Exhibit 12

STATE OF NORTH CAROLINA	ENVIRONMENTAL MANAGEMENT COMMISSION
COUNTY OF WAKE	

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 DEQ has the authority to require WASCO to obtain a post-closure permit or a post-closure order 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 F and G 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. 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." (Opinion[3] 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." (Opinion pp 21-22)
- "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site." (Opinion p 22)

Good cause to refuse the request for declaratory relief also exists on the grounds that WASCO's petition is highly fact-intensive, and a declaratory proceeding is not the appropriate place to make detailed factual findings or determine disputed issues of fact. That is the purpose of litigation before a court, which allows for discovery and provides a forum for resolving factual disputes.

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

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

If the Commission were to consider the merits of WASCO's petition, the Commission should hold that DEQ has the authority to require WASCO to obtain a post-closure permit or a post-closure order 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. 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 December 8, 2017. 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; and a petition for rulemaking that is also before this Commission.

In September 2013, WASCO filed a petition for contested case in the Office of Administrative Hearings ("OAH") (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 (Doc. Ex. 87). The presiding administrative law judge ruled in favor of DEQ, agreeing that WASCO was an operator of the

[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.

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.

WASCO then filed a Petition for Judicial Review with the Wake County Superior Court. (R[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. (R 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." (Opinion 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.
>
> ****
>
> WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site.

(Opinion pp 21-22)

[5] Citations to "R" are to the Record on Appeal filed with the North Carolina Court of Appeals in the prior litigation between DEQ and WASCO. The Record on Appeal is included as Exhibit B to this response.

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 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.

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) leaked. The tank was removed and the pit backfilled as a landfill with contaminated soil left in place. In 1995, after entering into an Administrative Order on Consent[6]

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

with the State agreeing to close the Facility as a landfill and provide post-closure remediation 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. (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.

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. (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. (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." (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. (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 times

[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.

between the divestiture of Culligan and the initiation of the 2013 contested case. (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. (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 operation and maintenance of a groundwater contamination cleanup system and assessments of potential contamination sources at the Facility. (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." (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 K) 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 DEQ has the authority to require WASCO to obtain a post-closure permit or a post-closure order 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).

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").

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 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 such ruling."

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

Pursuant to 15A NCAC 2I .0603(d), good cause for refusing to issue a declaratory ruling includes (but is not limited to):

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

(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;

(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.

Good cause to refuse the requested declaratory ruling in this matter exists for two reasons. First, 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. 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." (Opinion 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.

Second, WASCO's request for declaratory ruling is highly fact-intensive, and a declaratory proceeding is not the appropriate place to make detailed factual findings or determine disputed issues of fact. That is the purpose of litigation before a court, which allows for discovery and provides a forum for resolving factual disputes. This is another basis for refusing to issue a declaratory ruling in this matter.

A. Good Cause for Denying the Petition Exists Because these Matters Have Already Been Decided 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." (Opinion 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." (Opinion pp 21-22)
- "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site." (Opinion 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),[10] 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.

[10] The cases discussed in DEQ's brief are included as Exhibit H to this response.

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 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.

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).

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 authority to require WASCO to obtain a post-closure permit at the Facility. WASCO was required to bring forth all of its arguments against DEQ's authority 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.

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. To allow the declaratory request to proceed would be a waste of administrative resources.

B. Good Cause for Denying the Petition Exists Because WASCO's Petition Impermissibly Requires the Commission to Base its Decision on Unproven Factual Assertions

Good cause also exists for refusing to issue a declaratory ruling because WASCO's request is highly fact-specific and requires the Commission to make the type of fact-finding more suitable for a judicial proceeding. The procedure established by law for a declaratory petition before the Commission "clearly does not contemplate an evidentiary proceeding." In re Ford, 52 N.C. App. 569, 572, 279 S.E.2d 122, 124 (1981). If evidence is required to establish the necessary facts, the proper procedure is a contested case hearing. Id. Moreover, statements of a petitioner before the EMC do not constitute evidence. Id.

