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** | § | |
| **And** | § | |
| | § | |
| **Silicon Valley Toxics Coalition,** | § | |
| **Intervenor-Petitioner** | § | |
| **v.** | § | **No. 06-1297** |
| | § | |
| **Stephen L. Johnson, in his capacity** | § | |
| **as Administrator, U.S. Environmental** | § | |
| **Protection Agency; and the U.S.** | § | |
| **Environmental Protection Agency,** | § | |
| **Respondents** | § | |

## MOTION TO INTERVENE

Pursuant to Federal Rule of Appellate Procedure 15(d), Silicon Valley Toxics Coalition ("SVTC") hereby moves to intervene in this action as a joint Petitioner. SVTC submits that no parties will be prejudiced by this intervention, as no action has been taken and no case schedule has been established. SVTC also submits that it is a true party in interest with respect to the issues raised herein.

**I. Background:** Petitioners Texas Disposal Systems Landfill, Inc. ("TDSL"), Texas Campaign for the Environment ("TCE"), and Clean Water Action ("CWA") petitioned the Court on August 11, 2006 to review the final action taken by Respondents United States Environmental Protection Agency ("EPA") and Stephen L. Johnson, Administrator, United States EPA, in the document entitled, "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program," and dated May 16, 2006. A copy of the document is attached to this Motion.

**II. SVTC's Interest:** Silicon Valley Toxics Coalition is a grassroots coalition that engages in research, advocacy, and organizing around the environmental and human health

problems associated with the high-tech electronics industry. SVTC is located in San Jose, California, which suffers from some such environmental and occupational health problems. SVTC's goal is to advance environmental sustainability and clean production in the industry, as well as to improve health, promote justice, and ensure democratic decision-making for communities and workers affected by the high-tech industry in Silicon Valley and other high-tech areas of the United States and the world.

EPA's new Determination constitutes an improper rulemaking, as it significantly changes and weakens the requirements for proper treatment and disposal of hazardous wastes associated with the high-tech industry, thereby increasing the present and future threat to human health and the environment. The substance of EPA's "Determination" is contrary to the requirements of the Land Disposal Rules, 40 C.F.R. Part 268 and the objectives of the Solid Waste Disposal Act, 42 U.S.C. § 6902. EPA's Determination includes a significant new statement of law by the Agency, as well as a change to Agency rules and prior interpretations of the Solid Waste Disposal Act, and was promulgated entirely without notice and an opportunity for public comment, in violation of the requirements contained in the Solid Waste Disposal Act, 42 U.S.C. § 6974(b).

EPA's "Determination," if upheld, will significantly affect the efforts of SVTC to improve safety practices in the global electronics industry, especially with regard to safe and effective disposal of toxic wastes. For instance, EPA has historically required cradle-to-grave regulation of hazardous wastes. In other words, if a waste is declared hazardous, it remains hazardous until it is adequately treated and disposed of. Moreover, EPA has expressly prohibited dilution as a means of treating toxic characteristic hazardous wastes. Toxic wastes must be treated by stabilizing the underlying toxic constituent, in accordance with the Land Disposal Restrictions; simply increasing the volume of waste is inadequate treatment.

EPA's "Determination," however, alters these longstanding rules. Rather than cradle-to-grave regulation, EPA's Determination allows hazardous wastes to be re-characterized by mixing with soil or non-hazardous solid waste, despite the fact that the toxic characteristic remains, creating the same risks to the environment and public health.

SVTC relies on EPA's regulations of hazardous wastes to educate, advocate, and improve environmental health and safety practices in the electronics industry. Moreover, consistent interpretation and enforcement of EPA rules is essential to SVTC's efforts to improve performance standards and encourage the high-tech industry to adopt more sustainable practices. Ad hoc changes to EPA's rules, without providing an opportunity for comment from affected members of the community, such as SVTC, detrimentally affects SVTC and the members it represents by lowering the standards that they have relied upon and increasing their risk of exposure to toxic materials.

**III. Grounds:** An Intervenor's burden for demonstrating the inadequacy of representation is minimal. The United States Supreme Court has stated that federal rule of civil procedure 24 "is satisfied if the applicant shows that the representation 'may be' inadequate," so that the applicant's burden on this matter should be "minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1982).

SVTC's interests may not be adequately represented by Petitioners TDSL, TCE, and CWA. Thus, SVTC's interests, as a practical matter, may be impaired or impeded by its inability to protect these interests without participation in the action.

For instance, two of the three Petitioners reside in Texas, and the third has an office in Texas. SVTC, however, is located in San Jose, California, an area that suffers from the environmental and occupational health problems associated with the high-tech development

there. In fact, SVTC was formed in response to the discovery of substantial groundwater contamination throughout Silicon Valley, which was caused by toxic chemicals that leaked out of underground storage tanks.

