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PHYSICAL DOCUMENT

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NOTICE OF INTENT TO SUE

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|---|---|
| **Author:** | Hilgemeier, Gavin |
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| **Co-Counsel:** | |
| **Counsel LSA(s):** | |
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| **DJ#:** | EE20190083 |
| **Case Name:** | CITIZEN SUITS: GENERAL RCRA, CERCLA & CWA NOTICES OF INTENT & COMPLAINTS CALENDAR 2019 |
| **Court:** | DC D. D.C.;D.C. Cir. |
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U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL
RESOURCES DIVISION

OCT 09 2020

EXECUTIVE OFFICE

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October 2, 2020

*Via email and certified mail, return receipt requested*
The Honorable Andrew R. Wheeler
Administrator
U.S. EPA
1200 Pennsylvania Ave. NW
Washington, DC 20004

**Re: Notice of Intent to Sue under Section 7002(a)(2) of RCRA, 42 U.S.C. § 6972(a)(2) regarding the Asheville Dyeing and Finishing Facility in Swannanoa, North Carolina**

Dear Administrator Wheeler:

On behalf of our client, WASCO LLC ("WASCO" or the "Company"), we write to provide notice of the Company's intent to sue you, in your official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA), under section 7002(a)(2) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(2), regarding your failure to carry out non-discretionary duties to oversee North Carolina's EPA-authorized state hazardous waste program and ensure its consistency with federal law, regulations and policy. The lawsuit relates to the North Carolina Department of Environmental Quality's ("NCDEQ") issuance of a draft RCRA Hazardous Waste Management Permit for the Asheville Dyeing and Finishing Facility located at 850 Warren Wilson Road in Swannanoa, North Carolina (EPA I.D. No. NCD070619663) (the "Facility"). NCDEQ incorrectly names WASCO as operator on the permit and has publicly declared its intent to issue a final permit imminently.

WASCO never owned the Facility and never had a single employee at the Facility or anywhere in the state of North Carolina. WASCO never generated, stored, treated or disposed of hazardous waste at the Facility, and has never sought to do so. WASCO is not the current operator of the Facility. WASCO does not have any physical presence in North Carolina and is not seeking to ever have a physical presence there. Further, WASCO is not seeking a RCRA permit, or any other type of permit, for the Facility.

Nevertheless, the state of North Carolina has erroneously concluded that WASCO is an operator of the Facility and must now be subject to a RCRA Part B permit that would require



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characterization and remediation of the *entire* 65-acre Facility – including a portion of the Facility NCDEQ calls the "Northrop Dump," where military-related and other pre-jurisdictional wastes were deposited prior to the enactment of RCRA. In reaching that erroneous conclusion, the State improperly modified the language of 40 C.F.R. § 270.1(c) to omit any reference to the RCRA permit applicability criteria, which WASCO does not and cannot meet.

Notice of this pending lawsuit is not the first time WASCO has approached you and the EPA for assistance related to this matter. By letter to you dated January 11, 2019, which summarizes some relevant facts related to the Facility, WASCO sought a meeting with the EPA in its federal oversight role, seeking assistance regarding NCDEQ's protracted and improper effort to require WASCO to submit an application for a RCRA permit. The meeting was held March 1, 2019.

WASCO's court-ordered submittal deadline was the day before the meeting with the EPA. Given that WASCO does not own or operate the Facility, it was impossible for WASCO to submit a complete application. Nevertheless, WASCO timely submitted to NCDEQ, under protest and with a full reservation of rights and defenses, documents to the best of its ability to comply with the state court's directive to submit a permit application. WASCO copied you and several EPA senior executives on this submittal.[1]

During the meeting, WASCO representatives related the information noted above and explained that Facility has been solely owned and operated by Dyna-Diggr, LLC and/or Loren Lanter ("Lanter"), respectively, the entity's managing member and/or CEO, (collectively, "Dyna-Diggr") since December 1, 2007. The purchase agreement (terms of which were withheld from WASCO until November 2014) conveyed the site to Dyna-Diggr as-is, where-is, with all-faults.[2] Since at least October 10, 2012, RCRAInfo, the national database of record, and North Carolina's public records portal identify Dyna-Diggr as the sole owner and operator for the Facility.

