

Exhibit 20

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 EHR 18253

WASCO LLC)
)
Petitioner,)
)
DYNA-DIGGR LLC)
)
Intervenor-Petitioner,)
)
v.)
)
N.C. DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
RESOURCES, DIVISION OF WASTE)
MANAGEMENT,)
)
Respondent.)

**MEMORANDUM OF LAW
IN SUPPORT OF RESPONDENT'S
MOTION FOR
SUMMARY JUDGMENT**

OFFICE OF
ADMIN HEARINGS

25 SEP 25 PM 1:42

FILED

Filed 25 September 2014

Pursuant to N.C.G.S. § 1A-1, Rule 56, and 26 NCAC 03 .0115(a), Respondent, North Carolina Department of Environment and Natural Resources ("the Department"), Division of Waste Management ("the Division"), through its Hazardous Waste Section ("the Section"), files this Memorandum in Support of its Motion for Summary Judgment on all claims raised by Petitioner WASCO LLC ("WASCO")¹ in WASCO's Petition for a Contested Case Hearing.

INTRODUCTION

This case concerns the Section's ongoing efforts to ensure the cleanup of real property with historic soil and groundwater contamination to a level protective of human health and the environment. Summary Judgment is proper because the only genuine issue—WASCO's "operator" liability under the State Hazardous Waste Program—involves a matter of statutory construction, which is a question of law, not fact, and WASCO cannot prove error as a matter of

¹ For ease of reference, "WASCO" shall be used to refer to WASCO LLC and all predecessors in interest, including but not limited to Water Applications & Systems Corporation and United States Filter Corporation.

* * * *

[pages omitted]

- Doc. Ex. 33 -

questions are not material to the outcome of this case, as liability under the State Hazardous Waste Program is both strict and joint and several.

A. The Section Has Authority to Require any Owner and/or Operator of the Landfill to Obtain a Post-Closure Permit or AOC.

It is beyond dispute that (1) the site of the former waste-PCE tank was closed as a landfill with hazardous waste left in place, triggering the Section's post-closure jurisdiction, and (2) the Facility remains subject to the Section's authority to require any owner and/or operator of that landfill to obtain a post-closure permit or enforceable document in lieu of a permit.

Pursuant to 40 C.F.R. § 270.1(c) and 15A NCAC 13A .0113(a), "[o]wners and operators" of "landfills . . . that received waste after [January 26, 1983], or that certified closure (according to § 265.115 of this chapter) after January 26, 1983," must obtain post-closure permits or enforceable documents in lieu of post-closure permits, "unless they demonstrate closure by removal or decontamination." If a tank or tank system is closed with waste in place, such unit "is then considered to be a landfill" for purposes of post-closure and associated corrective action requirements. 40 C.F.R. § 265.197(b) (adopted by reference at 15A NCAC 13A .0110(j)).

First, a 1992 Closure Certification Report reflects that the former waste-PCE tank was closed as a landfill with hazardous waste left in place, making the Facility subject to post-closure. (Ex. F-3; see also Ex. F-1 (1990 Order providing background on the former waste-PCE tank); Ex. F-2 (1992 Plat noting land use restrictions under 40 C.F.R. Part 265, Subpart G); Ex. F-4 (Letter accepting Closure Certification subject to post-closure); Ex. F-6 (1993 Deed Notice indicating that a "495.4 square foot portion of this land has been used to manage hazardous waste" and "[t]he property is currently known to contain residual amounts of volatile organic compounds"); and Ex. F-5 (first post-closure groundwater monitoring report)). Thus, as a matter of law, the closure of the former waste-PCE tank triggered the Section's authority to

* * * *

[pages omitted]

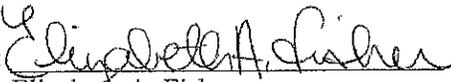
- Doc. Ex. 52 -

CONCLUSION

For the reasons stated above, the Section's interpretation of the State Hazardous Waste Program concerning WASCO's post-closure "operator" status is entitled to deference as a matter of law, and this Court should grant summary judgment to the Section on all of WASCO's claims.

Respectfully submitted this is the 25th day of September, 2014.

ROY COOPER
Attorney General

By: 
Elizabeth A. Fisher
Assistant Attorney General
NC State Bar No. 38161
NC Department of Justice
Environmental Division
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6600 - telephone
(919) 716-6939 - facsimile

STATE OF NORTH CAROLINA

COUNTY OF WAKE

WASCO LLC,

Petitioner,

v.

