STATE OF NORTH CAROLINA

COUNTY OF WAKE

ENVIRONMENTAL MANAGEMENT COMMISSION

In Re PETITION FOR DECLARATORY RULING by WASCO LLC	))))

BRIEF OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

The Department of Environmental Quality ("DEQ"), by and through its undersigned counsel, hereby submits this brief to the Environmental Management Commission ("Commission") in opposition to Petitioner WASCO LLC's Petition for Declaratory Ruling regarding WASCO's post-closure responsibilities to remediate property located at 850 Warren Wilson Road in Swannanoa ("the Facility"). As set forth below, DEQ requests that the Commission, for good cause, refuse to issue a declaratory ruling in the above-captioned matter. In the alternative, DEQ requests that the Commission issue a declaratory ruling that WASCO is required to obtain a post-closure permit for the Facility pursuant to 15A N.C.A.C. 13A .0113(a), which adopts by reference 40 C.F.R. § 270.1(c).[1]

INTRODUCTION

WASCO comes to this Commission seeking a declaratory ruling that would be directly contrary to a decision issued last year by the North Carolina Court of Appeals and that would allow WASCO to avoid responsibility for environmental remediation at the Facility, a responsibility that

[1] 15A N.C.A.C. 13A .0113(a) and 40 C.F.R. § 270.1(c) are included as Exhibits D and E to this response, respectively.

WASCO voluntarily and affirmatively accepted almost fifteen years ago. The Commission should refuse to issue such a declaratory ruling.

Pursuant to 15A NCAC 2I .0603,[2] good cause exists for the Commission to refuse WASCO's request because the matters within the petition have already been decided by the Office of Administrative Hearings, the Wake County Superior Court, and the North Carolina Court of Appeals.[3] While WASCO asks this Commission to declare that "DEQ lacks the authority to require WASCO to obtain a post-closure permit or a post closure order for the facility," this is exactly the question that was already addressed in this prior litigation. In its decision finding that WASCO was responsible for obtaining a post-closure permit at the Facility, the Court of Appeals held that:

- "It is WASCO's responsibility to obtain a post-closure permit for the Site [i.e., the Facility] that is at issue in the present case." (Ex. A p 5)
- "It is clear that the pit at the Site that was certified closed as a landfill in 1993 is subject to post-closure regulation under the State Hazardous Waste Program and RCRA." (Ex. A pp 21-22)
- "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site." (Ex. A p 22)

If the Commission were to consider the merits of WASCO's petition, the Commission should hold that WASCO is required to obtain a post-closure permit for the Facility pursuant to 15A N.C.A.C. 13A .0113(a), adopting by reference 40 C.F.R. § 270.1(c). Since the Court of Appeals has already determined this to be the case, the Commission cannot now hold otherwise.

[2] This rule is included as Exhibit F to this response.

[3] The Court of Appeals opinion is included as Exhibit A to this response.

In addition, WASCO acknowledged DEQ's authority in this regard for a decade prior to initiating litigation, and WASCO is bound by its conduct and its voluntary assumption of environmental liability at the Facility.

PROCEDURAL HISTORY

This matter is before the Commission on WASCO's Petition for Declaratory Ruling, filed March 5, 2018. However, this dispute is much older. WASCO's present petition is the latest salvo in a barrage of attempts to avoid its environmental liabilities at the Facility, including: five years of litigation; numerous letters to high-level state officials under both the McCrory and Cooper Administrations, including Secretary of DEQ and the Governor; letters to the Attorney General; a petition for rulemaking, also before this Commission, which was denied at the Commission's March 8, 2018 meeting; and a previous petition for declaratory ruling before this Commission, which was filed December 8, 2017 and subsequently withdrawn.

In September 2013, WASCO filed a petition for contested case in the Office of Administrative Hearings ("OAH") (Ex. C at Doc. Ex.[4] 1-11), challenging DEQ's assertion in an August 2013 letter that WASCO was an operator of a landfill at the Facility and needed to obtain a post-closure permit under the State's Hazardous Waste Program (Ex. C at Doc. Ex. 87). The presiding administrative law judge ruled in favor of DEQ, agreeing that WASCO was an operator of the Facility subject to the requirement to obtain a post-closure permit. This is the exact same issue WASCO now asks the Commission to decide again in its declaratory request.

[4] Citations to "Doc. Ex." are to the documentary exhibits in the prior litigation between WASCO and DEQ that were filed with the North Carolina Court of Appeals. These documents are included as Exhibit C to this response.

