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Best Brief, Intervenors

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

Best Brief, Intervenors*

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C.A. No. 18-2010 and C.A. No. 400-2010
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.,
Petitioner-Appellant-Cross-Appellee,
v.
LISA JACKSON, ADMINISTRATOR,
United States Environmental Protection Agency,
Respondent-Appellee-Cross-Appellant,
v.
STATE OF NEW UNION,
Intervenor-Appellee-Cross-Appellant.

On Appeal from the United States District Court for the District of New Union

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Brief for THE STATE OF NEW UNION,
Intervenor-Appellee-Cross-Appellant

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* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

INTRODUCTION

This is an initial brief filed by the intervenor-appellee-cross-appellant, the State of New Union, in response to the order of this court dated September 29, 2010. References to the problem are abbreviated as follows: "R." = Problem. References to the documents cited in the Summary of the Record are abbreviated as follows: "Rec. doc." = Record Document.

STATEMENT OF JURISDICTION

Subject-matter jurisdiction is a contested issue in this case. The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union, including decisions to dismiss for lack of jurisdiction. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE CASE AND FACTS

Pursuant to its statutory mandate under the Resource Conservation and Recovery Act ("RCRA"), the U.S. Environmental Protection Agency ("EPA") approved the State of New Union's hazardous waste program in lieu of a federal program in 1986. (Rec. doc. 2, p. 1). EPA made this determination after finding New Union possessed adequate resources to fully administer and enforce the program. *Id*.

Recently, state budget constraints have resulted in alterations to New Union's program. In response to these changes, the New Union Department of Environmental Protection ("DEP") has sought to administer the program more efficiently. Among other things, the New Union DEP asked EPA to work in tandem with its regulators to maintain the quality of the New Union program. (Rec. doc. 5 for 2009, p. 23). Moreover, the New Union legislature transferred some state environmental regulatory authority to the New Union Railroad Commission. (Rec. doc. 5 for 2000, pp. 103-105). Finally, the New Union legislature passed a law focusing the efforts of the state hazardous waste program on Pollutant X, one of the most potent

and toxic chemicals to human health. (Rec. doc. 5 for 2000, pp. 105–07).

On January 5, 2009, the Citizens for Regulation and the Environment, Inc. ("CARE") served a petition on the Administrator of the EPA. (R. at 4). The petition requested that EPA commence proceedings to withdraw its approval of New Union's hazardous waste program. *Id.* EPA has not yet acted on this petition. *Id.*

Dissatisfied with EPA's delay, CARE filed suit in the U.S. District Court for the District of New Union on January 4, 2010. Pursuant to 42 U.S.C. § 6972, CARE sought either an injunction requiring EPA to act on the petition, or judicial review of EPA's "constructive denial" of the petition and "constructive determination" that the program met RCRA's requirements. The State of New Union filed an unopposed motion to intervene, which the district court granted.

At the same time it filed the above action in the district court, CARE filed a petition for review with the U.S. Court of Appeals for the Twelfth Circuit. CARE sought judicial review of EPA' s "constructive denial" and "constructive determination" on the same grounds. New Union filed an unopposed motion to intervene in that case as well. This court granted the motion and stayed resolution of the claim pending the outcome of the district court action.

In an order dated June 2, 2010, the district court, responding to the parties' cross-motions for summary judgment, denied CARE's motion for summary judgment and granted New Union's motion for summary judgment. (R. at 9). Each of the parties subsequently filed notices of appeal with this court. (R. at 1). In addition, CARE now asks this court to lift its earlier stay and consolidate the two actions. (R. at 1–2).

On September 29, 2010, this Court ordered all parties to brief seven issues. (R. at 3). This timely response on behalf of the State of New Union follows.

STATEMENT OF THE ISSUES

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.

Whether 28 U.S.C. § 1331 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 under 5 U.S.C. § 553(e).

Whether EPA's failure to act on CARE's petition that EPA initiate proceedings to consider withdrawing approval of New Union's hazardous waste program under RCRA § 3006(e) 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 §§ 7002(a)(2) and 7006(b).

Whether, assuming the answer to issue III is positive and the answer to either or both of issues I and II is positive, this court should lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions or should the court remand the case to the lower court to order EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program.

Whether, assuming this court proceeds to the merits of CARE's challenge, EPA must withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria.

Whether, assuming this court proceeds to the merits of CARE's challenge, EPA must 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.

Whether, assuming this court proceeds to the merits of CARE's challenge, EPA must 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.

STANDARD OF REVIEW

The Twelfth Circuit Court of Appeals reviews a district court's dismissal of a case for lack of subject matter jurisdiction *de novo*. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir.2009). If this court consolidates this action, this court reviews a district court's grant of summary judgment *de novo*. *Haynes v. Williams*, 392 F.3d 478, 484 (D.C. Cir. 2004).

SUMMARY OF THE ARGUMENT

RCRA's citizen suit provision allows any person to bring an action against the EPA Administrator where there is alleged a failure of the Administrator to perform any act or duty which is not discretionary. RCRA requires the EPA Administrator to take action after a person petitions the Administrator for the promulgation, amendment, or repeal of any regulation. RCRA does not require the Administrator to take action after a person petitions the administrator for the promulgation, amendment, or repeal of any order. Such action is discretionary.

CARE argues its petition requesting that EPA commence proceedings to withdraw its approval of New Union's hazardous waste program falls under a nondiscretionary provision of RCRA. However, program approvals are orders, rather than rulemakings, under RCRA. Therefore, because the Administrator has discretion to act on petitions dealing with orders, RCRA's citizen suit provision does not provide a jurisdictional basis for a district court to order EPA to act on CARE's petition.

Furthermore, EPA's failure to respond to CARE's petition is not a "constructive denial" of the petition or a "constructive determination" that New Union's program is in compliance. RCRA lacks time-specific statutory deadlines for EPA's response. Rather, Congress granted EPA the discretion to address petitions as the agency sees fit, and to conserve its limited resources. Where there is no time-specific duty to respond, a 364-day delay cannot be construed as a constructive denial of a petition or a constructive determination of compliance. The decision to initiate

withdrawal proceedings is, under RCRA, discretionary with EPA. Discretionary statutes such as RCRA give agencies the flexibility to respond within a "reasonable" time, a term that has been interpreted to equate to several years or even decades. EPA's delay of just under a year is not such an unreasonable inaction or delay. When EPA has not yet made such a determination or denial, there is no basis for the district court's review.

Even if this court disagrees and finds that EPA's delay is a "constructive" denial of CARE's petition, the court should remand the issue to EPA for initiation and exhaustion of the statutory administrative remedies. New Union has a right under RCRA to notice, a fair hearing, a compiled agency record, and an opportunity to comply with RCRA's framework. RCRA's own regulatory scheme and the basic demands of due process demand that this court refrain from initiating a substantive review of the New Union RCRA program.

