NCDEQ Recommendation for WASCO Petition for Rulemaking

On December 5, 2017, the Division of Waste Management received a petition for rulemaking from WASCO LLC. The petition specifically addressed the definition for "operator" and requested amendment of 15A NCAC 13A .0102(b) to add the term "operator" to the list of terms whose definitions are not incorporated by reference from the federal regulations at 40 C.F.R. 260.10. In the petition, WASCO stated the term "operator" is defined in N.C.G.S. 130A-290(a)(21) and this definition is the one that should be used by the North Carolina Division of Waste Management.

The Division of Waste Management, Hazardous Waste Section, opposes rulemaking to amend 15A NCAC 13A .0102(b) to add the term "operator" to the list of terms whose definitions are not incorporated by reference from the federal regulations at 40 C.F.R. 260.10. As discussed in more detail below, the Division opposes the petition for rulemaking because (1) the three existing definitions of “operator” found in the relevant statute and rules are necessary, consistent, and supported by binding precedent from North Carolina’s courts; (2) the rule at issue is subject to periodic review, including public comment and hearing, and the rule has been unopposed for the 33 years of its existence; (3) changing the rule as Petitioner requests would potentially throw into question the status of many other sites throughout the State, including 59 sites currently managed under the State’s RCRA program; and (4) the current definition of “operator” set forth in the rule at issue is consistent with EPA’s interpretation of the RCRA definition of “operator”.

1) The North Carolina Hazardous Waste Program consists of two parts—the Solid Waste Management Act (“the Act”), N.C.G.S. Chapter 130A, Article 9, and the Hazardous Waste Management Rules (“the Rules”), 15A NCAC Subchapter 13A. The Act specifically authorizes the Hazardous Waste Section to “cooperate . . . with . . . the federal government . . . in the formulation and carrying out of a solid waste management program,” including a program for the management of hazardous waste. The Act (N.C.G.S. § 130A-294(b)) mandates the adoption of rules to implement that program, and requires the Hazardous Waste Section to enforce the rules promulgated thereunder. Consistent with its statutory authority, the Hazardous Waste Section has promulgated specific rules related to various subsets of the State Hazardous Waste Program. These rules largely adopt and incorporate the federal RCRA regulations by reference. North Carolina was authorized by EPA to operate its own state hazardous waste program on December 14, 1984.

   Three definitions of "operator" have application in North Carolina. First, the Solid Waste Management Act (N.C.G.S. § 130A-290(a)(21)) defines operator as:

   > "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."

   This broad definition has general application throughout Article 9 of Chapter 130A, which includes portions of the State Hazardous Waste Program, as well as numerous other separate state regulatory programs related to waste management.

   Second, the Rules adopted by the State Hazardous Waste Program (15A NCAC 13A .0102(b), which incorporates by reference 40 C.F.R. 260.10) under the authority of the Solid Waste Management Act, generally define an "operator" as "the person responsible for the overall operation of a facility."

Finally, for the specific purposes of permitting, including post-closure activities, State Rules (15A NCAC 13A .0113(a) which incorporates by reference 40 C.F.R. 270.2) define operator as the "operator of any facility or activity subject to regulation under RCRA."

While not identical, these three definitions of "operator" are consistent, and all are applicable and necessary: the Solid Waste Management Act definition applying most broadly; the definition in 15A NCAC 13A .0102 applying more narrowly to the State Hazardous Waste Program; and the definition in 15A NCAC 13A .0113(a) applying most specifically to the post-closure activities in which WASCO is involved.

These definitions were confirmed and supported through a series of judgments described as follows.

The North Carolina Office of Administrative Hearings (13 EHR 18253, Signed September 25, 2014, WASCO LLC, Petitioner, Dyna-Diggr LLC, Intervenor-Petitioner v. N.C. Department of Environment and Natural Resources, Division of Waste Management, Respondent) Administrative Law Judge (ALJ) decision stated:

> "As a matter of law, the parties dispute whether the definition of "operator" in N.C.G.S. § 130A-290(a)(21) or the definitions in 40 C.F.R. §§ 260.10, 270.2 (adopted by reference at 15A NCAC 13A .0102(b), .0113(a)) apply. Viewing the evidence in the light most favorable to WASCO, it is not necessary for the undersigned to resolve this issue. The result is the same under either definition."

On October 12, 2015 WASCO appealed the ALJ decision to the North Carolina Superior Court and argued that WASCO was not an operator as defined in 15A NCAC 13A .0102(b). The General Court of Justice, Superior Court Division Final Order (15 CVS 1438, Filed October 23, 2015, WASCO LLC, Petitioner, v. N.C. Department of Environment and Natural Resources, Division of Waste Management, Respondent), found WASCO to be an "operator" for purposes of 40 C.F.R. 270.1(c) (adopted by reference in 15A NCAC 13A .0113(a)).

The Court of Appeals of North Carolina (No. COA16-414, Filed: 18 April 2017, WASCO LLC, Petitioner, v. N.C. Department of Environment and Natural Resources, Division of Waste Management, Respondent) 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). 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."
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> "…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."

2) Since the North Carolina Hazardous Waste Management Program was authorized December 14, 1984, no public comments (neither formally nor informally) have been received concerning or opposing the definition of "operator" as set forth in the rule at issue.

Additionally, N.C.G.S. §150B-21.3A, adopted in 2013, requires state agencies to review existing rules every 10 years. The periodic rule review process allows public input at two separate times during the evaluation process. The first public comment period is when the rules are determined to be necessary with public interest, without public interest, or not necessary. No comments were received during this public comment period. The rules deemed to be necessary with public interest received an additional public comment period. Both 15A NCAC 13A .0102 and .0113 (the two state rules that incorporate the federal definitions of "operator") were deemed "necessary with public interest". On December 15, 2017, a public comment period for the periodic rule review of the Hazardous Waste Management Rules - 15A NCAC 13A was completed. A public hearing was held on November 15, 2017. No comments were received during the public comment period pertaining to the definition of "operator".

The definition of "operator" found in 15A NCAC 13A .0102(b) (which incorporates by reference 40 C.F.R. 260.10), is a long-standing definition that has had no opposition (or even question) for 33 years. The rulemaking petition to change the definition of "operator" is an isolated request.

3) Amending 15A NCAC 13A .0102(b) to add the term "operator" to the list of terms whose definitions are not incorporated by reference from the federal regulations at 40 C.F.R. 260.10 would potentially call into question whether the definition of "operator" found in N.C.G.S. § 130A-290(a)(21) would then cover any of the otherwise liable operators after closure of a facility. This was in fact the argument put forward by Petitioner—and rejected by the courts—in prior litigation, and Petitioner appears to renew the same already rejected argument here. Such an interpretation would be contrary to longstanding practice and could potentially affect the status of numerous facilities subject to remediation in this State. Petitioner offers no basis justifying such a drastic change.

RCRA addresses soil and groundwater contamination resulting from hazardous waste management units. The site where the hazardous waste management unit is located does not have to be in operation to fall under the jurisdiction of the RCRA requirements. The regulations do not limit post-closure operator liability to owner(s)/operator(s) of active businesses. The requirements of 40 C.F.R. 270.1(c) apply to "owners 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 40 C.F.R. 265.115) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under 40 C.F.R. 270.1(c)(5) and (6).

There are currently 59 sites that are remediating or need to remediate solid waste management units (SWMUs) in North Carolina. Using the N.C.G.S. § 130A-290(a)(21) definition of "operator", divorced from the context provided by the federal rule incorporated from 40 C.F.R. 260.10, may cause some or all of these sites currently required to comply with post-closure requirements of 40 C.F.R. 270 to fall out of RCRA regulation under the jurisdiction of the Hazardous Waste Section. The only recourse for remediation of soil and/or groundwater contamination at these sites would then

be under CERCLA, which would increase the already undue burden on the State's Superfund program.

There are also approximately 1,800 hazardous waste sites in North Carolina where the site is owned and operated by different entities. If the definition of "operator" were to change to N.C.G.S. § 130A-290(a)(21), and any of these facilities had contamination from a solid waste management unit, the site may fall out of RCRA closure/post-closure requirements and would then also have to be managed under the State's Superfund program.

4) EPA considers both the owner(s) and operator(s) of a facility to be responsible for regulatory compliance. In fact, joint and several liability applies (e.g., EPA RO 12703 - Aug. 1, 1986). For this reason, EPA may initiate an enforcement action against either the owner, the operator, or both. Additionally, the October 30, 1980 Federal Register (45 FR 72024) explains that in addition to the owners/operators of the facility, others operating at a site (e.g., contractors) who generate hazardous waste would be considered co-generators of the hazardous waste and subject to the RCRA requirements.

EPA has always held that both the owner and the operator are equally responsible for compliance with the permit issued to a facility. Section 3005(a) of RCRA requires "each person owning or operating" a treatment, storage, or disposal facility to obtain a permit. The permit regulations require both owner(s) and operator(s) to sign the permit application according to 40 C.F.R. 270.10(b). The permit is issued to both the owner(s) and operator(s). Preamble discussions in the May 19, 1980 Federal Register confirm this concept of dual responsibility at 45 FR 33169 and 45 FR 33295. Both discussions specifically reference situations where the operator may be different from the landowner or facility owner.

Since EPA authorized North Carolina to operate its own hazardous waste management program that is no less stringent than the federal program, the N.C.G.S. § 130A-290(a)(21) definition of "operator", by itself, may not capture all of the operators that are considered "co-generators" at a site or situations where there are multiple operators at one site.

Some examples of sites with different owners and operators under the statute and rules discussed above include:

- Former Heatcraft: Daikin Applied Americas is the operator of the clean-up; Port City is the owner and operates a business at the site.
- Schlage Lock: Schlage Lock is the operator of clean-up; Aspen Investment is the owner and possibly operates a business (warehouse).
- Nexeo: Ashland is the operator of corrective action; Nexeo is the owner and operator of commercial hazardous waste operations.

List of Exhibits

Exhibit 1

15A NCAC 13A .0102(b)

15A NCAC 13A .0102 DEFINITIONS

(a) The definitions contained in G.S. 130A-290 apply to this Subchapter.

(b) 40 CFR 260.10 (Subpart B), "Definitions," (81 FR 85713, Nov. 28, 2016) is incorporated by reference, except that the definitions for "Disposal," "Landfill," "Management or hazardous waste management," "Person," "Sludge," "Storage," and "Treatment" are defined by G.S. 130A-290 and are not incorporated by reference and the definition in 260.10 for "Contained" is not incorporated by reference.

(c) The following definition shall be substituted for "Contained": "Contained" means held in a unit (including a land-based unit as defined in this subpart) that meets the following criteria:

(1) the unit is in good condition, with no leaks or other continuing or intermittent unpermitted releases of the hazardous secondary materials or hazardous constituents originating from the hazardous secondary materials to the environment, and is designed, as appropriate for the hazardous secondary materials, to prevent releases of hazardous secondary materials to the environment. "Unpermitted releases" means releases that are not covered by a permit (such as a permit to discharge to water or air) and may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, windblown dust, fugitive air emissions, and catastrophic unit failures;

(2) the unit is properly labeled or otherwise has a system (such as a log) to immediately identify the hazardous secondary materials in the unit; and

(3) the unit holds hazardous secondary materials that are compatible with other hazardous secondary materials placed in the unit and is compatible with the materials used to construct the unit and addresses any potential risks of fires or explosions.

(4) hazardous secondary materials in units that meet the applicable requirements of 40 CFR parts 264 or 265 are presumptively contained.

(d) The following additional definitions shall apply throughout this Subchapter:

(1) "Section" means the Hazardous Waste Section, in the Division of Waste Management, Department of Environmental Quality.

(2) The "Department" means the Department of Environmental Quality (DEQ).

(3) "Division" means the Division of Waste Management (DWM).

(4) "Long Term Storage" means the containment of hazardous waste for an indefinite period of time in a facility designed to be closed with the hazardous waste in place.

(5) "Off-site Recycling Facility" means any facility that receives shipments of hazardous waste from off-site to be recycled or processed for recycling through any process conducted at the facility, but does not include any facility owned or operated by a generator of hazardous waste solely to recycle their own waste.

History Note: *Authority G.S. 130A 294(c); 150B-21.6;*
Eff. September 1, 1979;
Amended Eff. June 1, 1989; June 1, 1988; February 1, 1987; October 1, 1986;
Transferred and Recodified from 10 NCAC 10F .0002 Eff. April 4, 1990;
Amended Eff. April 1, 1993; October 1, 1990; August 1, 1990;
Recodified from 15A NCAC 13A .0002 Eff. December 20, 1996;
Amended Eff. August 1, 2000;
Temporary Amendment Eff. January 1, 2009;
Amended Eff. July 1, 2010;
Temporary Amendment Eff. December 1, 2015;
Amended Eff. July 1, 2016;
Temporary Amendment Eff. May 30, 2017.

Exhibit 2

40 CFR 260.10
Definition of Operator

§260.10 Definitions.

When used in parts 260 through 273 of this chapter, the following terms have the meanings given below:

Above ground tank means a device meeting the definition of "tank" in §260.10 and that is situated in such a way that the entire surface area of the tank is completely above the plane of the adjacent surrounding surface and the entire surface area of the tank (including the tank bottom) is able to be visually inspected.

Act or *RCRA* means the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. section 6901 *et seq.*

Active life of a facility means the period from the initial receipt of hazardous waste at the facility until the Regional Administrator receives certification of final closure.

Active portion means that portion of a facility where treatment, storage, or disposal operations are being or have been conducted after the effective date of part 261 of this chapter and which is not a closed portion. (See also "closed portion" and "inactive portion".)

Acute hazardous waste means hazardous wastes that meet the listing criteria in §261.11(a)(2) and therefore are either listed in §261.31 of this chapter with the assigned hazard code of (H) or are listed in §261.33(e) of this chapter.

Administrator means the Administrator of the Environmental Protection Agency, or his designee.

AES filing compliance date means the date that EPA announces in the FEDERAL REGISTER, on or after which exporters of hazardous waste and exporters of cathode ray tubes for recycling are required to file EPA information in the Automated Export System or its successor system, under the International Trade Data System (ITDS) platform.

Ancillary equipment means any device including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps, that is used to distribute, meter, or control the flow of hazardous waste from its point of generation to a storage or treatment tank(s), between hazardous waste storage and treatment tanks to a point of disposal onsite, or to a point of shipment for disposal off-site.

Aquifer means a geologic formation, group of formations, or part of a formation capable of yielding a significant amount of ground water to wells or springs.

Authorized representative means the person responsible for the overall operation of a facility or an operational unit (i.e., part of a facility), e.g., the plant manager, superintendent or person of equivalent responsibility.

Battery means a device consisting of one or more electrically connected electrochemical cells which is designed to receive, store, and deliver electric energy. An electrochemical cell is a system consisting of an anode, cathode, and an electrolyte, plus such connections (electrical and mechanical) as may be needed to allow the cell to deliver or receive electrical energy. The term battery also includes an intact, unbroken battery from which the electrolyte has been removed.

Boiler means an enclosed device using controlled flame combustion and having the following characteristics:

(1)(i) The unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases; and

(ii) The unit's combustion chamber and primary energy recovery sections(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design: process heaters (units that transfer energy directly to a process stream), and fluidized bed combustion units; and

(iii) While in operation, the unit must maintain a thermal energy recovery efficiency of at least 60 percent, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(iv) The unit must export and utilize at least 75 percent of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(2) The unit is one which the Regional Administrator has determined, on a case-by-case basis, to be a boiler, after considering the standards in §260.32.

(3) Control of emission of the gaseous combustion products.

(See also “incineration” and “thermal treatment”.)

Operator means the person responsible for the overall operation of a facility.

Owner means the person who owns a facility or part of a facility.

Partial closure means the closure of a hazardous waste management unit in accordance with the applicable closure requirements of parts 264 and 265 of this chapter at a facility that contains other active hazardous waste management units. For example, partial closure may include the closure of a tank (including its associated piping and underlying containment systems), landfill cell, surface impoundment, waste pile, or other hazardous waste management unit, while other units of the same facility continue to operate.

Person means an individual, trust, firm, joint stock company, Federal Agency, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

Personnel or *facility personnel* means all persons who work at, or oversee the operations of, a hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of part 264 or 265 of this chapter.

Pesticide means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, or intended for use as a plant regulator, defoliant, or desiccant, other than any article that:

(1) Is a new animal drug under FFDCA section 201(w), or

(2) Is an animal drug that has been determined by regulation of the Secretary of Health and Human Services not to be a new animal drug, or

(3) Is an animal feed under FFDCA section 201(x) that bears or contains any substances described by paragraph (1) or (2) of this definition.

Pile means any non-containerized accumulation of solid, nonflowing hazardous waste that is used for treatment or storage and that is not a containment building.

Plasma arc incinerator means any enclosed device using a high intensity electrical discharge or arc as a source of heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

Point source means any discernible, confined, and discrete conveyance, including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

Publicly owned treatment works or *POTW* means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a “State” or “municipality” (as defined by section 502(4) of the CWA). This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

Qualified Ground-Water Scientist means a scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering, and has sufficient training and experience in ground-water hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university courses that enable that individual to make sound professional judgements regarding ground-water monitoring and contaminant fate and transport.

Recognized trader means a person domiciled in the United States, by site of business, who acts to arrange and facilitate transboundary movements of wastes destined for recovery or disposal operations, either by purchasing from and subsequently selling to United States and foreign facilities, or by acting under arrangements with a United States waste facility to arrange for the export or import of the wastes.

