IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| Texas Disposal Systems Landfill, Inc.; Texas Campaign for the Environment; and Clean Water Action, Petitioners, | ) | C.A. No. 06-1297 |
| v. | ) | |
| Stephen L. Johnson, in his capacity as Administrator, U.S. Environmental Protection Agency; and the U.S. Environmental Protection Agency, Respondents. | ) | |

**RESPONDENTS' MOTION TO DISMISS PETITION FOR REVIEW**

## INTRODUCTION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27(g), Respondents United States Environmental Protection Agency and Stephen L. Johnson, Administrator (collectively hereinafter "EPA" or "the Agency") hereby move the Court for an Order dismissing this petition for review.[1/]

Petitioners Texas Disposal Systems Landfill, Inc. ("TDSL"), Texas Campaign for the Environment, and Clean Water Action seek review of EPA's "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program" (hereinafter "determination") under 42 U.S.C. § 6976(a)(1). As is explained more fully below, this Court lacks jurisdiction to review EPA's determination. Section 7006(a)(1) of RCRA provides this Court with jurisdiction over only three types of action by the Administrator of EPA: (1) promulgating a regulation; (2) promulgating a requirement; and (3) denying a petition for the promulgation, amendment or repeal of any RCRA regulation. 42 U.S.C. § 6976(a)(1).

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[1/] Respondent is aware of Local Rule 27(g)(1), which requires the filing of dispositive motions within 45 days of the docketing of the case. Here, however, approximately thirty days after this case was docketed, the parties jointly requested that the case be held in abeyance (including all procedural deadlines) to allow the parties to explore whether this matter could be resolved without litigation. The Court granted this request on October 19, 2006. After settlement negotiations failed, Petitioners requested that the abeyance be lifted, and the parties proposed a schedule to the Court to govern future proceedings. EPA files the present dispositive motion in accordance with that schedule. Given the previous abeyance and the parties' agreement that dispositive motions could be filed until April 30, 2006, Local Rule 27(g)(1)'s "good cause" standard is satisfied, should the Court consider this an untimely motion.

The Regional Administrator did not take any of these three actions in rendering his determination of whether to commence withdrawal proceedings.[2/] Rather, the Regional Administrator issued a determination finding that no cause existed to commence proceedings to withdraw Texas's RCRA authorization pursuant to Section 6926(e) of RCRA, 42 U.S.C. § 3006(e). This Court has repeatedly held that it lacks jurisdiction to review determinations issued pursuant to RCRA. See, e.g., American Portland Cement Alliance v. EPA, 101 F.3d 772, 774 (D.C. Cir. 1996) ("Unlike the judicial review provisions for other environmental statutes . . . RCRA does not explicitly provide for review of EPA determinations in a Circuit Court of Appeals."); Molycorp. Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999); see also Florida Power & Light Co. v. EPA, 145 F.3d 1414, 1418-20 (D.C. Cir. 1998). Because EPA's determination does not constitute the promulgation of a regulation or requirement or the denial of a petition for the promulgation, amendment or repeal of a regulation, this Court does not have jurisdiction over the petition for review.

## STATUTORY AND REGULATORY BACKGROUND

Congress enacted RCRA to address the serious environmental and health

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[2/] The Regional Administrator has been delegated the authority to take action relative to the authorization of Texas' hazardous waste program pursuant to RCRA, the action at issue here. See EPA Delegation Authority No. 8-7, 1200 TN 350 (May 11, 1994); 40 C.F.R. Pt. 272.2201.

dangers arising from waste generation, management, and disposal. Congress was particularly concerned with the management and disposal of hazardous wastes, for which it mandated comprehensive "cradle-to-grave" regulation in RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e (hereinafter "Subtitle C"). See, e.g., Chicago v. Environmental Defense Fund, 511 U.S. 328, 331 (1994); Environmental Defense Fund v. EPA, 210 F.3d 396, 397-98 (D.C. Cir. 2000); United Technologies Corp. v. EPA, 821 F.2d 714, 716 (D.C. Cir. 1987). Congress broadly defined "hazardous waste" as "a solid waste" which "may . . . pose a substantial present or potential hazard to human health or the environment when improperly . . . managed." 42 U.S.C. § 6903(5). "Solid waste" includes all "discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial [or] commercial . . . operations." 42 U.S.C. § 6903(27); see also 40 C.F.R. § 261.2 (regulatory definition of "solid waste").

Congress delegated to EPA the task of developing criteria for identifying the characteristics of hazardous waste and listing hazardous wastes, and specified that EPA must determine through the development and application of these criteria which hazardous wastes should be regulated under Subtitle C. See 42 U.S.C. § 6921(a). Congress also directed EPA to establish characteristics of hazardous waste and to identify particular hazardous wastes based on the criteria. See 42

U.S.C. § 6921(b)(1). Both hazardous wastes identified by their characteristics ("characteristic wastes") and hazardous wastes listed by EPA ("listed wastes") are subject to regulation under RCRA Subtitle C. See 42 U.S.C. §§ 6921-25; Chemical Waste Mgmt., Inc. v. EPA, 976 F.2d 2, 8 (D.C. Cir. 1992); see generally 40 C.F.R. Pt. 261, Sbpt. B ("Criteria for Identifying the Characteristics of Hazardous Waste and For Listing Hazardous Waste"); 40 C.F.R. Pt. 261, Sbpt. C ("Characteristics of Hazardous Waste"); 40 C.F.R. Pt. 261, Sbpt. D ("Lists of Hazardous Wastes"). Under Subtitle C of RCRA, stringent management standards apply to the generation, transportation, treatment, storage and disposal of hazardous wastes. See 42 U.S.C. §§ 6922-25.