In finding an agency had good cause for refusing requests for declaratory action, the Court of Appeals has noted the advantages of litigation in developing needed evidence. For instance, in noting that good cause existed to deny a petition for declaratory action on the grounds that other litigation was pending, the Court of Appeals also noted that "the trial court ruling on the issues in the [separate litigation] will have the benefit of a fully developed factual record following discovery, while [the] request [for declaratory action] presented only an alleged factual basis for a ruling." 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). Similarly, in Catawba Memorial Hosp. v. North Carolina Dep't of Human Resources, 112 N.C. App. 557, 562-63, 436 S.E.2d 390, 393 (1993), the court observed that factual disputes were appropriately resolved by a contested case, not in the context of a declaratory proceeding.

WASCO's requested declaratory ruling depends on the assertion of many facts whose validity has not been established, including:

- That Winston Mills was a small quantity generator at all relevant times;
- That closure of the tanks occurred in 1985, rather than in 1992, when the piping and other materials surrounding the tanks were actually removed (see the Closure Certification included as Exhibit J to this response);
- That no other basis of RCRA liability existed, such as the fact that there was a prior spill from the tanks (see the Administrative Order on Consent included as Exhibit I to this response);
- The intent of the parties in entering the Administrative Order on Consent almost 30 years ago, and the facts leading up to the execution of the agreement;
- The extent of the liability assumed by WASCO by stepping into the shoes of the prior parties on the site, whether that liability arises from contract, operation of law, or WASCO's own conduct.

The evidence for many of these issues goes back more than thirty years and would require a thorough review of DEQ's records and potentially the testimony of any remaining witnesses with knowledge of the relevant events. This is not the type of simple, established fact pattern that is appropriate for resolution by the Commission on a request for declaratory ruling. For this additional reason, good cause exists to refuse WASCO's request for declaratory ruling.

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." (Opinion 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 DEQ has the authority to require WASCO to obtain a post-closure permit or post-closure order 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, the Facility was in fact closed as a landfill pursuant to an administrative order on consent between Winston Mills and DEQ's predecessor agency. (See Exhibit I). 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." (Opinion 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." (Opinion 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 DEQ has the authority to require WASCO to obtain a post-closure permit or a post-closure order 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 19th day of February, 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. N.C.G.S. § 150B-4	Exhibit D
5. 15A NCAC 2I .0603	Exhibit E
6. 15A N.C.A.C. 13A .0113(a)	Exhibit F
7. 40 C.F.R. § 270.1	Exhibit G
8. Cases cited in DEQ's brief	Exhibit H
9. Administrative Order on Consent	Exhibit I
10. Closure Plan	Exhibit J
11. DEQ's brief to the Court of Appeals	Exhibit K

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 19th day of February, 2018.

/s/ T. Hill Davis, III
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Exhibit A

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-414

Filed: 18 April 2017

Wake County, No. 15 CVS 1438

WASCO LLC, Petitioner,

v.

N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, Respondent.

Appeal by petitioner from order and judgment entered 23 October 2015 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 6 October 2016.

King & Spalding LLP, by Cory Hohnbaum and Adam G. Sowatzka, pro hac vice, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Hirschman, for respondent-appellee.

McCULLOUGH, Judge.

Petitioner WASCO LLC (WASCO) appeals from the final order and judgment in which the trial court affirmed the administrative law judge's (ALJ) denial of WASCO's motion for continuance and affirmed the ALJ's grant of summary judgment in favor of respondent North Carolina Department of Environment and Natural Resources (the "Department"), Division of Waste Management (the "Division"). For the following reasons, we affirm.

I. Background

This appeal is the result of a petition for a contested case hearing filed by WASCO in the Office of Administrative Hearings on 27 September 2013. In the petition, WASCO sought a declaration that it was not an "operator" of a former textile manufacturing facility located at 850 Warren Wilson Road in Swannanoa, North Carolina (the "Site"), and, therefore, not responsible for remedial cleanup efforts required by federal and state laws governing the management of hazardous wastes. Those laws include portions of the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. §§ 6901-6992, federal regulations, and North Carolina's Hazardous Waste Program (the "State Hazardous Waste Program").

