

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

**TEXAS DISPOSAL SYSTEMS LANDFILL,  
INC.,**

*Plaintiff,*

v.

**U.S. ENVIRONMENTAL PROTECTION  
AGENCY; RICHARD E. GREENE,  
REGIONAL ADMINISTRATOR; AND  
STEPHEN L. JOHNSON,  
ADMINISTRATOR,**

*Defendants.*

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CIVIL ACTION NO \_\_\_\_\_

**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.

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. 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 reveal that Texas laws and rules, as interpreted by TCEQ, conflict with and are less stringent than the federal hazardous waste program.

3. 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 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 in Texas, returning the program to EPA.

4. Claiming to have undertaken an informal investigation, EPA determined that no cause exists 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.

5. 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

6. 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).

### **III. VENUE**

7. 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**

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

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

10. 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.

11. If not reversed, Defendants' decision on the Petition will result in direct and immediate harm to TDSL, including added costs of management of the hazardous waste, 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.

12. 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.

13. EPA has adopted the rules at issue in this case.

14. Defendant U.S. Environmental Protection Agency can be served by delivering a copy of this 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.

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

16. 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.

17. 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.

18. 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**

19. 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.

20. 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.

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

22. 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.

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

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

25. TDSL then rejected the hazardous waste and demanded the generators remove all of the hazardous waste that had been delivered to the landfill.

26. When the generators refused, TDSL isolated the waste for proper management in accordance with its municipal solid waste landfill permit, which was issued by TCEQ.

27. This commingled mixture of hazardous waste, nonhazardous waste, clay and other soil materials that was isolated has been stored in shipping containers at the landfill awaiting proper resolution of the issues that underlie the appeal to this Court.

28. The commingled hazardous waste includes several hundred Cathode Ray Tubes.

29. There remains an estimated 6,000 – 10,000 pounds of toxic characteristic hazardous waste in the so called stored commingled wastes at TDSL’s municipal solid waste landfill.

30. TCEQ has 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 has admitted that it 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 conflicts with EPA's rules, Plaintiff filed its Petition with EPA for withdrawal of the federal approval of Texas hazardous waste program. EPA denied the Petition on May 16, 2006.

## 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**

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

35. 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.

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

37. 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.

38. For example, EPA's decision includes a statement of fact that all the hazardous waste that can be removed from the mixture of the D008 wastes and the municipal solid waste was removed.

39. EPA states the "mixture of solid waste and CRT waste" in question has been "sorted for visible CRT parts which were taken to another facility, and the remaining removed waste was containerized at TDSL."

40. That is not true, and there was nothing presented to EPA to support such an assumption.

41. There was no sorting of visible CRT parts in the commingled hazardous waste now stored at Plaintiff's landfill.

42. There remain large and clearly visible CRT parts, which are hazardous waste, stored in the containers at TDSL's landfill.

43. There is no evidence in the record before EPA that all the visible or otherwise large or removable hazardous D008 wastes were removed.

44. That fact is clearly not accurate, and EPA erred in relying on this erroneous fact.

45. This assumption that there has 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."

46. There is nothing in the record to support such a statement of the condition of the waste.

47. The D008 waste materials are still distinguishable, not amalgamated.

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

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

50. This is not true.

51. EPA has no basis for this assumption or statement of fact. EPA then based its legal analysis on its erroneous assumptions or statements about the facts that are not true.

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

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

54. 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**

55. 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 waste.

56. 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.



57. 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.

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

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

60. 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.

61. 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.

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

63. 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.

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

65. 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.

66. 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.

67. 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.

68. 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.

### VIII. PRAYER

**WHEREFORE, PREMISES CONSIDERED,** Plaintiff requests that, upon a final trial hereof, the decision 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. Plaintiff further prays for any further relief to which Plaintiff may show itself justly entitled.

Respectfully Submitted

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**ORDER**

CAME ON FOR CONSIDERATION, Plaintiff's Original Complaint. After consideration of the evidence, briefs and pleadings, this Court is of the opinion that Defendants' decision in EPA Docket No. TX/RCRA-06-2006-001 was arbitrary and capricious and contrary to the Federal Resource Conservation and Recovery Act ("RCRA") and rules of the U.S. Environmental Protection Agency ("EPA") under such Act and that relief requested by Plaintiffs should be **GRANTED**; it is therefore

**ORDERED** the decision of Defendants on EPA Docket No. TX/RCRA-06-2006-001 denying the Petition of Plaintiffs is reversed and remanded to the U.S. Environmental Protection Agency ("EPA") for reconsideration consistent with RCRA, EPA's rules and EPA's preamble prohibiting the dilution or mixing of waste that is hazardous due to its toxic characteristics to change the classification of the waste to a nonhazardous waste; it is further

Signed on this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

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Judge Presiding