RCRA allows a State to apply for EPA authorization to administer a hazardous waste program. 42 U.S.C. § 6926(b). Among other things, to be so authorized, a state hazardous waste program must be "equivalent" to the federal Subtitle C program established by EPA, must be "consistent" with the federal and state programs applicable in other States, and must provide for "adequate" enforcement. Id.; see generally Florida Power & Light Co. v. EPA, 145 F.3d 1414, 1416-17 (D.C. Cir. 1998). The state-issued requirements authorized by EPA supplant equivalent federally-issued requirements in the federal program, and the authorized requirements become requirements of RCRA Subtitle C. 42 U.S.C. §

6926(b). The Texas hazardous waste program has been authorized since 1984. See 40 C.F.R. Pt. 272.2201

RCRA allows EPA to withdraw authorization of a State's hazardous waste program after first notifying the State of its noncompliance with the requirements of § 6926 and allowing the State a reasonable time to take corrective action. 42 U.S.C. § 6926 (e). EPA's regulations also allow any interested person to petition EPA to commence withdrawal proceedings for an authorized state program. See 40 C. F. R. §271.23(b)(1). EPA may conduct an informal investigation into the allegations in such a petition, and EPA must respond to a petition in writing. Id. EPA's decision regarding the commencement of withdrawal proceedings is discretionary. Id. ("The Administrator may order the commencement of withdrawal proceedings . . . in response to a petition from an interested person . . ."). If EPA grants a petition, the Agency must then follow the withdrawal process set forth in the regulations. Id. The process primarily involves a hearing on the record in which the State and petitioner present evidence regarding the State's compliance with RCRA requirements. Id.

On November 14, 2005, TDSL submitted to EPA its "Petition of Texas Disposal Landfill, Inc. To U.S. Environmental Protection Agency for Withdrawal of Approval of the Hazardous Waste Program of the State of Texas" (hereinafter

the "petition"). TDSL argued that Texas' authorization should be withdrawn because, in TDSL's view, Texas had wrongly interpreted the RCRA regulations regarding what constitutes a characteristic hazardous waste and whether that waste must be treated before land disposal.

TDSL's petition seeking withdrawal of Texas's authorization arises from a single incident that occurred in 1997. On October 9, 1997, a highway accident in Texas resulted in the generation of cathode ray tube waste. The cathode ray tube waste was sent to TDSL's municipal solid waste landfill. Since that time, TDSL and TCEQ have been involved in a dispute about the proper treatment and storage requirements for this waste.

On December 7, 2005, EPA forwarded a copy of the petition to the Texas Commission on Environmental Quality ("TCEQ"). EPA explained that the Agency was commencing an informal review of the petition and requested that TCEQ provide any response or information that might be helpful. TCEQ provided EPA with a response on December 16, 2005. TDSL also submitted additional information in support of its position that Texas' RCRA authorization should be withdrawn. After a review of all of the information submitted by TDSL and TCEQ, EPA issued its determination on May 16, 2006. EPA concluded that no cause existed to commence withdrawal proceedings because TCEQ was

administering its RCRA program consistently with the requirements of federal law.

## ARGUMENT

### I. SECTION 7006(a) OF RCRA DOES NOT GRANT THIS COURT JURISDICTION TO REVIEW EPA'S DETERMINATION AS TO WHETHER CAUSE EXISTS TO COMMENCE WITHDRAWAL PROCEEDINGS FOR TEXAS'S RCRA AUTHORIZATION.

Section 7006(a)(1) of RCRA, 42 U.S.C. § 6976(a)(1), grants this Court jurisdiction to review only three specific types of action by the Administrator of EPA: "the promulgation of final regulations, the promulgation of requirements, and the denial of petitions for the promulgation, amendment or repeal of RCRA regulations." American Portland Cement, 101 F.3d at 775; Molycorp, 197 F.3d at 545 ("[W]e may review only final regulations, requirements, and denials of petitions to promulgate, amend or repeal a regulation."). Section 7006(a) provides, in relevant part:

> Any judicial review of final regulations promulgated pursuant to this chapter and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this chapter shall be in accordance with section 701 through 706 of Title 5, except that –
>
> (1) a petition for review of action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter may be filed only in the United

> States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days from the date of such promulgation or denial.