Regional Administrator means the Regional Administrator for the EPA Region in which the facility is located, or his designee.

Remanufacturing means processing a higher-value hazardous secondary material in order to manufacture a product that serves a similar functional purpose as the original commercial-grade material. For the purpose of this definition, a hazardous secondary material is considered higher-value if it was generated from the use of a commercial-grade material in a manufacturing process and can be remanufactured into a similar commercial-grade material.

Exhibit 3

N.C.G.S. 130A-290(a)(21)
Definition of Operator

Article 9.

Solid Waste Management.

Part 1. Definitions.

§ 130A-290. Definitions.

(a) Unless a different meaning is required by the context, the following definitions shall apply throughout this Article:

(1) "Affiliate" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition).

(1a) "Business entity" has the same meaning as in G.S. 55-1-40(2a).

(1b) "CERCLA/SARA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. § 9601 et seq., as amended, and the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, as amended.

(1c) "Chemical or portable toilet" means a self-contained mobile toilet facility and holding tank and includes toilet facilities in recreational vehicles.

(1d) "Chlorofluorocarbon refrigerant" means any of the following when used as a liquid heat transfer agent in a mechanical refrigeration system: carbon tetrachloride, chlorofluorocarbons, halons, or methyl chloroform.

(2) "Closure" means 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.

(2a) Recodified as subdivision (a)(2d) at the direction of the Revisor of Statutes. See note.

(2b) "Coal combustion residuals" means residuals, including fly ash, bottom ash, boiler slag, mill rejects, and flue gas desulfurization residue produced by a coal-fired generating unit destined for disposal. The term does not include coal combustion products as defined in G.S. 130A-309.201(4).

(2c) "Coal combustion residuals landfill" means a facility or unit for the disposal of combustion products, where the landfill is located at the same facility with the coal-fired generating unit or units producing the combustion products, and where the landfill is located wholly or partly on top of a facility that is, or was, being used for the disposal or storage of such combustion products, including, but not limited to, landfills, wet and dry ash ponds, and structural fill facilities.

(2d) "Coal-fired generating unit" means a coal-fired generating unit, as defined by 40 Code of Federal Regulations § 96.2 (1 July 2001 Edition), that is located in this State and has the capacity to generate 25 or more megawatts of electricity.

(3) "Commercial" when applied to a hazardous waste facility, means a hazardous waste facility that accepts hazardous waste from the general public or from another person for a fee.

(3a) "Commission" means the Environmental Management Commission.

(4) "Construction" or "demolition" when used in connection with "waste" or "debris" means solid waste resulting solely from construction, remodeling, repair, or demolition operations on pavement, buildings, or other structures, but does not include inert debris, land-clearing debris or yard debris.

(4a) "Department" means the Department of Environmental Quality.

(5) Repealed by Session Laws 1995 (Regular Session, 1996), c. 594, s. 1.

(6) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste into or on any land or water so that the solid waste or any constituent part of the solid waste may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(7) "Garbage" means all putrescible wastes, including animal offal and carcasses, and recognizable industrial by-products, but excluding sewage and human waste.

(8) "Hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics may:

(19) "Natural resources" means all materials which have useful physical or chemical properties which exist, unused, in nature.

(20) "Open dump" means any facility or site where solid waste is disposed of that is not a sanitary landfill and that is not a coal combustion residuals surface impoundment or a facility for the disposal of hazardous waste.

(21) "Operator" means 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.

(21a) "Parent" has the same meaning as in 17 Code of Federal Regulations § 240.12b-2 (1 April 1996 Edition).

(22) "Person" means an individual, corporation, company, association, partnership, unit of local government, State agency, federal agency or other legal entity.

(22a) "Pre-1983 landfill" means any land area, whether publicly or privately owned, on which municipal solid waste disposal occurred prior to 1 January 1983 but not thereafter, but does not include any landfill used primarily for the disposal of industrial solid waste.

(23) "Processing" means any technique designed to change the physical, chemical, or biological character or composition of any solid waste so as to render it safe for transport; amenable to recovery, storage or recycling; safe for disposal; or reduced in volume or concentration.

(24) "Recovered material" means a material that has known recycling potential, can be feasibly recycled, and has been diverted or removed from the solid waste stream for sale, use, or reuse. In order to qualify as a recovered material, a material must meet the requirements of G.S. 130A-309.05(c).

(25) "RCRA" means the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 90 Stat. 2795, 42 U.S.C. § 6901 et seq., as amended.

(26) "Recyclable material" means those materials which are capable of being recycled and which would otherwise be processed or disposed of as solid waste.

(27) "Recycling" means any process by which solid waste, or materials which would otherwise become solid waste, are collected, separated, or processed, and reused or returned to use in the form of raw materials or products.

(28) "Refuse" means all nonputrescible waste.

(28a) "Refuse-derived fuel" means fuel that consists of municipal solid waste from which recyclable and noncombustible materials are removed so that the remaining material is used for energy production.

(29) "Resource recovery" means the process of obtaining material or energy resources from discarded solid waste which no longer has any useful life in its present form and preparing the solid waste for recycling.

(30) "Reuse" means a process by which resources are reused or rendered usable.

(31) "Sanitary landfill" means a facility for disposal of solid waste on land in a sanitary manner in accordance with the rules concerning sanitary landfills adopted under this Article.

(31a) "Secretary" means the Secretary of Environmental Quality.

(32) "Septage" means solid waste that is a fluid mixture of untreated and partially treated sewage solids, liquids, and sludge of human or domestic origin which is removed from a wastewater system. The term septage includes the following:

a. Domestic septage, which is either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works receiving only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works receiving either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap at a restaurant.

b. Domestic treatment plant septage, which is solid, semisolid, or liquid residue generated during the treatment of domestic sewage in a treatment works where the designed disposal is subsurface. Domestic treatment plant septage includes, but is not limited to, scum or solids removed in primary, secondary, or advanced wastewater

Exhibit 4

15A NCAC 13A .0113(a)

15A NCAC 13A .0113 THE HAZARDOUS WASTE PERMIT PROGRAM - PART 270

(a) 40 CFR 270.1 through 270.6 (Subpart A), "General Information" are incorporated by reference including subsequent amendments and editions, except that 40 CFR 270.1(a)(3), 270.1(c)(2)(i) and 270.1(c)(2)(iii) (71 FR 40279, July 14, 2006) are incorporated by reference. For the purpose of this incorporation by reference, "January 26, 1983" shall be substituted for "July 26, 1982" contained in 40 CFR 270.1(c).

(b) 40 CFR 270.10 through 270.29 (Subpart B), "Permit Application" are incorporated by reference including subsequent amendments and editions.

(c) The following are additional Part B information requirements for all hazardous waste facilities:

(1) description and documentation of the public meetings as required in 15A NCAC 13A .0109(r)(7);

(2) a description of the hydrological and geological properties of the site including flood plains, depth to water table, ground water travel time, seasonal and long-term groundwater level fluctuations, proximity to public water supply watersheds, consolidated rock, soil pH, soil cation exchange capacity, soil characteristics and composition and permeability, existence of cavernous bedrock and seismic activity, slope, mines, climate, location and withdrawal rates of surface water users within the immediate drainage basin and well water users within a one mile radius of the facility; water quality information of both surface and groundwater within 1000 feet of the facility, and a description of the local air quality;

(3) a description of the facility's proximity to and potential impact on wetlands, endangered species habitats, parks, forests, wilderness areas, historical sites, mines, and air quality;

(4) a description of local land use including residential, industrial, commercial, recreational, agricultural, and the proximity to schools and airports;

(5) a description of the proximity of the facility to waste generators and population centers; a description of the method of waste transportation; the comments of the local community and state transportation authority on the proposed route, and route safety. Comments shall include proposed alternative routes and restrictions necessary to protect the public health;

(6) a description of facility aesthetic factors including visibility, appearance, and noise level; and

(7) a description of any other objective factors that the Department determines are reasonably related and relevant to the proper siting and operation of the facility.

(d) In addition to the specific Part B information requirements for hazardous waste disposal facilities, owners and operators of hazardous waste landfills or longterm storage facilities shall provide the following information:

(1) design drawings and specifications of the leachate collection and removal system;

(2) design drawings and specifications of the artificial impervious liner;

(3) design drawings and specifications of the clay or clay-like liner below the artificial liner, and a description of the permeability of the clay or clay-like liner; and

(4) a description of how hazardous wastes will be treated prior to placement in the facility.

(e) In addition to the specific Part B information requirements for surface impoundments, owners and operators of surface impoundments shall provide the following information:

(1) design drawings and specifications of the leachate collection and removal system;

(2) design drawings and specifications of all artificial impervious liners;

(3) design drawings and specifications of all clay or clay-like liners and a description of the clay or clay-like liner; and

(4) design drawings and specifications that show that the facility has been constructed in a manner that will prevent landsliding, slippage, or slumping.

(f) 40 CFR 270.30 through 270.33 (Subpart C), "Permit Conditions" are incorporated by reference including subsequent amendments and editions.

(g) 40 CFR 270.40 through 270.43 (Subpart D), "Changes to Permit" are incorporated by reference including subsequent amendments and editions, except that 40 CFR 270.42(l) and the entries under O.1 in the table of appendix I to 40 CFR 270.42 (80 FR 58012, Sept. 25, 2015) are incorporated by reference.

(h) 40 CFR 270.50 through 270.51 (Subpart E), "Expiration and Continuation of Permits" are incorporated by reference including subsequent amendments and editions.

(i) 40 CFR 270.60 through. 270.68 (Subpart F), "Special Forms of Permits" are incorporated by reference including subsequent amendments and editions, except that 40 CFR 270.67 and 270.68 are not incorporated by reference.

(j) 40 CFR 270.70 through 270.73 (Subpart G), "Interim Status" are incorporated by reference including subsequent amendments and editions. For the purpose of this incorporation by reference, "January 1, 1986" shall be substituted for "November 8, 1985" contained in 40 CFR 270.73(c).

(k) 40 CFR 270.235, (Subpart I), "Integration with Maximum Achievable Control Technology (MACT) Standards" is incorporated by reference including subsequent amendments and editions.

(l) The following are additional permitting requirements for hazardous waste facilities.

(1) An applicant applying for a permit for a hazardous waste facility shall submit a disclosure statement to the Department as a part of the application for a permit or any time thereafter specified by the Department. The disclosure statement shall be supported by an affidavit attesting to the truth and completeness of the facts asserted in the statement and shall include:

(A) a brief description of the form of the business (e.g. partnership, sole proprietorship, corporation, association, or other);

(B) the name and address of any hazardous waste facility constructed or operated after October 21, 1976 by the applicant or any parent or subsidiary corporation if the applicant is a corporation; and

(C) a list identifying any legal action taken against any facility identified in Part (l)(1)(B) of this Rule involving:

(i) any administrative ruling or order issued by any state, federal, or local authority relating to revocation of any environmental or waste management permit or license, or to a violation of any state or federal statute or local ordinance relating to waste management or environmental protection;

(ii) any judicial determination of liability or conviction under any state or federal law or local ordinance relating to waste management or environmental protection; and

(iii) any pending administrative or judicial proceeding of the type described in this Part.

(D) the identification of each action described in Part (l)(1)(C) of this Rule shall include the name and location of the facility that the action concerns, the agency or court that heard or is hearing the matter, the title, docket or case number, and the status of the proceeding.

(2) In addition to the information set forth in Subparagraph (l)(1) of this Rule, the Department shall require from any applicant such additional information as it deems necessary to satisfy the requirements of G.S. 130A-295. Such information may include:

(A) the names, addresses, and titles of all officers, directors, or partners of the applicant and of any parent or subsidiary corporation if the applicant is a corporation;

(B) the name and address of any company in the field of hazardous waste management in which the applicant business or any of its officers, directors, or partners, hold an equity interest and the name of the officer, director, or partner holding such interest; and

(C) a copy of any administrative ruling or order and of any judicial determination of liability or conviction described in Part (l)(1)(C) of this Rule, and a description of any pending administrative or judicial proceeding in that item.

(3) If the Department finds that any part or parts of the disclosure statement is not necessary to satisfy the requirements of G.S. 130A-295, such information shall not be required.

(m) An applicant for a new, or modification to an existing commercial facility permit shall provide a description and justification of the need for the facility.

(n) Requirements for Off-site Recycling Facilities.

(1) The permit requirements of 15A NCAC 13A .0109 apply to owners and operators of off-site recycling facilities unless excluded in Subparagraph (2) of Paragraph (n) of this Rule.

(2) Requirements of 15A NCAC 13A .0113(n)(4), (5), (6), (7) and (8) do not apply to owners and operators of off-site recycling facilities that recycle only precious metals as described in 40 CFR 266.70(a), as incorporated by reference in 15A NCAC 13A .0111(b).

(3) Off-site facilities that recycle precious metals shall follow the regulations as described in 15A NCAC 13A .0111(b).

(4) Notwithstanding any other statement of applicability, the following provisions of 40 CFR Part 264, as incorporated by reference, shall apply to owners and operators of off-site recycling facilities except those excluded in 15A NCAC 13A .0113(n)(2):

(A) Subpart B - General Facility Standards;

(B) Subpart C - Preparedness and Prevention;

(C) Subpart D - Contingency Plan and Emergency Procedures;

(D) Subpart E - Manifest System, Recordkeeping and Reporting;

(E) Subpart G - Closure and Post-closure;
(F) Subpart H - Financial Requirements;
(G) Subpart I - Use and Management of Containers;
(H) Subpart J - Tank Systems;
(I) 264.101 - Corrective Action for Solid Waste Management Units;
(J) Subpart X - Miscellaneous Units; and
(K) Subpart DD - Containment Buildings.

(5) The requirements listed in Subparagraph (n)(4) of this Rule apply to the entire off-site recycling facility, including all recycling units, staging and process areas, and permanent and temporary storage areas for wastes.

(6) The following provisions of 15A NCAC 13A .0109 shall apply to owners and operators of off-site recycling facilities:
(A) the substitute financial requirements of Rule .0109(i)(1), (2) and (4); and
(B) the additional standards of Rule .0109(r)(1), (2), (3), (6) and (7).

(7) The owner or operator of an off-site recycling facility shall keep a written operating record at his facility.

(8) The following information shall be recorded, as it becomes available, and maintained in the operating record until closure of the facility:
(A) a description and the quantity of each hazardous waste received, and the method(s) and date(s) of its treatment, storage, or recycling at the facility;
(B) the location of all hazardous waste within the facility and the quantity at each location. This information shall include cross-references to specific manifest document numbers if the waste was accompanied by a manifest; and
(C) documentation of the fate of all hazardous wastes received from off-site or generated on-site. This shall include records of the sale, reuse, off-site transfer, or disposal of all waste materials.

(o) Permit Fees for Commercial Hazardous Waste Facilities.

(1) An applicant for a permit modification for a commercial hazardous waste facility shall pay an application fee for the Class of permit modification defined in 40 CFR 270.42 as follows:
(A) Class 1 permit modification $100;
(B) Class 2 permit modification $1,000; or
(C) Class 3 permit modification $5,000.

Note: Class 1 permit modifications which do not require prior approval of the Division Director are excluded from the fee requirement.

(2) The application fee for a new permit, permit renewal, or permit modification shall accompany the application, and is non-refundable. The application shall be considered incomplete until the fee is paid. Checks shall be made payable to: Division of Waste Management.

History Note: *Authority G.S. 130A-294(c); 130A-294.1; 130A-295(a)(1),(2), (c); 150B-21.6;*
Eff. November 19, 1980;
Amended Eff. November 1, 1989; June 1, 1988; February 1, 1988; December 1, 1987;
Transferred and Recodified from 10 NCAC 10F .0034 April 4, 1990;
Amended Eff. August 1, 1990;
Recodified from 15A NCAC 13A .0014 Eff. August 30, 1990;
Amended Eff. April 1, 1993; August 1, 1991; October 1, 1990;
Recodified from 15A NCAC 13A .0013 Eff. December 20, 1996;
Amended Eff. August 1, 2008; April 1, 2006; August 1, 2004; April 1, 2001; August 1, 2000;
Temporary Amendment Eff. May 30, 2017.

Exhibit 5

40 CFR 270.1

§270.1 Purpose and scope of these regulations.

(a) *Coverage.* (1) These permit regulations establish provisions for the Hazardous Waste Permit Program under Subtitle C of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (RCRA), (Pub. L. 94-580, as amended by Pub. L. 95-609 and by Pub. L. 96-482; 42 U.S.C. 6091 *et seq.*). They apply to EPA and to approved States to the extent provided in part 271.

(2) The regulations in this part cover basic EPA permitting requirements, such as application requirements, standard permit conditions, and monitoring and reporting requirements. These regulations are part of a regulatory scheme implementing RCRA set forth in different parts of the Code of Federal Regulations. The following chart indicates where the regulations implementing RCRA appear in the Code of Federal Regulations.

