

Exhibit 26

Appellate Court Hearing
Transcript (October 6, 2016)

(transcribed from the Court's video/audio recording of the hearing).

COURT OF APPEALS OF NORTH CAROLINA

WASCO LLC, Petitioner, v. N.C. DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT,
Respondent.

No. COA16-414

Oral Arguments
October 6, 2016 Session

Presiding Judges:

Judge J. Douglas McCullough
Judge Donna S. Stroud
Judge Valerie Zachary

APPEARANCES:

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1 (The proceedings began at 10:28 a.m.)

2 MR. SOWATZKA: Your Honor, I think we're
3 ready.

4 JUDGE STROUD: Okay. Very good. All
5 right. Did you want to reserve --

6 MR. SOWATZKA: Five minutes, Your Honor.

7 JUDGE STRoud: Five? Okay. Very good.

8 MR. SOWATZKA: Good morning, Your Honors.

9 May it please the Court. My name is Adam Sowatzka,
10 and I'm a lawyer with King and Spalding in Atlanta.
11 Sitting at counsel table with me is my co-counsel,
12 David Gudry, from King and Spalding's Charlotte
13 office. And we represent WASCO, LLC, the Appellant
14 in this matter.

25 I'll point you to document Exhibit 486 in

1 the record, which is the first letter of credit
2 issued by WASCO in 2003. And if you look at that
3 document carefully, clearly the plain language of
4 the letter of credit states that it's being
5 provided on behalf of Asheville Dyeing and
6 Finishing. WASCO provided that guarantee because
7 of a contractual arrangement as part of a
8 transaction involving its former subsidiary,
9 Culligan Water Technologies, Inc., which it sold in
10 2004.

11 We're not here, however, to talk about
12 that financial assurance. There's -- there's no
13 dispute, and WASCO concedes, that that letter of
14 credit and the standby trust are still in place and
15 available to be called in by the State at any time
16 under the terms and conditions of those agreements.

17 Instead, the DEQ is attempting to expand
18 WASCO's liability beyond those financial
19 instruments by deeming it an operator in the former
20 waste tank. In fact, for the first time in
21 their -- in this whole case, in their reply brief,
22 they state that, and I quote, "The entity with
23 ultimate decision-making responsibility for
24 post-closure care compliance matters since 2004 was
25 WASCO." And that's simply not true. I think it's

1 very clear in the record that there were three
2 other companies that were responsible for the
3 post-closure care in this matter.

4 The first was Winston Mills, and they
5 signed -- they were the owner and operator of this
6 facility, signed a consent order back in 1990.
7 Winston Mills sold the site in 1995 to Anvil
8 Knitwear, who owned and operated the site from '95
9 all the way through 2007. I point you to Exhibit
10 374 in the record. And then --

11 JUDGE STROUD: And that reminds me of a
12 question I was going to ask.

13 MR. SOWATZKA: Sure.

14 JUDGE STROUD: Did -- by any chance --
15 are these exhibits, by any chance, available on a
16 disc?

17 MR. SOWATZKA: Absolutely, Your Honor.
18 We'd be happy to provide them that -- in that
19 fashion.

20 JUDGE STROUD: That would be really
21 great. Okay.

22 MR. SOWATZKA: No problem.

23 JUDGE STROUD: I mean, it just makes it a
24 lot easier to search them, as you know, 'cause you
25 probably do it that way on your computer, so --

5

1 MR. SOWATZKA: Not a problem.

2 JUDGE STROUD: Okay. Thanks.

3 MR. SOWATZKA: Yeah, we can do that.

4 And, finally, Dyna-Diggr came and bought the
5 facility from Anvil Knitwear in 2007. And they're
6 the current owner and operator of the facility. If
7 you drive up there today, they're operating a
8 business at that location.

When DEQ started to look at WASCO and ask
WASCO to do other things in around 2013 in
September, WASCO was the one who filed for a
declaratory judgment, wanted the administrative law
judge to decide it wasn't an operator based on the
law and the facts of this case. So that's why
we're here.

I don't know any other place to start in
an environmental case other than starting with the
rules, so I thought I'd take a few minutes and walk
you through the rules and our view of -- of what
the rules are in this case. On Page 5 of their
brief, the State sets out their statutory authority
for this case. And interestingly, they leave out
the actual provision that gives them the enabling
authority for this case under the North Carolina
General Statutes, and that's 130A-249(c). I think

1 they talk about (b), and I think they talk about
2 other provisions, but they don't talk about (c).

3 Further, their own delegation for the
4 section, who's brought -- who's involved in this
5 action. And that's found at 1237. That provides
6 that their authority's limited to enforce the
7 provisions of 130A, Chapter 19, which is
8 130A-294(c). So starting with their delegated
9 authority and looking at the enabling statute, you
10 then go to the definitions section for that whole
11 section. So you start with the definitions.

12 In 130A-290 -- in fact, it's A-21. And
13 I'll have to read the definition, because I think
14 it's really important. The definition provided by
15 the General Assembly -- and -- and the General
16 Assembly actually amended the act in 1989, so it
17 added this provision specifically later on after it
18 had set up this enabling statute.

19 It says, "'Operator' means any person,
20 including the owner, who's principally engaged in,
21 and is in charge of, the actual operation,
22 supervision and maintenance of a solid-waste
23 management facility and includes the person in
24 charge of a shift or periods of operation during an
25 part of the day."

