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COUNTY OF WAKE Office of Administrative Hearings 13EHR18253

WASCO LLC Petitioner and DYNA-DIGGR LLC Intervenor v. NC DEPT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT Respondent	**FINAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

This matter is before the undersigned on the *Motion for Summary Judgment* filed September 25, 2014 by the Respondent North Carolina Department of Environment and Natural Resources, Division of Waste Management, acting by and through its Hazardous Waste Section (hereinafter "the Section"), pursuant to N.C.G.S. § 1A-1, Rule 56, and 26 NCAC 03 .0115(a), seeking entry of a Final Decision pursuant to N.C.G.S. § 150B-34. Upon due consideration of the submissions of the parties and the applicable statutes, regulations, and legal precedents, the following dispositive Order is entered.

Statement of the Case

Petitioner seeks to be relieved of the obligation to provide control and remediation at a hazardous waste site in Swannanoa. The pit at the former Asheville Dyeing and Finishing Plant site once held an underground storage tank for waste *perchloroethylene* ("PCE"), a suspected carcinogen, and contains significant residual contaminated soil and groundwater today.

The entity currently constituted as WASCO LLC ("WASCO"), began its involvement with the site in 1995. *See*, Respondent's Exhibits to the *Motion for Summary Judgment,* tab G, section 3, page 364, and tab B, section 12, page 67 (hereinafter, "R Ex p 364 & 67.") The Section sent the letter that triggered the filing of this contested case to the Petitioner and the Intervenor on August 16, 2013 (*see*, R Ex p 23). The letter concerned the requirements of the State Hazardous Waste Program, and asserted, in relevant part, that WASCO was an "operator," and consequently required to obtain a post-closure permit, or an "Administrative Order on Consent" ("AOC") in lieu of the post-closure permit, pointedly noting that, "If an agreement ... cannot be reached, the Section always has the option of issuing a Compliance Order with Administrative Penalty for violation of 40 C.F.R. § 270.1(c) and associated post-closure regulations." Petitioner's recalcitrance represented a stark departure from its past relationship with the Respondent. See, *e.g.*, a draft Administrative Order on Consent submitted by

Petitioner's then-counsel, together with a list of 42 reports of remediation and containment work performed by Petitioner's contractors. R Ex p 46-56.

WASCO filed a Petition commencing this contested case in the Office of Administrative Hearings on September 27, 2013, alleging that the Section's characterization of WASCO as an "operator" in this context deprived WASCO of property or otherwise substantially prejudiced its rights and violated the North Carolina Administrative Procedure Act ("NCAPA"), N.C.G.S. § 150B-23(a). As the current owner of the property, and facially liable as such under the applicable environmental statutes, Dyna-Diggr LLC ("Dyna-Diggr") was permitted to intervene on December 12, 2013.

Respondent recounts that WASCO served its first set of discovery requests on January 6, 2014, and that, to date, the Section has responded to two (2) sets of Requests for Admission (212 requests in total), two (2) sets of Requests for Production of Documents (110 requests in total), and one (1) set of Interrogatories; has produced various business records, including over 11,000 pages of emails; and, has provided WASCO with electronic access to its public file.

The Section's *Motion for Summary Judgment* was filed with over 1,200 pages of exhibits. WASCO moved for and received a 30-day extension of the usual 10-day period to file a Response to the Motion. On October 21, 2014, WASCO filed a second motion for an extension of time, supported by a 12-page brief with five attachments totaling approximately 50 pages, including an *Affidavit of WASCO's Counsel Dan Biederman*; followed by an *Amendment and Supplement of Affidavit of WASCO's Counsel Dan Biederman* (approximately 30 pages), including legal arguments concerning key question of the proper statutory interpretation of the term "operator." Petitioner argued that it needed to take, transcribe, and review the Section's Rule 30(b)(6) deposition(s) before responding to the motion. On October 22, 2014, the Section filed a Reply opposing WASCO's motion and moved to stay discovery pending resolution of the summary judgment motion.