42 U.S.C. § 6976(a).[3/]

This Court has previously held that determinations by the Administrator of EPA are not among the three actions this Court has jurisdiction to review under section 7006(a). American Portland Cement, 101 F.3d at 775, 777. In American Portland Cement, petitioners challenged EPA's determination under section 3001(b)(3)(C) that cement kiln dust did not warrant full hazardous waste regulation under Subtitle C of RCRA, but should instead be subject to tailored standards to be developed by EPA. American Portland Cement, 101 F.3d at 773. This Court dismissed the petition for lack of jurisdiction, holding that "[t]he plain language [of section 7006(a) of RCRA] indicates that Congress intended for this court to have original jurisdiction to review three specific types of agency action; although Congress used the term 'determination' in the jurisdictional passage of §

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[3/] The other judicial review subsection of RCRA, section 7006(b), provides for judicial review of the Administrator's action in "granting, denying, or withdrawing authorization or interim authorization" under RCRA's state authorization provisions. See 42 U.S.C. § 6976 (b)(2); 42 U.S.C. § 6926. EPA does not concede that section 7006(b) would provide a basis for jurisdiction because TDSL does not seek review of the grant, denial, or withdrawal of Texas's RCRA authorization, but of EPA's discretionary decision not to commence withdrawal proceedings. In any event, section 7006(b)(2) would not provide a basis for jurisdiction over TDSL's claim in this Court, as that provision requires TDSL to file suit in the Circuit Court for the federal judicial district in which TDSL resides or transacts business, in this case, the Fifth Circuit. See 42 U.S.C. § 6976(b)(2).

7006(a)(2) and has expressly given the court original jurisdiction over 'determinations' in other statutes, it did not give the court jurisdiction to review 'determinations' in this context." Id. at 775 (emphasis added).

The Court in American Portland Cement held that the determination at issue there was not a regulation because (1) "EPA labeled its action a 'determination' rather than a regulation," and "no regulatory flexibility analysis was required;" (2) EPA had not published its determination in the Code of Federal Regulations; and (3) the determination did not "have binding effects on the interested parties and the agency." Id. at 776. Accordingly, the Court dismissed the petition for lack of jurisdiction because the determination was not one of the three actions that section 7006(a) of RCRA grants this Court jurisdiction to review. Id.; see also Molycorp, 197 F.3d at 545-6.

This Court properly found the determination at issue in American Portland Cement was not subject to judicial review, and the determination at issue here is also clearly not reviewable. First, EPA's determination does not even reference current or future regulatory developments, but simply explains EPA's basis for refusing to commence proceedings to withdraw Texas' RCRA authorization at TDSL's request, an action which has no effect on any regulation or requirement. Second, as in American Portland Cement, EPA's finding on TDSL's petition for

the withdrawal of Texas' authorization is labeled a "determination" and establishes no new regulatory controls. Id. at 776; see also Molycorp, 197 F.3d at 546 (holding that a guidance issued by EPA was not reviewable because although it might "assist the industry, public and federal and state regulators in applying statutory and regulatory requirements of RCRA, the guidance is not a substitute for those legal requirements; nor is it a regulation itself.").

Third, EPA's determination is not published in the Federal Register or Code of Federal Regulations. Id.; see also Brock v. Catherdral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986)("The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations . . . ."). Instead, EPA's determination was issued in response to a specific petition from TDSL and does not establish new generally applicable requirements for any party. EPA's determination has no binding regulatory effects on interested parties. See American Portland Cement, 101 F.3d at 776. EPA's determination simply leaves in place Texas' existing RCRA authorization based on EPA's finding that Texas' program operates in compliance with the requirements of federal law. See Determination at 7, attached as Ex. A (finding that "[s]ince TCEQ has interpreted state law consistently with Federal law and TCEQ is properly exercising control over the operation of the program, EPA does

not find - on the basis of the mixture rule - that cause exists to commence a proceeding for withdrawal of Texas' RCRA program."); 9-10 (finding that because a number of unresolved facts bear on whether EPA's Land Disposal restrictions apply to the waste in question, no basis exists to conclude that TCEQ's approach to the land disposal restrictions is contrary to federal regulations). As in American Portland Cement, the regulatory determination at issue here does not promulgate a regulation or a requirement.

Finally, EPA's determination is not a denial of a petition for rulemaking. TDSL's petition requested that EPA commence proceedings to withdraw Texas's RCRA Subtitle C program. As explained above, the withdrawal proceedings primarily involve a hearing to gather evidence on a State's compliance with RCRA requirements. See 40 C.F.R. § 271.23(b)(1). EPA's regulations do not require the Agency to initiate rulemaking in response to a petition to commence withdrawal proceedings. Thus, TDSL's petition cannot be construed as a petition for rulemaking, and EPA's determination does not constitute an impermissible rulemaking. Accordingly, for the reasons discussed herein, the Court should dismiss this petition for lack of jurisdiction.[4/]

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[4/] The petition for review may also raise potential standing and ripeness concerns. In the event that the Court orders briefing of the merits, EPA reserves its right to raise standing and ripeness defenses after reviewing petitioners' demonstration of standing in their opening brief.

## CONCLUSION

For the foregoing reasons, the petition for review should be dismissed.

Respectfully submitted,

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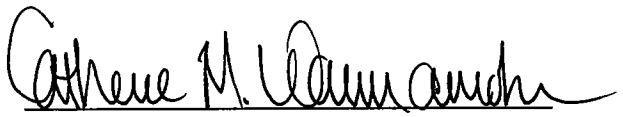

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Dated: April 30, 2007

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Additionally, EPA reserves the right to raise the argument that the action TDSL seeks to challenge here - EPA's determination not to commence withdrawal proceedings – is a decision wholly committed to the Agency's discretion, and thus constitutes unreviewable agency action. See, e.g., Sendra Corp. v. Magaw, 111 F.3d 162, 166 (D.C.Cir. 1997) (agency's denial of request for consideration committed by law to agency discretion and therefore generally unreviewable).