1 In addition DEQ's own regulation -- so
2 that's the statute. Then you look to the
3 regulations. The regulations at 13A-0102(a)
4 incorporate that definition by reference.

5 DEQ can't really make up their mind about
6 what regulation does apply. They talk about the
7 federal regulations under RCRA. They then come
8 back in the -- in the -- in their reply brief. In
9 this case, talk about three separate definitions,
10 including two from the federal regulations, and
11 says well, they're all kind of the same, so we're
12 going to, you know, go do something else. And I --
13 we -- we disagree with that. We think that's
14 wrong. We think the Superior Court made that same
15 decision, and the Superior Court was wrong. We
16 believe this is the statute that applies in this
17 case.

18 And I -- and for a couple of reasons
19 and -- and -- and it's grounded in the law. And
20 the first is a case that we cited in Note 34 in re:
21 E.I. du Pont Nemours, where the Court recognized
22 that North Carolina General Statute 130A-290, which
23 provides the definitions which I just read, they
24 are to be applied throughout this article.
25 Therefore, it's necessary to look at the statutory

1 definitions. So the Courts have said, these are
2 the definitions you apply.

3 Further, if you apply the State's
4 interpretation, it would render the definition of
5 "operator" that the General Assembly added in 1989
6 to be of no use. And of course, under RJ Reynolds,
7 which is also cited in our brief, they stated that
8 the statute -- in fact, this Court stated that,
9 "The statute must be considered as a whole and
10 construed if possible so that none of its
11 provisions are rendered useless or redundant." And
12 so if you're just going to ignore that provision
13 and look to other -- other statutory authority,
14 like under the federal law, you would, in fact, do
15 that. And Courts say that you can't.

16 JUDGE STROUD: I want to ask you, too,
17 about the -- in the definition section. So we have
18 operator, and it would -- it seems to me that
19 several of the terms in the definition of operator
20 are also defined in the statute, such as
21 solid-waste management as purposeful systematic
22 control of the generation storage collection
23 transport, separation, et cetera, et cetera of
24 disposal of solid waste. Is that --

25 MR. SOWATZKA: That's exactly right.

1 JUDGE STROUD: All of those additional
2 pieces of definition, solid waste management
3 facility is defined -- okay.

4 MR. SOWATZKA: That's exactly right, Your
5 Honor.

6 JUDGE STROUD: All of those bits would
7 have to fit into that definition.

8 MR. SOWATZKA: It does. And that's
9 what -- that's why we were so frustrated in this
10 case when the Superior Court and the State have
11 ignored their own definitions, went to a -- a whole
12 other statute, a federal statute. And then -- and
13 then another statute beyond that to create a new
14 test which has never, you know, for the first time
15 used in North Carolina law, rather than taking the
16 time -- and it's painful -- but taking time to
17 break down the definition and look at the other
18 definitions within that section and see how they
19 all fit together. Because at the end of the day,
20 when you start to apply those definitions in this
21 case, it is very clear that WASCO is not the
22 operator. So let me take a minute and do that.

23 The State admitted in the oral argument
24 before the Superior Court WASCO's never owned the
25 site. Never had an active business on the site.

10

1 There's no -- nothing in the record that we ever
2 caused or contributed to any contamination at the
3 site. There's no allegation, as you just pointed
4 out in the definition of solid waste management,
5 that we ever used, stored, transported, handled or
6 were otherwise involved with hazardous waste at the
7 facility. There's been no action. We've never had
8 an employee even visit the site. So when you look
9 at the definitions and they all fit together, it's
10 very clear in the record that WASCO's not the
11 operator.

12 JUDGE ZACHARY: Excuse me, did the --
13 WASCO owned Culigan? Right?

14 MR. SOWATZKA: WASCO did. Was an owner
15 of Culligan for a very brief period of time.
16 That's right, Your Honor.

17 JUDGE ZACHARY: Okay. And so did --
18 was -- what about -- what was Culigan's role?

19 MR. SOWATZKA: Culligan -- and there's
20 some confusion, but I think in the record and I can
21 get the citations of the record. Culligan also
22 only provided financial assurance. They had no
23 role in -- in owning or operating the site. So
24 this isn't the kind of case like the cases cited in
25 the State's brief where you look at -- under Best

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1 Foods, for example, we're looking to pierce the
2 corporate veil because of a lot of activity by
3 the -- by the parent company. That didn't happen
4 here. So those cases, in fact, aren't even
5 relevant, 'cause I think you -- you stick with the
6 North Carolina statutes, and you -- and you
7 don't -- you don't get -- get there. And -- and
8 you -- also if you did apply that fact -- those
9 factors here, there was no active involvement.
10 There were no, you know, corporate officers
11 directing activity and the like, which is what you
12 see in all of the CERCLA cases.

13 I also think it's important just to --
14 one consideration in the facts that Dyna-Diggr
15 filed the Part A Application in 2010 indicating
16 that they've been the owner -- sole owner and
17 operator of the site since 2007. So I think that's
18 a -- a very important fact as well.