WASCO's only outstanding discovery request is a *Notice to Depose* the Section per N.C. Gen. Stat. § 1A-1, Rule 30(b)(6). This was projected to entail taking the depositions of four Section employees concerning their personal knowledge about the parties' activities concerning the hazardous waste site. (Their Affidavits appear at R Ex p 1178-95.) Petitioner argued that the parties had discussed taking these depositions in early December, before the December 5, 2014 discovery deadline, but asked that the additional time to respond to the Motion be extended to 45 days following receipt of the transcripts -- which Respondent contended would extend the time for non-moving party's response to a total of 117 days from the date the motion was filed.

In consideration of the breadth of completed discovery; the probability that "the facts which would have raised a genuine issue of material fact were within the defendant's knowledge," based on the theory of Respondent's motion, *Gebb v. Gebb*, 67 N.C. App. 104, 108, 312 S.E.2d 691, 694 (1984); the opportunity Petitioner had to identify any such material facts in its Response; and, the unjustifiable delay and imposition on Respondent of further discovery in light of these circumstances, the undersigned denied Petitioner's request for additional months to respond, and granted Respondent's request for a stay of discovery until the summary judgment Motion was resolved, in an Order entered on October 28, 2014.

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On November 7, 2014, WASCO responded to the Section's *Motion for Summary Judgment* in detail, appending seven affidavits with numerous attachments, and requested a hearing on the motion. Following opportunities for the parties to suggest language for this Order, the motion is determined in accordance with 26 NCAC 03 .0115(b).

Statement of the Undisputed Facts

This contested case concerns real property located at 850 Warren Wilson Road, Swannanoa, North Carolina, 28778, which was assigned the United States Environmental Protection Agency ("EPA") Identification Number NCD 070 619 663 ("the Facility").

A pit at the Facility once contained an underground storage tank for waste perchloroethylene ("PCE"), a dry cleaning solvent. The pit was closed as a landfill in 1992 with contaminated soil left in place. Significant groundwater contamination remains today.

Petitioner initially became involved with the Facility in 1999. At the time, it was known as United States Filter Corporation or USFilter. WASCO later changed its name to Water Applications & Systems Corporation, and then was converted to the limited partnership with the name WASCO, LLC.

On June 15, 1998, the Petitioner -- then known as United States Filter Corporation – acquired Culligan Water Technologies, Inc. (hereinafter, "Culligan"). (R Ex p 362) In its March 31, 1998 Form 10-K filing with the Securities and Exchange Commission, Petitioner disclosed that:

> In 1995, Culligan purchased an equity interest in Anvil Holdings Inc. As a result of this transaction, Culligan assumed certain environmental liabilities associated with soil and groundwater contamination at Anvil Knitwear's Asheville Dyeing and Finishing Plant (the "Plant") in Swannanoa, North Carolina. Since 1990, Culligan has delineated and monitored the contamination pursuant to an Administrative Consent Order entered into with the North Carolina Department of Environment, Health and Natural Resources relating to the closure of an underground storage tank at the site. Groundwater testing at the plant and two adjoining properties has shown levels of a cleaning solvent believed to be from the Plant that are above action levels under state guidelines. The company has begun remediation of the contamination. The company currently estimates the cost of future site remediation will range from $1.0 million to $1.8 million and that it has sufficient reserves for the site cleanup.

(R Ex p 364). Culligan assumed responsibility for the environmental operations at the Facility in a Guaranty Agreement in favor of the property's buyer, Anvil Knitwear, Inc., in return for $9 million (R Ex p 352), exchanged for stock in Anvil Holdings, Inc. (R Ex p 335), as a part of a transaction in which Winston Mills, Inc. and McGregor Corporation, both wholly owned by Astrum International Corp., sold "all of [their] assets comprising their Anvil Knitwear division"

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to Anvil Knitwear, Inc. and Anvil Holdings, Inc., including the Facility in Swannanoa. (See deed from Winston Mills to Anvil Knitwear, Inc. (R Ex p 249), which includes an environmental "exception.") Astrum was a co-guarantor with Culligan and, in effect, guaranteed Culligan's performance under the Guaranty Agreement. (R Ex p 352)

Three months later, Culligan, as "a subsidiary of Astrum International Corp.," executed a *Corporate Guarantee for Closure or Post-Closure Care* to the United States Environmental Protection Agency ("EPA") declaring that, "For value received from the operator, guarantor [Culligan] guarantees to EPA that in the event the operator fails to perform post-closure care of the [Facility] ... the guarantor shall do so or establish a trust fund" to defray the expense of "post-closure care" of the Facility. (See Exhibit B to Dyna-Diggr's *Motion to Intervene*.) The operator was identified as "Winston Mills, Inc. ... which is a subsidiary of Astrum International Corp."

