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2010 Judges' Edition Memorandum

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TWENTY-THIRD ANNUAL PACE UNIVERSITY LAW SCHOOL NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

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Statement of the Case

This is an appeal from a final order in the United States District Court for the District of New Union.

On January 5, 2009, Citizen Advocates for Regulation and the Environment, Inc. (CARE), served a petition on the Administrator of the Environmental Protection Agency (EPA), under §7004 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992, 6974 (2006) and § 553(e) of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 (2006). The petition requested that EPA commence proceedings to withdraw its approval of New Union's hazardous waste regulatory program to operate in lieu of the federal program under RCRA, pursuant to RCRA § 3006(b). 42 U.S.C. § 6926(b) (2006). (R. at 4)[1]. In support of its petition to EPA, CARE recited a litany of facts that arose after EPA's initial approval and alleged that New Union's program no longer met the criteria for EPA approval. EPA took no action on that petition. (R. at 4).

On January 4, 2010 CARE filed a suit in the District Court against EPA, first seeking an injunction requiring EPA to act on that petition or, in the alternative, judicial review of EPA's

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1. "R" refers to the Record in this case.

constructive denial of the petition premised on its constructive determination that New Union's hazardous waste program continued to meet the criteria for approval despite the alleged deficiencies. (R. at 4). The State of New Union filed an unopposed motion to intervene under Fed. R. Civ. P. 24, which the court granted. (R. at 4). The facts alleged by CARE were uncontested and the parties also agreed that no further facts were necessary to make a decision. (R. at 4). Thereafter, the parties filed cross-motions for summary judgment. (R. at 4).

CARE, unsure of its jurisdictional basis, simultaneously filed a petition for review with this Court, C.A. No. 18-2010, seeking judicial review of EPA's constructive denial and determination on the same grounds. (R. at 4, 5). New Union also moved to intervene in that case, which this Court granted. (R. at 5). EPA filed a motion to stay the proceeding in this Court pending the outcome of the case in the District Court. (R. at 5).

The District Court dismissed CARE's action, holding that it lacked jurisdiction under both RCRA § 7002(a)(2) and 28 U.S.C. § 1331 to order EPA to act on a petition submitted pursuant to RCRA § 7004 and APA § 553(e). (R. at 7, 8). In dismissing CARE's citizen suit, the District Court determined that EPA approval or disapproval of New Union's program was an order and not a rulemaking. As such, the District Court held that EPA's action was not subject to petition under RCRA § 7004, which authorizes petitions only for promulgation, amendment, or repeal of rules. (R. at 7). The district court also held that it lacked jurisdiction under § 1331 because APA § 553(e) authorizes petitions only for promulgation, amendment, or repeal of rules. (R. at 8). With regards to CARE's claim for judicial review of EPA's constructive actions under RCRA § 3006, the District Court held that jurisdiction for review lies in the Court of Appeals, but that judicial review was time-barred. (R. at 8).

Statement of the Statutory Context

This case revolves around RCRA. RCRA creates a cradle-to-grave regulatory scheme for the generation, transportation, treatment, storage and disposal of hazardous waste. Of particular relevance to the present action is that RCRA favors administration of its hazardous waste regulatory program by states with approved programs, RCRA §1003(a)(7). In this

regard, § 3006(b) authorizes the EPA to approve a state program to operate in lieu of the federal program where the EPA determines that the state program is equivalent to the federal program, is consistent with the federal and state programs of other approved states, and the state has adequate resources to provide adequate enforcement. 42 U.S.C. § 6926(b) (2006). Against this backdrop of federal-state cooperation, RCRA also favors citizen participation by giving citizens enforcement authority by either bringing alleged violations to the attention of EPA or by directly bringing enforcement actions against any persons, including the United States, the EPA, and other governmental instrumentality or agency, alleged to be in violation of the federal standards. *See* 42 U.S.C. §§ 6974, 6972 (2006). Specific to this case is § 7004(a), which allows citizens to petition EPA for the promulgation, amendment, or repeal of any rules. 42 U.S.C. § 6974(a) (2006). Second, is § 7002(a)(2), which gives citizens the authority to bring a civil action against the Administrator for alleged failure to perform a nondiscretionary duty. 42 U.S.C. § 6972(a)(2) (2006).

Statement of the Facts

In 1986, EPA approved New Union's hazardous waste program under the statutory authority of § 3006(b) based on its finding that New Union's Department of Environmental Protection (DEP) had the resources and capabilities to fully administer the state program, including the issuance of permits in a timely manner, inspection of all RCRA regulated facilities at least every other year, taking enforcement actions against all significant violations, and administering all other necessary parts of the program. (Rec. doc. 2, p.1). The EPA noted, however, that with fewer resources the program might not be adequate. (Rec. doc. 4, p. 16).

Since the initial approval, New Union's resources devoted to its state program have decreased considerably, while demands have increased. (R. at 10). In 1986, there were 1,200 hazardous waste treatment, storage and disposal facilities (TSDs) in the state requiring permits under RCRA and 50 full-time employees. (Rec. doc. 1, p.17, 73). However, in its 2009 Annual Report to EPA, the DEP reported 1,500 TSDs but only 30 full-time employees (a decrease of 40%). (Rec. doc. 5 for 2009, p. 23, 52).

This attrition in resources occurred mostly after the year 2000 when the state's finances started to deteriorate.

DEP's shortage of resources has translated directly into a deterioration of its ability to implement and enforce its state RCRA program. In its 2009 Annual Report to EPA, the DEP indicated that it had a growing backlog of permit applications; some 900 TSDs had expired permits but were continued by operation of law (some of them expired as long as 20 years ago), and at the same time it had about 50 applications a year from new facilities or permitted facilities seeking amended permits to expand their operations. (Rec. doc. 5 for 2009, p. 20). The 2009 Annual Report also indicated that the DEP could not inspect more than 10% of the TSDs a year, rather than the 50% minimum required by RCRA. Even with EPA's inspection of a comparable number of facilities last year and again in the present year, RCRA's mandate of inspecting these facilities will not be met.

In 2000, the New Union legislature enacted the 2000 Environmental Regulatory Adjustment Act (ERAA), which contained a number of amendments to environmental legislation. Two of these amendments are pertinent in this case. The first was an amendment to the Railroad Regulation Act (RRA). The ERAA amended the RRA by transferring "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the Commission." (Rec. doc. 5 for 2000, pp. 103-05). It also removed criminal sanctions for violations of environmental statutes by facilities falling under the jurisdiction of the Commission. *Id.* The second pertinent provision was an amendment to the state hazardous waste program with regard to the treatment of Pollutant X, which requires: (1) a phase out of the generation of Pollutant X in New Union; (2) a cease in issuance of permits allowing the treatment, storage or disposal of Pollutant X; and (3) transport of Pollutant X through New Union to be quick, with no stops within New Union except for emergencies and refueling. (Rec. doc 5 for 2000, pp. 105-07).

Following the issuance of the District Court's order, CARE and EPA each filed a Notice of Appeal. The parties were directed

to brief seven issues[2]. This bench brief discusses each of the issues in turn. For each issue, the position of the parties and the law are discussed.

ISSUE I

Does § 7002(a)(2) provide jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004?

Relevant Statutory Provisions

§ 7002(a)(2), RCRA's citizen suit provision: "Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under [RCRA] which is not discretionary with the Administrator."

§ 7004(a), Petition for Rulemaking provision: "Any person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under [RCRA]. Within a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition and shall publish notice of such action in the Federal Register, together with the reasons therefore."

Position of the Parties

CARE and EPA argue that RCRA § 7002(a)(2) provides jurisdiction to order EPA to respond to CARE's petition filed pursuant to RCRA § 7004. CARE argues § 7004 also provides jurisdiction to order EPA to commence proceedings to consider withdrawing approval of New Union's program under § 3006(b), while EPA argues it does not.

New Union argues that RCRA § 7002(a)(2) does not provide jurisdiction to order EPA to act on a petition filed pursuant to RCRA § 7004.

2. *See* Record for a list of issues.

Discussion

Determining whether RCRA § 7002(a)(2) provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004, requires an analysis of two threshold questions: (1) whether EPA's approval of New Union's hazardous waste program was a rule or an order; and (2) whether § 7004 imposes mandatory or discretionary duties on EPA to act on petitions. The District Court will have subject matter jurisdiction if EPA's approval of New Union's program was a rule, and if § 7004(a) of RCRA sets forth duties which are not discretionary with the Administrator.

A. Was EPA's approval of New Union's hazardous waste program a rule making or an order?

The first issue is whether EPA's approval of New Union's hazardous waste program was a rule or an order. The rule/order distinction is crucial because CARE's petition to the EPA was filed pursuant to RCRA § 7004. Section 7004 of RCRA authorizes any person to petition EPA for the promulgation, amendment, or repeal of *regulations*. 42 U.S.C. § 6974(a) (2006) (emphasis added). Thus, CARE's petition will stand only if EPA's approval of New Union's hazardous waste program is a rulemaking. If EPA's approval of New Union's program was not a rule, but was rather an order, then this Court should hold that CARE's action was properly dismissed by the District Court for failure to state a claim.

The analysis of this issue turns on the parties' interpretations of what administrative actions constitute rules and what administrative actions constitute orders. Courts have consistently reviewed an agency's interpretation of a statute it is charged with administering (EPA and RCRA) following the two-step analysis set forth in *Chevron*. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* defines a reviewing court's role in reviewing an agency's interpretation of a statute it is charged with administering. *Chevron* sets forth a two-pronged analysis. Under step one, if Congress has clearly spoken on a issue, then the agency and the court must give effect to the unambiguously expressed intent of

Congress. *Id.* at 842-44. If the statute is silent or ambiguous with respect to a particular issue, then the courts proceed to the second step in the analysis, and if the agency's interpretation is a permissible construction of the statute, then the courts must give deference to the agency. *Id.* However, courts are split on whether *Chevron* analysis applies to an agency's interpretation of a statute it is not charged with administering (EPA and APA).

Conclusion: For the reasons set forth below, CARE and EPA's argument that the approval of New Union's hazardous waste program was a rulemaking is equally as persuasive as New Union's argument that the approval was an order.

CARE and EPA's argument

CARE and EPA will argue that the District Court erred in dismissing CARE's petition for failure to state a claim because EPA's approval of New Union's hazardous waste program was a rulemaking.

a. EPA's approval of New Union's program is a "rule" as set forth in the APA.

"Rule"[3] is defined in the APA as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . ." 5 U.S.C. § 551(4) (2006). "Order" is defined as the "whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* §551(6).

"Two principal characteristics distinguish rulemaking from adjudication. First, adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals. . .Second, because adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is

3. Regulation and rule are used interchangeably.

applied." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988) (explaining that the "central distinction" between rulemaking and adjudication is that rules have legal consequences "*only* for the future") (Scalia, J., concurring) (emphasis added); *Prentis v. Atl. Coast Line Co.,* 211 U.S. 210, 226 (1908) (stating that a "judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is the purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.")

CARE and EPA will argue that EPA's approval of New Union's program fits within the distinctions set forth in *Yesler*. First, even though EPA focused specifically on New Union's state program, its approval affected the rights of broad classes of unspecified individuals, such as generators, transporters, and disposers of waste in New Union. Second, the approval did not immediately affect specific individuals. Rather, the approval changed existing conditions in that it transferred authority from the federal government to the State of New Union, to be applied henceforth, *i.e.* the future.

In addition, CARE and EPA will argue that the District Court failed to take into account that the APA definition of "rule" explicitly includes the phrase "of particular applicability". 5 U.S.C. § 551(4) (2006). CARE and EPA will argue that, therefore, the fact that EPA specifically considered New Union's (a particular party) state program does not warrant the conclusion that EPA's action was an order.

b. EPA's interpretation that § 3006(b) of RCRA requires approval of state programs through rulemaking is a permissible interpretation.

CARE and EPA will argue that EPA's determination that its approval of New Union's program was a rulemaking is entitled to *Chevron* deference because EPA was interpreting a provision of RCRA, a statute that it administers, while only applying the procedures set forth in the APA for rulemaking. CARE and EPA will argue that since Congress did not unambiguously state

whether EPA should proceed under rulemaking or adjudication in approving a state implementation program under § 3006(b) of RCRA, EPA's interpretation of the provision should be given deference, so long as it is a permissible construction of the statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (stating that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

The procedure set forth in RCRA § 3006(b) supports the assertion that EPA's initial approval of New Union's program was a rulemaking. CARE and EPA will argue that the steps explicitly outlined in § 3006(b) of RCRA–notice, opportunity for public hearing, and publishing of findings—are similar to the process outlined in the APA for the promulgation of rules. *Compare* 42 U.S.C. § 6926(b) *with* 5 U.S.C. § 553 (2006). As further support, CARE and EPA will cite to cases where courts validated EPA's use of rulemaking in approving state programs. *See United States v. S. Union Co.,* 643 F. Supp. 2d 201, 211-14 (D. R.I. 2009) (validating EPA's use of rulemaking under RCRA); *Maryland v. EPA,* 530 F.2d 215, 221 (4th Cir. 1975) (validating EPA's use of rulemaking under CAA).

CARE and EPA will argue that, additionally, policy considerations support EPA's determination that New Union's approval process was a rulemaking. Notice-and-comment rulemaking allows the general public to participate in the deliberative process. *See* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 930 (1965). This is especially important in the current context because, upon approval, authority is transferred from the federal government to the state to administer and enforce all matters pertaining to the generation, transportation, treatment, storage and disposal of hazardous waste and, as such, the policies and regulations incorporated in the state program have far reaching and widespread effects on its citizens. CARE and EPA will argue that as a matter of policy, the APA never intends for such an important process to be decided by an order. Further, that it is both rational and logical to conclude that in an approval process

carrying such great import, Congress surely intended that the public be given the opportunity to partake in the matter.

c. Even if the District Court was correct in holding that EPA interpreted the APA and not RCRA with regards to § 3006(b), the District Court was nonetheless required to defer to EPA's determination.

CARE and EPA will argue that even if EPA was not entitled to *Chevron* deference, the District Court should have held that EPA's characterization of its action was correct. CARE and EPA will rely on *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001), where the Supreme Court held that "in instances where the agency is interpreting a statute it does not administer *Chevron* deference will not be given, but nonetheless courts are to respect the agency's interpretation as is warranted by the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." As further support for this argument, CARE and EPA will rely on circuit court cases that accord significant deference to an agency's characterization of its own action, even in instances where the agency interprets a statute it is not charged with administering. *See Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) ("In determining whether an agency action constituted adjudication or rulemaking, we look to the product of the agency action. We also accord significant deference to an agency's characterization of its own action."). *See also British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 992 (D.C. Cir. 1978).