As the United States Supreme Court clearly explained,

> RCRA is a comprehensive environmental statute that empowers [the Environmental Protection Agency (EPA)] to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 USC §§ 6921-6934. (Nonhazardous wastes are regulated much more loosely under Subtitle D, 42 USC §§ 6941-6949.) Under the relevant provisions of Subtitle C, EPA has promulgated standards governing hazardous waste generators and transporters, *see* 42 USC §§ 6922 and 6923, and owners and operators of hazardous waste treatment, storage, and disposal facilities (TSDF's), *see* § 6924. Pursuant to § 6922, EPA has directed hazardous waste generators to comply with handling, recordkeeping, storage, and monitoring requirements, *see* 40 CFR pt 262 (1993). TSDF's, however, are subject to much more stringent regulation than either generators or transporters, including a 4 to 5-year permitting process, *see* 42 USC § 6925; 40 CFR pt 270

> (1993); US Environmental Protection Agency Office of Solid Waste and Emergency Response, The Nation's Hazardous Waste Management Program at a Crossroads, The RCRA Implementation Study 49-50 (July 1990), burdensome financial assurance requirements, stringent design and location standards, and, perhaps most onerous of all, responsibility to take corrective action for releases of hazardous substances and to ensure safe closure of each facility, *see* 42 USC § 6924; 40 CFR pt 264 (1993).

City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331-32, 128 L. Ed. 2d 302, 307-308 (1994).

In lieu of the federal program, RCRA allows states to develop, administer, and enforce their own hazardous waste programs, subject to authorization by EPA. *See* 42 U.S.C. § 6926 (2016). State programs must meet the minimum requirements of RCRA. *Id*. (requiring state programs to be "equivalent" to the federal hazardous waste program). EPA granted North Carolina final authorization to operate the State Hazardous Waste Program in 1984. *See* 49 Fed. Reg. 48694-01 (Dec. 14, 1984).

The State Hazardous Waste Program is administered by the Division's Hazardous Waste Section (the "Section"). *See* 15A N.C. Admin. Code 13A.0101(a) (2016). The State Hazardous Waste Program consists of portions of the North Carolina Solid Waste Management Act (the "State Solid Waste Management Act"), Article 9 of Chapter 130A of the General Statutes, and related state rules and regulations. Specifically, Part 2 of the State Solid Waste Management Act concerns "Solid and Hazardous Waste Management" and requires that rules establishing a complete and integrated regulatory scheme in the area of hazardous waste

management be adopted and enforced. *See* N.C. Gen. Stat. § 130A-294(c) (2015). North Carolina's Hazardous Waste Management Rules (the "State Hazardous Waste Rules") are found in Title 15A, Subchapter 13A of the N.C. Administrative Code. The State Hazardous Waste Rules largely incorporate the federal regulations under RCRA by reference.

Pertinent to the present case, the State Hazardous Waste Rules adopt closure and post-closure standards for owners and operators of hazardous waste TSDF's from subpart G of the federal regulations. *See* 15A N.C. Admin. Code 13A.0109(h) (incorporating by reference 40 C.F.R. §§ 264.110 through 264.120). The State Hazardous Waste Rules also implement a hazardous waste permit program, which incorporates much of the federal hazardous waste permit program, with added "Part B" information requirements. *See* 15A N.C. Admin. Code 13A.0113 (incorporating by reference portions of 40 C.F.R. Ch. 1, Subch. I, Pt. 270,).

40 C.F.R. § 270.1(c) is one of those sections of the federal hazardous waste permit program incorporated by reference in 15A N.C. Admin. Code 13A.0113(a). That section provides, in pertinent part, that

> [o]wners and operators of surface impoundments, landfills, land treatment units, and waste pile units that received waste after July 26, 1982, or that certified closure (according to § 265.115 of this chapter) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under § 270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as

> provided under paragraph (c)(7) of this section. If a post-closure permit is required, the permit must address applicable 40 CFR part 264 groundwater monitoring, unsaturated zone monitoring, corrective action, and post-closure care requirements of this chapter.

40 C.F.R. § 270.1(c) (2017). It is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case.

As mentioned above, the Site is a former textile manufacturing facility located at 850 Warren Wilson Road in Swannanoa, North Carolina. Years before WASCO became involved with the Site, Asheville Dyeing & Finishing (AD&F), a division of Winston Mills, Inc., operated a knitwear business on the Site. During the operation of the knitwear business, underground tanks were used to store virgin and waste perchloroethylene (PCE), a dry cleaning solvent. At some point prior to 1985, PCE leaked from the tanks and contaminated the soil. The storage tanks were excavated by Winston Mills in 1985 and the resulting pits were backfilled with the contaminated soil left in place.