19 JUDGE STROUD: That brings up another
20 question I have.

21 MR. SOWATZKA: Uh-huh.

22 JUDGE STROUD: I'm just curious. Why did
23 Dyna-Diggr intervene in this case?

24 MR. SOWATZKA: I have no idea, Your
25 Honor. I think they probably want to keep a low

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1 profile, let the State enforce after WASCO. And if
2 they're -- the State's somehow successful in
3 convincing this Court that we were an operator,
4 which we're not, that would ultimately make us
5 liable for -- for some of the activities, I guess,
6 arguably at the site, and Dyna-Diggr gets away
7 with, you know, with being the owner and operator
8 of the site and not having to do anything.

9 So if I -- if I were representing
10 Dyna-Diggr, I would not have wanted to stick my
11 head up very far. So that -- I'm only speculating
12 because I don't know the answer to your question,
13 but -- and just to be very clear, we - we're not
14 affiliated with Dyna-Diggr in any way. We don't
15 own them. We don't -- we're not involved in their
16 operations. We -- we -- we, you know, there's --
17 there's no connection, you know, whatsoever.

18 JUDGE MCCULLOUGH: So you maintain that
19 the letter of credit makes you a guarantor, but not
20 an operator.

21 MR. SOWATZKA: Absolutely, and I think
22 that's very clear in the record.

23 JUDGE MCCULLOUGH: And the liability is
24 limited to the amount of the letter -- the letter.

25 MR. SOWATZKA: Nothing more and nothing

13

1 less. I think what the guarantee -- what's in the
2 guarantee is what we're liable for. One more
3 point, and then I -- I do want to spend a little
4 bit more time on that guarantee, 'cause I -- I
5 think -- I think it's important to kind of look at
6 the facts around the guarantee. But the one other
7 point in the definitions is that the State contends
8 that we're a post-closure operator. I went on
9 Lexis; I asked my associate to go on Lexis; we
10 looked at where that was cited. It hasn't been
11 cited in the history of RCRA. It doesn't exist.
12 It's a new, made-up term, and I think it really
13 doesn't make sense when you focus on the State's
14 definitions.

15 So going back to 130A-290(a)(2), closure
16 means cessation of an operation of a solid waste
17 management facility, which is also defined, and the
18 act of securing the facility so that it will pose
19 no significant threat to human health and the
20 environment. You can't possibly operate something
21 that has ceased operating by definition. It's an
22 oxymoron. Just -- it can't happen.

14

1 was Winston Mills. They closed the tanks. And by
2 1993, the State, the sections, certified that the
3 facility was closed. And I think that was the end
4 of the operation of the facility. So there's no
5 way that WASCO could possibly be an operator from
6 2004 to the present when the facility had ceased
7 operation by definition under North Carolina law.

8 They focus on three factors. And they
9 spent some bit of time in their brief about -- and
10 the guarantee is one of them, but -- why they think
11 WASCO was the operator. So there's a guarantee
12 and -- and WASCO provided the financial assurance,
13 but the financial assurance was related to a
14 post-closure care agreement that was signed by
15 Winston Mills in 1990.

16 They also argue that because we filled
17 out three Part A forms, that we're an operator.
18 And finally, there was a consultant that had been
19 doing work on this site going back to the '80s,
20 late '90s -- '80s and '90s -- that WASCO continued
21 to pay for it so that the status quo would be
22 maintained. The State looks at those three facts
23 and says under this brand-new -- and the -- and the
24 Superior Court adopted it. Under this brand-new
25 test of totality of the circumstances that WASCO is

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1 the operator, ignoring, again, the statutory
2 definitions that are in North Carolina law.

3 So looking at the financial assurance for
4 just a second, the State has provided not a single
5 case in their brief that support the principle that
6 based on the financial assurance alone, that we're
7 an operator. We're a guarantee, as you pointed
8 out, Your Honor, and -- and I looked at RCRA for
9 that purpose because I believe the North Carolina
10 regulations adopt this part of RCRA in whole.

11 For the purpose of this subsection, the
12 term "guarantor" means any person other than the
13 owner or operator who provides evidence of
14 financial responsibility for an owner/operator
15 under this section. And then further under RCRA,
16 the total liability of any guarantor shall be
17 limited to the aggregate amount which the guarantor
18 has provided as evidence. That means we're liable
19 for -- for what the guarantee is.

20 If the Court holds otherwise, why would
21 anybody ever agree to be a guarantor if it would
22 automatically lead to unlimited liability? It
23 just -- it doesn't make any sense, which is why
24 RCRA created that provision.

25 Take a minute. Look at the Part A forms.

16

1 And -- and I recognize it doesn't look very good
2 when you submit forms to an agency that says you're
3 an operator. We were asked to submit the forms.
4 We did so in a cooperative manner. Under --
5 really, under penalty of -- under the threat of
6 penalty and under -- under duress -- I know the
7 State's argued the definition of duress and how all
8 that works. I think if that's really an issue for
9 this Court, it should be -- the case should be
10 remanded back for further factual findings, because
11 we -- we never got a chance, really, to -- to
12 finish the inquiry of the State because discovery
13 was cut short. But I don't think you have to do
14 that because I think there's case law.

15 For example, Quaker State. And in that
16 case the -- the applicant in Quaker State filled
17 out a form, submitted it to EPA, said that we have
18 hazardous waste on our facility. There was a later
19 enforcement action and the facility said well, wait
20 a minute. We've now gone back and looked, and it
21 turns out it's not hazardous waste and the -- the
22 agency said no, well, you -- you admitted in your
23 Part A that you had hazardous waste. That's
24 dispositive. And the Court said no, you don't look
25 to the Part A; you look to the underlying facts

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1 and -- in making that determination. I would ask
2 y'all to do that here as well.

