IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS LANDFILL, INC., *Plaintiff,*	§	
v.	§	**CAUSE NO. A06CA642LY**
U.S. ENVIRONMENTAL PROTECTION AGENCY; RICHARD E. GREENE, REGIONAL ADMINISTRATOR; AND STEPHEN L. JOHNSON, ADMINISTRATOR, *Defendants.*	§	

PLAINTIFF'S ORIGINAL COMPLAINT

COMES NOW, Texas Disposal Systems Landfill, Inc. ("TDSL"), complaining of an action of the U.S. Environmental Protection Agency ("EPA"); Richard E. Greene, Regional Administrator for Region VI of EPA; and Stephen L. Johnson, Administrator of EPA, jointly referred to as Defendants, and in support thereof, would respectfully show the following:

I. INTRODUCTION AND SUMMARY OF THE CASE

1. TDSL brings this suit against the Defendants based on their decision to deny the petition filed by Plaintiff TDSL on November 14, 2005. By its petition, TDSL sought initiation of EPA's process for withdrawal of its approval of the hazardous waste program of the State of Texas. EPA's Decision denying the Petition is referenced as EPA Docket No. TX/RCRA-06-2006-001, and hereinafter referred to as the "Determination."

2. TDSL is the owner and operator of a municipal solid waste landfill in Travis County, Texas, to which certain hazardous waste was delivered improperly and illegally. The generators of the waste, Penske Truck Leasing L.P., Penske Logistics, Inc., and/or Zenith Electronics Corporation falsely represented that the waste was non-hazardous when they delivered the waste to the landfill.

3. This improper delivery of hazardous waste resulted in decisions by the Texas Commission of Environmental Quality ("TCEQ"), the agency of the State of Texas responsible for the implementation of the Texas hazardous waste program, that revealed that TCEQ's interpretation of Texas laws and rules conflicted with and were less stringent than the federal hazardous waste program.

4. TDSL filed its petition for withdrawal of approval of the hazardous waste program in Texas to alert EPA of TCEQ's erroneous interpretations of applicable law and to request EPA action, by either (1) requiring Texas to apply its hazardous waste program in compliance with federal law, or (2) withdrawing Texas' responsibilities to manage the federal hazardous waste management program and returning the program to EPA.

5. Claiming to have undertaken an informal investigation, EPA determined that no cause existed to commence withdrawal proceedings and denied TDSL's petition in a response dated May 16, 2006. *See* 40 C.F.R. § 271.23(b)(1) (requiring EPA Administrator to respond to any petition to commence withdrawal proceedings). In reaching its determination, EPA made several factual and legal errors. Moreover, rather than accept as true the facts set out in TDSL's petition, EPA reached and relied upon factual conclusions in its response that had no basis in the evidence presented to EPA. In

fact, EPA failed to develop a full and correct administrative record for its factual determinations.

6. EPA also based its decision on a new interpretation of its own rules. EPA applied its rules in a fashion that is in direct conflict with the language of the rules, with EPA's explanation of its rules in its preamble to the adoption of some of these rules, and with past EPA practices.

II. JURISDICTION

7. This action arises under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

8. This is also an action for a declaratory judgment pursuant to 28 U.S.C. § 2201, for the purpose of determining a question of actual controversy between the parties.

III. VENUE

9. Venue is proper pursuant to 28 U.S.C.§ 1391(e)(3) because TDSL's place of business is in the Western District of Texas, and the Defendant is the United States Environmental Protection Agency, an agency of the United States government. Additionally, the action leading to the complaint to the U.S. Environmental Protection Agency occurred in the Western District of Texas, and the decision by the Texas Commission on Environmental Quality that is complained of in TDSL's petition to the U.S. Environmental Protection Agency occurred in the Western District of Texas.

IV. PARTIES

10. Plaintiff Texas Disposal Systems Landfill, Inc. is the owner and operator of a municipal solid waste landfill in Travis County, Texas.

11. The illegal delivery of hazardous waste to this landfill initiated the underlying dispute.

12. The decision of Defendants that is on appeal in this case is Defendants' denial of Plaintiff TDSL's petition and their arbitrary and capricious interpretation and application of agency rules in their May 16, 2006 Response to TDSL's Petition.

13. If not reversed, Defendants' decision on the petition will result in direct and immediate harm to TDSL, including risks of future illegal disposal of hazardous waste at its landfill, and risks of being subject to sanctions or liability under other federal laws, including the Federal Superfund law.

