IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

No. 09-50274

_____

TEXAS DISPOSAL SYSTEMS LANDFILL, INC,

Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LISA P. JACKSON, in her official capacity as Administrator of the United States Environmental Protection Agency; and LAWRENCE E. STARFIELD, in his official capacity as Acting Regional Administrator for Region 6 of the United States Environmental Protection Agency,

Defendants-Appellees.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, CIV. NO. 06-642

_____

BRIEF FOR THE APPELLEES

_____

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Interested Private Parties: Texas Disposal Systems Landfill, Inc.; Texas Disposal Systems, Inc.; Texas Landfill Management, LLC; TJFA, LP; Bob

Gregory; Jim Gregory.

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Date

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STATEMENT REGARDING ORAL ARGUMENT

The Appellees acknowledge Appellant's decision to waive oral argument. But the Appellees do not waive their right to present oral argument should the Court nevertheless wish to hear it.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Texas Disposal Systems Landfill, Inc. ("TDSL") brought suit against EPA, its Administrator, and its Regional Administrator for Region VI. TDSL's amended complaint[1/] invoked the district court's jurisdiction under 5 U.S.C. §§ 701–706 and 28 U.S.C. §§ 1331 & 2201. ER 5, ¶¶ 7–8 (USCA5 135).[2/] But the district court correctly dismissed for lack of jurisdiction.

In 2004, TDSL petitioned the Texas Commission on Environmental Quality ("TCEQ") to order a third party to remove hazardous waste that it had disposed of at TDSL's landfill. Dissatisfied with TCEQ's response, TDSL in 2005 petitioned EPA to withdraw its authorization of Texas's hazardous waste program, in accordance with the Resource Conservation and Recovery Act ("RCRA"). In 2006, EPA issued a Determination that the petition showed no cause to commence withdrawal proceedings, whereupon TDSL filed the instant lawsuit. In 2007, TCEQ re-visited the issue and ordered the third party to remove the waste from TDSL's landfill. Responding to a request by TDSL, EPA in 2008 acknowledged that its Determination had no cognizable binding legal effect and made no formal

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[1/] Both the initial complaint filed in August 2006 and the amended complaint filed in June 2008 are styled as the "Plaintiff's Original Complaint." For clarity, this brief refers to them as "initial" and "amended" complaints, respectively.

[2/] "ER" refers to the Record Excerpts filed with TDSL's opening brief. Parallel "USCA5" references are provided to the Certified Appeal Record's pagination, which is reproduced in the Record Excerpts. *See* 5th Cir. R. 28.2.2.

findings about future regulatory actions.

As the district court held in dismissing the amended complaint, EPA's decision not to hold a public hearing to commence proceedings to withdraw authorization of Texas's hazardous waste program was committed to agency discretion by law, so the district court lacked subject matter jurisdiction per the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) ("APA"). *See infra* at 17–30. Furthermore, once the waste was removed pursuant to TCEQ's order, and once EPA acknowledged that its Determination had no binding legal effect, no live controversy existed, so that jurisdiction was lacking under Article III of the Constitution. *See infra* at 30–45.

STATEMENT OF THE ISSUES

1. RCRA directs EPA to withdraw its authorization of a state's hazardous waste program whenever EPA determines—after a public hearing—that the program is inconsistent with RCRA. But neither the statute nor EPA's regulations provide substantive law for a court to apply in reviewing EPA's decision whether cause exists to commence withdrawal proceedings through a hearing. Is the decision committed to EPA's discretion?
2. TDSL sued over EPA's Determination that no cause existed to initiate withdrawal proceedings against Texas, after TDSL was dissatisfied with TCEQ's enforcement response against a third party. TCEQ subsequently

ordered the third party to remove the waste, the third party complied, and EPA acknowledged that its Determination lacked binding legal effect. Is there a live controversy for purposes of Article III jurisdiction?

STATEMENT OF THE CASE

I. RCRA and Its Implementing Regulations

RCRA is a "comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). The statute's "primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Id.* (quoting 42 U.S.C. § 6972(b)). RCRA "empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with . . . rigorous safeguards and waste management procedures." *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 331 (1994); *see* 42 U.S.C. § 6912(a) (authorizing EPA to promulgate implementing regulations); *see also* 42 U.S.C. §§ 6921–27 (requiring EPA to promulgate regulations that identify hazardous wastes; impose standards on generators, transporters, and facilities; and require permits and inspections).

Of relevance here as background information, RCRA defines hazardous waste as a solid waste that contributes to causing death or serious illness, or poses

a substantial threat to human health. *Id.* § 6903(5). It requires EPA to develop criteria for identifying the characteristics of hazardous waste in general and for listing specific hazardous wastes, as well as to promulgate regulations identifying those characteristics and listing those specific hazardous wastes. *Id.* § 6921(a)–(b)(1). Thus, a solid waste may be hazardous either because it exhibits one of the identified characteristics or because it is specifically listed as a hazardous waste. Consistent with the statute, Part 261 subpart C of EPA's implementing regulations identifies four characteristics of hazardous waste: ignitability, corrosivity, reactivity, and toxicity. 40 C.F.R. §§ 261.20–.24 (2005). And subpart D lists specific solid wastes that have been identified as hazardous through EPA rulemaking. *Id.* §§ 261.30–.38.

EPA's regulatory definition of "hazardous waste" includes "a mixture of solid waste and one or more hazardous wastes listed in subpart D." *Id.* § 261.3(a)(2)(iv). Revised in 2001, this "mixture rule" treats a *listed* hazardous waste as hazardous even after mixture with another solid waste, subject to certain exceptions. *See* 66 Fed. Reg. 27,266, 27,269 (May 16, 2001); *see also Am. Chemistry Council v. EPA*, 337 F.3d 1060, 1063–66 (D.C. Cir. 2003) (discussing and upholding mixture rule). But, by its plain text, the mixture rule does not apply to *characteristic* hazardous waste. That is, a characteristic hazardous waste that is mixed with another solid waste only continues to be a characteristic hazardous

waste if the resulting mixture continues to exhibit one of the four characteristics of hazardousness. *See* 66 Fed. Reg. at 27,283 (explaining that "*unlisted* characteristic waste becomes non-hazardous when it ceases to be characteristic") (emphasis added).

II. Authorization of State Hazardous Waste Programs

While RCRA and its implementing regulations impose extensive federal requirements for treatment, storage, and disposal of hazardous waste, the statute also allows EPA to authorize states to carry out their own hazardous waste programs "in lieu of the Federal program." 42 U.S.C. § 6926(b). To be authorized, state programs must (1) be "equivalent to the Federal program," (2) be "consistent with the Federal or State programs applicable in other States," and (3) "provide adequate enforcement of compliance with [RCRA's] requirements." *Id.*

EPA initially authorized Texas's hazardous waste program in 1984, 49 Fed. Reg. 48,300 (Dec. 12, 1984), with revisions periodically authorized thereafter, *see, e.g.*, 64 Fed. Reg. 49,673 (Sept. 14, 1999). Texas's authorization is codified at 40 C.F.R. § 272.2201.

RCRA also authorizes EPA to withdraw its authorization of state hazardous waste programs:

> Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State

> and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

42 U.S.C. § 6926(e). But the statute provides no law to apply concerning EPA's decision whether to *commence* withdrawal proceedings by holding a hearing.

