Supreme Court, U.S.
FILED

No. 10-464 OCT 5 - 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LAWRENCE E. STARFIELD, REGIONAL ADMINISTRATOR; LISA P. JACKSON, ADMINISTRATOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID O. FREDERICK
Counsel of Record

LOWERRE, FREDERICK, PERALES, ALLMON & ROCKWELL
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346
dof@lf-lawfirm.com

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTION PRESENTED

Whether the Environmental Protection Agency's substantive interpretation of law (in this instance, 40 C.F.R. § 268.3), propounded after a factual investigation and the application of law to the facts that were found, escapes judicial review because it is announced in the body of a Determination to forego correction of state agency practices EPA oversees.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies, nor does it or any of its affiliate businesses have shares issued to the public.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1
Statement	4
Reasons for Granting the Writ	10
A. The APA and the Presumption of Reviewability	11
B. Fifth Circuit's Conflict with Other Courts' Holdings	12
1. Other courts distinguish between a decision not to enforce and an announcement of a new statutory interpretation in the course of making such a decision	13
2. Other courts have concluded that there is law to apply, thus rebutting the presumption of non-reviewability, even when the law in question uses discretionary language, such as "may"	15

TABLE OF CONTENTS – Continued

Page

C. Had the appellate court engaged in the correct analysis, it would have discovered that there is indeed law to be applied here, and EPA's Determination is thus subject to review under the APA 17

1. EPA's Determination is not committed to unfettered agency discretion; the agency's regulations provide the Court with law to apply 18

2. EPA's Determination was akin to an announcement of a new interpretation of its rules, and thus, was subject to judicial review 19

Conclusion..... 24

Appendices

Fifth Circuit Court of Appeals Opinion .....App. 1

Fifth Circuit Court of Appeals Final Judgment.....App. 5

United States District Court for the Western District of Texas, Austin Division Memorandum Opinion and Order.....App. 7

United States District Court for the Western District of Texas, Austin Division Final Judgment.....App. 13

TABLE OF CONTENTS – Continued

Page

United States Environmental Protection Agency Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program, Response to the Petition ..... App. 15

Fifth Circuit Court of Appeals Denial of Petition for Rehearing ..... App. 38

TABLE OF AUTHORITIES

Page

CASES:

Abbott Lab. v. Gardner, 387 U.S. 136 (1967).....11

Amalgamated Transit Union International, AFL-CIO v. Donovan, 767 F.2d 939 (D.C. Cir. 1985).....14

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986).....11

Cardoza v. Commodity Futures Trading Comm'n, 768 F.2d 1542 (7th Cir. 1985).....16

Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984).....14

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).....11

Edison Electric Institute v. U.S. EPA, 996 F.2d 326 (D.C. Cir. 1993).....15

Heckler v. Chaney, 470 U.S. 821 (1985).....*passim*

International Union of Bricklayers v. Meese, 761 F.2d 798 (D.C. Cir. 1985).....14

International Union, United Automobile Aerospace & Agricultural Implement Workers v. Brock, 783 F.2d 237 (D.C. Cir. 1986).....13, 14, 15, 22

Interstate Commerce Commission v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987).....8, 9, 13

Montana Air Chapter No. 29 v. Federal Labor Relations Authority, 898 F.2d 753 (9th Cir. 1990).....15

TABLE OF AUTHORITIES – Continued

Page

Nat'l Wildlife Federation v. U.S. EPA, 980 F.2d 765 (D.C. Cir. 1992) 15, 23

Pub. Citizen, Inc. v. EPA, 343 F.3d 449 (5th Cir. 2003) 9

Socop-Gonzalez v. INS, 208 F.3d 838 (9th Cir. 2000) 16

STATUTORY PROVISIONS AND RULES:

5 U.S.C. § 701(a) 1, 11

5 U.S.C. § 702 2

5 U.S.C. § 706 3

28 U.S.C. § 1257(a) 1

42 U.S.C. §§ 6921-6939e 4

40 C.F.R. § 268.3(a) 20

40 C.F.R. § 271.22 18

40 C.F.R. § 271.22(a)(3)(i) 4

40 C.F.R. § 271.23 18

40 C.F.R. § 271.23(b)(1) 18

OTHER AUTHORITIES:

55 Fed. Reg. 22,520 (June 1, 1990) 20

Blank Page

Texas Disposal Systems Landfill, Inc. respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals was not officially reported. It is reproduced in the Appendix herein at App. 1-4. The decision of the U.S. District Court for the Western District of Texas, Austin Division, was also not officially reported; it is reproduced in the Appendix at App. 7-12.

JURISDICTION

The judgment of the Court of Appeals was issued on May 7, 2010. App. 5-6. Petitioner's timely petition for rehearing was denied on July 7, 2010. App. 38-39. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 701(a). Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that –

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

STATEMENT

This case concerns an agency's informal adjudication of a specific set of facts and the application of the law to those facts. The Environmental Protection Agency (EPA) adjudicated the facts and law in response to a petition filed by Texas Disposal Systems Landfill, Inc. (TDSL), requesting that EPA withdraw delegation of Texas's hazardous waste program. TDSL alleged that Texas's environmental agency, Texas Commission on Environmental Quality (TCEQ), failed to enforce its hazardous waste regulations, as required by the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6921-6939e. *See* 40 C.F.R. § 271.22(a)(3)(i). EPA denied TDSL's petition in a 12-page 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. 15.

Before responding to TDSL's petition, EPA conducted an investigation into the allegations in the petition. EPA sought and received input from both the state agency, TCEQ, and from other affected private entities. TDSL also provided additional documents and information in support of its petition.

Following its informal investigation, EPA issued its "Determination," which not only included a recitation of facts, based on EPA's investigation of those facts, but it also included its interpretation of applicable law – a new interpretation, in TDSL's view, unsupported by the express language in its regulations or in the Federal Register Preamble to those regulations. EPA's interpretation, as announced in the Determination, allows deliberate dilution of toxic characteristic hazardous waste with non-hazardous waste. The Determination approved Texas's application of the RCRA hazardous waste regulations. Ultimately, EPA concluded that no cause exists to initiate withdrawal of Texas's hazardous waste program.

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:[1]

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 due to their lead content. In fact, Zenith had

---

[1] These facts are taken from the allegations in TDSL's Amended Complaint filed in the District Court. They were not adjudicated by the District Court, as the court dismissed the cause.

previously characterized the CRTs as hazardous if damaged. Nevertheless, several truckloads of broken CRTs – toxic characteristic hazardous waste – were hauled to Petitioner TDSL's municipal solid 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 TCEQ to require Penske and Zenith to properly manage and remove the remaining 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 – rules intended to create "cradle-to-grave" regulation of hazardous wastes – 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, incorrectly adjudicates certain facts, and ultimately concludes that no cause exists to initiate formal withdrawal proceedings. *See* App. 37.

Importantly, EPA's Determination did not confine itself to determining whether it should initiate withdrawal of Texas's 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. 23. It then applied that law to the facts it adjudicated to be true (some of which TDSL disputes).

For instance, in framing the issue to be considered, EPA accepted that the characteristic hazardous waste was inextricably "mixed" with non-hazardous material, creating one waste stream, even though TDSL alleged that the hazardous waste was

identifiable and segregable. Moreover, the issue presumes that the "resulting mixture" tests below RCRA characteristic hazardous and land disposal restriction levels, although this too was disputed. EPA also suggested that when the hazardous waste was mixed with the municipal waste, the resulting mixture might have resulted in a new "point of generation," although there were no facts alleged to suggest that a new waste stream was generated. Ultimately, EPA 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 – all based on information and allegations that it assumed were true, though not reflected in or supported by TDSL's petition filed with the agency.

