

Pace Environmental Law Review Online Companion

Volume 1

Issue 1 *Twenty-Third Annual Pace University Law
School National Environmental Law Moot Court
Competition*

Article 2

April 2011

2011 National Environmental Law Moot Court Competition Problem

Jeffrey G. Miller

Pace University School of Law, jmiller@law.pace.edu

Follow this and additional works at: <http://digitalcommons.pace.edu/pelroc>

Recommended Citation

Jeffrey G. Miller, *2011 National Environmental Law Moot Court Competition Problem*, 1 Pace Envtl. L. Rev. Online Companion 4 (2011)

Available at: <http://digitalcommons.pace.edu/pelroc/vol1/iss1/2>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review Online Companion by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

**2011 National Environmental Law Moot Court
Competition Problem***

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR)	
REGULATION AND THE)	
ENVIRONMENT, INC.,)	
<i>Petitioner-Appellant-Cross-Appellee,</i>)	
v.)	
LISA JACKSON,)	C.A. No. 18-2010
ADMINISTRATOR,)	
U.S. Environmental Protection)	C.A. No. 400-2010
Agency, 2010)	
<i>Respondent-Appellee-Cross-Appellant,</i>)	
v.)	
STATE OF NEW UNION,)	
<i>Intervenor-Appellee-Cross-Appellant</i>)	

ORDER

Following the issuance of the Order of the District Court dated June 2, 2010, in Civ. 000138-2010, Citizen Advocates for Regulation and the Environment, Inc. (CARE) and Lisa Jackson, Administrator, U.S. Environmental Protection Agency (EPA), each filed a Notice of Appeal. CARE takes issue with the decision of the lower court with respect to its holding that it lacked jurisdiction under either 42 U.S.C. § 6972** or 28 U.S.C. § 1331 to order EPA to make a determination on a petition submitted by CARE, pursuant to 42 U.S.C. § 6974 and 5 U.S.C. § 553(e), that

* The 2011 Problem was written by Pace Law School Professor Jeffery G. Miller, Vice Dean for Academic Affairs.

** Grayed out text was added or changed in response to official NELMCC Q&A period and can be used by all teams.

EPA withdraw its approval of the New Union hazardous waste program to operate in lieu of the federal program under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (RCRA), pursuant to 42 U.S.C. § 6926(b) & (e). EPA takes issue with the decision of the lower court with respect to its holding that it lacked jurisdiction under 42 U.S.C. § 6972. At the same time, CARE requested this Court to lift its stay of an action it had filed in this Court on January 4, 2010, C.A. No. 18-2010, seeking judicial review of EPA's constructive denial of CARE's petition, C.A. No. 18-2010, on grounds identical to those stated in the Summary of Record, Appendix A to the decision of the court below, and to consolidate these two, related actions. EPA and New Union take issue with lifting the stay and with EPA's failure to act as a "constructive" determination that New Union's program continues to meet RCRA's approval criteria. New Union takes issue with all of CARE's arguments that New Union's program no longer meets the approval criteria, while EPA takes issue with all of those arguments except CARE's contention that New Union's program no longer governs hazardous waste at railroad yards, although EPA argues this does not require disapproval of the entire state program.

Therefore, it is hereby ordered that the parties brief all of the following issues:

1. 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. (CARE and EPA argue that it does and that the court below erred in granting New Union's motion for summary judgment on this issue; New Union argues that it does not and that the court below was correct in granting summary judgment on this issue.)
2. 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). (CARE argues that it does and that the court below erred in granting New Union's motion for summary judgment on

6 *PACE ENVIRONMENTAL LAW REVIEW ONLINE* [Vol. 1

this issue; EPA and New Union argues that it does not and that the court below was correct in granting summary judgment on this issue.)