Consistent with the statute, EPA regulations provide that EPA "*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." 40 C.F.R. § 271.22(a) (2005) (emphasis added). They provide a non-exclusive list of circumstances under which authorization "may" be withdrawn. *Id.* The regulations further provide that any "interested person" may petition EPA to commence withdrawal proceedings, and that EPA "shall respond in writing to any petition." *Id.* § 271.23(b)(1). But—like the statute—the regulatory text commits the decision to commence withdrawal proceedings to EPA's discretion:

> The Administrator *may* order the commencement of withdrawal proceedings on his or her own initiative or 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 Sec. 271.22. . . . He *may* conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph shall fix a time and place for the commencement of the hearing and shall specify the allegations against the State which are to be considered at the hearing.

Id. (emphases added).

STATEMENT OF THE FACTS

I. Underlying Facts

Following an October 1997 traffic accident, Penske Truck Leasing disposed of several hundred broken cathode ray tubes (which Penske had been transporting for Zenith Electronics Corporation) at TDSL's landfill in Travis County, Texas. ER 5, ¶¶ 23–25 (USCA 5 138); *see also* ER 5, Ex. A at 4 (USCA5 152) (summarizing facts). Penske initially classified the cathode ray tubes as non-hazardous waste, and they were commingled with municipal solid waste in the landfill. ER 5, ¶¶ 24, 27 (USCA5 138) . TDSL alleged that they should have been classified as hazardous, because they contained lead. ER 5, ¶¶ 23, 26 (USCA5 138). Thus, shortly after the cathode ray tubes' disposal, TDSL demanded that Penske remove them. ER 5, ¶¶ 26–27 (USCA5 138). After Penske refused, TDSL isolated the cathode ray tubes and the municipal solid waste with which they had been commingled, storing the commingled waste in shipping containers. ER 5, ¶ 28 (USCA5 138).

In March 2004, TDSL sought an order from TCEQ requiring Penske and Zenith to remove the commingled waste. Although TCEQ issued a notice of violation to Penske in 2004, TDSL alleges that "TCEQ refused to require [Penske] to remove or manage [the commingled] waste with proper hazardous waste

manifests or other steps that are consistent with federal law." ER 5, ¶ 30 (USCA5 139). TCEQ further alleges that this was because "TCEQ's 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." ER 5, ¶ 31 (USCA5 139).[3/] But TCEQ later re-visited the case and, in July 2007, ordered Penske to remove all of the commingled waste. ER 5, ¶¶ 35–37 (USCA5 139–40). Penske complied, removing the commingled waste on December 12, 2007. ER 5, ¶ 39 (USCA5 140).

II. TDSL's Petition and EPA's Determination

On November 14, 2005, while state court litigation was ongoing, TDSL petitioned EPA to withdraw its authorization of Texas's hazardous waste program in accordance with RCRA. ER 5, ¶ 33 (USCA5 139); *see* 42 U.S.C. § 6926(e); *supra* at 5–6. The gravamen of TDSL's petition was a legal argument that TCEQ misinterpreted the mixture rule in EPA's regulatory definition of hazardous waste, *see* 40 C.F.R. § 261.3(a)(2) (2005); *supra* at 4–5, and thus erred in determining that the cathode ray tubes—which were characteristic hazardous waste—could "'be treated as a non-hazardous waste once mixed with other wastes,'" ER 5, Ex.

[3/] As EPA noted, TDSL was also pursuing administrative and state court remedies against Penske and Zenith at the time TDSL first sought an order from TCEQ. ER 5, Ex. A at 4 (USCA5 152). A settlement was reached in the state court litigation in November 2007.

A at 4 (USCA5 152); *see also* ER 5, Ex. A at 6 (USCA5 154) ("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.").

In response to TDSL's petition, EPA conducted an informal investigation. ER 5, Ex. A at 1–2 (USCA5 149–50); *see* 40 C.F.R. § 271.23(b)(1) (2005) ("The Administrator . . . may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence [withdrawal] proceedings . . . ."). On May 16, 2006, EPA issued its Determination that TDSL's petition did not provide cause for EPA to commence proceedings for withdrawing its authorization of Texas's hazardous waste program. ER 5, Ex. A at 1, 12 (USCA5 149, 160).

EPA stated that "[a]uthorizing 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." ER 5, Ex. A at 3 (USCA5 151). It noted that withdrawal proceedings could create a significant expense, ER 5, Ex. A at 3 (USCA5 151), and that two courts had described withdrawal of authorization as a "'drastic'" step, ER 5, Ex. A at 3 (USCA5 151) (quoting *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1238 (10th Cir. 2002); *Waste Mgmt. of Ill. v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill. 1989)). It added that, in order for withdrawal proceedings to be

warranted, "EPA believes there must be a broad programmatic concern with a state program . . . rather than issues associated with a single incident." ER 5, Ex. A at 3 (USCA5 151).

Moving to the substance of the petition, EPA rejected TDSL's principal argument:

> 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 . . . 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 . . . .
>
> . . . If the exhumed waste at TDSL does not exhibit any characteristics of hazardous waste, then the waste would not be hazardous 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.

ER 5, Ex. at 7 (USCA5 155). The agency also rejected TDSL's arguments that, because of its alleged misinterpretation of the mixture rule, TCEQ would also misinterpret RCRA land disposal restrictions and a regulatory prohibition on impermissible dilution of hazardous wastes. *See* ER 5, Ex. A at 8–10 (USCA5 156–58).

III. Legal Proceedings

TDSL filed suit challenging EPA's Determination on August 14, 2006.

Compl., Docket # 1 (USCA5 8). TDSL also filed petitions for review in this Court and the United States Court of Appeals for the D.C. Circuit,[4/] and the parties jointly moved for a stay of proceedings in the district court on September 22, 2006. *See* ER 4 at 2 (USCA5 260). As stated, however, on July 30, 2007, TCEQ issued an order that required Penske to remove all of the commingled waste. ER 5, ¶¶ 35–37, Ex. B at 1 (USCA5 139–40, 161). TDSL, Penske, and Zenith then reached a settlement agreement in the state court litigation on November 20, 2007. ER 5, ¶ 38, Ex. C at 1 (USCA5 140, 164).

On November 29, 2007, TDSL, Penske, and Zenith jointly sent a letter to EPA, informing the agency of TCEQ's July 2007 order, and requesting that the Determination be withdrawn or "supplement[ed] with a separate letter," ER 5, Ex. B at 2 (USCA5 162), to indicate that it was limited to the facts of this situation:

> [T]he issue on which the EPA Determination was based has been resolved. Specifically, the exhumed [commingled waste] will soon be removed from TDSL's premises. . . . With any question about the proper means of handling the [cathode ray tube] Waste now resolved, TDSL, Penske, Zenith, and [Texas Campaign for the Environment] agree that the EPA should withdraw, revise, or supplement the EPA Determination.