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents' Motion to Dismiss Petition for Review was served by first-class mail, postage pre-paid, on April 30, 2007, upon:

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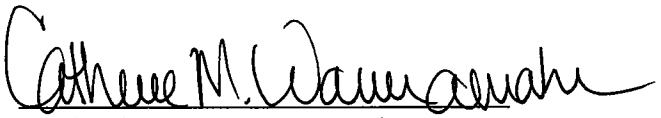

Catherine M. Wannamaker

# Exhibit A

Docket No: W/Petition-TX/RCRA-06-2006-0001

# Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program

**RESPONSE TO THE PETITION**
May 16, 2006

This is the determination as to whether cause exists for the United States Environmental Protection Agency Region 6 ("Region") to commence proceedings for withdrawing authorization of Texas' hazardous waste program managed by the Texas Commission on Environmental Quality ("TCEQ") under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 3006(e), and 40 C.F.R. Parts 271.22 and 271.23, as requested by Texas Disposal Systems Landfill, Inc. ("TDSL" or "Petitioner").

## Background

On November 14, 2005, TDSL submitted its "Petition of Texas Disposal Systems Landfill, Inc. to U.S. Environmental Protection Agency for Withdrawal of Approval of the Hazardous Waste Program of the State of Texas" (hereinafter the "Petition") to the EPA Administrator and EPA Region 6 Regional Administrator. The Regional Administrator has been delegated the authority to take action relative to the authorization of Texas' hazardous waste program pursuant to RCRA (referred to by the Petition as the "hazardous waste program" of the State of Texas). *See* EPA Delegation Authority number 8-7, 1200 TN 350 (May 11, 1994) (State Hazardous Waste Programs); *See also* 40 C.F.R. § 272.2201 (Texas State-administered program: final authorization).

On December 7, 2005, the Region forwarded a copy of the Petition to TCEQ stating that the Region was beginning an informal review of the Petition and requesting that TCEQ forward to the Region any response or information TCEQ might have concerning the Petition. The Region received a response from TCEQ on December 16, 2005, with ten attachments. TDSL also sent in two subsequent letters regarding the Petition. In a letter dated December 29, 2005, TDSL responded to a letter dated December 16, 2005, from Pamela Giblin, counsel for Penske Truck Leasing Co., L.P. ("Penske") to Troy Hill, Associate Director, EPA Region 6 RCRA Programs Division. In a letter dated January 24, 2006, TDSL responded to a letter dated December 15, 2005, from Glenn Shankle, Executive Director of TCEQ, to Carl Edlund, Director, EPA Region

6 Multimedia Planning and Permitting Division. The Region thereafter commenced its informal investigation into the allegations of the Petition pursuant to 40 C.F.R. §§ 271.22 and 271.23, reviewing these and other documents. This informal investigation is now complete.

## *Framework for Review of a Petition to Withdraw Approval of an Authorized State RCRA Program*

Congress established within RCRA provisions for promulgating regulations to effectuate state program development, for authorizing state programs, and for withdrawing state program authorization.. RCRA §§ 3006(a), (b), and (e).

Pursuant to RCRA § 3006(a), EPA promulgated 40 C.F.R. Part 271. Particularly relevant to reviewing this Petition is 40 C.F.R. § 271.23(b)(1) which provides:

> The Administrator may order the commencement of withdrawal proceedings . . . in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in § 271.22. . . . The Administrator shall respond in writing to any Petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the Petition to determine whether cause exists to commence proceedings under this paragraph (271.23(b)) . . . . (Emphasis added.)

Whether to order the commencement of withdrawal proceedings or conduct an informal investigation of the allegations in a petition are both within the discretion of EPA. The Region here, however, has conducted an informal investigation of the allegations of the Petition regarding TCEQ's authorized RCRA program to determine whether cause exists to commence withdrawal proceedings. In order to make this determination, EPA looked to the provisions of 40 C.F.R. § 271.22(a), which specify circumstances under which withdrawal may be appropriate:

> (a) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this subpart, and the State fails to take corrective action. Such circumstances include the following:
> (1) When the State's legal authority no longer meets the requirements of this part including:
> (i) Failure of the State to promulgate or enact new authorities when necessary; or
> (ii) Action by a State legislature or court striking down or limiting State authorities.

(2) When the operation of the State program fails to comply with the requirements of this part, including:
   (i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;
   (ii) Repeated issuance of permits which do not conform to the requirements of this part; or
   (iii) Failure to comply with the public participation requirements of this part.

(3) When the State's enforcement program fails to comply with the requirements of this part, including:
   (i) Failure to act on violations of permits or other program requirements;
   (ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed;
   (iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under § 271.8.

EPA has analyzed the Petition allegations within the framework of this regulation. However, Petitioner does not specifically explain how its allegations establish that the State's program no longer meets the requirements of 40 C.F.R. Part 271. Petitioner only cites to 40 C.F.R. § 271.22(a) generally as the bases for why it believes cause exists to commence a proceeding to withdraw. It is difficult for EPA to evaluate this general assertion without any discussion of the specific bases for withdrawal, such as those listed in 40 C.F.R. §§ 271.22(a)(1)-(a)(4).