New Union's argument

a. CARE's petition, filed pursuant to § 7004(a), is improper because CARE is petitioning for the withdrawal of state approval, which is clearly an agency order.

New Union will argue that EPA's initial approval of New Union's state hazardous waste program is not at issue in the

present action. Rather, the issue here concerns the *withdrawal* of authorization of a state program under § 3006(e) of RCRA. 42 U.S.C. § 6926(e) (2006). The withdrawal provision provides:

> Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section and in accordance with the 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. . .

Id.

New Union will argue that the withdrawal provision requires the Administrator to make a determination by relying on past and present facts existing at the time of such determination with respect to a specific state. Citing to the APA's definitions of "rule" versus "order,"[4] New Union will argue that the procedure set forth in § 3006(e) clearly indicates that withdrawal of a state's program constitutes an order.

In further support of its argument, New Union will cite two Supreme Court cases which provide courts with helpful distinctions between "orders" and "rules". "The *Londoner/Bi-Metallic* teaching. . .is that 'orders' are usually adjudicative in nature and apply to a particular group, whereas 'rules' are more legislative in nature and have general applicability." *N. Am. Aviation Prop., Inc. v. Nat'l Transp. Safety Bd.*, 94 F.3d 1029, 1031 (9th Cir. 1996); *see also Londoner v. City of Denver*, 210 U.S. 373 (1908); *Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441 (1915); *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994). Relying on the distinction set forth above, New Union will assert that the process involved in determining whether to withdraw authorization is clearly adjudicative in nature because making this determination requires EPA to apply specific facts concerning New Union's

4. As stated earlier, "rule" is defined in the APA as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency…" 5 U.S.C. § 551(4) (2006). An "order" is defined as the "whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6).

program. Once the determination is made, that is the purpose and the end. There is nothing left to be prospectively applied at a future time.

New Union will thus argue that CARE improperly submitted a petition under § 7004(a) of RCRA because § 7004(a) allows a person to petition the EPA only for the promulgation, amendment, or repeal of a regulation. 42 U.S.C. § 6974(a) (2006). Additionally, in order to challenge a particular agency action under RCRA, that action has to be enumerated in the statutory provision that is used to challenge the action. Since § 7004(a) does not provide for a petition challenging an order, the lower court properly dismissed CARE's action for failure to state a claim. *See Cement Kiln Recycling Coal. v. U.S. EPA*, 493 F.3d 207, 227-28 (D.C. Cir. 2007) (dismissing for failure to state a claim because policy statements are not enumerated in § 7006(a)); *Am. Portland Cement Alliance v. U.S. EPA*, 101 F.3d 772, 774 (D.C. Cir. 1996) (dismissing the case for failure to state a claim because regulatory determinations are not enumerated in §7006(a)).

b. The District Court correctly held that EPA is not entitled to *Chevron* deference.

New Union will argue that EPA's determination that its approval of New Union's hazardous waste program was a rulemaking is not entitled to *Chevron* deference because EPA's construction of the § 3006(b) approval process required EPA to interpret the definitions of "rule" and "order" under the APA. Therefore, EPA was interpreting the APA and not RCRA. New Union will argue that the *Chevron* analysis only applies to situations where a court is reviewing an agency's interpretation of a statute the agency is authorized to administer. In support of this argument, New Union will rely on the Supreme Court's decision in *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). There the Supreme Court limited *Chevron* deference to situations in which Congress delegated authority to the agency generally to make rules carrying the force of law, and where the subject agency interpretation was in the exercise of that authority. *Id.* at 226-27. New Union will argue that, applying the principle set forth in *Mead* to the case at bar, since EPA was interpreting the APA, EPA's interpretation is not subject to *Chevron* deference. In

further support of its assertion, New Union will rely on *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998), where the circuit court held: "[w]e do not, however, accord *Chevron* deference to EPA's interpretation of the ESA, because the ESA is not a statute that EPA is charged with administering."

B. Does § 7004 impose mandatory duties on EPA to act on petitions?

Section 7002(a)(2) of RCRA authorizes any person to commence a civil action against the Administrator "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is *not discretionary* with the Administrator." 42 U.S.C. § 6972(a)(2) (2006) (emphasis added). Assuming *arguendo* that EPA's approval of New Union's program was a rule, this Court must still decide whether § 7004 of RCRA imposes a mandatory duty on EPA to act on petitions because the precondition to suits brought pursuant to § 7002(a)(2) is a failure of the Administrator to perform an act or duty that is not discretionary. The issue here is whether "shall" indicates a mandatory or discretionary duty on the Administrator. If the duties imposed by § 7004(a) are mandatory, i.e., not discretionary, then the District Court would have subject matter jurisdiction. If, however, this Court finds that the duties are discretionary, then this Court should find that the District Court lacks subject matter jurisdiction to hear CARE's case, since it was brought pursuant to § 7002(a)(2).

CARE's argument

a. The plain language of § 7004(a) supports a finding that it imposes nondiscretionary duties on the EPA.

CARE will argue that a §7004(a) petition requesting that EPA repeal its authorization of a state program, imposes a clear-cut mandatory duty on EPA to respond to the petition, and therefore the District Court has jurisdiction under § 7002(a)(2) of RCRA. First, CARE will point to the plain language of § 7004(a), which provides in pertinent part that "[w]ithin a reasonable time following receipt of such petition, the Administrator *shall* take

action with respect to such petition. . ." 42 U.S.C. § 6974(a) (2006) (emphasis added). CARE will argue that the use of "shall" indicates Congress' intent to impose a non discretionary duty on the Administrator to take action with respect to the petition. *See Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (holding that statutory language that an act "shall" be carried out is generally regarded as mandatory); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (holding that the word 'shall' is ordinarily a language of command); *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977) ("Use of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made.").

CARE will cite to *National Wildlife Federation v. Adamkus*, 936 F. Supp. 435, 442 (W.D. Mich. 1996). There, petitioners submitted comments pursuant to the CWA regarding changes to Michigan's wetlands program pursuant to an EPA request for public comments. *Id.* The court there relied on 40 C.F.R. § 233.43 (2010), which stated that the Administrator "shall respond in writing to any petition to commence withdrawal proceedings," to conclude that EPA had a non-discretionary duty to respond to petitions. CARE will argue that similar to *National Wildlife*, EPA had a nondiscretionary duty to respond in writing to CARE's petition to commence withdrawal proceedings.

Additionally, CARE will point to 40 C.F.R. § 271.23 (2010), which sets forth the procedures for withdrawing approval of State programs under § 3006(e) of RCRA, and states in pertinent part that the "Administrator *shall* respond in writing to any petition to commence withdrawal proceedings. . ." *Id.* (emphasis added). It goes on to state that the Administer *may* conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings. *Id*. CARE will argue that the last two sentences, read together, clearly indicate EPA's acknowledgement that § 3006(e) imposes a mandatory duty on the Administrator to respond in writing to such petitions, regardless of whether the Administrator determines that a cause exists to commence proceedings. *See United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 360 (1895) (holding that when the same rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense-the one act being permissive, the other mandatory); *Koch Ref. Co. v. U.S. Dep't of Energy*, 497 F. Supp. 879 (D. Minn. 1978).

b. If the Court holds that § 7004 imposes merely discretionary duties, it would vitiate the statutory scheme for public participation in the implementation of RCRA.

CARE will argue that overriding policy considerations support the assertion that § 7004 imposes nondiscretionary duties on EPA to act on a petition. CARE will stress that petitions are a crucial mechanism through which an interested person can bring alleged defects in the implementation of RCRA to the attention of the agency. Allowing EPA to ignore information presented to it through citizen petitions would defeat the public participation policy of RCRA. Even if an express finding of a violation is required to activate the Administrator's duty to initiate proceedings, this does not mean that the Administrator's duty to act on a petition to make such a determination is discretionary. CARE will argue that to hold otherwise would abrogate the public participation scheme of RCRA. In support of this argument CARE might rely on *Wisconsin's Environmental Decade, Inc. v. Wisconsin Power & Light Co.*, 395 F. Supp. 313 (W.D. Wis. 1975); *see also S. Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 130 (D. S.C 1978).

CARE will then argue that Congress included the § 7004(a) citizen petition authority in RCRA to encourage persons to bring violations to the attention of EPA, thereby providing an effective mechanism for the protection and welfare of the public. Since citizen petition authority was designed for this purpose, the use of "shall" should be construed as mandatory. *See Escoe v. Zerbst*, 295 U.S. 490, 494 (1935); *In re National Mills*, 133 F.2d 604, 607 (7th Cir. 1943) (holding that a "provision in a statute designed for the protection of the public or third parties is usually considered as mandatory).

EPA's argument

EPA will argue that its only nondiscretionary duty with regards to a petition filed under § 7004(a) is to respond to it in writing.

a. EPA's interpretation is entitled to *Chevron* deference because Congress did not define what actions EPA is

required to undertake.

EPA will argue that although Congress requires EPA to take action, it did not specify what actions EPA must take with regards to petitions for repeal of a rule. Since Congress has not directly spoken on the matter, EPA will argue once again that its interpretation of § 7004(a) is entitled to *Chevron* deference. Section 7004(a) allows any person to petition the Administrator for the promulgation, amendment, or repeal of any regulation and states that EPA "shall take action with respect to such petition and shall publish notice of such petition in the Federal Register, together with the reasons therefor." 42 U.S.C. § 6974(a) (2006). EPA will cite to cases that hold that 'shall' indicates a non-discretionary duty. *See Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *Zerbst*, 295 U.S. at 493, *Sierra Club v. Train*, 557 F. 2d at 489 (1977). EPA will also cite to 40 C.F.R. § 271.23, which sets forth the procedures for withdrawing approval of State programs under § 3006(e) of RCRA. The regulation states, in pertinent part, that the "Administrator *shall* respond in writing to any petition to commence withdrawal proceedings. . ." 40 C.F.R. § 271.23 (2010) (emphasis added). EPA will argue that the only mandatory duty that EPA failed to take was that which it mandated for itself in the regulation—to respond in writing to petitions for withdrawal of state programs.

b. A mandatory duty to initiate enforcement proceedings in response to every § 7004 petition for withdrawal of a state program would hamper EPA's ability to efficiently carry out the statutory goals of RCRA.

First, EPA will argue that its decision not to commence withdrawal proceedings constituted an agency action, and was therefore an exercise of its prosecutorial discretion. EPA will rely on *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), which stands for the proposition that an "agency's decision not to take enforcement action should be presumed immune from judicial review. . .[because] such a decision has traditionally been 'committed to agency discretion'. . ." *See also Harmon Cove Condo. Ass'n, Inc. v Marsh*, 815 F.2d 949, 952-53 (3rd Cir. 1987). The Court in *Chaney* noted that an agency's exercise of its prosecutorial

discretion involves a balancing of several factors, including whether its resources are best spent on the particular violation or another and the allocation of resources, and that such considerations are peculiarly within the discretion of the agency. *Chaney*, 470 U.S. at 831. *See also Steel Corp. v. U.S. EPA*, 782 F.2d 645, 649 (7th Cir. 1986); *Seabrook v. Costle*, 659 F.2d 1371, 1375 (5th Cir. 1981). EPA will assert that its authority to take actions on allegations set forth in a citizen petition comprises just one of the many enforcement options provided under RCRA, and a decision not to take action on the petition constituted an enforcement action. In this regard, EPA will assert that a duty to take enforcement action is wholly discretionary. *See Thompson v. Thomas*, 680 F. Supp. 1, 2 (D. D.C. 1987). Further, EPA will argue that, in deciding not to act on the petition, it exercised its discretion to decide how best to spend its limited resources so as to effectively and efficiently carry out the requirements set forth in RCRA's statutory scheme.

EPA will argue that the statutory language of § 7004 does not support a finding that EPA had a non-discretionary duty to commence proceedings to withdraw authorization of New Union's program. In support of its argument, EPA will rely on *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542 (1940), where the Supreme Court stated that in interpretation of statutes, the function of the courts is to "construe the language so as to give effect to the intent of Congress. . .To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute. . ." EPA will argue that the plain language of §7004(a), taken in isolation, does not accurately portray the intent of Congress, and that should this Court hold the plain language of § 7004(a) to be determinative, this Court will in actuality frustrate the intent of Congress.

In further support of this argument, EPA will point out that in *American Trucking*, the Supreme Court also held that "even when the plain meaning did not produce absurd results, but merely an unreasonable one 'plainly at variance' with the policy of the legislation as a whole this Court followed that purpose, rather than the literal words." *American Trucking*, 310 U.S. at 543. *See also Ozawa v. United States*, 260 U.S. 178, 194 (1922);

Exxon Corp. v. Train, 554 F. 2d 1310 (5th Cir. 1977). EPA will argue that holding that § 7004 imposes a mandatory duty to commence enforcement proceedings in response to petitions would compel EPA to expend its limited resources in investigating multitudinous citizen petitions irrespective of their environmental significance, which would invariably hamper EPA's ability to efficiently and effectively monitor or prosecute those complaints the EPA considers to be of significance.

Furthermore, EPA will argue that a "readily ascertainable deadline" for agency action is necessary to argue that § 7004(a) in the context of § 3006(e) imposed a mandatory duty on EPA to commence withdrawal hearings. *See Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) ("In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must "categorically mandate" that *all* specified action be taken by a date-certain deadline."); *Mountain States Legal Found. v. Costle,* 630 F.2d 754, 766 (10th Cir.1980) (citizen suit jurisdiction proper only in action to enforce "specific nondiscretionary clear-cut requirements of the Clean Air Act"); *Natural Res. Def. Council v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). EPA will argue that neither § 7004 nor § 3006(e) contain any specific dates or timelines, but instead contain discretionary "within a reasonable time" timeframes. *See* 42 U.S.C. §§ 6974, 6926(b) (2006). As such, EPA will argue that CARE's § 7004(a) petition created no mandatory duty to commence enforcement actions.

ISSUE II

Does 28 U.S.C. § 1331 provide jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed under 5 U.S.C. § 553(e)?

