No. 09-50274

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,
Plaintiff - Appellant

v.

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

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

BRIEF FOR APPELLANT
TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

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CERTIFICATE OF INTERESTED PERSONS

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,
Plaintiff – Appellant,

v.

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

No. 09-50274

The undersigned counsel of record certifies that the following listed entities have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Texas Disposal Systems, Inc.,
2. Texas Disposal Systems Landfill, Inc.,
3. Texas Landfill Management, LLC,
4. TJFA, LP
5. Mr. Bob Gregory, President, Chief Executive Officer and Principal Owner for Texas Disposal Systems, Inc., Texas Disposal Systems Landfill, Inc., Texas Landfill Management, LLC,

6. Mr. Jim Gregory, Co-owner, Vice-President and Secretary of Texas Disposal Systems, Inc., Texas Disposal Systems Landfill, Inc., and Texas Landfill Management, LLC.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED. R. APP. P 34(a)(1) and 5TH CIR. R. 28.2.3, Appellant, Texas Disposal Systems Landfill, Inc., hereby waives oral argument.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Federal Register

JURISDICTIONAL STATEMENT

A. Basis for district court's subject-matter jurisdiction.

Appellant Texas Disposal Systems Landfill, Inc. ("TDSL")[1] filed an Original Complaint (later amended) in the United States District Court for the Western District of Texas, seeking review of a decision issued by EPA, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *See* App. 5, p. 135.[2] TDSL also alleges that the District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). *See id.*

B. Basis for Court of Appeals' jurisdiction.

This is an appeal from a Final Judgment rendered by the United States District Court for the Western District of Texas, dismissing TDSL's Complaint for lack of subject-matter jurisdiction. *See* App. 3. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291.

C. Timeliness of this appeal.

The District Court issued its Final Judgment on January 28, 2009. *See* App. 3. Because the United States or its officer or agency is a party in this proceeding,

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[1] Throughout this Brief, the Appellant will be referred to as "TDSL." Appellees will be referred to collectively as "EPA."

[2] References to Record Excerpts will be as follows: App. # (referring to the document number in the Record Excerpts filed with this Brief), p. # (where citation to a specific page is appropriate).

the notice of appeal may be filed within 60 days after the judgment is rendered. Fed. R. App. P. 4(a)(1)(B). The Notice of Appeal was filed on March 30, 2009, *see* App. 2, within 60 days of the final judgment. *See also* Fed. R. App. P. 26(a)(3).

D. This appeal is from a final judgment, disposing of all claims.

This is an appeal of a Final Judgment, dismissing all of TDSL's claims for lack of subject-matter jurisdiction. *See* App. 3.

ISSUE PRESENTED FOR REVIEW

This appeal presents a single issue for review: Whether the District Court possessed jurisdiction to review EPA's adjudication of TDSL's Petition to withdraw Texas' hazardous waste program approval, pursuant to the Administrative Procedure Act.

STATEMENT OF THE CASE

Nature of the Case: TDSL filed an Original Complaint (which it later amended), seeking judicial review of a decision issued by EPA—a decision issued in response to TDSL's Petition seeking to withdraw federal approval of Texas' hazardous waste program. *See* App. 5. TDSL sought review of EPA's decision under the APA.

Course of Proceedings: EPA filed a Motion to Dismiss for Lack of Jurisdiction, arguing that its decision was not subject to review under the APA, and therefore,

the District Court lacked subject-matter jurisdiction to review its decision. EPA also argued that TDSL lacked standing to pursue its Complaint. *See* Motion to Dismiss for Lack of Jurisdiction, p. 186.

Final Disposition: The District Court agreed with EPA's argument that it lacked subject-matter jurisdiction. Accordingly, it granted EPA's Motion and issued a Final Judgment, dismissing all of TDSL's claims. It did not reach the issue of whether TDSL had standing to pursue its claims. *See* App. 3 & 4.