To assure payment for the obligations it assumed with its acquisition of Culligan, Petitioner entered into a "Trust Agreement " (conforming with 40 C.F.R. § 264.143, with North Carolina modifications) with Petitioner as the "Grantor," and Wells Fargo Bank, N.A. as "Trustee," to "establish a trust fund ... for the benefit of DENR." It recites that:

> ... [T]he Department of Environmental and Natural Resources, "DENR," an agency of the State of North Carolina, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of facility[.]

(R Ex p 409) In Section 4, "Payment for Closure and Post-Closure Care," the Trust Agreement provides that

> The Trustee shall make payments from the fund as the Secretary of the Department of Environmental and Natural Resources (the "Secretary") shall direct, in writing, to provide for the payment of the cost of closure and/or post-closure care of facilities covered by this agreement.

(R Ex p 410). The agreement further provides that, "this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Secretary, or by the Trustee and the Secretary, if the Grantor ceases to exist." (R Ex p 413) The location of the subject property, and the estimated costs, are listed. That amount -- adjusted to $443,769.98 by June 27, 2013 -- is guaranteed by a Letter of Credit. (R Ex p 524)

The Trust Agreement defines the "Grantor" as "the owner or operator who enters into this agreement and any successors or assigns of the Grantor." (R Ex p 409)

Between 1999 and the present, WASCO has supplied and maintained post-closure financial assurance for the Facility. WASCO or its employees and the Section have communicated directly concerning financial assurance and other matters related to the Facility's

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environmental compliance. WASCO is named as an operator in EPA forms submitted to the Section in 2004, 2006, and 2008.

Between 2004 and the filing of the instant contested case, WASCO has hired and paid for the work of Mineral Springs Environmental, P.C. ("Mineral Springs") concerning the Facility, including operation and maintenance of air sparge/soil vapor extraction systems, groundwater sampling, preparation of reports and their submission to the Section, project management, assessment activities, and payment of utility bills. WASCO has been in communication with Mineral Springs concerning the aforementioned work and has edited draft documents.

The site was transferred to Intervenor Dyna-Diggr, LLC on December 18, 2007. (R Ex p 249) WASCO continued to maintain the Facility's financial assurance, pay for remediation costs including sampling and reporting, and use Mineral Springs as an environmental consultant in communications with the Section following Dyna-Diggr's purchase of the Facility.

Regulatory Framework

The "State Hazardous Waste Program" consists of the North Carolina Solid Waste Management Act ("the Act"), contained in N.C. Gen. Stat. Chap. 130A, Art. 9, §130A-290, *et seq.*, and the rules promulgated thereunder and codified in Subchapter 13A of Title 15A of the North Carolina Administrative Code ("the Rules"), which the Department has been authorized to operate in lieu of the federal program under the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 - 6992k.

The regulation cited in the letter, 40 C.F.R. § 270.1, which "establish provisions for the [Federal] Hazardous Waste Permit Program," is adopted by reference at 15A NCAC 13A .0113(a), and enables approved States to implement and enforce "basic EPA [Environmental Protection Agency] permitting requirements, such as application requirements, standard permit conditions, and monitoring and reporting requirements," that are "part of a regulatory scheme implementing RCRA," 42 U.S.C. 6091 et seq., including entering into "enforceable documents for post-closure care" of hazardous waste sites, which may include a "remedial action" pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1976 ("CERCLA"), as amended RCRA, commonly known as the "Superfund" legislation.

The Act instructs the Department to "cooperate . . . with . . . the federal government . . . in the formulation and carrying out of a solid waste management program," including a program for the management of hazardous waste "designed to protect the public health, safety, and welfare; [and to] preserve the environment." N.C.G.S. § 130A-294(a)(2), (b). The Act mandates the adoption of rules to implement that program, which the Department "shall enforce." N.C.G.S. § 130A-294(b). The Rules largely adopt and incorporate the applicable federal regulations by reference. The authority to enforce the State Hazardous Waste Program has been delegated to the Director of the Division of Waste Management. The Director has issued a sub-delegation of this authority to the Chief of the Section.