Authorizing a hearing to withdraw any state's program is a serious matter and should occur only where there are reliable facts and support for the allegations. While EPA must ensure that each state is maintaining a program in accordance with the statute and regulations cited above, EPA also must be mindful of the significant impact on the states of having to respond to these petitions and defend its implementation of its authorized program in a possible hearing. Authorizing such a proceeding should not be done lightly. Each petition requires the relevant state agency to incur significant costs to defend its implementation of the program, costs both in terms of funds and staff time. These are resources that would be otherwise directed to developing and issuing permits or in pursuing and prosecuting violations of environmental programs. Further, two courts have noted that: "[w]ithdrawal of authorization for a state [RCRA] program is an "extreme" and "drastic" step . . . ." *U.S. v. Power Engineering Company*, 303 F.3d 1232, 1238 (10th Cir. 2002) (citing *Waste Management of Illinois v. EPA*, 714 F.Supp. 340, 341 (N.D. Ill. 1989)). Furthermore, EPA believes there must be a broad programmatic concern with a state program in order to support a finding that the state program fails to comply with the requirements of 40 CFR Part 271, rather than issues associated with a single incident.

*Summary of Petitioner's Allegations for Withdrawal of the RCRA Program*

Petitioner's allegations that TCEQ misinterprets the rules stems from a highway accident involving a truck hauling 19-inch color televisions and more specifically, the disposition of the debris from that accident, particularly cathode ray tubes ("CRTs") contained in the televisions. Penske was shipping the televisions for Zenith Electronics Corporation ("Zenith"). The accident debris was hauled to TDSL which is a RCRA municipal solid waste landfill (not a hazardous waste landfill). Petitioner alleges the CRTs contained in the televisions are characteristic hazardous waste under RCRA for toxicity for lead. At least some of the CRTs were mixed with non-hazardous accident debris, solid waste, and soil when they were placed into the face of the TDSL landfill. This mixture of solid waste and CRTs was subsequently removed from the landfill, sorted for visible CRT parts which were taken to another facility, and the remaining removed waste ("exhumed waste") was containerized at TDSL. Many of the Petitioner's allegations of fact, if not all of them, are adamantly disputed by Penske and Zenith in ongoing civil litigation and appeals of administrative decisions.

The Petitioner has alleged many facts in the Petition and argues that Texas' RCRA program conflicts with all four of the circumstances from 40 C.F.R. § 271.22, quoted above. For purposes of EPA's determination, however, it is not necessary to determine the veracity of all of the factual allegations because the Petitioner's argument is a legal one–TCEQ's alleged misinterpretation of the law. Petitioner argues that because of this alleged TCEQ misinterpretation of the law, each of the circumstances of 40 C.F.R. § 271.22 are met. Although Petitioner fails to specifically describe how its allegations meet any one of the circumstances, the gravaman of the Petition is that "TCEQ has interpreted language in its rules, which is essentially the same as the language in EPA's rules, in a way that conflicts with both the clear language of the rules and EPA's interpretation of its rules." Petition at 2.

*Question of Law*

In light of the factual disputes and the litigation, EPA does not believe it is appropriate to act as the finder of fact. This is particularly true in the context of remediation such as here. Authorized states are encouraged to reasonably interpret their authorized programs. The Petition can thus be decided as a question of law. In a letter dated January 24, 2006, to EPA Region 6, TDSL apparently agreed that the issue is a question of law. In that letter TDSL stated:

> The facts are discussed in detail in the Petition, but in general the legal issues for EPA boil down to whether, under Federal law, these characteristic toxic hazardous wastes [allegedly the CRTs] can be treated as non-hazardous waste once mixed with other wastes.

Letter dated January 24, 2006, from Richard W. Lowerre and James B. Blackburn, Jr., attorneys for TDSL, to Carl Edlund, Director, EPA Region 6 Multimedia Planning and Permitting Division, at 1 (emphasis in original). Essentially, TDSL argues that the core issue is a legal rather than factual one. Thus, EPA believes it is appropriate to simply answer the legal question, which is: whether a RCRA characteristic hazardous waste mixed with non-hazardous material is still hazardous waste under RCRA and must be treated and disposed of pursuant to RCRA land disposal restrictions even though the resulting mixture tests below RCRA characteristic hazardous and land disposal restriction levels.[1]

## *Analysis of the Petition*

Petitioner contends that TCEQ has wrongly interpreted the RCRA regulations regarding what is a characteristic hazardous waste and whether that waste must be treated before land disposal.

### *Regulatory Background*

RCRA "is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with . . . rigorous safeguards and waste management procedures." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 331, 114 S.Ct. 1588, 1590, 128 L.Ed.2d 302 (1994). RCRA requires EPA to regulate the identification, disposal, and treatment of "hazardous waste," which is defined as a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may: (1) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. 42 U.S.C. § 6903(5). "Solid waste" is defined as any "discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial [or] commercial . . . operations." *Id.* § 6903(27).