14. Defendant U.S. Environmental Protection Agency is the federal agency responsible for the implementation of RCRA, including decisions to authorize any state to take over from EPA the management, implementation, and enforcement of RCRA if the state hazardous waste program qualifies for such authorization.

15. EPA has adopted the rules at issue in this case, rules intended to implement RCRA.

16. Defendant U.S. Environmental Protection Agency can be served by delivering a copy of this Amended Complaint to the Administrator Mr. Stephen L. Johnson, EPA Headquarters, Ariel Rios Building, Mail Code 1101A, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

17. Defendant Richard E. Greene is the Regional Administrator, for Region VI of EPA, and signed the decision on appeal here.

18. Defendant Richard E. Greene is sued in his official capacity as the Regional Administrator for Region VI of the U.S. Environmental Protection Agency and can be served at Mail Code 6RA, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

19. Defendant Stephen L. Johnson is the Administrator of EPA and is charged with the decisions on the approval or withdrawal of approval of state RCRA programs under RCRA.

20. Defendant Stephen L. Johnson is sued in his official capacity as the Administrator of the U.S. Environmental Protection Agency and can be served at the EPA Headquarters, Ariel Rios Building, Mail Code 1101A, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

VI. FACTS

21. On November 14, 2005, TDSL filed its Petition with EPA requesting that EPA take action either to (1) bring the hazardous waste program that is administered by Texas into compliance with federal law or (2) withdraw Texas' responsibilities to manage the federal hazardous waste management program in Texas, and, thereby return the management responsibilities of the program to EPA.

22. The Petition is the result of a long history of efforts by TDSL to resolve issues resulting from the illegal delivery of hazardous waste to its landfill and to have the hazardous waste legally disposed in a permitted facility.

23. On October 9, 1997, a highway accident just south of Austin, Texas, resulted in the generation of a large quantity of a toxic characteristic hazardous waste due to lead.

24. The hazardous waste was comprised of broken Cathode Ray Tubes ("CRTs"), which were first improperly classified by the generator of the waste as non-hazardous wastes.

25. As a result, the wastes were sent to TDSL's nearby municipal solid waste landfill in Travis County, Texas.

26. Several hours later, the generators notified TDSL that the waste was a hazardous waste due to its toxic nature.

27. TDSL then rejected the hazardous CRT waste and demanded the generators remove all of the commingled hazardous waste (the hazardous waste and the municipal solid waste with which the hazardous waste was commingled) from the landfill.

28. When the generators refused, TDSL isolated the commingled hazardous waste for proper management in accordance with its municipal solid waste landfill permit, which was issued by TCEQ. The 6,000 to 10,000 pounds of toxic characteristic hazardous waste was stored in shipping containers at the landfill, pending resolution of the proper manner of disposal of the waste.

29. The commingled hazardous waste included several hundred Cathode Ray Tubes.

30. Initially, TCEQ refused to require the generators of the hazardous waste to remove or manage that waste with proper hazardous waste manifests or other steps that are consistent with federal law.

31. TCEQ's Executive Director at that time admitted that he interprets Texas law to allow the generators to manage the entire quantity of the commingled waste as one nonhazardous waste.

32. This interpretation conflicts with the clear language of EPA's rules under RCRA and EPA's long-time application of those rules. In its Petition TDSL explained:

> 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. Such wastes could then be transported without a valid hazardous waste manifest and disposed of at facilities that are not authorized to manage hazardous wastes.

33. Because TCEQ's reading of its rules conflicted with EPA's rules, Plaintiff filed its Petition with EPA for withdrawal of the federal approval of Texas' hazardous waste program.

34. EPA denied the Petition in its Determination, issued on May 16, 2006. This Determination included several incorrect assumptions of fact and incorrect statements of law. *See* Exhibit A.

35. Subsequently, at a public meeting on July 25, 2007, the TCEQ Commissioners again considered the issues related to the commingled hazardous waste that was stored at TDSL's landfill and how it should be properly treated and/or disposed.

36. By Order dated July 30, 2007, the TCEQ Commissioners ordered Penske Truck Leasing Co., L.P. ("Penske") to remove all of the commingled hazardous waste

stored at TDSL's landfill, using an unconditional, standard, unaltered hazardous waste manifest that designates Penske as the generator of the commingled hazardous CRT waste and identifies the 1997 accident scene as the point of generation.