Section of RCRA	Coverage	Final regulation
Subtitle C	Overview and definitions	40 CFR part 260
3001	Identification and listing of hazardous waste	40 CFR part 261
3002	Generators of hazardous waste	40 CFR part 262
3003	Transporters of hazardous waste	40 CFR part 263
3004	Standards for HWM facilities	40 CFR parts 264, 265, 266, and 267
3005	Permit requirements for HWM facilities	40 CFR parts 270 and 124
3006	Guidelines for State programs	40 CFR part 271
3010	Preliminary notification of HWM activity	(public notice) 45 *FR* 12746 February 26, 1980

(3) *Technical regulations.* The RCRA permit program has separate additional regulations that contain technical requirements. These separate regulations are used by permit issuing authorities to determine what requirements must be placed in permits if they are issued. These separate regulations are located in 40 CFR parts 264, 266, 267, and 268.

(b) *Overview of the RCRA Permit Program.* Not later than 90 days after the promulgation or revision of regulations in 40 CFR part 261 (identifying and listing hazardous wastes) generators and transporters of hazardous waste, and owners or operators of hazardous waste treatment, storage, or disposal facilities may be required to file a notification of that activity under section 3010. Six months after the initial promulgation of the part 261 regulations, treatment, storage, or disposal of hazardous waste by any person who has not applied for or received a RCRA permit is prohibited. Treatment, storage, and disposal facilities (TSDs) that are otherwise subject to permitting under RCRA and that meet the criteria in paragraph (b)(1), or paragraph (b)(2) of this section, may be eligible for a standardized permit under subpart J of this part. A RCRA permit application consists of two parts, part A (see §270.13) and part B (see §270.14 and applicable sections in §§270.15 through 270.29). For “existing HWM facilities,” the requirement to submit an application is satisfied by submitting only part A of the permit application until the date the Director sets for submitting part B of the application. (Part A consists of Forms 1 and 3 of the Consolidated Permit Application Forms.) Timely submission of both notification under section 3010 and part A qualifies owners and operators of existing HWM facilities (who are required to have a permit) for interim status under section 3005(e) of RCRA. Facility owners and operators with interim status are treated as having been issued a permit until EPA or a State with interim authorization for Phase II or final authorization under part 271 makes a final determination on the permit application. Facility owners and operators with interim status must comply with interim status standards set forth at 40 CFR part 265 and 266 or with the analogous provisions of a State program which has received interim or final authorization under part 271. Facility owners and operators with interim status are not relieved from complying with other State requirements. For existing HWM facilities, the Director shall set a date, giving at least six months notice, for submission of part B of the application. There is no form for part B of the application; rather, part B must be submitted in narrative form and contain the information set forth in the applicable sections of §§270.14 through 270.29. Owners or operators of new HWM facilities must submit parts A and B of the permit application at least 180 days before physical construction is expected to commence.

(1) The facility generates hazardous waste and then non-thermally treats or stores hazardous waste on-site in tanks, containers, or containment buildings; or

(2) The facility receives hazardous waste generated off-site by a generator under the same ownership as the receiving facility, and then stores or non-thermally treats the hazardous waste in containers, tanks, or containment buildings.

(c) *Scope of the RCRA permit requirement.* RCRA requires a permit for the “treatment,” “storage,” and “disposal” of any “hazardous waste” as identified or listed in 40 CFR part 261. The terms “treatment,” “storage,” “disposal,” and “hazardous waste” are defined in §270.2. Owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit. Owners 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. The denial of a permit for the active life of a hazardous waste management facility or unit does not affect the requirement to obtain a post-closure permit under this section.

(1) *Specific inclusions.* Owners and operators of certain facilities require RCRA permits as well as permits under other programs for certain aspects of the facility operation. RCRA permits are required for:

(i) Injection wells that dispose of hazardous waste, and associated surface facilities that treat, store or dispose of hazardous waste, (See §270.64). However, the owner and operator with a UIC permit in a State with an approved or promulgated UIC program, will be deemed to have a RCRA permit for the injection well itself if they comply with the requirements of §270.60(b) (permit-by-rule for injection wells).

(ii) Treatment, storage, or disposal of hazardous waste at facilities requiring an NPDES permit. However, the owner and operator of a publicly owned treatment works receiving hazardous waste will be deemed to have a RCRA permit for that waste if they comply with the requirements of §270.60(c) (permit-by-rule for POTWs).

(iii) Barges or vessels that dispose of hazardous waste by ocean disposal and onshore hazardous waste treatment or storage facilities associated with an ocean disposal operation. However, the owner and operator will be deemed to have a RCRA permit for ocean disposal from the barge or vessel itself if they comply with the requirements of §270.60(a) (permit-by-rule for ocean disposal barges and vessels).

(2) *Specific exclusions and exemptions.* The following persons are among those who are not required to obtain a RCRA permit:

(i) Generators who accumulate hazardous waste on site in compliance with all of the conditions for exemption provided in 40 CFR 262.14, 262.15, 262.16, and 262.17.

(ii) Farmers who dispose of hazardous waste pesticides from their own use as provided in §262.70 of this chapter;

(iii) Persons who own or operate facilities solely for the treatment, storage, or disposal of hazardous waste excluded from regulations under this part by 40 CFR 261.4 or 262.14 (very small quantity generator exemption).

(iv) Owners or operators of totally enclosed treatment facilities as defined in 40 CFR 260.10.

(v) Owners and operators of elementary neutralization units or wastewater treatment units as defined in 40 CFR 260.10.

(vi) Transporters storing manifested shipments of hazardous waste in containers meeting the requirements of 40 CFR 262.30 at a transfer facility for a period of ten days or less.

(vii) Persons adding absorbent material to waste in a container (as defined in §260.10 of this chapter) and persons adding waste to absorbent material in a container, provided that these actions occur at the time waste is first placed in the container; and §§264.17(b), 264.171, and 264.172 of this chapter are complied with.

(viii) Universal waste handlers and universal waste transporters (as defined in 40 CFR 260.10) managing the wastes listed below. These handlers are subject to regulation under 40 part CFR 273.

(A) Batteries as described in 40 CFR 273.2;

(B) Pesticides as described in §273.3 of this chapter;

(C) Mercury-containing equipment as described in §273.4 of this chapter; and

(D) Lamps as described in §273.5 of this chapter.

(ix) A New York State Utility central collection facility consolidating hazardous waste in accordance with 40 CFR 262.90.

(3) *Further exclusions.* (i) A person is not required to obtain a RCRA permit for treatment or containment activities taken during immediate response to any of the following situations:

(A) A discharge of a hazardous waste;

(B) An imminent and substantial threat of a discharge of hazardous waste;

(C) A discharge of a material which, when discharged, becomes a hazardous waste.

(D) An immediate threat to human health, public safety, property, or the environment from the known or suspected presence of military munitions, other explosive material, or an explosive device, as determined by an explosive or munitions emergency response specialist as defined in 40 CFR 260.10.

(ii) Any person who continues or initiates hazardous waste treatment or containment activities after the immediate response is over is subject to all applicable requirements of this part for those activities.

(iii) In the case of emergency responses involving military munitions, the responding military emergency response specialist's organizational unit must retain records for three years identifying the dates of the response, the responsible persons responding, the type and description of material addressed, and its disposition.

(4) *Permits for less than an entire facility.* EPA may issue or deny a permit for one or more units at a facility without simultaneously issuing or denying a permit to all of the units at the facility. The interim status of any unit for which a permit has not been issued or denied is not affected by the issuance or denial of a permit to any other unit at the facility.

(5) *Closure by removal.* Owners/operators of surface impoundments, land treatment units, and waste piles closing by removal or decontamination under part 265 standards must obtain a post-closure permit unless they can demonstrate to the Regional Administrator that the closure met the standards for closure by removal or decontamination in §264.228, §264.280(e), or §264.258, respectively. The demonstration may be made in the following ways:

(i) If the owner/operator has submitted a part B application for a post-closure permit, the owner/operator may request a determination, based on information contained in the application, that section 264 closure by removal standards were met. If the Regional Administrator believes that §264 standards were met, he/she will notify the public of this proposed decision, allow for public comment, and reach a final determination according to the procedures in paragraph (c)(6) of this section.

(ii) If the owner/operator has not submitted a part B application for a post-closure permit, the owner/operator may petition the Regional Administrator for a determination that a post-closure permit is not required because the closure met the applicable part 264 closure standards.

(A) The petition must include data demonstrating that closure by removal or decontamination standards were met, or it must demonstrate that the unit closed under State requirements that met or exceeded the applicable 264 closure-by-removal standard.

(B) The Regional Administrator shall approve or deny the petition according to the procedures outlined in paragraph (c)(6) of this section.

(6) *Procedures for closure equivalency determination.* (i) If a facility owner/operator seeks an equivalency demonstration under §270.1(c)(5), the Regional Administrator will provide the public, through a newspaper notice, the opportunity to submit written comments on the information submitted by the owner/operator within 30 days from the date of the notice. The Regional Administrator will also, in response to a request or at his/her own discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning the equivalence of the part 265 closure to a part 264 closure. The Regional Administrator will give public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.)

(ii) The Regional Administrator will determine whether the part 265 closure met 264 closure by removal or decontamination requirements within 90 days of its receipt. If the Regional Administrator finds that the closure did not meet the applicable part 264 standards, he/she will provide the owner/operator with a written statement of the reasons why the closure failed to meet part 264 standards. The owner/operator may submit additional information in support of an equivalency demonstration within 30 days after receiving such written statement. The Regional Administrator will review any additional information submitted and make a final determination within 60 days.

(iii) If the Regional Administrator determines that the facility did not close in accordance with part 264 closure by removal standards, the facility is subject to post-closure permitting requirements.

(7) *Enforceable documents for post-closure care.* At the discretion of the Regional Administrator, an owner or operator may obtain, in lieu of a post-closure permit, an enforceable document imposing the requirements of 40 CFR 265.121. “Enforceable document” means an order, a plan, or other document issued by EPA or by an authorized State under an authority that meets the requirements of 40 CFR 271.16(e) including, but not limited to, a corrective action order issued by EPA under section 3008(h), a CERCLA remedial action, or a closure or post-closure plan.

[48 FR 14228, Apr. 1, 1983, as amended at 48 FR 30113, June 30, 1983; 51 FR 10176, Mar. 24, 1986; 52 FR 45798, Dec. 1, 1987; 53 FR 27165, July 19, 1988; 54 FR 9607, Mar. 7, 1989; 56 FR 32692, July 17, 1991; 60 FR 25542, May 11, 1995; 62 FR 6656, Feb. 12, 1996; 63 FR 56735, Oct. 22, 1998; 64 FR 36488, July 6, 1999; 64 FR 37638, July 12, 1999; 70 FR 45520, Aug. 5, 2005; 70 FR 53474, Sept. 8, 2005; 71 FR 40279, July 14, 2006; 81 FR 85828, Nov. 28, 2016]

Exhibit 6

40 CFR 270.2

§270.2 Definitions.

The following definitions apply to parts 270, 271 and 124. Terms not defined in this section have the meaning given by RCRA.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in approved States, including any approved modifications or revisions. Application also includes the information required by the Director under §§270.14 through 270.29 (contents of part B of the RCRA application).

Approved program or approved State means a State which has been approved or authorized by EPA under part 271.

Aquifer means a geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

Closure means the act of securing a Hazardous Waste Management facility pursuant to the requirements of 40 CFR part 264.

Component means any constituent part of a unit or any group of constituent parts of a unit which are assembled to perform a specific function (e.g., a pump seal, pump, kiln liner, kiln thermocouple).

Corrective Action Management Unit or *CAMU* means an area within a facility that is designated by the Regional Administrator under part 264 subpart S, for the purpose of implementing corrective action requirements under §264.101 and RCRA section 3008(h). A CAMU shall only be used for the management of remediation wastes pursuant to implementing such corrective action requirements at the facility.

CWA means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act amendments of 1972) Pub. L. 92-500, as amended by Pub. L. 92-217 and Pub. L. 95-576; 33 U.S.C. 1251 *et seq.*

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no approved State program, and there is an EPA administered program, Director means the Regional Administrator. When there is an approved State program, Director normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State program. In such cases, the term Director means the Regional Administrator and not the State Director.

Disposal means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous waste into or on any land or water so that such hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water.

Disposal facility means a facility or part of a facility at which hazardous waste is intentionally placed into or on the land or water, and at which hazardous waste will remain after closure. The term disposal facility does not include a corrective action management unit into which remediation wastes are placed.

Draft permit means a document prepared under §124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a permit. A notice of intent to terminate a permit, and a notice of intent to deny a permit, as discussed in §124.5, are types of draft permits. A denial of a request for modification, revocation and reissuance, or termination, as discussed in §124.5 is not a “draft permit.” A proposed permit is not a draft permit.

Elementary neutralization unit means a device which:

(a) Is used for neutralizing wastes only because they exhibit the corrosivity characteristic defined in §261.22 of this chapter, or are listed in subpart D of part 261 of this chapter only for this reason; and

(b) Meets the definition of tank, tank system, container, transport vehicle, or vessel in §260.10 of this chapter.

Emergency permit means a RCRA permit issued in accordance with §270.61.

Environmental Protection Agency (EPA) means the United States Environmental Protection Agency.

EPA means the United States Environmental Protection Agency.

Existing hazardous waste management (HWM) facility or existing facility means a facility which was in operation or for which construction commenced on or before November 19, 1980. A facility has commenced construction if:

(a) The owner or operator has obtained the Federal, State and local approvals or permits necessary to begin physical construction; and either

(b)(1) A continuous on-site, physical construction program has begun; or

(2) The owner or operator has entered into contractual obligations which cannot be cancelled or modified without substantial loss—for physical construction of the facility to be completed within a reasonable time.

Facility mailing list means the mailing list for a facility maintained by EPA in accordance with 40 CFR 124.10(c)(1)(ix).

Facility or activity means any HWM facility or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA program.

Federal, State and local approvals or permits necessary to begin physical construction means permits and approvals required under Federal, State or local hazardous waste control statutes, regulations or ordinances.

Final authorization means approval by EPA of a State program which has met the requirements of section 3006(b) of RCRA and the applicable requirements of part 271, subpart A.

Functionally equivalent component means a component which performs the same function or measurement and which meets or exceeds the performance specifications of another component.

Generator means any person, by site location, whose act, or process produces “hazardous waste” identified or listed in 40 CFR part 261.

Ground water means water below the land surface in a zone of saturation.

Hazardous waste means a hazardous waste as defined in 40 CFR 261.3.

Hazardous Waste Management facility (HWM facility) means all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (for example, one or more landfills, surface impoundments, or combinations of them).

HWM facility means Hazardous Waste Management facility.

Injection well means a well into which fluids are being injected.

In operation means a facility which is treating, storing, or disposing of hazardous waste.

Interim authorization means approval by EPA of a State hazardous waste program which has met the requirements of section 3006(g)(2) of RCRA and applicable requirements of part 271, subpart B.

Major facility means any facility or activity classified as such by the Regional Administrator, or, in the case of approved State programs, the Regional Administrator in conjunction with the State Director.

Manifest means the shipping document originated and signed by the generator which contains the information required by subpart B of 40 CFR part 262.

National Pollutant Discharge Elimination System means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of the CWA. The term includes an approved program.

NPDES means National Pollutant Discharge Elimination System.

New HWM facility means a Hazardous Waste Management facility which began operation or for which construction commenced after November 19, 1980.

Off-site means any site which is not on-site.

On-site means on the same or geographically contiguous property which may be divided by public or private right(s)-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right(s)-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which the person controls and to which the public does not have access, is also considered on-site property.

Owner or operator means the owner or operator of any facility or activity subject to regulation under RCRA.

Exhibit 7

North Carolina Office of Administrative Hearings (13 EHR 18253, Signed September 25, 2014, WASCO LLC, Petitioner, Dyna-Diggr LLC, Intervenor-Petitioner v. N.C. Department of Environment and Natural Resources, Division of Waste Management, Respondent)

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
13EHR18253

WASCO LLC Petitioner and DYNA-DIGGR LLC Intervenor v. NC DEPT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT Respondent	**FINAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

This matter is before the undersigned on the *Motion for Summary Judgment* filed September 25, 2014 by the Respondent North Carolina Department of Environment and Natural Resources, Division of Waste Management, acting by and through its Hazardous Waste Section (hereinafter "the Section"), pursuant to N.C.G.S. § 1A-1, Rule 56, and 26 NCAC 03 .0115(a), seeking entry of a Final Decision pursuant to N.C.G.S. § 150B-34. Upon due consideration of the submissions of the parties and the applicable statutes, regulations, and legal precedents, the following dispositive Order is entered.

Statement of the Case

Petitioner seeks to be relieved of the obligation to provide control and remediation at a hazardous waste site in Swannanoa. The pit at the former Asheville Dyeing and Finishing Plant site once held an underground storage tank for waste *perchloroethylene* ("PCE"), a suspected carcinogen, and contains significant residual contaminated soil and groundwater today.

The entity currently constituted as WASCO LLC ("WASCO"), began its involvement with the site in 1995. *See*, Respondent's Exhibits to the *Motion for Summary Judgment,* tab G, section 3, page 364, and tab B, section 12, page 67 (hereinafter, "R Ex p 364 & 67.") The Section sent the letter that triggered the filing of this contested case to the Petitioner and the Intervenor on August 16, 2013 (*see*, R Ex p 23). The letter concerned the requirements of the State Hazardous Waste Program, and asserted, in relevant part, that WASCO was an "operator," and consequently required to obtain a post-closure permit, or an "Administrative Order on Consent" ("AOC") in lieu of the post-closure permit, pointedly noting that, "If an agreement ... cannot be reached, the Section always has the option of issuing a Compliance Order with Administrative Penalty for violation of 40 C.F.R. § 270.1(c) and associated post-closure regulations." Petitioner's recalcitrance represented a stark departure from its past relationship with the Respondent. See, *e.g.*, a draft Administrative Order on Consent submitted by

Petitioner's then-counsel, together with a list of 42 reports of remediation and containment work performed by Petitioner's contractors. R Ex p 46-56.