RCRA requires EPA to develop and promulgate circumstances for identifying the characteristics of hazardous waste and for listing hazardous waste. 42 U.S.C. § 6921(a). EPA must take into account "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." *Id.* EPA must "promulgate regulations identifying

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[1] EPA is analyzing the Petition using the cites to the EPA regulations for convenience, but the operative Subtitle C regulations are those adopted by Texas and authorized by EPA.

the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of section 6903(5) of this title), which shall be subject to the provisions of this subchapter." *Id.* § 6921(b)(1). Therefore, pursuant to 42 U.S.C. § 6921, EPA hazardous wastes fall into two categories: (1) they possess one of the four hazardous characteristics identified by the EPA in 40 C.F.R. Part 261, Subpart C (ignitability, corrosivity, reactivity, or toxicity), or; (2) they have been found to be hazardous as a result of an EPA rulemaking. *See id.* § 261.3(a)(2)(i) (1991); *see id.* Part 261, Subpart D ("listed wastes"). The first category of hazardous waste is often referred to as "characteristic" hazardous waste. The second category is often referred to as "listed" hazardous waste.

Both characteristic hazardous wastes and listed hazardous wastes are subject to regulation under Subtitle C of RCRA, which applies stringent management standards to the generation, transportation, treatment, storage, and disposal of hazardous waste. *See* 42 U.S.C. §§ 6921 and 6925. However, as one can see from the statutes and regulations discussed above, "characteristic" and "listed" hazardous wastes are two very distinct categories of hazardous waste and are regulated differently by EPA.

*The Mixture Rule*

The Petitioner questions TCEQ's interpretation of the RCRA "mixture rule." 40 C.F.R. § 261.3(a)(2). Petitioner argues that the proper interpretation of RCRA means that "mixing the spilled hazardous waste with municipal solid waste does not defeat the materials' hazardous waste designation under RCRA." Petition Exhibit 1, at 8. In other words, Petitioner argues that if a waste is a characteristic hazardous waste and that waste is mixed with non-hazardous material, the resulting mixture is still characteristic hazardous waste, even if it does not exhibit any characteristics of hazardous waste. Petitioner alleges that TCEQ failed to regulate the exhumed waste consistent with this interpretation.

Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. For purposes of EPA's analysis, however, this alleged misinterpretation of law could arguably fall under the circumstance at 40 C.F.R. § 271.22(a)(2)(i), which states "when the operation of the State program fails to comply with the requirements of this part, including: (i) [f]ailure to exercise control over activities required to be regulated under this part . . . ." The alleged misinterpretation would be that TCEQ did not exercise control over the CRT waste as a hazardous waste.[2]

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[2] This alleged misinterpretation would not fall under 40 C.F.R. § 271.22(a)(1), regarding legal authority, because Petitioner alleges that the language in TCEQ's rules at issue "is essentially the same as the language in EPA's rules . . . ." Thus, the question is not one of whether TCEQ has the appropriate legal authority. 40 C.F.R. §§ 271.22(a)(3)

The Petitioner's interpretation of the law is incorrect. The federal interpretation of RCRA is that if a characteristic hazardous waste is mixed with non-hazardous solid waste, and that resulting mixture (other than wastes not at issue here such as beneficiation wastes) does not exhibit any characteristics of hazardous waste, then the resulting mixture is no longer characteristic hazardous waste. EPA did not intend the mixture rule to apply to characteristic hazardous wastes. This is evident in the plain language of the RCRA regulation covering the definition of solid and hazardous waste that states:

> (d) Any solid waste . . . is not a hazardous waste if it meets the following criteria:
>
> > (1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in subpart C of this part . . . .

40 C.F.R. § 261.3(d)(1).

Contrary to Petitioner's claim, the "mixture rule" in 40 C.F.R. § 261.3(a)(2) does not apply to the mixture of wastes here. In 2001 EPA reaffirmed its regulatory definition of a listed "hazardous waste" to include, subject to certain exceptions, "a mixture of solid waste and one or more hazardous wastes **listed** in Subpart D of this part . . . ." 40 C.F.R. § 261.3(a)(2)(iv) (emphasis added); *see* 66 Fed. Reg. 27,266. This rule was ultimately upheld in *American Chemical Counsel v. EPA*, 337 F.3d 1060 (D.C. Cir. 2003) (discussing EPA's policy behind why the mixture rule does not apply to characteristic hazardous waste). Thus, even if the solid waste and CRTs were a characteristic hazardous waste when added to the landfill, the exhumed waste, which presumably was a mixture of solid waste, CRTs, and landfill waste and cover, would not automatically be characteristic hazardous waste. If the exhumed waste at TDSL does not exhibit any characteristics of hazardous waste, then the waste would not be hazardous waste under RCRA.

This is the interpretation followed by TCEQ for the exhumed waste. Since TCEQ has interpreted state law consistently with Federal law and TCEQ is properly exercising control over the operation of the program, EPA does not find–on the basis of the mixture rule–that cause exists to commence a proceeding for withdrawal of Texas' RCRA program.

