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January 11, 2019

Via hand delivery and email

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
Wm. Jefferson Clinton Building (MC 1101A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable Barry Breen
Acting Assistant Administrator
Office of Land and Emergency Management
U.S. Environmental Protection Agency
Wm. Jefferson Clinton Building (MC 5101T)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Asheville Dyeing & Finishing Facility, North Carolina (EPA ID No. NCD070619663)

Dear Messrs. Wheeler and Breen:

On behalf of my client, WASCO, LLC (WASCO), I write to seek the ***EPA's urgent intercession to right a serious wrong in the state of North Carolina, an injustice that threatens not only WASCO, but decades of RCRA guidance and precedent.***

Critically, by dispensing with fundamental principles of fairness, North Carolina's decision will likely discourage would-be guarantors from serving at hazardous waste management facilities, thereby undermining RCRA's financial assurance program. This would be bad for business, bad for the EPA and bad for the environment and human health.

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In asking for your assistance now, WASCO recognizes that the timing is difficult for the EPA, due to the partial government shutdown. We are hopeful that the EPA's involvement would be a light lift – that a telephone call from you may be enough to persuade senior management of the North Carolina Department of Environmental Quality (NC DEQ) to change course.

A. Introduction.

The matter relates to the Asheville Dyeing & Finishing (AD&F) facility, a 62-acre site in Swannanoa, North Carolina (EPA ID No. NCD070619663).[1] Groundwater at and near the facility is contaminated with perchloroethylene (PCE), presumed to be caused from dry-cleaning operations that ceased in the early 1980s. A remote one-acre section of the facility, known informally as the "Northrop Dump," appears to contain waste pyrotechnics and other contamination stemming from Northrop manufacturing operations there in the 1960s.

WASCO'S connection to AD&F is tenuous, at best. ***WASCO never owned the facility, never directed or undertook any operations that caused the contamination and never managed any hazardous waste there***. Further, WASCO does not have and has never had any employees working at the facility or in the state of North Carolina. Yet the North Carolina Department of Environmental Quality (NC DEQ), acting through the North Carolina Superior Court for Buncombe County, has ordered that WASCO, instead of the facility's current owner and operator, must submit a RCRA Part B permit application as operator of a purported landfill at the facility no later than February 28, 2019 (*North Carolina v. WASCO, LLC*, 18-CVS-1731, NC Sup. Ct. for Buncombe County, *slip. op.* (November 30, 2018) (Part B Order).[2]

WASCO is seeking a stay of the Part B Order pending reconsideration and is planning to appeal if that effort is unsuccessful. But after years of administrative and judicial litigation in multiple North Carolina forums, the trajectory seems clear and, absent application of the EPA's oversight authority, ***unlikely to change before WASCO is put to the impossible task (and expense) of preparing a Part B permit application for a site it does not own and cannot access***.

B. Brief site history.

The relevant site history commences in 1976, with the sale of the property from M. Lowenstein & Sons, Inc. (Lowenstein) to Winston Mills, Inc. (Winston Mills), which operated the site through its Asheville Dyeing and Finishing Division. (Please see Enclosure A, a flowchart with an overview of the site history and corporate relationships.) The facility is bounded to the north by the Chemtronics Superfund site. Celanese Corp. (Celanese) and a predecessor of Northrop Grumman Systems Corp.

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[1]"Asheville Dyeing & Finishing" is a trade name of Winston Mills, Inc., which is not related to WASCO.

[2]Notably, the Part B Order gives WASCO only 90 days from entry (which predated service on WASCO by 11 days) to prepare and submit the permit application, even though North Carolina and federal RCRA regulations allow at least six months for such submittals. *See* 40 CFR § 270.10 (e)(4) ("Any owner or operator ***shall be allowed at least six months*** from the date of request to submit part B of the application.") (Emphasis added).

(Northrop Grumman) each — directly, or through subsidiaries — owned the Chemtronics and AD&F sites as one unitized property prior to 1976.

Either Lowenstein or Winston Mills installed the two underground storage tanks (USTs) that were used as part of a dry-cleaning operation incident to the primary textile manufacturing operations at the facility: (a) a 4,000-gallon raw perchloroethylene (PCE) UST; and (b) a 2,000-gallon waste PCE tank. After Winston Mills terminated the dry-cleaning operations and no longer required PCE, it removed the USTs on March 23, 1985. In May of that year, a predecessor of NC DEQ terminated the site's RCRA identification number.