3 The forms themselves are -- because of
4 the protector filers policy and -- and for public
5 policy reasons, we shouldn't be judged by what's on
6 the form; we should be judged by whether we are, in
7 fact, an operator, and we meet all these
8 definitions under North Carolina law. And,
9 finally, just a minute or so on -- on Mineral
10 Springs. Again, I think WASCO was concerned about
11 keeping the status quo in this case.

12 So way back in 1990 with the
13 administrative order, there was some semi annual
14 monitoring that occurred. Somebody goes out for a
15 day, takes a few samples, gets the results from the
16 lab, sends them in -- in to the State, and that's
17 the activity that had been maintained. It's
18 demanded by the order that's in the -- in the
19 original order for Winston Mills.

20 There's some allegations and -- and --
21 and claims by the State that there was control over
22 Mineral Springs. You know, frankly, I think
23 there's also competing evidence in the record that
24 there was no direction provided by WASCO. All they
25 did was pay the bills and keep the status quo

18

1 going. They paid utility bills. They did some
2 other things, but none of them rise to the level of
3 operator found back in -- in the definitions.

4 And so I don't think any of these three
5 things alone, any of these three things in
6 combination, change the fact that WASCO is not an
7 operator.

8 I think there's another critical element
9 for your consideration here, and that's the summary
10 judgment standard that I believe was misapplied by
11 the Superior Court. And summary judgment in North
12 Carolina is appropriate only when the record shows
13 that there's no genuine issue as to any material
14 fact and a party is entitled to judgment as a
15 matter of law. It's a very common standard.

16 When considering a motion for summary
17 judgment, the trial judge must view the presented
18 evidence in the light most favorable of the
19 non-moving party. Those -- both of those issues or
20 citations come from *In re: Will of Jones*. And in
21 that case, the Court goes on to say that if there's
22 any question as to the weight of evidence, summary
23 judgment should be denied. And that's not what
24 happened here. The Court -- the Superior Court, in
25 part because I think they provided -- used the

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1 wrong legal standard, created this totality of
2 circumstances and then didn't afford WASCO the --
3 the deference or the -- apply the summary judgment
4 standard.

5 They didn't view the light -- the facts
6 and the light most favorable to WASCO. They just
7 said, 'Here are some facts the State has talked
8 about; we think WASCO is an operator.' And that's
9 not how the summary judgment standard works.
10 There's plenty of evidence in the record on a
11 number of these points, that WASCO provided
12 affidavits disputing the contentions by the State.
13 I'll point out just a few, and you'll be able to
14 search them too when I -- when I provide a disc.

15 But the DEQ directed WASCO to file the
16 Part A forms, for example. That's in several
17 exhibits; 1791 and 92 and 1588 and 1720. The
18 financial assurance was provided without any
19 understanding that either Culligan or WASCO would
20 be an operator. That's in Exhibit 1592 and 1772 to
21 1776. The DEQ understood that WASCO wasn't an
22 operator of this site. That's in the Rodney Huerter
23 affidavit at 1592, 1772 to 1776.

24 JUDGE MCCULLOUGH: No -- let -- before
25 you keep going through --

20

1 MR. SOWATZKA: Yeah, and just -- and I
2 just had a couple more.

3 JUDGE MCCULLOUGH: -- through those
4 examples, let me just -- pardon me for interrupting
5 you, but raise the question. Is -- whether or not
6 WASCO is an operator, is that an issue of fact, or
7 is that a conclusion of law? Or is it mixed?

8 MR. SOWATZKA: I think it's a mix, Your
9 Honor, because I think you have to look at the
10 definition -- so there's -- there's a -- a legal
11 definition, and then you have to look at the facts
12 that are available. And if -- and if the
13 definition -- if you can meet that definition and
14 you meet that hurdle, then the other party is --
15 it's their burden to provide other facts that would
16 demonstrate that they're not. And I think what's
17 interesting is, here, if you actually apply the
18 definition, WASCO's entitled to summary judgment
19 because we can't be an operator of a facility that
20 ceased operating in 1993. And those facts are not
21 disputed.

22 So if you actually apply the law as it
23 should be applied, in that event, WASCO's entitled
24 to summary judgment. I think it would be
25 appropriate for this Court to do so. If this Court

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1 somehow disagrees and says, I'm going to ignore
2 North Carolina law and I love this new test that
3 the Superior Court adopted for the first time in
4 the country, in a RCRA -- in a -- in a solid-waste
5 management case and under RCRA and under the
6 State's statutes here, and I like that test, I
7 think there are facts on both sides that provide a
8 genuine issue of material fact. So I'm not sure.
9 I hope I've answered your question, but I think --

10 JUDGE MCCULLOUGH: I'm not sure, but --

11 MR. SOWATZKA: I think it's a mix. I
12 think you start with what's the law, you apply the
13 facts to it, and if there are no competing facts,
14 so there's no genuine issue to those facts, you
15 can, you know, issue summary judgment. So it's --

16 JUDGE MCCULLOUGH: Do you accept the
17 definition that's set out in their brief from
18 Bestfoods? Defines what an operator is and
19 that we should, kind of, look to that as -- as a
20 guiding light?