ER 5, Ex. B at 1 (USCA5 161). The letter requested that EPA clarify that "EPA believes no court is bound by the EPA determination, and other authorities should

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[4/] This Court denied TDSL's petition for review for lack of jurisdiction in November 2007. *TDSL v. Greene et al.*, No. 06-60740 (5th Cir. Nov. 20, 2007). The D.C. Circuit did the same in July 2007. *TDSL v. EPA et al.*, No. 06-1297 (D.C. Cir. July 23, 2007).

not rely on it for any purpose." ER 5, Ex. B at 2 (USCA5 162). It added that "withdrawing, revising, or supplementing the EPA Determination will resolve the two remaining proceedings initiated by TDSL in federal court," and stated that TDSL would "take whatever steps are possible to withdraw the TDSL Petition" if the Determination were withdrawn, revised, or supplemented. ER 5, Ex. B at 2 (USCA5 162).

Responding in March 2008, EPA reaffirmed what it had already stated in briefs filed in the D.C. Circuit: (1) the Determination was not a regulation and made no formal findings about future regulatory actions; (2) the Determination had no cognizable binding legal effect; (3) the Determination did not establish any new generally applicable requirements for any party; and (4) no regulated entity was required to change its behavior in response to the Determination. ER 5, Ex. D at 2–3 (USCA5 169–70). It explained: "The Determination only explains EPA's decision, wholly within EPA's discretion, . . . that . . . cause does not exist to commence withdrawal proceedings." ER 5, Ex. D at 3 (USCA5 170).[5/]

Notwithstanding its earlier representations that all issues upon which the Determination had been based were resolved and that it would withdraw its

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[5/] In its letter asking EPA to withdraw, revise, or supplement the Determination, TDSL specifically quoted from EPA's D.C. Circuit briefing, and stated that "[c]onfirming the substance of these statements in a short letter . . . would dispel any misconceptions . . . ." ER 5, Ex. B at 2 (USCA5 162).

petition if EPA reaffirmed that the Determination lacked binding legal effect, TDSL moved the district court to lift its stay of proceedings on April 25, 2008, Docket # 28 (USCA5 105), and on June 30, 2008, filed an amended complaint, Docket # 37, ER 5 (USCA5 133). EPA moved to dismiss for lack of jurisdiction, arguing that: (1) the district court lacked subject matter jurisdiction, because the decision whether to commence withdrawal proceedings was committed to EPA's discretion by law and unreviewable per 5 U.S.C. § 701(a)(2); and (2) TDSL lacked standing under Article III, because the factual situation underlying the Determination had been resolved and EPA had reaffirmed that the Determination had no binding legal effect. *See* EPA's Mot. to Dismiss for Lack of Jurisdiction 7–21, Docket # 41 (Aug. 15, 2008) (USCA5 186). On January 28, 2009, the district court dismissed for lack of subject matter jurisdiction, finding that it did not need to reach the alternative jurisdictional ground of standing. ER 4 at 4 (USCA5 262). This appeal followed.

SUMMARY OF THE ARGUMENT

The district court correctly held that it lacked subject matter jurisdiction over TDSL's suit because EPA's decision whether to commence withdrawal proceedings through a public hearing is committed to agency discretion by law, and therefore unreviewable. The withdrawal process is an onerous adversarial proceeding akin to an enforcement action. A decision not to undertake an

enforcement action is presumptively unreviewable, because it entails discretionary policy choices about prioritization and resource allocation. Presumptions aside, the legislative scheme provides no substantive law for a court to apply in reviewing EPA's decision not to commence withdrawal proceedings. RCRA's text and legislative history provide EPA with great discretion, and are silent as to what factors should guide EPA's discretion, and EPA's own regulations provide only permissively-phrased procedural guidance, not substantive law to apply.

Furthermore, the district court lacked Article III jurisdiction. In order to satisfy the case-or-controversy requirement, the plaintiff must retain a personal stake in an actual, live controversy at all stages of federal court proceedings. But TDSL lost that personal stake—and this case became moot—when the commingled waste was removed from TDSL's landfill pursuant to a TCEQ order in 2007, and when EPA reaffirmed that its Determination lacked any cognizable binding legal effect in 2008. This case is moot because there is no effective relief that a court may grant for the violations alleged by TDSL: requesting a declaratory judgment that the Determination's conclusions were arbitrary and capricious, based on speculative allegations of a future illegal delivery of hazardous waste, cannot forestall mootness. And no exceptions to mootness apply.

TDSL also failed to establish Article III standing in its amended complaint, which was filed after the commingled waste had been removed and after EPA had

reaffirmed the Determination's lack of binding legal effect. Where EPA has reaffirmed that the Determination is not legally binding, TDSL's convoluted allegations that the Determination will leave it without legal recourse in the event of a future illegal delivery of hazardous waste are insufficient to establish a concrete and particularized injury-in-fact. And TDSL's assumptions about hypothetical future incidents and actions of third parties not before the Court cannot satisfy the causation and redressability prongs.

STANDARD OF REVIEW

On appeal from a district court's dismissal for lack of jurisdiction, this Court "reviews the district court's legal conclusions *de novo* and factual determinations for clear error." *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009). "The party seeking to assert federal jurisdiction . . . has the burden of proving by a preponderance of the evidence that subject matter jurisdiction exists." *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008). The district court "has the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). "In evaluating jurisdiction, the district court must resolve disputed facts

without giving a presumption of truthfulness of the plaintiff's allegations." *Vantage Trailers*, 567 F.3d at 748 (citing *Williamson*, 645 F.2d at 413).

The district court dismissed for lack of subject matter jurisdiction because the decision to commence withdrawal proceedings is committed to EPA's discretion under the APA, 5 U.S.C. § 701(a)(2). While this is the only issue presented in TDSL's brief, this Court may also affirm for lack of Article III jurisdiction, or indeed on "any basis that is supported by the record." *Zuspann v. Brown*, 60 F.3d 1156, 1160 (5th Cir. 1995). Both subject matter jurisdiction and the existence of a live case or controversy are threshold jurisdictional requirements imposed by Article III. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (explaining that "[s]ubject-matter jurisdiction . . . is an Art. III as well as a statutory requirement"); *see also Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction.") (citing U.S. Const., Art. III, § 1); *In re Weaver*, 632 F.2d 461, 463 n.6 (5th Cir. 1980) ("Because standing is an element of the constitutional requirement of 'case or controversy,' lack of standing deprives the court of subject matter jurisdiction."). A court must consider both requirements before reaching the merits, but need not do so in any particular order, because "there is no unyielding jurisdictional hierarchy." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999); *see, e.g.*, *Lang v. French*, 154 F.3d 217, 218 (5th

Cir. 1999) (raising standing *sua sponte* to affirm dismissal for lack of jurisdiction where district court had dismissed based on subject matter jurisdiction).

ARGUMENT

I. The District Court Lacked Subject Matter Jurisdiction Because the Decision Whether to Commence Withdrawal Proceedings Through a Public Hearing Is Committed to EPA's Discretion by Law

As the district court correctly held, it lacked subject matter jurisdiction over TDSL's challenge to EPA's conclusion that the petition showed no cause to commence withdrawal proceedings through a public hearing,[6/] because the Determination was fully committed to EPA's discretion. *See* ER 4 at 3–4 (USCA5 261–62).