STATEMENT OF FACTS[3]

TDSL initiated a suit under the APA, challenging a decision issued by EPA as an erroneous, arbitrary and capricious decision. *See* App. 5. This decision is reflected in a document entitled, "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program" (hereinafter referred to as the "Determination"), on May 16, 2006. *See* App. 5, p. 149. EPA's Determination was issued in direct response to a petition submitted to EPA by Appellant TDSL. The petition alleged that Texas was improperly interpreting and applying the federal Resource Conservation and Recovery Act ("RCRA"), *see* 42 U.S.C. §§ 6921-6939e, and, thus, TDSL sought the withdrawal of Texas' federal RCRA hazardous waste program approval.

[3] These facts were not adjudicated by the District Court, as the Court did not reach the merits of TDSL's complaint. These facts are allegations taken from TDSL's Amended Complaint.

In responding to TDSL's petition, EPA included its interpretation of applicable law—a new interpretation, unsupported by the express language in its regulations or in the Federal Register Preamble to those regulations. It also approved Texas' application of the RCRA hazardous waste regulations and determined that no cause exists to initiate withdrawal of Texas' hazardous waste program. TDSL is an entity subject to RCRA regulations and, of course, EPA's interpretation of those regulations.

The following summary of the facts giving rise to TDSL's filing of the petition for withdrawal of program approval provides a useful context for understanding EPA's Determination:[4]

In October 1997, while transporting a load of cathode ray tubes ("CRTs") for Zenith Corp., trucker Penske was involved in a vehicular accident in Central Texas, which resulted in broken CRTs on the roadway and side of the road. The broken CRTs were known to be toxic characteristic hazardous wastes (or "D008" waste) due to their lead content. In fact, Zenith had previously characterized the CRTs as hazardous if damaged, and it informed Penske of the hazardous character of damaged CRTs. Nevertheless, several truckloads of broken CRTs—toxic characteristic hazardous waste—were hauled to Appellant TDSL's municipal solid

[4] Again, these facts are taken from the allegations in TDSL's Amended Complaint, *see* App. 5. They were not adjudicated by the District Court.

waste landfill, where they were commingled with municipal solid waste and cover soil.

Initially, TDSL removed from the surface of the landfill's working face the toxic characteristic hazardous waste and any other solid waste with which it was commingled. Several months later, Penske arranged for the removal from the landfill of the segregated waste. Although Penske ultimately removed the hazardous waste that had been segregated from the surface of the landfill's working face, toxic characteristic hazardous waste that was beneath the surface remained at the landfill, commingled with other solid wastes and soils.

In an effort to have the commingled hazardous waste removed from its landfill, TDSL sought assistance from the Texas Commission on Environmental Quality ("TCEQ") to require Penske and Zenith to properly manage and remove the commingled hazardous waste in accordance with state and federal law. TCEQ initially instructed Penske to remove the hazardous waste mixture from the landfill, but, then, it authorized Penske and Zenith to manage the entire quantity of the exhumed mixture as a non-hazardous waste. Because TCEQ's position conflicted with EPA's rules and exposed TDSL to increased risks, TDSL petitioned EPA to withdraw Texas's hazardous waste program approval.

Upon receiving TDSL's petition to withdraw program approval, EPA initiated an informal investigation of the allegations in the petition. At the

conclusion of its informal investigation, EPA issued its Determination, which TDSL alleges, includes erroneous interpretations of law, adjudicates certain facts, and ultimately concludes that no cause exists to initiate formal withdrawal proceedings. *See* App. 5, pp. 149-160.

Importantly, EPA's Determination did not confine itself to determining whether it should initiate withdrawal of Texas' hazardous waste program approval. Rather, EPA's 12-page Determination characterized the issue to be addressed as a "question of law" and proceeded to provide an interpretation of that law:

> 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 ["LDRs"] even though the resulting mixture tests below RCRA characteristic hazardous and land disposal restriction levels.