If this court nevertheless decides to overturn the decision of the district court and proceed to the merits of CARE's challenge, EPA should not be forced to withdraw its approval of the New Union RCRA program. The withdrawal of a state program's approval is an extreme and drastic remedy that requires EPA to fill the gap left by the withdrawn state program, and that undermines the letter and spirit of cooperative federalism embodied by RCRA.

This is particularly true when New Union's program is substantially in compliance with RCRA. New Union's program has not failed to issue permits, inspect facilities, or otherwise exercise its control over hazardous waste management as required by RCRA. New Union, in partnership with EPA, has demonstrated the ability to enforce its RCRA program via civil suits and other remedies. There is no "failure" in regulation or enforcement that would constitute a "failure" of the New Union program or subject it to withdrawal.

CARE next challenges the New Union program on the basis of the 2000 Amendments to the Railroad Regulatory Act. However, CARE misunderstands the role of the federal authorities in RCRA's federal-state partnership scheme. These amendments do not create a regulatory gap that would subject the New Union program to withdrawal—enforcement authority is

simply moved to another state body, with EPA retaining civil enforcement authority in case the Railroad Commission fails to adequately enforce the environmental law. Federal authorities are also empowered to enforce state permit requirements and bring criminal charges under RCRA, thus filling any potential gap created by the RRA Amendments. There is no basis for withdrawal.

Finally, New Union's regulation of Pollutant X is exactly the sort of permissible more-stringent regulation, based in considerations of human health and environmental protection, that states are allowed under RCRA. EPA is not required to withdraw its approval. The regulation of Pollutant X does not ban the movement of hazardous waste across New Union's border, and does not constitute a "prohibition" on the treatment, storage, or disposal of hazardous waste. The regulation is not facially discriminatory, and does not violate the dormant Commerce Clause under the Supreme Court's balancing test for legislation based on permissible concerns. CARE's petition should be denied and the New Union RCRA program should be upheld.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT RCRA SECTION 7002 DOES NOT PROVIDE A JURISDICTIONAL BASIS FOR A DISTRICT COURT TO ORDER EPA TO ACT ON CARE'S PETITION, FILED UNDER RCRA SECTION 7004, FOR REVOCATION OF EPA'S APPROVAL OF NEW UNION'S HAZARDOUS WASTE PROGRAM.

The Resource Conservation and Recovery Act ("RCRA") provides a comprehensive federal program for the management of hazardous waste from "cradle to grave." However, RCRA allows states to establish their own hazardous waste programs, in lieu of the federal program, after obtaining EPA's approval. *See* 42 U.S.C. § 6926(b). Indeed, the statute makes clear that states, like New Union, are the preferred authorities for implementation and enforcement of the federal program. *Id.*

In order to ensure compliance, RCRA's citizen suit provision allows any person to bring an 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). However, contrary to CARE's claims, this section does not provide the district court a jurisdictional basis to order EPA to act on its petition to withdraw approval from New Union's program. Rather, EPA has discretion to decide whether to act. The decision of the District Court to dismiss for lack of jurisdiction was correct, and should be upheld.

A. CARE's petition was not properly submitted under RCRA Section 7004 because withdrawal of a state program's approval is an order, not a rule.

On January 5, 2009, CARE filed its petition with the EPA pursuant to RCRA Section 7004 to force EPA to begin proceedings to withdraw New Union's program approval. (R. at 4). Section 7004 provides, "[a]ny person may petition the Administrator for the promulgation, amendment, or repeal of any regulation . . . .Within a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition." 42 U.S.C. § 6974.

However, RCRA does not define "regulation" as used in Section 7004. Therefore, this court should look to the Administrative Procedure Act ("APA") for guidance. *See, e.g., Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007) (looking to APA definitions to interpret term used in federal securities laws).

The APA provides definitions of agency substantive "rules" and "orders" as used in the APA. Section 551(4) defines "rule" as:

> the whole or a 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 and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

"Rulemaking" is defined in section 551(5) as "agency process for formulating, amending, or repealing a rule[.]"

"Order" is defined in section 551(6) 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*[.]" (emphasis added).

"License" is defined in section 551(8) as "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."

"Licensing" is defined in section 551(9) as "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license."

EPA argues the APA definitions of "rule" or "rulemaking" apply to the RCRA permit approval process. Because "[c]ourts and Congress treat the terms "regulation" and "rule" as interchangeable and synonymous," EPA would have this court apply the definition of "rule" in 551(4) or "rulemaking" in 551(5). *Nat'l Treas. Emps. Union v. Weise*, 100 F.3d 157, 160 (D.C. Cir. 1996). However, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974). Here, the APA definitions of "order" and "license" more closely resemble the RCRA permitting process than the definitions of "rule" or "rulemaking."

In approving the New Union program, EPA was issuing a "permit." *See* 42 U.S.C. § 6925. Under 551(8), a permit is a form of "license." According to 551(9), an agency issues a "license" after conducting a "licensing." A "licensing," under 551(6) is an "order." Therefore, because an "order" is "a matter other than rulemaking," the RCRA permitting process cannot be a "rulemaking" and CARE's petition was not submitted under 42 U.S.C. § 6974. *See* 5 U.S.C. § 551(4).

There is an additional reason for this court to reject EPA's interpretation of the APA. Because Congress did not direct the EPA to implement the APA, EPA's interpretation is not entitled to *Chevron* deference. *See Adams Fruit Co. v. Barrett,* 494 U.S. 638 (1990) (a precondition to *Chevron* deference is a congressional delegation of administrative authority). In addition, "ambiguities

in the APA are not properly viewed as congressional delegations to the administrative agencies, since the very purpose of the APA is to constrain these agencies." *Air North Am. v. Dep't of Transp.*, 937 F.2d 1427, 1436–37 (9th Cir. 1991) (citing *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950)). As such, this court is not bound to accept EPA's strained interpretation of "rule" and "rulemaking."

When interpreting ambiguous procedural terms in a statute an agency is authorized to administer, some courts of appeals have not stopped with the APA definitions. *See, e.g., New Mexico Envtl. Imp. Div. v. Thomas*, 789 F.2d 825, 829 (10th Cir. 1986). They have also looked to "the character of a proceeding to determine whether it is a rule or an order." *Id.*

Here, as the district court rightly noted, "[EPA's] action has the characteristics of an order. EPA is applying facts to law; determining whether the program submitted by New Union met the criteria of RCRA and EPA's regulations under RCRA." (R. 6).