Relevant Statutory Provisions

28 U.S.C. § 1331: "The district courts shall have jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

5 U.S.C. § 553(e): "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

Position of the Parties

CARE argues that 28 U.S.C. § 1331 provides district court jurisdiction to order EPA to act on a petition filed pursuant to § 553(e) of the APA.

EPA and New Union argue that 28 U.S.C. § 1331 does not provide district court jurisdiction to order EPA to act on a petition filed pursuant to § 553(e) of the APA.

Discussion

CARE's argument

CARE will argue that 28 U.S.C. § 1331 provides concurrent jurisdiction for district courts to order EPA to act on CARE's petition filed under § 553(e) of the APA because the EPA, in failing to act on CARE's petition, violated CARE's rights under the APA, and RCRA does not preclude review under the APA.

a. EPA's failure to act on CARE's petition violated CARE's rights under the rulemaking petition provision of the APA and therefore gave rise to a claim under the federal question statute, with the federal question jurisdiction of the district courts.

The APA provides judicial review to any "person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action. . ." 5 U.S.C. § 702 (2006). CARE will argue that a right of review exists under the APA and that EPA's failure to take action on CARE's petition within a reasonable time violated CARE's right provided by the rulemaking petition provision (§ 553(e)) of the APA. Section 553(e) of the APA states that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e) (2006). Although § 553(e) does not specifically provide that the agency has to respond, nor a timeframe within which it must respond, CARE will argue that such duties are implied by the statutory structure of the APA. *See In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). Specifically, § 555(b) requires an agency to conclude a matter presented before it within a reasonable time and § 555(e)

requires an agency to give a petitioner prompt notice when the agency denies a petition, along with a brief statement setting forth the grounds for denial. 5 U.S.C. § 555(b) & (e) (2006). Furthermore, § 706(1) authorizes the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (2006). Finally, it defines "agency action" to include a failure to act. 5 U.S.C. § 551(13) (2006). CARE will argue that these various provisions, taken together, create a mandatory duty on EPA to respond to rulemaking petitions submitted under § 553(e), and to do so within a reasonable time. The right to petition is an illusory right if the agency does not respond within a reasonable time.

Precedent supports CARE's argument that EPA had a nondiscretionary duty to respond to the petition. *See Wisconsin Electric Power Co. v. Costle*, 715 F.2d 323, 328 (7th Cir. 1983) (recognizing an affirmative duty to respond to petitions submitted under § 553(e) of the APA). Although "reasonable time" is not defined in the APA, a reasonable time for agency action is typically counted in weeks or months, not years. *See Am. Rivers*, 372 F.3d at 418; *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992). Since EPA received CARE's petition almost an entire year prior to CARE's filing of the present action, EPA's failure to respond during that entire time is unreasonable. Judicial review is available in the present case because when "administrative inaction has precisely the same impact on the rights of the parties as a denial of relief, an agency cannot preclude such review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Envtl. Def. Fund v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir 1970); *see also Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 76 (D.C. Cir. 1984) [hereinafter *TRAC*] (holding that § 706(1) coupled with § 555(b) of the APA "does indicate a congressional view that agencies should act within reasonable time frames and that court's designated by statute to review agency actions may play an important role in compelling agency action. . ."). CARE will argue that in light of the above, EPA had a nondiscretionary duty to respond to the petition within a reasonable time. Therefore, EPA's failure to respond creates a cause of action under the APA. As outlined *supra* Issue I, CARE will argue that its petition was

properly filed pursuant to § 553(e) because EPA's approval of New Union's state program was a rulemaking.

b. RCRA's citizen suit provision does not preclude review under the APA.

CARE will argue that, in addition to the right of review provided by the specific environmental statute in question, the APA provides a concurrent basis of review of federal agency actions. Generally, instances where agency actions (which, by APA definition, include *in*action) are not subject to judicial review under the specific environmental statute, so long as the citizen suit provision within the specific statute does not specifically preclude review available under the APA, the APA will provide an independent basis for review of the agency action. For example, in *Bennett v. Spear*, 520 U.S. 154 (1997), petitioners brought an action pursuant to the citizen suit provision of the Endangered Species Act (ESA), seeking review of a Biological Opinion issued by the Fish and Wildlife Service that concluded that the irrigation project in question would jeopardize two endangered species of fish. *Id.* There, the Supreme Court held that even though ESA's citizen suit provision did not provide for review of the actions in question, review was nonetheless available under the APA since the ESA did not preclude such review. *Id. See also Alliance to Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 3 (D. D.C. 2007) (finding that the Clean Water Act's citizen suit provision did not preclude APA review).

CARE will argue that in the present case, RCRA's citizen suit provision does *not* preclude review of agency action under the APA, and that to the contrary, the provision contains a savings clause which provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement. . .or to seek any other relief (including relief against the Administrator or a State agency)." 42 U.S.C. § 6972(f) (2006). CARE will argue that inclusion of this savings clause clearly indicates that RCRA does not preclude review of EPA's inaction under the APA.

As further support for this argument, CARE will rely on *Hough v. Marsh*, 557 F. Supp. 74 (D. Mass. 1982). There the

District of Massachusetts held that the savings clause of the CWA preserves a right of review under the APA and jurisdiction under the federal question statute for the approval of a permit by the Army Corps. of Engineers under § 404 of the CWA. *Id.* at 77-79. Moreover, many courts have reviewed federal actions violating the Clean Air Act and Clean Water Act under the APA. *See e.g., City of Highland Park v. Train*, 519 F.2d 681, 692-93 (7th Cir. 1975) (seeking a review of the Administrator's promulgation of indirect source regulations pursuant to § 110 of the CAA); *Oljato Chapter of Navajo Tribe v. Train,* 515 F.2d 654, 664 (D.C. Cir. 1975) (seeking review of the Administrator's refusal to revise previously promulgated standards of performance for new coal-fired power plants pursuant to the CAA); *Natural Res. Def. Council v. Train*, 510 F.2d 692, 699 (D.C. Cir. 1974) (seeking review of the Administrator's failure to publish effluent limitation guidelines called for by § 304(b)(1)(A) of the CWA); *Atl. Terminal Urban Renewal Coal. v. New York City Dep't of Envtl. Prot.*, 697 F. Supp. 666, 668 (S.D. N.Y. 1988) (seeking review of HUD's preliminary approval of a development project despite the final environmental impact statement citing possible adverse impacts).

RCRA's citizen suit provision is almost identical to the provisions found in the ESA, CWA, and CAA. *Compare* 42 U.S.C. § 7604 (2006) *with* 16 U.S.C. § 1540(g) (2006) *and* 33 U.S.C. § 1365 (2006). CARE will argue that, as such, even if it was determined that § 7002(a)(2) does not provide jurisdiction to district courts to compel the EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, jurisdiction for the District Court is still available under the APA.

EPA and New Union's argument

a. RCRA displaces the APA under the maxim of statutory construction that the specific statute governs over the general statute.

EPA and New Union will argue that there is no federal question jurisdiction for the District Court because § 7004 of RCRA is the specific authority for rulemaking petitions under RCRA, and therefore displaces § 553(e) of APA, which provides

general authority for rulemaking petitions. In support of this argument, EPA and New Union will cite the maxim of statutory interpretation that the specific governs over the general. EPA and New Union will rely on cases such as *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-25 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."). *See also Edmond v. United States,* 520 U.S. 651, 658 (1997); *Bulova Watch Co. v. United States,* 365 U.S. 753, 758 (1961).

EPA and New Union will argue that § 553(e) of the APA requires an agency to give an interested person the *right to petition* and nothing else. 5 U.S.C. § 553(e) (2006). Section 7004(a) provides that "[w]ithin a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition and shall publish notice of such action in the Federal Register, together with the reasons therefor." 42 U.S.C. § 6974(a) (2006). EPA and New Union will argue that since the substance (RCRA-related questions) and procedures (reasonable time) set forth in RCRA § 7004(a) are more specific than the statutory minimum set forth in § 553(e) of the APA, RCRA § 7004 entirely displaces the APA § 553(e).

New Union's argument

a. CARE's petition under § 553(e) is improper because withdrawal of approval of a state program is an order, not a rule.

New Union will reassert its argument, *supra* section I-A, that the withdrawal of approval of a state program is an order, not a rule. New Union will argue that since § 553(e) of the APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule," CARE's petition under § 553(e) of the EPA is improper. 5 U.S.C. § 553(e) (2006). Therefore, CARE's petition, filed pursuant to § 553(e), fails to state a claim.

ISSUE III

Whether EPA's failure to act on CARE's petition constituted a constructive denial of that petition and a constructive determination that New Union's program continued to meet criteria for program approval under RCRA § 3006(b), both subject to judicial review under RCRA 7006(b)

Position of the Parties

CARE argues that EPA's failure to act on the petition constituted constructive denial of the petition and a constructive determination that New Union's program continues to meet the criteria for approval, and that both actions are subject to judicial review.

EPA and New Union argue that inaction on CARE's petition is not a constructive action of any kind and is therefore not subject to judicial review.

Discussion

CARE argues that EPA's failure to act on the petition constituted a constructive denial of the petition and a constructive determination that New Union's program continues to meet RCRA's criteria for approval. This argument rests on the well-established doctrine of "constructive submission." *See Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984); *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422 (W.D. Wash. 1991); *Sierra Club v. Browner*, 843 F. Supp. 1304 (D. Minn. 1993).

The constructive submission doctrine was originally crafted in the context of CWA § 303(d), which governs the total maximum daily loads (TMDLs) of pollutants that can be discharged into waters within a state's boundaries for which the effluent limitations are not stringent enough to implement any water quality standards or for which controls on thermal discharges are not stringent enough to ensure protection and propagation of fish and wildlife. 33 U.S.C. § 1331(d) (2006). It also imposes a statutory timeline within which states and EPA are to promulgate TMDLs. *Id.* The rationale behind the constructive submission doctrine is set forth in *Scott*. There, the Seventh

Circuit held that a state's "refusal to [submit TMDLs] would amount to a determination that no TMDL is necessary and none should be provided." *Scott*, 741 F.2d. at 998. This amounted to a "constructive submission" of no TMDLs. *Id.* Because the statute required EPA to establish TMDLs if the states did not, the state's long-term refusal to establish and submit TMDLs triggered a mandatory duty on the part of EPA to do so. The court went on to state that where a court determines that the "states have made a constructive submission of no TMDLs, the failure of the EPA to act would amount to failure to perform a nondiscretionary duty. . ." *Id.* *Scott* further held that inaction by EPA would be considered "tantamount to approval of state decisions. . ." *Id.* The court reasoned that it was unwilling to let an important aspect of the federal scheme for water pollution control to be frustrated by the refusal of the states to act. *Id.* at 997.

First, it must be determined whether EPA's failure to respond to the petition was an unreasonable delay constituting a constructive denial of the petition. Second, if EPA's failure to respond to the petition constitutes a constructive denial, the question is whether that denial constitutes a constructive continued approval of New Union's state program.

CARE's argument

a. EPA's failure to respond to CARE's petition was an unreasonable delay and therefore constituted a constructive denial of the petition, subject to judicial review.

CARE will argue that EPA's failure to act on the petition constituted a constructive denial of the petition because a §7004(a) petition requesting that EPA repeal its authorization of a state program imposes a clear-cut mandatory duty on EPA to respond to the petition. Section 271.23 sets forth the regulatory procedures for withdrawing approval of State programs under § 3006(e) of RCRA, and states in pertinent part that the "Administrator *shall* respond in writing to any petition to commence withdrawal proceedings. . ." 40 C.F.R. § 271.23 (2010) (emphasis added). It goes on to state that the Administer *may* conduct an informal investigation of the allegations in the

petition to determine whether cause exists to commence proceedings. *Id.* CARE will argue that the last two sentences, read together, clearly impose a mandatory duty on the Administrator to respond in writing to such petitions, regardless of whether the Administrator determines that a cause exists to commence proceedings. *See United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 360 (1895) (holding that when the same rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense-the one act being permissive, the other mandatory). Citing the very short "not to exceed ninety days" statutory time limit of § 3006(e), 42 U.S.C. § 6926(e) and the "within a reasonable time" requirement of § 7004(a), U.S.C. § 6974(a), in conjunction with the language of C.F.R. § 271.23, CARE will argue that EPA had a mandatory duty to act on the petition and to do so within a reasonable time. CARE will argue that EPA's failure to act on the petition over the course of almost one year was an unreasonable delay, therefore amounting to a constructive denial of CARE's petition. *See In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (holding that even though there is no *per se* rule as to how long is too long to wait for agency action, a reasonable time for agency action is typically counted in weeks or months, not years).

Although courts have not expressly defined what constitutes "unreasonable delay", they are guided by various factors in making such a determination. In *TRAC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984), the court set forth a six-factor test for assessing claims of unreasonable delay. The test sets forth the following factors:

> (1) the time agencies take to make decisions must be governed by a "rule of reason,"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Id. (internal citations omitted)

In *TRAC,* the court, citing to the complexity of the regulation, held that a delay of five years on a rate return inquiry and two on the proper ratemaking treatment was not unreasonable. *Id.* at 80. CARE will argue that application of the six-factor test does not warrant a similar conclusion in the case at bar.

Further, CARE will argue that since EPA's inaction had precisely the same impact on the rights of CARE as that of a denial, and therefore constructive denial subject to judicial review.

See Envtl. Def. Fund v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir 1970) ("When administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief", and that the Secretary's inaction with regard to the request for suspension was tantamount to an order denying suspension.).

b. EPA's inaction on CARE's petition constituted a constructive determination that New Union's program continued to meet RCRA's criteria for program approval under RCRA § 3006(b).

All of the allegations set forth in CARE's petition were obtained from documents and reports that New Union submitted directly to EPA. CARE will argue that EPA has been aware of the egregious inadequacies and failures of New Union's program from the dates on which they were reported, many of them dating as far back as 2000. CARE will argue that EPA's failure to commence withdrawal proceedings in the course of an entire decade is contrary to the statutory time-period set forth in § 3006(e) of RCRA. The notion that EPA's inaction should be permitted to frustrate a critical mechanism for achieving RCRA's objectives is highly unlikely. As such, the rationale for finding a constructive submission in the TMDL cases is just as convincing as a rationale for finding a "constructive" determination in the present case. CARE will argue that EPA's constructive denial of CARE's petition to repeal EPA's approval of New Union's program is tantamount to an approval of New Union's state hazardous waste program. *See Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984) (holding that inaction by EPA is

considered to be "tantamount to approval of state decisions that TMDLs are unneeded"); *U.S. Brewers Ass'n, Inc. v. EPA*, 600 F.2d 974, 978 (D.C. Cir. 1979) (finding that the "Administrator's refusal to repeal his regulation was, for jurisdictional purposes, equivalent to its promulgation and therefore reviewable").