App. 5, p. 153. It then applied that law to the facts it adjudicated to be true (some of which TDSL disputes). Finally, EPA essentially approved of TCEQ's actions and interpretations of federal law and determined that the criteria for initiating withdrawal proceedings were not present in this case.

TDSL, so as not to waive any of its rights to judicial review, sought to challenge the Determination in the District Court in Austin and by petitions for judicial review in both this Court and the Court of Appeals for the D.C. Circuit. *See* Seventh Status Report, p. 98 (providing a procedural history of this case). Both this Court and the D.C. Circuit Court of Appeals determined that they had no

jurisdiction to review EPA's Determination via petitions for judicial review of agency action. *See id.*

Finally, TDSL sought to lift the stay of proceedings in the District Court and pursue its APA claims. *See* Unopposed Motion to Lift Stay of Proceedings, p. 105. EPA thereafter filed a motion to dismiss TDSL's complaint, arguing that the District Court had no jurisdiction over TDSL's claims, or, in the alternative, TDSL had no standing to pursue its claims. *See* Motion to Dismiss for Lack of Jurisdiction, p. 186. The District Court agreed that it had no subject-matter jurisdiction to consider TDSL's claims and granted the Motion to Dismiss. *See* App. 3 & 4. Having concluded that subject-matter jurisdiction was lacking, the District Court did not address the issue of standing. *See* App. 4, p. 149, n.1.

By this appeal, TDSL seeks review of the District Court's dismissal and requests reversal of that decision and remand to the District Court to consider the merits of TDSL's claims.

SUMMARY OF ARGUMENT

By its Complaint, TDSL sought judicial review of an agency decision under the APA. The APA presumptively entitles a person affected by an agency decision to judicial review of that decision.

In dismissing TDSL's claims, the District Court relied on one of two exceptions to the presumption of reviewability of an agency decision: the

presumption that a decision committed to agency discretion is not reviewable. But this exception is triggered only when there is no law to apply to the review of the agency action. In this case, EPA's own regulations provide the law against which to review its Determination.

Nor does the presumption of unreviewability, articulated in the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), apply here. That presumption applies to agencies' refusals to initiate enforcement proceedings. In this case, however, TDSL does not challenge EPA's refusal to take action. Instead, it challenges the adjudication and interpretation of law announced in EPA's Determination—an affirmative action by the agency.

In sum, the District Court should have exercised its jurisdiction to reach the merits of TDSL's complaints because EPA's decision was not a decision committed to unfettered agency discretion. Moreover, EPA's decision is not akin to a refusal to prosecute, entitled to a presumption of unreviewability. Rather, EPA's decision is an affirmative adjudication, subject to review under the provisions of the APA.

ARGUMENT

A. Standard of Review

Review of a dismissal for lack of subject-matter jurisdiction is governed by a de novo standard of review. *PCI Transp. Inc. v. Fort Worth & W. R.R. Co*., 418 F.3d 535, 540 (5th Cir. 2005).

B. APA creates a presumption of judicial review.

The APA presumptively entitles a person suffering legal wrong because of agency action to judicial review thereof. *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971). "Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967); *accord Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). There are two exceptions to this presumption of reviewability: (1) statutes preclude judicial review and (2) agency action is committed to agency discretion by law. 5 U.S.C. § 701(a). In its Motion to Dismiss, EPA argued that the second exception to reviewability applies in this case, and the District Court agreed.

C. The "agency action is committed to agency discretion by law" exception does not preclude review in this case.

The District Court concluded that it lacked subject-matter jurisdiction to entertain TDSL's APA claims because "EPA's Determination not to withdraw the

Texas RCRA Program" is an unreviewable action committed to agency discretion. *See* App. 4.

The exception to judicial review for action committed to agency discretion by law is a narrow one; it applies only in "rare instances." *Volpe*, 401 U.S. at 410. This exception applies only where "statutes are drawn in such broad terms that in a given case there is no law to apply." *Id*.