3. 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 RCRA's criteria for program approval under RCRA § 3006(b), both subject to judicial review under *RCRA 7006(b)*¹. (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 under RCRA § 7006; EPA and New Union argue that EPA's inaction on CARE's petition is not a constructive action of any kind and is therefore not subject to judicial review.)
4. Assuming the answer to issue 3 is positive and the answer to either or both of issues 1 and 2 is positive, should this Court 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? (CARE argues the Court should lift the stay and proceed with judicial review rather than remanding to the lower court; EPA and New Union argue the Court should not lift the stay, and instead remand to the court below to order EPA to initiate proceedings under RCRA §§ 3006(e) and 7004.)
5. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria? (CARE argues New

1. Deleted §§ 7002(a)(2)

2011]

NELMCC COMPETITION PROBLEM

7

Union's resources and performance are not sufficient to meet RCRA's criteria for state program approval 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 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.)

6. Assuming this Court proceeds to the merits of CARE's challenge, 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? (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.)
7. Assuming this Court proceeds to the merits of CARE's challenge, 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? (CARE argues 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 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.)

SO ORDERED.

8 *PACE ENVIRONMENTAL LAW REVIEW ONLINE* [Vol. 1

Entered this 29th day of September, 2010.

[NOTE: No cases decided or documents dated after September 1, 2010 may be cited either in the briefs or in oral argument.]

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

_____)	
Citizen Advocates for)	
Regulation and the Environment,)	
Inc.,)	
<i>Plaintiff,</i>)	
v.)	
Lisa Jackson, Administrator,)	
U.S. Environmental Protection)	Civ. 000138-2010
Agency,)	
<i>Defendant,</i>)	
v.)	
State of New Union,)	
<i>Intervenor.</i>)	
_____)	

Procedural History

On January 5, 2009, the Citizen Advocates for Regulation and the Environment, Inc. (CARE), a non-profit corporation organized under the laws of the State of New Union, served a petition on the Administrator of the Environmental Protection Agency (EPA), under §7004 of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, 6974 (RCRA) and § 553(e) of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (APA), requesting that EPA commence proceedings to withdraw its approval in 1986, 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). In support of its petition to EPA, CARE recited a litany of facts arising after that approval suggesting that New Union's program no longer

met the criteria for EPA approval, see Appendix A. EPA has taken no action on that petition. On January 4, 2010, CARE filed (with all notice requirements fulfilled) an action in this court under RCRA §7002(a)(2), 42 U.S.C. § 6972, first seeking an injunction requiring EPA to act on that petition or, in the alternative, judicial review of EPA's constructive denial of the petition and EPA's constructive determination that New Union's hazardous waste program meets the criteria for approval despite the alleged facts. New Union filed an unopposed motion to intervene under FRCP Rule 24, which this court granted. The parties filed cross-motions for summary judgment, agreeing that the facts alleged by CARE were uncontested and no further facts were necessary to decide the matter. Evidently unsure of its jurisdictional claims, CARE filed simultaneously with this complaint a petition for review with the Court of Appeals, C.A. No. 18-2010, seeking judicial review of EPA's constructive denial and determination on the same grounds. New Union also filed an unopposed motion to intervene in that case, which the Court of Appeals granted. On EPA's motion, the Court of Appeals stayed that proceeding, pending the outcome of this action.

Statutory Background

RCRA regulates the generation, transportation, treatment, storage and disposal of hazardous waste. It authorizes EPA to establish standards governing those activities and requires that persons treating, storing or disposing of hazardous waste have permits to do so. It authorizes EPA to inspect such facilities; indeed, it requires EPA to do so at least once every two years. Finally, it authorizes a range of enforcement options for EPA to use against violators, including criminal sanctions. At the same time, the statute contemplates and favors administration and enforcement by states with approved programs in lieu of the federal program. RCRA §§ 1002(a)(4) & 1003(a)(7), 42 U.S.C. §§ 6901(a)(4) & 6902(a)(7). It requires EPA to approve state programs that are equivalent to the federal program, are consistent with the federal program and the programs of other approved states, and provide adequate enforcement.