Two Supreme Court cases elaborate on the distinction between a "rule" and an "order," *Londoner v. Denver,* 210 U.S. 373 (1908) and *Bi-Metallic Inv. Co. v. State Bd. of Equalization,* 239 U.S. 441 (1915). The *Londoner/Bi-Metallic* doctrine generally holds that "orders" are usually adjudicative in nature and apply to a particular group, whereas "rules" are more legislative in nature and have general applicability. When EPA approved New Union's program, it was acting in a way that affected *only* the New Union program. EPA's approval did not have any general applicability.

Therefore, because "EPA's approval or disapproval of New Union's program was an order rather than a rulemaking, it is not subject to petition under section [6974]" and 42 U.S.C. § 6972 does not provide a jurisdictional basis for a district court to order EPA to act on CARE's petition. (R. 7).

B. CARE may have had a cause of action under RCRA Section 7006, however it is now time barred.

Because a program approval is an "order" rather than a "regulation," CARE's petition could not have been filed under Section 7004. 42 U.S.C. § 6974. Instead, RCRA Section 7006, the

provision governing review of approvals of state programs, applies. That section provides:

> [r]eview of the Administrator's action (1) in issuing, denying, modifying, or revoking any permit under section 6925 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 upon application by such person.

42 U.S.C. § 6976.

In addition to providing CARE the exclusive means by which it could challenge the New Union permit, Section 7006 requires that any petition for review be filed within ninety days. *See* 42 U.S.C. § 6976(b) ("[a]ny such application 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.").

Because "the facts CARE alleges in support of its argument that New Union's program no longer meets the approval criteria occurred more than ninety days ago," CARE's potential cause of action under RCRA Section 7006(b) is time barred. (R. at 7).

II. THE DISTRICT COURT CORRECTLY HELD THAT THERE IS NO FEDERAL QUESTION JURISDICTION FOR A DISTRICT COURT TO ORDER EPA TO ACT ON A PETITION FOR REVOCATION OF EPA'S APPROVAL OF NEW UNION'S HAZARDOUS WASTE PROGRAM.

CARE alternatively argues 28 U.S.C. § 1331 provides jurisdiction for a district court to order EPA to act on its petition. However, "[s]ection 1331 does not independently or separately confer jurisdiction. Rather, the plaintiffs must identify a statute or law of the United States on which their claims are based." *Gem Cnty. Mosquito Abatement Dist. v. Envtl. Prot. Agency*, 398 F. Supp. 2d 1, 12 (D.D.C. 2005). Here, CARE asserts 5 U.S.C. § 553(e) provides this basis. However, this section is inapplicable to CARE's petition.

Section 553(e) states "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." But as found by the District Court and discussed in the analysis above, CARE petitioned EPA to reconsider an order, not a rule. Because CARE is challenging an order rather than a rule, section 553(e) does not apply and cannot give CARE a basis for its claim. Absent this independent statutory basis, there is no federal question jurisdiction under 28 U.S.C. § 1331.

Furthermore, judicial review under the APA is limited to either review specifically authorized in a substantive statute, or "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The "form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action. . . ." 5 U.S.C. § 703.

Here, RCRA itself mandates a special statutory review procedure for precisely the type of claim CARE raised. *See* 42 U.S.C. § 6976. Because CARE chose not to exercise its rights under this section, its claim is now time barred. Rather than affirm CARE's eleventh hour attempts to bring a cause of action, this court should act in accordance with the plain language of RCRA and uphold the district court's dismissal of CARE's claim for lack of jurisdiction.

III. THERE HAS BEEN NEITHER A CONSTRUCTIVE DENIAL OF CARE'S PETITION NOR A CONSTRUCTIVE DETERMINATION OF NEW UNION'S COMPLIANCE FOR THIS COURT TO REVIEW

CARE erroneously contends that EPA's failure to respond to the petition to initiate withdrawal proceedings is a "constructive denial" of CARE's petition and a "constructive determination" that New Union is in compliance with RCRA. Based upon this string of inferences, CARE claims it is entitled to judicial review under RCRA Section 7006. CARE's argument is without merit because neither of the statutes CARE bases its petition on provide time-specific deadlines for EPA to respond. Without a

time-specific deadline mandated by RCRA or the APA, there is no basis for this court to decide that a "constructive" denial or determination has been made. Moreover, EPA's inaction is not an unreasonable agency delay.

A. RCRA Section 7004 and APA Section 553 do not impose a time-specific deadline upon the EPA to answer petitions, therefore there was no "constructive denial" of CARE's petition.

Even if this court decides CARE's petition was properly filed as a challenge to a "rule," EPA's delay in responding to the petition does not constitute a "constructive denial" of the petition that would be subject to judicial review under RCRA Section 7006.

RCRA section 7004 provides, "[a]ny person may petition the Administrator for the promulgation, amendment, or repeal of any regulation . . . . [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 (emphasis added). Similarly, APA section 553 provides, "[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) (emphasis added). However, the statutory right to petition the Administrator does not grant a statutory right to a response in a particular time frame. EPA's silence for 364 days cannot trigger a deadline that does not exist, and does not mean that the delay is a "constructive denial." Therefore, CARE's reliance on a "constructive denial" theory is unfounded. *Cf. Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984) (holding that prolonged silence and a "refusal to act" by a state may amount to the "constructive submission" of a regulatory change under the Clean Water Act, which then places a duty upon the Administrator to approve or disapprove within thirty days).

In *Scott*, it was the Clean Water Act's *short statutory deadlines* that created the duty to respond and allowed the court to characterize the state's prolonged silence as a refusal to act. *See id.* While New Union concedes that under RCRA section 3006(e), "[t]he administrator s*hall* respond in writing to any petition to commence withdrawal proceedings," the Administrator

is not under a duty to approve or disapprove CARE's petition *in a fixed amount of time* absent short statutory deadlines.

"Mere inaction by [an agency] cannot be transmuted by petitioners into an order rejecting their petition. Administrative action is not reviewable as an order 'unless and until [it] impose[s] an obligation, den[ies] a right, or fix[es] some legal relationship as a consummation of the administrative process.' " *Am. Rivers v. FERC*, 170 F.3d 896, 897 (9th Cir. 1999) (*quoting Cities of Riverside & Colton v. FERC,* 765 F.2d 1434, 1438 (9th Cir. 1985)). The mere passage of time where there is no fixed time to respond does not constitute a "constructive denial" of CARE's petition. *See* 40 C.F.R. § 271.23 (2010).

B. Since RCRA Section 3006 does not impose a time-specific deadline, there has been no "constructive determination" that New Union is in compliance for this Court to review.

