RCRA Corrective Action Liability: Can it be Imposed on a Company that Never Owned or Operated the Facility?

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The North Carolina Court of Appeals recently issued a ruling that will have a significant impact on business transactions involving property subject to a permit or corrective action obligations under the Resource Conservation and Recovery Act (RCRA) or its state equivalents. In *WASCO LLC vs. N.C. Department of Environment and Natural Resources,* the Court ruled a company that did not become involved with a hazardous waste treatment, storage and disposal facility until after the facility was closed has liability as an "operator" under RCRA. The case is a helpful reminder of how commitments made to facilitate a business transaction can evolve into unexpected environmental liability.

Winston Mills owned and operated a textile manufacturing mill in North Carolina (the "Facility"). The Facility used perchloroethylene ("PCE") as a dry-cleaning solvent and stored virgin and waste PCE in underground storage tanks ("USTs"). In the 1980s, Winston Mill removed the USTs and entered into a consent order with the North Carolina Department of Environment and Natural Resources ("NCDENR") (now the North Carolina Department of Environmental Quality) to close the area as a landfill under an approved North Carolina Solid Waste Management Act ("NCSWMA") closure plan. Winston Mills completed closure of the tank area in the early 1990s.

Shortly after closing the UST area, Winston Mills sold the Facility to Anvil Knitwear, Inc. ("Anvil"). Under the purchase agreement, Winston Mills agreed that it would be responsible for environmental issues at the Facility, and it indemnified Anvil for costs associated with "environmental requirements." Culligan International ("Culligan"), a company affiliated with Winston Mills, was a co-guarantor under the purchase agreement and shared financial liability with Winston Mills. Through a series of corporate transactions, WASCO purchased and then sold an interest in Culligan. While it owned its interest in Culligan, WASCO provided financial assurance to NCDENR for post-closure care of the Facility. Moreover, Culligan and WASCO informed NCDENR that WASCO was to be contacted as to Culligan's obligations for RCRA post-closure activities.

In early 2000, NCDENR identified WASCO as the "Responsible Party" for hazardous waste issues at the Facility, and WASCO agreed, signing RCRA permit applications as the "operator" and paying

environmental consultants for post-closure work. As late as 2007, WASCO responded to RCRA issues at the Facility, including negotiating a groundwater assessment plan with NCDENR. In 2008, Anvil sold the Facility to Dyna-Diggr, LLC, and WASCO decided it had no further responsibility for RCRA post-closure activities. NCDENR disagreed and notified Dyna-Diggr and WASCO in 2013 that they were both liable for post-closure corrective actions as "owner" and "operator," respectively.

A RCRA facility "operator" is defined in relevant part by RCRA regulations as "the person responsible for the overall operation of a facility." NCSWMA and North Carolina hazardous waste regulations incorporate this definition, and further define an "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…."

WASCO never participated in actual operation of the Facility. It did not hold a hazardous waste permit for the Facility, and it was never in the chain of title to the property. WASCO's corporate and financial relationship with the Facility was, at best, complex, and its connection to the Facility's contamination was at most remote. This gave WASCO strong arguments that it was not an "operator." In response to claims that its participation in RCRA post-closure care meant it was liable, WASCO said its participation was "voluntary" and did not make it an "operator."

The Court rejected WASCO's arguments. It found that WASCO's involvement after the Facility ceased operation made it a post-closure "operator" for purposes of fulfilling RCRA closure obligations. The Court noted that post-closure "operator" status ". . . is based on an examination of the totality of the circumstances" and, thus, is a fact-specific inquiry. The Court found a number of factors weighed heavily against WASCO in this regard, including that (i) it voluntarily referred to itself as an "operator" of the Facility for RCRA purposes in communications to NCDENR, effectively admitting that status; (ii) it did not deny responsibility for RCRA post-closure care until a new party purchased the Facility; and (iii) it provided financial assurance and performed post-closure care at the Facility for ten years without protest.

What's the take-away here? It is that companies must be very careful when they assume environmental obligations in business transactions, even if those obligations are just financial guarantees or indemnification. Further, taking an active role in fulfilling existing environmental obligations of the current owner or operator of the Facility is rife with risk. Finally, companies must watch what they say to regulators and not admit to or assume liability they do not have. As WASCO learned the hard way, once you jump in the pool, it's hard to climb out.

WASCO LLC v. N.C. Department of Environment and Natural Resources, No. COA CVS 1438 (N.C. Ct. App. Apr. 18, 2017)

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