RCRA § 7004 authorizes citizens to petition EPA for the promulgation, amendment or repeal of regulations, but provides

10 *PACE ENVIRONMENTAL LAW REVIEW ONLINE* [Vol. 1

no jurisdiction for appealing EPA action or non-action. RCRA § 7006(a), 42 U.S.C. § 6976(a) authorizes judicial review of regulations in the Circuit Court of the District of Columbia, within 90 days of promulgation of the regulations. RCRA §7006(b), 42 U.S.C. § 6976(b), authorizes judicial review of EPA's approval or denial of a state's program in lieu of the federal program. Judicial review is available under either subsection only for ninety days following EPA action or later, if based on facts arising after EPA action. Finally, RCRA § 7002(a)(2) authorizes citizens to sue EPA to perform a mandatory duty under the statute.

Factual Background

CARE admits that when EPA approved New Union's hazardous waste program in lieu of RCRA in 1986, New Union's program met all of RCRA's statutory and EPA's regulatory criteria for approval. CARE uncontestedly asserts that since 1986 New Union's resources devoted to the program have shrunk while demands on the program have increased. CARE further asserts that the inevitable result is that the resources New Union devotes to the program are no longer sufficient to adequately implement and enforce it. CARE finally asserts that since 1986 the New Union legislature has enacted statutes that have 1) withdrawn some RCRA regulated facilities from regulation by New Union and 2) regulated one hazardous waste inconsistently with the federal RCRA program, to the extent that it may even violate the Commerce Clause of the United States Constitution. These assertions are based entirely on documents submitted by New Union to EPA, neither of which contests the facts stated therein. While these allegations may raise justiciable issues, they bear no relation to whether this court has jurisdiction to consider these issues.

Jurisdictional Issues

Citizen Suit Jurisdiction

Before reaching the merits of this matter, it must be determined whether this court has jurisdiction. State of New Union has filed a motion for summary judgment arguing this

court has no jurisdiction to proceed with CARE's citizen suit to force EPA to take a mandatory action under § 7002(a)(2), to wit, taking action on CARE's § 7004 petition to commence proceedings to withdraw its approval of New Union's hazardous waste program. While New Union concedes that EPA has a duty to respond to § 7004 petitions, it argues that CARE's petition was not submitted under § 7004. Section 7004 authorizes petitions to make, amend or repeal rules, while EPA's approval of New Union's program is an order, not a rule. CARE opposes the motion, although it has hedged its bets by asserting an alternative claim. While EPA agrees with CARE that EPA's approval of New Union's program was a rule and not an order, it argues that § 7004 does not mandate EPA action on petitions: "shall" does not necessarily indicate a mandatory action, see *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432-433 n. 9 (1995), and Congress could not have intended to require EPA to squander its resources reacting to what could be thousands of such citizen petitions should this court rule otherwise.

RCRA does not define what administrative actions are rule makings and what administrative actions are orders. That distinction is drawn in the APA. It defines a rule as "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), while an order as an action other than a rule, but includes a permit, 5 U.S.C. § 551(6) & (8). Courts and commentators have characterized rule making as legislative in nature, forward looking and general in application, while orders are adjudicatory in nature, applying fact to law in specific situations involving specific parties. David L Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 924 (1965). The significance of the distinction lies in the procedures agencies must follow in taking administrative actions, the jurisdiction for seeking judicial review, and the availability of attorney's fees.

EPA and CARE argue that EPA's initial approval of New Union's program was a rule making. EPA treated it as such by using a notice and comment procedure and incorporating the result in 40 CFR Part 272. EPA's determination that its action is