Subject matter jurisdiction is a threshold requirement imposed by Article III. *Ins. Corp. of Ireland*, 456 U.S. at 701–02; *see* U.S. Const. Art. III, § 2, cl. 1 (conferring jurisdiction on federal district courts over cases "arising under . . . the laws of the United States"). Congressional authorization for federal courts to review agency action is provided by the general "Federal question" provision in 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106–07 (1977). But the APA serves as a "jurisdictional predicate" to such review. *Id.* at 105; *see also Bowen v.*

[6/] TDSL's brief confirms that the Determination's refusal to commence withdrawal proceedings is the decision at issue: "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." Br. 19.

Massachusetts, 487 U.S. 879, 891 n.16 (1988) ("[I]t is common ground that if review is proper under the APA, the District Court had jurisdiction under 28 U.S.C. § 1331."); *Lundeen v. Mineta*, 291 F.3d 300, 304 (5th Cir. 2002) (characterizing 5 U.S.C. § 701(a)(2) as an exception to the APA's waiver of sovereign immunity). And the APA bars subject matter jurisdiction "to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); *see, e.g.*, *Ellison v. Connor*, 153 F.3d 247, 254 (5th Cir. 1998) (affirming dismissal for lack of subject matter jurisdiction where action was committed to agency discretion).

A. The Scope of the Committed-to-Agency-Discretion Exception

Courts lack jurisdiction under the APA, 5 U.S.C. § 701(a)(2), where (as here) "'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 79-752, at 26 (1945)). This exception does not require evidence of congressional "intent to preclude judicial review." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Instead, "even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* (emphasis added); *see also Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002) ("Since the Court's decision in *Overton Park*, the

'no law to apply' formula has come to refer to the search for substantive legal criteria against which an agency's conduct can be seriously evaluated.").

In general there is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). But the Supreme Court explained in *Heckler* that there is a presumption of *unreviewability* of "an agency's decision not to take enforcement action." 470 U.S. at 821. Like this case, *Heckler* involved an agency's decision not to invoke a statutory enforcement mechanism, and the Supreme Court noted that such a decision requires balancing many considerations:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. at 831–32; *see also Hinck v. United States*, 550 U.S. 501, 504 (2007) (holding that decision whether to abate interest owed by delinquent taxpayers is committed to IRS's discretion); *S. Ry. Co. v. Seaboard Allied Mining Corp.*, 442 U.S. 444, 457, 461 (1979) (holding that ICC decision not to suspend proposed rates submitted by railroads was committed to agency discretion, and noting potential

disruptive consequences of judicial review); *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003) ("'The presumption against judicial review of such refusal avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency's construction of its governing statutes.'" (quoting *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 331 (2d Cir. 2003))).

Regardless of which way the presumption cuts, to determine whether there is substantive law to apply this Court first "'careful[ly] examin[es] . . . the statute on which the claim of agency illegality is based.'" *Ellison*, 153 F.3d at 251 (quoting *Webster v. Doe*, 486 U.S. 592, 600 (1988)); *see also Kirby Corp. v. Pena*, 109 F.3d 258, 262 (5th Cir. 1997) ("[W]e look to the express language of [the statutory] subsection, as well as the structure of Title XI and its legislative history."). Consistent with the Supreme Court's reasoning, it also considers the practical consequences of allowing review. *See Ellison*, 153 F.3d at 252 ("'[T]here must be a weighing of the need for, and feasibility of, judicial review versus the potential for disruption of the administrative process.'" (quoting *Bullard v. Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980))). Finally, "[a]n agency's own regulations can provide the requisite 'law to apply.'" *Id.* at 251.

B. The Determination's Conclusion that TDSL's Petition Showed No Cause to Commence Withdrawal Proceedings Through a Public Hearing Was Committed to EPA's Discretion

The Determination concluded that TDSL's petition "does not provide cause to order the commencement of withdrawal proceedings." ER 5, Ex. A at 12 (USCA5 160). This refusal to initiate withdrawal proceedings is presumptively unreviewable. And even if it were presumptively reviewable, there is no substantive law for a court to apply in reviewing the Determination.

1. Withdrawal Proceedings Are an Enforcement Action and the Decision Not to Commence Them Is Therefore Presumptively Unreviewable

EPA's decision not to commence withdrawal proceedings is a non-enforcement decision that is presumptively unreviewable. *See Heckler*, 470 U.S. at 821. RCRA allows EPA to withdraw authorization of a state's hazardous waste program after it has notified the state of a deficiency in the program and the state has failed to take corrective action within a reasonable amount of time. 42 U.S.C. § 6926(e). To commence withdrawal proceedings, EPA issues an order to which the state must respond in writing within thirty days; an adversarial hearing before an administrative law judge follows. 40 C.F.R. § 271.23(b) (2005). That hearing is generally conducted in accordance with EPA's "consolidated rules of practice governing the administrative assessment of civil penalties and the revocation/termination or suspension of permits." *See id.* § 271.23(b)(3); *see also*

id. Part 22 (listing procedures). Therefore, the decision not hold a hearing is "an agency's decision not to invoke an enforcement mechanism provided by statute," and thus "not typically subject to judicial review." *Pub. Citizen*, 343 F.3d at 464.

TDSL nevertheless attempts to distinguish *Heckler* by arguing that the decision not to hold a hearing is not a non-enforcement decision. *See* Br. 12–15. But this Court has already applied *Heckler* to find that a similar EPA non-enforcement decision was presumptively (and ultimately) unreviewable under the APA. In *Public Citizen*, 343 F.3d at 452, the petitioners sued in part over EPA's failure to issue "notices of deficiency" to Texas over flaws in its Clean Air Act state implementation plan. Section 502 of the Clean Air Act provides: "Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter . . . the Administrator shall provide notice to the State and may . . . apply . . . sanctions." 42 U.S.C. § 7661a(i)(1). *See also id.* § 7661a(i)(4) (directing EPA to take over a state's program if deficiencies are not eventually remedied). (This discretionary language is very similar to RCRA's direction that EPA should withdraw its authorization of a state program "[w]henever the Administrator determines" that it is inconsistent with RCRA. *Id.* § 6926(e).)

In public comments to the agency, the *Public Citizen* petitioners identified

several alleged deficiencies in Texas's plan; EPA responded with a letter stating that it would address some of the alleged deficiencies, but "did not agree with Petitioners" that others warranted notices of deficiency, 343 F.3d at 455. This Court held that EPA's decision not to issue notices of deficiency was presumptively unreviewable under *Heckler*. *Id.* at 464. It further held that the presumption was not rebutted because the statute provided no substantive law for a reviewing court to apply:

> The clear [statutory] language . . . undisputably grants the EPA the authority to initiate the [notice of deficiency] process when it deems doing so appropriate. In other words, Congress left the decision whether, and when, to issue [a notice of deficiency] 'to the institutional actor best equipped to make it.' Accordingly, the EPA's decision not to issue a [notice of deficiency] for the four grounds raised by Petitioners is not subject to our review.

Id. at 464–65.[7] The statutory scheme here similarly provides no substantive law for a court to apply in reviewing EPA's decision whether to commence withdrawal proceedings, *see infra* at 26–30, a decision not to invoke a statutory enforcement mechanism that is presumptively unreviewable.

