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

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' REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS PETITION FOR REVIEW

In their Response to the U.S. Environmental Protection Agency's ("EPA") Motion to Dismiss, Petitioners Texas Disposal Systems Landfill, Inc., Texas Campaign for the Environment, and Clean Water Action (collectively hereinafter "TDSL") candidly admit the central and dispositive issue in this case, i.e. that "a simple refusal to commence withdrawal proceedings [relating to Texas' hazardous waste management program] is not a final regulation or requirement subject to judicial review under section 7006(a)." Pets. Resp. at 9. Despite this admission, TDSL asserts this Court has jurisdiction because EPA's determination refusing to commence withdrawal proceedings "announces new rules indirectly," see Pet.

Resp. at 7. TDSL fails to explain what binding effects on its behavior or the behavior of EPA flow from the determination, however. EPA's determination merely announces the Agency's conclusion that no cause exists to commence proceedings to withdraw Texas' hazardous waste management program based on a single incident and promulgates no new rules of general applicability. Accordingly, the determination is not tantamount to a regulation, and TSDL's petition for review should be dismissed for lack of jurisdiction.

ARGUMENT

I. TDSL Has Not Challenged A Final "Regulation" Reviewable Under RCRA.

As explained in the motion to dismiss, this Court has repeatedly held that actions by the Administrator of EPA akin to EPA's determination here are not reviewable in this Court under the narrow judicial review provision of the Resource Conservation and Recovery Act ("RCRA") section 7006 (a)(1), 42 U.S.C. § 6976(a)(1).[1/] See Molycorp, Inc. v. EPA, 197 F.3d 543 (D.C. Cir. 1999);

[1/]Petitioner TDSL has filed three separate actions challenging EPA's determination: (1) the present action, (2) an action brought pursuant to RCRA section 7006(b) in the United States Court of Appeals for the Fifth Circuit, and (3) an action brought pursuant to the Administrative Procedure Act ("APA") in the United States District Court for the Western District of Texas. By agreement of the parties, the Fifth Circuit and Western District of Texas cases are presently stayed.

EPA concedes that TDSL may assert an APA claim in district court alleging that the Agency's refusal to withdraw Texas' RCRA authorization was arbitrary and capricious. TDSL's petition before this Court seeks a far broader ruling on substantive statements made in the

Florida Power & Light Co. v. EPA, 145 F.3d 1414 (D.C. Cir. 1998); American Portland Cement Alliance v. EPA, 101 F.3d 772 (D.C. Cir. 1996). In response to EPA's motion, TDSL acknowledges that EPA's determination is not reviewable on its face, see Pets. Resp. at 9, but claims that the determination contains "new legal standards" which, in TDSL's view, constitute "indirectly" promulgated "new rules." Id. at 7. Accordingly, the only dispute between the parties is whether EPA's determination constitutes a rule as a result of its "binding effects on private parties or on the agency." Molycorp, 197 F.3d at 545. TDSL's arguments on this point ignore the narrow scope of RCRA's judicial review provision and fail to distinguish the Court's prior holdings that similar agency pronouncements are not tantamount to regulations reviewable under RCRA section 7006(a)(1).

On three occasions, this Court has considered the scope of RCRA section 7006(a)(1) in situations relevant here, and in each of those cases, the Court dismissed the petitions for review, stressing the narrow scope of judicial review available under RCRA. First, in American Portland Cement Alliance v. EPA, 101 F.3d 772 (D.C. Cir. 1996), a coalition of environmental and citizens groups sought

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determination, however. Should TDSL seek to pursue its claims in the proper district court forum pursuant to the APA, EPA reserves the right to argue that the agency action at issue is wholly committed to EPA's discretion, and thus is unreviewable. See, e.g., Sendra Corp. v. Magaw, 111 F.3d 162, 166 (D.C. Cir. 1997) (holding that an agency's denial of a request for consideration was committed by law to agency discretion and therefore unreviewable).

to challenge an EPA determination not to subject cement kiln dust to full Subtitle C RCRA regulation, but instead to more tailored Subtitle C standards. 101 F.3d at 773, 777-78. EPA characterized the decision as a "regulatory determination" and published it in the Federal Register. 101 F.3d at 773. Nonetheless, the Court held that the determination was not a "regulation" challengeable under 42 U.S.C. § 6976(a). Although EPA did "determine" that cement kiln dust should be subject to some Subtitle C regulation, 101 F.3d at 777-78, and also rejected the notion that the dust should be subject to full Subtitle C requirements, id. at 776, the details and final parameters of the applicable requirements would not be known until future rulemakings were completed. 101 F.3d at 777. In the Court's view, any regulatory actions were still "in flux," and thus EPA's determination set no binding law or policy on interested parties or the Agency. Id.

Next, in Florida Power & Light Co. v. EPA, 145 F.3d 1414 (D.C. Cir. 1998), the Court dismissed a utility's attempt to challenge two EPA statements made in a preamble to a proposed rule regarding the scope of the Agency's authority to order corrective action under section 3008(h) of RCRA, 42 U.S.C. § 6928(h). See Florida Power & Light, 145 F.3d at 1417-18. At the time EPA made the disputed statements, it was engaged in settlement negotiations with Florida Power & Light, but had not yet issued any 3008(h) corrective action orders to it.