21 MR. SOWATZKA: No, I think -- I -- if we
22 weren't clear in our brief, let me try and be clear
23 right now. I don't think Bestfoods applies. I
24 don't think you get to Bestfoods, because I think
25 the statute in North Carolina is unambiguous. So

22

1 you -- you don't move past the statute. If you
2 disagree and you think you need to look to other --
3 look to, you know, case law or RCRA or CERCLA as
4 guidance, we're still not an operator under the
5 Bestfoods analysis.

6 It may be Loren Lanter, who is the owner
7 of Dyna-Diggr, who signs all kinds of forms as
8 the -- as Loren Lanter and as Brisco and as
9 Dyna-Diggr and you -- you, kind of, move all that
10 around, and you try and understand whether there's
11 breaching the -- you know, piercing the corporate
12 veil and those sorts of things. But none of that
13 applies here in this case, because WASCO wasn't,
14 you know, operating and doing all the things from
15 to definition of what an operator is, for one.

16 But also, there's a fundamental
17 difference between CERCLA and RCRA, and that -- and
18 I go back to the fact that CERCLA deals with
19 operating facilities, and RCRA was -- or CERCLA was
20 created to deal with sites that are closed and are
21 contaminated. And they are just very different
22 statutes.

23 And here again, we can't be the operator
24 of a facility that's closed. Maybe there's some
25 argument under CERCLA, but it doesn't appear here.

23

1 So I think it's different. The Bestfoods analysis
2 does not apply.

3 And I can see that I'm almost out of
4 time, so I'm just going to summarize very quickly
5 and leave my five minutes for rebuttal. I
6 respectfully request that you reverse the Superior
7 Court's decision and rule as a matter of law, that
8 the definition of operator in the State's Solid
9 Waste Management Act, that WASCO is, in fact, not
10 an operator and -- and rule in WASCO's favor.

11 Alternatively, as I said, if you disagree and you
12 want to apply a different standard, I think you have
13 to reverse the Superior Court's decision, remand the
14 case back because of -- there are genuine issues of
15 material fact under that test.

16 In summary, WASCO's involvement in this
17 case is that of a financial guarantor. That should
18 be the limit of our involvement and -- and our
19 liability in this case. We haven't owned the
20 property at the site. We've never run a business
21 there. We've never had any operations there.
22 We've never treated or stored or disposed of
23 hazardous waste. The only other involvement I --
24 of the site I've gone through, and I think, you
25 know, particularly in viewing the facts in -- in

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1 the most favorable light to WASCO, if you have to
2 apply that standard, we're not an operator, and the
3 Superior Court erred in declaring that.

4 I think deciding otherwise would set a
5 precedent, an important one that would have a
6 chilling effect for a couple reasons. One, on
7 being a guarantor, but another one on being
8 cooperative. We were painted in the brief as being
9 bad guys, and we're one of the only good guys in
10 this situation, having kept the status quo and done
11 things that the State asked us to do. And then
12 punishing us by declaring us an operator, I think
13 is -- is doubly unfair. Thank you, Your Honors.

14 MS. FISHER: May it please the Court, my
15 name is Elizabeth Fisher with the North Carolina
16 Department of Justice. And I'm here with
17 co-counsel Daniel Hirschman. Together we represent
18 the Appellee in this matter, the hazardous waste
19 section of what is now the Department of
20 Environmental Quality.

21 As a matter of North Carolina law, ALJ
22 Ward and Judge Collins properly granted summary
23 judgment to the agency, finding WASCO liable as an
24 operator of a landfill for purposes of the
25 post-closure program. WASCO has been familiar with

25

1 post-closure since 1998 when it acquired the former
2 operator, Culligan International, and it became, by
3 its direct dealings with the agency, an operator in
4 its own right no later than 2004.

5 Since 2004, WASCO has paid or pledged
6 close to \$1 million for post-closure care related
7 primarily to contamination from the two former
8 underground storage tanks, including ground water
9 sampling, reporting operating clean-up systems and
10 maintaining communication with the agency
11 throughout that time period, until the instant
12 litigation concerning regulatory matters. WASCO --

13 JUDGE STROUD: I'm sorry.

14 MS. FISHER: That's all right.

15 JUDGE STROUD: If I could ask, you said
16 it -- they became an operator in their own right in
17 2004, and the facility had been closed prior to
18 that. How did they become an operator then?

19 MS. FISHER: WASCO became an operator
20 based on taking on operator liability directly with
21 the hazardous waste section. And the best example
22 I can point to is at documentary exhibit Page 132.
23 If you look, there had been a letter in October
24 2004, which was when WASCO was divested of
25 Culligan. And Culligan represented to the

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1 agency -- actually, on Page 129 Culligan
2 represented that as of a closing date, WASCO is
3 assuming responsibility for the Asheville Dyeing
4 and Finishing remediation project. And gave a
5 director of environmental affairs as a new contact,
6 copy that person in a letter.

7 Now, rather than taking that letter at
8 face value, at Page 132 is an e-mail chain where
9 Larry Stanley of the agency e-mailed that Director
10 of Environmental Affairs and said -- referenced
11 this letter, indicating WASCO is now responsible
12 for RCRA issues at the former Asheville Dyeing and
13 Finishing facility and referencing a requirement
14 for completion of a new form with operator
15 information, updated information. So that was the
16 key e-mail, because that put WASCO on notice that
17 the agency was viewing it, based on the
18 representations of Culligan, as an operator.