CARE may also argue that "TMDL cases" where courts held the constructive submission theory inapplicable were instances where the States had either (a) submitted some TMDLs, or (b) demonstrated a good-faith interest in developing TMDLs. *See Natural Res. Def. Council, Inc. v. Fox*, 93 F. Supp.2d 531, 540 (S.D. N.Y. 2000); *Sierra Club, North Star Chapter v. Browner*, 843 F. Supp. 1304, 1314 (D. Minn.1993); *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 883 (9th Cir. 2002). Distinguishing those cases from the present action, CARE will argue that there is nothing to suggest that EPA has any intention of commencing withdrawal proceedings; nor are there any facts to suggest that New Union has plans to bring its state hazardous waste program into compliance. The absence of such intentions warrants the application of the constructive action doctrine to the present case, thereby leading to a finding that EPA's failure to act on the petition to commence withdrawal proceedings amounted to a constructive determination that New Union's program continues to meet the requirements outlined in § 3006(b) of RCRA. *See Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422, 1425, 1429 (W.D. Wash. 1991) (holding that a finding of a constructive submission rested on the facts that Alaska had not submitted any TMDLs whatsoever and had no intention of preparing any in the future).

c. The two constructive actions are both subject to judicial review under RCRA 7006(b).

CARE will argue that EPA's constructive denial of its petition to commence withdrawal proceedings under § 3006(e) of RCRA and constructive determination that New Union's program continues to meet RCRA criteria for program approval under § 3006(b) are both subject to judicial review under § 7006(b) of RCRA. In support of its position, CARE will draw attention to the language of § 7006(b) of RCRA, and argue that it clearly indicates Congress's intent that jurisdiction for review of EPA actions pertaining to state programs be in the Court of Appeals.

"To avoid unintended anomalous results, statutes authorizing review of specified agency actions should be construed to allows review of agency actions which are 'functionally similar' or 'tantamount to' those specified actions." *Vineland Chem. Co. v. EPA*, 810 F.2d 402, 405 (3d Cir. 1987). *See also Modine Mfg. Corp. v. Kay*, 791 F.2d 267, 270 (3d Cir. 1986). CARE will argue that in the case at bar, EPA's failure to respond to the petition is a constructive denial of the petition, which in turn is tantamount to a continued approval of New Union's state program, and therefore both actions are subject to judicial review under § 7006(b) of RCRA.

With regard to CARE's constructive determination argument, CARE will also argue that EPA has had years to commence withdrawal proceedings from the time when it was initially presented with evidence of the many inadequacies of New Union's state hazardous waste program. Despite having this knowledge, EPA has continuously failed to take any action to repeal its initial authorization of New Union's program (which was a rulemaking). CARE will also argue that EPA's refusal to repeal the regulation is equivalent to its promulgation and is thus reviewable under § 3006(b). *See U.S. Brewers Ass'n,* 600 F.2d at 978 ("The Administrator's refusal to repeal his regulation was, for jurisdictional purposes, equivalent to its promulgation and therefore reviewable.").

EPA and New Union's argument

a. EPA's delay in responding to CARE's petition is not a constructive denial of the petition because the delay is not unreasonable.

EPA and New Union will argue that the constructive submission doctrine set forth in *Scott* and other cases dealing with TMDLs are distinguishable from the present case. In holding that states' failure to submit TMDLs constitutes a "constructive submission" of no TMDLs, which in turn imposes a mandatory duty on EPA to take action, the Court pointed to the statutory time limits set forth in CWA § 303(d). EPA and New Union will argue that unlike *Scott*, where § 303(d) sets forth explicit statutory time limits, in the case at bar, § 7004(a) sets no

specific time limits, but instead sets forth a deferential "within a reasonable time" standard. *See* 42 U.S.C. § 6974(a) (2006). As such, EPA's failure to respond to the petition should only constitute a constructive denial if the delay was unreasonable. EPA and New Union will argue courts have generally found a delay to be unreasonable when an agency has failed to act for a number of years. *See Scott v. City of Hammond*, 741 F.2d 992, 997 (7th Cir. 1984); *Nader v. Fed. Commc'ns Comm.*, 520 F.2d 182, 205 (D.C. Cir. 1975).

Here, only a year has passed between the time CARE served its petition and commenced this action in the District Court. As such, this does not warrant a conclusion that EPA's inaction constitutes a constructive denial of CARE's petition or a constructive determination that New Union's program continues to meet RCRA's criteria for approval under § 3006(b). *See Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1977) (holding that generally a reasonable time for an agency action could encompass "months, occasionally a year or two. . ."); *MCI Telecomms. Corp. v. FCC,* 627 F.2d 322, 340 (D.C. Cir.1980).

b. EPA's decision not to commence withdrawal proceedings as a response to a citizen petition is an exercise of prosecutorial discretion and is therefore immune from judicial review.

EPA and New Union will argue that courts have consistently held that judicial review is not available in situations where the agency's action is subject to agency discretion. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (holding that an agency's decision not to take an enforcement action is presumed immune from judicial review); *Mobil Oil Explorations & Producing Se. Inc. v. United Distribution*, 498 U.S. 211 (1991); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984). EPA's inaction on CARE's petition to commence withdrawal proceedings was an exercise of its discretion not to undertake enforcement actions, and therefore not subject to judicial review.

c. EPA's inaction on the petition does not constitute a consistent failure to act and therefore does not constitute a constructive determination that New Union's program continues to meet RCRA's criteria

for approval under § 3006(b).

EPA and New Union may contend that even if it is assumed that an explicit statutory timeline is not required or that EPA's inaction was not an exercise of discretion pertaining to enforcement actions, such inaction still fails to amount to a constructive determination that New Union's program meets RCRA's approval criteria. EPA and New Union will call attention to the fact that the allegations contained in CARE's petition stem from facts that were reported to EPA in New Union's 2009 annual report and, as such, CARE's contention that EPA has continuously failed to take action over a period of several years is inaccurate. Further, the facts that EPA has assisted New Union's DEP to inspect a number of facilities in 2009, and has promised to do so again in 2010, provides further support that EPA did indeed undertake actions to ensure that New Union continues to operate a state program that is consistent with the federal statutory scheme. As such, EPA and New Union will stress that inaction on the petition did not constitute a constructive determination.

ISSUE IV

Assuming the answer to issue III is positive and the answer to either or both of issues I and II is positive, should this Court: (1) lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions; or (2) remand the case to the district court to order EPA to conduct proceedings to consider withdrawal of approval of New Union's hazardous waste program?

Relevant Statutory Provisions

§ 7006(b)(2), RCRA's judicial review provision: "Review of the Administrator's action in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business. . .Any such application shall be made within ninety days from the day of such issuance, denial, modification, revocation, grant, or withdrawal,

or after such date only if such application is based solely on grounds which arose after such ninetieth day. . ."

Position of the Parties

CARE argues that the Court should lift the stay and proceed with judicial review rather than remanding to the lower court.

EPA and New Union argue that the Court should not lift the stay, but instead remand the case to the court below to order EPA to initiate proceedings under RCRA §§ 3006(e) and 7004.

Discussion

If this Court determines that EPA's inaction on the petition amounted to a constructive denial of the petition and a constructive determination that New Union's program continues to meet RCRA's approval criteria, this court can either lift the stay in C.A.No. 18-2010 and proceed with judicial review of EPA's constructive actions, or remand the case to the lower court to order EPA to initiate and complete proceedings. The questions that must be resolved to determine which course to take are: (1) whether § 7006(b) confers jurisdiction for judicial review for EPA's failure to withdraw approval; (2) whether judicial review of EPA's constructive actions is time-barred; and (3) whether there are judicial economy and other policy issues.

Conclusion: For the reasons set forth in EPA and New Union's arguments this Court should remand the case to the lower court.

CARE's argument

a. EPA's failure to act on CARE's petition to initiate proceedings to withdraw authorization of New Union's program constitutes a constructive grant of continued approval by EPA of New Union's program, and this Court should lift the stay and proceed with judicial review under § 7006(b).

CARE will argue that, EPA's failure to act on the petition to commence withdrawal proceedings constituted an agency action.

As such, EPA's constructive determination that New Union's program continues to meet RCRA's criteria for program approval is, in essence, equivalent to a grant of authorization of the state program under the circumstances that exist today. In support of this argument, CARE will cite to *Maier v. U.S. E.P.A.*, 114 F.3d 1032 (10th Cir. 1997), in which the issue was whether EPA's denial of a petition to institute rulemaking constituted an "action . . . in approving or promulgating any effluent limitation or other limitation. . ." under the CWA. *Id.* at 1037. The court determined that the denial of the petition constituted an action approving or promulgating regulations. *Id. See also Scott v. City of Hammond*, 741 F.2d 992, 998(7th Cir. 1984) (holding that inaction by EPA would be considered "tantamount to approval of state decisions. . ."); *Oljato Chapter of Navajo Tribe v. Train,* 515 F.2d 654, 658 (D.C. Cir. 1975) (holding that the Administrator's failure to revise the rule under the CAA "constituted a failure to perform a nondiscretionary duty. . ."). CARE will argue that a similar conclusion is warranted in the present case. Since § 7006(b) grants jurisdiction to the Court of Appeals for judicial review of EPA's action in granting authorization under § 3006, this Court has jurisdiction to review the case. CARE will argue that thereby, in keeping with the unambiguously expressed will of Congress, this Court should lift the stay and proceed with judicial review of EPA's constructive actions.

b. The statutory language of § 7006(b) indicates Congress's intention that jurisdiction for review of all of EPA's actions regarding state programs be in the Court of Appeals.

CARE will argue that the judicial review provision of § 7006(b) should be read broadly to avoid unintended and anomalous results. *See Vineland Chem. Co. v. EPA*, 810 F.2d 402, 405 (3d Cir. 1987) (holding that "to avoid unintended and anomalous results, statutes authorizing review of specified agency actions should be construed to allow review of agency actions which are "functionally similar" or "tantamount to" those specified actions."). *See also Crown Simpson Pulp Co. v. Costle,* 445 U.S. 193 (1980) (cautioning not to construe appellate review provisions too narrowly); *Modine Mfg. Corp. v. Kay*, 791 F.2d 267, 267 (3d Cir. 1986) (same).

CARE will argue that § 7006(b)'s grant of jurisdiction to the Court of Appeals for judicial review of EPA's action in "granting, denying, or withdrawing authorization or interim authorization under § 6926. . ." constitutes all possible actions that EPA could take regarding whether state programs meet RCRA's criteria for approval. 42 U.S.C. § 6976(b) (2006). CARE will argue that this clearly indicates that Congress intended jurisdiction for review of all EPA actions regarding state programs be in this Court. Since CARE appeals EPA's constructive authorization of New Union's state hazardous program, the essence of CARE's claim lies under § 7006(b) of RCRA. As further support, CARE will cite to the last sentence of § 7006(b), which states that "[s]uch review shall be in accordance with sections 701 through 706 of Title 5." *Id.* Specifically, § 701(b)(2) refers to § 551 of the APA for definitions. *See* 5 U.S.C. § 701(b)(2) (2006). As mentioned previously, § 551(13) defines an "agency action" to include a *failure* to act. 5 U.S.C. § 551(13) (2006) (emphasis added).

CARE will argue that because EPA's inaction was equivalent to a constructive approval, EPA in essence granted authorization to New Union for its modified hazardous program, and therefore its constructive actions are subject to judicial review under § 7006(b).

c. Considerations to judicial economy cautions against remand to the lower court.

Remanding this case to the district court while simultaneously holding that EPA constructively denied CARE's petition, makes little sense. CARE's appeal of EPA's denial on remand will ultimately be in this court. Furthermore, given that all facts alleged by CARE are uncontested and all parties agree that no further facts are necessary to decide the matter, a sufficient factual record exists for appellate review. Only legal issues remain to be determined. This Court is perfectly capable of deciding them on its own, with no preceding decision by the District Court. Thus, with considerations to judicial economy and consistency, this Court should lift the stay and proceed with judicial review.

d. Judicial review under § 7006(b) of RCRA is not time-barred.

CARE will argue that judicial review is not time-barred because CARE is not seeking review of EPA's initial approval of New Union's program in 1986. Rather, CARE is seeking review of EPA's constructive denial on the petition and EPA's constructive determination that New Union's program continues to meet RCRA's criteria for program approval. CARE will argue that the 90-day statutory period begins to run upon a constructive denial of the petition, not when EPA acts or doesn't act. Thus, the 90-day statutory period has not passed because an application for judicial review in this Court does not become available until after this Court makes the determination that EPA's inaction constituted constructive actions. CARE will argue that only after such a determination could it then be argued that EPA's refusal to repeal the regulation is equivalent to its promulgation. CARE will argue that since it made an application for judicial review at the same time as it sought a determination that EPA's inaction constituted constructive actions, judicial review under § 7006(b) is not time-barred.

Additionally, CARE will argue that the petition is based on facts arising years after the initial approval and, therefore, the ninety-day statutory limit on filing an application for judicial review does not apply. *See* 42 U.S.C. § 6976(b) (2006) (any application for judicial review "shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day").

EPA and New Union's argument

a. § 7006(b) does not confer jurisdiction for judicial review of EPA's determination not to withdraw authorization, and therefore this Court must remand to the District Court.

When statutory language conferring jurisdiction is ambiguous, the court can resolve the ambiguity by reference to what Congress may have intended; but where the statutory

language conferring jurisdiction is unambiguous, the courts are "simply not at liberty to displace, or to improve upon, the jurisdictional choices of Congress. . ." *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1428, 1441 (D.C. Cir. 1988). In such instances, the courts have "just so much jurisdiction as Congress has provided by Statute." *Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987). *See also Vineland*, 810 F.2d at 405 ("The jurisdiction of the Court of Appeals is limited to that conferred by statute."); *Modine Mfg. Corp. v. Kay*, 791 F.2d 267, 270 (3d Cir. 1986); *Hempstead County & Nevada County Project v. EPA,* 700 F.2d 459, 461 (8th Cir.1983); *City of Baton Rouge v. EPA,* 620 F.2d 478, 480 (5th Cir.1980).