37. The Order required Penske to dispose of all the hazardous waste in the containers in one of two ways: (1) by transporting the entire contents of the storage containers to a landfill that is authorized to receive and dispose of hazardous waste, according to the RCRA Land Disposal Restrictions; or (2) by negative sort separation of all the nonhazardous municipal solid waste from the CRT component debris and contaminated soil in the storage containers, followed by disposal of the remaining CRT debris and contaminated soil and any municipal solid waste unsegregated from the mix in a landfill that is authorized to receive and dispose of hazardous waste.

38. The Order became final and unappealable by an Agreed Final Judgment dated November 20, 2007.

39. Penske complied with the Order and removed all of the waste by December 12, 2007, to an authorized hazardous waste disposal facility in Robstown, Texas.

40. Subsequently, TDSL, Penske, Texas Campaign for the Environment, and TCEQ Chairman H.S. Buddy Garcia (in his official capacity as an individual commissioner) submitted written requests to EPA that EPA Region 6 withdraw, revise, or supplement its May 16, 2006 Determination. *See, e.g,* Exhibit B.

41. TCEQ Commissioner Soward sent his own letter to EPA, encouraging the Agency not to withdraw, revise, or supplement its Determination. *See* Exhibit C.

EPA responded by written letter to each of these requests by refusing to withdraw, revise, or supplement its Determination, and instead affirmed that "EPA stands behind the sound legal analysis contained therein which culminated from months of analysis and coordination with EPA national headquarters." *See, e.g.,* Exhibit D.

VII. CAUSES OF ACTION

CAUSE OF ACTION #1: EPA'S DECISION IS ARBITRARY AND CAPRICIOUS, WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW, UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND UNWARRANTED BY THE FACTS.

42. EPA's decision is based on incorrect factual assumptions.

43. In its decision, EPA states: "EPA does not believe it is appropriate to act as the finder of fact" and that it is not necessary to determine the veracity of all of the factual allegations in the petition.

44. In its decision, however, EPA did not accept the facts presented in Plaintiff's Petition as true.

45. EPA claims to have undertaken an informal investigation. EPA, however, either accepted or assumed an incorrect set of facts that was not supported by any evidence before EPA to reach its conclusions.

46. For example, EPA's decision includes a statement of fact that the mixture of solid waste and broken CRTs were removed from the landfill, sorted, and the visible CRTs were taken to another facility, while the remaining waste was containerized at the TDSL facility: "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."

47. This is not an accurate statement of fact, and there was nothing presented to EPA to support such an assumption.

48. At the time of the filing of TDSL's petition to withdraw RCRA program approval, there was no sorting of visible CRT parts in the commingled hazardous waste stored at Plaintiff's landfill.

49. Large and clearly visible CRT parts, which are hazardous waste, had been stored in the containers at TDSL's landfill.

50. There is no evidence in the record before EPA that all the visible or otherwise large or removable hazardous D008 wastes were removed at the time EPA reached its Determination.

51. That fact was clearly not accurate, and EPA erred in relying on this erroneous fact.

52. This assumption that there had been a sorting of the large pieces of hazardous waste is highlighted again when EPA assumes that the "exhumed waste" mixture was an "amalgamated mixture."

53. There was nothing in the record to support such a statement of the condition of the waste.

54. The D008 waste materials were distinguishable, not amalgamated.

55. There was never any effort to homogenize the waste for any purpose.

56. Thus, it appears that EPA assumed that the CRT hazardous waste materials no longer existed as waste that can be sorted and removed from the commingled waste.

57. EPA had no basis for this assumption or statement of fact.

58. EPA then based its legal analysis on its erroneous assumptions or statements of facts.

59. There was no evidence that the toxic CRT wastes in the mixture "no longer exhibit" the toxic characteristics that make them hazardous.

60. Indeed, that is the crux of the problem: Toxic CRT waste undisputedly remained in the commingled waste stored in the containers on Plaintiff's property.

61. In Cause of Action #1, Plaintiff alleges that even though EPA claims to have undertaken an informal investigation, it did not develop an administrative record sufficient to support the factual statements in the EPA decision document.

CAUSE OF ACTION #2: EPA'S DECISION IS BASED ON ARBITRARY AND CAPRICIOUS INTERPRETATION AND APPLICATION OF LAW AND IS AN ABUSE OF DISCRETION.