Further demonstrating that the Determination is presumptively

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[7] The United States Court of Appeals for the Second Circuit reached an identical conclusion in holding that EPA's refusal to issue notices of deficiency to New York was not reviewable under the APA. *See N.Y. Pub. Interest Research Group*, 321 F.3d at 332 ("By placing the initiation of enforcement procedures within the agency, Congress left the decision of when and whether they are warranted to the institutional actor best equipped to make it.").

unreviewable under *Heckler*, the Determination explicitly considered two of the factors that *Heckler* described as characteristic of non-enforcement decisions. First, the Determination addressed resource allocation: it explained that authorizing a hearing to commence withdrawal proceedings "is a serious matter and should occur only where there are reliable facts and support for the allegations," in part because of significant costs and demands on staff time. ER 5, Ex. A at 3 (USCA5 151); *see Heckler*, 470 U.S. at 831–32 ("[T]he agency must . . . assess whether . . . resources are best spent on this violation or another . . . ."). Second, it stated EPA's view of when invocation of the statutory enforcement mechanism is appropriate in general: "EPA believes there must be a broad programmatic concern with a state program . . . rather than issues associated with a single incident." ER 5, Ex. A at 3 (USCA5 151); *see Heckler*, 470 U.S. at 831–32 ("[T]he agency must . . . assess . . . whether the particular enforcement action requested best fits the agency's overall policies . . . . An agency generally cannot act against each technical violation of the statute it is charged with enforcing."); *see also Pub. Citizen*, 343 F.3d at 464 ("'The presumption against judicial review of such refusal avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency's construction of its governing statutes.'" (quoting *N.Y. Pub. Interest Research Group*, 321 F.3d at 331)).

TDSL next argues that the Determination is not a non-enforcement decision, but instead "more akin to an informal adjudication" because it discussed the facts and the law. Br. 15. It relies solely on *Kemmons Wilson, Inc. v. FAA*, 882 F.2d 1041 (6th Cir. 1989), for this proposition. But, as the Sixth Circuit explained, in *Kemmons Wilson* the FAA had actually "*adjudicated* [*petitioner's*] *claim*." *Id.* at 1045. Here, on the other hand, EPA's Determination found that TDSL had not shown cause why EPA *should* undertake an adjudicatory enforcement proceeding (i.e., the public hearing) on whether to withdraw authorization. EPA's refusal to go forward and hold a hearing was a non-enforcement decision that was absent from *Kemmons Wilson*. *See id.* at 1046 ("A perfunctory adjudication . . . is not the same as the exercise of prosecutorial discretion.").

Moreover, as the district court noted, *see* ER 4 at 3–4 (USCA5 261–62), the Supreme Court has flatly rejected the notion that "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987).[8] Indeed, under TDSL's reasoning, even *Heckler* involved a reviewable "informal

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[8] TDSL argues that this case is distinguishable in that it involved an agency decision not to reconsider a previous decision. *See* Br. 10–11. But the salient point is that the Supreme Court held that, when an action is committed to agency discretion per 5 U.S.C. § 701(a)(2), it cannot *become* reviewable simply because the agency explains its reasoning. *See Bhd. of Locomotive Eng's*, 482 U.S. at 283. Thus, *ICC* forecloses TDSL's argument that the Determination is reviewable because EPA discussed the facts and the law in it.

adjudication," because the FDA Commissioner issued a letter explaining why he felt the governing statutory scheme did not require the agency to undertake the enforcement action requested, as well as citing the agency's discretion not to undertake enforcement actions. *See* 470 U.S. at 824; *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 675 (D.C. Cir. 1994) (stating that, in *Heckler*, "the agency *both* expressed a substantive view of the law on the unapproved use of approved drugs . . . *and* invoked its inherent enforcement discretion"); *see also Pub. Citizen*, 343 F.3d at 455 (noting that EPA issued a detailed letter, for which it even published a notice of availability in the Federal Register, explaining its unreviewable non-enforcement decision). Here, the Determination similarly rejected TDSL's arguments, and noted the agency's discretion in deciding whether to commence withdrawal proceedings. *See* ER 5, Ex. A at 3, 5–12 (USCA5 151, 153–60). Agencies inevitably must investigate the facts and the law before deciding whether to invoke a statutory enforcement mechanism, but that does not make a non-enforcement decision reviewable.

2. In Any Event, the Legislative Scheme Provides No Substantive Law for a Reviewing Court to Apply

Even assuming *arguendo* that the Determination *is* presumptively reviewable, that presumption is rebutted, because RCRA and EPA's implementing regulations do not provide any substantive law to apply, which is necessary in

order for the Determination to be reviewable under *Overton Park*.

The statutory text is entirely silent on when EPA must commence withdrawal proceedings. It directs that EPA "shall withdraw authorization" if it determines that a state program is not equivalent to RCRA's federal regulatory scheme. 42 U.S.C. § 6927(e). But it provides no substantive guidance on when EPA should exercise its discretion to begin the process. The statute only provides that the determination whether a state's hazardous waste program is consistent with RCRA's requirements must be made "after public hearing." *Id.* § 6927(e). It is silent on the substance of when EPA should hold a hearing. Nor does RCRA's legislative history provide law to apply on when EPA must exercise its discretion to commence withdrawal proceedings. *See, e.g.*, H.R. Rep. No. 94-1491, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6269 ("[I]f the state program . . . becomes not equivalent . . . , the Administrator, after notice and opportunity for the State to have a hearing, is authorized to enforce the federal minimum standards . . . ."). This legislative silence confirms that EPA has discretion to decide when commencement of withdrawal proceedings is appropriate.

Contrary to TDSL's brief, EPA's implementing regulations likewise provide no substantive law to apply. They include a list of non-exclusive criteria for which EPA "may withdraw program approval," 40 C.F.R. § 271.22 (2005), but the use of permissive language reflects discretion, not binding law to apply. *See, e.g.*,

Perales v. Casillas, 903 F.2d 1043, 1048–49 (5th Cir. 1990) (holding that statutory and regulatory provisions provided no law to apply on whether INS should grant pre-immigration hearing right of voluntary departure to illegal aliens, because both were phrased in permissive terms); *see also Hinck*, 550 U.S. at 503–04 (finding no law to apply where statute said IRS "may abate" interest); *Webster*, 486 U.S. at 600 (finding no law to apply where termination was authorized where CIA "'shall *deem* [it] necessary or advisable'"); *Heckler*, 470 U.S. at 835 (construing statutory provision that "'[t]he Secretary is *authorized* to conduct examinations and investigations'"); *Pub. Citizen*, 343 F.3d at 464 (finding that statutory language directing EPA to take enforcement action "'[w]henever the Administrator makes a determination [that a program is not being adequately administered]' [is] language which clearly grants discretion") (second alteration in original).

Furthermore, as with the statutory text, the listed criteria are for the ultimate decision to withdraw authorization (which TDSL has explained it is *not* challenge, *see* Br. 19), not the discretionary, inherently prosecutorial decision whether to commence withdrawal proceedings. This also undercuts TDSL's argument that references to resource allocation and prosecutorial discretion must be codified in agency regulations in order for the pertinent action to be a non-enforcement decision. *See* Br. 20–21. Simply put, EPA's regulations provide *no* substantive

criteria for the decision whether to commence enforcement proceedings, and this confirms EPA's discretion.[9] *See, e.g.*, *Pub. Citizen*, 343 F.3d at 464 (following *Heckler* in searching for "meaningful standards" whereby to review a non-enforcement decision, and concluding that "[s]uch standards are not present").