1. EPA's Determination is not committed to unfettered agency discretion; the agency's regulations provide the Court with law to apply.

The mere fact that a statute contains discretionary language does not make agency action unreviewable. Several Courts have recognized repeatedly that the Supreme Court's holding in *Chaney* does not bar judicial review when an agency's regulation provides the Court with law to apply. *See, e.g., Socop-Gonzalez v. INS*, 208 F.3d 838, 844 (9th Cir. 2000) (citing decisions from 6th, 1st, and 3rd Circuit Courts of Appeals). In this case, EPA's regulations provide the Court with law against which to scrutinize EPA's Determination.

EPA's regulations at 40 C.F.R. § 271.23 allow EPA's Administrator to order commencement of withdrawal proceedings in response to a petition from an interested person alleging failure of the State to comply with the requirements of Part 271 ("Requirements for Authorization of State Hazardous Waste Programs"), as set forth in Section 271.22. The Administrator *must* respond in writing to any

petition to commence withdrawal proceedings. 40 C.F.R. § 271.23(b)(1). And he may conduct an informal investigation of the allegations in the petition "*to determine whether cause exists to commence proceedings*." 40 C.F.R. § 271.23(b)(1). In other words, should the Administrator initiate an informal investigation, the purpose and scope of that investigation is circumscribed by at least two other regulations: Section 271.4 (regarding requirements that a State program be consistent with the Federal program) and Section 271.22 (criteria for withdrawing approval of State programs).

Among the criteria enumerated in Section 271.22 and justifying withdrawal of State program approval are the following: "Failure to act on violations of permits or other program requirements" and "Failure to inspect and monitor activities subject to regulation." 40 C.F.R. § 271.22. These regulations alone provide the Court with law to apply in reviewing EPA's Determination.

2. Supreme Court's decision in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers* does not apply here.

In its Memorandum Opinion and Order granting EPA's Motion to Dismiss, the District Court relied on two Supreme Court decisions. One of those decisions is *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). But the *ICC* case does not involve a legal administrative determination such as the one presented in this case; it is not directly on point.

In the *ICC* case, the Supreme Court held that the ICC's decision regarding a request to reconsider a prior agency action is reviewable only if new evidence or changed circumstances that rendered the agency's original decision inappropriate are alleged. On the other hand, if the request for reconsideration is based solely on the ground of "material error," *i.e.*, on the same record that was before the agency when it rendered its original decision, then the order denying rehearing is not reviewable. That is the gravamen of the Court's opinion. The Court did not, however, address whether the subject-matter of the agency's decision is reviewable.

Although TDSL requested that EPA reconsider its decision, TDSL does not seek judicial review of EPA's refusal to grant the request. Rather, TDSL seeks judicial review of the original agency action, as reflected in EPA's Determination. And so, the *ICC* decision is not on point and is not helpful in determining whether the District Court had jurisdiction in the present case to review EPA's Determination.

D. Presumption of unreviewability does not apply in this case.

The second case cited by the District Court in its Memorandum and Order granting EPA's Motion to Dismiss is *Heckler v. Chaney*, 470 U.S. 821 (1985). In that case, the Supreme Court created another presumption. An agency decision not

to seek enforcement of a violation is presumed *unreviewable*, but this presumption can be rebutted. Like the *ICC* case, however, *Chaney* is not exactly on point here.

In *Chaney*, prison inmates who had been sentenced to death by lethal injection petitioned the Food and Drug Administration ("FDA") for enforcement of the Federal Food, Drug, and Cosmetic Act. They alleged that the drugs used in the lethal injection violated the Act because the drugs' use for human execution was an unapproved use of the drug. The FDA denied the inmates' petition, and the inmates appealed.