WASCO filed a Petition commencing this contested case in the Office of Administrative Hearings on September 27, 2013, alleging that the Section's characterization of WASCO as an "operator" in this context deprived WASCO of property or otherwise substantially prejudiced its rights and violated the North Carolina Administrative Procedure Act ("NCAPA"), N.C.G.S. § 150B-23(a). As the current owner of the property, and facially liable as such under the applicable environmental statutes, Dyna-Diggr LLC ("Dyna-Diggr") was permitted to intervene on December 12, 2013.

Respondent recounts that WASCO served its first set of discovery requests on January 6, 2014, and that, to date, the Section has responded to two (2) sets of Requests for Admission (212 requests in total), two (2) sets of Requests for Production of Documents (110 requests in total), and one (1) set of Interrogatories; has produced various business records, including over 11,000 pages of emails; and, has provided WASCO with electronic access to its public file.

The Section's *Motion for Summary Judgment* was filed with over 1,200 pages of exhibits. WASCO moved for and received a 30-day extension of the usual 10-day period to file a Response to the Motion. On October 21, 2014, WASCO filed a second motion for an extension of time, supported by a 12-page brief with five attachments totaling approximately 50 pages, including an *Affidavit of WASCO's Counsel Dan Biederman*; followed by an *Amendment and Supplement of Affidavit of WASCO's Counsel Dan Biederman* (approximately 30 pages), including legal arguments concerning key question of the proper statutory interpretation of the term "operator." Petitioner argued that it needed to take, transcribe, and review the Section's Rule 30(b)(6) deposition(s) before responding to the motion. On October 22, 2014, the Section filed a Reply opposing WASCO's motion and moved to stay discovery pending resolution of the summary judgment motion.

WASCO's only outstanding discovery request is a *Notice to Depose* the Section per N.C. Gen. Stat. § 1A-1, Rule 30(b)(6). This was projected to entail taking the depositions of four Section employees concerning their personal knowledge about the parties' activities concerning the hazardous waste site. (Their Affidavits appear at R Ex p 1178-95.) Petitioner argued that the parties had discussed taking these depositions in early December, before the December 5, 2014 discovery deadline, but asked that the additional time to respond to the Motion be extended to 45 days following receipt of the transcripts -- which Respondent contended would extend the time for non-moving party's response to a total of 117 days from the date the motion was filed.

In consideration of the breadth of completed discovery; the probability that "the facts which would have raised a genuine issue of material fact were within the defendant's knowledge," based on the theory of Respondent's motion, *Gebb v. Gebb*, 67 N.C. App. 104, 108, 312 S.E.2d 691, 694 (1984); the opportunity Petitioner had to identify any such material facts in its Response; and, the unjustifiable delay and imposition on Respondent of further discovery in light of these circumstances, the undersigned denied Petitioner's request for additional months to respond, and granted Respondent's request for a stay of discovery until the summary judgment Motion was resolved, in an Order entered on October 28, 2014.

On November 7, 2014, WASCO responded to the Section's *Motion for Summary Judgment* in detail, appending seven affidavits with numerous attachments, and requested a hearing on the motion. Following opportunities for the parties to suggest language for this Order, the motion is determined in accordance with 26 NCAC 03 .0115(b).

Statement of the Undisputed Facts

This contested case concerns real property located at 850 Warren Wilson Road, Swannanoa, North Carolina, 28778, which was assigned the United States Environmental Protection Agency ("EPA") Identification Number NCD 070 619 663 ("the Facility").

A pit at the Facility once contained an underground storage tank for waste perchloroethylene ("PCE"), a dry cleaning solvent. The pit was closed as a landfill in 1992 with contaminated soil left in place. Significant groundwater contamination remains today.

Petitioner initially became involved with the Facility in 1999. At the time, it was known as United States Filter Corporation or USFilter. WASCO later changed its name to Water Applications & Systems Corporation, and then was converted to the limited partnership with the name WASCO, LLC.

On June 15, 1998, the Petitioner -- then known as United States Filter Corporation – acquired Culligan Water Technologies, Inc. (hereinafter, "Culligan"). (R Ex p 362) In its March 31, 1998 Form 10-K filing with the Securities and Exchange Commission, Petitioner disclosed that:

> In 1995, Culligan purchased an equity interest in Anvil Holdings Inc. As a result of this transaction, Culligan assumed certain environmental liabilities associated with soil and groundwater contamination at Anvil Knitwear's Asheville Dyeing and Finishing Plant (the "Plant") in Swannanoa, North Carolina. Since 1990, Culligan has delineated and monitored the contamination pursuant to an Administrative Consent Order entered into with the North Carolina Department of Environment, Health and Natural Resources relating to the closure of an underground storage tank at the site. Groundwater testing at the plant and two adjoining properties has shown levels of a cleaning solvent believed to be from the Plant that are above action levels under state guidelines. The company has begun remediation of the contamination. The company currently estimates the cost of future site remediation will range from $1.0 million to $1.8 million and that it has sufficient reserves for the site cleanup.

(R Ex p 364). Culligan assumed responsibility for the environmental operations at the Facility in a Guaranty Agreement in favor of the property's buyer, Anvil Knitwear, Inc., in return for $9 million (R Ex p 352), exchanged for stock in Anvil Holdings, Inc. (R Ex p 335), as a part of a transaction in which Winston Mills, Inc. and McGregor Corporation, both wholly owned by Astrum International Corp., sold "all of [their] assets comprising their Anvil Knitwear division"

to Anvil Knitwear, Inc. and Anvil Holdings, Inc., including the Facility in Swannanoa. (See deed from Winston Mills to Anvil Knitwear, Inc. (R Ex p 249), which includes an environmental "exception.") Astrum was a co-guarantor with Culligan and, in effect, guaranteed Culligan's performance under the Guaranty Agreement. (R Ex p 352)

Three months later, Culligan, as "a subsidiary of Astrum International Corp.," executed a *Corporate Guarantee for Closure or Post-Closure Care* to the United States Environmental Protection Agency ("EPA") declaring that, "For value received from the operator, guarantor [Culligan] guarantees to EPA that in the event the operator fails to perform post-closure care of the [Facility] ... the guarantor shall do so or establish a trust fund" to defray the expense of "post-closure care" of the Facility. (See Exhibit B to Dyna-Diggr's *Motion to Intervene*.) The operator was identified as "Winston Mills, Inc. ... which is a subsidiary of Astrum International Corp."

To assure payment for the obligations it assumed with its acquisition of Culligan, Petitioner entered into a "Trust Agreement " (conforming with 40 C.F.R. § 264.143, with North Carolina modifications) with Petitioner as the "Grantor," and Wells Fargo Bank, N.A. as "Trustee," to "establish a trust fund ... for the benefit of DENR." It recites that:

> ... [T]he Department of Environmental and Natural Resources, "DENR," an agency of the State of North Carolina, 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[.]

(R Ex p 409) In Section 4, "Payment for Closure and Post-Closure Care," the Trust Agreement provides that

> The Trustee shall make payments from the fund as the Secretary of the Department of Environmental and Natural Resources (the "Secretary") 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.

(R Ex p 410). The agreement further provides that, "this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Secretary, or by the Trustee and the Secretary, if the Grantor ceases to exist." (R Ex p 413) The location of the subject property, and the estimated costs, are listed. That amount -- adjusted to $443,769.98 by June 27, 2013 -- is guaranteed by a Letter of Credit. (R Ex p 524)

The Trust Agreement defines the "Grantor" as "the owner or operator who enters into this agreement and any successors or assigns of the Grantor." (R Ex p 409)

Between 1999 and the present, WASCO has supplied and maintained post-closure financial assurance for the Facility. WASCO or its employees and the Section have communicated directly concerning financial assurance and other matters related to the Facility's

environmental compliance. WASCO is named as an operator in EPA forms submitted to the Section in 2004, 2006, and 2008.

Between 2004 and the filing of the instant contested case, WASCO has hired and paid for the work of Mineral Springs Environmental, P.C. ("Mineral Springs") concerning the Facility, including operation and maintenance of air sparge/soil vapor extraction systems, groundwater sampling, preparation of reports and their submission to the Section, project management, assessment activities, and payment of utility bills. WASCO has been in communication with Mineral Springs concerning the aforementioned work and has edited draft documents.

The site was transferred to Intervenor Dyna-Diggr, LLC on December 18, 2007. (R Ex p 249) WASCO continued to maintain the Facility's financial assurance, pay for remediation costs including sampling and reporting, and use Mineral Springs as an environmental consultant in communications with the Section following Dyna-Diggr's purchase of the Facility.

Regulatory Framework

The "State Hazardous Waste Program" consists of the North Carolina Solid Waste Management Act ("the Act"), contained in N.C. Gen. Stat. Chap. 130A, Art. 9, §130A-290, *et seq.*, and the rules promulgated thereunder and codified in Subchapter 13A of Title 15A of the North Carolina Administrative Code ("the Rules"), which the Department has been authorized to operate in lieu of the federal program under the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 - 6992k.

The regulation cited in the letter, 40 C.F.R. § 270.1, which "establish provisions for the [Federal] Hazardous Waste Permit Program," is adopted by reference at 15A NCAC 13A .0113(a), and enables approved States to implement and enforce "basic EPA [Environmental Protection Agency] permitting requirements, such as application requirements, standard permit conditions, and monitoring and reporting requirements," that are "part of a regulatory scheme implementing RCRA," 42 U.S.C. 6091 et seq., including entering into "enforceable documents for post-closure care" of hazardous waste sites, which may include a "remedial action" pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1976 ("CERCLA"), as amended RCRA, commonly known as the "Superfund" legislation.

The Act instructs the Department to "cooperate . . . with . . . the federal government . . . in the formulation and carrying out of a solid waste management program," including a program for the management of hazardous waste "designed to protect the public health, safety, and welfare; [and to] preserve the environment." N.C.G.S. § 130A-294(a)(2), (b). The Act mandates the adoption of rules to implement that program, which the Department "shall enforce." N.C.G.S. § 130A-294(b). The Rules largely adopt and incorporate the applicable federal regulations by reference. The authority to enforce the State Hazardous Waste Program has been delegated to the Director of the Division of Waste Management. The Director has issued a sub-delegation of this authority to the Chief of the Section.

"Operator"

The State Hazardous Waste Program requires that "operators . . . of landfills" obtain post-closure permits. 40 C.F.R. § 270.1(c) (adopted by reference at 15A NCAC 13A .0113(a)). Here,

the former waste-PCE tank at the Facility is a "landfill," within the meaning of the regulation. WASCO's Petition was occasioned by the Section's proposed agreement with other responsible parties concerning post-closure care of the facility, but WASCO's position that it is not in the position of an "operator" has implications for all of its responsibilities for the Facility.

The material facts necessary to the legal determination of whether Petitioner has the responsibilities of an "operator," within the meaning of the applicable laws and regulations, are not in dispute.

WASCO's post-closure operator liability for the Facility is a matter of statutory construction -- a question of law. As a matter of law, the parties dispute whether the definition of "operator" in N.C.G.S. § 130A-290(a)(21) or the definitions in 40 C.F.R. §§ 260.10, 270.2 (adopted by reference at 15A NCAC 13A .0102(b), .0113(a)) apply. Viewing the evidence in the light most favorable to WASCO, it is not necessary for the undersigned to resolve this issue. The result is the same under either definition. While the parties have identified no North Carolina case law interpreting the meaning of the term "operator" under the State Hazardous Waste Program, guidance from the EPA, case law from other jurisdictions—including a unanimous opinion of the Supreme Court, and the undisputed facts related to WASCO's more than 14 years of involvement with the Facility support the Section's characterization of WASCO as a post-closure "operator."

Respondent relies primarily on the United States Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). That case, the Court began by noting the simplistic statutory definition of "operator" as "any person owning or operating such [CERCLA regulated] facility." "Here of course we may again rue the uselessness of CERCLA's definition of a facility's 'operator' as 'any person ...operating' the facility, 42 U.S.C.A. § 9601(20)(A)(ii), which leads us to do the best we can to give the term its 'ordinary or natural meaning.'" The Court concluded with a broad, comprehensive contextual reading of the term applicable beyond the specific facts of the case before it.

> [U]nder 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, and 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**.

(Emphasis mine.) *United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S. Ct. 1876, 1887, 141 L. Ed. 2d 43 (1998). This understanding of the term "operator" conforms with Congress' declared "national policy ... that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated" and that "[w]aste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." The utility of this application of "operator" is emphasized elsewhere in *Bestfoods* by the observation that, "even a saboteur who sneaks into the facility at night to discharge its poisons out of malice" could not escape operator liability "[u]nder the plain language of" 42 U.S.C. § 9607(a)(2). *Id.*, at 524 U.S. 51, 65, 118 S. Ct. 1876, 1886, 141 L. Ed. 2d 43.

Petitioner proposes a series of refinements to the definition of "operator" or its application that would exclude it. But it is difficult to believe that such exceptions could be carved out for a corporate entity that voluntarily took on the responsibility of operating the facility in return for value received. It is notable that, for some years, even the States were not afforded the protections of the 11th Amendment from Superfund claims. *See, Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-14, 109 S. Ct. 2273, 2281, 105 L. Ed. 2d 1 (1989), overruled by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66, 116 S. Ct. 1114, 1128, 134 L. Ed. 2d 252 (1996).

It is noted that, in light of the substantial discovery completed, the detailed arguments raised by WASCO in its Response and accompanying Affidavits - including WASCO's alternative request for summary judgment in its favor - and because the putative issues of material fact raised by WASCO do not bear on the determinative legal issue, it appears that WASCO has not been prejudiced by not having the Rule 30(b)(6) depositions it proposed to take prior to its response to the present motion.

FINAL DECISION

Respondent is entitled to judgment as a matter of law, and consequently, the Petition must be, and hereby is, DISMISSED. N.C. Gen. Stat. §§ 150B-34(e); 1A-1, Rule 56.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 2nd day of January, 2015.

Hon. J. Randolph Ward
Administrative Law Judge

On this date mailed to:

H. Glenn Dunn
Poyner & Spruill, LLP
PO Box 1801
Raleigh, NC 27602-1801
Attorney For Petitioner

Elizabeth Fisher
N.C. Department Of Justice
9001 Mail Service Center
Raleigh, NC 27699
Attorney For Respondent

William Clarke
PO Box 7647
Asheville, NC 28802
Attorney for Intervenor

This the 2nd day of January, 2015.

Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6714
Telephone: 919/431-3000
Fax: 919/431-3100

Exhibit 8

The General Court of Justice, Superior Court Division Final Order (15 CVS 1438, Filed October 23, 2015, WASCO LLC, Petitioner, v. N.C. Department of Environment and Natural Resources, Division of Waste Management, Respondent)

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
COUNTY OF WAKE	15 CVS 1438
WASCO LLC, Petitioner, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, Respondent.	**FINAL ORDER AND JUDGMENT ON RULE 56(f) MOTION AND PETITION FOR JUDICIAL REVIEW**

This matter came on for hearing 12 October 2015, before the Honorable G. Bryan Collins, Jr., Superior Court Judge presiding, on the Petition for Judicial Review ("PJR") filed by WASCO LLC ("WASCO"). Having considered the PJR, the briefs filed by the parties, the complete official record in this case, and the oral arguments of counsel for the parties, the Court hereby AFFIRMS (A) the 28 October 2014 interlocutory order of Administrative Law Judge J. Randolph Ward ("ALJ Ward") denying WASCO's Motion for Continuance Regarding Respondent's Summary Judgment Motion, and (B) ALJ Ward's 2 January 2015 final decision granting summary judgment in favor of Respondent, North Carolina Department of Environmental Quality ("the Department"),[1] Division of Waste Management, acting through its Hazardous Waste Section ("the Section"), and enters the following:

Procedural History

1. In a letter dated 16 August 2013, concerning the requirements of the State Hazardous Waste Program, the Section alleged that WASCO was an "operator" of a landfill for

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

purposes of 40 C.F.R. § 270.1(c) (adopted by reference in 15A NCAC 13A .0113(a)) and needed to obtain a post-closure permit or administrative order on consent in lieu of a post-closure permit. WASCO disputed this assertion in a 27 September 2013 Petition for a Contested Case Hearing.

2. The parties exchanged written discovery, with WASCO's first requests served on the Section 6 January 2014. Prior to filing a motion for summary judgment ("MSJ"), the Section responded to 212 total Requests for Admission, 1 set of Interrogatories, and 2 sets of Requests for Production of Documents (110 requests in total). The Section provided WASCO with access to its public file containing decades of documents and produced various handwritten notes, financial records, drafts, and over 11,000 pages of emails.

3. The Section filed its MSJ on 25 September 2014, including over 1,200 pages of exhibits. Prior to that time, WASCO had served a notice of its intent to take the Section's deposition under N.C.G.S. § 1A-1, Rule 30(b)(6). The discovery deadline had not yet lapsed when the Section filed its MSJ.