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and (4) are discussed in other sections of this determination, *infra.*

*Land Disposal Restrictions*

TDSL also argues that if the alleged TCEQ interpretation of the law stands, and the exhumed waste may be considered non-hazardous even if it does not exhibit a characteristic of hazardous waste, that "[n]o treatment would be required prior to disposal." Petition at 2. EPA assumes for the purpose of this determination that TDSL is arguing that TCEQ has misinterpreted the Land Disposal Restrictions rules found at 40 C.F.R. Part 268 ("LDRs"). Again, Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. For purposes of EPA's analysis, however, this second alleged misinterpretation of law regarding LDRs could arguably fall under 40 C.F.R. § 271.22(a)(2)(i), which states "when the operation of the State program fails to comply with the requirements of this part, including: (i) [f]ailure to exercise control over activities required to be regulated under this part . . . ."[3]

Regarding LDRs, 40 C.F.R. § 261.2(d) provides:

> (d) Any solid waste . . . is not a hazardous waste if it meets the following criteria:
>
> > (1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in subpart C of this part. (However, wastes that exhibit a characteristic at the point of generation may still be subject to the requirements of part 268 [land disposal restrictions], even if they no longer exhibit a characteristic at the point of land disposal.)

40 C.F.R. § 261.3(d)(1) (emphasis added).

Thus, land disposal restrictions may apply to once-characteristic hazardous wastes that no longer exhibit a characteristic when they are disposed. *Chemical Waste Management v. EPA*, 976 F.2d 2, at 14, 16 (D.C. Cir. 1992). If a waste as generated exhibits a characteristic, it ordinarily must meet LDR treatment standards before it may be land disposed, even if it no longer exhibits a characteristic (or is otherwise hazardous) at the time of disposal.

EPA has also adopted special land disposal restriction rules for remediation wastes. See 63 FR 28,566, 28,602-28,622 (May 26, 1998) (contaminated soils); 57 FR

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[3] *See* footnote 2, as to why EPA believes 40 C.F.R. § 271.22(a)(1) does not apply. *See* discussion, *infra*, as to (3) and (4).

37,194, 37,211-37,243 (August 18, 1992) (contaminated debris). [4] These include fact-dependent principles as to what the point of generation is for such wastes, which in turn determines whether land disposal restrictions apply, and if so, which ones. See. e.g. 63 FR at 28,617-28,620.

Here, a number of critical facts remain in dispute and will not be resolved until litigation, or resolution in another forum such as alternative dispute resolution, is concluded. These include whether the initial waste (the amalgamation of CRTs and soil picked up after the accident) exhibited a characteristic, the extent to which CRTs were removed from that amalgamated mixture, whether as a result of this removal the waste ultimately exhumed from the landfill is deemed to be newly generated for purposes of LDRs, and the contents of the exhumed waste. All of these facts bear on if and when LDRs apply, and if so, which specific treatment standards would be applicable.

Assuming LDRs apply, there are two treatment standards which are potentially applicable. The first is for D008 wastes generally (wastes exhibiting the characteristic for lead). This standard is 0.75 mg/l using the Toxic Characteristic Leaching Procedure ("TCLP") (plus meeting treatment standards for other hazardous constituents present in the waste matrix). 40 C.F.R. § 268.40 Table.

The second of these standards are separate LDR treatment standards for soils and debris. Since many spill residues are either soil or debris, it would seem at least possible that the mixture initially picked up here would be one or the other. Treatment standards for soils subject to LDR are ten times the universal treatment standard for the constituent at issue, or a 90 % reduction in mobility for that constituent. *See* 40 C.F.R. §§ 268.49 (c)(1) (B) and (C). For lead, this would be a level of 7.5 mg/l measured by the TCLP (or a 90 % reduction in mobility from lead levels in the waste as-generated). Treatment standards for debris are work practices (such as separating the contaminating fraction from otherwise inert dirt) rather than numerical levels. 40 C.F.R. § 268.45. The State of Texas has provided EPA TCLP data from samples of the exhumed waste and none of these reported data exceed any of the potentially-applicable LDR treatment standards. Thus, even assuming that LDRs apply to the initial mixture, and continue to apply to the exhumed waste, the exhumed waste potentially can be legally land disposed, regardless of which (if any) of the potential LDRs apply.

Because the facts are in dispute, this matter is in litigation, and the waste has not

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[4] "Soil," among other things, means "a mixture of [soil] with liquids, sludges, or solids which is inseparable by simple mechanical removal processes and is made up primarily of soil by volume . . . ."; and "debris" includes "solid material exceeding a 60 mm particle size such as manufactured objects, plant or animal matter, or geologic material. *See* 40 C.F.R. §§ 268.2(k) and (g).

been disposed of at this time, it is unclear what position TCEQ would take regarding LDRs for this truck accident and the exhumed waste.[5] It is also unclear that this answer has a practical consequence if the exhumed waste meets any of the treatment standards which could be applicable. Thus, EPA finds no basis at this time to conclude that TCEQ's approach to the LDR regulations is contrary to the requirements of 40 C.F.R. Part 271, nor does EPA believe TCEQ has done anything in this situation to suggest a programmatic conflict between the state and federal LDR regulations. Therefore, EPA does not find that cause exists to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

*Impermissible Dilution of the Waste*

TDSL's Petition also argues that: "TCEQ has interpreted its rules to allow wastes classified as hazardous due to their toxic characteristics to be subsequently **diluted** or mixed and then reclassified as non-hazardous wastes." Petition at 2 (emphasis added). As stated previously, Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. Like the interpretation of law regarding whether the exhumed waste is hazardous and the interpretation of law regarding LDRs, for purposes of EPA's analysis, this third alleged misinterpretation of law regarding dilution could arguably fall under 40 C.F.R. § 271.22(a)(2)(i), "when the operation of the State program fails to comply with the requirements of this part, including: (i) [f]ailure to exercise control over activities required to be regulated under this part . . . ."[6]

