The Groundwater and Waste Management Committee (GWWMC) of the North Carolina Environmental Management Commission (EMC) addressed the following at a special February 7, 2018 meeting:

- Petition for Rulemaking to Amend 15A NCAC 13A .0102(b) for the Definition of “Operator”

On February 7, 2018, the GWWMC met in the Ground Floor Hearing Room at the Archdale Building in Raleigh, North Carolina.

**GWWMC Members in Attendance:**

Mr. Bill Puette, Committee Chairman  
Mr. Charles "Boots" Elam  
*Attended via phone*

Mr. David W. Anderson, RGIIIC, Chairman  
Dr. Albert R. Rubin, WQC Chairman  
*Attended via phone*

Mr. Steve Keen, Committee Vice-Chairman  

**Other Attendees:**

Mr. John D. "J.D." Solomon, EMC Chairman  
Ms. Julie Wilsey, EMC Vice-Chairman

Mr. Phillip Reynolds, EMC Counsel

**Preliminary Matters:**

In accordance to North Carolina General Statute § 138A-15, Chairman Bill Puette asked if any GWWMC member knew of any known conflict of interest or appearance of conflict with respect to any item on the February 7, 2018 GWWMC agenda. No conflicts were noted.
Action Items:

1. Petition for Rulemaking to Amend 15A NCAC 13A .0102(b) for the Definition of “Operator”

Chairman Puette opened with a general explanation of the petition request that was to be discussed and that the focus for the day was to review the petition before them and recommend action to the full Environmental Management Commission. Chairman Puette then acknowledged Mr. Phillip Reynolds, Commission Counsel, who provided an overview of the petition for rulemaking process and related issues.

Mr. Reynolds described the requirements of the North Carolina Administrative Procedures Act with respect to the adoption of rules, and noted that the granting of the petition was not the equivalent of adopting the proposed rules. Instead, if the petition was granted, the EMC would be required to initiate the rulemaking process. Mr. Reynolds also noted that, if the petition is denied, the petitioners were permitted to seek judicial review of the denial in superior court.

Mr. Reynolds explained further that the role of the committee was to provide a recommendation to the full Commission as to whether the petition should be granted or denied. The EMC will ultimately decide whether or not to accept the Groundwater and Waste Management Committee’s recommendation. Mr. Reynolds then described the steps that would need to be taken if the rulemaking process were to be initiated.

Next, Mr. Sean Sullivan of the law firm of Troutman Sanders LLP, counsel for WASCO, LLC, was recognized by Chairman Puette to present the petition on behalf of WASCO. Mr. Sullivan acknowledged that litigation related to the site at issue in the petition for rulemaking had already taken place and that it was not his intent to re-litigate the matter, but to address asserted inconsistencies that his client views as an issue of law that needs resolution.

Mr. Sullivan then provided an overview of the facts and circumstances described in the petition related to the site at issue in the petition for rulemaking. Among other information provided by Mr. Sullivan, he stated that the sole owner and entity, Dyna-Digger, LLC., acquired the property in question in September of 2007 and has had the title since that time. The property was acquired as-is and Dyna-Digger agreed to release WASCO of all claims for environmental liability, thereby releasing WASCO from any contractual obligation that they may have had to pay for clean-up.

Mr. Sullivan then stated that because WASCO was paying an environmental consultant for voluntary work and because WASCO was setting limits on what this consultant could or could not do, the Department took the position that WASCO was acting as “operator” using the CERCLA definition and should be deemed an “operator” for purposes of RCRA as well. However,
Mr. Sullivan, argued that CERCLA and RCRA are two different things, and that each Act establishes different bases for liability. The Solid Waste Management Act defines “operator” as: “An entity that is principally engaged in or a person who is in charge of actual operation, supervision and maintenance of a solid waste management facility. A person in charge of a shift or periods of operation during the day.” It is WASCO’s position that the Department has expanded the definition of “operator” in order to acquire funding to clean up the site via WASCO rather than the actual owner, Dyna-Digger.

Mr. Sullivan closed by stating that historically, the Department has relied on the CERCLA definition. He said WASCO was not asking to change the principles of the responsibility of compliance; just trying to establish who should be responsible.

Next, Hill Davis, Assistant Attorney General, spoke for the Department of Environmental Quality and stated that the Department is opposed to the WASCO petition because the proposed rule change is unnecessary and it has the potential to cause problems where none currently exist. The current definitions are clear and consistent. The Solid Waste Management Act contains the broadest of the definitions of “operator” and that definition applies to all of the solid waste programs in the State. The definitions in the hazardous waste rules are more specific.

Mr. Davis noted that the subject matter of the petition has already had the benefit of three court decisions, having been heard by the Court of Appeals, Superior Court, and an administrative law judge. All have reached the same conclusion: that WASCO is an operator under any of the three definitions and none of the courts saw a problem with how the three definitions interacted with each other and that they are compatible.

Mr. Davis also stated that WASCO’s rule request could create confusion. For example, there are currently 59 Solid Waste Management unit sites in the state that are currently in remediation or in need of remediation and changing the definition of operator could call into question the regulatory status of these sites and the status of the responsible parties at these sites. It also may cause problems with the Hazardous Waste program. The State program is authorized by the EPA to administer RCRA which is a federal program that regulates hazardous waste sites from “cradle to grave.” In order to remain authorized, the State’s rules must be at least as stringent as the EPA’s. Mr. Davis noted that there is uncertainty as to whether the requested rule change would impact the State’s program as it relates to how the EPA might view the change.

In closing, Mr. Davis stated that if WASCO were allowed to make a rule change it would only serve WASCO’s interests and would not benefit the State as a whole. He also repeated that the State has been consistent in listing WASCO as an operator.
Following Mr. Davis’ presentation, the Committee posed questions to counsel for WASCO and the Department, and clarified any concerns that the members had. For example, Chairman Solomon asked about the additional petition filed by WASCO for a declaratory ruling and alluded to additional paths forward to include changing legislation. Commissioner Keen asked about the rule review comment period in 2017, which included the current definition of “operator” being discussed before the Committee. Mr. Davis responded, that in November 2017 there was a hearing for the rule review process and no comments were received during the public comment period for this particular rule.

Chairman Puette asked about what the effects would be if the definition of “operator” were changed. Mr. Davis replied that confusion could occur within the regulatory community. Mr. Sullivan emphasized that the reason for the petition is to remove the ambiguity amongst the definitions for the term “operator.” In response to a question posed to him, Mr. Sullivan noted that he could not state with certainty how the change might impact WASCO in terms of whether it would still be deemed an “operator” under the law.

Commissioner Keen noted the due diligence process when WASCO acquired Culligan’s parent company and the opportunity, at that time, to comment on the applicable regulatory comments. Chairman Solomon noted the rule review process under House Bill 74 and the opportunity for public comment as part of that process. Lastly, Chairman Solomon commented that he was uncertain that the Committee would be the correct body to hear this request, as put forth by Mr. Sullivan, with regards to the definition of “operator” or whether it would be more appropriate for WASCO to seek a legislative change.

Chairman Puette called for a motion. Commissioner Anderson made the motion to recommend to the Environmental Management Commission that it deny the petition for rulemaking. Commissioner Keen seconded the motion. Further deliberation was had before the matter proceeded to a roll call vote. It was noted for the record that Commissioner Elam was no longer participating by telephone and had left before the vote was taken. The motion passed unanimously.

Having completed the sole item on the agenda, Chairman Puette adjourned the meeting.