WASCO then filed a Petition for Judicial Review with the Wake County Superior Court. (Ex. B[5] pp 2-8) Following further briefing and argument by the parties, the Superior Court entered an order denying WASCO's petition for judicial review and affirming the decision of the administrative law judge that WASCO was liable as an operator for post-closure remediation of the Facility. (Ex. B pp 105-23)

WASCO next appealed to the North Carolina Court of Appeals. That court again found in favor of DEQ, affirming the ruling of the Superior Court and the administrative law judge. In so doing, the Court of Appeals held that WASCO was an operator of the Facility for purposes of post-closure remediation and that "[i]t is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case." (Ex. A p 5) In direct contradiction of WASCO's chief argument in its petition for declaratory ruling, the Court of Appeals further found:

> It is clear that the pit at the Site that was certified closed as a landfill in 1993 is subject to post-closure regulation under the State Hazardous Waste Program and RCRA. Considering the above facts, we hold WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation.
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> ****
>
> WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site.

(Ex. A pp 21-22)

WASCO then filed a petition for discretionary review with the North Carolina Supreme Court. The Supreme Court denied this petition on November 1, 2017, cementing the Court of Appeals decision as the final ruling in this matter.

Unable to convince this State's courts that it should not be responsible for environmental remediation at the Facility, WASCO now asks this Commission to issue a declaratory ruling

[5] The Record on Appeal in the prior litigation is included as Exhibit B to this response.

directly contrary to the decision of the North Carolina Court of Appeals on the same issue that was entered just last year, after almost five years of litigation. During the course of this litigation, WASCO had the opportunity to make every argument that it now makes to the Commission in its petition for declaratory ruling. The recent amendments to North Carolina's hazardous waste rules governing generators, cited in WASCO's petition, do nothing to change these facts. DEQ has never alleged that WASCO was a generator of hazardous waste at the Facility. Instead, WASCO's liability is based on its status as an operator of the Facility for purposes of post-closure remediation. The rule amendments cited by WASCO do not apply retroactively to events that took place at the Facility twenty-five to thirty years ago, and they have no bearing on WASCO's status—and obligations—as an operator of the Facility.

STATEMENT OF FACTS

Overview

WASCO has obstructed the timely and complete cleanup of contaminated property in Swannanoa, North Carolina by assuming liability through its words and conduct over many years and then refusing to perform its statutory and regulatory obligations to ameliorate the harm onsite. Such liability is based on its direct dealings with DEQ's Division of Waste Management, Hazardous Waste Section ("the Section"). WASCO has been the only entity with ultimate decision-making responsibility for post-closure compliance matters at the Facility since 2004, and WASCO performed post-closure duties without complaint from 2004 until September 2013.

Decades ago, an underground storage tank containing used dry cleaning solvent (perchloroethylene or PCE) leaked. The tank was removed and the pit was backfilled and closed as a landfill with contaminated soil left in place. In 1995, after entering into an Administrative

Order on Consent[6] with the State agreeing to close the Facility as a landfill and provide post-closure care under the State's hazardous waste laws, the owner of both the contaminated land and the knitwear business responsible for the contamination ("Winston Mills") sold the property to Culligan. As part of this transaction, Culligan received $9 million for assuming the environmental liability at the Facility. As a result, Culligan contacted the Section and agreed to step into the shoes of the property owner. Culligan pledged to take responsibility for the contamination and followed through on that promise.

WASCO, then known as United States Filter Corporation, acquired Culligan in 1998. A corporate affiliate of WASCO was subsequently able to sell the Culligan Group for $610 million based partly on an indemnity agreement between WASCO and Culligan's buyer related to the Facility. As a result, after Culligan's divestiture from WASCO in 2004, WASCO contacted the Section and agreed to fill the same shoes worn by Culligan and acquired from the polluter. (Ex. C at Doc. Ex. 428-40, 761) After performing post-closure operations for many years, WASCO now claims no such post-closure operations were ever required by the applicable law.

WASCO misunderstands the nature of post-closure liability under the State Hazardous Waste Program, which is prospective and not retrospective. In stepping into the shoes of Winston Mills, Culligan became an operator. In stepping into the shoes of Culligan—knowing exactly what responsibility it was undertaking—WASCO became an operator responsible for obtaining a post-closure permit. An assuming party is bound by its conduct. Allowing WASCO to walk away from responsibilities it assumed expressly and knowingly would allow other operators to do the same, wreaking havoc on the State Hazardous Waste Program and the State's ability to achieve cleanup of contamination in the interests of human health and the environment.