TDSL sought to challenge EPA's Determination under the federal Administrative Procedure Act (APA). TDSL's intention in doing so was not to force EPA to withdraw Texas's RCRA delegation. Rather, TDSL sought to challenge EPA's adjudication of facts and its interpretation of law to those facts, as arbitrary and capricious.

EPA thereafter filed a motion to dismiss TDSL's complaint, arguing that the District Court had no jurisdiction over TDSL's claims because EPA's Determination was akin to a discretionary decision not to enforce – a decision not subject to judicial review, according to EPA. The District Court agreed that it had no subject-matter jurisdiction to consider TDSL's claims and granted the Motion to Dismiss. App. 7. For support, the District Court cited *Interstate Commerce*

Comm'n v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, at 283 (1987).

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. This exception is triggered only when there is no law to apply to the review of the agency action.

On appeal, the Fifth Circuit Court of Appeals affirmed the District Court's decision, citing principally, *Interstate Commerce, supra*, and *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 452 (5th Cir. 2003), and explaining that EPA's decision was not reviewable under the APA, because the decision could be viewed a decision of nonenforcement. Without analyzing or commenting on the substance of EPA's Determination, the Fifth Circuit Court of Appeals summarily determined that EPA's decision simply could not be the subject of an APA action, regardless of what was said in that Determination.

On July 7, 2010, the Fifth Circuit Court of Appeals denied Petitioner TDSL's petition for rehearing. App. 38.

REASONS FOR GRANTING THE WRIT

The district court and the appellate courts' decisions reflect a split with other circuit courts regarding the types of agency decisions that are unreviewable under the APA. In this case, the district court and the court of appeals looked no further than the fact that EPA had chosen not to initiate delegation withdrawal proceedings; this alone was sufficient to summarily determine that no review of that decision could be had. The agency's decision was akin to a prosecutorial decision not to enforce, they reasoned, which is unreviewable. Neither court delved into the Determination itself to determine whether the document indeed amounted to nothing more than a recitation that EPA refused to initiate withdrawal proceedings, for which there was no law to apply to a judicial review of the decision.

But other courts have taken a more nuanced and analytical approach in similar types of cases. Rather than employing a simplistic and superficial test, courts have employed the more measured analysis that this Court has used, determining whether the agency's action truly falls within the category of a decision not to enforce and searching for standards against which the agency's action might be reviewed. Had the Fifth Circuit undertaken a similar inquiry, it too might have determined that the EPA's Determination document was much broader than a simple decision not to enforce. It was a new interpretation of its regulations, and indeed, there is law against which to review this new interpretation.

A. The APA and the Presumption of Reviewability.

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). The district court and the court of appeals relied on the second exception to reviewability here, in reaching their decision to dismiss the case.

The District Court concluded, and the court of appeals agreed, 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. 11.

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.*

This Court has 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. *Heckler v. Chaney,* 470 U.S. 821, 831 (1985). 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.*

B. Fifth Circuit's Conflict with Other Courts' Holdings.

The Fifth Circuit Court of Appeals provided two separate reasons in support of its holding that EPA's Determination is not subject to judicial review. First, quoting applicable EPA regulations addressing the criteria and procedure for commencing delegation withdrawal proceedings, the Fifth Circuit determined

that the inclusion of the term "may" demonstrates that there are no mandatory standards by which the court can review EPA's decision. For support, the court cited this Court's opinion in *Heckler v. Chaney*, 470 U.S. 821. App. 2-3. Second, the appellate court held that EPA's interpretation and analysis of applicable law, in its Determination document, did not render the decision a reviewable one. For support, the court cited this Court's holding in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987), and summarized it thusly: "an action committed to agency discretion does not become reviewable merely because the agency gives a reviewable reason for an otherwise unreviewable action." App. 4.

Both of these rationales cited by the appellate court, however, present a direct conflict with holdings from other circuit courts regarding this same issue. Other courts have not applied such a broad and simplistic interpretation of the two cases cited above.

1. Other courts distinguish between a decision not to enforce and an announcement of a new statutory interpretation in the course of making such a decision.