EPA and New Union will argue that in the case at bar, CARE filed suit challenging EPA's failure to withdraw authorization of New Union's state hazardous waste program, not EPA's action in granting, denying, or withdrawing authorization. Section 7006(b) unambiguously provides jurisdiction to the court of appeals to review the Administrator's action only in "granting, denying, or withdrawing authorization or interim authorization under § 6926 of [RCRA]. . ." and, as such, judicial review of CARE's challenged action falls outside the jurisdiction conferred by § 7006(b). 42 U.S.C. § 6976(b) (2006); *see United Technologies Corp. v. EPA*, 821 F.2d 714, 721 (D.C. Cir. 1987) (holding that it could not review a petition challenging the EPA's failure to promulgate a rule under § 7006(a)(1) of RCRA, 42 U.S.C. § 6976(a)(1)). Section 6976(a)(1) confers jurisdiction to review actions of the Administrator in the promulgation, amendment, and repeal of a regulation. 42 U.S.C. § 6976(a)(1) (2006). The court refused to expand the plain language of the statutory provision to include review of the EPA's failure to promulgate a rule. *United Technologies*, 821 F.2d at 721. EPA and New Union will argue that similar to *United Technologies*, this Court cannot expand the explicit statutory language of § 7006(b) to include EPA's *failure* to act. Therefore, according to the plain meaning of the statutory provision, this Court lacks jurisdiction to review EPA's constructive actions and must remand this case to the court below.

b. RCRA provides district courts with explicit jurisdiction to govern citizen suits.

EPA and New Union will argue that the citizen suit provision of RCRA provides that any civil suit brought against the Administrator for an alleged failure to perform a nondiscretionary duty "may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. . .to order the Administrator to perform the act of duty." 42 U.S.C. § 6972(a)(2) (2006). EPA and New Union will argue that a finding of constructive actions by the EPA requires first a finding that EPA failed to carry out a nondiscretionary duty. As such, RCRA confers exclusive jurisdiction to the district courts. *See Bethlehem Steel Corp. v. U.S. EPA*, 782 F.2d 645, 655 (7th Cir. 1986) (holding that where EPA's refusal to undertake rulemaking proceeding constitutes a failure to perform a mandatory duty, the district court has exclusive jurisdiction to hear the matter).

c. Judicial review under § 7006(b) of RCRA is time-barred.

EPA and New Union will argue that even if this Court were to decide that EPA's inaction on the petition constituted constructive actions, the petition is still time-barred because CARE's application for judicial review was made far after the ninety-day window provided under § 7006(b). Section 7006(b) states that any application for judicial review "shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day." 42 U.S.C. § 6976(b) (2006). EPA and New Union will argue that this Court may not enlarge or alter the filing period provided under § 6976(b) because the filing period is jurisdictional in nature. *See Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981); *Geller v. FCC*, 610 F.2d 973, 977 (D.C. Cir.1979); *New York v. United States*, 568 F.2d 887, 892 (2d Cir. 1977); *B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1114 (8th Cir. 1977); *Chem-Haulers, Inc. v. United States*, 536 F.2d 610, 613-14 (5th Cir. 1976); *Microwave Commc'n, Inc. v. FCC*, 515 F.2d 385, 389-90 (D.C. Cir.

1974). Further, filing periods serve "the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations." *Nuclear Regulatory Comm'n*, 666 F.2d at 602.

EPA and New Union will argue that CARE's action is time-barred because CARE failed to file the application for review within 90-days from the date of such issuance, denial, modification, revocation, grant, or withdrawal. Specifically, CARE alleges that New Union's hazardous waste program no longer met the criteria for EPA approval for a number of years. Most of the facts relied upon by CARE date back, at the very latest, to 2000. (R. at 5, 11, 12). As such, if these failures are deemed to constitute constructive actions, CARE clearly failed to file an application for judicial review within the 90-day statutory period. Furthermore, since CARE clearly filed suit on grounds dating so far back, CARE is not entitled to the exception to the 90-day provision, because that exception requires that application be based *solely* on grounds occurring after such 90-day period. EPA and New Union will argue that since judicial review is time-barred, the only possible alternative is to remand this case to the District Court to order EPA to initiate proceedings under § 3006(e).

d. There is no record available to review and therefore the Court should remand the case to the court below.

EPA and New Union will argue that EPA has not developed any administrative record by which this court can review EPA's alleged constructive actions. As the Supreme Court held in *Camp v. Pitts*, 411 U.S. 138, 142 (1973), "the focal point for judicial review should be the administrative record already in existence, not some new record completed initially in the reviewing court." EPA and New Union will argue that since no administrative record exists, this Court will not be able to engage in any meaningful review of EPA's alleged constructive actions. *See Envtl. Def. Fund v. Hardin*, 428 F.2d 1093, 1096 (D.C. Cir 1970) (holding it is impossible to have a meaningful appellate review without any record of the administrative action). Relying on *Camp* and *Hardin*, EPA and New Union will argue that this court should remand the case to the lower court.

ISSUE V

Must EPA withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria?

Position of the Parties

CARE argues that New Union's resources and performance are not sufficient and that EPA must therefore withdraw its approval of New Union's program.

EPA and New Union argue that New Union's resources and performance are sufficient and that even if they were insufficient, EPA has discretion to take action other than withdrawing approval.

Discussion

The EPA is authorized to approve state administered RCRA programs under § 3006 of RCRA. 42 U.S.C. § 6926 (2006). The EPA shall approve state programs unless the state program is (1) not equivalent to the Federal program, (2) is inconsistent with the Federal or State programs applicable in other States, and (3) does not provide adequate enforcement of compliance with the requirements of this subchapter. *Id.* EPA regulations set forth a continuing obligation for states to meet these requirements: "Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this subpart." 40 C.F.R. § 271.1(g) (2010) (titled "Requirements for Authorization of State Hazardous Waste Programs"). If a state gains EPA's approval of a program, but subsequently modifies the program or carries it out in such a way so that it does not meet the standards set forth in § 3006, then the EPA has the authority to withdraw its approval of the non-complying state program. 42 USC § 6926(e) (2006). While this authority is clear, the lingering question is whether EPA is *required* to withdraw its approval of a state program that is no longer in compliance.

Relevant here is the third exception to approval, which implicitly entails an assessment of the adequacy of a state's resources and performance in enforcing compliance. The issues that must be determined are whether New Union's program

provides adequate enforcement of compliance with RCRA, and whether EPA is required to withdraw authorization if it is determined that New Union's resources and performance fail to meet this requirement.

CARE's argument

Care will argue that New Union's resources and performance are insufficient to adequately enforce compliance with RCRA and that EPA must therefore withdraw its approval of New Union's program.

a. New Union's resources and performance are insufficient to meet RCRA's requirements for program approval and thus EPA must withdraw approval.

In order to operate a state program in lieu of the federal program, RCRA requires a state to adequately administer and enforce its program in accordance with the federal statutory scheme. See 42 U.S.C. § 6926(b) (2006). In its regulations, EPA specifies various failures which may warrant withdrawal of state authorization, which include the failure to issue permits, inspect regulated facilities, and to take enforcement actions for violations. See 40 C.F.R. § 272.22(a)(2), (3) (2010). CARE will argue that New Union lacks the personnel and financial resources to adequately perform any of these basic requirements, rendering its program out of compliance with RCRA; as such, EPA's constructive approval of its continued compliance with RCRA was clearly erroneous.

First, § 3005(c)(3) of RCRA states that any permits issued to TSDs are to be for a fixed term, not to exceed 10 years. 42 U.S.C. § 6925(c)(3) (2006). CARE will point out that New Union clearly fails to comply with the permitting requirement because New Union's 2009 annual report to EPA indicates that over 900 regulated facilities have expired permits, some having expired 20 years ago. (Rec. doc. 5 for 2009, p.20). Second, § 3007(e) of RCRA imposes mandatory inspections of every single treatment, storage, and disposal facility (TSD) no less than every two years. See 42 U.S.C. § 6927(e) (2006). However, the 2009 Annual Report to EPA indicates that New Union DEP inspected 150 TSDs

during the last year and solicited EPA to inspect a comparable number of facilities, and that it expected to perform at the same level this year. (Rec. doc. 5 for 2009, p.23). CARE will argue that the DEP and EPA together inspect only 20% of all facilities every year, well short of the 50% needed to inspect all TSDs every other year, as required by § 3007(e) of RCRA. Further, the 2009 Annual Report indicates there were 22 significant permit violations and 100s of minor violations. (Rec. doc. 5 for 2009, p.24). Yet, New Union took only six enforcement actions. Id. at 25. CARE will argue that New Union is clearly incapable of undertaking enforcement actions to adequately enforce RCRA or assure the health and safety of its citizens. CARE will argue that, because it is clear that New Union's program fails to meet the requirements for program approval, EPA must withdraw approval of the program.

b. Section 3006(e) imposes a non-discretionary duty on EPA to withdraw program approval.

CARE will argue that the plain language of RCRA § 3006(e) imposes a mandatory duty on EPA to commence withdrawal proceedings because it states that when the Administrator determines that a state is no longer administering and enforcing its program in accordance with the requirements set forth in § 3006(b), the Administrator "shall notify the state and, if appropriate corrective action is not taken within a reasonable time, the Administrator shall withdraw authorization of such program. . ." 42 U.S.C. § 6926(e) (2006) (emphasis added). CARE will argue that since Congress does not give EPA discretion on the course of action to take upon a determination by EPA that a state program is not in compliance, Congress imposed a mandatory duty on EPA to commence the proceedings to make such a determination. To support its assertion, CARE will cite to cases interpreting an almost identical provision of the CWA. *Compare* 42 U.S.C. § 6926(e) (2006) *with* 33 U.S.C. § 1342(c)(3) (2006). In *Save the Valley, Inc. v. EPA*, 99 F. Supp. 2d 981, 985 (S.D. Ind. 2000), the court rejected EPA's argument that 'whenever the Administrator determines' indicates EPA has discretion to initiate withdrawal proceedings and instead held that "we read the CWA to impose a mandatory duty on the Administrator to make the requisite finding or determination

when he becomes aware of such violations. . ." *See also S. Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 129 (D. S.C. 1978); *Illinois v. Hoffman,* 425 F. Supp. 71, 77 (S.D. Ill. 1977); *United States v. Phelps Dodge Corp.,* 391 F. Supp. 1181, 1183 (D. Ariz. 1975). CARE will argue that when Congress enacts a statute, it has previous statutes in mind which relate to the same subject matter. *Marlowe v. Bottarelli*, 938 F.2d 807, 813 (7th Cir. 1991). Since the language in the relevant provisions of RCRA and CWA are almost identical, CARE will argue that Congress intended to impose the same mandatory duty on EPA to commence proceedings to make this determination under RCRA.

EPA and New Union's Argument

EPA and New Union will argue that New Union's resources and performance are sufficient for EPA's continued approval of New Union's program, and that even if they were insufficient, EPA has discretion to take action other than withdrawing approval.

a. New Union's resources and performance are sufficient and therefore do not fall under any of the criteria for program withdrawal set forth in 40 C.F.R. § 271.22.

RCRA authorizes the Administrator to withdraw authorization of a state program whenever she determines that a state program is no longer in compliance with the requirements for program approval, and after giving notice to the state, the state fails to take corrective actions to bring its program into compliance. *See* 42 U.S.C. § 6926(e) (2006). In § 271.22, EPA has set forth circumstances of state noncompliance in which the Administrator may withdraw program approval. *See* 40 C.F.R. § 271.22 (2010). These circumstances include: (1) failure to exercise control over activities required to be regulated, including failure to issue permits; (2) issuing permits that do not conform to the requirements set forth in RCRA; (3) failure to act on violations of permits; (4) failure to undertake adequate enforcement; and (5) failure to inspect facilities subject to regulation. *Id.* § 271.22(a)(2), (3).

EPA and New Union will argue that New Union continues to exercise control over regulated activities by issuing permits, inspecting facilities, and undertaking enforcement actions. The 2009 Annual Report to EPA indicates that the New Union DEP issued 125 permits in 2009 and anticipated issuing another 125 permits in 2010. (Rec. doc. 5 for 2009, p.19). Second, the DEP and EPA together inspected approximately 300 TSDs in 2009 and the same is expected for 2010. *Id.* at 22. Additionally, New Union reported that 18 enforcement actions were taken in 2009. *Id.* at 26. While the state cannot inspect 100% of the TSDs or enforce every permit violation, it does prioritize its inspections based on the greatest potential harm to the public health or the environment. *Id.* at 23. EPA and New Union will argue that with the continued support and assistance of EPA in performing inspections and prosecuting violators, the state has a manageable system for dealing with the worst offenders until such a time when the state can supply the DEP with more resources.

EPA and New Union will argue that since New Union has complied with the statutory and regulatory requirements, EPA correctly determined that New Union's program does not fit the circumstances set forth in § 271.22 under which the EPA may withdraw authorization.

b. Even if New Union's resources and performance are insufficient, EPA's decision to withdraw is discretionary.

EPA and New Union may argue that the RCRA language giving EPA authority to withdraw approval of state programs does not state that EPA must withdraw its approval in response to a state's noncompliance. 42 U.S.C. § 6926(e) (2006). Rather, the statute first requires EPA to determine if the state is administering its program in accordance with RCRA, and if it determines the state is out of compliance, then EPA is required to notify the state of its determination. *Id.* Only after the state fails to take appropriate action after notice is given is EPA required to withdraw its approval. *Id.* EPA and New Union will argue that policy considerations received in comments during the final rule making process lend further support to EPA's interpretation that § 3006(e) grants discretion to EPA. *See* Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,384 (May 19, 1980) (to be

codified at 40 C.F.R. § 123.14) ("One commenter thought that program withdrawal should be mandatory for any violation by a State of the requirements of this Part. Such a requirement would be draconian and has been rejected by the Agency and the Courts.").