RCRA section 3006(e), withdrawal of authorization, provides:

> *Whenever the Administrator determines* after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter.

42 U.S.C. §6926(e)(2010) (emphasis added). This section places discretion with EPA to decide when to withdraw authorization of a state's RCRA program, because Congress did not provide a time-specific deadline. *See Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) ("it is highly improbable that a deadline will be nondiscretionary . . . if it exists only by reason of an inference drawn from the overall statutory framework"). *But see Maine v. Thomas*, 874 F.2d 883, 888 (1st Cir. 1989) (adopting the D.C. Circuit's rule that provisions that *do* include explicit deadlines *should* create non-discretionary duties). Not only does the Administrator have discretion regarding the appropriate timeframe to respond to petitions, she also has the discretion to

choose when to make a determination if a state is in compliance or not. Since there was no time-specific deadline for the Administrator to make this "determination," the "constructive determination" doctrine of *Scott* is inapplicable

Other cases arising under the Clean Water Act clarify why EPA's inaction on CARE's petition does not constitute a "constructive determination" that New Union is in compliance. *See Northwest Envtl. Advocates v. EPA*, 268 F. Supp. 2d 1255, 1263 (D. Or. 2003). In *Northwest Environmental Advocates*, the court held the Administrator had a duty to review a continued implementation plan under the CWA and then make a *determination* if a revised standard was necessary or not. However, because the Administrator was given discretion to choose when to promulgate revised standards under the statute, a "constructive submission" theory was inapplicable. *Id.* Similarly, the discretion vested in the Administrator under RCRA belies CARE's theory that inaction on a petition is a constructive approval.

The enforcement regulations further emphasize the discretion of the Administrator over program compliance determinations under RCRA:

> "[t]he administrator *may* order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of [section 6926]. . ."

40 C.F.R. § 271.23. *See Texas Disposal Sys. Landfill Inc. v. EPA*, No. 09-502704, 2010 WL 1838724, at *1 (5th Cir. 2010) (withdrawal of authorization of a state's hazardous waste program is committed to the discretion of the Administrator). Further, "judicial imposition of any deadline upon EPA for construing a state's inaction as a 'constructive submission' would necessarily be premised only by inference from the deadlines in the statute, and that even if such an inference were plausible, it would be unwarranted as it would unduly limit EPA's flexibility in addressing [] compliance." *Am. Canoe Ass'n, Inc. v. EPA*, 30 F. Supp. 2d 908, 920 (E.D. Va. 1998). New Union DEP's annual reports coupled with EPA's inaction on CARE's petition are insufficient to constitute a "constructive determination" of

compliance by the Administrator, and are therefore not reviewable under RCRA Section 7006.

C. Judicial review is unnecessary because there has not been an unreasonable agency delay.

Finally, there is no basis for judicial scrutiny of EPA's failure to respond to CARE's petition when there has been no unreasonable delay or other justification for this to force the agency to act. "[A] fundamental infirmity in an agency proceeding, justifying interlocutory relief, may occur when an agency unduly delays the resolution of a matter committed to it." *In re City of Virginia Beach,* 42 F.3d 881, 885 (4th Cir. 1994) (emphasis added) (*citing Telecomm. Research & Action Ctr. v. FCC,* 750 F.2d 70 (D.C. Cir. 1984)). There is no such fundamental infirmity in the agency proceeding here.

In *City of Virginia Beach*, the court determined that FERC's environmental review was statutorily authorized. Therefore, what was left unanswered was whether the agency delay was *egregious*. The court stated, "when action sought to be reviewed is one that is committed to discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable and relief by a writ of mandamus would ordinarily not be available." *Id.*at 884 (*quoting Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (internal quotations omitted)). The Fourth Circuit opined that "we cannot conclude that the delays have been so egregious as to meet the demanding standard required for us to interfere with the agency process through a writ of mandamus" despite a delay of four and a half years. *Id.* at 886.

Similarly, in the state withdrawal proceedings at issue here, the regulations require the Administrator to "respond in writing to any petition to commence withdrawal proceedings," but the time-frame is committed to discretion. For this sort of discretionary action, a mere 364-day delay is not unreasonable. *See* 40 C.F.R. § 271.23. The D.C. Circuit observed that courts rarely compel an agency to make an immediate decision. "Rather, courts allow agencies to set their own priorities on account of their 'unique-and authoritative-position' to 'allocate their resources in the optimal way." *See Orion Reserves Ltd. P'ship v.*

Kempthorne, 516 F. Supp. 2d 8, 11 (D.D.C. 2007) (*quoting In re Barr Labs. Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991)).

Although a limit can be placed on the reasonableness of agency action, EPA has not surpassed this limit. The D.C. Circuit stated that there is no per se rule on how long is too long for agency inaction. Further, reasonableness can be defined as a time period encompassing months or occasionally a year or two, but certainly not decades. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 417 (D.C. Cir. 2004) (since agency did not offer explanation for delay, six year delay on a mandatory agency action to grant or deny a petition was unreasonable); *MCI Telecomms. Corp. v. FCC,* 627 F.2d 322, 340 (D.C. Cir.1980). Whereas here, the EPA's delay in responding to CARE's petition, 364-days, does not surpass the threshold of reasonableness and does not demand judicial intervention.

IV. THE COURT OF APPEALS SHOULD NOT LIFT THE STAY, AND INSTEAD SHOULD REMAND THE CASE TO THE DISTRICT COURT TO ORDER EPA TO INITIATE PROCEEDINGS

Even assuming this court has jurisdiction, and that inaction by EPA can be seen as a "constructive denial" of CARE's petition or a "constructive determination" that New Union is in compliance, the case is not ripe for review in this court. One of the main functions of the ripeness doctrine is to provide an agency a "full opportunity. . . to correct errors or modify positions in the course of a proceeding." *Pub. Citizen Health Research Group v. Comm'r, FDA,* 740 F.2d 21, 31 (D.C. Cir. 1984). As the Supreme Court stated:

> The basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967). The Court should not intercede until EPA has had a chance to make formal decision, using the complex regulatory process in place, and until New Union has a chance to comply with any final order from the EPA.

A. The question of New Union's compliance with RCRA is not subject to review in this Court because EPA's decision not to invoke its administrative process is discretionary and not reviewable.

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are particularly within its expertise. Thus, an agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all.

Nat'l Res. Def. Council, Inc. v. SEC, 606 F.2d 1031,1046–47 (D.C. Cir. 1979).

Generally, an agency's decision not to bring an enforcement action is presumptively unreviewable by a court. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985). This presumption may be rebutted only when the substantive statute at issue provides guidelines for the court to follow "in exercising its enforcement powers" over the agency. *Id.*at 33.Since the substantive statute and regulations lack time-specific guidance for the court, EPA's delay is an unreviewable agency decision and does not become reviewable until EPA has commenced its proceedings and New Union has had a chance to come into compliance.