In concluding that the courts were without subject-matter jurisdiction to review the FDA's denial of the inmates' petition for enforcement, the Supreme Court held that agency decisions not to institute a particular enforcement action are among the types of agency actions presumptively exempted from judicial review. *Id.* at 830-32. The Court reasoned that section 701(a)(2) of the APA forecloses review if the statute governing the agency's action is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. *Id.*

The Court explained that a decision not to enforce is unsuitable for judicial review because of the many variables that factor into the agency's decision—variables that agencies are far better equipped to deal with in the proper ordering of their priorities. For instance, the agency must assess whether agency resources are

best spent on a particular violation, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and whether the agency has enough resources to undertake the action at all. *Id.* at 831. Thus, an agency's refusal to initiate enforcement is "presumptively unreviewable."

The Court emphasized, however, that the presumption may be rebutted. If, for instance, Congress has provided the courts with law to apply, judicial review is available. *Id.* at 832-33. Even agency decisions that could be characterized as decisions not to take enforcement action are nonetheless reviewable where there is "law to apply." *Id.* And finally, *Chaney* recognized that the presumption of non-reviewability may be overcome if the agency has conspicuously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.[5] *Id.* at 833 & n.4.

1. EPA's Determination is not simply a refusal to enforce; it is an informal adjudication. Thus, *Chaney*'s presumption of unreviewability does not apply.

Significantly, the Court's decision in *Chaney* rested in large part on the Court's characterization of the agency action as a decision *not* to enforce. Its reasoning does not apply to an affirmative agency action, decision, or adjudication.

[5] The Court recognized another exception that TDSL does not claim applies here.

A review of EPA's Determination in this case reveals that this Determination is not simply a refusal to enforce, as described in *Chaney*. Rather, the Determination is more akin to an informal adjudication. Indeed, EPA did not simply decide that it would not enforce a particular violation. EPA determined that TDSL's "Petition . . . does not provide cause to order the commencement of withdrawal proceedings." TDSL's petition, of course, alleged mis-interpretation of bedrock RCRA law.

Before reaching this decision, EPA conducted an informal investigation into the allegations made by TDSL, the Petitioner. It adjudicated some of the facts (accepted some facts as true), and it engaged in a lengthy discussion of the relevant law and its application to those facts.

The Determination at issue in this case, then, is not simply a refusal to enforce. The agency did not concur that a violation had occurred and, then, exercise its discretion to forego enforcement for that violation; instead, the agency (erroneously) determined the law to be such that, independent of discretion, no enforcement would lie.

And *Chaney* is not the most apt law to apply. Instead, the Sixth Circuit Court of Appeals' decision in *Kemmons Wilson, Inc. v. Federal Aviation Administration*, 882 F.2d 1041 (6th Cir. 1989), provides a more useful analysis. In that case, Kemmons Wilson sought to open a "fixed base operation" at the

Memphis International Airport. When the request was denied, Kemmons Wilson filed a formal letter of complaint with the Memphis office of the FAA, alleging that the Airport Authority had denied the application in violation of the "exclusive rights" provision of the federal aviation law. The FAA office initiated an investigation based on the complaint. Responding to an FAA request, the Airport Authority provided one reason for its action: not enough space available at the airport to develop a second fixed base operation. The FAA accepted this reason as valid.

Kemmons Wilson requested reconsideration of this determination and requested a formal evidentiary hearing on its complaint. The FAA denied the request by letter, without elaborating on the reasons for the denial. Kemmons Wilson then sought judicial review of the decision.

In concluding that it had subject-matter jurisdiction to review the complaint, the Sixth Circuit Court of Appeals distinguished the Supreme Court's decision in *Chaney*. The Court explained that the FAA's action is not properly characterized as a "decision not to enforce," such as the one reviewed in *Chaney*. "Rather Wilson brought a complaint within the mandatory administrative jurisdiction of the FAA against the Memphis Airport Authority alleging a colorable violation of the 'exclusive rights' provision of the" federal aviation law. *Id.* at 1046. The FAA adjudicated that claim, although it did so in a perfunctory and conclusory fashion;

it conducted an informal investigation. And the FAA concluded that the conduct of the Airport Authority was justified. *Id.*

The Court characterized this agency action as an example of an "affirmative act of approval," which the *Chaney* Court distinguished from a refusal to enforce:

> A perfunctory adjudication of a case which the agency has not taken sufficiently seriously is not the same as the exercise of prosecutorial discretion. To confuse an inadequate adjudication with a decision not to prosecute would defeat the plainly stated intent of Congress . . . to provide an administrative remedy for such violations subject to full judicial review.