EPA and New Union will argue that EPA is not even required to determine if the state is administering its program in accordance with RCRA. Specifically, EPA and New Union will argue that numerous courts have held the phrase 'whenever the Administrator determines' to indicate that EPA has discretion to initiate withdrawal proceedings of a state program. This follows an analysis used by courts reviewing whether EPA must withdraw approval of state NPDES programs under the Clean Water Act (CWA). *See Sierra Club v. EPA*, 377 F. Supp. 2d 1205, 1207 (N.D. Fla. 2005) (holding that "the mandatory duty to withdraw approval arises only 'whenever the Administrator determines after public hearing' that a state is not administering its NPDES program in accordance with federal standards. The statute creates no *express* requirement that a public hearing be held at any specific time, or indeed ever, nor does the statute expressly require the EPA to make a determination. . .on the issue of whether a state is complying with federal law. . ."). *See also Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977); *Save the Bay* v. *Administrator,* 556 F.2d 1282 (5th Cir.1977); *Altman v. United States*, 2004 WL 3019171 (W.D. N.Y 2004); *Weatherby Lake Improvement Co. v. Browner*, 1997 WL 687656 (W.D. Mo. 1997); *but see Save the Valley, Inc. v. EPA*, 99 F. Supp. 2d 981, 985 (S.D. Ind. 2000). EPA and New Union will also point out that the language in the relevant provisions of RCRA and CWA are almost identical. *Compare* 42 U.S.C. § 6926(e) (2006) *with* 33 U.S.C. § 1342(c)(3) (2006). Additionally, Agency regulations for both the CWA and RCRA indicate that the Agency views program withdrawal as discretionary, since both regulations state the EPA "may" withdraw approval if a state fails to comply with program requirements. EPA and New Union will argue that since the provisions of the two statutes are almost identical, the conclusions of the courts interpreting the CWA should be applied to the present case arising under RCRA.

Furthermore, courts interpreting the phrase 'whenever the Administrator determines' under the Clean Air Act (CAA) have

reached the same conclusion. *See Ohio Pub. Interest Research Group. v. Whitman*, 386 F.3d 792, 796 (6th Cir. 2004); *New York Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 330-31 (2d Cir. 2003) ("key phrase. . .is the opening one, 'Whenever the Administrator makes a determination,' and this language grants discretion. . ."); *Sierra Club v. Whitman,* 268 F.3d 898, 900-03 (9th Cir. 2001); *Her Majesty the Queen v. EPA,* 912 F.2d 1525, 1533 (D.C. Cir.1990) (holding that statutory phrase 'whenever' the Administrator 'has reason to believe' implies a degree of discretion). Applying the holdings in these cases, EPA and New Union will argue that, similarly here, since the determination is to occur whenever the EPA makes it, the determination is necessarily discretionary.

c. Withdrawal is a drastic measure and EPA has several alternatives available to it short of withdrawal.

EPA and New Union will argue that a complete withdrawal of a state's RCRA program is an extreme step and should be used as a last resort. Courts deciding potential withdrawal of a state program under RCRA have recognized that withdrawal of approval is an extreme measure. *See United States v. Power Eng'g Co.*, 303 F.3d 1232, 1238-39 (10th Cir. 2002); *Waste Mgmt. of Illinois v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill. 1989); *see also Natural Res. Def. Council v. EPA*, 859 F.2d 156, 181 (D.C. Cir. 1988) (interpreting the potential withdrawal of a state program under the CWA and holding that because of the administrative burden on EPA and the increased state-federal friction, the remedy is so drastic that EPA cannot be expected to use it except in egregious cases). EPA and New Union will argue that CARE has failed to provide evidence of any such egregious violations as a result of the decreased funding and resources and, therefore, withdrawal is not warranted.

The *Waste Mgmt. of Illinois* court pointed out "to avoid such drastic measures, the U.S. EPA has promulgated regulations under which it may intervene in the granting and enforcement of state permits." *Waste Mgmt. of Illinois*, 714 F. Supp. at 341. Courts have consistently held that EPA's enforcement rights under RCRA are not displaced by state authorization. *See Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999)

(recognizing that RCRA "manifests a congressional intent to give the EPA a secondary enforcement right."); *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 34 (1st Cir. 1991). Specifically, the *Waste Mgmt. of Illinois* court pointed out that Congress gave the EPA authority to create many tools, short of withdrawing approval of the whole state program, to ensure state programs are in compliance with RCRA. "The Administrator may take enforcement action in a state with its own hazardous waste program, as long as he informs the state before taking action." *Waste Mgmt. of Illinois*, 714 F. Supp. at 341; *see also 42 U.S.C.* § 6928(a)(1), (2) (2006). EPA may comment on state permit applications and draft permits, indicate actions the state should take to come into compliance with its program, and file its own enforcement actions in the state. *Waste Mgmt. of Illinois*, 714 F. Supp. at 341-42; *see also* 40 C.F.R. § 271.19(a), (b), (e)(2) (2010). The EPA may, under section 3008(a)(3), revoke a permit or fine a violator up to $25,000 per day. *See* 42 U.S.C. § 6928(a)(3) (2006); *Waste Mgmt. of Illinois*, 714 F. Supp. at 342. Thus, EPA and New Union will argue that, even if New Union's resources are insufficient to carry out its RCRA program, the EPA has means available to ensure program compliance other than withdrawing program approval.

Additionally, EPA and New Union will argue that it would create an unreasonable administrative burden on EPA to have to withdraw approval of a state program. This is so because the EPA would have to put in place its own program in compliance with RCRA and administer it within the state. *See* 42 USC § 6926(e) (2006). Putting in place such a replacement program may not be a realistic possibility for the EPA. Even the *Save the Valley* court, which seemingly found that EPA was required to withdraw approval, did not require EPA to do so immediately given the administrative difficulties the agency would face in the absence of an approved state program. *See Save the Valley, Inc. v. EPA*, 99 F. Supp. 2d 981, 985 (S.D. Ind. 2000).

d. EPA's decision to not commence withdrawal proceedings should be given deference because the decision is committed to agency discretion.

EPA and New Union will argue that Congress does not unambiguously mandate that EPA commence withdrawal proceedings, and since there is ambiguity with respect to the specific question, EPA's interpretation of § 3006, as evidenced by EPA regulations, should be given deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). EPA and New Union will argue that since the agency action contained in § 3006(e) of RCRA is committed to agency discretion by law, EPA's determination that New Union's program has sufficient resources and performance to meet RCRA's program requirements is unreviewable. In *Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 Fed. App'x 406, 408 (5th Cir. 2010), the court held that "neither [RCRA] nor the regulations present standards by which we can review EPA's decision not to commence withdrawal proceedings." *See also Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (holding that review is unavailable "if statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.").

ISSUE VI

Must EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act effectively withdraws railroad hazardous waste facilities from regulation?

Position of the Parties

CARE argues that since New Union does not regulate all facilities regulated by RCRA, EPA must withdraw its approval of New Union's program.

EPA and New Union argue that New Union's present failure to regulate railroad hazardous waste facilities does not require EPA to withdraw its approval of the entire program.

Discussion

New Union's Environmental Regulatory Adjustment Act (ERAA) amended New Union's Railroad Regulation Act (RRA) by: (1) establishing a railroad Commission charged with regulating all aspects of New Union's intrastate railroad; (2) transferring all standard setting, permitting, inspection, and enforcement authorities from the DEP to the Commission; and (3) removing criminal sanctions for violations of environmental statutes by facilities falling under the jurisdiction of the Commission. (Rec. doc. 5 for 2000, pp.103-05). The issue here is whether this amendment renders New Union's program inconsistent with Federal requirements, thereby requiring withdrawal.

Conclusion: EPA is required to withdraw approval because states are not allowed to have partial programs.

CARE's argument

CARE will argue that EPA is required to withdraw approval of New Union's program because § 3006(g) contemplates partial state programs only to the extent necessary to continue approval of state programs approved prior to 1984, while they add elements necessary to comply with the 1984 amendments to RCRA. *See* 42 U.S.C. § 6926(g) (2006). ERAA amended the RAA to effectively withdraw railroad hazardous waste facilities from regulation, rendering New Union's program inconsistent with the Federal program.

a. ERAA is inconsistent with RCRA because it fails to meet the statutory and regulatory requirements.

Section 3006(b) provides that states submitting programs for EPA approval are authorized to administer their program in lieu of RCRA unless EPA finds their programs are not equivalent to RCRA, not consistent with RCRA, or do not adequately enforce RCRA. *See* 42 U.S.C. § 6926(b) (2006). A state program that does not regulate an entire segment of hazardous waste facilities regulated by RCRA is not equivalent to RCRA. Section 3006(e) authorizes EPA to withdraw authorization of a state program that no longer meets the requirements for approval under § 3006(b). *See* 42 U.S.C. § 6926(e) (2006). EPA set forth

circumstances indicating noncompliance, which includes the inability of a State's legal authority to meet requirements, and action by a state legislature that strikes down or limits state authorities. 40 C.F.R. § 271.22(a)(1)(ii) (2010). By removing criminal sanctions, the ERAA amendment to the RAA effectively reduced New Union's enforcement authorities. Specifically, New Union's program lacks the requisite enforcement mechanisms set forth in § 271.16, which requires an approved state program to have available criminal remedies. *See* 40 C.F.R. § 271.16(a)(3) (2010).

Second, by transferring all standard setting, permitting, inspection, and enforcement authorities related to rail transporters and hazardous waste treatment, storage, and disposal facilities associated with railroads (railroad TSDs) from the DEP to the Commission, the ERAA effectively removed rail transporters and railroad TSDs from being regulated under the state's hazardous waste program, thereby rendering New Union's program a partial program. *See* 40 C.F.R. § 271.11 (2010) (requiring state programs to cover all transporters listed under § 263 of the regulations, including intrastate rail); 40 C.F.R. § 271.12 (2010) (requiring state programs to cover all hazardous waste management facilities listed under §§ 264, 265, and 266); 40 C.F.R. § 271.1(h) (2010) ("[p]artial State programs are not allowed for programs operating under RCRA final authorization."). Applying EPA's regulations, CARE will argue that the ERAA amendment renders New Union's program an impermissible partial program. The railroad Commission has not promulgated regulations for these transporters and TSDs, and they are no longer subject to the DEP's regulations, leaving them wholly unregulated.

RCRA requires a state program be no less stringent than the federal requirements. *See* 42 U.S.C. § 6929 (2006). By deregulating railroad hazardous waste facilities and removing criminal sanctions, CARE will argue that the ERAA amendment accomplishes exactly the opposite. CARE will argue that as New Union's program is clearly inconsistent with RCRA's statutory scheme, EPA must withdraw approval of the program.

EPA and New Union's argument

EPA and New Union will argue that New Union's program is still in compliance and that even if EPA were to determine that New Union's program is in violation, the Administrator is not required to withdraw approval.

a. The ERAA amendment does not constitute an action by a state legislature that strikes down or limits state authorities.

EPA's regulation provides that withdrawal of authorization of a state's program may be warranted by an "[a]ction by state legislature or court striking down or limiting State authorities." 40 C.F.R. § 271.22(a)(1)(ii) (2010). EPA and New Union will argue that this provision does not apply to the case at bar because the ERAA amendments to the RAA do not limit New Union's authority in regulating hazardous waste.

The ERAA transfers authority to regulate railroad facilities from the DEP to the Commission. EPA and New Union will argue that a *transfer* of authority does not equal a *limitation* of such authority. Instead of the DEP, the Commission now has "all standard setting, permitting, inspection and enforcement authorities" with regards to railroad facilities. The Commission has administered this authority over the past ten years, and nothing in the record indicates a failure of the Commission to carry out these responsibilities.

Second, EPA and New Union will argue that even though the ERAA amendment removed criminal sanctions for violations of environmental statutes by railroad facilities, this does not render ineffective New Union's authority to take enforcement actions. New Union still has the authority to restrain or enjoin any person from engaging in any unauthorized activities and can also impose civil sanctions. Additionally, EPA can easily supplement New Union's enforcement authority by undertaking actions seeking criminal penalties for violators in New Union. *See United States v. Elias*, 269 F.3d at 1010 (upholding EPA's interpretation that RCRA does not cede exclusive enforcement authority to states); *Wyckoff Co. v. EPA*, 796 F.2d 1197 (9th Cir.1986). As such, the removal of criminal sanctions does not hamper or limit New Union's authorities.

Furthermore, EPA and New Union will argue that even if New Union's program is found to be in violation of the requirements set forth in § 3006(b) of RCRA, withdrawal of the entire program is a drastic and extreme measure for a relatively minor defect in the state's program. *See supra* Issue V. Alternatively, EPA can undertake various steps to supplement New Union's enforcement authority. *See supra* Issue V. Additionally, EPA can require New Union to follow the procedures for revision of its state program as set forth in 40 C.F.R. § 271.21. *See* 40 C.F.R. § 271.21 (2010).

b. A state with an approved program may delegate responsibilities to carry forth the state's hazardous waste regulatory scheme among its state agencies.

EPA and New Union will argue that EPA's regulation indicates that a state with an approved RCRA program has the power to "transfer all or part of any program from the approved State agency to any other State agency." 40 C.F.R. § 271.21(c) (2010). EPA and New Union will argue that the ERAA amendment did exactly this—it transferred the part of its state regulatory program dealing with railroad facilities from the DEP to the railroad Commission. EPA and New Union will also point out that in practice, regulatory responsibilities are often divided amongst agencies according to their particular expertise. For example, § 2002(a)(6) of RCRA authorizes the Administrator "to delegate to the Secretary of Transportation the performance of any inspection or enforcement function. . .relating to the transportation of hazardous waste where such delegation would avoid unnecessary duplication of activity. 42 U.S.C. § 6912(a)(6) (2006); *see also Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004). EPA and New Union will argue that similarly, the ERAA delegated to the railroad Commission the authority to regulate railroad facilities in order to avoid duplication of activity. Further, from a practical standpoint, the railroad Commission is well-informed of the dangers associated with the transport of hazardous waste via the railroads. EPA and New Union will argue that, as such, the Commission is in a position to better assess a given situation pertaining to transport via the railroads and take appropriate actions.

ISSUE VII

Must EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause?

Position of the Parties

CARE argues that the Act's treatment of pollutant X makes New Union's program not equivalent to the federal program, inconsistent with the federal program and other approved state programs, and in violation of the Commerce Clause.

EPA and New Union argue that the Act's treatment of pollutant X does not adversely affect the equivalency of the state program with the federal program, is not inconsistent with the federal or other approved state programs, and does not violate the Commerce Clause.

Discussion

A. Must EPA withdraw approval because the Act's treatment of Pollutant X renders the state RCRA program not equivalent to the Federal program?