19 So WASCO had a few different options at
20 that point of time -- point in time. It could have
21 responded by saying, 'No, this letter is completely
22 wrong. We're not an operator.' It could have
23 responded by saying, 'Well, we don't really
24 understand what RCRA issues are. We don't
25 understand what operator means. Let's sit down to

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1 figure things out.' It could have even said,
2 'Well, we're going to submit these forms for now,
3 but we want to make it clear that we really don't
4 understand the regulatory status that we've walked
5 into.'

6 But instead, the response -- again, from
7 WASCO's Director of Environmental Affairs -- says,
8 "I was with" -- WASCO's former name -- "U.S. Filter
9 when we purchased Culligan back in the summer of
10 1998, so I am very familiar with this project."
11 And he says, "We intend on keeping the same
12 consultants and doing everything else we can to
13 maintain continuity and keep the project headed in
14 the right direction. I will attend to the Part A
15 application in the very near future."

16 JUDGE STROUD: So are you -- so -- so if
17 we look back at the definition under the statute of
18 an operator --

19 MS. FISHER: Yes, Your Honor.

20 JUDGE STROUD: Are you saying that that
21 doesn't matter because they're sort of estopped
22 from saying, you know, that they're not an
23 operator? Or -- or do they have to fit under that
24 definition?

25 MS. FISHER: We're saying that WASCO does

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1 fit under that definition in Chapter 130A, that
2 WASCO is the person principally engaged in, and in
3 charge of, the actual operation, supervision and
4 maintenance of the solid waste management facility
5 at issue, which here is the Landfill, the former
6 underground storage tanks.

7 And we have State rules that explain the
8 concept of how we get to post-closure. There's a
9 State rule that specifically speaks to tank systems
10 and indicates that if -- if the site of a former
11 tank -- here they dug up the tank that had caused
12 contamination, they may have even removed some of
13 the soil, but for whatever reason, the pit was
14 backfilled with contamination left in place. And
15 so the -- the State rule, which was duly
16 promulgated pursuant to statutory authority -- that
17 was never challenged -- says that if not all
18 contaminated soils can be practically removed or
19 decontaminated, then the owner or operator must
20 close the tank system and perform post-closure
21 care. Such tank system is then considered to be a
22 Landfill.

23 So opposing counsel referenced the 1993
24 order of closure. And that order of closure
25 specifically was a document that triggered

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1 post-closure by its face on that document. It
2 indicated that from that point forward, the site
3 was now in post-closure.

4 JUDGE STROUD: So can you become an
5 operator of a site that is in post-closure?

6 MS. FISHER: Yes, that's the agency's
7 position here.

8 JUDGE STROUD: Where do -- what
9 regulation or definition or whatever -- how does
10 that happen?

11 MS. FISHER: Under the State rule -- and
12 this is a State rule that was cited in the 2013
13 letter that's the basis for the entire contested
14 case. And actually, WASCO has not referenced or
15 cited that letter either in its briefs or its
16 argument today. But that's at documentary exhibit
17 Page 10. There's a State rule in our
18 administrative code that says, "Owners and
19 operators of landfills closed with waste in place
20 must obtain post-closure permits."

21 So post-closure is unit-specific. It's
22 not business-specific. We're focusing on these
23 former -- former underground storage tanks that
24 caused the contamination as being the trigger for
25 liability.

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¹ JUDGE STRoud: Now what rule is that?

2 I'm sorry.

3 MS. FISHER: Yes, the -- it's a federal
4 regulation that's incorporated by reference in our
5 State rules. So the federal citation is 40 CFR
6 270.1(c) and the state citation is 15A NCAC
7 13A.113(a). And so based on that rule, that
8 explains why we are discussing post-closure and the
9 difference.

16 JUDGE STROUD: So does the definition
17 under 130A-290, are those definitions -- they -- do
18 they not matter? Are they superseded by this?

19 MS. FISHER: They matter. You can think
20 of it as a funnel. The Solid Waste Management Act
21 is Chapter 130A, and it applies not just to the
22 hazardous waste program, but to all of the states'
23 various solid waste programs. So that would be the
24 broad definition that applies.

25 And then because we have a state/federal

1 combination program with hazardous waste, and we
2 have a specific statutory mandate that the agency
3 shall promulgate rules that are consistent with
4 federal law -- that's why we have these other --
5 two other definitions, one applying to hazardous
6 waste in general and one applying to permitting
7 under hazardous waste in particular.

8 But the agency's argument is that these
9 definitions are not inconsistent, that we can focus
10 on the State definition, and WASCO still meets that
11 criteria, because the solid waste management
12 facility at issue here is the landfill. That --
13 that really you're plugging -- you can plug that
14 State definition back into the rule that I
15 previously cited earlier that focuses on the
16 operation of a landfill.

17 And so, really, that's the only reason
18 why we're -- we're providing Bestfoods or -- or
19 other federal cases. We don't have any state
20 cases. WASCO's not identified any state cases
21 specifically dealing with the question of
22 operatorship. But Bestfoods doesn't provide a new
23 definition, but rather just articulates a common
24 sense standard that we're going to look to the
25 totality of the circumstances, that it only makes

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1 sense when you're talking about environmental
2 contamination that we're going to look at who is
3 the person principally engaged in the operations
4 related to the environmental contamination. So --

JUDGE MCCULLOUGH: Now, did Culligan perform post-closure operations of any type?