12 *PACE ENVIRONMENTAL LAW REVIEW ONLINE* [Vol. 1

a rulemaking, however, is not entitled to *Chevron* deference because EPA is not interpreting RCRA, the statute it administers, but the APA, a non-environmental statute governing all administrative agencies. Although EPA treated its action as a rulemaking, its 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. Its action was not general in applicability; it considered a single and particular party: New Union. This distinction is seen in the contrast between this EPA action under 40 CFR Part 271 and EPA's promulgation of 40 CFR Part 271, governing the process and criteria it would use in determining whether to approve or disapprove all applications for approval of state programs. Those regulations are general in nature, they apply to all states, and they are forward looking, they govern future decisions by EPA. EPA's approval of New Union's program, however, involves a single state and while the results of the decision govern who issues permits in the future, the decision only considered whether the state's program met EPA's criteria, as they both existed, at one particular moment in time. Moreover, the structure of RCRA's judicial review provision, § 7006, confirms the difference. The first subsection, § 7006(a), grants jurisdiction for judicial review of EPA's promulgation of regulations. The second subsection, § 7006(b), grants jurisdiction for judicial review of EPA's issuance, amendment or denial of permits and of state programs. Permits are orders rather than rules, 5 U.S.C. § 551(6) & (8); program approvals are coupled with them and with no other administrative actions. There is no reason to set § 7006(b) apart from § 7006(a) except that (a) deals with review of regulations and (b) with review of orders. If the actions covered were all regulations, there would be no need for the second subsection and it would be redundant. Admittedly, (a) grants jurisdiction to the Court of Appeals for the District of Columbia, while (b) grants it to the local Court of Appeals. This emphasizes the general/particular distinction between the actions addressed in (a) and (b), again supporting the rule/order distinction. If the actions in (b) were rules, judicial review of all of the actions could

2011]

NELMCC COMPETITION PROBLEM

13

have been incorporated in (a), with the minor addition of an exception to jurisdiction in the D.C. Circuit.

Having determined that EPA approval or disapproval of New Union's program was an order rather than a rule making, it is not subject to petition under § 7004, which authorizes petitions only for promulgating, amending or revoking rules. Hence CARE's cause of action against EPA to compel it to act on the petition is dismissed for failure to state a claim.

Moreover, assuming that we ordered EPA to act on CARE's petition, and EPA denied that petition, our action would be futile, for the Court of Appeals would have to deny judicial review of EPA's action as out of time. EPA approved New Union's program in 1986, a decade and a half ago, far more than the 90 day statute of limitations for judicial review established in § 7006(a) & (b). Assuming that the Court of Appeals was persuaded by the "constructive approval" argument, the petition is still time barred, as the facts CARE alleges in support of its argument that New Union's program no longer meets the approval criteria occurred more than 90 days ago, most of them years ago. Since review of EPA's actions are time barred, it would be futile for this Court to assert jurisdiction.

28 U.S.C. § 1331 Jurisdiction

A. To order action on the petition under the APA. CARE's second claim is that EPA's failure to act on the petition also violates the Administrative Procedure Act, which requires that every federal 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). CARE asserts federal question jurisdiction under 28 U.S.C. § 1331 for this claim. The first problem with this alternative is the old maxim of statutory interpretation that the specific governs over the general. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-525 (1989). The APA is a general authority for rulemaking petitions; RCRA § 7004 is the specific authority for rulemaking petitions under RCRA, replacing APA § 553(e) when it comes to RCRA. This second claim also founders on the same grounds as the first. EPA's action in approving New Union's program was not a rule; it was an order. The wording of RCRA § 7004 demonstrates that APA § 553(e) is of no avail for

14 *PACE ENVIRONMENTAL LAW REVIEW ONLINE* [Vol. 1

another reason. The APA provision requires administrative agencies to allow interested parties to file rule making petitions. The RCRA provision requires EPA not only to allow interested parties to file rule making petitions, but also requires EPA to take timely actions on those petitions, an admonition missing in APA § 553(e). Only RCRA § 7004 supports an action for an injunction requiring EPA to act on a petition. But for the reasons enunciated above, such an action does not lie here.