Id.

Similarly, the Determination at issue in this case was rendered by EPA in response to TDSL's formal petition seeking withdrawal of approval of Texas' Hazardous Waste Program, based on alleged inconsistencies between Texas' interpretation of hazardous waste law and EPA's regulations. Like the FAA, EPA initiated an informal investigation and requested a response to the petition from the Texas Commission on Environmental Quality.

Based on the information provided, EPA adjudicated the allegations in TDSL's petition and issued an affirmative act of approval of TCEQ's administration of its Hazardous Waste Program. The Agency explained its rationale for choosing not to initiate formal withdrawal proceedings, and, in doing

so, it provided its interpretation of the law applicable to its understanding of the facts.

EPA's written Determination, which includes its analysis of the applicable law, is not akin to an agency's decision not to pursue an enforcement action. Although EPA chose not to act to seek withdrawal of Texas' RCRA program approval, it did act when it provided an analysis of the applicable law. Indeed, EPA's interpretation of applicable law can be reviewed against the express language of RCRA and the Agency's own rules.

For instance, the crux of TDSL's argument to EPA was that EPA's Land Disposal Restrictions expressly prohibit the dilution of hazardous wastes to justify land disposal without proper treatment. *See* 40 C.F.R. § 268.3(a). This prohibition is especially important in the case of lead-bearing waste, where dilution simply increases the volume of a waste without removing or stabilizing the toxic component of the waste. *See* Land Disposal Restrictions for Third Third Scheduled Wastes, 55 Fed. Reg. 22,520, at 22,652 (June 1, 1990). In its Determination, however, EPA has, in essence, interpreted the law to allow the deliberate mixing, or dilution, of toxic characteristic hazardous waste with non-hazardous waste and soil, resulting in a new treatment classification for the diluted waste and, thus, new land disposal restrictions. This is a departure from EPA's

rules, its Preamble to those rules, and its prior interpretation and application of those rules.

To be clear, at this juncture, TDSL does not challenge EPA's decision not to withdraw Texas's Hazardous Waste Program approval. Indeed, EPA could not reach such a decision without first initiating formal withdrawal proceedings. Rather, TDSL maintains that the District Court was cloaked with jurisdiction, under the APA, to review EPA's affirmative adjudication that TCEQ properly interpreted EPA's regulations and that no cause exists to proceed any further.

As in the *Kemmons Wilson* case, the Supreme Court's decision in *Chaney* does not apply to EPA's Determination. There is no presumption of unreviewability, here, because EPA's Determination was not simply a failure to enforce.

2. Even if the presumption of unreviewability applied, the presumption is rebutted here.

Assuming for the sake of argument that EPA's Determination could be characterized as a refusal to pursue enforcement action, this decision only creates a presumption that the action is not reviewable—a rebuttable presumption. The presumption of non-reviewability may be overcome if:

> (1) the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers; (2) if the agency refuses to institute proceedings based solely on the belief that it lacks jurisdiction; or (3) the agency has conspicuously and expressly

> adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.

Chaney, 470 U.S. at 833 & n.4. In this case, both the first and third propositions above apply.

a. EPA's regulations provide guidelines for the agency to follow in determining whether to initiate withdrawal proceedings.

TDSL has already demonstrated, in its arguments above, that EPA's regulations provide guidelines that EPA must follow in determining whether cause exists to initiate withdrawal proceedings. Those guidelines are set forth in at least two different regulations: 40 CFR §§ 271.4 and 271.22.