7 MS. FISHER: Yes, Your Honor. Culligan
8 was a post-closure operator, and in the same way
9 that we're alleging WASCO has, through an
10 environmental consultant. But -- but under WASCO's
11 direction, Culligan actually installed two active
12 clean-up systems. They're called Air Sparge Soil
13 Vapor Extraction Systems. So they're designed to
14 mobilize the contamination into the ground water
15 and then essentially a vacuum cleaner that sucks it
16 out. So those systems have been continuing to
17 operate, continuing to run up until at least the
18 filing of the present litigation.

19 And WASCO had engaged in regulatory
20 communications with the agency, much in a similar
21 way that -- I may have said what -- Culligan
22 engaged in communications much in a similar way
23 that WASCO has done. So --

24 JUDGE MCCULLOUGH: So if you direct -- if
25 you direct clean-up operations at a contaminated

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1 site, then you become an operator by directing
2 those operations? Is that part of the definition?

3 MS. FISHER: I wouldn't characterize it
4 quite that way. For example, we haven't alleged
5 that Mineral Springs, which is the environmental
6 contractor, would be an operator here, because they
7 are acting -- they're acting at the site. But it's
8 WASCO that is the one making the decisions about
9 which activities it will allow Mineral Springs to
10 perform, communicating with the agency concerning
11 the outcome of various investigations.

12 JUDGE MCCULLOUGH: So you're saying WASCO
13 is directing the operations, because they're just
14 employing Mineral Springs to carry out what they're
15 directing?

16 MS. FISHER: WASCO has employed Mineral
17 Springs, and there's a master consulting services
18 agreement in the record that shows that WASCO hired
19 Mineral Springs to act on its behalf. The -- the
20 focus of these definitions is operations of a solid
21 waste management facility. And so if you're --
22 you're looking at the landfill, it's the -- who's
23 making these decisions about environmental
24 compliance with the agency.

25 And the record here is lengthy. But as

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1 you go through it exhibit by exhibit, this is not a
2 case of a guarantor. If you think about a
3 guarantor, that's an entity that puts up money and
4 stays in the background. WASCO is not in the
5 background here. WASCO is all over the record.
6 Its officers, its Director of Environmental Affairs
7 is communicating directly with the agency. It's
8 instructing Mineral Springs that it wants review of
9 reports before they go out to the agency. When the
10 reports do go out to the agency, there are 33
11 ground water reports that went to the agency on
12 behalf of WASCO. And there are references in 16 of
13 those reports specifically identifying WASCO as the
14 responsible party for the site.

15 JUDGE STROUD: If WASCO said they were
16 just a guarantor, wouldn't they -- wouldn't they
17 want to be doing all those things to be -- I mean,
18 they would want to get this information as
19 guarantors, and they would want to be involved as
20 guarantors, wouldn't they?

21 MS. FISHER: The -- the question would
22 be, who -- whose responsibilities are they
23 guaranteeing? So from 1998 to 2004, WASCO did act
24 in a guarantor capacity, because during that time
25 period, WASCO owned Culligan. Culligan was on the

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1 forms, was the day-to-day contact with the agency,
2 was actually engaging in the pollution related
3 operations, and WASCO was in the background with
4 that financial assurance document. But after 2004,
5 Culigan was divested, and that's when WASCO really
6 took on the active role. So -- so if you even look
7 at the financial assurance documents in the record,
8 they don't use the word "guarantor."

9 Documentary Exhibit 471, which is a trust
10 agreement, uses the word "grantor." That WASCO was
11 the grantor of a trust in the agency's benefit, and
12 that the agency had the sole authority to direct
13 payments in writing for post-closure care. So
14 between 2004 and 2013, WASCO amended the financial
15 assurance documents 10 different times for
16 inflation, and most recently at Documentary Exhibit
17 586, the letter of credit was in the amount of
18 \$443,769.

19 So that's another indicia of WASCO's
20 operatorship. So we're looking at the totality of
21 the circumstances here. What in the record
22 indicates that WASCO would be an operator. What in
23 the record indicates that another entity should
24 have been the operator or -- we're talking about
25 present tense. So who is the operator, if not

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1 WASCO, or who -- I'm -- I'm saying that badly,
2 because there is -- is joint and several liability
3 here. There's strict liability. So there's no
4 question that Dyna-Diggr is the owner of the
5 property; that Dyna-Diggr could be subject to
6 regulation.

7 But the question here is WASCO's
8 liability, is whether WASCO, by its own conduct,
9 made itself the person principally engaged in and
10 in charge of the operations related to post-closure
11 here. And it's important to note that while this
12 Court is here under de novo review, de novo review
13 does not require it to disregard its background
14 knowledge or common sense concerning the agency.

15 So we have a matter of first impression
16 for this Court, but we have a site that's been
17 through decades of regulation by the agency and
18 specifically dealings with WASCO in one form or
19 another since 1998. So while it's not required to
20 defer to the agency's interpretation, we're looking
21 in the context of our Administrative Procedure Act,
22 which is really focusing on oversight, looking to
23 see whether the agency's actions here have the
24 power to persuade, if not the power to control.