62. The underlying legal issue is whether, under federal law, characteristically toxic hazardous waste can be treated as non-hazardous waste once it has been mixed with other non-hazardous waste.

63. In adopting rules for these toxic hazardous wastes in the 1990s, EPA made the decision that characteristically toxic hazardous waste could not be treated, for purposes of disposal, as non-hazardous once it has been mixed with other wastes, either on purpose or inadvertently.

64. Another way of looking at the legal issue is whether the point of generation of such a hazardous waste can be changed by the mixing in such a manner as to generate a new non-hazardous waste and, thus, allow reclassification of the mixture.

65. Again, EPA has a history of rejecting that approach as inconsistent with its rules.

66. The Resource Conservation and Recovery Act (RCRA) was passed by Congress in 1976 and established the federal hazardous waste program.

67. RCRA set up a comprehensive "cradle to grave" management program for hazardous waste, including a manifest program to accompany the waste as it is transported from generators to disposal facilities and a permitting program for hazardous waste disposal facilities.

68. Under RCRA provisions, the federal hazardous waste program that is administered by EPA can be delegated to a state if the state program is as stringent as the federal program.

69. EPA's hazardous waste program for Texas was delegated to the State of Texas on December 12, 1984.

70. The Petition filed by TDSL asks that EPA revoke this delegation decision and take over the RCRA program, unless the TCEQ reforms its program to comply with federal law.

71. In contrast to waste classified as hazardous because it is corrosive or explosive, the management of waste classified as toxic is restricted to a greater degree under EPA rules.

72. EPA has improperly interpreted and applied this set of its rules, 40 C.F.R. §§ 261.3, 268.3, and the Land Disposal Restrictions in chapter 268 to the facts set forth in the Petition or any valid set of facts.

73. If properly applied, EPA's rules protect a person, such as Plaintiff, from the risks that hazardous waste will be illegally dumped on or delivered to a person's property.

74. Thus, EPA arbitrarily and capriciously interpreted and applied its rules in its decision document regarding TDSL's petition to revoke the delegation of the hazardous waste program to the State of Texas.

75. EPA also abused its discretion in undertaking an informal investigation, but failing to base its factual conclusions and ultimate decision on any evidence before it.

CAUSE OF ACTION # 3: EPA'S INTERPRETATION OF RCRA IS NOT IN ACCORDANCE WITH LAW AND IS A VIOLATION OF THE APA (DECLARATORY JUDGMENT & ADMINISTRATIVE PROCEDURE ACT CLAIMS)

76. The EPA's May 17, 2006 "Determination" or Response to the Petition contains EPA's erroneous interpretation of RCRA and its implementing regulations, including the "mixture rule," 40 C.F.R. § 261.3, and dilution rule, 40 C.F.R. § 268.3.

77. The EPA's May 17, 2006 Determination is not in accordance with the law, and Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

78. Even though the hazardous waste illegally delivered to Plaintiff's landfill has been removed and disposed of as hazardous waste, the legal interpretation in the final agency action continues to be in effect.

79. The EPA has steadfastly refused to withdraw its Determination and retract its erroneous interpretation, and to this day, continues to maintain that this position is an accurate legal analysis of its Rules.

80. Notwithstanding the EPA's claim to the contrary, EPA's legal opinion expressed in Determination continues to exist in written form.

81. Plaintiff is concerned that it is only a matter of time before the situation that led to the filing of its Petition (*i.e.*, the illegal delivery of hazardous wastes) will recur at its landfill.

82. EPA's interpretation of RCRA will require an immediate and significant change in Plaintiff's conduct because Plaintiff will have no adequate remedy should illegally delivered hazardous waste become mixed with non-hazardous waste at Plaintiff's landfill.

83. Plaintiff will be required to bear the additional burden of screening or testing all deliveries of purportedly non-hazardous waste because it can no longer rely on the "cradle to grave" protections guaranteed by RCRA.

84. The Declaratory Judgment Act allows a party to seek a declaration of its rights and privileges. 28 U.S.C § 2201.

85. There is an actual controversy between TDSL and EPA that is ripe for judicial review, and review by this Court will not unduly interfere with EPA's administration of RCRA.