For instance, the D.C. Circuit Court of Appeals has recognized that an agency's statutory interpretations made in the course of nonenforcement decisions are reviewable. *International Union, United Automobile, Aerospace & Agricultural Implement Workers*

v. Brock, 783 F.2d 237, 245 (D.C. Cir. 1986). In complete contrast to the Fifth Circuit Court's holding in this case, the D.C. Circuit held that "even if a statutory interpretation is announced in the course of a nonenforcement decision, that does not mean that it escapes review altogether." *Id.* at 246 (citing *International Union of Bricklayers v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985)). That court explained that when a legal challenge focuses on an announcement of a substantive statutory interpretation, courts are emphatically qualified to decide whether an agency has acted outside of the bounds of reason. *Id.* at 245-46 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Amalgamated Transit Union International, AFL-CIO v. Donovan*, 767 F.2d 939, 944 n.7 (D.C. Cir. 1985)). "Indeed, it seems almost ludicrous to suggest that there is 'no law to apply' in reviewing whether an agency has reasonably interpreted a law," the Court announced. *Id.* at 246.

In determining the availability of judicial review, courts have explicitly noted the distinction between the reviewability of an agency's decision not to take an enforcement action, and the reviewability of an agency's "pronouncement of a new statutory interpretation in an opinion explaining the nonenforcement decision." *Int'l Union*, 783 F.2d 237, 239 (D.C. Cir. 1986). Ultimately, the court in *International Union* held that the agency's "ultimate decision not to take enforcement action is nonreviewable," but the agency's "pronouncement of new statutory interpretations

in an opinion explaining the nonenforcement decision is reviewable." *Id.* This distinction between the enforcement decision itself and a substantive statutory interpretation propounded in the context of that decision has been relied upon by the Ninth Circuit, as well as other panels of the D.C. Circuit. *See Montana Air Chapter No. 29 v. Federal Labor Relations Authority*, 898 F.2d 753, 756, 758 (9th Cir. 1990); *Edison Electric Institute v. U.S. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993); *Nat'l Wildlife Federation v. U.S. EPA*, 980 F.2d 765, 772-73 (D.C. Cir. 1992).

The Fifth Circuit's opinion in this case is at odds with the holdings from the various other appellate courts cited above, and this Court should take this opportunity to further explain the limited circumstances in which a decision not to enforce is presumed to be non-reviewable.

2. Other courts have concluded that there is law to apply, thus rebutting the presumption of non-reviewability, even when the law in question uses discretionary language, such as "may."

Courts also differ with the Fifth Circuit's summary determination that a decision not to commence withdrawal proceedings must be non-reviewable because such a decision is discretionary, and there is thus, no law to apply. *See* App. 4. The Fifth Circuit recounted the procedures outlined in EPA's regulations, which describe how EPA may respond to a

petition to withdraw state delegation authority. The court emphasized that the rule uses the permissive term "may" when describing the EPA's Administrator's options for responding to such a petition. This term, explained the court, renders EPA's decision not to initiate withdrawal proceedings unreviewable by a court.

But other courts have taken a different approach, choosing to examine the decision in question to determine whether there is law to apply.

The Seventh Circuit Court of Appeals, for example, has held: "It is not significant in our view that the regulation does not expressly require the Commission to consider these factors, but instead states that it 'may' consider them. The use of the term 'may' does not indicate that the Commission is free to ignore factors that in the past it has designated as highly relevant. Nor should the use of such discretionary language in a regulation exempt an agency from its obligation to follow its rules or policies upon which the public justifiably has come to rely." *Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1550 (7th Cir. 1985).

Similarly, several courts have recognized repeatedly that this 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 First, Third, and Sixth Circuit Courts of Appeals). In this case, the Fifth Circuit did

not conduct a meaningful search to determine whether there is law to apply in reviewing EPA's Determination. Its analysis, or lack thereof, is in direct conflict with other courts of appeals' holdings, wherein even discretionary decisions were determined to be reviewable under the APA, if the agency decision included interpretations of law that courts could review.