Because of SVTC's unique history and location, its interests are not the same as the other Petitioners'. It remains uncertain whether Petitioners' request for relief will encompass all possible issues related to EPA's alleged improper rulemaking. SVTC will bring to the case another perspective, illustrated by a variety of possible effects stemming from the improper rulemaking and will more fully inform this Court regarding the consequences of EPA's Determination.

**IV. Conclusion:** For the foregoing reasons, SVTC respectfully requests that its motion be GRANTED and that it be permitted to intervene in the instant action.

Dated: September 8, 2006

Respectfully submitted,

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Richard Lowerre (TX: 12632900)
LOWERRE & FREDERICK
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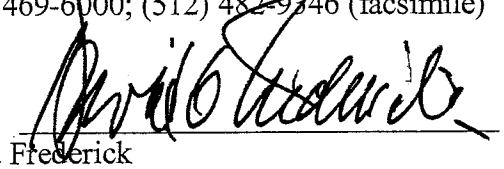
(512) 469-6000; (512) 482-9346 (facsimile)

By: 
David Frederick

Counsel for SVTC

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| **Protection Agency; and the U.S.** | § | |
| **Environmental Protection Agency,** | § | |
| **Respondents** | § | |

## CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Petitioners file this Corporate Disclosure Statement.

Silicon Valley Toxics Coalition ("SVTC") is an incorporated entity. There are no parent companies or subsidiaries, and it is not publicly owned. SVTC is a non-partisan, non-profit citizens' organization that engages in research, advocacy, and organizing around the environmental and human health problems caused by the rapid growth of the high-tech electronics industry. SVTC's goal is to advance environmental sustainability and clean production, improve community health, promote environmental and social justice, and ensure democratic decision-making for communities and workers affected by the high-tech industry in Silicon Valley and other high-tech areas of the United States and the world.

Respectfully submitted,

David Frederick (TX: 07412300)
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By: _____
David Frederick

Counsel for SVTC

## Certificate of Service

By my signature above, I, David Frederick, certify a true and correct copy of the foregoing **Motion to Intervene** was served September 8, 2006, by postage prepaid first class U.S. mail on the party and representatives indicated on the following service list:

Office of Regional Counsel
U.S. Environmental Protection Agency, Region VI
1445 Ross Avenue
Dallas, Texas 75202-2733
**U.S. Mail, First Class Postage Prepaid**

Mr. Stephen L. Johnson
Administrator, U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
**U.S. Mail, First Class Postage Prepaid**

Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave.
Washington, D.C. 20530
**U.S. Mail, First Class Postage Prepaid**

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

## PETITION FOR REVIEW

Pursuant to 42 U.S.C. § 6976(a)(1), Petitioners Texas Disposal Systems Landfill, Inc. ("TDSL"), Texas Campaign for the Environment ("TCE"), and Clean Water Action ("CWA") hereby petition this Court to review the final action taken by Respondents United States Environmental Protection Agency ("EPA") and Stephen L. Johnson, Administrator, United States EPA, in the document entitled, "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program," and dated May 16, 2006. A copy of the document is attached to this petition.

The substance of EPA's "Determination" is contrary to the requirements of the Land Disposal Rules, 40 C.F.R. Part 268 and the objectives of the Solid Waste Disposal Act, 42 U.S.C. § 6902. EPA's new Determination constitutes an improper rulemaking, as it significantly changes and weakens the requirements for proper treatment and disposal of hazardous wastes, thereby increasing the present and future threat to human health and the environment. EPA's Determination includes a significant new statement of law by

the Agency, as well as a change to Agency rules and prior interpretations of the Solid Waste Disposal Act, and was promulgated entirely without notice and an opportunity for public comment, in violation of the requirements contained in the Solid Waste Disposal Act, 42 U.S.C. § 6974(b).

Respectfully submitted,

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Counsel for Plaintiff Texas Disposal Systems Landfill, Inc.

By: David Frederick (w/permission)
David Frederick
State Bar of Texas #07412300

Certificate of Service

By my signature above, I, David Frederick, certify a true and correct copy of the foregoing **Petition for Review** was served August 10, 2006, by postage prepaid first class U.S. mail return receipt requested on the party and representatives indicated on the following service list:

SERVICE LIST

Office of Regional Counsel
U.S. Environmental Protection Agency, Region VI
1445 Ross Avenue
Dallas, Texas 75202-2733
**U.S. Mail, First Class Postage Prepaid, Return Receipt Requested**

Mr. Stephen L. Johnson
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Washington, D.C. 20460
**U.S. Mail, First Class Postage Prepaid, Return Receipt Requested**

Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
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**U.S. Mail, First Class Postage Prepaid, Return Receipt Requested**

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U.S. Environmental Protection Agency
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Mr. Greg Abbott
Texas Attorney General
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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: 06-16-06