VIII. PRAYER

WHEREFORE, Plaintiffs pray that the Court grant them the following relief:

A. Upon final trial hereof, the decisions of Defendants in EPA Docket No. TX/RCRA-06-2006-001 on Plaintiff's Petition be reversed and that the Petition be remanded to EPA for further action consistent with the decision of this Court;

B. That the Court issue a declaratory judgment in accordance with the legal and factual assertions of Plaintiff's Petition, as stated in the foregoing paragraphs, including, but not limited to, the following declarations:

1. that the administrative record does not support EPA's finding that no cause exists to act on Plaintiffs Petiton;

2. that EPA's Determination and associated legal interpretation is a final agency action subject to judicial review under the APA;

3. that EPA's Determination and interpretation therein is contrary to RCRA, EPA's regulations and in violation of the Administrative Procedure Act.

C. Alternatively, if this Court finds that the Administrator failed to comply with RCRA or the Administrative Procedure Act in the Determination filed in response to Plaintiff's petition, that the Court remand this case to the Administrator with directions to reconsider his response to the petition while retaining jurisdiction during remand.

D. Grant such further relief as this Court finds to be appropriate and just.

Respectfully Submitted

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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

November 29, 2007

Richard E. Greene
Regional Administrator, EPA Region 6
U.S. Environmental Protection Agency
1445 Ross Avenue, Ste. 1200
Mail Code: 6RA
Dallas, TX 75202-2733

Re: Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program, May 16, 2006; Docket No.: W/Petition-TX/RCRA-06-2006-0001.

Dear Mr. Greene:

Texas Disposal Systems Landfill, Inc. ("TDSL"), Penske Truck Leasing Co., LP, Penske Logistics, LLC (together, "Penske"), Zenith Electronics Corp. ("Zenith") and Texas Campaign for the Environment ("TCE") jointly request that the U.S. Environmental Protection Agency ("EPA") withdraw, revise, or supplement its "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program," issued on May 16, 2006 (the "EPA Determination").

TDSL, Penske, Zenith and TCE ask the EPA to withdraw, revise, or supplement the EPA Determination because the issue on which the EPA Determination was based has been resolved. Specifically, the exhumed cathode-ray tube waste (the "CRT Waste") on which TDSL based its November 15, 2005 petition for withdrawal of approval of the Hazardous Waste Program of the State of Texas (the "TDSL Petition") will soon be removed from TDSL's premises. When removed, the CRT Waste will be manifested, transported, treated and disposed of as hazardous waste at an authorized hazardous waste facility. Such removal will be consistent with the terms of a July 30, 2007 order issued by the Texas Commission on Environmental Quality (the "TCEQ Order"), a copy of which is attached to this letter as Exhibit A. The TCEQ Order is no longer subject to challenge or appeal, and is therefore a final order. With any question about the proper means of handling the CRT Waste now resolved, TDSL, Penske, Zenith and TCE agree that the EPA should withdraw, revise, or supplement the EPA Determination.

Although withdrawal of the EPA Determination would be most appropriate, TDSL, Penske, Zenith and TCE agree that, at a minimum, the EPA Determination should be revised or supplemented to ensure that it is not mischaracterized as having some kind of binding legal effect beyond merely denying the TDSL Petition, or as somehow limiting EPA's ability to exercise discretion in similar matters. The unnecessarily detailed nature of the EPA Determination has caused confusion as to whether it is a regulatory decision or determination that goes beyond simply communicating the EPA's decision to deny the TDSL Petition.

To resolve such confusion by revising the EPA Determination, the EPA could substitute the EPA Determination with an alternative limited strictly to the relevant procedural history and the EPA's decision to deny the TDSL Petition.

Alternatively, the EPA also could resolve any confusion resulting from the EPA Determination in its present form by supplementing it with a separate letter in response to this request. Such a letter would make clear that the EPA believes no court is bound by the EPA Determination, and other authorities should not rely on it for any purpose. For example, in briefs the EPA has filed in federal litigation with TDSL challenging the EPA Determination, the EPA has stated the EPA Determination was issued for no purpose other than "explain[ing] EPA's basis for refusing to commence proceedings to withdraw Texas' RCRA authorization . . ." and "merely determines whether cause exists to commence withdrawal proceedings for Texas' hazardous waste authorization program." Cautioning against misusing the EPA Determination in other proceedings, the EPA further stated in its briefs that the EPA Determination "has no effect on any regulation or requirement"; "has no binding regulatory effects on interested parties"; "does not make formal findings about future regulatory actions to be undertaken"; "lack[s] any cognizable binding legal effect"; "is not binding on its face, nor is it applied by the Agency in a way that indicates it is binding"; and "does not regulate anyone's behavior." Confirming the substance of these statements in a short letter supplementing the EPA Determination would dispel any misconceptions about its purpose or effect.