It is worth noting the absence of certain criteria or factors in the regulations governing withdrawal of program approval. Among the factors that are not included in EPA's regulations are the following: whether the agency's resources are best spent on a particular violation, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and whether the agency has enough resources to undertake the action at all. In other words, the variables that agencies typically consider in determining whether to initiate enforcement and that weigh in favor of non-reviewability, as described in *Chaney*, are not among the criteria that EPA may consider in determining whether cause exists to initiate withdrawal proceedings.

EPA's investigation into whether cause exists to initiate withdrawal proceedings is not, therefore, akin to a prosecutor's unfettered discretion in determining whether to pursue an indictment. EPA's investigation is constrained by certain criteria—criteria outlined in its own regulations—that it must consider in reaching its decision.

b. In the alternative, the agency has conspicuously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.

Again, assuming for the sake of argument that EPA enjoyed unfettered discretion in choosing not to initiate withdrawal proceedings, its Determination in this case can be characterized as a general policy that is so extreme as to amount to an abdication of its statutory responsibilities. EPA was required, by law, to issue a response to TDSL's petition; it had no discretion to refuse to do so. 40 C.F.R. § 271.23(b)(1). Having chosen to interpret the applicable law in its response and having relied on that interpretation in choosing not to initiate formal withdrawal proceedings, EPA was required to correctly interpret and apply the law.

The D.C. Circuit Court of Appeals has held that although there is no basis for review of an agency's individual, "single-shot" non-enforcement decision, an agency's statement of a general enforcement policy may be reviewable for legal sufficiency if the agency articulated the policy in some form of universal policy

statement. *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994).

The D.C. Court provided several reasons supporting this exception to non-reviewability. First, general enforcement policies are more likely to be direct interpretations of a statute and less likely to turn on particular combinations of facts. Second, a general policy will normally be a more clear and more easily reviewable statement of reasons, unlike statements on individual decisions to forego enforcement, which tend to be cursory or ad hoc. And finally, "an agency's pronouncement of a broad policy against enforcement poses special risks that it 'has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities,' a situation in which the normal presumption of non-reviewability may be inappropriate." *Id.* at 667 (quoting *Chaney*, 470 U.S. at 833 n. 4).

All three of the above rationales support review of the Agency's Determination in this case. First, in its Determination, EPA admitted that its Determination turns on a question of law: "[I]t is not necessary to determine the veracity of all of the factual allegations because the Petitioner's [TDSL's] argument is a legal one—TCEQ's alleged misinterpretation of the law." *See* App. 5, p. 152. EPA reiterated, under the subsection "Question of Law," that TDSL's

petition "can thus be decided as a question of law" and that "it is appropriate to simply answer the legal question." *Id.* at pp. 152-53.

Thus, the Determination does more than simply provide a cursory, ad hoc decision foregoing initiation of formal withdrawal proceedings. Rather, the Agency's statement of the law provides the Court with a clear and easily reviewable statement of reasons for its decision.

Finally, EPA's new policy, as articulated in its Determination, poses special risks that it "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." This renders the presumption of non-reviewability inappropriate in this case. In its Determination, EPA asked if the generator of a toxic characteristic hazardous waste can avoid the treatment requirements and land disposal restrictions in EPA's rules; it then answered in the affirmative. EPA's answer in the Determination is new and in direct conflict with EPA's written rules, its preamble to its rules, and its historic application of these rules. It eliminates the requirement that the waste's toxic characteristic be stabilized and creates a new standard that allows changes in treatment requirements as a result of waste dilution. And states, like Texas, that have been granted program approval are charged with applying their programs consistently with EPA's. Thus, this new regulatory policy is likely to affect more than just Texas.

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Marisa Perales, hereby certify that today, June 30, 2009, a paper and electronic copy of the Brief For Appellant Texas Disposal Systems Landfill, Inc., a paper and electronic copy of the record excerpts, and the official record in this case, consisting of one volume of the pleadings and exhibits, were served upon the following in the manner indicated:

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