The EPA responded to WASCO's entreaties via letter dated April 5, 2019, that read, in pertinent part: "The EPA continues to have confidence in the State of North Carolina's implementation of its authorized hazardous waste program and finds no involvement is necessary in this matter." Two months after the EPA letter, NCDEQ manually entered additional information into RCRAInfo that continues to identify Dyna-Diggr as the sole current owner and operator of the Facility.

In July 2020, NCDEQ published a draft RCRA permit naming WASCO as operator and Dyna-Diggr as owner of the Facility. Ironically, the draft permit contains information at odds with its naming, expressly incorporating information identifying Dyna-Diggr as the *sole current owner and operator*.[3] Nevertheless, NCDEQ has stated its intention imminently to issue a final permit.

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[1] WASCO delivered a CD containing all of the documents it submitted in response to the state court order to you and several other EPA senior officials by March 1, 2019. WASCO expressly incorporates those documents by reference herein.

[2] Within six months of assuming ownership of the Facility, Dyna-Diggr was obliged to provide RCRA financial assurance under 40 C.F.R. § 270.72(a)(4). Dyna-Diggr has never provided this financial assurance, nor has North Carolina compelled it to do so.

[3] NCDEQ incorporates the document addressed in note 1, *supra*, into the draft permit as a "RCRA Part B Permit Application." Page 6 of the document states that Dyna-Diggr, not WASCO, is the sole current operator of the Facility.

The EPA has long held that RCRA permits may be issued *only* to *current* facility owners and operators. Indeed, the EPA has repeatedly conducted training for NCDEQ hazardous waste staff and management with materials emphasizing that only current owners and operators are proper permittees. By issuing this draft permit, NCDEQ has failed to meet its obligation to conduct its EPA-approved state program "at all times" in compliance with the requirements of Subpart A of 40 C.F.R. Part 271.

Additionally, in issuing the draft permit, NCDEQ failed to comply with multiple substantive and procedural permitting requirements, including, but not limited to:

- NCDEQ failed to make a pre-permit compliance determination, as required under RCRA § 3005.
- NCDEQ has failed to inspect the Facility for compliance at least once every two years. According to the EPA's Enforcement and Compliance History Online database, NCDEQ has not inspected the Facility in over three years.[4]
- NCDEQ failed to determine, as required, that the permit "application" was complete prior to issuing a draft (and the fact sheet accompanying the draft permit expressly acknowledges unspecified deficiencies in that purported application).
- Despite acknowledging deficiencies in the "application," NCDEQ failed to issue any Notice of Deficiencies, which are required per Part 124. Instead, NCDEQ states it intends to issue a final permit that will require corrections of the unspecified deficiencies. This failure is at odds with both federal and state regulations and NCDEQ's regular practice of issuing Notices of Deficiencies and Completeness Determination letters for other facilities to be permitted. (Enclosure 1 provides a summary of NCDEQ's recent Notices of Deficiencies and Completeness Determination letters.)

Moreover, the draft permit seeks to: (i) immediately force WASCO to comply with a RCRA post-closure plan and groundwater sampling and analysis plan that NCDEQ approved solely for Winston Mills in 1992, pursuant to § 265.118, and (ii) require WASCO to continue to provide RCRA post-closure financial assurance on behalf of Winston Mills.

WASCO timely commented on the proposed permit, detailing its multiple deficiencies. The public comments were copied to you and several EPA senior officials.[5]

WASCO would prefer not to sue you, but NCDEQ appears intent to press this improper course of action that only EPA and the federal courts can stop. NCDEQ's long-standing effort to hold WASCO accountable for a site it never owned or operated has caused WASCO to expend

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Pages 5–21 of the document: (i) state that WASCO does not meet the applicability criteria for a RCRA permit and does not meet any of the applicability criteria for the Part 264 regulations addressed in the draft permit, and (ii) state that WASCO physically cannot comply with the standard conditions under section 270.30, and that as a result EPA RCRA guidance states that NCDEQ cannot issue a RCRA permit. Appendix G of the draft permit also includes language that states Dyna-Diggr is the sole current operator.