Additionally, withdrawing, revising, or supplementing the EPA Determination will resolve the two remaining proceedings initiated by TDSL in federal court to appeal it. Of course, if the EPA withdraws, revises or appropriately supplements the EPA Determination, TDSL and TCE also will take whatever steps are possible to withdraw the TDSL Petition in response to which the EPA Determination was issued.

Accordingly, for all of the foregoing reasons, TDSL, Penske, Zenith and TCE respectfully urge the EPA to withdraw the EPA Determination, to replace it with a substitute that simply denies the TDSL Petition, or to appropriately supplement it.

Thank you for your attention to this request.

Sincerely,

Name: _____

Title: President & Prin. Owner

Texas Disposal Systems Landfill, Inc.

Name: _____

Title: Counsel for

Zenith Electronics Corp.

Name: _____

MICHAEL A. DUFF
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL

Title: _____

Penske Truck Leasing Co., LP
Penske Logistics LLC

Name: _____

Title: Executive Director

Texas Campaign for the Environment

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 22, 2008

The Honorable Richard Greene
Regional Administrator
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Dear Mayor Greene:

I am aware via the Texas Disposal Systems Landfill, Inc. ("TDSL") website of the letter sent to you on January 14, 2008 by Texas Commission on Environmental Quality ("TCEQ") Chairman Buddy Garcia concerning an Agreed Final Judgment ("Final Judgment") entered into on November 20, 2007, by TDSL, Texas Campaign for the Environment ("TCE"), Penske Truck Leasing Co., LP and Penske Logistics, LLC (together, "Penske") and the TCEQ.

Pursuant to the Final Judgment, TDSL, TCE and Penske agreed to jointly request, in writing within 30 days of the date of the Final Judgment, that you "withdraw, revise or supplement" your May 16, 2006 "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program" ("EPA Determination"). I am aware that they have made that joint request to you by letter dated November 29, 2007. [I note that even though not a signatory to the Final Judgment, nor required by any provision of the Final Judgment to do so, Zenith Electronics Corp. ("Zenith") joined in the November 29 request to "withdraw, revise or supplement" the EPA Determination.] As the basis for their request, the parties state that "the issue on which the EPA Determination was based has been resolved" and that they want "to ensure that it is not mischaracterized as having some kind of binding legal effect beyond merely denying the TDSL Petition, or as somehow limiting EPA's ability to exercise discretion in similar matters."

The Final Judgment further provides that TCEQ Chairman Garcia, in his official capacity as an individual commissioner (emphasis added), will submit, as soon as practicable but no later than 30 days after confirmation that the waste has been disposed of, as evidenced by the submittal of final hazardous waste manifests, a written request that EPA Region 6 withdraw, revise, or supplement the EPA Determination. Chairman Garcia's January 14th is that request, saying "I join in their request."

As the Final Judgment correctly recites, the Chairman's letter is submitted in his official capacity as an individual commissioner. As such, it should be considered only as the position of and request from the Chairman individually, as one of three TCEQ Commissioners, and should not

be construed as any adopted agency position, since the Chairman's request submitted in the letter to you has not been the subject of any formal Commission deliberation or decision.

Likewise, the letter should in no way be construed as any expression of my position or recommendation, as an individual commissioner, on this matter. In fact, the contrary is true, and through this letter I am submitting my position in my official capacity as an individual commissioner.

I strongly urge you **not** to "withdraw, revise or supplement" the May 16 EPA Determination that "cause does not exist under applicable federal statutes and regulations to commence a proceeding for withdrawal of Texas' RCRA program."

The EPA Determination was the result of an extensive 6-month review of the petition filed by TDSL "for withdrawal of approval of the hazardous waste program of the State of Texas," including all its alleged facts and its arguments that Texas' RCRA program conflicts with all four of the circumstances from 40 C.F.R. §271.22. In the EPA Determination issued, you made it clear that for purposes of EPA's determination of the matter, "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." Your determination unequivocally states "that the petition can thus be decided as a question of law." In fact, you correctly noted that even TDSL stated in its petition that the issues it raised were questions of law. Accordingly, your determination states: "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."