[6] This Administrative Order on Consent is included as Exhibit G to this response.

WASCO's Activities at the Facility

The Facility is located at 850 Warren Wilson Road, Swannanoa, North Carolina 28778, which is associated with EPA Identification Number NCD 070 619 663. (Ex. C at Doc. Ex. 259-321)

Following Culligan's 2004 divestiture from WASCO, Culligan represented in a letter to the Section that WASCO was "assuming responsibility" for the Facility. (Ex. C at Doc. Ex. 129-30) The letter indicated that copies were transmitted to John Coyne, the Director of Environmental Affairs for WASCO. (Id.)

In subsequent communications, Mr. Coyne informed the Section that he was "very familiar with this project" and that WASCO "intend[ed] on keeping the same consultants . . . and doing everything else we can to maintain continuity and keep the project headed in the right direction." (Ex. C at Doc. Ex. 132-33)

WASCO thereafter submitted Part A permit[7] applications in 2004, 2006, and 2008, identifying WASCO as the operator for post-closure operations at the site pursuant to the State's hazardous waste laws. (Ex. C at Doc. Ex. 261-74, 276-79, 281-91) WASCO also continued to provide financial assurance[8] for the Facility under a 2003 Trust Agreement, Standby Trust Fund, and Irrevocable Standby Letter of Credit, which it amended in the Section's favor for inflation 10

[7] A post-closure permit consists of two parts. The "Part A" contains basic Facility information. 15A NCAC 13A .0113(j) (adopting 40 C.F.R. § 270.13). Initial notice of hazardous waste activity and submission of a Part A mean a facility is "treated as having been issued a permit," making it subject to "interim status" requirements, including post-closure care associated with the regulated unit (here, the former waste-PCE tank). 15A NCAC 13A .0113 (adopting 40 C.F.R. § 270.70(a)(2)); 15A NCAC 13A .0110.

[8] The purpose of the financial assurance requirement is to "ensure that sufficient funds are available for . . . post-closure maintenance and monitoring, [and] any corrective action that the Department may require . . . even if the applicant or permit holder becomes insolvent or ceases to reside, be incorporated, do business, or maintain assets in the State." N.C.G.S. § 130A-295.04.

times between the divestiture of Culligan and the initiation of the 2013 contested case. (Ex. C at Doc. Ex. 489-591)

After the divestiture of Culligan, WASCO also entered into a Master Consulting Services Agreement with Mineral Springs Environmental, P.C. ("Mineral Springs") for Mineral Springs to perform work at the Facility. (Ex. C at Doc. Ex. 878-82) Mineral Springs or its subcontractors performed a variety of post-closure activities related to the Facility between November 2004 and August 2013, including monitoring of groundwater quality, operation and maintenance of groundwater contamination cleanup systems, and assessments of potential contamination sources at the Facility. (Ex. C at Doc. Ex. 1048-1168)

Mineral Springs submitted 33 reports associated with these post-closure activities to the Section on WASCO's behalf between February 2005 and May 2013, including 16 groundwater monitoring reports that expressly identified WASCO as the "responsible party for the site." (Ex. C at Doc. Ex. 532-863) WASCO was routinely copied on these communications, and WASCO employees provided direct comment on a number of the reports prepared by Mineral Springs prior to their submission to DEQ.

More detailed facts are set out in both DEQ's brief to the Court of Appeals (attached hereto as Exhibit H) and in the Court of Appeals Opinion (Exhibit A).

POSITION OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

DEQ requests that the Commission deny WASCO's petition and refuse to issue a declaratory ruling. In the alternative, DEQ requests that the Commission issue a declaratory ruling that WASCO is required to obtain a post-closure permit for the Facility pursuant to 15A N.C.A.C.

13A .0113(a). After providing a brief overview of the statute and rules relevant to declaratory rulings generally, this brief will address each of these issues in turn.

I. Background on Declaratory Rulings

Declaratory rulings are authorized by the North Carolina Administrative Procedure Act pursuant to N.C.G.S. § 150B-4.[9] Using this process, a party may request that an agency "issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency." N.C.G.S. § 150B-4(a). As required by the statute, the Commission has promulgated rules in Section .0600 of Title 15A, Subchapter 2I of the North Carolina Administrative Code governing "the procedure for requesting a declaratory ruling and the circumstances in which rulings shall or shall not be issued." N.C.G.S. § 150B-4(a). Pursuant to this statute and the relevant rules, the Commission may refuse to issue a declaratory ruling when there is good cause to do so.