"Operator"

The State Hazardous Waste Program requires that "operators . . . of landfills" obtain post-closure permits. 40 C.F.R. § 270.1(c) (adopted by reference at 15A NCAC 13A .0113(a)). Here,

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the former waste-PCE tank at the Facility is a "landfill," within the meaning of the regulation. WASCO's Petition was occasioned by the Section's proposed agreement with other responsible parties concerning post-closure care of the facility, but WASCO's position that it is not in the position of an "operator" has implications for all of its responsibilities for the Facility.

The material facts necessary to the legal determination of whether Petitioner has the responsibilities of an "operator," within the meaning of the applicable laws and regulations, are not in dispute.

WASCO's post-closure operator liability for the Facility is a matter of statutory construction -- a question of law. As a matter of law, the parties dispute whether the definition of "operator" in N.C.G.S. § 130A-290(a)(21) or the definitions in 40 C.F.R. §§ 260.10, 270.2 (adopted by reference at 15A NCAC 13A .0102(b), .0113(a)) apply. Viewing the evidence in the light most favorable to WASCO, it is not necessary for the undersigned to resolve this issue. The result is the same under either definition. While the parties have identified no North Carolina case law interpreting the meaning of the term "operator" under the State Hazardous Waste Program, guidance from the EPA, case law from other jurisdictions—including a unanimous opinion of the Supreme Court, and the undisputed facts related to WASCO's more than 14 years of involvement with the Facility support the Section's characterization of WASCO as a post-closure "operator."

Respondent relies primarily on the United States Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). That case, the Court began by noting the simplistic statutory definition of "operator" as "any person owning or operating such [CERCLA regulated] facility." "Here of course we may again rue the uselessness of CERCLA's definition of a facility's 'operator' as 'any person ...operating' the facility, 42 U.S.C.A. § 9601(20)(A)(ii), which leads us to do the best we can to give the term its 'ordinary or natural meaning.'" The Court concluded with a broad, comprehensive contextual reading of the term applicable beyond the specific facts of the case before it.

> [U]nder CERCLA, an **operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility**. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, and operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, **or decisions about compliance with environmental regulations**.

(Emphasis mine.) *United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S. Ct. 1876, 1887, 141 L. Ed. 2d 43 (1998). This understanding of the term "operator" conforms with Congress' declared "national policy ... that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated" and that "[w]aste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." The utility of this application of "operator" is emphasized elsewhere in *Bestfoods* by the observation that, "even a saboteur who sneaks into the facility at night to discharge its poisons out of malice" could not escape operator liability "[u]nder the plain language of" 42 U.S.C. § 9607(a)(2). *Id.*, at 524 U.S. 51, 65, 118 S. Ct. 1876, 1886, 141 L. Ed. 2d 43.

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Petitioner proposes a series of refinements to the definition of "operator" or its application that would exclude it. But it is difficult to believe that such exceptions could be carved out for a corporate entity that voluntarily took on the responsibility of operating the facility in return for value received. It is notable that, for some years, even the States were not afforded the protections of the 11th Amendment from Superfund claims. *See, Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-14, 109 S. Ct. 2273, 2281, 105 L. Ed. 2d 1 (1989), overruled by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66, 116 S. Ct. 1114, 1128, 134 L. Ed. 2d 252 (1996).

It is noted that, in light of the substantial discovery completed, the detailed arguments raised by WASCO in its Response and accompanying Affidavits - including WASCO's alternative request for summary judgment in its favor - and because the putative issues of material fact raised by WASCO do not bear on the determinative legal issue, it appears that WASCO has not been prejudiced by not having the Rule 30(b)(6) depositions it proposed to take prior to its response to the present motion.

FINAL DECISION

Respondent is entitled to judgment as a matter of law, and consequently, the Petition must be, and hereby is, DISMISSED. N.C. Gen. Stat. §§ 150B-34(e); 1A-1, Rule 56.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 2nd day of January, 2015.

Hon. J. Randolph Ward
Administrative Law Judge

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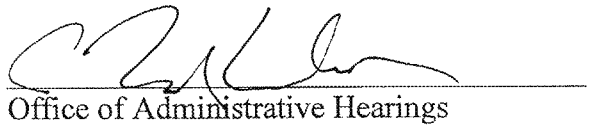
This the 2nd day of January, 2015.



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