

No. 09-50274

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,  
Plaintiff - Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;  
LAWRENCE E. STARFIELD, Regional Administrator;  
LISA P. JACKSON, Administrator,  
Defendants – Appellees

Appeal from the United States District Court  
for the Western District of Texas, Austin Division

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REPLY BRIEF FOR APPELLANT  
TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

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## REPLY TO EPA'S STATEMENT OF THE CASE

### **I. RCRA and Its Implementing Regulations**

EPA's summary of the relevant statutes and regulations, while accurate, omitted relevant and essential regulatory requirements. In particular, the summary failed to include a discussion of land disposal restrictions and the dilution prohibition.

RCRA set up a comprehensive "cradle to grave" management program for hazardous waste. Essential to this management program are the Land Disposal Restrictions ("LDRs"), 40 C.F.R. Part 268.<sup>1</sup> In adopting these Land Disposal Restrictions, EPA emphasized that the applicable LDRs must be determined at the point of generation, not at the point of disposal.<sup>2</sup> Indeed, EPA explained in the Preamble to its LDR rules that it sought to avoid "the enormous difficulties of determining new points of generation every time a hazardous waste is altered in some respect." 55 Fed. Reg. at 22,661. Thus, if a waste is identified as a hazardous waste at the point of generation, the applicable LDRs attach at that time. If that waste later loses its hazardous characteristic at some point prior to land

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<sup>1</sup> The rules were adopted to implement federal law banning disposal of certain hazardous wastes. RCRA § 3004(d)(1), 42 U.S.C.A. § 6924(d)(1) ("[T]he land disposal of hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition . . . is not required to protect human health and the environment . . .").

<sup>2</sup> See Land Disposal Restrictions for Third Third Scheduled Wastes, 55 Fed. Reg. 22,520, at 22651-52 (June 1, 1990) (codified at 40 C.F.R. Parts 148, 261, 262, 264, 265, 268, 270, 271, & 302).

disposal (such as through mixing with other waste), the applicable LDRs that attached at the point of generation still apply; they do not change.

A corollary to the Land Disposal Restrictions is the dilution prohibition.<sup>3</sup> The dilution prohibition works in coordination with the LDRs' "point of generation" principle to assure that the proper treatment level is achieved by appropriate treatment and not by dilution. 55 Fed. Reg. at 22,661-62. Thus, wastes that are inappropriately "diluted," or mixed with other solid wastes, do not comply with LDRs. *Id.* at 22,665.<sup>4</sup>

Finally, EPA expressly stated that the dilution prohibition applies equally to the mixing of hazardous waste and soil: "[A]ny deliberate mixing of prohibited hazardous waste with soil in order to change its treatment classification (*i.e.*, from waste to contaminated soil) is illegal." 63 Fed. Reg. at 28,621. If such an impermissible dilution of hazardous waste were to occur, EPA explained, the resulting mixture (the hazardous waste diluted by soil) would continue to be subject to the LDRs for the original hazardous waste. Thus, no benefit in terms of relaxed treatment requirements would occur through mixture of the hazardous waste with soils. *Id.*

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<sup>3</sup> The rule provides that "no generator, transporter, handler, or owner or operator of a treatment, storage, or disposal facility shall in any way dilute a restricted waste or the residual from treatment of a restricted waste as a substitute for adequate treatment." 40 C.F.R. 268.3(a).

<sup>4</sup> EPA explained, in adopting the LDRs, that the dilution prohibition is "intended to prohibit dilution in lieu of treatment" and to ensure that prohibited wastes are treated by methods that are appropriate to the respective waste. 55 Fed. Reg. at 22,656 & 22,665.

The dilution prohibition is particularly important when addressing toxic characteristic hazardous waste, such as the cathode ray tubes at issue here, because simple dilution is not effective treatment for toxic constituents. 55 Fed. Reg. at 22,656. The EPA recognized that toxic constituents can pose a cumulative impact on land disposal even where the waste is below the characteristic level. 55 Fed. Reg. at 22,655. Accordingly, the LDRs require that toxic characteristic hazardous waste containing lead must be treated to stabilize the underlying hazardous constituent so that the lead will not leach; this simply cannot be done by increasing the volume of the waste via dilution. *Id.* (“Dilution itself does not remove or treat any toxic constituent from the waste.”)

In short, in adopting its hazardous waste regulations, EPA clearly emphasized the importance of cradle-to-grave management of hazardous waste, including the attachment of LDRs at the point of generation of the waste. And it emphasized the importance of proper treatment and the prohibition against dilution. Its Determination, however, fails to implement these rules; in fact, it signifies a departure from the rules.

