental Motion to Dismiss	**GRANTED** with respect to negligence *per se* claim; **DENIED** with respect to nuisance and abatement claims, and punitive damages claim
484	MFG Chemical, LLC Motion to Dismiss	**DENIED**

Accordingly, the following claims remain:

Count I	CWA claim against Dalton Utilities
Count II	CWA claim against DWSWA
Count III	Willful, Wanton, Reckless, or Negligent Misconduct against the Manufacturing Defendants and DWSWA
Count IV	Negligence *per se* against the Manufacturing Defendants and DWSWA
Count V	Punitive Damages against the Manufacturing Defendants, the Supplier Defendants, and DWSWA
Count VI	Public Nuisance against the Manufacturing Defendants, the Supplier Defendants, and DWSWA
Count VII	Abatement of the nuisance against all Defendants

Also noted above, the Court **DENIES** Plaintiff's Motion for Leave to File Fourth Amended Complaint [Doc. 600] but **GRANTS** Plaintiff's Motion for Leave to File Matters Under Seal [Doc. 602].

Accordingly, Defendants are **DIRECTED** to file their Answers within **21 days** of the date of this Order. The Parties should proceed with discovery in accordance with the Proposed Revised Scheduling Order [Doc. 574-1].

IT IS SO ORDERED this 20th day of September 2021.

Honorable Amy Totenberg
United States District Judge

Johnson v. 3M *et al.*, 4:20-cv-8-AT

Acronym List:

CWA	Clean Water Act, 33 U.S.C. §§ 1251, *et seq*.
DWSWA	Dalton-Whitfield Solid Waste Authority
EPA	United States Environmental Protection Agency
EDP	Georgia Department of Natural Resources, Environmental Protection Division
FCWD	Floyd County Water Department
PSC	Georgia Public Service Commission
GWQCA	Georgia Water Quality Control Act, O.C.G.A. § 12-5-20, *et seq*.
LAS	Land Application System, *i.e.*, the approximately 9,800-acre land application system operated by Dalton Utilities, where effluent from wastewater treatment is sprayed onto the surface.
NPDES Permit	National Pollution Elimination Discharge System Permit, *i.e.*, a permit issued by the United States Environmental Protection Agency or an authorized state agency for the discharge of pollutants into the waters of the United States, subject to conditions established within the permit and by applicable federal and state statutes and regulations. See 33 U.S.C. § 1342.
PFAS	Per- and polyfluoroalkyl Substances, *i.e.*, a group of man-made chemicals that Plaintiff alleges have been discharged directly or indirectly into rivers, streams, and other watersheds upstream of the City of Rome.
PFOA	Perfluorooctanoic acid, a certain PFAS chemical
PFOS	Perfluorooctanesulfonic acid, a certain PFAS chemical
POTW	Publicly Owned Treatment Works, *i.e.*, any devices and systems, which are owned by a state or municipality, used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature. *See* 33 U.S.C. § 1292 and 40 C.F.R. § 403.3.
ppt	parts per trillion
RWSD	Rome Water and Sewer Division
SURR	Dalton Utilities' Sewer Use Rules and Regulations, which "Sets forth policies for the administration and operation of the Dalton Utilities Publicly Owned Treatment Works (POTW)" and

	establishes "[u]niform requirements for direct and indirect dischargers of pollutants from non-domestic sources into the POTW . . . to enable Dalton Utilities to comply with all applicable State and Federal laws. . . ."
UGA	University of Georgia
WPCP	Water Pollution Control Plant, *i.e.*, A general term used by Georgia EPD for sewage or wastewater treatment plants, including POTWs.

Chart of Defendants:

Manufacturing Defendants (including alleged dischargers directly involved with the carpet manufacturing industry): Aladdin Manufacturing Corporation Americhem, Inc. ("Americhem") Arrowstar, LLC Chem-Tech Finishers, Inc. Color Express, Inc. Columbia Recycling Corp. Cycle Tex, Inc. DyStar, L.P. ("DyStar") Engineered Floors, LLC Fibro Chem, LLC IMACC Corporation INV Performance Surfaces, LLC (INVISTA) JB NSD, Inc. MFG Chemical, LLC Milliken & Company Mohawk Carpet, LLC Mohawk Industries, Inc. Oriental Weavers USA, Inc. Polyventine LLC ("Polyventine") Secoa Technology, LLC Shaw Industries Group, Inc. Shaw Industries, Inc. Tarkett USA, Inc. The Dixie Group, Inc.	**Supplier Defendants**: 3M Company Daikin America, Inc. ("Daikin") E.I. du Pont de Nemours and Company The Chemours Company ("Chemours") **City of Dalton d/b/a Dalton Utilities ("Dalton Utilities")** **Dalton-Whitfield Solid Waste Authority ("DWSWA")**