25 And based on the lengthy record, the

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1 specific communications, the specific actions of
2 WASCO, there were 51 invoices in the record of
3 \$226,000 paid from Mineral Springs activities.
4 There were 236,000 additional dollars directly paid
5 for utility bills by WASCO. But there's also a
6 lengthy communication history, both with regard to
7 financial assurance communications from the agency
8 back and forth between WASCO's employees about
9 updating the financial assurance communications
10 back and forth about trying to get the cleanup of a
11 site.

12 Because that's really what we're talking
13 about here. We're talking about a multi-phase
14 process that after 1993, the focus was on the known
15 contamination, these former underground storage
16 tanks, trying to neutralize, trying to keep track
17 of that contamination. But in 2007 is when the
18 site was flagged for additional corrective action.
19 So that's what we're thinking about when we think
20 about, why does a Part B matter here. That we're
21 trying to identify all the other potential sources
22 of contamination at a property. Trying to figure
23 out what additional investigation, what corrective
24 action is needed to ensure that the whole property
25 is cleaned up.

1 And so that, really, from that point
2 onward is something of a trigger that led down this
3 path. That as long as the path was just focused on
4 the monitoring reports, the -- the ongoing
5 operation of those existing cleanup systems, there
6 hadn't been resistance. But then once there -- the
7 agency began seeking additional work, that's when
8 WASCO started dragging its feet all the way leading
9 up until 2013.

10 But I'd also like to say to the extent
11 that WASCO's arguing that the agency forced it to
12 take actions, that it was under threat of daily
13 penalties. Well, the first step would have been to
14 notify the agency. Again, going back to that 2004
15 letter, that it wasn't an operator. But at any
16 point in time it had the ability, if it truly
17 believed it was not subject to regulation, to
18 initiate a declaratory judgment action, to seek
19 injunctive relief, to prevent the agency from
20 assessing penalties against it.

21 But between 2004 and 2013, it continued
22 to take at least some actions related to
23 post-closure care, including some investigations
24 outside of the scope of the initial underground
25 storage tanks. There's an assessment report

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1 related to a former dump site and French drain. So
2 WASCO did some investigation of those locations as
3 well, prior to the time when it initiated the
4 contested case.

5 Does this Court have further questions?

6 In that event, we would respectfully ask
7 that this Court affirm the decision of the ALJ and
8 Judge Collins granting summary judgment to the
9 agency and finding WASCO liable as an operator.
10 Thank you.

11 MR. SOWATZKA: I have just a few minutes,
12 so I'm going to be very brief.

13 The State just argued that we didn't talk
14 about in our initial briefs 270.1C. And I think
15 there is a very good reason for that, and that's
16 because on Page 9 in Note 3 of their brief, the
17 State talks about the permitting process and how we
18 should have been in interim status. And so if you
19 look at the requirements for interim status,
20 Part -- and starting with Part 270, governs RCRA
21 hazardous waste permits, but in 270.2, it
22 specifically exempts RCRA interim status. So why
23 would we even be talking today unless they brought
24 it up about this particular rule? 'Cause it
25 doesn't apply. They even say it doesn't apply,

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1 essentially, 'cause they say that we should have
2 been in interim status and 270.1C doesn't apply to
3 those facilities in interim status by their own
4 brief.

5 So that's why we didn't talk about it
6 today until -- until they brought it up. I don't
7 think it applies. I think it's very clear what
8 does apply are all the statutes that I walked you
9 through. And when you apply those statutes very
10 carefully, I think it's very clear that WASCO's not
11 an operator in this case.

19 But when you look at what courts say
20 about that kind of an instance, where there is an
21 issue of first impression and when the only
22 authority for the agency's interpretation of the
23 law is the decision in that case, the
24 interpretation may be viewed skeptically on
25 judicial review. So not only are they not entitled

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1 to deference, I think this should all be viewed
2 very skeptically.

3 And finally, I think it's very
4 interesting that she said we should've filed a
5 declaratory judgment much earlier. I think if we
6 had understood in 2004, or at any other time before
7 we did in 2013, that they were trying to make us
8 more than a guarantor, we would have. As soon as
9 they started asking us to do more than what we
10 believed -- what we were doing as a guarantor -- we
11 filed the declaratory action and that's why we're
12 here today. So we would have done it sooner had
13 we -- had we thought that's where the -- the State
14 was, Your Honors.

15 JUDGE MCCULLOUGH: But if I understand
16 you correctly, and from what the State said, you
17 believe that your liability is limited to the
18 amount of money that's remaining on that letter of
19 credit. And --

20 MR. SOWATZKA: Yes, and we don't dispute
21 that.

22 JUDGE MCCULLOUGH: And obviously, what
23 they're asking you to do, as the, quote, operator,
24 is to do a whole lot more than that.

25 MR. SOWATZKA: That's exactly right, and

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1 we think -- it's -- our liability's limited to
2 what's under the guarantee. We're happy to --
3 to -- to see where that goes if they want to
4 enforce the guarantee. That's where this case
5 ought to be. Thank you, Your Honors.

6 JUDGE STROUD: All right. Thank you.

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

CERTIFICATION OF TRANSCRIPT

This is to certify that the foregoing transcript of proceedings taken at the October 6, 2016 Session of the North Carolina Court of Appeals is a true and accurate transcript of the proceedings as transcribed by me or under my supervision. I further certify that I am not related to any party or attorney, nor do I have any interest whatsoever in the outcome of this action.

This 24th day of October, 2017.



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