In 1990, Winston Mills and the Section entered into an Administrative Order on Consent that set forth a detailed plan to close the Site. Winston Mills completed the closure plan to close the Site as a landfill in 1992 and the Section accepted certifications of closure in a 1993 letter to Winston Mills.

Winston Mills and its parent corporation, McGregor Corporation, sold the site to Anvil Knitwear, Inc., in 1995. In connection with the sale, Winston Mills provided Anvil Knitwear indemnification rights for "environmental requirements." Culligan

International Company (Culligan) co-guaranteed Winston Mills' performance of indemnification for environmental liabilities.

WASCO became involved in 1998 when its predecessor in interest, United States Filter Corporation, acquired stock of Culligan Water Technologies, Inc., which owned Culligan. Thereafter, WASCO provided financial assurances to the Section on behalf of Culligan in the form of a trust fund to the benefit of the Department and an irrevocable standby letter of credit for the account of AD&F.

WASCO divested itself of Culligan in 2004. As part of the sale of Culligan, WASCO agreed to indemnify the buyer as to identified environmental issues at the Site. At that time, a letter from Culligan to the Section represented that WASCO was assuming Culligan's remediation responsibilities at the Site and directing further communications to WASCO's director of environmental affairs. Subsequent communications between WASCO and the Section show that WASCO did intend to take on those responsibilities and that the Section identified WASCO as the responsible party. Additionally, Part A permit applications signed by WASCO's director of environmental affairs identified WASCO as the operator and WASO continued to pay consultants and take action at the Site.

In 2007, WASCO received a letter from the Section that the Site was included on a list of facilities needing corrective action. A follow-up letter from the Section soon thereafter indicated that additional action was needed to develop a groundwater

assessment plan to address the migration of hazardous waste in the groundwater. This expanded the size of the area with which WASCO was dealing to off-site locations. WASCO, its consultant, and the Section continued to work together to address a groundwater plan.

In 2008, Anvil Knitwear sold the property to Dyna-Diggr, LLC. Thereafter, responsibility for compliance with the State Hazardous Waste Program became an issue, with both WASCO and Anvil disclaiming responsibility. WASCO asserted it participated in post-closure actions on a voluntary basis.

In an 16 August 2013 letter, the Section detailed its positions that Dyna-Diggr is liable as an owner and that WASCO is independently liable as an operator. The Section sought cooperation between all parties and suggested it "would be willing to enter into a modified Joint Administrative Order on Consent in Lieu of a Post-Closure Permit pursuant to which the two parties agree to undertake part of the post-closure responsibilities[.]" However, in the alternative, the Section reminded the parties that it "always has the option of issuing a Compliance Order with Administrative Penalty to both parties for violation of 40 CFR 270.1(c) and associated post-closure regulations." This action resulted in WASCO filing the 27 September 2013 petition.

Following the filing of the petition, on 25 September 2014, the Section filed a motion for summary judgment on all claims raised in WASCO's petition. After the ALJ denied WASCO's motion for a continuance regarding the summary judgment

motion by order filed 28 October 2014, the ALJ filed his final decision granting the Section's motion for summary judgment on 2 January 2015.

On 2 February 2015, WASCO filed a petition for judicial review (the "PJR") of both orders. After both parties filed briefs regarding the PJR, the matter came on for hearing in Wake County Superior Court on 12 October 2015 before the Honorable G. Bryan Collins, Jr.

On 23 October 2015, the court filed its "Final Order and Judgment on Rule 56(f) Motion and Petition for Judicial Review." The court concluded, "[a]s a matter of law, WASCO is an operator of a landfill for purposes of the State Hazardous Waste Program's post-closure permitting requirement." Therefore, the court affirmed the 2 January 2015 final decision of the ALJ granting summary judgment in favor of the respondent and denied WASCO's PJR. In the decretal portion of the court's order, the court reiterated that "WASCO is an 'operator' for purposes of 40 C.F.R. § 270.1(c) (adopted by reference in 15A [N.C. Admin. Code] 13A.0113(a)) and must comply with all attendant responsibilities and regulatory requirements."