Similarly, under the APA, an agency's decision not to invoke an enforcement mechanism provided by statute is not ordinarily subject to judicial review. *Id. (citing* 5 U.S.C. § 701(a)(2)). *See also Heckler v. Chaney*, 470 U.S. at 832 ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review under 701(a)(2)."). As in *Texas Disposal*, CARE petitions EPA based on RCRA's withdrawal provisions. The case law is again instructive. In *Texas Disposal*, a landfill company

petitioned EPA to withdraw its authorization of Texas's federally approved hazardous waste program. *See Texas Disposal*, 2010 WL 1838724, at *1. However, without cause to withdraw Texas's RCRA program or to commence proceedings, "EPA's determination was a non-reviewable discretionary agency action." *Id.*

Also, as the Fifth Circuit has correctly held, RCRA, with no statutory deadline, does not present standards to guide the court. Therefore the agency's non-enforcement action is not subject to judicial review. *Id.* The only limit imposed upon the EPA here is that it must commence withdrawal proceedings after it has *determined* that a state is *not* in compliance. So therefore, even assuming that this court did find that there was a "constructive determination" that New Union is in compliance with RCRA and that such a "determination" is presumptively *reviewable*, that presumption is rebutted by lack of any substantive law to apply. *See Texas Disposal*, 2010 WL 1838724, at *1; 40 C.F.R. § 271.23.There is no basis for this court to review EPA's non-enforcement decision.

B. This case is not entitled to judicial review until all administrative remedies have been exhausted under RCRA Section 3006 (e), and should be remanded back to the agency.

Even assuming EPA's inaction was a "constructive denial" of CARE's petition and a "constructive determination" that New Union is in compliance, CARE would still not be entitled to judicial review by this court until all administrative remedies have been exhausted and until the court has a final agency action to review. "The final agency action, for purposes of judicial review, occurs when the EPA issues its final decision, and all administrative remedies [have been] exhausted." 40 C.F.R. § 124.19(f)(1) (2010). New Union has not received a final decision from EPA, and the administrative remedies to correct any perceived deficiency in the program have not been exhausted.

In *Nat'l Res. Def. Council, Inc. v. SEC*, suit was commenced by public interest groups to challenge an agency's failure to promulgate a rule. 606 F.2d 1031, 1046–47 (D.C. Cir. 1979). The case was initially remanded back to the agency and district court

to conduct further rulemaking procedures. It was not until those procedures and proceedings were completed by the agency that the public interest groups could seek judicial review of the agency's final action. *See Nat'l Res. Def. Council, Inc. v. SEC*, 389 F. Supp. 689, 702 (D.D.C 1974).

At a maximum, this court should remand CARE's claims to the agency so all procedural requirements are exhausted under RCRA sections 7004 or 3006. 42 U.S.C. §§ 6926, 6974. Before making a determination that a state is no longer in compliance, the Administrator must issue an *order* with a time and place for a hearing, accompanied with the specific allegations of New Union's noncompliance to be considered at the hearing. 40 C.F.R. § 271.23 (b)(1). Next, the state *shall* admit or deny the allegations put forth in the order. *Id*. After an "agency record" is compiled and the presiding officer recommends a decision, *then* the Administrator *shall* review the record and *issue a decision*. 40 C.F.R. § 271.23 (b)(8)(i). "If the Administrator concludes that the State has administered the program in conformity with the Act and regulations his decision *shall* constitute a final agency action within the meaning of 5 U.S.C. § 704." 40 C.F.R. § 271.23 (b)(8)(ii) (emphasis added).

In *Ciba-Geigy*, the court examined whether the petitioner had exhausted all administrative remedies since "it directly related to the suitability of these matters for judicial review." *Ciba-Geigy Corporation v. Sidamon-Eristoff,* 3 F.3d 40, 45 (2d Cir. 1993) (*quoting Dettmann v. United States Dep't of Justice*, 802 F.2d 1472, 1476 n. 8 (D.C. Cir. 1986)). First, the Second Circuit found the relevant statute authorized the court of appeals to review only the "*Administrator's* action. . .in issuing, denying, modifying, or revoking any permit." 42 U.S.C. § 6976(b)(1) (emphasis added). Second, the court found that the EPA adopted regulations that expressly created exhaustion requirements, for instance requiring an appeal to the EAB as a prerequisite to seeking judicial review of final agency action. *Id.* As the petitioner had not exhausted all administrative remedies, judicial review was not warranted.

Similarly, this matter is not ripe for judicial review because CARE failed to exhaust all administrative remedies. Both the instant case and *Ciba-Geigy* have the same statute at issue,

RCRA section 7006. CARE argues that the court should lift the stay and proceed with judicial review pursuant to this section. However, RCRA section 7006 permits the court of appeals to review only *final agency action*, such as a final order. There has been no such order here.

The complex administrative remedy for non-compliance laid out in the Code of Federal Regulations Section 271.23, governing procedures for withdrawing approval of state programs, demonstrates that there is no final agency action for CARE to seek judicial review. Under this section, the administrator *may* first order commencement of withdrawal proceedings on his or her own initiative or in response to a petition. Then, after an optional information investigation, the Administrator issues an *order* to commence proceedings. "This order commencing proceedings under this paragraph shall fix a time and place for the commencement of the hearing and shall specify the allegations against the State which are to be considered at the hearing." 40 C.F.R. § 271.23(b)(1). Not only did the Administrator *not* issue an order to trigger RCRA section 7006, the petitioners did not exhaust all administrative remedies.

New Union has not received notice, has not received the statutorily required process, no order has been issued, and New Union has not been given an opportunity to come into compliance. Either this court needs to accept the "constructive determination" as non-reviewable action within the agency's discretion or remand it back to EPA to exhaust the administrative remedies.

V. NEW UNION'S RCRA PROGRAM DOES NOT MEET THE CRITERIA FOR THE DRASTIC REMEDY OF WITHDRAWAL BECAUSE IT IS COMPLIANT WITH FEDERAL REGULATIONS AND ADEQUATELY ENFORCED.