4. Without reference to the deposition, WASCO moved for and received a 30-day extension of time to respond to the MSJ. WASCO then filed a second motion for an extension of time, citing N.C.G.S. § 1A-1, Rule 56(f). ALJ Ward denied WASCO's Rule 56(f) motion on 28 October 2014, subject to renewal in WASCO's response to the MSJ. WASCO timely responded to the Section's MSJ, including 7 affidavits and numerous attachments as part of its response.

5. The ALJ granted the Section's MSJ on 2 January 2015 and renewed the denial of WASCO's Rule 56(f) motion, concluding that WASCO had not been prejudiced by the timing of the Section's MSJ and noting that "the putative issues of material fact raised by WASCO do not bear on the determinative legal issue." WASCO filed a Petition for Judicial Review on 2 February 2015, appealing both the 28 October 2014 interlocutory order and the 2 January 2015 final judgment.

Issues Raised by the Petition

6. In its brief before this Court WASCO set forth six issues: (i) whether the ALJ erred by concluding that being "involved" in a facility equates to being an "operator"; (ii) whether the ALJ erred by failing to define the "facility" that WASCO is alleged to have operated; (iii) whether WASCO can be deemed an operator based solely on beneficial remedial activities that occur at closed or inactive facilities; (iv) whether the ALJ confused WASCO and Culligan, treating them as if they were the same entity; (v) whether the facts found by the ALJ are legally insufficient to establish that WASCO is an operator; and (vi) whether the ALJ erred by denying WASCO's request for additional discovery.

7. Because this Court can affirm on any ground supported by the record, this Court will address WASCO's first five issues together, under the umbrella question of whether the ALJ properly granted summary judgment to the Section on the Section's claim that WASCO is a post-closure "operator" as a matter of law.

Standard of Review

8. In a challenge alleging a final agency decision violated the North Carolina Administrative Procedure Act ("NCAPA"), N.C.G.S. § 150B-23(a), this Court sits as a court of appeals. D.B. v. Blue Ridge Ctr., 173 N.C. App. 401, 407, 619 S.E.2d 418, 423 (2005).

9. This Court reviews the ALJ's grant of summary judgment *de novo*, to determine whether there are any genuine issues of material fact and whether any of the parties is entitled to a judgment as a matter of law. York Oil Co. v. N.C. Dep't of Env't, Health & Natural Res., 164 N.C. App. 550, 555, 596 S.E.2d 270, 273-74 (2004) (citing N.C.G.S. §§ 1A-1, Rule 56 and 150B-51(d)). This Court views the evidence "in the light most favorable to the nonmoving party." Richardson v. Bank of Am., N.A., 182 N.C. App. 531, 539, 643 S.E.2d 410, 416 (2007), appeal dismissed, 362 N.C. 227, 657 S.E.2d 353 (2008). The party moving for summary

judgment has the initial burden of showing a lack of a triable issue of fact, in that "an essential element of the opposing party's claim is nonexistent" or the opposing party will be unable to produce evidence to support an essential element of the claim. Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quotation marks omitted). The burden then shifts to the non-movant to "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." Id. (quotation marks omitted). A non-movant cannot create a genuine issue of material fact by resting on the mere allegations or denials contained in its pleadings. N.C.G.S. § 1A-1, Rule 56(e). An issue is material only "if its resolution would prevent the party against whom it is resolved from prevailing." Bone Int'l, Inc. v. Brooks, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981) (quotation marks omitted).

10. Even under *de novo* review, the agency's interpretation of the program it administers is entitled to deference if "reasonable and based on a permissible construction" of the law, especially with "complex and highly technical regulatory program[s], in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." County of Durham v. N.C. Dep't of Env't & Natural Res., 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998), disc. rev. denied, 350 N.C. 92, 528 S.E.2d 361 (1999) (quotation marks omitted); Morrell v. Flaherty, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994), cert. denied, 515 U.S. 1122, 132 L. Ed. 2d 282 (1995) (quotation marks omitted).

11. "[I]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." Shore v. Brown, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). This Court will not disturb the judgment "[i]f the correct result has been reached," even if the ALJ assigned an incorrect reason for the judgment entered. Id.

Undisputed Facts

12. This case concerns real property located at 850 Warren Wilson Road, Swannanoa, North Carolina 28778, which is associated with United States Environmental Protection Agency ("EPA") Identification Number NCD 070 619 663 ("the Facility").

13. A pit at the Facility once contained an underground storage tank for waste perchloroethylene ("PCE"), a dry cleaning solvent. The pit was closed as a landfill in 1992 with contaminated soil left in place. Significant groundwater contamination remains today.

14. At various times, the Petitioner has been known as United States Filter Corporation, Water Applications & Systems Corporation, and WASCO LLC (hereafter "WASCO").

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." (Ex G-4 pp 368-69; Ex G-5 pp 373-78; Ex I-21 p 699)[2]

[2] Exhibit citations refer to the paginated volume accompanying the Section's MSJ.

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. (Ex B-12 pp 67-68)

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. (Ex B-13 pp 70-71)

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." (Id.)

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. (Ex D-1 pp 199-212)

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. (Ex D-2 pp 214-17)

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. (Ex D-3 pp 219-29)

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. (Ex H pp 427-529; Ex Q-1 pp 1178-79)

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 DENR." 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 [DENR] . . . 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 . . ."

(Ex H-13 pp 409-22)

27. The Irrevocable Standby Letter of Credit, as amended, is subject to automatic renewal in one-year increments unless cancelled by the bank. (Ex H-14 p 424)

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. (Ex H-55 p 524)

29. Internal WASCO communications concerning financial assurance reference "the statutory / regulatory requirements relating to one of our environmental legacy sites in Swannanoa, NC." (Exs H-32 p 464, H-36 p 474, H-40 p 484)

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. (Ex K pp 816-20)

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 one meter labeled as "pump" and one meter labeled as "environmental cleanup."

(Ex M pp 986-1106)

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. (Id.; Ex N pp 1108-25)

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." (Ex I pp 531-801)

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. (Ex A pp 2-15; Ex B pp 66-130; Ex Q-2 pp 1181-83)

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. (Ex L-23 p 883) No such concerns are reflected in the final report. (Ex I-21 pp 694-708)

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]." (Exs L-23 p 882, L-27 p 892, L-32 pp 911-12, L-39 pp 945-59, L-40 pp 961-75)

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 (Exs L-21 p 878, L-22 p 880, L-25 p 888, L-34 p 919); (b) Mr. Pollard's practice of updating Mr. Huerter, copying him on communications with the Section, or forwarding such communications to him (Exs B-20 p 91, B-24 p 101, B-27 p 107, B-30 p 113, L-17 p 869, L-25 p 888, L-26 p 890, L-42 p 980); and (c) Mr. Huerter's requests for copies of utility bills to

compare with Mineral Springs's invoices, and annual cost projections (Exs L-9 p 847, L-24 p 885, L-41 p 977).

38. The Section has not alleged that WASCO ever owned the real property at 850 Warren Wilson Road, Swannanoa, NC; caused or contributed to the contamination associated with the Facility; or operated an active business onsite.

Conclusions of Law

39. The undersigned views as material the undisputed facts identified in paragraphs 19 to 37, above, concerning WASCO's involvement with the Facility following its divestiture of Culligan. Additional facts are cited to provide context. The Section has met its initial burden here of proving a lack of a triable issue of fact, as questions of statutory construction are questions of law "for the courts." Oxendine v. TWL, Inc., 184 N.C. App. 162, 164, 645 S.E.2d 864, 865 (2007) (quotation marks omitted). Viewing the evidence in the light most favorable to WASCO, WASCO has failed to produce a forecast of evidence demonstrating that it would be able to make out at least a *prima facie* case at trial that the Section erred under N.C.G.S. § 150B-23(a), as the alleged issues of fact identified by WASCO are immaterial to the resolution of this case. As a matter of law, WASCO is an operator of a landfill for purposes of the State Hazardous Waste Program's post-closure permitting requirement.

40. The "State Hazardous Waste Program" consists of the North Carolina Solid Waste Management Act ("the Act"), contained in Chapter 130A, Article 9 of the North Carolina General Statutes, and the rules promulgated thereunder and codified in Subchapter 13A of Title 15A of the North Carolina Administrative Code ("the Rules"). The Department is authorized to administer the State Hazardous Waste Program in lieu of the federal program under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 to 6992k, as long as the State program remains equivalent to and consistent with the federal program. (Ex P-1 p 1154)

41. The Act instructs the Department to "cooperate . . . with . . . the federal government . . . in the formulation and carrying out of a solid waste management program," including a program for the management of hazardous waste "designed to protect the public health, safety, and welfare; [and to] preserve the environment." N.C.G.S. § 130A-294(a)(2), (b). The Act mandates the adoption of rules to implement that program, which the Department "shall enforce." N.C.G.S. § 130A-294(b). The Rules largely adopt and incorporate the applicable federal regulations by reference. The authority to enforce the State Hazardous Waste Program has been delegated to the Director of the Division of Waste Management. The Director has issued a sub-delegation of this authority to the Chief of the Section. (Ex P pp 1171-75)

42. Based 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 undersigned concludes it is appropriate here to look to federal case law and administrative EPA documents for guidance. See Air-A-Plane Corp. v. N.C. Dep't of Env't, Health & Natural Res., 118 N.C. App. 118, 454 S.E.2d 297, disc. rev. denied, 340 N.C. 358, 458 S.E.2d 184 (1995) (looking to definitions adopted by reference in 40 C.F.R. § 260.10 in a case involving the assessment of civil penalties under the State Hazardous Waste Program); Skinner v. Preferred Credit, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005), aff'd, 361 N.C. 114, 638 S.E.2d 203 (2006) (stating for issues of first impression that it is proper to "look to other jurisdictions to review persuasive authority that coincides with North Carolina's law").

43. One requirement of the State Hazardous Waste Program is for "operators . . . of landfills" to obtain post-closure permits. 40 C.F.R. § 270.1(c) (adopted by reference at 15A NCAC 13A .0113(a)). Here, the former waste-PCE tank at the Facility is a "landfill." 40

C.F.R. § 265.197(b) (adopted by reference at 15A NCAC 13A .0110(j)). The post-closure permit requirement triggers liability for Facility-wide cleanup ("corrective action"), beyond the scope of the landfill. 40 C.F.R. §§ 270.1(c), 264.100 to .101 (adopted by reference at 15A NCAC 13A .0113(a) and .0109(g)).

44. Under federal regulations adopted by reference, an "operator" is "the person responsible for the overall operation of a facility," or the "operator of any facility or activity subject to regulation under RCRA." 40 C.F.R. §§ 260.10, 270.2 (adopted by reference at 15A NCAC 13A .0102(b), .0113(a)).[3] This Court construes the definitions of operator *in pari materia* with the post-closure permitting requirement at issue here. McGuire v. Dixon, 207 N.C. App. 330, 337, 700 S.E.2d 71, 75 (N.C. Ct. App. 2010).

45. The State Hazardous Waste Program provides for strict liability in enforcement matters, without regard to causation. United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 738 (8th Cir. 1986), cert. denied, 484 U.S. 848, 98 L. Ed. 2d 102 (1987); United States v. Production Plated Plastics, Inc., 742 F. Supp. 956, 960 (W.D. Mich. 1990), aff'd, 955 F.2d 45 (6th Cir. 1992).

46. There can be multiple owners and operators of a single Facility under the State Hazardous Waste Program. 45 Fed. Reg. 33153, 33169 (May 19, 1980). To ensure the Section is able "to gain compliance as quickly as possible," the State Hazardous Waste Program provides for joint and several liability. Id.; RO[4] No. 11005 (Nov. 18, 1980); see also RO 12703 (August 1986) ("EPA considers both the owner (or owners) and operator of a facility to be responsible for

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[3] Even if this Court were to consider the definition of "operator" in N.C.G.S. § 130A-290(a)(21), the ALJ properly concluded that the result would be the same. WASCO's reliance on federal RCRA and CERCLA case law and guidance, including Bestfoods, in support of its defense against post-closure operator liability under the State Hazardous Waste Program, supports the conclusion that the State definition is ambiguous as construed *in pari materia* with the post-closure permit requirement.

[4] Citations to "RO" refer to documents contained in the RCRA Online database, maintained by EPA at http://www.epa.gov/epawaste/inforesources/online/index.htm.

regulatory compliance. For this reason, EPA may initiate an enforcement action against either the owner, the operator, or both.").

47. The Section has the right to rely on the representation of any one owner or operator, that it is "assum[ing] and perform[ing] the [regulatory] duties . . . on behalf of all of the parties," and to "look to that designated party" for compliance. 45 Fed. Reg. 72024, 72026-27 (Oct. 30, 1980) (emphasis added).

48. Due to the similarities between the definitions of "operator" under sections 260.10 and 270.2 and another pollution-control statute—the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675—it is proper to look to CERCLA case law as guidance here. RO No. 13071 (Oct. 28, 1987); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1574 (5th Cir. 1988).

49. The United States Supreme Court analyzed the meaning of the term "operator" under CERCLA, and unanimously concluded:

> [U]nder 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.***

United States v. Bestfoods, 524 U.S. 51, 66-67, 141 L. Ed. 2d 43, 59 (1998) (emphasis added); see also Richardson, 182 N.C. App. at 546-47, 643 S.E.2d at 420-21 (applying Bestfoods in a state case concerning corporate liability).

50. The District Court for the District of Puerto Rico applied Bestfoods to RCRA, finding an individual liable as a RCRA operator where (1) he acted as the facility's representative in discussions with the state regarding an air quality Notice of Violation; (2) a facility employee deferred to him when questioned by EPA inspectors and another employee

would not allow an inspection of the facility without his permission; (3) he authorized an inspection and spoke with EPA inspectors about environmental regulations and a RCRA Information Request; and (4) he signed and certified "under penalty of law" a "Notification of Regulated Waste Activity" form on behalf of the facility. United States v. JG-24, Inc., 331 F. Supp. 2d 14, 75 (D.P.R. 2004), aff'd, 8 F.3d 28 (1st Cir. 2007); see also United States v. Envtl. Waste Control, Inc., 710 F. Supp. 1172, 1202-04 (1989) (rejecting a claim pre-Bestfoods that a person's signature on an EPA compliance document that "affirmatively identifie[d]" him as an operator in three places "was simply [a] mistake," based on the person's role in the day-to-day operations and financial obligations of a RCRA landfill and because he agreed to indemnify a waste broker from Superfund or cleanup-order liability).

51. Examining the "broad, passive language" in Bestfoods that an operator "is one who is involved in operations '*having to do with* the leakage or disposal of hazardous waste,'" the Third Circuit held that a corporation and its sole shareholder were "operators" for purposes of CERCLA even though their only activities at the facility "[had] been those necessary to remove and remediate the soil and groundwater contamination." Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Prot., 725 F.3d 369, 380-82 (3rd Cir. 2013). The Third Circuit noted that the shareholder-appellant had entered into an agreement with the prior owner to remediate the property in accordance with New Jersey's hazardous waste management program, and to accept financial responsibility for remediation beyond the first $100,000.00. The court emphasized that, "not only did the [operators] have the actual authority to make decisions about compliance with environmental regulations, they hired environmental consultants to conduct tests and remediation operations on the Litgo Property, and they oversaw that work." Id. at 381, 382 n.6.

52. In another decision applying Bestfoods, the Sixth Circuit held that a township which contracted with a landowner to use a waste dump was an "operator" under CERCLA

because, rather than "operating at arm's length with a contractor," it (1) "made repeated and substantial ad hoc appropriations"; (2) "made arrangements (including with the local Junior Fire Department) for bulldozing and other maintenance when [the owner] himself proved unequal to the task"; and (3) "took responsibility for ameliorating the unacceptable condition of the dump, before and after scrutiny from the state government," over a number of years. United States v. Township of Brighton, 153 F.3d 307, 315-16 (6th Cir. 1998).

53. The District of Kansas found that the president of a corporation, while "two layers removed from the day-to-day supervision of operations," was directly liable under Bestfoods as a CERCLA operator where he participated in weekly meetings that addressed environmental compliance issues, and where "no decisions were made at those meetings without [his] approval." City of Wichita v. Trs. of the Apco Oil Corp. Liquidating Trust, 306 F. Supp. 2d 1040, 1055-56 (D. Kan. 2003). The court emphasized "the frequency of those meetings, and the fact that [the president] was actively involved in deciding matters of environmental compliance." Id. at 1056.

54. Consistent with Bestfoods and its progeny, this Court determines that post-closure operatorship is based on an examination of the totality of the circumstances. The undersigned does not deem any one factor dispositive, but considers all indicia of operatorship in the record, which overwhelmingly supports the conclusion that WASCO "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution" at the Facility, including making "decisions about compliance" with post-closure regulations. Bestfoods, 524 U.S. at 66-67, 141 L. Ed. 2d at 59. Based on the undisputed facts identified above, these indicia of operatorship can be categorized as follows:

55. WASCO "took responsibility for ameliorating the unacceptable condition" of the Facility through affirmative representations to the Section and by WASCO's conduct, as

described further in paragraphs 19 to 25 and 33. Township of Brighton, 153 F.3d at 315-16. Affirmative representations included three Part A forms submitted to the Section and signed under penalty of law. See G-24, Inc., 331 F. Supp. 2d at 75; Envtl. Waste Control, Inc., 710 F. Supp. at 1202-04.