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

Respondent.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

15 CVS 1438

Filed
29 May 2015

RESPONDENT'S BRIEF
RESPONSE TO PETITION
FOR JUDICIAL REVIEW

MAY 29 P 4:08

FILED

Now Comes Respondent, North Carolina Department of Environment and Natural Resources ("DENR"), Division of Waste Management, acting by and through its Hazardous Waste Section ("Section"), and responds to the Petition for Judicial Review filed by Petitioner, WASCO LLC ("WASCO"). Pursuant to the North Carolina Administrative Procedure Act ("NCAPA"), WASCO is seeking review of the final decision of the Administrative Law Judge ("ALJ") entered on 2 January 2015, which granted summary judgment to the Section in connection with its classification of WASCO as a post-closure "operator" subject to permitting requirements under the State Hazardous Waste Program.¹

¹ While WASCO's Petition for Judicial Review also identified the 28 October 2014 interlocutory order denying its Rule 56(f) motion for an extension of time as being part of its appeal, WASCO has abandoned that challenge, as discussed further herein.

* * * *

[pages omitted]

WASCO would have this Court read the definition of operator in isolation rather than *in pari materia* with 40 C.F.R. § 270.1(c) and 15A NCAC 13A .0113(a). McGuire, 207 N.C. App. at 337, 700 S.E.2d at 75. Under these provisions, “[o]wners and operators of . . . landfills” must obtain post-closure permits or enforceable documents in lieu of post-closure permits, “unless they demonstrate closure by removal or decontamination.” 40 C.F.R. § 270.1(c); 15A NCAC 13A .0113(a). If a tank or tank system is closed with waste in place, such unit “is then considered to be a landfill” for purposes of post-closure and associated corrective action requirements. 40 C.F.R. § 265.197(b) (adopted by reference at 15A NCAC 13A .0110(j)). Nowhere do the regulations limit post-closure operator liability to operators of plants or active businesses. By contrast, section 270.1(c) explicitly applies to “operators of . . . landfills.”

Here, it is undisputed that the site of the former waste-PCE tank was closed with waste in place in 1992—which converted the pit into a “landfill” for regulatory purposes—and that the resulting “landfill” is regulable under the post-closure program. (Ord pp 3, 5-6); Lanvale, 366 N.C. at 154, 731 S.E.2d at 809. The site of the former waste-PCE tank did not become a landfill subject to post-closure regulation until *after* it was closed with waste in place. 40 C.F.R. § 265.197(b) (adopted by reference at 15A NCAC 13A .0110(j)). Thus, the *only* activities relevant to determining who is an operator of that landfill occurred during post-closure care.

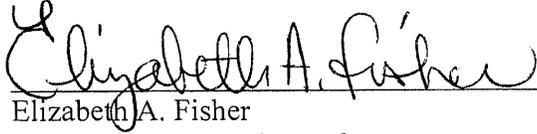
Based on the above, a single footnote in Southern Timber II, omitting reference to section 270.1(c)’s clear mandate and finding it “unnecessary” to decide whether operatorship of a surface impoundment would be sufficient for post-closure purposes, cannot aid WASCO. (Pet Br p 11); In re Southern Timber Products, Inc. (“Southern Timber II”), 3 E.A.D. 880, 896 n.30 (1992); Hayes v. Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956) (“In every case

* * * *

[pages omitted]

This is the 29th day of May, 2015.

ROY COOPER
Attorney General

A handwritten signature in cursive script that reads "Elizabeth A. Fisher". The signature is written in black ink and is positioned above a horizontal line.

Elizabeth A. Fisher
Assistant Attorney General
NC State Bar No. 38161
NC Department of Justice
Environmental Division
P.O. Box 629
Raleigh, NC 27602-0629
(919) 716-6600 - telephone
(919) 716-6939 - facsimile

CERTIFICATE OF SERVICE

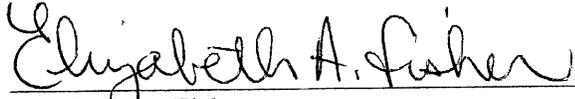
The undersigned certifies that copies of the foregoing RESPONDENT'S BRIEF IN RESPONSE TO PETITION FOR JUDICIAL REVIEW has been served on the parties to this action by depositing the same in the United States mail, first class and postage prepaid, and addressed to the parties' counsel of record as follows:

David Guidry, Esq.
King & Spalding LLP
100 N Tryon St, Ste 3900
Charlotte, NC 28202
Counsel for Petitioner

William Clarke, Esq.
Roberts & Stevens, P.A.
P.O. Box 7647
Asheville, NC 28802
Counsel for Intervenor Below

This the 29th day of May, 2015.