Where, as here, a party requests a declaratory ruling regarding the application of a statute or rule "to a given set of facts," the facts alleged by the party requesting the ruling must be settled. In Re Ford, 52 N.C. App. 569, 572, 279 S.E.2d 122, 124 (1981) (noting that the former NCGS 150B-17, with the same language regarding "a given state of facts," "clearly [did] not contemplate an evidentiary proceeding").

II. "Good Cause" Exists for the Commission to Refuse to Issue a Declaratory Ruling

Pursuant to 15A NCAC 2I .0603(c), "[w]henever the Commission believes for 'good cause' that the issuance of a declaratory ruling is undesirable, the Commission may refuse to issue

[9] This statute is included as Exhibit I to this response.

such ruling." As set forth in 15A NCAC 2I .0603(d), good cause for refusing to issue a declaratory ruling includes, but is not limited to:

> (1) finding that there has been a similar determination in a previous contested case or declaratory ruling;
>
> (2) finding that the matter is the subject of a pending contested case hearing or litigation in any North Carolina or federal court;
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> (3) finding that no genuine controversy exists as to the application of a statute, order or rule to the specific factual situation presented; or
>
> (4) finding that the factual context put forward as the subject of the declaratory ruling was specifically considered upon the adoption of the rule being questioned, as evidenced by the rulemaking record.

There is good cause to refuse the requested declaratory ruling in this matter. The issues raised by WASCO in the declaratory ruling have already been determined in a contested case before OAH, the Wake County Superior Court, and the North Carolina Court of Appeals. For this reason, good cause to deny the petition exists on the basis of reasons one and two cited above: there was a similar determination in a previous contested case, and the matter has already been the subject of litigation in the North Carolina courts.[10] In addition, good cause exists for denying the petition for the third reason noted above, in that there is no genuine controversy. The North Carolina Court of Appeals has determined the matter at issue in this petition and already decided that "[i]t is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case." (Ex. A p 5) Since the court has now spoken on the matter, there can be no genuine controversy as to the application of the statutes and rules to WASCO.

[10] In addition, on April 19, 2018, DEQ filed a new complaint for injunctive relief against WASCO in Buncombe County Superior Court. In that case, DEQ is seeking to enforce the Court of Appeals decision rendered against WASCO in the prior litigation.

A. Good Cause for Denying the Petition Exists Because these Matters Have Already Been Decided in DEQ's favor by OAH and the North Carolina Courts

As shown above, good cause for the Commission to refuse the requested ruling exists because these matters have already been considered and decided by OAH, the Wake County Superior Court, and the North Carolina Court of Appeals. WASCO asks this Commission to declare that "DEQ lacks the authority to require WASCO to obtain a post-closure permit or a post closure order for the Facility." This is exactly the question that was already addressed in the contested case proceeding, the Superior Court, and the Court of Appeals. And each of these courts held exactly the opposite—that WASCO was required to obtain a post-closure permit for the Facility. To reiterate some of the most relevant language from the Court of Appeals decision:

- "It is WASCO's responsibility to obtain a post-closure permit for the Site [i.e., the Facility] that is at issue in the present case." (Ex. A p 5)
- "It is clear that the pit at the Site that was certified closed as a landfill in 1993 is subject to post-closure regulation under the State Hazardous Waste Program and RCRA." (Ex. A pp 21-22)
- "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site." (Ex. A p 22)

Although the focus of the prior litigation was on whether WASCO met the definition of "operator" under the State's Hazardous Waste program, the above language shows that the courts considered the broader issue of whether the Facility was appropriately subject to continuing RCRA jurisdiction. Moreover, the central question in the prior litigation was the same as the question presented in this request for declaratory ruling: whether WASCO is responsible for post-closure remediation at the Facility. OAH, the superior court, and the Court of Appeals all found that WASCO was in fact the responsible party.

Because the matter has already been resolved in DEQ's favor by the courts following a contested case proceeding, good cause exists for refusing WASCO's petition for declaratory ruling. In prior cases where a party has sought a declaratory ruling from an agency on a matter already decided in either a contested case or the courts, the Court of Appeals has held that the agency was correct to refuse to issue a declaratory ruling.