On August 29, 1990, a predecessor of NC DEQ (North Carolina Department of Environment and Natural Resources) and Winston Mills entered an administrative order on consent, *In re* Winston Mills, Inc. (Docket No. 89-249) (AOC). That order required Winston Mills to reinstate its EPA ID number, file a Part A permit application, and formally close the location of the former waste PCE tank. Winston Mills removed the potentially affected soil from the area (down to the water table), lined the pit with geotechnical fabric, filled the pit with clean crushed stone, installed a two-foot thick clay cover, and a two-foot thick final cover. The AOC remains open and in the name of Winston Mills.

In 1995 Winston Mills sold the site to Anvil Knitwear, Inc. (Anvil Knitwear). The site transfer was subject to an indemnification agreement covering certain environmental obligations of Winston Mills. Winston Mills' corporate grandparent, Astrum International Corp. (Astrum), and another subsidiary of Astrum, Culligan International Co. (Culligan) agreed to serve as co-guarantors of that indemnification agreement. Culligan's counsel has confirmed that ***no claim for reimbursement was ever been submitted under the co-guaranty agreement***. The co-guarantee agreement terminated at the latest in December 2007, when Anvil Knitwear subsequently sold the facility on an as-is basis to Dyna-Diggr, LLC (Dyna-Diggr). In both 2010 and 2012, Dyna-Diggr submitted RCRA Subtitle C Site Identification forms, marked as subsequent notifications, listing itself as the sole owner and operator of the site (WASCO is not mentioned in the forms and did not sign the forms).[3,4]

C. <u>WASCO's tenuous connection</u>.

The facility has had at least seven owners and operators since the 1960s. WASCO is not one of those seven. Further, WASCO is not seekingto treat, store, or dispose of any hazardous waste at the facility, and is not seeking, and has never sought, to conduct any business whatsoever in North Carolina. Nevertheless, NC DEQ has selected WASCO to bear responsibility for carrying out corrective action at the facility, even though WASCO's connection to the facility consists solely of the following:

[3]In an earlier case associated with the Part B Order (*WASCO LLC v. N.C. DENR*, No. COA 16-414, filed April 18, 2017), NC DEQ represented in writing to the tribunal that the two Dyna-Diggr forms were "Part A Permit Applications."
[4]The EPA's responses to various FOIA requests, including EPA-R4-2018-011123, identify these RCRA forms as the last submitted for the site.

- Culligan, a subsidiary of WASCO's former subsidiary, Culligan Water Technologies (CWT)[5], co-guaranteed the 1995 indemnification agreement among Winston Mills, McGregor Corporation (Winston Mills' parent) and Anvil Knitwear and, additionally, beginning in May 1995, replaced McGregor in providing RCRA post-closure financial assurance on behalf of Winston Mills. On June 2, 2003, NC DEQ allowed Culligan to use a standby letter of credit (LOC) to provide RCRA financial assurance for Winston Mills.

  Based on perceived contractual indemnification obligations to CWT's new parent and a lack of relevant knowledge, WASCO continued to provide the LOC on behalf of Winston Mills after it divested CWT in September 2004. The LOC currently remains in place. Although NC DEQ still points to the Culligan co-guaranty agreement, it terminated upon Dyna-Diggr purchasing the facility from Anvil Knitwear in December 2007;

- WASCO, first in error in 2004 and then under protest in 2008, filed RCRA Part A applications as operator, after pressure from certain staff members of the NC DEQ; and

- WASCO paid for a contractor to: maintain a non-regulated air sparging system originally funded by CWT, collect various groundwater samples at the site, and conduct limited assessments at the site (also under protest).

We show below why these connections form an insufficient basis for requiring WASCO to apply for a Part B permit as an operator of a landfill.

1. <u>Neither guaranteeing an indemnification agreement nor providing post-closure financial assurance renders a company an "operator" under RCRA.</u>

RCRA provides two definitions of "operator." The first, in 40 CFR § 260.10, defines "operator" to mean "the person responsible for the overall operation of the facility"; while the second, in 40 CFR § 270.2 defines operator, in circular fashion, to mean the "operator of any facility or activity subject to regulation under RCRA."

As an initial matter, we note that North Carolina is alleging the existence of a land disposal facility at the property, for which it claims WASCO must submit a Part B permit application. Yet the state has not proffered any evidence that a PCE "disposal facility" exists at the facility. The definitions of "disposal facility" in Parts 260 and 270 both require ***intentional placement*** of hazardous waste into or onto land or water. And there is no evidence that any party intentionally placed waste PCE into or onto the land at the facility.