[4] https://echo.epa.gov/detailed-facility-report?fid=110000615264.

[5] You and several other EPA senior officials received a CD containing all of WASCO's comments on the proposed permit. WASCO expressly incorporates its comments by reference herein.

considerable resources and, if required to assume post-closure permit obligations, even more onerous obligations.

Accordingly, WASCO will be asking the court to enjoin you to ensure: (i) that NCDEQ administers the North Carolina authorized hazardous waste program in a manner consistent with RCRA; (ii) that NCDEQ compels Dyna-Diggr to provide financial assurance for the Facility, notifies WASCO in writing that it no longer needs to provide financial assurance on behalf of Winston Mills for the Facility, and thereafter releases that financial assurance mechanism; (iii) that NCDEQ removes WASCO from the draft Part B Permit prior to issuance; (iv) that the EPA objects to the draft permit due to its numerous procedural and substantive faults, including its impermissible naming of WASCO as a permittee; (v) that the EPA objects to any final Part B Permit naming WASCO as operator that NCDEQ may issue with respect to the Facility; and (vi) that, despite any such objection and or other action you or the EPA undertakes, if NCDEQ proceeds with issuance of a final Part B RCRA Permit to WASCO, that the EPA withdraws RCRA authorization for North Carolina's hazardous waste program. WASCO will also be seeking declaratory relief and attorneys' fees and costs and any other relief which the court should deem proper.

If you have any questions regarding this notice or the enclosed complaint, please do not hesitate to contact the undersigned.