In the case of Charlotte-Mecklenburg Hosp. Auth. v. Bruton, 145 N.C. App. 190, 550 S.E.2d 524 (2001),[11] the North Carolina Court of Appeals held that the Department of Health and Human Services had appropriately refused a request for declaratory ruling pursuant to N.C.G.S. § 150B-4, where the two factual situations upon which the petitioners based their requests had already been the subject of contested cases in OAH. The Court of Appeals agreed with the agency that the requested ruling "would be a waste of administrative resources, and is clearly unnecessary." Id. at 192, 550 S.E.2d at 526.

In the case of Catawba Memorial Hosp. v. North Carolina Dep't of Human Resources, 112 N.C. App. 557, 436 S.E.2d 390 (1993), the Court of Appeals similarly affirmed that the agency had good cause to refuse a declaratory ruling where the issue presented was similar to the issue decided in a prior contested case. "We hold good cause exists for denial of a request for a declaratory ruling where the denial is based on the existence of a prior agency ruling which necessarily required an interpretation of the same statute which is the subject of the request for declaratory ruling." Id. at 563, 436 S.E.2d at 393.

And in the case of Equity Solutions of the Carolinas, Inc. v. N.C. Dep't of State Treasurer, 232 N.C. App. 384, 394, 754 S.E.2d 243, 251 (2014), the Court of Appeals again held that "it would be a waste of administrative resources" for an agency to issue a declaratory ruling on a

[11] The cases discussed in this portion of DEQ's brief are included as Exhibit J to this response.

matter that was the subject of pending litigation, and affirmed the agency's decision to refuse a declaratory ruling on the matter.

As in the cases cited above, in the present matter WASCO seeks a declaratory ruling on an issue that has already been the subject of a contested case and an appeal through the North Carolina court system. As in the cases cited above, the prior case involved an interpretation of the same Hazardous Waste program rules and statutes that are the subject of the present declaratory request. Because the question in the prior litigation was the same, good cause exists to refuse WASCO's request. WASCO cannot come to the Commission seeking a different answer from the one provided by the courts. Since these matters have already been decided, reopening the case is futile and a waste of administrative resources.

B. The Doctrines of Res Judicata and Collateral Estoppel Similarly Prevent Relitigation of the Issues in WASCO's Petition

This conclusion is bolstered by the legal doctrines of res judicata and collateral estoppel, which prevent a party from relitigating an issue that was decided, or could have been decided, in a prior case. As explained by the North Carolina Supreme Court, the doctrine of res judicata provides that "a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." Whitacre P'ship v. BioSignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). The doctrine operates to prevent "the relitigation of all matters . . . that were or should have been adjudicated in the prior action." Id. (ellipsis in original; emphasis added). Under the closely-related doctrine of collateral estoppel, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." Id.

Res judicata and collateral estoppel apply equally to administrative decisions and to decisions of the EMC. Maines v. Greensboro, 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980); King v. N.C. Dep't of Env't, Health & Nat'l Res., 125 N.C. App. 379, 481 S.E.2d 330 (1997) (giving res judicata effect to a decision of the EMC); Weeks v. N.C. Dep't of Nat'l Res. & Comm. Dev., 97 N.C. App. 215, 388 S.E.2d 228 (1990); Sasser v. N.C. Dep't of Env. & Nat'l Res., 02 EHR 1794, 2003 N.C. ENV LEXIS 14 (OAH, filed Aug. 28, 2003) (applying res judicata in the context of an administrative proceeding).[12]

In the present matter, these legal doctrines prevent WASCO from seeking a different ruling from the Commission than was received from the Court of Appeals in the prior litigation between WASCO and DEQ. Because the Court of Appeals has already decided that WASCO is required to obtain a post-closure permit at the Facility and that the Facility is a landfill subject to post-closure requirements, WASCO cannot now ask the Commission to declare otherwise.

Even if WASCO claims that some of the specific arguments raised in its petition were not raised in the prior litigation, this is of no import. The prior litigation challenged DEQ's assertion that WASCO was required to obtain a post-closure permit at the Facility. WASCO was required to bring forth all of its arguments against DEQ's position in that proceeding. Any argument that was not made then was abandoned, and the doctrines of res judicata and collateral estoppel prevent any new argument on the same issue from being raised now that the prior litigation is over. To allow otherwise would encourage a party such as WASCO to raise only one argument at a time, and then relitigate the matter over and over until all potential arguments were exhausted, allowing litigation to continue—and cleanup and remediation to be delayed—indefinitely. It is exactly this which the doctrines of res judicata and collateral estoppel are designed to prevent.