In any event, federal courts have long considered "active involvement" to be the hallmark of operation under RCRA. *See, generally, United States v. Environmental Waste Control*, 710 F.Supp. 1172 (N.D. Ind. 1989). A financial guarantor, simply by guaranteeing an indemnification agreement, does not possess the requisite amount of active involvement to be deemed an "operator" under either RCRA

[5]WASCO divested CWT (and its worldwide portfolio of subsidiaries) to CDRC Holding S.àr.l in September 2004.

definition. That involvement is even shakier here where the guarantor is a former second-generation subsidiary of WASCO.

The same holds true for an entity serving as guarantor for RCRA financial assurance. By regulation, a *RCRA guarantor must be an entity other than the owner or operator*. Thus, a guarantor does not constitute an "operator" under RCRA, absent other facts, not present here, evidencing active involvement in hazardous waste management operations.

2. Applications filed in error and under protest do not trump the truth: WASCO's operation of an air sparger does not constitute hazardous waste management.

In December 2004, after receiving a directive from NC DEQ and wanting to maintain a good relationship with the regulator, WASCO submitted a RCRA Part A amendment listing itself as operator and Anvil Knitwear as owner of the AD&F facility. It submitted a subsequent Part A, under protest, in 2008, listing itself as operator and Dyna-Diggr as owner.[6]

In hindsight, both submissions were mistakes. But the mere submission of a form does not alter the facts on the ground. It is undisputed that, at the time of the submissions, WASCO's only involvement with the site was its retention of a contractor to maintain voluntary air sparging systems (i.e., not regulated under RCRA) originally funded[7] by Culligan (its second-tier subsidiary) in 1998 and 2002 and to take semi-annual groundwater samples from four monitoring wells.[8] As of May 31, 2018, the air sparging systems have been disconnected from their power supplies and removed from service.

The EPA has long held that, "Groundwater contaminated by RCRA hazardous waste **is not** considered a solid waste and is, therefore, not classified as a hazardous waste. However, because hazardous waste is 'contained in' the groundwater, it must be treated 'as if' it was a RCRA hazardous waste if it is removed for treatment, storage, or disposal." *RCRA Subtitle C Reporting Instructions and Forms: EPA Forms 8700-12, 8700-13 A/B, 8700-23* at 92 (OMB #2050-0024; Expires 05/31/2020).

The air sparging systems, which operated for approximately 20 years, removed no contaminated groundwater for treatment, storage and disposal; rather, they simply percolated air to a depth of less than thirty feet below ground surface. Notably, no RCRA permit or order governing or compelling their operation has ever been issued.

D. Need for Your Assistance.

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[6]Since 2010, the site's RCRA Subtitle C identification forms identify Dyna-Diggr as the sole owner and operator.
[7]Culligan's rationale for installing the air sparging systems seems related to its desire to appear as an environmental "good guy" to the North Carolina regulators and to limit its potential financial liability under the indemnification guarantee. North Carolina itself refers to these systems as "voluntary" and not required under either the AOC or the post-closure plan approved thereunder, both of which remain in Winston Mills' name.
[8]At NC DEQ's request, the consultant periodically conducted sampling of various other monitoring wells that Winston Mills had installed on other portions of the facility.

A WASCO affiliate, Veolia Water North America Operating Services, LLC (Veolia), was pleased to receive a helpful letter dated December 17, 2018 from Barnes Johnson, Director of the EPA's Office of Resource Conservation and Recovery (ORCR) (ORCR Letter) (enclosed as Enclosure B). In that letter, Mr. Johnson responded to a Veolia inquiry based on hypothetical facts relating generally to all Veolia operations in North America – and specifically to a threatened federal RCRA citizen suit against Veolia in a different state.

Mr. Johnson confirmed that the Agency would not generally view a hypothetical corporation akin to WASCO, lacking the same indicia of ownership or operational control, as a RCRA operator under 40 CFR § 260.10 or a RCRA owner or operator under 40 CFR § 270.2. In so confirming, he correctly noted that "states authorized to implement the RCRA program may have more stringent requirements that may impact the Company's status under RCRA." ORCR Letter at 2.

But more stringent RCRA requirements are not at issue here. State law prohibits NC DEQ from adopting environmental standards more stringent than the federal government;[9] and it has adopted the federal RCRA regulations essentially without any substantive modification.