Wasco filed notice of appeal to this Court on 20 November 2015.

II. Discussion

The issue on appeal is whether the trial court erred in entering summary judgment in favor of the Section on the basis that, "[a]s a matter of law, WASCO is an operator of a landfill for purposes of the State Hazardous Waste Program's post-

closure permitting requirement." WASCO contends that it is not, and has never been, an operator of any facility at the Site.

Under the Administrative Procedure Act, when a party to a review proceeding in a superior court appeals to the appellate division from the final judgment of the superior court, "[t]he scope of review to be applied by [this Court] . . . is the same as it is for other civil cases." N.C. Gen. Stat. § 150B-52 (2015). "Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Citing *In re Appeal of N.C. Sav. & Loan League*, 302 N.C. 458, 276 S.E.2d 404 (1981), WASCO asserts that in our de novo review, the Section's interpretation of the law is entitled to no deference. However, this Court has stated that "an agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language." *Hillian v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 598, 620 S.E.2d 14, 17 (2005). In fact, in *N.C. Sav. & Loan League*, the Court explained as follows,

> [w]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Although the interpretation of a

> statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

302 N.C. at 465-66, 276 S.E.2d at 410 (internal citations and quotation marks omitted). Thus, the Section's interpretation is afforded some deference.

"Operator" is defined in various places throughout the State Solid Waste Management Act and the State Hazardous Waste Rules. First, the general definitions in Part 1 of the State Solid Waste Management Act define "operator" to mean "any person, including the owner, who is principally engaged in, and is in charge of, the actual operation, supervision, and maintenance of a solid waste management facility and includes the person in charge of a shift or periods of operation during any part of the day." N.C. Gen. Stat. § 130A-290(a)(21) (2015). This definition applies broadly to the entire State Solid Waste Management Act, including those portions relevant to hazardous waste management. The definition's application to hazardous waste management is evident from the definition provision in the State Hazardous Waste Rules, which provides that both the definition of "operator" in N.C. Gen. Stat. § 130A-290 applies to the State Hazardous Waste Rules, *see* 15A N.C. Admin. Code 13A.0102(a) (providing "[t]he definitions contained in [N.C. Gen. Stat. §] 130A-290 apply to this Subchapter[]"), and that the definition of "operator" in 40

C.F.R. § 260.10, "[o]perator means the person responsible for the overall operation of a facility[,]" is incorporated by reference, *see* 15A N.C. Admin. Code 13A.0102(b). Yet, most specific to the post-closure permit requirement at issue in this case, the State Hazardous Waste Rules concerning the hazardous waste permit program incorporate by reference Subpart A of the federal regulations providing general information about the hazardous waste permit program, *see* 15A N.C. Admin. Code 13A.0113(a), including the definitions in 40 C.F.R. § 270.2, which provides that "[o]wner or operator means the owner or operator of any facility or activity subject to regulation under RCRA." 40 C.F.R. § 270.2 (2017).

In this case, the court determined WASCO was an "operator" under the two definitions specifically dealing with hazardous waste management adopted from 40 C.F.R. §§ 260.10 and 270.2. The court, however, noted that the result would be the same applying the definition of "operator" in N.C. Gen. Stat. § 130A-290(a)(21). In conclusion number 42, the court explained its analysis of the definitions as follows,

> [b]ased on the federally delegated nature of the State Hazardous Waste Program, the Section's Memorandum of Agreement with the EPA, the fact that the obligation at issue arises under a federal regulation – 40 C.F.R. § 270.1(c) – and not Chapter 130A, and because both parties have identified no state case law on point and have cited to federal law, [the court] concludes it is appropriate here to look to federal case law and administrative EPA documents for guidance.