56. WASCO "became directly involved in environmental and regulatory matters" through the work of its former Directors of Environmental Affairs, Mr. Coyne and Mr. Huerter, who "actively participated in and exerted control over a variety of [the facility's] environmental matters," including by issuing "directives regarding [the facility's] responses to regulatory inquiries." Bestfoods at 72, 141 L. Ed. 2d at 62 (quotation marks and citations omitted). Paragraphs 21, 25, and 34 to 37 support this conclusion.

57. As described further in paragraphs 25 to 32, WASCO has made "repeated and substantial ad hoc appropriations" for post-closure care. Township of Brighton, 153 F.3d at 315-16. Such a financial role included hiring and paying for substantial work of an environmental consultant, and paying for the operation of the air sparge / soil vapor extraction corrective action system, totaling $235,984.43. Litgo N.J. Inc., 725 F.3d at 381, 382 n.6. Further, WASCO provided irrevocable financial assurance amended numerous times for inflation, including one such amendment adjusting the amount to $443,769.88 in June 2013, shortly before the filing of WASCO's contested case.

58. As in Litgo, the fact that WASCO's involvement has been limited to post-closure operations rather than active business operations is not a barrier to liability. The Litgo Court expressly rejected the claim that entities "should not be held liable as current operators because they have only managed remedial activities on the site." 725 F.3d at 380-82.

59. In a matter of impression under the State Hazardous Waste Program, which is a complex and highly technical regulatory program that requires interpretation of both State and

federal law, the Section's construction of 40 C.F.R. § 270.1(c) (adopted by reference in 15A NCAC 13A .0113(a)) was both "reasonable" and "based on a permissible construction" of that regulation, especially considering the Section's need to make a policy judgment as to operator liability, and to rely on such judgment in order to gain compliance as quickly as possible and prevent the kind of delays that have resulted from the present litigation. County of Durham, 131 N.C. App. at 396-97, 507 S.E.2d at 311 (quotation marks omitted); Morrell, 338 N.C. at 238, 449 S.E.2d at 180.

60. The undersigned has considered the five subsidiary issues raised by WASCO as identified in paragraph 6, above. The undersigned deems WASCO's protective filer argument abandoned, as it was not presented to the ALJ, Amanini v. N.C. Dep't of Human Res., 114 N.C. App. 668, 681; 443 S.E.2d 114, 121-22 (1994), but views this doctrine as inapplicable in any event. To the extent the conclusions of law herein do not already resolve WASCO's remaining issues, none of WASCO's arguments were sufficient to raise a genuine issue of material fact or provide a valid basis to support its claim that it is not an operator as a matter of law. In light of the undersigned's *de novo* review, ability to affirm on any ground supported by the record, and conclusion that the Section acted properly under the NCAPA and the undisputed material facts by characterizing WASCO as a post-closure operator as a matter of law, this Court deems it unnecessary to address WASCO's first five issues in further detail.

61. In sum, the undisputed facts identified above show that WASCO, through its hired environmental consultant, has been the only person supplying and maintaining post-closure financial assurance for the Facility, operating remediation systems onsite, performing groundwater sampling and reporting, and making decisions about compliance with the post-closure requirements of the State Hazardous Waste Program since 2004. WASCO is "responsible for the overall operation" of the Facility for purposes of the post-closure program.

62. Finally, while WASCO has raised a cursory challenge to ALJ Ward's 28 October 2014 interlocutory order denying WASCO's Motion for Continuance Regarding Respondent's Summary Judgment Motion, WASCO has failed to identify any legal grounds to support its bald claim that ALJ Ward's ruling on the Section's MSJ prior to the completion of discovery and the taking of the Section's deposition under N.C.G.S. § 1A-1, Rule 56 was error. The undersigned notes the substantial discovery exchanged by the parties prior to the filing of the Section's MSJ, as described in paragraph 2; the fact that the instant case had been in litigation for approximately one year prior to the filing of the Section's MSJ; WASCO's detailed legal arguments on the merits as supported by 7 affidavits—including a claim that it is entitled to reverse summary judgment—and the overwhelming nature of the evidence in the record in support of the Section's substantive arguments. WASCO has not been prejudiced by the timing of the Section's MSJ and ALJ Ward's final judgment.

Order

WHEREFORE, IT IS HEREBY ORDERED AND DECREED THAT ALJ Ward's 28 October 2014 interlocutory order in OAH Docket No. 13 EHR 18253, denying WASCO's Motion for Continuance Regarding Respondent's Summary Judgment Motion the Petition for Judicial Review, be and hereby is AFFIRMED, and the final decision ALJ Ward entered in the same matter on 2 January 2015, granting summary judgment in favor of Respondent, be and hereby is AFFIRMED. WASCO is an "operator" for purposes of 40 C.F.R. § 270.1(c) (adopted by reference in 15A NCAC 13A .0113(a)) and must comply with all attendant responsibilities and regulatory requirements. WASCO's PJR is DENIED.

This the 23rd day of October, 2015.

The Honorable G. Bryan Collins, Jr.
Superior Court Judge presiding

Exhibit 9

The Court of Appeals of North Carolina (No. COA16-414, Filed: 18 April 2017, WASCO LLC, Petitioner, v. N.C. Department of Environment and Natural Resources, Division of Waste Management, Respondent)

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.

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]."

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.

Exhibit 10

EPA RCRA Online 12703

9523.1986(03)

RCRA/SUPERFUND HOTLINE MONTHLY SUMMARY

AUGUST 86

7. RCRA Compliance Orders

Is a RCRA compliance order issued to the owner of a facility or its operator? Who is responsible for complying with the order?

EPA has always held that both the owner and the operator are equally responsible for compliance with the permit issued to a facility. Section 3005(a) of RCRA requires "each person owning or operating" a treatment, storage, or disposal facility to obtain a permit. The permit regulations require both owner and operator to sign the permit application according to 40 CFR 270.10(b). The permit will be issued to both the owner and operator.

Preamble discussions in the May 19, 1980 Federal Register confirm this concept of dual responsibility at 45 FR 33169 and 45 FR 33295. Both discussions specifically reference situations where the operator may be different from the landowner or facility owner. EPA considers both the owner (or owners) and operator of a facility to be responsible for regulatory compliance. For this reason, EPA may initiate an enforcement action against either the owner, the operator, or both. Normally, the compliance order is issued to the person responsible for the daily operations at the facility because this person is most likely to be in the position to correct the problems. If the operator is unable or unwilling to rectify the problems then EPA may issue a separate compliance order to the owner.

Sources: Tony Baney (202) 382-4460
Carrie Wehling (202) 475-8067
Research: Kim B. Gotwals

Exhibit 11

October 30, 1980 Federal Register (45 FR 72024)

OSWFR 80016

federal register

Thursday
October 30, 1980

Part XI

Environmental Protection Agency

Hazardous Waste Management System: Identification and Listing of Hazardous Waste, and Interim Status Standards for Owners and Operators of Treatment, Storage, and Disposal Facilities; Final, Interim, and Proposed Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260 and 261

[SW FRL 1642-4]

Hazardous Waste Management System; General and Identification and Listing of Hazardous Waste

AGENCY: Environmental Protection Agency.

ACTION: Interim final amendment to rule and request for comments.

SUMMARY: This regulation amends 40 CFR 261.4 to provide that a hazardous waste that is generated in a product or raw material storage tank, transport vehicle or vessel or in a manufacturing process unit is not subject to regulation under 40 CFR Parts 262 through 265 or Parts 122 through 124 or the requirements of Section 3010 of the Resource Conservation and Recovery Act (RCRA) until it is removed from the unit in which it was generated, unless the unit in which it is generated is a surface impoundment or unless the hazardous waste remains in the unit for more than 90 days after the unit ceases to be operated for the purpose of storing or transporting product or raw materials or manufacturing. This regulation also amends 40 CFR 260.10 to modify the definition of "generator" so that it clearly covers persons who remove hazardous wastes from product or raw material storage tanks, transport vehicles or vessels, or manufacturing process units in which the hazardous waste is generated. Finally, this regulation amends 40 CFR 260.10 to add definitions for "transport vehicle" and "vessel." The purpose of this requirement is to allow persons handling hazardous wastes sufficient lead time to prepare to comply with major new regulatory requirements. The effect of these amendments is to reduce the overall costs, economic impact and reporting and recordkeeping impacts of EPA's hazardous waste management regulations.

DATES: Effective Date: For the amendment to 40 CFR 261.4 and the definitions of "transport vehicle" and "vessel," in 40 CFR 260.10, November 19, 1980.

For the amendment to the definition of "generator," in 40 CFR 260.10, April 30, 1981.

Comment Date: This amendment is promulgated as an interim final rule. The Agency will accept comments on it until December 29, 1980.

ADDRESSES: Comments on the amendment should be sent to Docket Clerk [Docket No. 3001], Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: For general information, contact Alfred W. Lindsey, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460, (202) 755-9185. For information on implementation, contact:

Region I, Dennis Huebner, Chief, Radiation, Waste Management Branch, John F. Kennedy Building, Boston, Massachusetts 02203, (617) 223-5777

Region II, Dr. Ernest Regna, Chief, Solid Waste Branch, 26 Federal Plaza, New York, New York 10007, (212) 264-0504/5

Region III, Robert L. Allen, Chief, Hazardous Materials Branch, 6th and Walnut Streets, Philadelphia, Pennsylvania 19106, (215) 597-0980

Region IV, James Scarbrough, Chief, Residuals Management Branch, 345 Courtland Street, N.E., Atlanta, Georgia 30365, (404) 881-3016

Region V, Karl J. Klepitsch, Jr., Chief, Waste Management Branch, 230 South Dearborn Street, Chicago, Illinois 60604, (312) 886-6148

Region VI, R. Stan Jorgensen, Acting Chief, Solid Waste Branch, 1201 Elm Street, First International Building, Dallas, Texas 75270, (214) 787-2645

Region VII, Robert L. Morby, Chief, Hazardous Materials Branch, 324 E. 11th Street, Kansas City, Missouri 64106, (816) 374-3307

Region VIII, Lawrence P. Gazda, Chief, Waste Management Branch, 1860 Lincoln Street, Denver, Colorado 80203, (303) 837-2221

Region IX, Arnold R. Den, Chief, Hazardous Materials Branch, 215 Fremont Street, San Francisco, California 94105, (415) 556-4606

Region X, Kenneth D. Feigner, Chief, Waste Management Branch, 1200 Sixth Avenue, Seattle, Washington 98101, (206) 442-1260.

SUPPLEMENTARY INFORMATION:

I. Amendment to 40 CFR 261.4

On February 26 and May 19, 1980, EPA promulgated hazardous waste regulations in 40 CFR Parts 260 through 265 (45 FR 12721 et seq. and 45 FR 33066 et seq.) and on May 19, 1980, promulgated consolidated permit regulations in 40 CFR Parts 122 through 124 (45 FR 33289 et seq.). Section 261.2 of these regulations provides that a solid waste is any garbage, refuse or sludge; or any other waste material which is (1) discarded or is being accumulated, stored or physically, chemically or biologically treated prior to being discarded; or (2) has served its original intended use and sometimes is discarded; or (3) is a manufacturing or mining by-product and sometimes is discarded. Section 261.3 provides that a solid waste becomes a hazardous waste when (1) it first meets any of the listing descriptions set forth in Part 261, Subpart D; or (2) it first becomes a mixture containing a hazardous waste listed in Part 261, Subpart D; or (3) it first exhibits one or more of the characteristics of hazardous waste identified in Part 261, Subpart C. Section 261.1 provides that hazardous wastes identified in Part 261 are subject to regulation under Parts 262 through 265 and Parts 122 through 124. The effect of these provisions, particularly § 261.3(b), is to make hazardous wastes subject to regulation at the point where they are generated. The point of generation, however, may be a product or raw material storage tank, transport vehicle or vessel, or a manufacturing process unit. A literal application of the Part 261 regulations would mean that such units are hazardous waste storage facilities, and that their owners and operators must comply with the notification requirements of Section 3010 of RCRA, submit applications for and obtain permits under Part 122 and comply with the Interim Status Standards of Part 265 until a permit is issued or denied. An exception to these requirements is provided in § 262.34 which states that hazardous waste may be accumulated on the site of its generation without a permit for 90 days or less before it is removed and transported off-site for treatment, storage or disposal. For such accumulation, the owner and operator of the unit must notify under Section 3010 and comply with § 262.34, including requirements for containerization, labelling, marking, inspection and personnel training.

Many members of the regulated community have questioned the Agency's intent and wisdom in regulating those units in which hazardous wastes are first generated. These people claim that such units only incidentally hold or treat hazardous wastes and thus should not be subject to the regulations. They contend that such hazardous wastes do not pose a hazard to human health or the environment while they remain in these units.

Commenters on this issue provided several examples of units in which hazardous wastes are generated which currently appear to be, perhaps unnecessarily, subject to the regulations.

provides that a hazardous waste which is generated in a manufacturing process unit or an associated non-waste treatment unit, or in a product or raw material storage tank, transport vehicle or vessel is not subject to regulation under Parts 262 through 265 or Parts 122 through 124 or the notification requirements of Section 3010 of RCRA until it is removed from the unit in which it is generated, unless the unit is a surface impoundment or unless the hazardous waste remains in the unit for more than 90 days after the unit ceases to be operated for the purpose of manufacturing, or storing or transporting product or raw materials.

II. Definition of Transport Vehicle and Vessel

As indicated in the above discussion, this amendment deals with hazardous wastes that are generated in product or raw material transport vehicles and vessels, as well as those generated in manufacturing units and product or raw material storage tanks. Because the terms "transport vehicle" and "vessel" are not currently defined in § 260.10, definitions of these terms are included in this amendment. These definitions are the same as those in the Department of Transportation regulations governing the transportation of hazardous materials (see 49 CFR 171.8).

III. Generator Responsibilities and Amendment to 40 CFR 260.10

Many members of the regulated community also have asked the question: Who is the generator of hazardous wastes that are generated in manufacturing process units or in product or raw material storage tanks, transport vehicles or vessels? These persons point out that, with respect to stationary product and raw material storage tanks, it is quite common for one person to own and operate the storage tank, a second person to own the product or raw material being stored, and a third person (usually under contract to either the first or second person) to remove and dispose of sludges, sediments and residues that may have been formed in the tank. It also is common for the owner and operator of the tank to also own the stored product or raw material, but to hire another person to remove and dispose of sediments and residues formed in the tanks. There are situations, of course, where the three parties are one person, or where more than three parties are involved.

The same scenarios occur with respect to tank trucks, rail cars, and ships and barges. However, these scenarios are commonly complicated by two additional practices. Oftentimes these transport vehicles or vessels are taken to a central facility for removal of sediment and residues and attendant tank washing or cleaning. Frequently, this central facility is owned or operated by a person other than the owner or operator of the vehicle or vessel and, even more frequently, other than the owner of the product or raw material that produced the sediment or residue. Secondly, the residue or sediment cleaned and removed from a vehicle or vessel may have been produced by two or more products, thus bringing into the picture additional parties—the owners of two or more products. This situation can also occur, but is less common, with stationary storage tanks.

With respect to manufacturing units, the situation typically is not complicated. Usually, the same person owns and operates the unit, owns the manufacturing materials that may generate a hazardous waste and removes any hazardous wastes generated in the unit. However, there are situations where two or more parties are involved. One such situation is where a second party is periodically retained to clean a unit. Another situation is where the hazardous waste is produced by the processing of materials that are owned by two or more persons. This occurs in the reclaiming of spent solvents and spent catalysts where the reclaimer custom-processes batches of spent material without taking ownership of the material.

The definition of "generator" in § 260.10 is "any person, by site, whose act or process produces hazardous waste identified or listed in Part 261 * * *." This definition suggests that the operator of a manufacturing process unit or a product or raw material storage tank, transport vehicle or vessel is a generator of a hazardous waste because it is his "act" of storage or transportation or his "process" of manufacturing that produces the hazardous waste. In the case of storage or transportation, the act of holding the product or raw material enables settling of heavy fractions of material to create hazardous waste sludges or sediments and enables hazardous waste residues to adhere to the tank. In the case of manufacturing processes, the process of manufacturing produces the hazardous wastes.

The owner of the product or raw material being stored or transported and the owner of the materials being manufactured also fit the definition of "generator" of the hazardous waste because their "acts" cause the product or material to be stored, transported or manufactured which leads to the generation of the hazardous wastes. Additionally, it is constituents in their product or material that "produce" a hazardous waste.

The definition of generator, particularly when read in conjunction with the amendment discussed above, also fits the person removing the hazardous waste from a manufacturing process unit or a product or raw material storage tank, transport vehicle or vessel. Although often it is not his "act or process" that produces the hazardous waste, it is his act that causes the hazardous waste to become subject to regulation (except where it is generated in a surface impoundment or remains in a non-operating unit for more than 90 days after cessation of operation).

The definition of generator, depending on the particular factual situation, can include all of the parties discussed above. Both the operator of a manufacturing process unit, or a product or raw material storage tank, transport vehicle or vessel, and the owner of the product or raw material act jointly to produce the hazardous waste generated therein, and the person who removes the hazardous waste from a tank, vehicle, vessel or manufacturing process unit subjects it to regulation. All three parties are involved and EPA believes that all three (and any others who fit the definition of "generator") have the responsibilities of a generator.