WASCO included the ORCR Letter in the exhibits to its December 27, 2018 motion to stay[10] the Superior Court decision pending reconsideration; as of this writing, the company has heard nothing from the Court or North Carolina regarding that motion.

This motion is the just the latest in a series of attempts, administrative and judicial, to obtain redress here. At this point, WASCO has exhausted its administrative remedies. And with the court-ordered deadline for submission of the Part B permit drawing near, WASCO's window for judicial redress is rapidly closing.

In sum, WASCO has no active involvement the AD&F facility. It does not own, and has never owned, the facility. The air sparging systems – which, even while operating, did not remove hazardous waste for treatment, storage or disposal – are shut down and disconnected from electrical power.

Accordingly, WASCO believes it improper to be required to submit a RCRA Part B permit application for ***the AD&F facility where it operates nothing.*** We seek your assistance to rein in this improper attempt to require WASCO to submit such a permit application. We would appreciate an audience with one or both of you to answer questions you may have and prepare you for a call with NC DEQ.

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[9] N.C.G.S. § 150B-19.3(a). None of the five exceptions identified in the statute applies here.
[10] We include a link that motion for your review: https://edocs.deq.nc.gov/WasteManagement/0/edoc/1274963/NCD070619663_ADF_Permit_DefendantsMotionforReconsideration_20181227.pdf?searchid=0b304a5f-45af-4807-a153-5c53e1ecd5fa.

We thank you for your consideration and look forward to hearing from you soon.

Sincerely,

Bernadette Rappold
Shareholder

Encl.

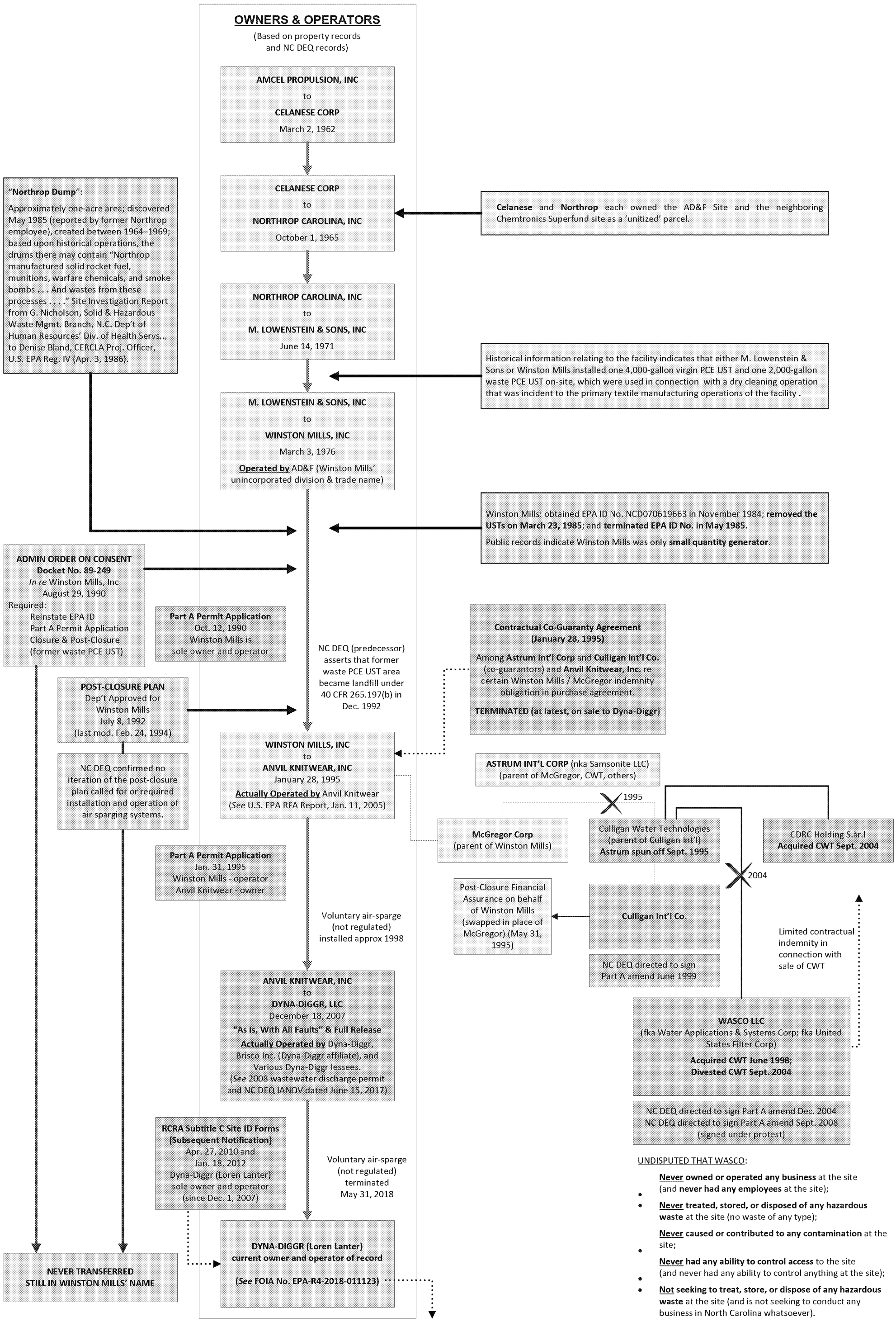
cc:
Rodney G. Huerter (WASCO)
Barnes Johnson (ORCR)