[12] These cases are included in Exhibit J to this response.

C. The Recent Changes to the Hazardous Waste Rules Regarding Generators Have No Effect on the Matters in WASCO's Petition

WASCO argues that recent changes to portions of the hazardous waste rules pertaining to generators of hazardous waste, (see WASCO Br. pp. 1 n.1, 10-11), allow WASCO a second bite of the apple—to argue again what WASCO has already unsuccessfully argued in OAH, Superior Court, and the Court of Appeals. WASCO is mistaken, for two reasons.

First, WASCO is liable for post-closure permitting and remediation as an operator, not a generator, so changes to the hazardous waste rules regarding post-closure responsibilities of generators have no bearing on WASCO's responsibilities as an operator. In fact, WASCO's liability has always derived from its status as an operator of the Facility, and WASCO has never been found to be a generator of hazardous waste at the Facility.

The responsibilities of operators are found in a separate rule, 40 C.F.R. § 270.1. WASCO's responsibilities as an operator of the Facility were not altered by the changes to the generator rules, and the operator rules continue to require WASCO to obtain a post-closure permit and perform post-closure care at the Facility.

Second, to the extent the new generator rules are substantively different from the prior rules,[13] the new rules are not retroactive such that they would apply to this Facility, where there is currently no generator and where there has not been a generator for approximately twenty-five years. There is a strong presumption against retroactive application of statutes and rules, and nothing in the new generator rules indicates an intent that any substantive changes be applied retroactively to facilities where no generator is present and that have already been closed under the

[13] To the extent WASCO argues that the new generator rules merely clarify the meaning of the prior rules, WASCO's arguments on this issue are barred by the decision of the Court of Appeals and the doctrines of res judicata and collateral estoppel, for the reasons stated above in Sections II.A and II.B.

prior rules. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1988) (decision of the United States Supreme Court holding that "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989) (acknowledging that retroactive application of RCRA regulations is disfavored); Booker v. Duke Medical Center, 297 N.C. 458, 467 (1979) (N.C. Supreme Court noting that retroactive application of a law is unconstitutional where it interferes with existing rights or liabilities); Ken-Mar Finance v. Harvey, 90 N.C. App. 362, 366 (1988) (refusing to retroactively apply a federal regulation that took effect after the transaction at issue in that case). Even where a law is intended to apply retroactively, the new law cannot disturb a judgment rendered against a party on the same issue in a prior court decision. Piedmont Memorial Hospital, Inc. v. Guilford County, 221 N.C. 308 (1942).

Since there are no generators currently at the Facility (to which the new rules could apply), the generator rules have no applicability in the present case. All generator activity at the Facility ceased with closure and removal of the tanks and their associated structures, and as such there has not been a generator at the Facility now for approximately twenty-five years. The new generator rules cannot retroactively alter the decision to close the Facility as a landfill made at the time of closure and memorialized in the administrative order on consent in 1990. For this reason, even if the generator rules did apply retroactively to current generators, they would not change the regulatory status of the Facility in this case for purposes of the post-closure regulations which apply once generation of hazardous waste has ceased. Accordingly, the changes to the rules do not alter the decision of the Court of Appeals finding that WASCO, as an operator of the Facility, was required to obtain a post-closure permit.

D. Conclusion

For the foregoing reasons, good cause exists to refuse WASCO's request for declaratory ruling. The matter has previously been litigated in OAH and the courts. The Commission cannot reach a determination different from the Court of Appeals. The changes to the generator rules have no bearing on WASCO's responsibilities as an operator of the Facility. To allow the declaratory request to proceed would be a waste of administrative resources.

III. Should the Commission Reach the Merits of the Requested Declaratory Ruling, DEQ Requests a Ruling in its Favor

As noted above, the North Carolina Court of Appeals reviewed the relevant statutes and rules and held that "[i]t is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case." (Ex. A p 5) The doctrine of res judicata forbids the Commission from reaching a different decision. For this reason alone, should the Commission reach the merits of WASCO's petition, DEQ is entitled to a declaratory ruling that WASCO is required to obtain a post-closure permit for the Facility pursuant to 15A N.C.A.C. 13A .0113(a), adopting by reference 40 C.F.R. § 270.1(c).