Because all three parties contribute to the generation of a hazardous waste and because none of the parties stands out in all cases as the predominant contributor, the Agency has concluded that the three parties should be jointly and severally liable as generators. The Agency will, of course, be satisfied if one of the three parties assumes and performs the duties of the generator on behalf of all of the parties. In fact, the Agency prefers and encourages such action and recommends that, where two or more parties are involved, they should mutually agree to have one party perform the generator duties. Where this is done, the Agency will look to that designated party to perform the generator responsibilities. Nevertheless, EPA reserves the right to enforce against any and all persons who fit the definition of "generator" in a particular case if the requirements of Part 262 are not adequately met, providing such enforcement is equitable and in the public interest.

Given this conclusion, the Agency believes it has an obligation to give guidance to the regulated community on who it prefers to assume the generator

responsibilities and to whom it will initially look to perform the generator duties where more than one party is involved and where EPA does not know which party, by mutual agreement, is appointed to carry out the generator duties, or where no party has been so designated. In the case of hazardous wastes generated in a stationary product or raw material storage tank, EPA will initially look to the operator of the tank to perform the generator responsibilities. EPA believes that this party is in the best position to perform the generator responsibilities. The operator typically is on-site and can determine when a tank contains sludges or residues that may be hazardous wastes. He certainly knows or ought to know when these sludges and residues are being removed and, therefore, when they become subject to regulation, if they are a hazardous waste. Because he is typically on-site, he is in a good position to carry out those duties of a generator which practically must be performed on-site. These include determining whether a hazardous waste exists (§ 262.11), initiating a manifest for off-site shipment (Part 262, Subpart B) and performing the pre-transportation requirements of packaging, labeling and marking (Part 262, Subpart C).

For hazardous wastes generated in a manufacturing process unit, EPA will initially look to the operator of the unit to fulfill the generator duties for the same reasons described above.

For hazardous wastes generated in a product or raw material transport vehicle or vessel which are removed at a central facility which is operated to remove sediments and residues from such vehicles or vessels, the Agency will initially look to the operator of the central facility to perform the generator duties. Following the reasoning outlined above, the Agency believes that the operator of a central facility is the party best able to perform the generator duties. Where hazardous wastes generated in product or raw material transport vehicles or vessels are *not* removed at a central facility, the Agency will look to the operator of the vehicle or vessel to perform the generator duties.

As discussed above, the person who removes hazardous waste from a manufacturing process unit or a product or raw materials storage tank, transport vehicle or vessel will be jointly and severally liable, along with the owner and operator of the tank, vehicle, vessel or unit and the owner of the product or raw material, as a generator. To clarify that such persons are included in the definition of generator, the Agency, in this rulemaking action, is amending the definition of "generator" in § 260.10 by adding a final clause so that the definition reads "* * * any person, by site, whose act or process produces a hazardous waste identified or listed in Part 261 of this Chapter or whose act first causes a hazardous waste to become subject to regulation."

IV. Accumulation of Hazardous Wastes

A number of questions have been asked about whether the hazardous wastes removed from product or raw material storage tanks, transport vehicles or vessels or manufacturing process units can be accumulated on-site without a permit for up to 90 days after removal and prior to off-site transport in accordance with § 262.34. Because today's amendment to §261.4 subjects such hazardous wastes to regulation only after they are removed from such tanks, vehicles, vessels or units and because there often will be a need to accumulate the removed wastes until a sufficient quantity can be obtained for off-site transport, the Agency believes that the 90-day accumulation provisions of §262.34 should be available to the generators of these hazardous wastes, except where these wastes are generated in a surface impoundment or the wastes remain in the unit more than 90 days following cessation of operation of the unit.

This allowance of 90-day accumulation without a permit is available to any of the persons who are generators, even though the party accumulating the waste on-site may not own or operate the site. This allowance only applies where the accumulation occurs on the site where the removal of hazardous waste from the tank, vehicle, vessel or unit takes place; all of the other conditions and requirements of § 262.34 must, of course, be met. The 90-day accumulation period starts when the hazardous waste is removed from the tank, vehicle, vessel or unit, except in the case where a tank, vehicle, vessel or unit ceases to be operated for its primary purpose, in which case the period starts when operation ceases.

V. Notification and EPA Identification Number Requirements

A number of questions have been asked about how the notification requirements of Section 3010 of RCRA and the EPA Identification Number requirements of §262.12 apply to generators of hazardous wastes generated in manufacturing process units or product or raw material storage tanks, transport vehicles or vessels. Today's amendment to §261.4 provides that such wastes (not including those generated in surface impoundments or retained for more than 90 days in non-operating units) are not subject to regulation, including section 3010 notification, until they exit the units in which they are generated. Thus, only those wastes that are removed during a future notification period are subject to notification.

Section 262.12, though, requires that a generator must not treat, store, dispose of, transport or offer for transportation a hazardous waste without having an EPA Identification Number. Section 260.10 defines a "generator" to be a person "by site" who generates wastes. Therefore a generator must have a separate EPA Identification Number for each site at which he generates hazardous wastes. Where two or more persons are generators, as discussed above, the person who performs the duties of a generator must have and use an EPA Identification Number for the site at which hazardous wastes are removed from a tank, vehicle, vessel or unit. Thus, if the operator of the tank, vehicle, vessel or unit performs the generator duties, he must have an EPA Identification Number for the facility and can use that number with respect to the management of all of his hazardous waste generated at that facility. If the owner of the product or raw material performs the duties of the generator, he must have and use an EPA Identification Number for the site at which the hazardous waste is generated; if he owns products being stored or processed at several sites, he must have and use a separate EPA Identification Number for each site. If the person who removes hazardous wastes from tanks or units performs the generator duties, he must have a separate EPA Identification Number for each site at which he performs these duties.

VI. Effective Date

Section 3010(b) of RCRA provides that EPA's hazardous waste regulations and revisions thereto take effect six months after their promulgation. The purpose of this requirement is to allow persons handling hazardous wastes sufficient lead time to prepare to comply with major new regulatory requirements. For the amendment to § 261.4 promulgated today, however, the Agency believes, that an effective date six months after promulgation would cause substantial and unnecessary disruption in the implementation of the regulations and would be counterproductive for the regulated community and the public. The regulatory provisions that these amendments modify take effect on November 19, 1980. In the absence of the effectuation of these amendments,

Exhibit 12

RCRA Solid Waste Disposal Act Section 3005(a)

99th Congress
1st Session

COMMITTEE PRINT

S. PRT.
99-215

THE SOLID WASTE DISPOSAL ACT

AS AMENDED BY

THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984 (PUBLIC LAW 98–616); THE SAFE DRINKING WATER ACT AMENDMENTS OF 1986 (PUBLIC LAW 99–339); AND THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986 (PUBLIC LAW 99–499)

Printed for the use of the
Senate Committee on Environment and Public Works

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(2) all landfills, surface impoundments, and waste pile units (including any new units, replacements of existing units, or lateral expansions of existing units) which receive hazardous waste after July 26, 1982.

Pending promulgation of such regulations, the Administrator shall issue corrective action orders for facilities referred to in paragraphs (1) and (2), on a case-by-case basis, consistent with the purposes of this subsection.

(w) UNDERGROUND TANKS.—Not later than March 1, 1985, the Administrator shall promulgate final permitting standards under this section for underground tanks that cannot be entered for inspection. Within forty-eight months after the date of the enactment of the Hazardous and Solid Waste Amendments of 1984, such standards shall be modified, if necessary, to cover at a minimum all requirements and standards described in section 9003.

(x) If (1) solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium, (2) fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels, or (3) cement kiln dust waste, is subject to regulation under this subtitle, the Administrator is authorized to modify the requirements of subsections (c), (d), (e), (f), (g), (o), and (u) and section 3005(j), in the case of landfills or surface impoundments receiving such solid waste, to take into account the special characteristics of such wastes, the practical difficulties associated with implementation of such requirements, and site-specific characteristics, including but not limited to the climate, geology, hydrology and soil chemistry at the site, so long as such modified requirements assure protection of human health and the environment.

PERMITS FOR TREATMENT, STORAGE, OR DISPOSAL OF HAZARDOUS WASTE

SEC. 3005. (a) PERMIT REQUIREMENTS.—Not later than eighteen months after the date of the enactment of this section, the Administrator shall promulgate regulations requiring each person owning or operating [a] *an existing facility or planning to construct a new* facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subtitle to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 3010 and upon and after such date the treatment storage or disposal of any such hazardous waste *and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste* is prohibited except in accordance with such a permit. *No permit shall be required under this section in order to construct a facility if such facility is constructed pursuant to an approval issued by the Administrator under section 6(e) of the Toxic Substances Control Act for the incineration of polycholorinated biphenyls and any person owning or operating such a facility may, at any time after operation or construction of such facility has begun, file an application for a permit pursuant to this section authorizing such facility to incinerate hazardous waste identified or listed under this subtitle.*

Exhibit 13

May 19, 1980 Federal Register (45 FR 33169 and 33295)

Monday
May 19, 1980

Federal Register

Part VII

Environmental Protection Agency

Hazardous Waste Management System

Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 264 and 265

[FRL 1446-8]

Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities

AGENCY: Environmental Protection Agency.

ACTION: Final Rule and Interim Final Rule.

SUMMARY: Subtitle C of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (RCRA), directs the Environmental Protection Agency to promulgate regulations establishing a Federal hazardous waste management system. These Parts 264 and 265 regulations are the first phase of EPA's requirements under Section 3004 of RCRA for owners and operators of facilities that treat, store, and dispose of wastes which are identified or listed as hazardous under Part 261 of this Chapter.

The regulations under Part 265 establish requirements applicable during the interim status period (the period after an owner or operator has applied for a permit, but prior to final disposition of the application) respecting preparedness for and prevention of hazards, contingency planning and emergency procedures, the manifest system, recordkeeping and reporting, ground-water monitoring, facility closure and post-closure care, financial requirements, the use and management of containers, and the design and operation of tanks, surface impoundments, waste piles, land treatment facilities, landfills, incinerators, thermal, physical, chemical, and biological treatment units, and injection wells. In addition, there are included some general requirements respecting identification numbers, required notices, waste analysis, security at facilities, inspection of facilities, and personnel training.

The Part 264 regulations include the first phase of the standards which will be used to issue permits for hazardous waste treatment, storage, and disposal facilities. Included are requirements respecting preparedness for and prevention of hazards, contingency planning and emergency procedures, the manifest system, and recordkeeping and reporting. Also included are general requirements respecting identification numbers, required notices, waste analysis, security at facilities, inspection of facilities, and personnel training. Additional Part 264 regulations will be promulgated later this year.

DATES:

Effective Date: These regulations, in the form published today, complete EPA's initial rulemaking on the subjects covered and are final Agency action. They become effective on November 19, 1980, which is six months from the date of promulgation as Section 3010 requires. Today's promulgation begins the various schedules provided by RCRA for filing notifications and permit applications, and for States to apply for interim authorization.

Comment dates: EPA will accept public comments on these regulations as follows:

Deadline for Submission of Comments

Final regulations—technical errors only (e.g., typographical errors, inaccurate cross references)—July 18, 1980.
Interim final regulations—July 18, 1980.
Starred (*) Part 265 regulations—comments only on the propriety of making the standard applicable during interim status—July 18, 1980.

ADDRESSES: Comments on Interim Final portions should be sent to Docket Clerk [Docket No. 3004], Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

Public Docket: The public docket for these regulations is located in Room 2711, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C., and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays. Among other things, the docket contains background documents which explain, in more detail than the preamble to this regulation, the basis for many of the provisions in this regulation.

Copies of Regulations: Single copies of these regulations will be available approximately 30 days after publication from Ed Cox, Solid Waste Information, U.S. Environmental Protection Agency, 26 West St. Clair Street, Cincinnati, Ohio 45268 (513) 684-5362. Multiple copies will be available from the Superintendent of Documents, Washington, D.C. 20402.

FOR FURTHER INFORMATION CONTACT: For general information, contact Alfred Lindsey, Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

For information on implementation of these regulations, contact the EPA regional offices below:

Region I

Dennis Huebner, Chief, Waste Management Branch, John F. Kennedy Building, Boston, Massachusetts 02203, (617) 223-5777.

Region II

Dr. Ernest Regna, Chief, Solid Waste Branch, 26 Federal Plaza, New York, New York 10007, (212) 264-0504/5.

Region III

Robert L. Allen, Chief, Hazardous Materials Branch, 6th and Walnut Streets, Philadelphia, Pennsylvania 19106, (215) 597-0980.

Region IV

James Scarbrough, Chief, Residuals Management Branch, 345 Courtland Street N.E., Atlanta, Georgia 30365, (404) 881-3016.

Region V

Karl J. Klepitsch, Jr., Chief, Waste Management Branch, 230 South Dearborn Street, Chicago, Illinois 60604, (312) 886-6148.

Region VI

R. Stan Jorgensen, Acting Chief, Solid Waste Branch, 1201 Elm Street, First International Building, Dallas, Texas 75270, (214) 767-2645.

Region VII

Robert L. Morby, Chief, Hazardous Materials Branch, 324 E. 11th Street, Kansas City, Missouri 64106, (816) 374-3307.

Region VIII

Lawrence P. Gazda, Chief, Waste Management Branch, 1860 Lincoln Street, Denver, Colorado 80203, (303) 837-2221.

Region IX

Arnold R. Den, Chief, Hazardous Materials Branch, 215 Fremont Street, San Francisco, California 94105, (415) 556-4606.

Region X

Kenneth D. Feigner, Chief, Waste Management Branch, 1200 6th Avenue, Seattle, Washington 98101, (206) 442-1260.

SUPPLEMENTARY INFORMATION:

Preamble Outline

The outline of this preamble is as follows:

emissions from materials that have not been discharged onto land or water are not "disposal"; thus, RCRA does not mandate the prohibition of air emissions from tanks or containers.

These comments suggest perhaps a more basic issue concerning storage. While RCRA defines storage as containment in such a manner as not to constitute disposal, it does permit disposal under appropriate conditions. Thus, it seems anomalous in the Section 3004 regulations to require an absolute prohibition of emissions when handling of wastes is called "storage," while permitting some level of emissions in other facilities performing "disposal." Surface impoundments, indeed, appear to fall somewhere between a clear example of storage, such as a sealed container, and a clear example of disposal, such as a landfill. An unlined impoundment, for example, may be used to accumulate hazardous wastes for a number of years, and over that time at least some of the waste will almost certainly migrate into the soil under the impoundment. Yet, if at the end of its life the residue and contaminated soil are removed, the impoundment might be rendered non-hazardous, and certainly presents a different picture from a landfill. This situation suggests that the proper focus for regulation of storage facilities is on whether the wastes will eventually be removed from the facility. This approach to storage, under interim status, is reflected primarily in appropriate standards for closure and financial responsibility (i.e., the cost estimate for closure).

The Agency believes that RCRA permits this approach. The definition of storage in RCRA refers to "containment . . . either on a temporary basis or for a period of years," which is a central factor in the current regulatory definition. RCRA apparently would permit the Agency to regulate treatment, storage, and disposal without anywhere prescribing different standards or approaches for facilities falling into different statutory categories; indeed, the statute typically, as in Section 3004, mentions "treatment, storage, and disposal" in a single phrase, indicating that the same statutory provisions apply to all three. This is to be compared with RCRA's much different treatment of generators, and of transporters. This is not to say, of course, that the Agency cannot or should not prescribe quite different standards for facilities that are storage facilities (under some regulatory definition) than for disposal facilities, but simply to say that RCRA permits the Agency to use that concept of storage which seems most appropriate for regulatory purposes.

With these considerations in mind, and recognizing the impracticality of completely eliminating emissions from most types of facilities, the Agency has redefined "storage" to mean "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere."

A few commenters suggested that the Agency consider adding a standard which would limit the time or quantity (or both) of waste that can be stored at a hazardous waste facility. Any such standard would best be based on the type of waste to be stored, the design and construction of the containment device used to store the material, and the climatic conditions under which the storage is to take place. At present, the Agency lacks sufficient data to develop such standards, and a detailed consideration of such information can for now best be made in permitting proceedings. However, the Agency expects to examine further appropriate limitations for storage, and may propose regulations in the future.

In addition, the closure and financial responsibility requirements will set limits indirectly on the quantity of hazardous waste in storage. The Phase II financial standards are expected to require that adequate funds be placed in the closure trust (or other acceptable mechanism) to close the facility at any given time, considering the amount of waste on hand. The amount of these funds will create a definite upper limit on the amount of waste in storage at any time, and will create financial incentives for owners and operators to minimize this amount.

H. Owner or Operator

In a majority of cases, the owner and operator of a hazardous waste treatment, storage, or disposal facility are the same person or corporation. However, it is not uncommon for an operator to lease the land and perhaps structures from a landowner. In a few cases, the owner of the land, the owner of the structures, and the operator may all three be different persons or companies.

In the proposed regulations, the Agency used the term "owner/operator" when referring to any or all of these parties, and defined the term to mean "the person who owns the land on which a facility is located and/or the person who is responsible for the overall operation of the facility." Commenters complained that the definition was vague and ambiguous and that it was not clear who (the owner or operator) was responsible or liable for what. A few commenters also pointed out that for a few of the requirements, only the owner can legally comply—a case in point being the requirement to record a note on the deed in proposed § 250.43–7(b).