CARE's argument

CARE will argue that ERAA's treatment of Pollutant X renders New Union's program not equivalent to the Federal program because its treatment of Pollutant X is different from that of EPA and other states with approved programs. Standards for the treatment, storage and disposal of hazardous waste, such as Pollutant X, are set forth in RCRA §§ 3001-3018. *See* 42 U.S.C. §§ 6921-6939 (2006). The Federal program treats Pollutant X the same way it treats other hazardous waste—in accordance with the standards set forth in §§ 3001-3018. A state that has been authorized to carry out its own program in lieu of the federal program becomes the sole permitting authority for the

treatment, storage, or disposal of hazardous waste within its borders. *See* 42 U.S.C. § 6925 (2006). Pollutant X is a listed hazardous waste for which the federal RCRA program requires permits. Yet, New Union's state program prohibits the issuance of permits for the treatment, storage, and disposal of Pollutant X. Thus, New Union's program no longer complies with the standards set forth in RCRA §§ 3001-3018. CARE will argue that, as such, New Union's program conflicts with the federal program, and is therefore not equivalent to the federal program or the programs of other states.

EPA and New Union's Argument

EPA and New Union will argue that New Union's program is equivalent to RCRA's federal statutory scheme because the ERAA provision regarding Pollutant X makes New Union's program *more stringent* than the federal program. RCRA expressly allows states to adopt more stringent requirements, and provides that "no State. . .may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations. . .. Nothing in this chapter shall be construed to prohibit any State. . .thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." 42 U.S.C. § 6929 (2006). The EPA also interprets more stringent requirements to be equivalent to RCRA. *See* 40 C.F.R. § 271.1(i)(1) (2010). RCRA sets a floor, not a ceiling and, as such, states can adopt regulations that are more stringent but not less stringent. *See Safety-Kleen, Inc. v Wyche*, 274 F.3d 846, 863 (4th Cir. 2001). Courts have consistently held that where a state's hazardous waste program is more stringent than RCRA, it is "equivalent" to RCRA. *See Old Bridge Chemicals, Inc. v. New Jersey Dep't of Envtl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992); *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1467 (9th Cir. 1985). As such, New Union's program is still equivalent to the federal program.

EPA and New Union will argue that when EPA initially approved New Union's program in 1986, EPA deemed the program equivalent to the Federal program. EPA and New Union will argue that since the initial approval, the 2000 ERAA amendment imposed a more stringent requirement for the

treatment, transport, and disposal of Pollutant X. (Rec. doc. 5 for 2000, pp. 105-07). Citing to § 3009 of RCRA, EPA's regulation § 271.1(i)(1), and the court decisions above, EPA and New Union will argue that ERAA's treatment of Pollutant X does not adversely affect the equivalency of New Union's program with the federal program.

B. Must EPA withdraw approval because the state Act renders the state RCRA program inconsistent with the Federal program and other approved state programs?

Under § 3006 of RCRA, 42 U.S.C. § 6926, EPA may authorize a State to implement its own hazardous waste program "in lieu of" the federal program, as long as the state program is, among other things, not inconsistent with the federal program or other state programs. 42 U.S.C. § 6926(b) (2006). EPA regulations interpreting the "consistency" requirement state that a state program shall be deemed inconsistent in the following circumstances: (a) if any aspect of the State program. . .unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program; (b) if any aspect of State law or of the State program. . . has no basis in human health or environmental protection and. . .acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State; or (c) if the State manifest system does not meet the requirements of this part. 40 C.F.R. § 271.4 (2010).

CARE's argument

CARE will argue that the amendments to the Act render the state program inconsistent in all three circumstances listed in the regulations. First CARE will argue that the amendment unreasonably restricts or impedes the free movement of Pollutant X across the State border by requiring that transportation of Pollutant X through New Union be "as direct and fast as reasonably possible, with no stops within the state except for emergencies and necessary refueling." (Rec. doc. 5 for 2000, pp.

105-07). CARE will argue this unreasonably impedes the free movement of Pollutant X across the State border because transporters may need to stop for reasons other than an emergency, including meals, breaks, or lodging. As such, many transporters may be reluctant to travel through New Union.

Second, CARE will argue that the amendment "acts as a prohibition on the treatment, storage, or disposal of hazardous wastes in the state," since the amendment prohibits the DEP from issuing permits for the "treatment, storage or disposal" of Pollutant X. State law "acts as a prohibition" on treatment of hazardous wastes, for purposes of determining whether it is inconsistent with RCRA, when state law effects a total ban on particular waste treatment technology within state. *See Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1395 (D.C. Cir. 1991); *Blue Circle Cement, Inc. v. Bd. of County Comm'rs*, 27 F.3d 1499, 1506 (10th Cir. 1994) (holding that "the savings clause of § 6929 speaks only in terms of saving to state and local authorities the power to impose more stringent "requirements" and it does not vest in such authorities the power to ban outright important activities that RCRA is designed to promote. . ."). CARE will argue that since the ERAA amendment prohibits issuance of permits for the treatment, storage, or disposal of Pollutant X, the amendment amounts to a ban on Pollutant X waste treatment technology.

Third, CARE will argue that although the ERAA amendment may have a basis in protecting the health of the citizens of New Union, it cannot do so at the expense of the citizens of states that do not ban the treatment, storage, and disposal of Pollutant X.

Furthermore, CARE will argue that the state program manifestly does not meet the requirements for final state programs because, by not allowing for the DEP to issue permits for all substances defined as "hazardous waste" –namely, Pollutant X –it does not meet the requirements set forth in RCRA.

EPA and New Union's argument

EPA and New Union will counter by arguing that the restrictions on transportation of Pollutant X through the state are not unreasonable. The amendment still allows for the movement of Pollutant X through the state, and it is likely that a

transportation company would choose a direct route and limit stops to those only absolutely necessary for maximum efficiency, even without the amendment. The amendment in no way prevents transportation of Pollutant X through the state by imposing these restrictions. *See Blue Circle Cement*, 27 F.3d at 1508.

Second, EPA and New Union may argue that while the amendment may prohibit the treatment, storage, or disposal of Pollutant X in the state, this prohibition is based on human health and environmental protection. Since there is no way to treat or dispose of Pollutant X, one of the most potent and toxic chemicals to public health and the environment, within the state, measures to not allow it in New Union serve as the best way to protect public health and the environment. *See Blue Circle Cement*, 27 F.3d at 1508 (holding that "an ordinance that falls short of imposing a total ban on encouraged activity will ordinarily be upheld so long as it is supported by a record establishing that it is a reasonable response to a legitimate local concern for safety or welfare"); *see also Old Bridge Chemicals, Inc. v. New Jersey Dep't of Envtl. Prot.*, 965 F.2d 1287, 1296-97 (3d Cir. 1992); *LaFarge Corp. v. Campbell,* 813 F. Supp. 501, 508-12 (W.D. Tex. 1993); *N. Haven Planning & Zoning Comm'n v. Upjohn Co.,* 753 F. Supp. 423, 431 (D. Conn. 1990). Since the EPA allows for a ban on treatment, storage, or disposal of hazardous waste when done for the purpose of protecting human health or the environment, New Union is proper in its ban on issuing permits for Pollutant X.

For the reasons above, New Union and EPA will argue that the state program meets the requirements of consistency set forth in 40 C.F.R. 271.4.

C. Must EPA withdraw approval because the state Act is in violation of the commerce clause?

The Commerce Clause of the U.S. Constitution gives the Federal government the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

CARE's argument

a. ERAA's ban on issuing permits to facilities for the treatment, storage, or disposal of Pollutant X places an excessive burden on interstate commerce and therefore violates the Commerce Clause.

The Commerce Clause limits the power of States to discriminate against interstate commerce. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937) ("actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow"). Where a state statute regulates even-handedly to effectuate a legitimate local public interest and only incidentally burdens interstate commerce then it will be upheld, unless the burden is clearly excessive in relation to the local benefits derived from such state law. ***Philadelphia v. New Jersey,*** 437 U.S. 617, 617 (1978); *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970). "[W]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935).

During the final rule making process, EPA found that "[a] State that refuses entirely to allow a necessary part of national commerce—the disposal of hazardous wastes—to take place within its boundaries is impeding the flow of interstate commerce just as much as a State that refuses to allow the transportation of those wastes." Consistency, 45 Fed. Reg. 33,290, 33,395 (May 19, 1980) (to be codified at 40 C.F.R. § 123.32). CARE will argue that the ERAA amendment prohibits the DEP from issuing permits allowing the disposal of Pollutant X which, in effect, prevents the disposal of Pollutant X within New Union. Thereby, according to EPA's statement during the final rule making process, the ERAA amendment clearly violates the Commerce Clause. Second, "just as a State's ban on interstate transport of hazardous waste could violate the commerce clause under *City of Philadelphia v. New Jersey*. . .so could a ban on the treatment of waste". *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1393 (D.C. Cir. 1991). Once again, CARE will argue that since the ERAA amendment prohibits the DEP from issuing permits allowing

treatment of Pollutant X, the amendment in effect imposes an outright ban on the treatment of Pollutant X. As such, the amendment violates the Commerce Clause.

Even though New Union may argue that it enacted the amendment to protect its citizens from the potential risk that Pollutant X places on public health and the environment, CARE will argue that the local public interest does not hold weight. The problem of hazardous waste is a matter of national concern and focus. By outright prohibiting the treatment, storage, and disposal of Pollutant X within the state, New Union has placed itself in a position of economic isolation. Additionally, although New Union does not prevent out-of-state Pollutant X from being transported through New Union, the restrictions it imposes have effects identical to those prohibited in *Baldwin*. New Union has effectively removed itself from bearing any responsibility for the Pollutant X that it is creating; instead, shifting the burden on other states that do issue such permits. CARE will argue that in light of the fact that Pollutant X is one of the most potent and toxic chemicals in the world, the burden New Union places on interstate commerce is clearly excessive in comparison to the local benefits to its citizens.

Additionally, with respect to ERAA's restrictions on the transport of Pollutant X within New Union, CARE will argue that there are nondiscriminatory alternatives to preserve New Union's interests in protecting its citizens and the environment from exposure to Pollutant X. Since New Union failed to undertake any nondiscriminatory alternatives, the ERAA violates the Commerce Clause. *See Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992), (holding that a successful dormant commerce clause claim must show that the discriminatory action is justified by some factor that is not related to economic protectionism, and that there are no "nondiscriminatory alternatives adequate to preserve the local interests at stake."); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389 (1994); *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994).

EPA and New Union's argument

a. New Union's program does not violate the Commerce

Clause because the ERAA amendment only incidentally burdens interstate commerce.

A restriction on commerce that benefits in-state economic interests and burdens out-of-state economic interests is *per se* invalid and subject to strict scrutiny. *Oregon Waste Sys.*, 511 U.S. at 100-01. But where a state law regulates even-handedly to effectuate a legitimate local public interest and only incidentally burdens interstate commerce, it will be upheld, unless the burden is clearly excessive in relation to the local benefits derived from such state law. *Pike*, 397 U.S. at 142. EPA and New Union will argue that the ERAA does not discriminate against out-of-state generators and transporters of Pollutant X, and therefore does not facially discriminate against interstate commerce. As such, the ERAA amendment should be evaluated according to the *Pike* test. Under the *Pike* test, ERAA can only be found to violate the Commerce Clause if the burden it places on interstate commerce is *clearly excessive*. EPA and New Union will argue that ERAA only incidentally burdens interstate commerce in that it poses some restrictions on the transport of Pollutant X through New Union and prevents potential TSDs from operating in New Union. In contrast, the amendment clearly serves a strong, legitimate public interest. The legislative history to the amendment clearly indicates that it was adopted after recognition that Pollutant X is among the most potent and toxic chemicals to public health and the environment. (Rec. doc. 5 for 2000, pp. 105-07). Since New Union is not able to treat or dispose of Pollutant X because there are no facilities within the state capable of handling it safely, the amendment was adopted to minimize the possibility of inevitable accidents, clearly intended to protect the citizens of New Union. EPA and New Union will argue that this burden is not excessive in comparison to the benefits derived by the amendment and therefore the ERAA amendment does not violate the Commerce Clause. As such, New Union's adoption of the ERAA amendment was a legitimate exercise of the broad regulatory authority retained by states to protect the health and safety of its citizens. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986) (holding that a state retains broad regulatory authority to protect health and safety of its citizens "as long as a state does not needlessly obstruct interstate trade or attempt to place itself in a position of

economic isolation. . ."); *S. Pac. Co. v. Arizona ex rel Sullivan*, 325 U.S. 761, 767 (1945).

Second, EPA and New Union will argue that the Act does not violate the Commerce Clause because there is no nondiscriminatory alternative that will adequately protect the public and environmental health from exposure to pollutant X. *See Chem. Waste Mgmt., Inc. v. Hunt*, 540 U.S. at 342 (holding that a successful dormant commerce clause claim must show that there are no "nondiscriminatory alternatives adequate to preserve the local interests at stake"). They will reiterate that the state is not able to treat or dispose of Pollutant X because there are no such facilities within the state, and that any exposure to Pollutant X is highly destructive to both human health and the environment. EPA and New Union will argue that limiting unnecessary transportation of Pollutant X within the state is a necessary and justifiable measure to protect the public and the environment, and does not serve any economic interest whatsoever.

b. Even if the ERAA amendment is found to violate the Commerce Clause, it does not require a withdrawal of New Union's hazardous waste program.

Finally, EPA and New Union will argue that, even if the state Act is declared unconstitutional, there is no affirmative duty on the part of the EPA to withdraw approval of the remainder of New Union's RCRA program for the reasons outlined *supra* Issue V.

QUESTIONS FOR ORALISTS

ISSUE I

Whether RCRA's citizen suit provision (§ 7002(a)(2)) provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004?

Position of the Parties

CARE and EPA argue that RCRA § 7002(a)(2) provides jurisdiction to order EPA to respond to CARE's petition. CARE argues § 7004 also provides jurisdiction to order EPA to commence proceedings to consider withdrawing approval of New Union's program under § 3006(b), while EPA argues it does not.

New Union argues that RCRA § 7002(a)(2) does not provide jurisdiction to order EPA to act on a petition filed pursuant to RCRA § 7004.