ROY COOPER
Attorney General



Elizabeth A. Fisher
Assistant Attorney General
NC State Bar No. 38161
NC Department of Justice
Environmental Division
P.O. Box 629
Raleigh, NC 27602-0629
(919) 716-6600 - telephone
(919) 716-6939 - facsimile

NORTH CAROLINA COURT OF APPEALS

WASCO LLC,)
)
 Petitioner-Appellant,)
)
 v.)
)
 NORTH CAROLINA DEPARTMENT)
 OF ENVIRONMENT AND NATURAL)
 RESOURCES, DIVISION OF WASTE)
 MANAGEMENT,)
)
 Respondent-Appellee.)

From Wake County

APPELLEE'S BRIEF

* * * *

[pages omitted]

WASCO acknowledges that RCRA imposes “a duty to provide ‘post-closure care’ on operators of facilities after they cease to operate.” (Id.)

Under the State Hazardous Waste Rules, “[o]wners and operators of . . . landfills” must obtain post-closure permits or AOCs, “unless they demonstrate closure by removal or decontamination.” 15A NCAC 13A .0113(a) (adopting 40 C.F.R. § 270.1(c)). If a tank or tank system is closed with waste in place, such unit “is then considered to be a landfill” for purposes of post-closure and associated corrective action requirements. 15A NCAC 13A .0110(j) (adopting 40 C.F.R. § 265.197(b)). Nowhere do the Rules limit post-closure operator liability to operators of plants or active businesses. By contrast, 15A NCAC 13A .0113(a) explicitly applies to “operators of . . . landfills.”

Here, it is undisputed that the site of the former storage tank was closed with waste in place in 1992—which converted the pit into a “landfill” for regulatory purposes—and that the resulting “landfill” is subject to regulation under the post-

closure program. (Doc. Ex. 331-56) The site of the former storage tank did not become a landfill subject to post-closure regulation until **after** it was closed with waste in place. 15A NCAC 13A .0110(j) (adopting 40 C.F.R. § 265.197(b)).

Thus, the **only** activities relevant to determining who is an operator of that landfill occurred during post-closure care.

* * * *

[pages omitted]

Respectfully submitted, this the 12th day of July, 2016.

ROY COOPER
Attorney General

Electronically Submitted
Elizabeth A. Fisher
Assistant Solicitor General
State Bar No. 38161
efisher@ncdoj.gov

N.C. R. App. P. 33(b) Certification:
I certify that the attorney listed below
has authorized me to list his name on
this document as if he had personally
signed it.

Daniel Hirschman
Special Deputy Attorney General
Environmental Division
State Bar No. 27252
dhirschman@ncdoj.gov

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

Counsel for the State of North Carolina

CERTIFICATION AS TO WORD COUNT

In accordance with Rule 28 of the North Carolina Rules of Appellate Procedure, the undersigned hereby certifies that this is the principal brief of the State-Appellee, which contains no more than 8,750 words (including footnotes and citations but excluding covers, index, table of authorities, certificate of service, and certificate of compliance), as verified by the undersigned's word processing program.

This the 12th day of July, 2016.

Electronically Submitted
Elizabeth A. Fisher
Assistant Solicitor General

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing APPELLEE'S BRIEF, which was filed electronically with the appellate courts' official website, was served on this the 12th day of July, 2016, upon counsel for Appellant electronically via email, to counsel's correct and current email address as follows:

David Guidry
KING & SPALDING LLP
100 N. Tryon Street, Suite 3900
Charlotte, NC 28202
dguidry@kslaw.com

ROY COOPER
Attorney General

Electronically Submitted
Elizabeth A. Fisher
Assistant Solicitor General

NO. 164P17

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

WASCO LLC,)

Petitioner-Appellant,)

v.)