A person is prohibited from diluting "a restricted waste . . . as a substitute for adequate treatment to achieve compliance with [the applicable treatment standard] to otherwise avoid a prohibition in subpart C of the part, or to circumvent a land disposal prohibition imposed by RCRA section 3004." 40 C.F.R. § 268.4. On January 15, 2004, TCEQ sent a letter to TDSL stating that: "40 Code of Federal Regulations Section 268.3 prohibits dilution as a means to render a characteristic hazardous waste as non-hazardous." This letter indicates that TCEQ interprets the law consistently with EPA's interpretation. EPA has no reason to believe TCEQ has taken a position contrary to EPA regulations. Therefore, EPA does not find that cause exists to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

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[5] EPA understands that TCEQ proposes sending the waste to a facility that would further test the exhumed waste to see if it exhibits a characteristic (a level less than the treatment standards for soils, e.g. 5.0 mg/l TCLP versus the treatment standard for soil of 7.5 mg/l TCLP, as explained in the previous paragraph) and make a disposal determination.

[6] *See* footnote 2, as to why EPA believes 40 C.F.R. § 271.22(a)(1) does not apply. *See* discussion, *infra*, as to (3) and (4).

*TCEQ's Enforcement Discretion*

Petitioner argues that TCEQ's alleged actions mean the State's RCRA program "does not provide for adequate enforcement of compliance with federal requirements [at] 42 U.S.C. § 6962(b) . . . ." Petition at 4. Again, Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. For purposes of EPA's analysis, however, this allegation could arguably fall under the withdrawal circumstances at 40 C.F.R. § 271.22(a)(3)(i), which states "[f]ailure to act on violations of . . . other program requirements," and (ii), which states "[f]ailure to seek adequate enforcement penalties . . . " While improper "dilution" of a characteristic hazardous waste under RCRA might be unlawful, dilution of a characteristic hazardous waste has nothing to do with whether the diluted or mixed waste is classified subsequently as characteristic hazardous waste.

That there might have been a violation connected with "dilution" of the exhumed waste event (the facts are disputed) does not mean TCEQ must enforce against the violator. Indeed, EPA Region 6, which has oversight authority over states' enforcement activities, did review TCEQ's actions with regard to the truck accident and the exhumed waste as part of EPA Region 6's informal investigation. EPA Region 6 enforcement personnel believe that TCEQ's enforcement activity with respect to the exhumed waste was properly within TCEQ's discretion.[7]

While Petitioner may disagree with TCEQ's enforcement response in this case, EPA does not believe the allegations presented here provide any grounds to conclude that TCEQ's enforcement program fails to meet the requirements of 40 C.F.R. Part 271. Therefore, EPA does not find that cause exists to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

*The Memorandum of Agreement and Memorandum of Understanding (MOA/MOU)*

Petitioner alleges that TCEQ's actions justify commencing withdrawal proceedings pursuant to 40 C.F.R. § 271.22(a)(4): "[w]hen the State program fails to comply with the terms of the Memorandum of Agreement required under § 271.8." EPA and the Texas Natural Resources Conservation Commission (now TCEQ) entered into a

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[7] Moreover, TCEQ's Executive Director stated that "because this matter is best resolved in court, I do not plan to take further action on Penske's Notice of Violation pending the resolution of this matter in court proceedings." Letter dated December 16, 2005, from Glenn Shankle, Executive Director, TCEQ, to Carl Edlund, Director, EPA Region 6 Multimedia Planning and Permitting Division.

Memorandum of Agreement (MOA) on March 27, 2003, and a Memorandum of Understanding (MOU) on April 1, 1999. These documents entail 24 pages of agreements. Nowhere in the Petition, however, does Petitioner state any term or section of the MOA/MOU with which the TCEQ program fails to comply. For this reason alone, the Petition fails to allege enough facts to justify withdrawal of TCEQ's RCRA program. *See U.S. v. Power Engineering Company*, 303 F.3d 1232, 1238 (10th Cir. 2002); *Waste Management of Illinois v. EPA*, 714 F.Supp. 340, 341 (N.D. Ill. 1989).

The MOA/MOU do generally require that the Texas RCRA program be consistent with the federal RCRA statue and its associated regulations. The MOA states that the Regional Administrator will assess the State's administration of the hazardous waste program for consistency with RCRA. MOA § III.A. And, the MOU has provisions for EPA to review the State's enforcement program's performance. MOU § IV. As discussed above, on the whole, Texas' RCRA program is consistent with the federal RCRA statute, regulations, and TCEQ here enforced within the ambit of its discretionary authority. For this reason also, TCEQ's RCRA program does comply with the MOA/MOU entered into pursuant to 40 C.F.R. § 271.8. Therefore, EPA does not find that cause exists under 40 C.F.R. § 271.22(a)(4) to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

*Determination Concerning the RCRA Petition*

For the above stated reasons, I have determined that the Petition before me does not provide cause to order the commencement of withdrawal proceedings and I therefore deny the Petition.

Richard E. Greene
Regional Administrator
EPA Region 6

Dated: DEC-16-06