TDSL seizes on the fact that the regulations lay out procedures for the withdrawal proceedings. *See* Br. 10–11 (citing 40 C.F.R. § 271.23). Courts may always review an agency's compliance with its own procedures, but that is not the same thing as providing substantive law to apply. *See Ellison*, 153 F.3d at 252

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[9] TDSL also misguidedly argues that the Determination falls within an exception allowing judicial review where an agency action constitutes "a general policy that is so extreme as to amount to an abdication of [EPA's] responsibilities." Br. 21. In the first place, that exception does not apply to non-enforcement decisions on which no statutory constraints are imposed. *See Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (stating that non-enforcement cases were "distinguishable from the case at bar" because "Title VI not only requires the agency to enforce the Act, but also sets forth specific enforcement procedures"); *see also Heckler*, 470 U.S. at 833 n.4 (stating that, in abdication-of-responsibility cases, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"). Second, even the D.C. Circuit has also found the exception inapplicable where (as here and in *Heckler*) the agency's non-enforcement decision specifically refers to its discretion. *See Crowley*, 37 F.3d at 675. Finally, while "[i]t is conceivable that a document announcing a particular non-enforcement decision would actually lay out a general policy delineating the boundary between enforcement and non-enforcement and purport to speak to a broad class of parties," *id.* at 677, that was certainly not the case here, where EPA reaffirmed that its Determination lacks any cognizable binding legal effect, makes no formal findings about future regulatory actions, and does not require any regulated entity to change its behavior, ER 5, Ex. D at 2 (USCA5 169).

("Even if the substance of an agency's decision is beyond review as discretionary, an agency's failure to follow its own regulations may be challenged under the APA."). But TDSL does not—and cannot—argue that EPA failed to follow any required procedure: the only thing that can be construed as a procedural *requirement* is that EPA "shall respond in writing to any petition to commence withdrawal proceedings," 40 C.F.R. § 271.23(b)(1) (2005); that was accomplished through the Determination here. In contrast, EPA "*may* order the commencement of withdrawal proceedings," and "*may* conduct an informal investigation." *Id.* (emphases added).

II. No Live Controversy Exists as to EPA's Determination, Because the Commingled Waste Was Removed from TDSL's Landfill in 2007 and the Determination Has No Binding Legal Effect

In order to satisfy Article III's case-or-controversy requirement, "an actual, live controversy must remain at all stages of federal court proceedings, both at the trial and appellate levels. That is, the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *de la O v. Hous. Auth. of El Paso*, 417 F.3d 495, 499 (5th Cir. 2005). No live case or controversy exists here, because—as TDSL stated in a letter to EPA—any dispute over disposal of the commingled waste was resolved once Penske complied with TCEQ's order to remove the commingled waste in 2007. *See* ER 5, ¶¶ 35–39, Ex. B at 1 (USCA5 139–40, 161) ("TDSL, Penske,

Zenith and [Texas Campaign for the Environment] ask the EPA to withdraw, revise, or supplement the EPA Determination because the issue on which the EPA Determination was based has been resolved."). As requested by TDSL, moreover, EPA reaffirmed that the Declaration had no "cognizable binding legal effect," made no formal findings about future regulatory actions, and imposed no generally-applicable requirements on any party. ER 5, Ex. D at 2 (USCA5 169). TDSL admits that it no longer has a personal stake in the specific issues addressed by the Determination, so this case is moot.[10/] Because these mooting events pre-dated TDSL's amended complaint, TDSL also failed to establish standing.

A. This Case Is Moot

1. TDSL No Longer Possesses the Personal Interest Required by Article III, Because No Effective Relief Remains Available for the Violations TDSL Has Alleged

A case is moot—and Article III jurisdiction lacking—when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "[A]ny set of

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[10/] This Court need not vacate the district court's opinion if it affirms on mootness grounds. Vacatur based on mootness "is an 'extraordinary' and equitable remedy." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 n.15 (5th Cir. 2009). It is available when a case has become moot while on appeal. *See United States v. Munsingwear*, 340 U.S. 36, 39 (1950)). Here, the case was already moot when TDSL filed its amended complaint, well before the district court entered its judgment. Therefore, vacatur is not warranted even if the court affirms on mootness grounds.

circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006). The key question is whether "the parties maintain a 'concrete interest in the outcome' and effective relief is available to remedy the effect of the violation." *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998) (quoting *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984)). TDSL admitted that "any question about the proper means of handling the [cathode ray tube] Waste [is] now resolved." ER 5, Ex. B at 1 (USCA5 161); *see also* ER 5, Ex. B at 1 (USCA5 161) ("[T]he issue on which the Determination was based has been resolved."). This Court thus can no longer grant any effective relief for the violations alleged by TDSL.

TDSL's initial and amended complaints alleged that the Determination's interpretation of the mixture rule as applied here misstated the facts and was contrary to RCRA and EPA's own regulations. ER 5, ¶¶ 42–75 (USCA5 9–13). They asked that the Determination be remanded to the agency for reconsideration. ER 5 at 15 (USCA5 147). Perhaps in an effort to forestall mootness, the amended complaint added a request for a declaratory judgment that the Determination was arbitrary and capricious in violation of the APA, 5 U.S.C. § 706(2)(A). *See* ER 5, ¶¶ 76–85, at 15 (USCA5 145–47). But once Penske complied with TCEQ's order to remove the commingled waste, and once EPA reaffirmed that the Determination

had no cognizable binding legal effect, there remained no "effect[s] of the violation" to "remedy." *Dailey*, 141 F.3d at 227, and the case became moot.

Plainly, a request that EPA be ordered to reconsider its Determination because of factual errors concerning the commingled waste became moot when that waste was removed. *See, e.g.*, *AT&T Commc'ns of the Sw., Inc. v. City of Austin*, 235 F.3d 241, 244 (5th Cir. 2000) (finding challenge to ordinance moot where it had been repealed). Nor can a request for declaratory relief based on speculative fears of future harm save a case from mootness: a plaintiff must be able to point to "a genuine threat of injury absent a declaration by the Court," *Okpalobi v. Foster*, 244 F.3d 405, 434–35 (5th Cir. 2001) (citing *Steffel v. Thompson*, 415 U.S. 452, 458–60 (1974)); "threats of injury that [are] 'imaginary or speculative'" are insufficient, *id.* at 434; *see also Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125–26 (1974) (holding that, in order for declaratory relief to forestall mootness, a plaintiff must "show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest").

