Exhibit 35

Email to DEQ General Counsel, dated 05 May 2017

Scanned Copy of 5/4 Letter to Your Attention

1 message

Huerter, Rodney <rodney.huerter@veolia.com> Fri, May 5, 2017 at 12:48 PM
To: "Lane, Bill F" <bill.lane@ncdenr.gov>
Bcc: "Sowatzka, Adam" <asowatzka@kslaw.com>, Schrang <michael.schrang@veolia.com>

Bill:

Good afternoon. I have attached a scanned copy of a letter I sent to your attention (dated 5/4), which your office received this morning. The file with the documents referenced in the graphic (the graphic is included in the attached PDF) would make the file too large to email, so I will send those in a separate email. I will also email a copy of the referenced public records request (No. 2017-01-02), so that you have easy access to the attachments to that request.

A few relevant comments:

- All of the documents that are included in the tabs that support the graphic were produced by the Department to WASCO during discovery in the contested case between those parties (the Department used a "WASCOxxxxxx" format for Bates numbering, but did not apply Bates numbering to all produced documents . . . for the latter, WASCO applied a "DENR Non Bates Numbered xxxxxx" format)
- Footnote 4 of the letter and the 9/27/13 text block on the graphic relate to a "fact-intensive" determination requirement (not proper for summary judgment), and Footnote 7 relates to the *Bestfoods* case on remand. The attached ZIP file includes:
    - various *Bestfoods*-related opinions that address the **'fact-intensive' requirement** (the relevant citation is included in each file name) . . . although there are a couple of red-flagged opinions, the 'fact-intensive' requirement was not a challenged issue that was elevated to the Supreme Court;
    - the transcript of the 3/24/98 oral arguments before the Supreme Court (see generally pp 12-13, 20, 33-34 and 53 . . . WASCO has had no involvement in the day-to-day operations of the AD&F facility) (note Justice Ginsburg's comment (pp 33-34) that not having a physical presence in the location of the subject facility "helps" an argument that a person is not an operator (this reflects back to **"day-to-day" control, which WASCO does NOT have, and has never had, with respect to AD&F facility**); and
    - A copy of an opinion related to the very same snippet from the *Bestfoods* case from E.D.N.C.'s Judge Boyle, who ruled that language did not make the contractors in that case (who damaged a pipeline, which was the root-cause of a release of jet fuel) "operators" under CERCLA (see page *7) . . . but this very same snippet is being pointed to as making WASCO a RCRA operator, despite the fact that WASCO: **1) has never had any physical presence** at the AD&F facility (or in the State of North Carolina), **2)** has **not not caused or exacerbated any contamination** at the AD&F site, **and 3)** has **not treated, stored or disposed** of any hazardous waste -- or any wastes whatsoever -- at the AD&F facility.
- I have also attached a copy of the *Bestfoods* case, in which I have highlighted a number of items for your attention. Particularly note the Court's references to "wrongful conduct" (p. 60), "alleged wrong" / "wrong complained of" / "wrongs committed" (pp. 64-65), "wrongful conduct prohibited by the Act [i.e., CERCLA]" (pp. 65-66) . . . **WASCO is not accused of having ever committed any wrongful conduct prohibited by CERCLA in connection with the AD&F facility**.
- The graphic references information on the various EPA data portals as of 5/4/17. That is indeed the case. I will be glad to provide the supporting documentation if you request its.

- The financial assurance-related information that is associated with the letter included as Tab No. "III" also needs to be considered in connection with PRR No. 2016-12-04 (which the Department has still not responded to) . . . if the Department never complied with the requirements in 40 CFR 270.72(a)(4) (i.e., written notification), then it was never proper to release Winston Mills from its financial assurance requirements (yet, the Department's briefs represent that Culligan was providing FA on its own behalf, and then WASCO was providing FA on its own behalf . . . which we contend are misrepresentations . . . and we believe that our contentions are supported by the Department's own records (or lack thereof))