Respectfully,

Bernadette M. Rappold
Shareholder

Enclosure

cc: (*Via first-class mail)*

William P. Barr, U.S. Attorney General

Enclosure 1

## NCDEQ RCRA Permit Application Notices of Deficiency Summary (2009–2020) (see 40 C.F.R. § 124.3)

| | | |
|---|---|---|
| Aug. 5, 2020 – | Piedmont Natural Gas (NCR000147280) ♦ | M. Babuin [– –] [1] |
| | cc'ed to **J. Woosley** | |
| July 2, 2020 – | General Electric (Connover) (NCD003237948) ♦ | C. Bari [9/4/20] |
| May 11, 2020 – | DART (NCD121700777) ♦ | K. O'Neal [– –] |
| | cc'ed to **J. Woosley** | |
| Mar. 23, 2020 – | DuPont (Kinston) (NCD003190386) ♦ | **M. Siedlecki** ▲ [– –] |
| Oct. 28, 2019 – | Ecoflo (NCD980842132) ♦ [*see* 4/11/19 NOD] | K. O'Neal ▲ [2/17/20] |
| Oct. 18, 2019 – | DuPont (Brevard) (NCD003152329) – **2d NOD** | **M. Siedlecki** ▲ [12/4/19] |
| | "There are minor deficiencies that require correction and/or revision **before a determination of completeness can be issued**." | |
| July 29, 2019 – | DuPont (Brevard) [*Mentioned in 2d NOD but not posted*] | **M. Siedlecki** [*see 2d NOD*] |
| Apr. 12, 2019 – | Safety-Kleen (St Pauls) (NCD980846935) ♦ [NCDEQ: "#2"] | C. Bari ▲ [5/20/19] |
| Apr. 11, 2019 – | Ecoflo (NCD980842132) ♦ | K. O'Neal ▲ [*see 2d NOD*] |
| Jan. 8, 2019 – | Mallinckrodt (NCD042091975) ♦ | K. O'Neal ‡ ▲ [6/28/19] |
| Oct. 4, 2018 – | Brenntag (NCD003471158) ♦ | M. Babuin ▲ [2/7/19] |
| June 28, 2018 – | Fmr. Alcatel-Lucent (Winston Salem) (NCD003213907) ♦ | R. McDaniel ▲ [11/21/18] |
| | cc'ed to **J. Woosley** | |
| Mar. 26, 2018 – | Porcelanite – Letter, meeting in lieu of **3d NOD** | **M. Siedlecki** ▲[12/7/18] |
| Feb. 23, 2018 – | DyStar (NCD003168168) ♦ | K. O'Neal ▲ [*see 7/12/18 letter*] |
| Feb. 16, 2018 – | Apex Tool (NCD042892067) ♦ | R. McDaniel ▲ [3/29/19] |
| | cc'ed to **J. Woosley** | |
| Feb. 6, 2018 – | Porcelanite (NCD986181451) – **2d NOD** | **M. Siedlecki** ▲ [*see 3/26/18*] |
| | "[T]here are several deficiencies that require further correction and/or revision **before a determination of completeness can be issued**." | |
| Feb. 6, 2018 – | Fmr. Alcatel-Lucent (Raleigh) (NCD003185238) – **2d NOD** | **M. Siedlecki** ▲ [3/9/18] |
| | "[T]here are several deficiencies that require further correction and/or revision **before a determination of completeness can be issued**." | |
| Oct. 6, 2017 – | Fmr. Alcatel-Lucent (Raleigh) (NCD003185238) ♦ | **M. Siedlecki** ▲ [*see 2d NOD*] |
| Sept. 18, 2017 – | Porcelanite (NCD986181451) ♦ | **M. Siedlecki** ▲ [*see 2d NOD*] |
| Aug. 29, 2017 – | Former John Deere (NCD091249417) ♦ | M. Babuin ▲[5/3/18] |
| Mar. 31, 2017 – | Badin Business Park (NCD003162542) ♦ | R. McDaniel ▲ [6/27/18] |
| | cc'ed to **J. Woosley** | |
| 2013–2015: | Safety-Kleen – **2d NOD** ♦; Clean Harbors ♦; DART ♦ | ‡ ▲ |
| 2009–2010: | DuPont (Fayetteville) ♦; Ingersoll-Rand ♦; Detrex – **3d NOD** ♦ | ‡ ▲ |

‡ – cc'ed to **EPA Reg. 4;** ▲ – cc'ed to HWS Supervisor B. McCarty; ♦ – NOD standard language [2]

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[1] HWS Signatory (RCRA Permit Writer) / [date of Completeness Determination Letter]

[2] "The attached Notice of Deficiency identifies specific items that must be corrected **before the application can be determined to be complete**," or substantially similar language. (All emphasis in quotations is added).

"The [Secretary of NCDEQ] **shall not** begin the processing of a permit ***until*** the applicant has **fully complied with the application requirements** for that permit." 40 C.F.R. § 124.3(2), as adopted by 15A N.C. Admin. Code 13A.0105(a), modified by *id.* 13A.0101(b) (emphasis added).



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## Enclosure 1

### NCDEQ Determination of Completeness Letters for RCRA Permit Application (2011–2020) ("in accordance with 40 CFR 124.3")