In adding a request for declaratory relief, TDSL's amended complaint alleged that "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," ER 5, ¶ 81 (USCA5 146). This allegation is

speculative at best, and insufficient to show a genuine threat of injury absent declaratory relief as to the Determination for at least two reasons. First, EPA has reaffirmed that the Determination lacked binding legal effect, made no formal findings about future regulatory actions, and did not require any regulated entity to change its behavior. ER 5, Ex. D at 2 (USCA5 169); *see Harris v. City of Houston*, 151 F.3d 186, 191 n.5 (5th Cir. 1998) ("Requests for declaratory relief may sustain a suit only when the claims 'challenge . . . some ongoing underlying policy' rather than 'merely attack[ing] an isolated . . . action.'" (quoting *City of Houston v. HUD*, 24 F.3d 1421, 1429 (D.C. Cir. 1994))) (alteration in *Harris*). Second, TCEQ ordered Penske to remove the commingled waste from TDSL's landfill even *after* the Determination had found no cause to withdraw Texas's hazardous waste program, so it is counterintuitive for TDSL to suggest that the Determination will somehow lead TCEQ to act differently—and TDSL thus to have no legal redress—in the future. In sum, the amended complaint's request for declaratory relief is too speculative to forestall mootness, because TDSL can point to no concrete, ongoing threat to its present interests. *See Super Tire*, 416 U.S. at 125–26; *Okpalobi*, 244 F.3d at 434–35.[11/]

[11/] The request for declaratory relief thus also fails to satisfy Article III's ripeness requirement, which "turns on whether a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests." *Venator Group Specialty, Inc. v. Matthew/Muniot Family, LLC*, 322 F.3d 835, 838 (5th Cir. 2003).

2. No Exception to the Mootness Doctrine Applies

Any set of circumstances that eliminates the actual controversy after the commencement of a lawsuit moots that lawsuit. *Ctr. for Individual Freedom*, 449 F.3d at 661. But where the mooting event consists of the defendant's voluntary cessation of the challenged conduct, the defendant must show both that (1) "there is no reasonable expectation . . . that the alleged violation will recur," and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of L.A. v. Davis*, 440 U.S. 625, 631 (1979). There has been no voluntary cessation on EPA's part here. The agency has refused to withdraw the Determination, and has simply reaffirmed as much as it had previously stated in related litigation: the Determination has no cognizable binding legal effect, makes no formal findings about future regulatory actions, and does not impose any generally-applicable rule that requires any party to alter its conduct. *See* ER 5, Ex. D at 2 (USCA5 169).

Nor is the "narrow" exception to mootness for harms capable of repetition yet evading review applicable, *Rocky v. King*, 900 F.2d 864, 869 (5th Cir. 1990). It requires that "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Neither requirement is

met here. First, more than twenty months passed between TDSL's first complaint and EPA's letter reaffirming that the Determination lacked any cognizable binding legal effect. Moreover, the Supreme Court has required plaintiffs to show that the duration of a challenged action is "*always* so short as to evade review," *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (emphasis added), and the denial of a petition to withdraw authorization of a state's hazardous waste program has no inherent duration. Second, TDSL cannot show a reasonable expectation of recurrence, for the reasons provided *supra*, at 34.

Finally, TDSL has shown no collateral consequences of EPA's Determination that would preclude a finding of mootness. "Even if the plaintif"'s primary injury has been resolved, [this] doctrine serves to prevent mootness when the violation in question may cause continuing harm and the court is capable of preventing such harm." *Dailey*, 141 F.3d at 227. Although the doctrine is most often used to enable review of expired criminal sentences, this Court has occasionally applied it in the civil context where the plaintiff still faces the possibility of some form of sanction. *See, e.g.*, *Alwan v. Ashcroft*, 388 F.3d 507, 511 (5th Cir. 2004) (holding deportation order did not moot alien's challenge to removal order, because of possible permanent inadmissibility); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365–66 (5th Cir. 2003) (holding that challenge to injunction was not moot

where it might still require plaintiff to indemnify defendant); *Dailey*, 141 F.3d at 226 (holding, where disbarred attorney had been reinstated, that the case was not moot "because the disbarment on the attorney's record may affect her status as a member of the bar").[12/]

TDSL can point to no potential sanction justifying invocation of the collateral consequences doctrine in the civil context here. Its amended complaint simply alleges that the Determination's statements regarding the mixture rule "will" require TDSL "to bear the additional burden of screening or testing all deliveries of purportedly non-hazardous waste"[13/] because TDSL "will have no adequate remedy should illegally delivered hazardous waste become mixed with non-hazardous waste at Plaintiff's landfill." ER 5, ¶¶ 83, 82 (USCA5 146).

[12/] Counsel is aware of one case in which this Court applied the collateral consequences doctrine without relying on the possibility of a future formal sanction. In *Connell v. Shoemaker*, 555 F.2d 483 (5th Cir. 1977), the Army temporarily forbade its personnel from renting from the plaintiff because it believed he was discriminating among potential tenants on the basis of race. The Court held that his request for a declaration that the Army's procedures had denied him due process was not moot even after the ban expired, because "[i]t is well settled that one's reputation or good name constitutes a cognizable 'liberty' interest for purposes of the due process clauses of both the fifth and fourteenth amendments." *Id.* at 487. Here, of course, there has been no constitutional claim and no allegation of harm to a "liberty" interest.

[13/] It is unclear why this would be an "additional burden," because Texas's hazardous waste program *already* requires landfills to follow a "site operating plan" that "must include . . . procedures for the detection and prevention of disposal of prohibited wastes, including regulated hazardous waste as defined in [40 C.F.R. Part 261]." 30 Tex. Admin. Code § 330.127(5) (2009).

Furthermore, by the time this allegation was made, EPA had already reaffirmed that its Determination was not a regulation, had no cognizable binding legal effect, was based on the specifics of TDSL's petition, and did not require any change in conduct. *See* ER 5, Ex. D at 2 (USCA5 169). And, notwithstanding that EPA found no cause for the Texas hazardous waste program to be withdrawn, TCEQ subsequently ordered Penske to remove the commingled waste from TDSL's landfill. ER 5, ¶¶ 35–39 (USCA5 139–40). Thus, the notion that the Determination will force TDSL either to change its conduct or lack any legal recourse in similar future circumstances is misguided, and certainly insufficient to prevent mootness under the collateral consequences doctrine.

B. TDSL Failed to Establish Standing

Viewed from another Article III perspective, TDSL failed to established standing in its amended complaint, which was filed after had TDSL admitted that "the issue upon which the EPA Determination was based has been resolved," ER 5, Ex. B at 1 (USCA5 161), as well as after EPA had reaffirmed that the Determination lacks any cognizable binding legal effect, ER 5, Ex. D at 2 (USCA5 169). The party invoking federal jurisdiction has the burden to show that the elements of standing are satisfied. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009). Specifically,

> a Plaintiff must show that he is under threat of suffering "injury in fact" that

> is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable decision will prevent or redress the injury.

Id. at 1149 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). That is the case here, where TDSL challenges EPA's refusal to commence proceedings to withdraw authorization from Texas's hazardous waste program.

"The standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2769 (2008). The "time crucial to the issue of standing" is thus "when the complaint was filed." *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978). Here that refers to TDSL's June 30, 2008, filing of its amended complaint, which added a new cause of action alleging that "it is only a matter of time" before TDSL would again be faced with the same situation, ER 5, ¶ 81 (USCA5 146), as well as a request for declaratory relief, ER 5 at 15 (USCA5 147). *See, e.g.*, *County of Riverside v. McLaughlin*,

500 U.S. 44, 48 (1991) (stating that second amended complaint was "the operative pleading" in determining whether newly-added plaintiffs had standing); *Sierra Club v. Peterson*, 185 F.3d 349, 357, 363–64 (5th Cir. 1999) (considering whether allegations in amended complaint established standing to bring amended complaint's new claims). This is confirmed by the Declaratory Judgment Act, which the amended complaint invoked, ER 5, ¶ 84 (USCA5 146): that statute only applies where there is an "actual controversy," 28 U.S.C. § 2201(a), and this Court has interpreted the requirement to come into force when a complaint invoking the statute is filed, *see Vantage Trailers*, 567 F.3d at 748. The allegations in TDSL's amended complaint failed to establish injury-in-fact, causation, and redressability, and the suit should have been dismissed for lack of standing.