In closing, I call your attention to the language in the Department's August 10, 2012 letter (which I forwarded to you with my April 18 letter) that represents that the Department will give "every consideration . . . to changing WASCO's status as an operator of the Site" if WASCO "identif[ies] an alternate operator." At the time Department drafted and sent that letter, there were ***two*** Part A forms submitted that identify Dyna-Diggr (Loren Lanter) as the ***sole*** owner and operator of the AD&F facility, **dating back to December 1, 2007**. We're requesting assistance from you and Secretary Regan to take the proper action to help correct the Department's error in continuing to attempt to classify WASCO as an operator of the AD&F facility, which is counter to the information in the Dyna-Diggr Part A forms, and counter to the EPA's records associated with this faiclity.

Thank you for your consideration. Have a good weekend.

Rodney G. Huerter
Vice President & Senior Counsel
WASCO LLC
4760 World Houston Pkwy, Ste 100
Houston, TX 77032

832-300-5719 (office)
713-672-8209 (fax)
936-648-3162 (mobile)

Rodney.Huerter@veolia.com

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3 attachments

Letter to DEQ GC (5.4.17), without Tabs A-R.pdf
6270K

Bestfoods-related ('fact-intensive' 'higly fact-specific').zip
672K

US v Best Foods, 524 US 51 (1998) -- highlighted for DEQ GC.docx
86K

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[pages omitted]

1998 WL 146706 (U.S.) (Oral Argument)
Supreme Court of the United States.

UNITED STATES, Petitioner
v.
BESTFOODS, ET AL.

No. 97-454.
Tuesday, March 24, 1998
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ORAL ARGUMENT OF LOIS J. SCHIFFER ON BEHALF OF THE PETITIONER

ORAL ARGUMENT OF KENNETH S. GELLER ON BEHALF OF THE RESPONDENTS

Washington, D.C.

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

Oral Argument

Appearances:

LOIS J. SCHIFFER, ESQ., Assistant Attorney General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

KENNETH S. GELLER, ESQ., Washington, D.C.; on behalf of the Respondents.

*3 PROCEEDINGS

(10:13 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 97-454, the United States v. Bestfoods, et al.

Ms. Schiffer.

ORAL ARGUMENT OF LOIS J. SCHIFFER ON BEHALF OF THE PETITIONER

MS. SCHIFFER: Mr. Chief Justice, and may it please the Court:

At issue in this case is under what circumstances is a parent corporation directly liable through its own acts as an operator of a facility under CERCLA?

This is a case of statutory construction. Congress, to carry out its intent to have those responsible for causing pollution at a facility responsible to remediate it created a system that holds, among others, "any person who owned or operated" a facility

* * * *

[pages omitted]

MR. GELLER: Williams is the only person that they have identified as an employee of CPC and nothing that Williams did can be construed as operating this facility. He attended a single meeting. He gave some advice which was not followed. That was the extent of Williams' involvement in this case.

When you look at the list of factors that the ***32** district court identified as to why it concluded that CPC was an operator here, Williams is far down the list. What the district court principally referred to was the fact that CPC owned 100 percent of the stock here. There were some dual officers and directors. The fact is, there is no employee of CPC that did anything here that could be construed as operating the facility.

QUESTION: Well, what did Williams do in particular? I'm concerned in particular.

MR. GELLER: He--

QUESTION: Even if we eliminate all the rest, should we send it back to the district court--

MR. GELLER: No, I--

QUESTION:--and tell the district court, you know, is--was Williams, what Williams did enough?

MR. GELLER: If the--Justice Scalia, if the Sixth Circuit adopted the right legal standard, which we conclude it did, there's no reason to send it back because the Sixth Circuit looked at all the evidence in this case, including Williams, and concluded that none of that amounted to operating a facility on the part of CPC.

But I'd like to return the Court, if it would, because there's a lot-- been a lot of--

QUESTION: Mr. Geller, before we get off Mr. Williams, what you said is, well, he was just sort of ***33** a peripheral character, but at least one of these briefs told us that the sub didn't even fill out a questionnaire without consulting him, because he was responsible for the environmental affairs of the corporate unit, that is, both parent and sub.