The federal case law considered by the court included cases analyzing operator liability under the Comprehensive Environmental Response, Compensation, and

Liability Act, 42 U.S.C. §§ 9601 to 9675 (CERCLA), which, similar to the State Hazardous Waste Rules, defines "operator" as "any person owning or operating such facility[.]" 42 U.S.C. § 9601(20)(A) (2016). Specifically, the court looked to *United States v. Bestfoods*, 524 U.S. 51, 141 L. Ed. 2d 43 (1998), in which the Court explained that,

> under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66-67, 141 L. Ed. 2d at 59. The court in the present case then concluded that "[c]onsistent with *Bestfoods* and its progeny, . . . post-closure operatorship is based on an examination of the totality of the circumstances."

On appeal, WASCO's first contention is that the court erred in basing its decision exclusively on CERCLA without considering the elements of the operator definition in N.C. Gen. Stat. § 130A-290(a)(21). WASCO contends that the definition in N.C. Gen. Stat. § 130A-290(a)(21) sharpened the definition of operator for purposes of the State Solid Waste Management Act and, citing *R.J. Reynolds Tobacco Co. v. N.C. Dep't of Environment & Natural Resources*, 148 N.C. App. 610, 616, 560 S.E.2d 163, 167-68 (looking to the plain meaning of N.C. Gen. Stat. § 130A-290(35) and determining that tobacco scrap, stems, and dust did fall within the definition of "solid

waste"), *disc. review denied*, 355 N.C. 493, 564 S.E.2d 44 (2002), contends the definition in N.C. Gen. Stat. § 130A-290(a)(21) is controlling over other definitions to the extent the definitions differ. Thus, WASCO contends to be an operator, it must be "principally engaged in, and is in charge of, the actual operation, supervision, and maintenance of a solid waste management facility[.]" N.C. Gen. Stat. § 130A-290(a)(21).

We are not persuaded by WASCO's arguments that the court is limited to an analysis of the definition of "operator" in N.C. Gen. Stat. § 130A-290(a)(21). Moreover, we note that it is clear the court did not look exclusively to CERCLA, but instead looked to CERCLA only for guidance on how to interpret the definitions of operator in the State Hazardous Waste Rules adopted from the federal regulations. Despite differences in the framework of RCRA and CERCLA, the definitions of "operator" in both acts are similar and CERCLA case law does provide persuasive guidance. Furthermore, and not contested by WASCO on appeal, the court also looked to EPA documents providing guidance on RCRA and concluded that those documents support the conclusion that WASCO was an operator.

We hold the court was correct to look for guidance in federal law while interpreting the term "operator" in the context of the State Hazardous Waste Rules and, specifically, the hazardous waste permit program. Those portions of the State Hazardous Waste Rules deal specifically with the post-closure permit requirement at

issue in the present case. *See* 40 C.F.R. § 270.1(c) (incorporated by reference in 15A N.C. Admin. Code 13A.0113(a)). In contrast, the terms of N.C. Gen. Stat. § 130A-290(a)(21) make clear that the definition of operator therein is for an operator of any "solid waste management facility." Although that definition is more detailed than the definitions in the State Hazardous Waste Rules, that definition was intended to apply to the management of all solid wastes, not just the control of hazardous wastes of a facility post-closure.

Nevertheless, although the three definitions of "operator" applicable to the State Hazardous Waste Program differ slightly, the definitions seem to be in accord that, in general terms, an "operator" is the person responsible for, or in charge of, the facility subject to regulation. In the present case, that facility is the pit that was certified closed as a landfill in 1993.

WASCO's next contention on appeal is that the court erred in holding that WASCO was an operator even though WASCO did not become involved with the Site until after the Site was certified closed by the Section. Citing N.C. Gen. Stat. § 130A-290(a)(2), which defines "closure" to mean "the cessation of operation of a solid waste management facility and the act of securing the facility so that it will pose no significant threat to human health or the environment[,]" WASCO asserts that it is impossible to operate a facility that has ceased operation. Thus, WASCO contends it cannot be an operator of the Site.

WASCO, however, recognizes that both RCRA and the State Hazardous Waste Program impose duties on operators to provide post-closure care, but contends that those duties can only be imposed on those owning and operating the facility before the time that the facility ceases to operate. WASCO asserts that the Section has created the concept of "post-closure operator" for purposes of this case without any basis in the law. Again, we disagree with WASCO's arguments.

As the Section points out, and as we noted above,

> [o]wners and operators of . . . landfills . . . must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under § 270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as provided under paragraph (c)(7) of this section.