If this court nonetheless decides that CARE's petition to withdraw the New Union program is reviewable on the merits, the court should not require withdrawal of the program authorization. Withdrawal of a program's approval is an "extreme" and "drastic" remedy that requires EPA to establish a

federal program to replace the state program. *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1038–39 (10th Cir. 2002).[1]

CARE, as the party seeking withdrawal of the New Union program's authorization, bears the burden of demonstrating that New Union's program fails to comply with RCRA. 40 C.F.R. § 271.23(b)(1) (2010). EPA's complex regulatory scheme for withdrawal mandates that CARE must prove New Union's program is noncompliant with the federal requirements in either its operation or its enforcement. 40 C.F.R. § 271.22(a)(2) and (3). Even then, the language of Section 271.22 is permissive, allowing EPA to use its best judgment as to whether withdrawal of a state's program is proper and justified. *See* 40 C.F.R. §271.22(a) ("[t]he Administrator *may* withdraw program approval when a State program no longer complies") (emphasis added). CARE cannot meet this burden for New Union's program because New Union has not failed to operate or enforce its program despite the temporary budget constraints. So long as New Union's program is in compliance with the federal requirements, there is no basis for EPA to withdraw its approval of the program's authorization.

A. New Union has not failed to issue permits or otherwise exercise control over activities that are required to be regulated.

A state program *may* face withdrawal if a state fails to "exercise control over activities required to be regulated . . . including failure to issue permits." 40 C.F.R. §271.22(a)(2)(i). New Union has not failed to exercise control over regulated activities or issue permits as required. *See* 40 C.F.R. § 271.14; 40 C.F.R. 270 *et. seq.* (2010). New Union issued 125 state RCRA permits in 2009 and anticipates issuing another 125 throughout the course of this year, more than enough to meet the demand of 50 annual permit applications and address the ongoing backlog. (Rec. doc. 5

1. Indeed, EPA approval of an authorized state program like New Union's is virtually never withdrawn. Out of the forty-six states that currently operate authorized RCRA programs, the extreme remedy of withdrawal has only been threatened in a single state, North Carolina. *See* William H. Rodgers, *Environmental Law: Hazardous Waste and Substances*, 4 ENVTL. L. § 7:22 (2010); *Hazardous Waste Treatment Council v. Reilly*, 938 F.3d 1390 (D.C. Cir. 1991).

for 2009, p. 19). New Union is prioritizing its permit decisions in order to maximize its control over potentially harmful hazardous waste in a manner consistent with the RCRA's statutory scheme. It is doing this in the following order of priority: new facilities, facilities seeking to expand operations, facilities with permits that expired more than 15 years ago, and facilities that have the greatest potential for harm. *Id.* Continual permitting of facilities hardly constitutes a failure.

Furthermore, the current pace of permitting in New Union cannot be said to create a regulatory gap. Facilities with expired permits still operate under the threat of permit revocation and enforcement. Facilities are required to maintain and continue current practices and comply with their expired RCRA permits, which remain in force beyond the expiration date. 40 C.F.R. § 270.51(d). *See Ciba-Geigy*, 3 F.3d at 48. *See also Wisconsin v. Hydrite Chem. Co.*, 2000 WL 35624540 (Wis. App. Cir. 2000) (a state court holding that a permit issued by the state RCRA program remains in effect under 40 C.F.R. § 270.51(d) for an unlimited period of time after expiration). Thus, New Union retains sufficient control over regulated activities to meet the requirements of the law.

B. New Union's RCRA program is adequately enforced.

A program *may* also face withdrawal if it fails to enjoin violations, sue for and recover civil penalties, enforce criminal remedies, and "immediately and effectively restrain" any person "engaging in unauthorized activity" that is endangering the public health. 40 C.F.R. § 271.16(a)(1) and (2) (2010). New Union has not "failed to act on violations of permits," "failed to seek adequate enforcement penalties," or "failed to inspect and monitor activities." 40 C.F.R. § 271.22(a)(3)(i)–(iii). The New Union DEP took six enforcement actions in 2009, including two civil actions requesting injunctive relief and civil penalties. (Rec. doc. 5 for 2009, p. 25).

The New Union program has shown itself capable of policing the compliance of its permitees by implementing a program of periodic inspection that is designed to ferret out and curtail the most serious violations of permit requirements. *Id. See also* 40 C.F.R. § 271.15(b) (Requirements for compliance evaluation

programs). The New Union DEP performed inspections of 150 facilities during 2009 and prioritized these inspections to ensure that "facilities that have reported unpermitted releases of hazardous waste into the environment" and facilities "posing the greatest potential for harm to public health and the environment" are investigated and in compliance with the environmental laws. (Rec. doc. 5 for 2009, p. 22). Furthermore, EPA is explicitly authorized to retain the authority to enforce state permit requirements (as it does in New Union) and support New Union's enforcement scheme. 42 U.S.C. § 6928(a); 40 C.F.R. §§ 271.16, 271.19. New Union's program is not suffering from a failure in enforcement.

EPA's original authorization of the New Union program meant that the program met the statutory requirements of RCRA as well as EPA's regulatory requirements for compliance and approval. (Rec. doc. 2, p. 1). To the extent EPA's decision to continue the New Union program is a "constructive" determination that the program is in compliance, it affirms that New Union continues to meet this statutory and regulatory standard. New Union has continually provided EPA with honest information in its Annual Reports, which allow EPA to make the independent determination of whether the New Union program meets the federal criteria. (Rec. doc. 5 for 2000–09). EPA, in receipt of this information, has made the decision to continue to approve the New Union program. The permissive regulatory language means that EPA is allowed to decide if program authorization should be continued for the New Union program, and is not required to withdraw its authorization. This court must defer to EPA's rational interpretation of its own regulatory requirements and uphold the New Union program even if the court disagrees with that interpretation. *Chem. Mfrs. Ass'n v. EPA*, 919 F.2d 158,170 (D.C. Cir. 1990).

VI. TRANSFERRING THE REGULATION OF A SINGLE RAILROAD FROM THE NEW UNION PROGRAM DOES NOT CREATE A REGULATORY GAP THAT WOULD ALLOW EPA TO WITHDRAW THE PROGRAM'S APPROVAL

The plain language and statutory history of RCRA make clear that Congress intended for states (like New Union) to act as the main authorities for RCRA implementation, with the federal government in a supportive partnership role. *See* 42 U.S.C. § 6926. *See also* H.R. Rep. 1491, 94th Cong. 2nd Sess. 24 (1976) ("[s]tates are to have primary enforcement authority" for RCRA). CARE challenges this partnership with its claim that EPA is required to withdraw its approval for the New Union program. However, CARE's claim that EPA should withdraw New Union's program due to the passage of the 2000 Environmental Regulatory Adjustment Act represents a fundamental misunderstanding of the role of the federal authorities in RCRA's federal-state partnership scheme.

A. The New Union 2000 Environmental Regulatory Adjustment Act amendment to the Railroad Regulation Act does not create a regulatory gap in the state program's civil enforcement.