MR. GELLER: Justice Ginsburg, that is completely untrue. Williams was a lawyer-lobbyist who worked for CPC who attended a single meeting, would occasionally give advice to Ott II, which was frequently ignored.

But as I say, all of this was before the Sixth Circuit, which concluded that none of this amounted to direct operation of the facility by CPC.

QUESTION: Well, where did Williams live? I'd like to get something concrete here.

MR. GELLER: Williams lived--

QUESTION: Did he live in Muskegon?

MR. GELLER: No. No, he didn't. None of the--none of the C--none of the people whose activities here were attributable to CPC, none of the dual employees lived at the Muskegon site.

QUESTION: Where did they live?

MR. GELLER: They all lived in New Jersey, where CPC had its corporate headquarters. None of them was--

QUESTION: Even Mr. Ott? Was Mr Ott--

***34** MR. GELLER: Mr. Ott--the two corporate officers who had dual-- who wore the two hats, Ott and Eiszner, who had been employees of Ott I when it was taken over by CPC, shared their time between Muskegon and New Jersey, spent most of their time at CPC--

QUESTION: It would be better for your case if the dual employees lived in Muskegon. What's better for your case is if the sole employee, such as Williams, lived in New Jersey. That helps you.

But the fact that the dual employees were at CPC's headquarters--

MR. GELLER: It doesn't matter where they lived. The question is, when these dual employees took actions on behalf of Ott II, is it appropriate to attribute those actions to the parent CPC, and the common law rule is clearly no.

QUESTION: But do you agree the record doesn't tell us who paid their salary when they were working? Supposing they were paid entirely by the parent for everything they did, would that make a difference?

MR. GELLER: If they were employee--if they were acting--if they were dual employees, it seems to me, Justice Stevens, it doesn't matter who paid their salaries. The question is, in what capacity were they acting, and if they were acting in their capacity as ***35** Ott II employees it is inappropriate-- inappropriate--

QUESTION: Do you think he'd be acting in his capacity as an Ott II employee if all his money came from the parent?

MR. GELLER: Well, the record doesn't reflect, of course, and it's--

QUESTION: Strange.

MR. GELLER:--silly to speculate. The question is, who is responsible for the activities of these dual employees, and the common law answers that question quite clearly. What the Government is asking for here is a new Federal common law rule to attribute all of that activity to the parent, and there's absolutely no basis--

QUESTION: Well, no, they just say you've got to attribute some of it to the parent. If you attribute some of it to the parent, it's--you know, maybe half-time he's an operator and half-time he's the general--

MR. GELLER: The Government has never made that case. What they suggest is simply because CPC controlled and participated in the activities of its--

QUESTION: Well, the district court did emphasize that a lot, I agree with you, but I'm not sure they confined it to the corporate control.

MR. GELLER: Well, I would like if I could to ***36** turn the court's attention to the district court's fact-findings, because it seems to me they are fairly significant in this case, and quite contrary to what the Government suggests here.

QUESTION: Mr. Geller, may I ask for a clarification before you do that, and that--you said the Sixth Circuit took care of Williams. They made him a minor player and that's that.

But I took it that the big difference between the district court and the Sixth Circuit was, what is the source of law that we look to, because if it's State law veil-piercing, then it takes a sham, a fraud to go through, but if you--on the district judge's view and on the Government's view it's not State law, it's Federal common law. They called it, what, a middle ground or something, but not the traditional State veil-piercing. Some uniform Federal notion that the Federal courts will develop of a parent liability.

MR. GELLER: That's correct, Justice Stevens. The district court adopted this new middle ground of liability, which is something in between direct liability and State common law veil-piercing, and the question in this case, the question for this Court is, is there anything in CERCLA that could be read on the part of Congress to want to have a new rule for attributing the ***37** liability of the subsidiary to the parent where the Congress--

QUESTION: Well, but the Government--the Government says that's not its theory now, at least. The Government says you have to define the term operate, owner and operate. These people were actively engaged in management and participating.