C. Had the appellate court engaged in the correct analysis, it would have discovered that there is indeed law to be applied here, and EPA's Determination is thus subject to review under the APA.

Had the appellate court conducted a meaningful review of EPA's Determination and the regulations governing responses to petitions to withdraw, it would have discovered that there is law to be applied here. First, EPA's response to the petition to withdraw delegation authority is at least somewhat circumscribed by its own regulations. And second, EPA's newly announced interpretation of disposal standards for toxic hazardous waste is a legal interpretation that can be reviewed against the clear language of EPA's rules to determine whether the interpretation is arbitrary and capricious or an abuse of discretion.

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

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.

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.

2. EPA's Determination was akin to an announcement of a new interpretation of its rules, and thus, was subject to judicial review.

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, applying a new interpretation of EPA's rules. 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 misinterpretation of bedrock RCRA law.

Before reaching this decision, EPA conducted an informal investigation into the allegations made by TDSL, the Petitioner. 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 engaged in a lengthy discussion of the relevant law and its application to those facts. Thus, 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 (June 1,

1990), 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.

Where, as here, an interested and affected member of the regulated community requests that EPA evaluate the state's approved hazardous waste program to determine whether it should be withdrawn, EPA should not use this opportunity to, in effect, announce new regulatory requirements and policies and apply those new regulatory requirements to a set of facts that have not been formally adjudicated. An informal investigation and written response to a petition must, at the very least, conform to the applicable law. Congress could not have intended, when it required EPA to respond to a petition, that EPA would use that response as an opportunity to arbitrarily and capriciously apply the law.

The D.C. Circuit Court of Appeals articulated the problems that would arise were an agency allowed to announce new regulatory interpretations in the context of non-enforcement decisions: "We would be handing agencies carte blanche to avoid review by announcing new interpretations of statutes only in the context of decisions not to take enforcement action. Of course, agencies have wide leeway in

choosing to announce rules and interpretations in the course of adjudications. [Citations omitted.] But our approval of the authority to interpret and implement statutory authority through adjudications has always contemplated the availability of judicial review to ensure that the announced interpretations are consistent with the governing statute. Nothing in *Heckler v. Chaney* changed any of this." *Int'l Union*, 783 F.2d at 246.

EPA's 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.

This is particularly important in environmental cases involving the EPA, an agency that has delegated much of its authority to states to implement its federal regulations. It is naïve to think that the federal agency's adjudication of a particular factual scenario and its interpretation and application of its regulations has no impact on how a state agency will interpret and implement those regulations to other similar factual disputes. And because there was no opportunity for TDSL to challenge the factual and legal determinations made by the federal agency, TDSL has little recourse in attempting to rebut reliance on the Determination.

Indeed, the D.C. Circuit has also found significant cases in which the agency's non-enforcement

decision related to whether a state should continue to have primary responsibility for the enforcement of a federal Act – such as the case presented here. In the *National Wildlife Federation* case, the D.C. Circuit court of appeals noted that an issue related to whether federal or state authorities should have primary enforcement authority to administer the Safe Drinking Water Act "is somewhat different from the typical enforcement context in which *Chaney* originated or is customarily applied." 980 F.2d at 773, n.3. Here the concern is not so much remedying or sanctioning a particular statutory violation but instead determining who will have overall responsibility for the safety of a state's public water drinking supply. *Id.*

In sum, the Fifth Circuit's analysis was woefully deficient in providing a meaningful review of the various factors that support judicial review of an agency's decision under the APA. This is in conflict with various other circuit courts of appeals, and it should be corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID O. FREDERICK
Counsel of Record

LOWERRE, FREDERICK, PERALES,
ALLMON & ROCKWELL
707 Rio Grande, Suite 200
Austin, Texas 78701
Telephone (512) 469-6000
Facsimile (512) 482-9346
dof@lf-lawfirm.com

Counsel for Petitioner

October 5, 2010