In addition, the arguments of WASCO's petition miss the point. Whether or not closure as a landfill was required by the rules in place at the time,[14] the Facility was in fact closed as a landfill

[14] Of course, DEQ disagrees with WASCO's argument that the Facility was not required to be closed as a landfill. However, even accepting the legal premise of WASCO's argument that small quantity generators were not required to clean close under 40 C.F.R. § 265.201, WASCO has not established the facts necessary to show that Winston Mills would have fallen within this rule. For instance, WASCO has not shown that Winston Mills was a small quantity generator at all relevant times, that waste-PCE did not remain in the waste-PCE tank more than 180 days (see the 1992 version of 40 C.F.R. § 265.201(a), attached hereto as Exhibit K, which specifically states that the provisions of that section do not apply to small quantity generators who store hazardous waste in tanks beyond 180 days), or that no other basis of RCRA liability existed, such as the fact that there was a prior spill from the tanks (see Exhibit G).

pursuant to an administrative order on consent between Winston Mills and DEQ's predecessor agency. (See Exhibit G). If DEQ lacked the authority to do so, Winston Mills could have challenged the closure decision when it was made, in 1990. This Winston Mills did not do, and the time for challenging this decision has long since passed. See N.C.G.S. § 150B-23(f) (final agency decisions must generally be challenged within 60 days). The status of the Facility as a landfill is therefore settled, and has been for twenty-five years.

Moreover, WASCO knew this history at the time it voluntarily and affirmatively agreed to take over responsibility for environmental cleanup at the site. WASCO then proceeded to act as operator of the Facility for almost ten years before raising any objections to the role it had voluntarily undertaken. Given that the status of the Facility has long-since been settled, and given that WASCO knew of this settled status at the time it assumed responsibility as operator of the Facility, WASCO cannot now challenge the decision to close the site as a landfill. At this point, the fact that the Facility is a landfill has been judicially determined. As the Court of Appeals stated, "It is clear that the pit at the Site that was certified closed as a landfill in 1993 is subject to post-closure regulation under the State Hazardous Waste Program and RCRA." (Ex. A pp 21-22)

Because the Facility is regulated as a landfill, WASCO, as its operator, is required to obtain a post-closure permit for the Facility pursuant to 40 C.F.R. § 270.1(c), incorporated by reference at 15A N.C.A.C. 13A .0113(a). WASCO does not challenge this requirement or its status as an operator in its petition for declaratory ruling. Moreover, the Court of Appeals found that "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site" and that "It is WASCO's responsibility to obtain a post-closure permit for the Site." (Ex. A pp 5, 22)

As the party principally engaged in and in charge of the post-closure operations at the Facility for more than a decade, WASCO is an operator of a landfill responsible for obtaining a

post-closure permit pursuant to 15A N.C.A.C. 13A .0113(a), which incorporates by reference 40 C.F.R. § 270.1(c). Should the Commission consider the merits of WASCO's petition for declaratory ruling, DEQ requests that the Commission so find.

CONCLUSION

For all of the foregoing reasons, the Commission should refuse, for good cause, to issue a declaratory ruling on the merits of this request. In the alternative, the Commission should issue a ruling declaring that WASCO is required to obtain a post-closure permit for the Facility pursuant to 15A N.C.A.C. 13A .0113(a), adopting by reference 40 C.F.R. § 270.1(c).

Respectfully submitted this the 20th day of April, 2018.

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EXHIBIT LIST FOR THE DEPARTMENT OF ENVIRONMENTAL QUALITY

1. Court of Appeals Decision filed April 18, 2017	Exhibit A
2. Record on Appeal	Exhibit B
3. Documentary Exhibits included with the Record on Appeal	Exhibit C
4. 15A N.C.A.C. 13A .0113(a)	Exhibit D
5. 40 C.F.R. § 270.1	Exhibit E
6. 15A NCAC 2I .0603	Exhibit F
7. Administrative Order on Consent	Exhibit G
8. DEQ's brief to the Court of Appeals	Exhibit H
9. N.C.G.S. § 150B-4	Exhibit I
10. Cases cited in DEQ's brief	Exhibit J
11. 40 C.F.R. § 265.201 (1992)	Exhibit K
12. Closure Certification	Exhibit L

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing BRIEF OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY was served on the Environmental Management Commission and counsel for petitioner, by electronic mail, as follows:

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This the 20th day of April, 2018.

/s/ T. Hill Davis, III
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