

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

ENVIRONMENTAL MANAGEMENT  
COMMISSION

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In Re PETITION FOR DECLARATORY )  
RULING by WASCO LLC )  
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**RESPONSE IN OPPOSITION TO MOTION TO INTERVENE**

NOW COMES the Department of Environmental Quality (“DEQ”) and hereby submits this response in opposition to Dyna-Diggr, LLC’s motion to intervene in this matter. DEQ opposes Dyna-Diggr’s intervention on the grounds that it is untimely, unhelpful to resolution of the matter before the Environmental Management Commission (“the Commission”), and prejudicial to DEQ.

**Applicable Law**

15A NCAC 2I .0602(d) states that the Chairman of the Commission may allow intervention of other parties in a request for declaratory ruling “[i]n the manner provided in G.S. 150B-23(d).” N.C.G.S. 150B-23(d), in turn, states that a party may intervene in the manner provided in N.C. Rule of Civil Procedure 24, and that an interested person may intervene to the extent deemed appropriate. For intervention to be allowed under Rule 24, the application to intervene must be “timely.” N.C. R. Civ. P. 24(a), (b).

**Dyna-Diggr’s Request to Intervene is Untimely**

In the present case, Dyna-Diggr’s requested intervention is untimely. Dyna-Diggr did not request intervention until the week before the Commission meeting where this matter will be

heard, and not until the day the record closed for pre-hearing submissions of documents and briefing to the Commission. This late filing compromises the schedule set by the Commission, and DEQ would be prejudiced by Dyna-Diggr's late entry into this proceeding. DEQ will not have the opportunity to respond to the substantive matters raised by Dyna-Diggrs' motion prior to the hearing, and restricting DEQ's opportunity to address these matters to the limited time for oral argument before the Commission would be inadequate. The timing is especially egregious given that Dyna-Diggr has been represented by counsel at all relevant times and had every opportunity to intervene since the filing of WASCO's initial request for declaratory ruling in December of last year.

Moreover, given the fact that WASCO relies on the substance of Dyna-Diggr's motion to intervene in support of WASCO's own argument in its reply brief (WASCO Reply p 10), and the fact that WASCO filed its reply only nineteen minutes after Dyna-Diggr served its motion to intervene, it appears that WASCO and Dyna-Diggr have coordinated together in the filing of the motion to intervene, which underscores the unfair surprise and potential prejudice to DEQ in allowing Dyna-Diggr's intervention at this stage. If Dyna-Diggr's Motion to Intervene is denied, DEQ also requests that the references to Dyna-Diggr's motion contained in WASCO's reply brief, and WASCO's memorandum in support of intervention and supporting documentation, be excluded from consideration at the hearing on this matter.

**Dyna-Diggr's Intervention Will Not Aid in Resolving the Pending Request for Declaratory Ruling**

Turning from timeliness to matters of substance, Dyna-Diggr's participation will do nothing to aid the Commission in resolution of the pending request for declaratory ruling. The request for declaratory ruling seeks a determination of DEQ's authority to regulate WASCO as

an “*operator*” of the facility. This question is specific to WASCO and its regulatory status. Dyna-Diggr’s liability and regulatory status as an *owner* are not in question and never have been.<sup>1</sup>

In its motion, Dyna-Diggr does not take a firm position regarding the pending request for declaratory ruling, and Dyna-Diggr presents no arguments relevant to resolution of this request. To the extent Dyna-Diggr wishes to argue against WASCO’s request, Dyna-Diggr’s interest, such as it is, is adequately represented by DEQ. To the extent Dyna-Diggr wishes to argue in favor of WASCO’s request, Dyna-Diggr’s interest is adequately represented by WASCO.

Moreover, to the extent Dyna-Diggr wishes to raise separate issues and arguments not raised in WASCO’s request for declaratory ruling, Dyna-Diggr’s intervention is irrelevant to resolution of WASCO’s request. Dyna-Diggr’s motion to intervene makes extensive reference to the North Carolina Brownfields Program, a voluntary program separate and apart from the Hazardous Waste statutes and rules. Notably, neither WASCO nor Dyna-Diggr (nor anyone else) have applied for this facility’s entry into the Brownfields Program. Discussions regarding the Brownfields Program are wholly irrelevant to a determination of WASCO’s request, which concerns the application of the Hazardous Waste rules as they relate to WASCO’s status as an operator of the facility.

In addition, Dyna-Diggr’s stated purpose for intervening in this matter, to “work with WASCO and DEQ to develop and fund a cost effective approach to renovating and redeveloping the facility under [the Brownfields Program],” is beyond the scope of WASCO’s request for

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<sup>1</sup> Dyna-Diggr does not claim a right to intervene in this matter. Although WASCO asserts that Dyna-Diggr has a right to intervene in WASCO’s Memorandum in Support of intervention, WASCO cannot assert a “right” on behalf of Dyna-Diggr that Dyna-Diggr does not assert for itself.

declaratory ruling, which focuses on the application of the Hazardous Waste rules to WASCO and makes no reference to the Brownfields Program. In fact, Dyna-Diggr does not request any type of declaratory relief from the Commission whatsoever. Dyna-Diggr's stated purpose for intervening is thus beyond the Commission's authority to grant.

Dyna-Diggr's stated purpose is also impractical; there is insufficient time for the parties to mediate this matter in the week remaining before the Commission hearing. DEQ remains willing to consider proposals for effective remediation of the facility and has not foreclosed use of the Brownfields Program to achieve this end. However, this is not the appropriate forum for addressing these matters, which are beyond the scope of WASCO's request for declaratory ruling.<sup>2</sup>

For all of these reasons, Dyna-Diggr's proposed intervention will not aid the Commission in resolving the sole question presented by WASCO's request for declaratory ruling. Allowing Dyna-Diggr to intervene and argue extraneous matters will only cloud the issues before the Commission and hamper resolution of WASCO's request.

### **CONCLUSION**

Dyna-Diggr's motion to intervene is untimely and will not aid the Commission in resolving the issue put forward by WASCO's request for declaratory relief. Instead, Dyna-Diggr's last-minute intervention would only confuse the issues before the Commission. For these reasons, allowing Dyna-Diggr's intervention would also prejudice DEQ. DEQ therefore respectfully requests that Dyna-Diggr's Motion to Intervene be DENIED.

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<sup>2</sup> DEQ would also note that there is no requirement that there be a pending legal action for such a resolution to occur.

Respectfully submitted this the 2nd day of May, 2018.

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing RESPONSE IN OPPOSITION TO MOTION TO INTERVENE was served on the Environmental Management Commission, counsel for Dyna-Diggr, LLC, and counsel for Petitioner WASCO LLC, by electronic mail, as follows:

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This the 2nd day of May, 2018.

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