Id. at 1418. In rejecting the utility's contention that the preamble statements -- as illuminated by EPA's nascent enforcement efforts -- were sufficient to constitute a reviewable "regulation," the Court observed, among other things, that these preliminary enforcement steps had themselves imposed no binding obligations, and that Florida Power & Light would have the opportunity for judicial review that Congress intended if and when EPA actually did decide to file an enforcement action. Id. at 1419-20. Because the utilities did not have to change any behavior as a result of the preamble statements, the Court concluded that the statements were non-binding and unreviewable under RCRA section 7006(a)(1) (holding that the petitioners failed to demonstrate "that the [challenged] preamble has a direct and immediate rather than a distant and speculative impact upon them . . ." and that the Court must "await a concrete case where we can probe the limits of the rule in the context of a live controversy involving actual events.") (internal citations omitted).

Finally, in Molycorp, Inc. v. EPA, 197 F.3d 543 (D.C. Cir. 1999), a mining company sought review of an unpublished EPA technical background document that, in the company's view, reflected an incorrect interpretation of an existing RCRA Subtitle C exclusion and an incorrect characterization of the company's operations, which allegedly jeopardized the company's qualification for the

exclusion. See 197 F.3d at 544-45. The Court held, however, that the document was not a "regulation" reviewable under RCRA, because it did not "impose obligations on regulated interests or on the EPA" but instead was "merely a non-binding statement of the EPA's view of how it plans to regard particular activities relating to the production of mineral commodities." Id. at 546; see also General Motors Co. v. EPA, 363 F.3d 442, 450-51 (D.C. Cir. 2004) (citing favorably to Molycorp and Florida Power & Light and concluding that EPA letters were not reviewable under RCRA section 7006(a)(1)).

EPA's determination here is, if anything, even less of a "regulation" than were the challenged agency actions in each of these cases. Unlike American Portland Cement, for example, the determination does not make formal findings about future regulatory actions of general applicability to be undertaken; instead, it merely determines whether cause exists to commence withdrawal proceedings for Texas' hazardous waste authorization program. Unlike both American Portland Cement and Florida Power & Light, EPA's determination was not published in the Federal Register or otherwise widely disseminated.

What the determination does have in common with the agency actions challenged in each of these cases is a lack of any cognizable binding legal effect. As with the challenged actions in American Portland Cement, Florida Power &

Light, and Molycorp, EPA's determination is not binding on its face, nor is it applied by the Agency in a way that indicates that it is binding. The determination is not "couched in mandatory language" or "in terms indicating that it will be regularly applied." See General Electric Co. v. EPA, 290 F.3d 377, 383 (D.C. Cir. 2003) citing Robert A. Anthony, Interpretative Rules, Policy Statements, Gudances, Manuals, and the Life - Should Federal Agencies Use Them to Bind the Public?, 41 Duke L.J. 1311, 1355 (1992); see also Kennecott Utah Copper Corp. v. DOI, 88 F.3d 1191, 1207 (D.C.Cir. 1996) (interpreting "regulation" under an analogous judicial review provision as "a statement that has general applicability and that has the legal effect of binding the agency or other parties"). TDSL does not, and cannot, assert that it has had to change its practices as a result of any statements in the determination. Instead, the determination is part of a dialogue, initiated by TDSL, regarding whether cause exists to withdraw authorization of Texas' hazardous waste management program. The determination does not regulate anyone's behavior, but simply explains the Agency's conclusion that no cause exists to commence withdrawal proceedings, a wholly discretionary decision. See 40 C.F.R. § 271.23(b)(1) ("The Administrator may order the commencement of withdrawal proceedings . . .").

Moreover, because the determination finds that Texas administers its

hazardous waste program in accordance with the requirements of federal law, the obligations TDSL is subject to remain the same – that is, TDSL's operations continue to be governed by TCEQ's RCRA-authorized hazardous waste program. Thus, TDSL is "no worse off than it would be had [the determination] not been issued at all." See id. at 547; Cf. Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 732 (D.C. Cir. 2003) (holding that "[n]o legal consequences flow from the agency's conduct to date, for there has been no order compelling Reliable to do anything."). Rather than explaining precisely what effects the determination has on TDSL, TDSL argues that the determination is binding because statements therein "create for *TCEQ* and for *hazardous waste generators* in Texas a safe harbor by which to shape their actions." See Pets. Resp. at 19 (emphasis added). TDSL must show that EPA's determination has a direct and immediate impact on it, however, and not some speculative impact on third parties. See Florida Power & Light, 145 F.3d at 1420. Because TDSL has not demonstrated that it or anyone else has or must change its behavior in response to the Determination, the Determination is not tantamount to a binding regulation reviewable under RCRA section 7006(a)(1). Accordingly, the Court should dismiss the petition for review for lack of jurisdiction.

CONCLUSION

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

Respectfully submitted,

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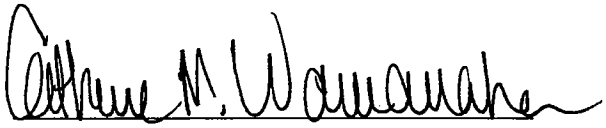

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents' Reply in Further Support of Its Motion to Dismiss Petition for Review was served by first-class mail, postage pre-paid, on May 22, upon:

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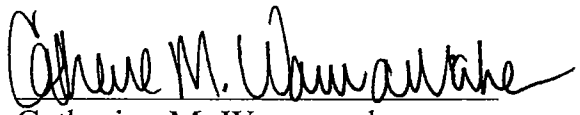

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