| | | |
|---|---|---|
| Sept. 4, 2020 – | General Electric (NCD003237948) | W. Hunneke (C. Bari) [1] |
| Feb. 17, 2020 – | ECOFLO (NCD980842132) | B. McCarty (K. O'Neal) |
| Dec. 4, 2019 – | DuPont (Brevard) (NCD003152329) | B. McCarty (**M. Siedlecki**) |
| June 28, 2019 – | Mallinckrodt (NCD042091975) | B. McCarty (K. O'Neal) ‡ |
| May 20, 2019 – | Safety-Kleen (Saint Pauls) (NCD980846935) | B. McCarty (C. Bari) |
| Apr. 8, 2019 – | Safety-Kleen (Charlotte) (NCD079060059) | B. McCarty (C. Bari) |
| Mar. 29, 2019 – | Apex Tool (NCD042892067) cc'ed to **J. Woosley** | B. McCarty (R. McDaniel) |
| Mar. 18, 2019 – | Safety-Kleen (Raleigh) (NCD000776740) | B. McCarty (C. Bari) |
| Feb. 7, 2019 – | Brenntag (NCD003471158) | B. McCarty (M. Babuin) |
| Dec. 7, 2018 – | Former Porcelanite (states application is ***not*** complete) [2] | **J. Woosley** (**M. Siedlecki**) ▲ ⊥ |
| Nov. 21, 2018 – | Former Alcatel-Lucent (NCD003213907) cc'ed to **J. Woosley** | B. McCarty (R. McDaniel) |
| Aug. 13, 2018 – | DAK Americas (NCD047369046) | B. McCarty (J. Ghiold) |
| Aug. 8, 2018 – | DSM Dyneema (NCD047373766) | **J. Woosley** (C. Utterback) ▲ |
| Aug. 6, 2018 – | Safety Kleen (Archdale) (NCD077840148) | B. McCarty (**M. Siedlecki**) |
| July 24, 2018 – | DSM Pharmaceuticals (NCD047373766) | B. McCarty (C. Utterback) |
| July 12, 2018 – | Dystar Carolina (NCD003168168) (Clarification) | B. McCarty (K. O'Neal) |
| June 27, 2018 – | Badin Business Park (NCD003162542) cc'ed to **J. Woosley** | B. McCarty (R. McDaniel) |
| May 3, 2018 – | Former John Deere (NCD000771964) | B. McCarty (M. Babuin) |
| Mar. 9, 2018 – | Former Alcatel-Lucent USA Inc. (NCD003185238) (ref. to "**Second Notice of Deficiency**") | B. McCarty (**M. Siedlecki**) |
| June 9, 2017 – | Former Parker Hannifin (NCD002591014) | B. McCarty (J. Ghiold) |
| Jan. 5, 2015 – | DART Acquisitions (NCD121700777) | B. McCarty (K. O'Neal) ‡ |
| Mar. 7, 2014 – | Nexeo (NCD061263315) | **J. Woosley** (C. Utterback) ‡ ▲ |
| July 30, 2013 – | Safety Kleen (NCD000776740) | Q. Qi (K. Lawson) ‡ ▲ |
| June 21, 2013 – | YRC Freight (NCD046362117) | B. McCarty (**M. Siedlecki**) ‡ |
| Dec. 14, 2012 – | Petty Machine (NCD991278805) | B. McCarty (**M. Siedlecki**) ‡ |
| Sept. 26, 2012 – | Johnston Co. School Bd. (NCD981476955) | Q Qi (A. Ulishney) ‡ ▲ |
| June 14, 2011 – | Pitt Co. School Bd. (NCD986187458) | V. Jackson (**M. Siedlecki**) ‡ ▲ |
| Apr. 26, 2011 – | Haynes Wire (NCD986190791) | V. Jackson (A. Ulishney) ‡ ▲ |
| Feb. 22, 2011 – | Int'l Paper (NCD003156460) | V. Jackson (**M. Siedlecki**) ‡ ▲ |

‡ – cc'ed to **EPA Reg. 4**; ▲ – cc'ed to HWS Supervisor B. McCarty; ⊥ – cc'ed to NCDEQ counsel

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[1] HWS Signatory (HWS Project Manager / RCRA Permit Writer)

[2] "[T]he completeness determination … is deemed incomplete. The information submitted to date **does not comply with the application requirements** for a complete Part B Permit Application." (Emphasis added).

"The [Secretary of NCDEQ] **shall not** begin the processing of a permit ***until*** the applicant has **fully complied with the application requirements** for that permit." 40 C.F.R. § 124.3(2), as adopted by 15A N.C. Admin. Code 13A.0105(a), modified by *id.* 13A.0101(b) (emphasis added).



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REFERRED
MAIL REFERRAL UNIT

OCT 6 2020

READER #3

GT GreenbergTraurig

**Greenberg Traurig, LLP**
2101 L Street, N.W. | Suite 1000
Washington, D.C. 20037

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
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