In answering that legal question and making your legal determination that no cause exists to commence a proceeding for withdrawal of Texas' RCRA program, you found:

- as to the mixture rule [40 C.F.R. §261.3(a)(2)], "the petitioner's interpretation of the law is incorrect" and ". . . TCEQ has interpreted the state law consistently with Federal law and TCEQ is properly exercising control over the operation of the program . . ."
- as to the land disposal restrictions [40 C.F.R Part 268; 40 C.F.R. §261.2(d)], "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 the TCEQ has done anything in this situation to suggest a programmatic conflict between the state and federal LDR regulations."
- as to the allegation of impermissible dilution of waste, ". . . TCEQ interprets the law consistently with EPA's interpretation," and "EPA has no reason to believe TCEQ has taken a position contrary to EPA's regulations."
- as to the matter of TCEQ's enforcement discretion, the determination recites that "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" and "believes that TCEQ's enforcement activity with respect to the exhumed waste was properly within TCEQ's discretion." Accordingly, "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."

- as to the Memorandum of Agreement and Memorandum of Understanding (MOA/MOU) between the EPA and TCEQ required under 40 C.F.R §271.8, "nowhere in the petition does Petitioner state any term or section of the MOA/MOU with which the TCEQ program fails to comply" and "Texas' RCRA program is consistent with the federal RCRA statute, regulations" and "TCEQ's RCRA program does comply with the MOA/MOU . . ."

Now, because the parties have compromised and settled their differences, the requesting parties want the EPA Determination withdrawn, revised or supplemented, claiming that the question about the proper means of handling the exhumed cathode-ray tube waste on which TDSL based its petition for withdrawal is now resolved.

The parties may have resolved their differences among themselves through negotiation and settlement, but that in no way affects the independent legal analyses and findings made in the EPA Determination. Even though some of the parties do not like the EPA Determination and simply want it to go away --- notably TDSL, the very party that filed the determination petition with the EPA --- that is no basis for the EPA Determination, that addresses only legal questions, to be withdrawn, revised or supplemented. Despite any compromise or settlement of issues among the parties, the law remains what it is, as fully analyzed and set forth in the EPA Determination.

As an alternative to withdrawal of the EPA Determination, the requesting parties state that it should be revised or supplemented "to ensure that it is not mischaracterized as having some kind of binding legal effect beyond merely denying the TDSL Petition, or as somehow limiting EPA's ability to exercise discretion in similar matters." They claim that the "unnecessarily detailed nature of the EPA Determination has caused confusion as to whether it is a regulatory decision or determination that goes beyond simply communicating the EPA's decision to deny the TDSL Petition."

Yet, they argue against this alleged "confusion" by citing briefs the EPA has filed in federal litigation with TDSL challenging the EPA Determination which state "the EPA Determination was issued for no purpose other than "explain[ing] EPA's basis for refusing to commence proceedings to withdraw Texas' RCRA authorization . . ." and "merely determines whether cause exists to commence withdrawal proceedings for Texas' hazardous waste authorization program." The requesting parties even recite EPA's caution against misusing the determination in other proceedings by acknowledging EPA's statements in its briefs that the EPA Determination "has no effect on any regulation or requirement"; "has no binding regulatory effects on interested parties"; "does not make formal findings about future regulatory actions to be undertaken"; "lack[s] any cognizable binding legal effect"; "is not binding on its face, nor is it applied by the Agency in a way that indicates it is binding"; and "does not regulate anyone's behavior."

Thus, there should be no confusion as to the legal effects of the EPA Determination beyond denying the TDSL Petition, or as to EPA's ability to exercise discretion in similar matters in the future. Perhaps the "unnecessarily detailed nature" of the EPA Determination that the requesting parties now complain of is too good of an example of the age-old adage "one should be careful what one asks for"!

Finally, the requesting parties say that withdrawing, revising, or supplementing the EPA Determination will resolve the two remaining proceedings initiated by TDSL in federal court to appeal it, and if the EPA Determination is withdrawn, TDSL and TCE will take whatever steps are possible to withdraw the TDSL federal litigation. I urge you not to fall victim to this "generous offer." The EPA Determination is an exhaustive analysis of the law as it relates to Texas' RCRA program being in compliance with federal laws and regulations under the facts of this case. You know that you were correct in your legal analyses in this matter. Accordingly, you should not fear any judicial review of the EPA Determination you issued. Only with proper judicial review of the EPA Determination will we truly address any instance of "confusion" in these matters, as alleged by the requesting parties.