CARE alleges that the 2000 amendments to the Railroad Regulation Act ("RRA Amendments"), which transferred "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the [New Union Railroad] Commission," should force EPA to withdraw its approval of the New Union program because it "withdraws railroad hazardous waste facilities from regulation." (Rec. doc. 5 for 2000, pp. 103–05). However, New Union has simply amended which oversight body would *enforce* New Union's environmental laws, a move which does not create a regulatory gap or leave railroad facilities outside the reach of RCRA.

The RRA had previously established a New Union Railroad Commission charged with regulating intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards. The

2000 Amendments to the RRA clarify that oversight for railroad operations is vested in the Commission, including enforcement of the state environmental statutes. *Id.* This shift in jurisdictional authority does not equate to non-enforcement of the state's environmental laws. The Commission is a state agency, the Commissioners are state employees, and the chair of the Commission is appointed by the state legislature. *Id.* Thus, the environmental enforcement remains under the oversight of a state body. There is no requirement that any particular agency be the enforcement body, and enforcement of the statutory scheme by more than one state agency is contemplated by EPA. *See* 40 C.F.R. 271.6(b) (2010) (requiring a State to describe and chart the "*agency or agencies* which will have responsibility for administering the program") (emphasis added). Allowing for local variance in the form of state enforcement is in keeping with RCRA's overall goal of encouraging State-run programs and maintaining state authority. *See* 42 U.S.C. §§ 6902, 6926.*See also* H. R. Rep. 1491, 94th Cong., 2nd Sess. 24.

However, even if the Commission fails to regulate, RCRA Section 3008 grants EPA the authority to enforce the New Union environmental program when the state fails to do so. 42 U.S.C. § 6928(a)(1). If the New Union Railroad Commission chooses not to act, the EPA is not prohibited from bringing an independent enforcement action. *United States v. Conservation Chem. Co.*, 660 F. Supp. 1236, 1245 (N.D. Ind. 1987). The majority of the courts support the position that federal enforcement is permissible when a state fails to enforce its program, even when the program is operating under EPA authorization. S*ee Wykcoff Co.*, 796 F.2d 1197, 1200 (9th Cir. 1986); *Power Eng'r Co.*, 303 F.3d at 1238. *See also United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054 (W.D. Wis. 2001). The Eighth Circuit's limitation in *Harmon Indus. v. Browner* is inapposite, as it relates to EPA's authority to "overfile" when a state has *already* taken action. 191 F.3d 894, 901–02 (8th Cir. 1999). The legislative history of RCRA confirms that Congress anticipated federal authorities enforcing state programs if and when a state fails to do so. H.R. Rep. No. 94-1491, 94th Cong., 2nd Sess. 31 (1976) ("[T]he Administrator is not prohibited from acting in those cases where the state fails to act"). RCRA's federal-state partnership envisions this

simultaneous enforcement authority, which does not create a regulatory gap or a failure to implement New Union's environmental laws.

B. The removal of state criminal enforcement for violations by railroads does not render the program inconsistent with federal law

Similarly, the removal of state criminal penalties under the RRA Amendments does not subject the entirety of New Union's program to withdrawal as inconsistent with the federal requirement that the state "shall have available" criminal enforcement remedies or otherwise enforce its program. 40 C.F.R. §§ 271.16, 271.22(a)(3). The RRA Amendments merely carve out a narrow exception to New Union's criminal enforcement of its environmental law by exempting a single railroad in the state. (Rec. doc. 5 for 2000, pp. 103–05). The New Union DEP is in no way constrained from pursuing criminal remedies against any other facility within its jurisdiction. *Id*.

Despite this constraint on New Union's state criminal enforcement, the RRA Amendments have no effect on the ability of EPA to bring criminal sanctions for violations of the RCRA or New Union's environmental laws. RCRA Section 3008 has been interpreted to allow federal criminal prosecution for violations of state permits even where the state is operating an approved program in lieu of the federal program. 42 U.S.C. § 6928(d); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 43–45 (1st Cir. 1991) (state operation of a RCRA program does not remove the federal government's ability to prosecute under Section 3008 for violations of state law). *See also Wykcoff Co.*, 796 F.2d at 1200–01 (discussing the federal-state partnership that allows for simultaneous federal enforcement of state law). Thus there is no prohibition on prosecution, nor is a regulatory gap created by the RRA Amendments. Concurrent federal law serves to ensure that all potential remedies are available against *any* violator of New Union's environmental law.

VII. THE NEW UNION 2000 ENVIRONMENTAL REGULATORY ADJUSTMENT ACT'S REGULATION OF POLLUTANT X DOES NOT

RENDER THE NEW UNION PROGRAM SUBJECT TO WITHDRAWAL AS INCONSISTENT WITH RCRA OR IN VIOLATION OF THE COMMERCE CLAUSE.

It is established under RCRA that states are free to implement environmental protections that are more stringent than the Federal standard. 42 U.S.C. § 6929. *See also Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs*, 27 F.3d 1499, 1504 (10th Cir. 1994). When it drafted RCRA, Congress explicitly intended not to foreclose state and local oversight of hazardous waste management that would be more stringent than the federal "floor." *Old Bridge Chems., Inc. v. New Jersey Dep't of Envtl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992). State programs are only subject to the condition that they be "consistent" with the federal program. 42 U.S.C. § 6929. "Consistency" is defined by regulation in Section 271.4, which states:

> To obtain approval, a State program must be consistent with the Federal program . . .
> a) Any aspect of the State program which 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 approved State program shall be deemed inconsistent.
> b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

40 C.F.R. § 271.4 (2010). New Union's regulation of Pollutant X is consistent with this regulation, and is therefore, by definition, consistent with the Federal program.

A. New Union's regulation of Pollutant X does not operate as a ban on the free movement of hazardous wastes across the state border that would require EPA to withdraw its approval.

New Union's regulation of Pollutant X provides, "[a]ny person *may transport* Pollutant X through or out of the state . . . provided, however, that such transport shall be as direct and fast as is reasonably possible . . ." (Rec. doc. 5 for 2000, pp. 105–07). The New Union Hazardous Regulation Act can best be described as a limitation upon the *manner* in which Pollutant X can be transported through the State. *See, e.g., Old Bridge Chems.*, 965 F.2d at 1296 (upholding a New Jersey law that required transporters to label and identify hazardous waste).

The New Union legislature has made a conscientious determination of how to best balance the needs of the interstate commerce system with the strong state interest in protecting the health and welfare of the citizens of the state and the New Union environment against a pollutant that has been determined to be among the most potent and toxic to human and environmental health. *See Maine v. Taylor*, 477 U.S. 131, 150–51 (1986). Any person is free to transport Pollutant X across the open state line. The only requirement is that they do so reasonably quickly. A statute which gives persons *permission* to transport Pollutant X through the state of New Union can hardly be construed as a "ban" or an "unreasonable impediment" on the free flow of transport within the state. Therefore there is no basis for EPA's mandatory withdrawal of the New Union program's approval under Section 271.4(a).