The Agency's first priority is to protect human health and the environment. Thus, where there has been a default on any of the regulatory provisions, the Agency will attempt to gain compliance as quickly as possible. In so doing, the Agency may bring enforcement action against either the owner or operator or both. EPA considers the owner (or owners) and operator of a facility jointly and severally responsible to the Agency for carrying out the requirements of these regulations.

One reason for this joint responsibility is that, as the commenters pointed out, there is at least one provision of the Section 3004 regulations that only the owner can comply with—that is the requirement to record a notation on the deed to property where hazardous waste remains after closure. Second, if the owner is not bound by the regulations, EPA could have a very hard time trying to implement and enforce the closure and financial responsibility provisions of the regulations. Third, the legislative history of RCRA indicates that responsibility for complying with the regulations pertaining to hazardous waste facilities should rest equally with owners and operators where the owner is not the operator (H.R. Rep. No. 94–1491, 94th Cong., 2d Sess. 28 (1976)).

With most of the regulations, the Agency is primarily concerned with compliance, and is secondarily concerned with who ensures compliance. The Agency believes that decisions concerning who should be responsible for ensuring compliance for which requirements can properly and adequately be a matter between the owner and operator. Nonetheless, both the owner and operator ultimately remain responsible, regardless of any arrangement between them.

Some facility owners have historically been absentees, knowing and perhaps caring little about the operation of the facility on their property. The Agency believes that Congress intended that this should change and that they should know and understand that they are assuming joint responsibility for compliance with these regulations when they lease their land to a hazardous waste facility. Therefore, to ensure their knowledge, the Agency will require owners to co-sign the permit application and any final permit for the facility. Part 122 of the consolidated permit

regulations has been changed to reflect this.

The Agency agrees with those commenters who pointed out that in a few cases only the owner can legally comply with a requirement. Where this is so, the Agency has specified the "owner" in these final regulations. EPA has also changed its usage of the term "owner/operator" to "owner or operator" to indicate when EPA will be satisfied by compliance by either party (but also to indicate that the Agency may enforce against either or both).

I. Inactive Facilities

RCRA is written in the present tense and its regulatory scheme is prospective. Therefore, the Agency believes Congressional intent to be that the hazardous waste regulatory program under Subtitle C of RCRA is to control primarily hazardous waste management activities which take place after the effective date of these regulations. Thus, the proposed Subtitle C regulations did not by their terms apply to inactive (either closed or abandoned) disposal facilities.

Comments received on the subject pointed out the need to protect the public from inactive and abandoned disposal sites, stressing that because these facilities are normally very poorly designed and situated, they represent a more severe hazard than new facilities. Love Canal and other disasters were cited to support this argument.

The Agency agrees that inactive and abandoned hazardous waste sites (particularly dumps, landfills, and lagoons) may pose serious hazards to human health and the environment. RCRA already provides one tool which can be used to deal with the problem of inactive and abandoned sites—the imminent hazard provision of Section 7003. This provision—which is applicable to both inactive and active sites—can be used to obtain injunctive relief from any party who can be shown to be causing or contributing to ". . . an imminent and substantial endangerment to health or the environment . . . ."

The Agency is actively using Section 7003 and other applicable laws to force responsible parties to bear the costs of cleaning up sites posing a hazard. These authorities will remain in place and continue to be actively employed even after the effective date of the Subtitle C regulations.

To provide site cleanup in those situations where the responsible parties are unknown or lack the funds to do the job, the Administration has proposed "Superfund" legislation currently pending in Congress.

While RCRA's regulatory scheme is generally prospective, certain inactive facilities, or portions of inactive facilities, because of their relationship to facilities which continue to operate, may be subject to some RCRA Subtitle C regulatory controls. Some existing landfills or other facilities are expected to close if they do not or cannot meet the Subtitle C standards. The owners or operators may then design a facility which meets the standards and apply for a permit to locate it on land immediately adjacent to the inactive portion. This is not an improper action, but, in some cases, problems associated with the inactive site (leachate, emissions, etc.) may interfere with the ability of the owner or operator to adequately monitor the "new" facility. In these cases, the Regional Administrator may require that the owner or operator of the new facility ensure that certain actions are taken on the inactive site, in order to minimize or eliminate any interference with monitoring or enforcement activities at the "new" facility.

J. New Facilities and Existing Facilities

In some regulatory programs regulated operations are subject to different requirements, depending on how old the operation is when the regulatory program begins. Often, existing operations are exempted or are subject to less stringent regulations than new operations.

The original language of RCRA did not distinguish between new and existing facilities. Consequently, EPA made the proposed Section 3004 regulations applicable to both new and existing facilities. The Agency recognized, however, that some existing facilities would have difficulty complying with some of the regulations. The Agency envisioned that the "Note" (variance) procedure, as well as the use of compliance schedules would accommodate the possible difficulties associated with retrofitting existing facilities.

The Agency received numerous comments on this general issue. The most frequent comment on the subject concerned RCRA coverage of NPDES permitted wastewater treatment impoundments. Nearly all commenters were opposed to having RCRA cover these impoundments, citing the impracticality of retrofitting existing lagoons to meet the proposed standards. Specific comments addressed:

(a) The tremendous cost associated with lining existing impoundments or building new ones,

(b) The costs of transporting wastes to off-site facilities from manufacturing operations which may be located in areas which are unsatisfactory for waste management,

(c) The likelihood that many manufacturing plants would have to close while the impoundment was being retrofitted, and

(d) The possibility that some existing facilities may not be polluting now and may never in the future pollute the environment, even though they do not meet all of the proposed RCRA surface impoundment standards.

After substantial additional study, EPA has concluded that the proposed surface impoundment regulations can be changed to answer many of the commenters' concerns about their application to existing wastewater treatment impoundments. The Agency, in keeping with its general guideline of not imposing major capital expenditures on existing facilities during interim status will not require extensive retrofitting of existing surface impoundments in the interim status standards. Furthermore, it is anticipated that the general regulations yet to be promulgated in Phases II and III will also not require retrofitting of these facilities, if the owner or operator can demonstrate that the impoundment is not contributing statistically significant quantities of contaminants to ground water. The Phase I regulations require ground-water monitoring program in order to determine whether an impoundment is polluting. Regulations yet to be issued in Phases II and III of this regulatory program will set forth additional technical requirements for impoundments. Most of these requirements probably will not apply to existing impoundments found not to be affecting ground water.

The Agency believes that this regulatory approach will (1) substantially reduce the number of existing NPDES facilities which might otherwise had to have been retrofitted, closed, or replaced in order to comply with the proposed Subtitle C rules, and (2) ensure that human health and the environment is protected. Further, this approach is consistent with pending Congressional amendments to RCRA.

Some commenters suggested that all existing facilities, and particularly existing landfills, should be regulated differently than new facilities. After careful consideration, the Agency has concluded, for the following reasons, that landfills do not pose the special problems or deserve the same consideration as "existing" facilities that surface impoundments do:

(1) Sections of landfills are typically filled in sequentially; i.e., one trench or part (cell) of the total landfill area is

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May 19, 1980

Federal Register

Part X

Environmental Protection Agency

Consolidated Permit Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 123, 124, and 125

[FRL 1453-5]

Consolidated Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA National Pollutant Discharge Elimination System; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes consolidated permit program requirements governing the Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), the National Pollutant Discharge Elimination System (NPDES) program and State Dredge or Fill ("404") programs under the Clean Water Act (CWA), and the Prevention of Significant Deterioration (PSD) program under the Clean Air Act, for three primary purposes:

(1) To consolidate program requirements for the RCRA and UIC programs with those already established for the NPDES program.

(2) To establish requirements for State programs under the RCRA, UIC, and Section 404 programs.

(3) To consolidate permit issuance procedures for EPA-issued Prevention of Significant Deterioration permits under the Clean Air Act with those for the RCRA, UIC, and NPDES programs.

DATES: These regulations shall become effective as follows: All regulations shall become effective as to UIC permits and programs July 18, 1980, but shall not be implemented until the effective date of 40 CFR Part 146. All regulations shall become effective as to RCRA permits and programs November 19, 1980. Part 124 shall become effective as specified in § 124.21. All other provisions of the regulations shall become effective July 18, 1980. For purposes of judicial review under the Clean Water Act, these regulations will be considered issued at 1 p.m. eastern time on June 2, 1980; see 45 FR 26894, April 22, 1980. In order to assist EPA to correct typographical errors, incorrect cross-references, and similar technical errors, comments of a technical and nonsubstantive nature on the final regulations may be submitted on or before July 18, 1980. The effective date will not be delayed by consideration of such comments.

Comments on the scope and applicability of Executive Order 11990 and Executive Order 11988 to RCRA, UIC, and NPDES permits must be submitted on or before July 18, 1980.

Comments on requirements for Class IV wells must be received by July 15, 1980.

There will be a hearing on the requirements for Class IV wells on July 8, 1980, from 9 a.m. to 5 p.m.

ADDRESSES: Comments of a technical and nonsubstantive nature, as well as the comments concerning the scope and applicability of Executive Order 11990 and Executive Order 11988, should be addressed to: Edward A. Kramer, Office of Water Enforcement (EN-336), U.S. Environmental Protection Agency, Washington, D.C. 20460.

Comments on requirements for Class IV wells should be addressed to: Alan Levin, Director, State Program Division (WH-550), Office of Drinking Water, Environmental Protection Agency, Washington, D.C. 20460.

The Public Hearing on Class IV wells will be held at: HEW Auditorium, 330 Independence Avenue, S.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Edward A. Kramer, Office of Water Enforcement (EN-336), U.S. Environmental Protection Agency, Washington, D.C. 20460, (202) 755-0750.

SUPPLEMENTARY INFORMATION:

Background

These final regulations consolidate requirements and procedures for five EPA permit programs. These regulations represent the major product of the Agency's permit consolidation initiative that began in the fall of 1978. They are based on the proposed consolidated permit regulations that were published in the Federal Register for comment on June 14, 1979 (44 FR 32854).

EPA program requirements and State program requirements are established for three programs:

- The Hazardous Waste Management (HWM) program under the Resource Conservation and Recovery Act (RCRA);
- The Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA);
- The National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA); and

State program requirements only are established for:

- State section 404 "Dredge or Fill" programs under the CWA.

In addition, procedures for permit decisionmaking are established for above four programs, and for

- The Prevention of Significant Deterioration (PSD) program under the Clean Air Act, where this program is operated by EPA or a delegated State agency under 40 CFR 52.21(v); these procedures do not apply to PSD permits issued by States to whom administration of the PSD program has been transferred. (See preamble to Part 124, Subpart C.)

These regulations are an important element of an Agency-wide effort to consolidate and unify procedures and requirements applicable to EPA and State-administered permit programs.

The Agency has also developed a single set of permit application forms for the programs covered by these regulations. These consolidated application forms are published elsewhere in today's Federal Register. They consist of a single general form to collect basic information from all applicants, followed by separate program-specific forms which collect additional information needed to issue permits under each program. The application forms in today's Federal Register include the general information form and the additional forms for certain water discharges under NPDES and for hazardous waste permits u[n]der RCRA.

When the draft consolidated application forms were published for public comment, they appeared along with a set of proposed NPDES regulations which were closely related to the contents of the application forms. Those accompanying regulations have now been integrated with the final NPDES regulations which appear as part of these consolidated permit regulations, and are summarized in the proper places in the preamble discussion. For a more thorough discussion and response to comments on those portions of the NPDES regulations, see the preamble to the consolidated application forms published elsewhere in today's Federal Register. Because the draft application forms and accompanying proposed NPDES regulations were originally published together, commented upon together, and are closely related, the detailed discussion of both forms and accompanying regulations has been retained in one place.

Many of the requirements in these regulations apply both to EPA programs and to State programs that receive EPA approval to operate in lieu of a Federal program in a particular State. These common requirements are intended t[o] ensure that State permit programs satisfy minimum statutory and

"underground source of drinking water" (USDW), one for use under RCRA and one with "more latitude" for use in the UIC program. (The greater flexibility for USDWs in the UIC program resulted from the procedures for eliminating certain aquifers, now called "exempted aquifers," from the coverage of the UIC program.)

Likewise, commenters noted that the proposed definition of "aquifer" ("capable of yielding useable quantities of groundwater") contradicted the definition in proposed § 250.41(5) for RCRA ("uscable quantities to wells or springs"). The final definition applicable to both RCRA and UIC which appears in the consolidated regulations is "a geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring." This is slightly different than the definition which appears in Part 260 for RCRA, which is the same as proposed § 250.41(5).

In both instances EPA agrees that these definitions should be the same for both programs, and EPA will conform them. They have not been conformed in these regulations because the question of the proper definition of "aquifer" and "USDW" are closely related to the scope and form of the section 3004 standards under RCRA and to the manner in which Class IV wells will be dealt with. Both those issues are scheduled for final resolution by EPA next fall. The definitions of "aquifer" and "USDW" will be changed at the same time. The current definition of "USDW" applies to the RCRA program only insofar as injection wells are regulated under RCRA under § 122.26.

Best management practices. Several commenters noted that it was confusing to provide two separate definitions of "best management practices" (BMPs): one for NPDES and one for State 404 programs. The two definitions have been combined so that they appear in one place. The differing coverage under two programs is highlighted in the new combined definition.

For 404, several commenters objected to the requirement that BMPs "ensure compliance with water quality standards." EPA agrees that the proposed definition could be interpreted to place an unrealistic burden on individual BMPs, and therefore has changed the definition to require that BMPs facilitate compliance with applicable water quality standards. Some commenters argued that there should be no reference at all to water quality standards because CWA section 404(h)(1)(A)(i) does not mention them. The Agency disagrees, because that section refers to the environmental guidelines promulgated under CWA section 404(b)(1) (the "section 404(b)(1) guidelines," 40 CFR Part 230) which do require compliance with applicable water quality standards.

Some commenters wanted the BMP definition to require consideration of practicability, feasibility, or economics. The final regulation allows States to include such considerations in addition to the minimum environmental requirements. It should also be noted that the section 404 BMPs contained in § 123.92 are not absolute requirements; anyone objecting to any of them may apply for a permit and raise questions of practicability in that context.

Facility or activity. In response to a comment, EPA has clarified the applicability of this definition to section 404 programs by adding a reference to the 404 program. "Facility" and "activity" frequently appear in Part 123, Subpart E.

Hazardous waste. Two commenters stated that a full definition of "hazardous waste" rather than a cross-reference should be given. However, the definition in Part 261 is too complex to be set out in full. Several other commenters stated that no reference should be made to RCRA section 1004 because that definition is not self-implementing and the only hazardous wastes covered by Subtitle C of RCRA are those which are identified or listed under section 3001. EPA accepts this comment and has changed the definition of "hazardous waste" so that it reads entirely in terms of the substantive RCRA regulations.

Major facility. This is a new definition added to the final regulations. It is discussed in paragraph (2) of the preamble to § 122.18.

Owner or operator. This definition remains unchanged. Some commenters sought clarification of what happens when the owner and operator are not the same, and expressed concern that requirements of the permit program might, by virtue of this definition, be imposed on landowners who have no involvement in operation of a permitted activity. To address this concern, we have amended § 122.4, application for a permit, to provide that the operator is responsible for obtaining a permit and complying with it when ownership and operation are split. However, RCRA applications must be signed both by the owner and the operator. The requirements of a RCRA permit bind both the "owner" and the "operator" of the permitted facility, while the requirements of other permits subject to this Part bind only the permit holder.

The reasons for this approach are explained in the preamble to the regulations implementing section 3004 of RCRA. Briefly, this approach has been chosen because there is at least one provision of the 3004 regulations that only the owner can comply with—the one requiring insertion of a notation in the deed to the property in question. It also may be materially more difficult to implement and enforce the closure and financial responsibility provisions of the regulations if the owner is not bound, since in at least some of those cases the site may have been abandoned and the "operator" may be difficult to determine. Joint responsibility will also provide more incentive to comply with the requirements of the RCRA program. Finally, the legislative history suggests that both owner and operator should be bound.

To ensure that both the owner and the operator understand their joint responsibility, EPA is requiring both the owner and the operator to sign the permit application. In adopting this approach, however, EPA has no intention to require both owner and operator to take all or even most compliance actions in tandem. EPA will regard compliance by *either* owner or operator with any given obligation under the permit as sufficient for both of them. EPA anticipates that in most cases the operator will take the lead role in complying with all but the few conditions that only the owner can satisfy. The owner is free to make arrangements with the operator by contract or otherwise to assure itself that the operator will take most actions necessary for compliance activities beyond that. Nonetheless, EPA considers both parties responsible for compliance with the regulations.

Permit. EPA has changed the definition in response to comments. First, commenters found obscure and confusing the statement that "in Part 124, reference to 'permit' may include permit modification, revocation or denial." EPA agrees. Part 124 has been rewritten to specify the precise kinds of permit actions to which its provisions apply.

Second, we have clarified the scope of the definition by adding references to other types of authorization or documents, such as "general permit," "draft permit," and "permit by rule." Similarly, § 122.4, application for a permit, is now written to clarify which of the several types of permits or other authorizations under these regulations is covered by the application requirement. Finally, the procedures governing issuance, administration, or termination

of interim status, authorization by rule, permits by rule, and emergency permits are segregated within their own sections. As a result, provisions of Parts 122 and 124 (and discussions in this preamble) which are generally applicable to permits, permit applications, and permittees are not applicable to those types of authorization, but are applicable to all other permits, including area permits and general permits. The following chart may be helpful in determining which provisions of the regulations apply to which kinds of authorizations.

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