1. TDSL Failed to Allege Injury-in-Fact as Required by Article III

To satisfy the injury-in-fact requirement, a plaintiff seeking injunctive or declaratory relief "must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003) (citing *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983)). In *Summers*, 129 S. Ct. at 1150, the Supreme Court recently held that plaintiffs lacked standing to challenge certain Forest Service regulations because they had pointed to no impending application thereof that "threaten[ed] imminent and

concrete harm to [their] interests." Affidavits detailing an intent to visit national forests where the regulations might be applied in the future, the Court held, were insufficient. *See id.* ("Accepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact."); *see also Lyons*, 461 U.S. at 108 (holding, where plaintiff who alleged that he had been injured by an improper police chokehold sought injunctive relief barring use of the hold in the future, that he lacked standing because it was "no more than conjecture" that he would be subjected to the hold again).

The convoluted future injury alleged in TDSL's amended complaint is concern that "it is only a matter of time before . . . illegal delivery of hazardous wastes . . . will recur at its landfill," ER 5, ¶ 81 (USCA5 146), that the Determination's statements regarding the mixture rule will then leave TDSL with "no adequate remedy should illegally delivered hazardous waste become mixed with non-hazardous waste," ER 5, ¶ 82 (USCA5 146), and that TDSL thus "*will* be required to bear the additional burden of screening or testing all deliveries," ER 5, ¶ 83 (USCA5 146) (emphasis added).[14/] Rather than showing a substantial

[14/] Notably, TDSL does not allege that it *has* been screening or testing deliveries as a result of EPA's Determination. Instead, this is alleged purely as a future injury; it cannot be construed as an existing or ongoing injury, because "[i]t is a long-

likelihood of future injury, these allegations are conjectural, and depend on the occurrence of a number of uncertain events. They are therefore insufficient to establish the concrete and particularized injury-in-fact required for Article III standing. *See, e.g.*, *Prestage Farms, Inc. v. Bd. of Supervisors of Noxubee County, Miss.*, 205 F.3d 265, 268 (5th Cir. 2000) (holding that hog producer's assertion of future injury from ordinance on concentrated swine feeding operations was "too conjectural and hypothetical to provide Article III standing").

2. TDSL Failed to Allege Causation and Redressability as Required by Article III

TDSL also failed to allege an adequate connection between EPA's Determination and TDSL's concern that it will have no legal remedy in the event of an illegal delivery of hazardous waste to its landfill in the future. It is well established that a plaintiff's "injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court,'" and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable

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settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quoting *Grace v. Am. Cent. Ins. Co.*, 109 U.S. 278, 284 (1883)). And, again, state law *already* requires TDSL to adopt "procedures for the detection and prevention of disposal of prohibited wastes, including regulated hazardous waste as defined in [EPA's RCRA implementing regulations]." 30 Tex. Admin. Code § 330.127(5) (2009); *see supra* at 37 n.13.

decision.'" *Lujan*, 504 U.S. at 560–61 (citations omitted) (alterations in original). "As is often the case, the questions of causation and redressability overlap. And importantly, when a party is challenging the Government's allegedly unlawful regulation, or lack of regulation, of a third party, satisfying the causation and redressability requirements becomes 'substantially more difficult.'" *Massachusetts v. EPA*, 549 U.S. 497, 543 (2007) (Roberts, C.J., dissenting) (citations omitted). TDSL has failed to satisfy either requirement, for at least three reasons.

First, the notion that the Determination left TDSL without legal remedies is disproved by the facts of this case. EPA issued its determination on May 16, 2006. ER 5, ¶ 12 (UCSA5 136). TCEQ ordered Penske to remove the commingled waste from TDSL's landfill on July 30, 2007. ER 5, ¶¶ 36–37 (USCA5 139–40). Clearly, the Determination did not prevent TDSL from seeking legal recourse through TCEQ.

Second, "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain [TDSL's] standing." *Allen*, 468 U.S. at 759. For the alleged future injury to occur, a third party must dispose of characteristic hazardous waste at TDSL's landfill in violation of Texas law; TDSL must unwittingly allow that waste to be commingled with municipal solid waste, notwithstanding a state law

requirement its site plan include procedures for the detection of hazardous waste, *see supra* at 37 n.13; 42 n.14; and TCEQ must refuse to order the third party to remove the waste in reliance on EPA's Determination, notwithstanding (1) that EPA has said the Determination lacks binding legal effect, and (2) any factual differences between the situation then at hand and the one addressed by the Determination. There are too many steps and too many "action[s] of . . . third part[ies] not before the court," *Lujan*, 504 U.S. at 560, for causation to be established. *See, e.g.*, *Allen*, 468 U.S. at 759 (holding causation was not established where plaintiffs alleged that IRS's inadequate procedures for denying tax-exempt status to racially discriminatory private schools interfered with their children's opportunity to receive an education in desegregated public schools); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976) (finding causation not established where complaint alleged that IRS Revenue ruling encouraged hospitals to deny services to indigents); *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 668–72 (D.C. Cir. 1996) (finding causation not established where plaintiffs argued that tax credit would expand ethanol market and therefore encourage increased production of certain crops, including on lands adjacent to specific wildlife areas visited by plaintiffs, harming those areas).

Third, TDSL's future legal remedies against waste generators simply do not depend upon the Determination's validity. EPA has reaffirmed that the

Determination has no cognizable binding legal effect. ER 5, Ex. D at 2 (USCA5 169). Furthermore, RCRA gives TDSL the right to commence a civil action against any person who violates an order, condition, requirement, or prohibition of an applicable hazardous waste regulation, *see* 42 U.S.C. § 6972(a)(1)(A), potentially including a generator that delivers hazardous waste to TDSL's landfill in violation of RCRA or Texas's hazardous waste program.[15/]

CONCLUSION

For the foregoing reasons, the district court's dismissal for lack of jurisdiction should be affirmed.

Respectfully submitted,

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[15/] The Texas hazardous waste program's restrictions on the disposal of hazardous waste would address the potential illegal delivery of hazardous waste to TDSL's landfill. *See* 30 Tex. Admin. Code §§ 335.41–.47, .61–.78 (2009).

CERTIFICATE OF SERVICE

I certify that two paper copies and one electronic copy of the foregoing Brief for the Appellees have been served upon counsel this 31st day of July, 2009, by FedEx Standard Overnight Delivery addressed to:

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CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(a)(7) AND 5TH CIR. R. 32.3

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and 5th Cir. R. 32.3, the foregoing Brief for the Appellees is proportionately spaced, has a typeface of 14 points more, and contains 11,070 words.

_____ _____

Date Charles R. Scott