## **II. Reply to EPA’s Statement of Underlying Facts**

While EPA’s summary of the underlying facts precipitating TDSL’s petition for withdrawal of program approval are essentially accurate, there are a few relevant omissions in EPA’s brief. Significantly, the cathode ray picture tubes that

Penske was transporting at the time of the October 1997 accident were known to be toxic characteristic hazardous wastes if broken, due to their lead content. In fact, Zenith—for whom Penske was transporting the picture tubes—had previously characterized the cathode ray tubes as hazardous if damaged.

In addition, after the hazardous waste was finally removed from TDSL's municipal solid waste landfill, TDSL requested that EPA rescind its Determination. In response, EPA professed that its Determination was a wholly discretionary explanation of its decision not to initiate withdrawal proceedings. But, in that letter, EPA implicitly acknowledged that its Determination was also an affirmative adjudication, one that remains in effect: "EPA stands behind the sound legal analysis contained therein which culminated from months of analysis and coordination with EPA national headquarters." ER 5, Ex. D (USCA5 169).

## **ARGUMENT**

### **I. EPA's Determination was not simply a refusal to enforce; it was an affirmative adjudication, which is reviewable under the APA.**

In its Brief, EPA has conflated (or perhaps oversimplified) the issue presented by TDSL's Complaint. TDSL does not complain of EPA's failure to enforce or to withdraw Texas' hazardous waste program approval. Rather, TDSL complains of EPA's having gone further than simply refusing to enforce. By its Determination, EPA both changed existing law—a legislative function without the

benefit of the APA rulemaking process—and applied that new law in order to adjudicate the allegations in TDSL’s petition—a judicial function without the benefit of an evidentiary hearing. In doing so, EPA has provided the court with legal standards against which to review its Determination.

Admittedly, EPA enjoys some discretion in the grand scheme of determining whether state program approval should be withdrawn. For instance, EPA *may* choose to initiate an informal investigation. Or it may choose not to. 40 C.F.R. § 271.23(b)(1).

Moreover, following an informal investigation, should EPA determine that cause exists to withdraw state program approval, *e.g.*, if the operation of the state program fails to comply with EPA’s regulatory requirements, then, EPA *may* commence proceedings to withdraw approval. *Id.* Or, arguably, it may choose not to; it may choose to informally address the issue, by coordinating with the state’s regulatory agency.

Similarly, if EPA had simply applied existing, well-established law to the factual allegations in TDSL’s petition and concluded that, all things considered, withdrawal of Texas’ hazardous waste program was not justified, then, that would have been a non-reviewable exercise of enforcement discretion. Indeed, had EPA applied the law correctly, determined that cause did exist, and yet chosen not to commence withdrawal proceedings because it did not have the resources to devote



to such a proceeding, this too might be construed as a discretionary decision not to enforce. But that is not what occurred here.

Here, EPA did not simply choose not to take an enforcement action. EPA adjudicated the allegations in TDSL's petition, and it did so by evaluating that petition against its interpretation of its regulations, providing legal standards against which to review that adjudication.

Thus, contrary to EPA's argument, this case is not analogous to this Court's decision in *Public Citizen, Inc. v. EPA*, 343 F.3d 449 (5<sup>th</sup> Cir. 2003). In that case, Public Citizen challenged EPA's failure to issue notices of deficiency. EPA disagreed with Public Citizen that certain alleged deficiencies warranted such notices of deficiencies. In other words, EPA chose not to pursue the course of action urged by Public Citizen. This Court held that EPA's refusal to issue the notices of deficiency was not reviewable; it correctly interpreted EPA's discretionary authority to extend to deciding if the state's failings rose to the level of "inadequate program administration," such that an enforcement action should be initiated. *Id.*

In *Public Citizen*, EPA did not adjudicate Public Citizen's claims. It simply chose not to take the requested enforcement action. Here, however, EPA never reached this discretionary decision regarding whether to enforce, because it

affirmatively *approved* of TCEQ's interpretation of law. And it did so based on an arbitrary and capricious application of the law.

## **II. A live controversy exists.**

EPA argues that no live controversy exists in this case because the case has been rendered moot and TDSL no longer has standing to pursue its complaint. For support, EPA relies on the fact that the hazardous waste that had been stored at TDSL's municipal solid waste landfill has been removed. But TDSL's complaint regarding EPA's Determination did not seek any action regarding the removal of the hazardous waste; this was never a requested remedy. While the delivery of the hazardous waste to TDSL's landfill may have precipitated the events that led to the TDSL's submission of its petition for withdrawal of state program approval, TDSL never requested of EPA or the district court an order or judgment requiring the removal of the hazardous waste. The crux of TDSL's complaint is EPA's arbitrary application of the law, which led to an erroneous adjudication, as reflected in its Determination. The relief requested by TDSL is still available and would remedy the complaints alleged by TDSL.