See 40 C.F.R. § 270.1(c) (incorporated by reference in 15A N.C. Admin. Code 13A.0113(a)).

In this case, the pit where the underground storage tanks were located on the Site was not designated a landfill for purposes of the State Hazardous Waste Program until the time that it was closed with hazardous waste in place, after the time the facility ceased to operate. *See* 40 C.F.R. § 265.197(b) (incorporated by reference in 15A N.C. Admin. Code 13A.0110(j)). Thus, there were no "operators" of a landfill when the facility was in operation, as WASCO limits the term. Yet, the hazardous waste permit program clearly applies to operators of landfills and those facilities closed as landfills.

Moreover, although the definition of "closure" cited by WASCO is clear that the closure of a solid waste management facility is the time it ceases to operate, that definition also makes clear closure includes the act of securing the facility to prevent future harm. Thus, it is not just those parties in charge of the actual operation of a solid waste management facility that are subject to the post-closure permitting requirement.

Guided by the same federal law relied on by the trial court, including *Bestfoods*, its progeny, and EPA documents, we hold "operator," as it is defined in the State Hazardous Waste Rules, includes those parties in charge of directing post-closure activities under the State Hazardous Waste Program and RCRA.

In the present case, the trial court issued detailed findings as to WASCO's involvement at the Site that demonstrate it was the operator for purposes of the post-closure permitting requirement. WASCO does not challenge the factual findings, but instead asserts arguments that those findings do not lead to the conclusion that it is an operator as that term is defined in N.C. Gen. Stat. § 130A-290(a)(2). We are not convinced by WASCO's arguments.

The court's pertinent findings, which this Court has reviewed and determined to be supported by the documentary exhibits, are as follows:

> 15. WASCO became involved with the Facility in a limited capacity following its 1998 acquisition of Culligan Water Technologies, Inc. and its affiliate, Culligan International Company ("Culligan").

16. At the time WASCO acquired Culligan, Culligan had been performing post-closure operations related to the Facility.

17. Between 1999 and 2004, Petitioner provided financial assurance to the Section on behalf of Culligan for post-closure care associated with the Facility, including a Trust Agreement and Irrevocable Standby Letter of Credit in 2003.

18. The Culligan Group, including Culligan, was divested from WASCO in 2004 in a $610-million transaction that included WASCO's agreement to indemnify Culligan's buyer "as to certain matters associated at the Facility as they relate to specific Culligan obligations."

19. Following the 2004 divestiture, Culligan represented in a letter to the Section that WASCO was "assuming responsibility" for the Facility. The letter indicated that copies were transmitted to John Coyne, the Director of Environmental Affairs for WASCO.

20. The Section followed-up with Mr. Coyne by email, referencing Culligan's representation that WASCO "is now responsible for RCRA issues" at the Facility, and asking for WASCO to complete a new Part A permit application as the Facility's operator.

21. Mr. Coyne responded that (a) he was "very familiar with this project," (b) he would "attend to the Part A application in the very near future," and (c) 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."

22. An updated Part A permit application was submitted to the Section in December 2004 naming WASCO as operator. Mr. Coyne signed the Part A permit

application for WASCO "under penalty of law" as to the truth of its contents.

23. Mr. Coyne signed another updated Part A "under penalty of law" in 2006, which was submitted to the Section and continued to identify WASCO as operator.

24. Rodney Huerter—who had assumed the role of WASCO's Director of Environmental Affairs after Mr. Coyne—signed a third Part A permit application "under penalty of law" in 2008, which was submitted to the Section and which again identified WASCO as the Facility's operator.

25. After the divestiture of Culligan, WASCO continued to provide financial assurance for the Facility under the 2003 Trust Agreement, Standby Trust Fund, and Irrevocable Standby Letter of Credit, which it amended in the Section's favor for inflation 10 times between the divestiture of Culligan and the initiation of the 2013 contested case. WASCO has communicated directly with the Section throughout this time period concerning financial requirements for the Facility.