From Wake County

No. COA 16-414

N.C. DEPARTMENT OF)

ENVIRONMENT AND NATURAL)

RESOURCES, DIVISION OF WASTE)

MANAGEMENT,)

Respondent-Appellee.)

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

TO: THE HONORABLE SUPREME COURT OF NORTH CAROLINA

Respondent-Appellee the North Carolina Department of Environmental Quality,¹ Division of Waste Management (“Division”) responds to WASCO LLC's (“WASCO”) Petition for Discretionary Review, and moves that the petition be denied.

¹ The North Carolina Department of Environment and Natural Resources has been renamed the Department of Environmental Quality effective 18 September 2015.

* * * *

[pages omitted]

program, and requires the Section to enforce the rules promulgated thereunder. N.C.G.S. § 130A-294(b). Consistent with its statutory authority, the Section has promulgated specific rules related to various subsets of the State Hazardous Waste Program, including the rule at issue here. These rules largely adopt and incorporate the federal RCRA regulations by reference.

Broadly, in accordance with RCRA, the State Hazardous Waste Program regulates the generation, treatment, storage, and disposal of hazardous waste; closure of hazardous waste management units; and cleanup of “post-closure” contamination. Post-closure regulations require (a) maintenance of landfill units; (b) groundwater monitoring and reporting; (c) corrective action associated with any sources of contamination at a facility; and (d) up-front financial assurance for the entire projected cleanup costs as a contingency, subject to amendment if the costs change. See generally 15A NCAC 13A .0109(h) (adopting 40 C.F.R. § 264.117).

Specifically relevant to this case is the State Hazardous Waste Program’s requirement that “operators” of hazardous waste management units closed as landfills with waste in place obtain a post-closure permit or Administrative Order on Consent in lieu of a permit. 15A NCAC 13A .0113(a) (adopting 40 C.F.R. § 270.1(c)). When a tank system is removed but “not all contaminated soils can be practicably removed or decontaminated,” then “such a tank system

is then considered to be a landfill.” 15A NCAC 13A .0110(j) (adopting 40 C.F.R. § 265.197(b)).

B. Facts

Decades ago, an underground storage tank containing used dry cleaning solvent (perchloroethylene) leaked at a former textile manufacturing facility located in Swannanoa, North Carolina, which is now associated with EPA Identification Number NCD 070 619 663 (“the Facility”). (Doc. Ex. 259-321) The tank was removed and the pit backfilled as a landfill with contaminated soil left in place, after which time post-closure care began. (See, e.g., Doc. Ex. 331-56) In 1995, the owner of both the contaminated land and the knitwear business responsible for the contamination, Winston Mills, sold the property. An affiliate of Winston Mills’ parent company known as Culligan International Company (“Culligan”) agreed to assume Winston Mills’ environmental remediation obligations in exchange for interests valued at \$9 million. (Doc. Ex. 391-427) Culligan contacted the Section, pledged to take responsibility for the contamination, and began performing post-closure operations related to the Facility, including installation and operation of two groundwater cleanup systems. (Doc. Ex. 391-427, 597)

WASCO became involved with the Facility following its 1998 acquisition of Culligan. (Doc. Ex. 88-127) Between 1999 and 2004, WASCO’s role included supplying financial assurance to the Section on behalf of Culligan for post-

* * * *

[pages omitted]

CONCLUSION

WHEREFORE, the State moves that petitioner-appellant's petition for discretionary review be denied.

Electronically submitted this the 2nd day of June, 2017.

JOSH STEIN
ATTORNEY GENERAL

/s/ Electronically submitted
Daniel S. Hirschman
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919)716-6600
(919) 716-6767
State Bar No. 27250
dhirschman@ncdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing RESPONSE TO PETITION FOR DISCRETIONARY REVIEW has been filed pursuant to Appellate Rule 26 with the Clerk of the North Carolina Supreme Court by electronic submission.

I further certify that a copy of the foregoing RESPONSE TO PETITION FOR DISCRETIONARY REVIEW has been served upon counsel for the Petitioner-Appellant by sending it electronically to counsel's current email address:

Cory Hohnbaum
KING & SPALDING LLP
100 N. Tryon Street, Suite 3900
Charlotte, NC 28202
chohnbaum@kslaw.com

This the 2nd day of June, 2017.

/s/ Electronically submitted
Daniel S. Hirschman
Special Deputy Attorney General