WDC 373838703v1

ENCLOSURE A

HISTORICAL OWNERS & OPERATORS of the ASHVILLE DYEING & FINISHING ("AD&F") FACILITY, EPA ID No. NCD 070 619 663

(AD&F was a trade name for Winston Mills, Inc.; the trade name transferred to Anvil Knitwear, Inc. in 1995)



Note: Internal comment to first entry of RCRAInfo Site Detail Report for the January 2012 form states "NO HAZARDOUS WASTE ACTIVITY AT THIS SITE"

ENCLOSURE B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 17 2018

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

NOW THE
OFFICE OF LAND AND
EMERGENCY MANAGEMENT

Mr. Rodney Huerter
Veolia North America
4760 World Houston Parkway, Suite 100
Houston, Texas 77032

Dear Mr. Huerter:

Thank you for your letter of October 4, 2018, requesting clarifications of our March 5, 2018, letter to Veolia North America regarding the definition of "owner or operator." Your letter describes a hypothetical set of facts about a "Company" and then, based on assuming those facts to be undisputed, asks whether the U.S. EPA (the Agency) would generally consider the Company to be an *operator* under 40 CFR 260.10, or an *owner or operator* under § 270.2.

The hypothetical set of facts about the Company are as follows:

- never owned a particular property in a state (the "*Site*"), or any facility located on the Site;
- never conducted any treatment, storage, or disposal of hazardous waste at the Site (and never used any contractor to treat, store, or dispose of any hazardous waste at the Site on behalf of the Company);
- is not seeking (and has no intention to ever seek) a permit to treat, store, or dispose of hazardous waste at the Site;
- never exercised "active and pervasive control over the overall operation of the facility"; and was never "in charge of [overall] plant operations on a day-to-day basis" at the Site;
- never caused or contributed to any contamination at the Site;
- never engaged in any of the activities that require "Special Forms of [RCRA] Permits" under subpart F of part 270, either with respect to the Site, or any other area in the United States that is subject to the RCRA jurisdiction of the Agency; and
- is not identified in the most current RCRA Subtitle C Site Identification Forms related to the Site, and is not identified as the current owner or operator of record of the Site in the Agency's RCRAInfo system or in any of the Agency's public web-based resources (e.g., Envirofacts).

The questions from your letter are included here, followed by our response.

> Question 1: Based on the above-noted hypothetical facts, would the Agency generally consider the Company to be an "operator" of the Site under § 260.10 that is required to conduct RCRA corrective action or obligated to obtain a RCRA permit? (Yes or No)
>
> Question 2: Based on the above-noted hypothetical facts, would the Agency generally consider the Company to be an "owner or operator" under § 270.2 that is required to conduct RCRA corrective action or obligated to obtain a RCRA permit? (Yes or No)

Questions such as these are difficult to answer with certainty, as they are based on a hypothetical situation. Additionally, the letter *does not* present hypothetical, or actual, facts about activities that would call into question the status of the Company as an owner or operator. However, assuming the set of hypothetical facts presented is undisputed and the Company conducts no other activities that would otherwise trigger RCRA applicability criteria, the Agency would *generally* not consider the Company to be an operator under § 260.10 or an owner or operator under § 270.2. Please note that states authorized to implement the RCRA program may have more stringent requirements that may impact the Company's status under RCRA.

Thank you for your inquiry. If you have any questions, please contact Jeff Gaines of my staff at (703) 308-8655, or gaines.jeff@epa.gov.

Sincerely,

Barnes Johnson

Barnes Johnson, Director
Office of Resource Conservation and Recovery