### **A. This case is not moot.**

"A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). This Court explained that a case is moot "only when it

can be shown that a court cannot even 'theoretically grant' relief." *Vieux Carre Property Owners, Residents & Assocs., Inc. v. Brown*, 948 F.2d 1436, 1446 (5th Cir. 1991) (citing *Richland Park Homeowners Ass'n v. Pierce*, 671 F.2d 935, 943 (5th Cir. 1982)). Thus, "the question is whether there can be any effective relief." *Vieux Carre*, 948 F.2d at 1446 (quoting *Northwest Env'tl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988)).

Unlike the cases cited by EPA in its brief, this case does not present a situation wherein EPA has repealed or replaced a complained-of rule. In fact, just the opposite is true.

In its Determination, EPA announced new regulatory requirements, or at least, a significant departure from well-established regulatory requirements. In spite of the fact that the broken picture tubes were identified as toxic characteristic hazardous wastes and that under traditional application of EPA's regulations, the LDRs for toxic characteristic hazardous waste attached at the point of generation of those broken picture tubes, EPA determined that the LDRs had not yet attached and were still subject to change. EPA stated that because the broken picture tubes (*i.e.*, the toxic characteristic hazardous waste) had been commingled with accident debris and waste from the landfill in which it was deposited, the waste may have a new point of generation for purposes of the LDRs. In fact, EPA maintained that

the new point of generation determines *if* the LDRs even apply—suggesting that they may not apply.

Moreover, EPA’s Determination suggests that the toxic characteristic hazardous waste—commingled with soils, debris, or other waste from the landfill—may already meet the LDR treatment standards, even though there was no allegation that the waste had been treated. Again, this is directly contrary to EPA’s dilution prohibition.

Finally, based on these new, arbitrary interpretations of its rules, EPA found no basis to conclude that TCEQ’s approach to the LDR regulations is contrary to the requirements of 40 C.F.R. Part 271. And in its letter to TCEQ Commissioner Soward, EPA affirmed that it “stands behind the sound legal analysis contained therein which culminated from months of analysis and coordination with EPA national headquarters.”

This “legal analysis” has not been repealed or rescinded. It remains in effect. Following the removal of the hazardous waste from TDSL’s landfill, EPA continued to stand behind its legal analysis. And this analysis affects TDSL, as it is a regulated entity under TCEQ’s delegated authority. Thus, effective relief remains available to remedy this erroneous legal analysis. For instance, the district court could remand the Determination to EPA so that the Administrator may reconsider his response. And the district court could issue a declaration that the

Determination is contrary to RCRA, EPA's regulations, and in violation of the APA because it is arbitrary and capricious.

**B. TDSL has standing to pursue its complaint.**

Likewise, TDSL continues to have standing. TDSL is not simply a member of the general public seeking review of the interpretation of the law to further its arguments in a dispute with a third party. Rather, TDSL is a landfill operator—a regulated entity—subject to the very law that EPA sought to interpret in its Determination. TDSL must apply, in its daily operations, the very laws that EPA construed in its Determination.

For instance, because TDSL is a municipal solid waste landfill, it is not authorized to accept for disposal toxic characteristic hazardous wastes. Thus, TDSL relies upon EPA's land disposal restrictions—the very regulations that EPA interpreted in its Determination—in determining what types of wastes are acceptable for disposal in its landfill. Under EPA's prior interpretation, a toxic characteristic hazardous waste that was improperly diluted remained subject to land disposal restrictions. According to the Determination, however, the law is no longer so straightforward.

Where, as here, a suit challenges the legality of government action or inaction, the nature and extent of facts that must be averred in order to establish standing depends considerably upon whether the plaintiff is himself an object of

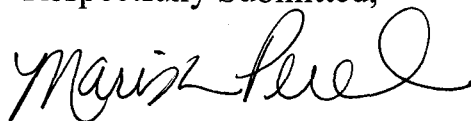
the action or inaction at issue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). If so, there is ordinarily little question that the action or inaction has caused the plaintiff injury and that a judgment preventing or requiring the action will redress it. *Id.*

As explained above, there is no question that TDSL, an entity subject to the RCRA regulations analyzed in EPA's Determination, is affected by that Determination. Similarly, review of that Determination and a subsequent judgment will redress the injury complained of by TDSL. For instance, a judgment will provide TDSL with a final determination of the correct application of the RCRA land disposal restrictions. TDSL is precisely the type of affected party with standing to challenge EPA's Determination.

### **CONCLUSION**

Because the District Court erroneously concluded that it did not have subject-matter jurisdiction to consider TDSL's complaint, this Court should reverse the District Court's judgment and remand this action to the District Court to consider TDSL's claims in accordance with the provisions of the APA.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Marisa Perales, hereby certify that today, September 16, 2009, a paper and electronic copy of the Reply Brief For Appellant Texas Disposal Systems Landfill, Inc. were served upon the following in the manner indicated:



Marisa Perales

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