26. The language of the Trust Agreement identifies WASCO as the "Grantor," and the agreement's purpose to "establish a trust fund . . . for the benefit of [the Department]." Specifically, the Trust Agreement recites that:

> . . . "DENR" . . . has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of facility. . . .
>
> The Trustee shall make payments from the fund as the Secretary of [the Department] . . . shall direct,

> in writing, to provide for the payment of the cost of closure and/or post-closure care of facilities covered by this agreement . . . .
>
> "this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Secretary . . ."

27. The Irrevocable Standby Letter of Credit, as amended, is subject to automatic renewal in one-year increments unless cancelled by the bank.

28. The most recent amendment to the Irrevocable Standby Letter of Credit submitted prior to the filing of the contested case is in the amount of $443,769.88.

29. Internal WASCO communications concerning financial assurance reference "the statutory/regulatory requirements relating to one of our environmental legacy sites in Swannanoa, NC."

30. After the divestiture of Culligan, WASCO entered into a Master Consulting Services Agreement with Mineral Springs Environmental, P.C. ("Mineral Springs") for Mineral Springs to perform work at the Facility.

31. A total of 51 invoices from Mineral Springs to WASCO shows that Mineral Springs or its subcontractors performed a variety of post-closure activities at the Facility or related to the Facility, between November 2004 and August 2013, which fell into the following categories:

    - operation and maintenance of an air sparge/soil vapor extraction groundwater remediation system, including use of a subcontractor for supplies such as air filters, oil filters, oil, and separators;

- groundwater sampling and analysis, including use of laboratory subcontractors;

- preparation of quarterly and semi-annual reports analyzing sampling results;

- project management;

- assessment of two potential sources of contamination at the Facility in addition to the former tank site—specifically, an old dump site and a French drain—including use of an excavation subcontractor and a bush hog subcontractor; and

- payment of utility bills based [on] one meter labeled as "pump" and one meter labeled as "environmental cleanup."

32. Mr. Coyne or Mr. Huerter personally approved payment to Mineral Springs for work in the above categories, and approved payment directly to the utility company for additional bills, totaling $235,984.43.

33. In particular, Mineral Springs submitted 33 reports associated with the invoiced 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."

34. The Section communicated directly with WASCO, or with both WASCO and Mineral Springs, in numerous matters related to environmental compliance, including but not limited to requests for preparation of a work plan for the investigation of the former dump site and French drain, and responses to Mineral Springs's monitoring reports.

> 35. After Mineral Springs and/or its sub-contractors performed the French drain and dump assessment but before drafting the Assessment Report, Kirk Pollard of Mineral Springs notified Mr. Huerter of preliminary findings concerning the volume and nature of drums discovered. Mr. Pollard identified liquid in one drum that tested at a pH of 14, which is considered hazardous based on corrosivity. Mr. Pollard expressed concern for health and safety, recommended that Mr. Huerter notify the Section, and expressed his belief that an immediate response and a more thorough evaluation could be necessary. No such concerns are reflected in the final report.
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> 36. Mr. Huerter instructed Mr. Pollard not to remove "any of the drums, containers, or anything else," and asked to conduct an "advanced review" of the dump Assessment Report before its submission to the Section. Mr. Huerter commented on Mr. Pollard's first draft, including by providing two "reviewed and revised blackline document[s]."
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> 37. Additional communications between Mr. Huerter and Mr. Pollard included (a) Mr. Pollard's requests for Mr. Huerter's guidance or authorization on matters related to the Facility, including changes to a Part A form, communications with the property owner, whether groundwater sampling should continue, and whether to advise the Section about the sale of the property; (b) Mr. Pollard's practice of updating Mr. Huerter, copying him on communications with the Section, or forwarding such communications to him; and (c) Mr. Huerter's requests for copies of utility bills to compare with Mineral Springs's invoices, and annual cost projections.

(Citations and footnote omitted).

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. Even under the definition of operator in N.C. Gen. Stat. § 130A-290(a)(21), when that definition is viewed through the lens of post-closure regulatory activities at issue in this case, since 2004, WASCO has been the party principally engaged in, or in charge of the post-closure operation, supervision, and maintenance of the Site for purposes of the hazardous waste permit program. WASCO's arguments to the contrary are overruled.

III. Conclusion

For the reasons stated above, we hold WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site. Therefore, we affirm the final order and judgment of the trial court.

AFFIRMED.

Judges STROUD and ZACHARY concur.