B. New Union's regulation of Pollutant X has a basis in the protection of human health and does not act as a prohibition on the treatment, storage, or disposal of hazardous waste that would allow for EPA to withdraw its approval.

Under the second regulatory prong, Section 271.4(b), withdrawal of program approval is *discretionary* with EPA. This means that *even if* the challenged state regulation is not based in the protection of human health and the environment *and* acts as

a prohibition on the treatment, storage, or disposal of hazardous waste in the state, EPA is not required to take the drastic step of withdrawing a state program's approval. *Id.*

Furthermore, the regulation's two prong test is conjunctive, which means that if the State regulation is either based in a valid protection of human or environmental health *or* if the state regulation does not constitute a total ban on hazardous waste treatment, disposal, or storage, EPA *may not* withdraw its program approval on the basis of inconsistency under Section 271.4(b). *Id. See also Blue Circle Cement*, 27 F.3d at 1508 ("An ordinance which falls short of 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."); *Hazardous Waste Treatment Council v. Reilly*, 938 F.3d at 1397 (upholding North Carolina's dilution standard and site-selection criteria when these laws did not effectuate a "total ban" on a certain treatment method within the state).

The New Union Act does not effectuate a "total ban" or "prohibition" on "the treatment, storage, or disposal of hazardous waste" in the state. New Union allows short-term temporary storage of Pollutant X within the state. (Rec. doc. 5 for 2000, pp. 105–07). Furthermore, the restrictions in the Hazardous Regulation Act restrict only Pollutant X, and do not constitute a ban on the disposal or treatment of "hazardous waste" as a whole. *Id.*

Finally, the restrictions on Pollutant X are supported by a record that establishes the legislation was based on legitimate concerns about human health and the environment. The Preamble to the legislation lays out the Legislature's findings that Pollutant X is among the most potent and toxic chemicals to human health and the environment as a basis for the regulation. *Id.* A state statute that does not effectuate a total ban on RCRA-encouraged activities, is based in a concern for human health, and is consistent with the goals of RCRA is exactly the sort of permissible more-stringent regulation that is encouraged by RCRA approval of State programs. *See* 42 U.S.C. § 6926.

C. New Union's regulation of Pollutant X does not

violate the Commerce Clause

Finally, CARE alleges that the New Union program should be withdrawn because the regulation of Pollutant X violates the dormant aspect of the Commerce Clause of the United States Constitution. U.S. CONST. Art. I, §8, cl. 3. It is true that courts have held RCRA's regulations do not preempt the dormant Commerce Clause's restrictions on states' ability to regulate and have indicated that the Commerce Clause may be more stringent than regulations such as Section 271.4. *See Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996). However, New Union's regulation of Pollutant X does not violate the dormant aspect of the Commerce Clause and does not provide a basis for EPA to withdraw the New Union program's approval.

The Supreme Court has refined its Commerce Clause jurisprudence in the area of waste disposal and regulation. *See United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt Auth.*, 550 U.S. 330 (2007) (holding a "flow control" ordinance which directed all trash haulers to deliver waste to a particular public facility was not an impermissible violation of the dormant Commerce Clause when it did not facially discriminate between in-state and out-of-state waste and the burdens on Commerce were outweighed by the public benefits). *But see C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). From this line of cases a fairly clear test has emerged. A state statute or local regulation is "virtually *per se*" invalid and subject to strict scrutiny under the Commerce Clause when it facially discriminates against interstate Commerce by burdening out-of-state waste generators differently than those in the state. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 100–01 (1994). *See also Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992) (invalidating an Alabama statute that charged a fee for the disposal of hazardous waste generated out-of-state). In contrast, non-discriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Oregon Waste Sys., Inc.*, 511 U.S. at 99 (*citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

The New Union Hazardous Regulation Act is not facially discriminatory against interstate commerce. There is no fee charged to enter the state or cross state lines while transporting Pollutant X, and no distinction drawn between in-state and out-of-state producers of Pollutant X for purposes of enforcing the regulation. (Rec. doc. 5 for 2000, pp. 105–07). In-state producers of Pollutant X, regulated by New Union's DEP, are required to minimize and eventually cease its production—a regulation which does nothing to discriminate against out-of-state production. (ERAA Amd. 1, *id.*). Both in-state and out-of-state generators are required to dispose of their quantity of Pollutant X at an approved facility which, since New Union has no such facility, will naturally be a facility out-of-state. (ERAA Amd. 2, *id.*). Nothing in the statute or its legislative history gives any indication the statute was motivated by a desire to impose an impermissible burden on interstate commerce or to discriminate against out-of-state generators of Pollutant X.

Thus, the New Union statute retains its presumption of validity and should be evaluated under the *Pike* test. *Oregon Waste Sys., Inc.*, 511 U.S. at 99. Under the *Pike* test, state and local ordinances should be upheld when the incidental burden on commerce does not outweigh the benefits conferred to the citizenry. *Id. See also Oneida-Herkimer Solid Waste Mgmt Auth.*, 550 U.S. at 334. There are two potential incidental effects on interstate commerce from New Union's regulation of Pollutant X: first, out of state producers may be lightly burdened by the requirement to transport Pollutant X as directly and quickly as possible out of New Union, and second, certain companies who wish to open facilities to treat and dispose of Pollutant X from either in-state or out-of-state producers may be unable to do so. (Rec. doc. 5 for 2000, pp. 105-107). These concerns are easily outweighed by the state's strong interest in protecting its citizenry from one of the most potent and toxic chemicals to public health and the environment. Protection of public health from an immediate and severe threat is a strong enough state interest to allow even *facially discriminatory* legislation to stand. *See Maine*, 477 U.S. at 151. Non-discriminatory legislation such as the New Union Hazardous Regulation Act should be upheld.

There is no basis for EPA to withdraw New Union's program. It is adequately enforced, consistent with federal requirements, and compliant with both EPA's regulations and the dictates of the Commerce Clause. EPA and New Union should be permitted to continue to work together to achieve RCRA's overarching goal of federal and state cooperation to minimize hazardous waste and protect human health and the environment.

CONCLUSION

For the foregoing reasons, this court should find for the State of New Union on any of the following three grounds: (1) this court lacks jurisdiction over the present dispute, (2) EPA's failure to act on CARE's petition is not a "constructive denial" of that petition, or (3) New Union's hazardous waste program continues to meet RCRA's criteria for state program approval.