Questions

For CARE and EPA

1. In distinguishing rulemaking from adjudication, courts have generally held that adjudications involve specific parties and have an immediate effect on those involved in the dispute, whereas rulemaking is prospective and has a definitive effect only after the rule is subsequently applied. What facts can you point to in the Record to support a position that EPA's approval of New Union's program was a rulemaking and not an order?
2. If this Court finds that the issue in this case concerns the withdrawal of New Union's program under § 3006(e) of RCRA, then was CARE's petition, which was filed under § 7004(a), still proper?
3. A) Doesn't the issue here concern the withdrawal of authorization of New Union's state program under §

3006(e) of RCRA and not EPA's initial approval of New Union's program under § 3006(b)?

B) The language in § 3006(e) seems to require the EPA Administrator to apply specific facts pertaining to New Union's program in determining whether to withdraw authorization, and as such isn't this adjudicative in nature (therefore not a rulemaking)?

4. Based on the facts of this case, if this Court finds that EPA's approval of New Union's program was an order, would the District Court have jurisdiction?
5. Is EPA's determination that its approval of New Union's program was a rulemaking entitled to *Chevron* deference?
6. All parties agree that EPA had a nondiscretionary duty to respond to CARE's petition. What factors should this Court rely on to determine whether or not EPA had a nondiscretionary duty to commence withdrawal proceedings?
7. **For EPA:** Petitions are a crucial mechanism through which citizens can bring alleged defects in the implementation of RCRA to the attention of the agency. If this Court were to determine that EPA does not have a mandatory duty to act on such petitions, what safeguards exist to ensure that RCRA's enforcement scheme is not hampered?
8. **For CARE:** Isn't EPA's decision not to commence withdrawal proceedings an exercise of its prosecutorial discretion, and therefore immune from judicial review?

For New Union

1. In distinguishing rulemaking from adjudication, courts have generally held that adjudications involve specific parties and have an immediate effect on those involved in the dispute, whereas rulemaking is prospective and has a definitive effect only after the rule is subsequently applied. What facts can you point to in the Record to support a position that EPA's approval of New Union's program was an order and not a rulemaking?
2. Since RCRA does not specify whether EPA should proceed under rulemaking or adjudication in approving a state

program, isn't EPA's determination that its approval of New Union's program was a rulemaking entitled to *Chevron* deference?

3. If this court finds that the issue in this case concerns the revocation of EPA's initial authorization of the state program under 3006(b) of RCRA, then wasn't CARE's petition properly brought pursuant to § 7004(a)?

ISSUE II

Does 28 U.S.C. § 1331 provide jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed under 5 U.S.C. § 553(e)?

Position of the Parties

CARE argues that 28 U.S.C. § 1331 provides district court jurisdiction to order EPA to act on a petition filed pursuant to § 553(e) of the APA.

EPA and New Union argue that 28 U.S.C. § 1331 does not provide district court jurisdiction to order EPA to act on a petition filed pursuant to § 553(e) of the APA.

Questions

For CARE

1. Since § 7004 of RCRA is the specific authority for rulemaking petitions under RCRA, doesn't it displace § 553(e) of APA under the maxim of statutory construction that the specific governs over the general?
2. Section 553(e) allows an interested person the right to petition for the issuance, amendment, or repeal of a rule.
    a. What facts can you point to in support of the position that EPA's approval of New Union's program was a rulemaking and not an order?
    b. What facts can you point to in support of the position that EPA's withdrawal of approval of a state program is a rulemaking and not an order?

3. What facts or factors should this Court consider in order to determine if RCRA's citizen suit provision does not preclude review under the APA?

For EPA and New Union

1. "The specific governs over the general." Why would this maxim of statutory construction preclude judicial review under the APA?
2. Given that RCRA's citizen suit provision does not preclude review of agency action under the APA, doesn't the District Court have federal question jurisdiction to order EPA to act on CARE's petition?
3. **For New Union:** Briefly explain why this Court should find that CARE's petition under § 553(e) of the APA is improper.

ISSUE III

Whether EPA's failure to act on CARE's petition constituted a constructive denial of that petition and a constructive determination that New Union's program continued to meet criteria for program approval under RCRA § 3006(b), both subject to judicial review under RCRA 7006(b)

Position of the Parties

CARE argues that EPA's failure to act on the petition constituted constructive denial of the petition and a constructive determination that New Union's program continues to meet the criteria for approval, and that both actions are subject to judicial review.

EPA and New Union argue that inaction on CARE's petition is not a constructive action of any kind and is therefore not subject to judicial review.

Questions

For CARE

1. Explain what the doctrine of constructive submission is, what its underlying purpose is, and why the underlying principle of the constructive submission doctrine should be applied in this case?
2. *Scott v. Hammond* concerned § 303(d) of the Clean Water Act, which sets forth explicit statutory time limits. However, § 7004(a) sets no specific time limits within which EPA must act.
    a. What facts or factors should this Court consider in determining whether EPA's failure to respond to the petition constituted a constructive denial of the petition?
    b. What facts or factors should this Court consider in determining whether EPA's inaction on the petition constituted a constructive determination that New Union's program continues to meet RCRA's criteria for program approval?
3. Assuming that this Court finds that EPA's only nondiscretionary duty was to respond to CARE's petition and nothing more, would EPA's failure to respond still constitute a constructive determination that New Union's program continues to meet RCRA's criteria for program approval?
4. Section 7006(b) grants jurisdiction for review of the Administrator's action only in granting, denying, or withdrawing authorization or interim authorization of a state program.

    In the event this Court finds that EPA's inaction on the petition constituted a constructive denial of the petition, wouldn't this Court still lack jurisdiction under § 7006(b) to review EPA's constructive denial?
5. In *Heckler v. Chaney* the Supreme Court held that an agency's decision not to take an enforcement action is presumed immune from judicial review.

a. Isn't EPA's decision not to commence withdrawal proceedings an exercise of its discretion not to undertake enforcement actions?
b. If not, how is the present case distinguishable from *Chaney*?

For EPA and New Union

1. How is this case distinguishable from *Scott v Hammond*?
2. Section 7004(a) sets forth a "within a reasonable time" standard within which EPA is to respond to petitions. Explain why this Court should find that EPA's failure to respond to the petition for an entire year does not constitute an unreasonable delay thereby amounting to a constructive denial of the petition?
3. Many of the purported inadequacies and failures of New Union's program date as far back as 2000 but EPA has not taken any action. Doesn't EPA's continuous failure to commence withdrawal proceedings thereby constitute a constructive determination by it that New Union's program continues to meet RCRA's criteria for program approval? Are there any facts or factors that support a finding to the contrary?

ISSUE IV

Assuming the answer to issue III is positive and the answer to either or both of issues I and II is positive, should this Court: (1) lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions; or (2) remand the case to the district court to order EPA to conduct proceedings to consider withdrawal of approval of New Union's hazardous waste program?

Position of the Parties

CARE argues that the Court should lift the stay and proceed with judicial review rather than remanding to the lower court.

EPA and New Union argue that the Court should not lift the stay, but instead remand the case to the court below to order EPA to initiate proceedings under RCRA §§ 3006(e) and 7004.

Questions

For CARE

1. Section 7006(b) grants jurisdiction for review of the Administrator's action only in granting, denying, or withdrawing authorization or interim authorization of a state program. Your suit challenges EPA's failure to withdraw authorization of New Union's program. As such, doesn't judicial review of your challenged action fall outside the jurisdiction conferred by § 7006(b)?
2. Assuming that § 7006(b) grants jurisdiction to hear your challenge, the section nonetheless requires that application for judicial review be made within ninety days from the date of issuance, denial, modification, revocation, grant, or withdrawal, unless the application is based solely on grounds arising after such ninetieth day.
   EPA and New Union argue that many of the facts alleged by you date back to 2000 and that, as such, your application for review is time-barred. Can you articulate an argument why this Court should find otherwise?
3. The Supreme Court has held that the focal point for judicial review should be the administrative record that already exists. Since EPA has not developed an administrative record, how can this Court engage in a meaningful review of EPA's alleged constructive actions?

For EPA and New Union

1. Given that all facts alleged by CARE are uncontested and all parties agree that no further facts are necessary to decide the matter, the only issues that remain are legal in nature. As such, don't considerations to judicial economy require this Court to lift the stay and proceed with judicial review?
2. Assuming this Court finds that EPA's failure to act on CARE's petition to initiate proceedings to withdraw authorization constitutes a constructive determination by EPA that New Union's program continues to meet RCRA's

criteria for program approval, wouldn't this Court have jurisdiction for judicial review under § 7006(b)?

3. Even though the statutory language of § 7006(b) does not specifically grant jurisdiction for judicial review of EPA's determination not to withdraw authorization, isn't this determination functionally similar to EPA's action in granting authorization, thereby conferring jurisdiction to this Court to review EPA's constructive actions?
4. Articulate the facts in the record that would support your position that CARE's petition is time-barred.

ISSUE V

Must EPA withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria?

Position of the Parties

CARE argues that New Union's resources and performance are not sufficient and that EPA must therefore withdraw its approval of New Union's program.

EPA and New Union argue that New Union's resources and performance are sufficient and that even if they were insufficient, EPA has discretion to take action other than withdrawing approval.

Questions

For CARE

1. What facts can you point to in the Record to support a finding that New Union's resources and performance are not sufficient to provide adequate enforcement of compliance with RCRA?
2. If this Court were to find that New Union's resources and performance no longer provide adequate enforcement of compliance with RCRA, would EPA be required to withdraw approval of New Union's program?

3. EPA and New Union argue that § 3006 does not unambiguously mandate that EPA commence withdrawal proceedings, and that since there is ambiguity with respect to the specific question, EPA's interpretation of § 3006(b) is entitled to *Chevron* deference. Can you point to precedent that supports a contrary finding?

For EPA and New Union

1. What facts can you point to in the Record to support a finding that New Union's resources and performance are sufficient to provide adequate enforcement of compliance with RCRA?
2. The language in § 3006(e) of RCRA states that when the Administrator determines that a state is no longer administering and enforcing its program in accordance with the requirements set forth in § 3006(b), the Administrator shall notify the state and if the state fails to take corrective action within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program.
   Doesn't the above language set forth a mandatory duty on the Administrator to withdraw authorization?
3. If this Court were to find that New Union's resources and performance no longer provide adequate enforcement of compliance with RCRA, briefly explain policy considerations and alternatives this Court should consider to support a finding that EPA is not required to withdraw approval of New Union's program

ISSUE VI

Must EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act effectively withdraws railroad hazardous waste facilities from regulation?

Position of the Parties

CARE argues that since New Union does not regulate all facilities regulated by RCRA, EPA must withdraw its approval of New Union's program.

EPA and New Union argue that New Union's present failure to regulate railroad hazardous waste facilities does not require EPA to withdraw its approval of the entire program.

Questions

For CARE

1. New Union's Environmental Regulatory Adjustment Act (Act) transfers authority to regulate railroad facilities from the DEP to the New Union Railroad Commission. A transfer of authority from one state agency to another is not a limitation on the authority. Are there any other grounds to find that the Act limits the state's authority?
2. EPA's regulation indicates that a state with an approved RCRA program has the power to transfer all or part of any program from the approved State agency to any other state agency. Thus, isn't New Union transfer of authority to regulate railroad facilities from the DEP to the Commission a proper and permissible action?
3. Briefly provide reasons why a finding that the Act effectively withdraws railroad hazardous waste facilities from regulation would require a withdrawal of New Union's entire state program, despite the fact that a total withdrawal is a drastic and extreme measure.

For EPA and New Union

1. Doesn't the Act deregulate New Union's railroad hazardous waste facilities, thereby rendering New Union's program an impermissible partial state program?
2. The Act removes criminal sanctions for violations of environmental statutes by railroad hazardous waste facilities. Doesn't this in effect reduce New Union's enforcement authorities, thereby rendering New Union's

program no longer in compliance with the requirements set forth in RCRA?

3. RCRA requires a state program be no less stringent than the federal requirements. Doesn't the Act render New Union's program less stringent, thereby rendering the program inconsistent with RCRA's statutory scheme?

ISSUE VII

Must EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause?

Position of the Parties

CARE argues that the Act's treatment of pollutant X makes New Union's program not equivalent to the federal program, inconsistent with the federal program and other approved state programs, and in violation of the Commerce Clause.

EPA and New Union argue that the Act's treatment of pollutant X does not adversely affect the equivalency of the state program with the federal program, is not inconsistent with the federal or other approved state programs, and does not violate the Commerce Clause.

Questions

For CARE

1. Since New Union has no way to treat or dispose of Pollutant X within the state, isn't the prohibition on the treatment, storage, or disposal of Pollutant X in New Union based on legitimate human health and environmental protection concerns? Is the local concern outweighed by other factors?
2. What are the circumstances under which a state program will be deemed inconsistent with the federal program and

other approved state programs? Which of these circumstances are present in this case?

3. EPA and New Union argue that the state program does not violate the Commerce Clause because the Act only incidentally burdens interstate commerce. What factors support your position that the burden New Union places on interstate commerce is excessive in comparison to the local benefits to its citizens?
4. Were there any nondiscriminatory alternatives available to New Union to preserve its interests in protecting its citizens and the environment from exposure to Pollutant X?

For EPA and New Union

1. Pollutant X is a listed hazardous waste for which the federal RCRA program requires permits. Yet, the Act prohibits the issuance of permits for the treatment, storage, and disposal of Pollutant X. Doesn't this render New Union's program not equivalent to the federal program or the programs of other states?
2. A) What facts and factors support your position that the Act imposes a more stringent requirement for the treatment, transport, and disposal of Pollutant X than the federal program?

   B) What is the significance of a finding that the Act imposes a more stringent requirement than the federal program in the current case?
3. The Act states that the transportation of Pollutant X must be "as direct and fast as reasonably possible, with no stops within the state except for emergencies and necessary refueling." Doesn't this unreasonably restrict or impede the free movement of Pollutant X across New Union's state border, thereby rendering New Union's program inconsistent with the federal program and other approved state programs?
4. A restriction on commerce that benefits in-state economic interests and burdens out-of-state economic interests is *per se* invalid and subject to strict scrutiny.
   a. Is the Act subject to strict scrutiny?

   b. If not, what test should this Court apply to determine whether New Union's program violates the Commerce Clause?

5. If this Court were to find that the Act's treatment of Pollutant X violates the Commerce Clause, wouldn't this require EPA to withdraw New Union's hazardous waste program?