Hazardous Waste Section

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Name:	Mary Siedlecki
EPA ID Number:	NCD057451270
Facility Name:	Former Heatcraft
Document Group:	Permit
Document Type:	Correspondence
Description:	NC DENR Response to April 9, 2015, Letter from Mr. F. Darryl Mills (Counsel representing Property Owner)
Date of Document:	05/07/2015
Author(s) of Doc:	NC DENR HWS

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May 7, 2015

F. Darryl Mills, Esq.
F. Darryl Mills, PLLC
P.O. Box 216
Wrightsville Beach, NC 28480

Re: Former Heatcraft Remediation Site, 602 Sunnyvale Dr, Wilmington, NC
EPA ID Number: NCD 057 451 270

Dear Mr. Mills:

I received your letter dated April 9, 2015 in the above-referenced letter. The following response is provided for informational purposes:

As you may know, 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"), which the Section is authorized to operate in lieu of the federal program under the Resource Conservation and Recovery Act ("RCRA"). Because the State Hazardous Waste Program is federally delegated, the United States Environmental Protection Agency ("EPA") continues to exercise oversight to ensure consistency with RCRA. EPA retains the ability to revoke program authorization if the state program is not equivalent to and consistent with the federal program and the programs of other delegated states.

With regard to post-closure, please be assured that where an entity assumes responsibility as an operator—as AAF-McQuay Inc. has done and Daikin Applied Americas, Incorporated ("Daikin") is in the process of doing in the present case—it is the Section's policy to look to that entity alone and <u>not</u> the property owner (i.e., Port City Distribution, LLC) for compliance *as long as* the operator continues to satisfy all post-closure requirements.

Even so, RCRA and the State Hazardous Waste Program provide for strict liability for owners and operators—without regard to causation.[1] There is no innocent purchaser exception. In the event that the operator becomes unable or unwilling to comply to the Section's satisfaction, the Section has the right to pursue the property owner *as a matter of law*. 40 C.F.R. § 270.1(c) (adopted by reference at 15A NCAC 13A .0113(a)) (outlining the requirement for "[o]wners and operators" to obtain post-closure permits or administrative orders on consent ("AOCs")) (emphasis added).

For this reason, EPA has advised that both the operator and the property owner be involved in the permitting / AOC process, so that each has an opportunity to provide input as each is strictly liable by operation of law. See 40 C.F.R. § 270.10(b) (adopted by reference at 15A NCAC 13A .0113(b)) ("When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application."); 45 Fed. Reg. 33154, 33169 (May 19, 1980) ("[T]o ensure their knowledge, [EPA] will require owners to co-sign the permit application and any final permit for the facility.").

To the extent the purchaser of a regulated site enters into a third-party agreement with a post-closure operator or former property owner, such agreement—to which the Section is not a party—cannot affect the Section's legal rights but merely the purchaser's remedies as against that third party in a private action to enforce the third-party agreement. 45 Fed. Reg. at 33169 ("[D]ecisions 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.").

I hope this letter has provided clarification that will enable the Section, Daikin, and your client to move forward with updating the AOC. The Section would be happy to schedule a conference call for further discussion if any concerns remain.

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[1] See, e.g., 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) (agreeing that RCRA imposes strict liability, including for acts of disposal that occurred before RCRA became effective); United States v. Production Plated Plastics, Inc., 742 F. Supp. 956, 960 (W.D. Mich. 1990) ("RCRA is a remedial strict liability statute which is construed liberally."), aff'd, 955 F.2d 45 (6th Cir. 1992); United States v. Domestic Indus., Inc., 32 F. Supp. 2d 855, 866-67 (E.D. Va. 1999); United States v. Liviola, 605 F. Supp. 96, 100 (N.D. Ohio 1985).

Please contact Mary Siedlecki with any question or concerns at 919-707-8208 or mary.siedlecki@ncdenr.gov.

Sincerely,

Julie S. Woosley, Chief
Division of Waste Management, NC DENR

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