Again, I strongly urge you **not** to "withdraw, revise or supplement" the May 16 EPA Determination that cause does not exist under applicable federal statutes and regulations to commence a proceeding for withdrawal of Texas' RCRA program under the allegations in TDSL's petition. When formally petitioned by TDSL to exercise your necessary and appropriate oversight over TCEQ's RCRA program, you did so in a thorough and unbiased fashion. In your extensive 6-month review of the legal questions raised in that petition, you thoroughly analyzed how the TCEQ had applied Texas' RCRA program to the facts alleged in the petition. You analyzed and compared, in detail, each interpretation, action and decision of the TCEQ in this case against the applicable federal laws and regulations. **In every instance** of that detailed analysis, you found that "TCEQ has interpreted the state law consistently with Federal law and TCEQ is properly exercising control over the operation of the program," "TCEQ interprets the law consistently with EPA's interpretation," "EPA has no reason to believe TCEQ has taken a position contrary to EPA's regulations" and/or "Texas' RCRA program is consistent with the federal RCRA statute and regulations."

Any such review of and determination relating to whether the TCEQ's RCRA program, and our interpretations, actions and decisions in a particular matter or set of circumstances within the program, are correct and/or consistent with applicable federal laws and regulations is healthy and vital. Just because one or more parties --- perhaps even the TCEQ --- may not like your findings and determinations at any given point in time, that is no basis to withdraw such a determination when it is properly issued. I submit to you that had the EPA Determination come out with opposite findings and determinations, the requesting parties would be defending it vigorously and aggressively against any request that it be withdrawn, revised or supplemented. Let it stand.

I sincerely appreciate your consideration of my views and thoughts on this matter.

Sincerely,

Larry R. Soward
Commissioner

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

April 9, 2008

APR 0[illegible] 2008

Mr. Larry R. Soward, Commissioner
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Dear Commissioner Soward:

This letter is in response to your letter dated January 22, 2008, regarding the U.S. Environmental Protection Agency (EPA) Region 6's "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program," dated May 16, 2006, docket number W/Petition - TX/RCRA-06-2006-0001 (Determination). Pursuant to a November 20, 2007 Agreed Judgment, the parties to this settlement requested that EPA withdraw, revise, or supplement the Determination. In your letter, you strongly urged EPA not to withdraw, revise, or supplement the Determination. After a thorough review of the matter at both the regional and national offices, EPA determined that the withdrawal, revision, or supplementation of the Determination is not appropriate. On March 25, 2008, a letter detailing this decision was sent to Mr. Bob Gregory at Texas Disposal Systems Landfill. A copy of this letter is enclosed for your review.

If you have any further questions regarding EPA's response, please contact David Gillespie, Assistant Regional Counsel, at (214) 665-7467.

Sincerely,

Carl E. Edlund, P.E.
Director
Multimedia Planning and
Permitting Division

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

March 25, 2008

Bob Gregory
Texas Disposal Systems Landfill, Inc.
P.O. Box 17126
Austin, TX 78760-7126

Dear Mr. Gregory:

This letter is in response to your letter dated November 29, 2007, regarding EPA Region 6's "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program," dated May 16, 2006, docket number W/Petition-TX/RCRA-06-2006-0001 (Determination).

EPA Region 6 will not be withdrawing the Determination and EPA stands behind the sound legal analysis contained therein which culminated from months of analysis and coordination with EPA national headquarters.

As requested by your letter, however, EPA Region 6 affirms the following, which was stated in briefs filed by the Department of Justice on behalf of EPA with the United States Court of Appeals for the District of Columbia:

* The Determination is not a regulation and does not make formal findings about future regulatory actions of general applicability to be undertaken.

* The Determination does not have any cognizable binding legal effect, is not binding on its face, nor is it applied by EPA in a way to indicate that it is binding.

* The Determination was issued in response to a specific petition from Texas Disposal Systems Landfill, Inc. (TDSL) and does not establish new generally applicable requirements for any party.

* No regulated entity is required to change its behavior in response to the Determination.

The Determination only explains EPA's decision, wholly within EPA's discretion, and that pursuant to 40 C.F.R. § 271.23(b)(1) cause does not exist to commence withdrawal proceedings for Texas' hazardous waste authorization program.

EPA is pleased that the parties involved in the situation discussed in the Determination have settled the case. If you have any further questions, please contact David Gillespie, Assistant Regional Counsel, at (214) 665-7467.

Sincerely,

David Gillespie
Assistant Regional Counsel