B. To review EPA's "constructive" denial of the petition and "constructive" determination that New Union's program currently meets the approval criteria. CARE argues that many factors occurring since 1986 have rendered New Union's hazardous waste program no longer approvable under RCRA. These factors are set forth in a series of documents that comprise the agreed upon administrative record. A list of those documents and a fair summary of the record, submitted by CARE, appear in Appendix A. CARE argues that, because all of the factors on which CARE relies were reported directly by New Union to EPA, EPA has been aware of them since the dates on which they were reported, many of them years ago. CARE further argues that EPA's continued failure to commence proceedings under RCRA § 3006(e) to withdraw its approval of New Union's hazardous waste program constitutes a "constructive" determination by it that New Union's program continues to meet RCRA's criteria for state program approval. *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). CARE argues that ordering EPA to commence proceedings to consider withdrawing approval of New Union's program is not necessary, since EPA has had years to do so when confronted with egregious evidence of the inadequacy of New Union's program. CARE seeks judicial review of EPA's "constructive" determination. EPA and New Union argue that if such judicial review is available, it is by the Court of Appeals under RCRA § 7006(b), not by this Court under 28 U.S.C. § 1331. CARE replies that § 7006(b) confers jurisdiction on the Court of Appeals for judicial review of EPA's action only in "granting, denying or withdrawing authorization" under RCRA § 3006(b), while CARE seeks judicial review of EPA's determination not to withdraw authorization, which is not covered by RCRA § 7006(b) and remains a federal question subject to judicial review under §

2011] *NELMCC COMPETITION PROBLEM* 15

1331. This is a distinction without a difference. The wording of § 7006(b) leaves no doubt that Congress intended that jurisdiction for review of all EPA actions regarding whether state programs meet RCRA's criteria for approval be in the Court of Appeals.

For the reasons stated above, the court denies CARE's motion for summary judgment and grants New Union's motion for summary judgment. CARE's action is dismissed.

SO ORDERED.

Romulus N. Remus
United States District Judge
June 2, 2010

APPENDIX A

RECORD

The record in this case consists of the following documents:

1. New Union's application to EPA in 1985 for approval of New Union's hazardous waste program (1,890 pp)
2. EPA's proposal to approve New Union's application in 1986 (2 pp)
3. EPA's approval of New Union's application in 1986 (2 pp)
4. The Decision Document prepared by EPA staff recommending EPA's approval of New Union's application in 1986 (22 pp)
5. The New Union DEP's Annual Reports to EPA Regarding the New Union Hazardous Waste Program, for the years 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 (1216 pp)
6. Various news articles from the *New Union Bugle* (47 pp).

SUMMARY OF RECORD

When EPA approved New Union's hazardous waste program in 1986, EPA made a finding that the New Union DEP had adequate resources to fully administer and enforce the program, including issuance of permits in a timely fashion, inspecting RCRA regulated facilities at least every other year, and taking enforcement actions against all significant violations. (Rec. doc. 2,

16 *PACE ENVIRONMENTAL LAW REVIEW ONLINE* [Vol. 1

p. 1) EPA noted that with fewer resources the program might not be adequate. (Rec. *doc. 4*, p. 16) At that time, the DEP reported in the application for approval of its program that there were 1,200 hazardous waste treatment, storage and disposal facilities (TSDs) in the state requiring permits under RCRA. (Rec. *doc. 1*, p. 17) It further reported that at that time it had 50 full-time employees dedicated entirely to that program, including: 15 permit writers, 15 inspectors, 3 laboratory technicians, two lawyers and 15 administrators. (Rec. *doc. 1*, p. 73) Since that time the number of TSDs in the state has grown, while the resources devoted to the program has shrunk. In its 2009 Annual Report to EPA, the DEP reported 1,500 TSDs (Rec. *doc. 5* for 2009, p. 23) and 30 full time employees, including: 7 permit writers, 7 inspectors, 2 laboratory technicians, 1 lawyer and 13 administrators. (Rec. *doc. 5* for 2009, p. 52) New Union's annual reports indicate that the increase in TSDs has been gradual since 1986, while most of the loss of employees has occurred since 2000. New Union's 2009 Annual Report to EPA attributed that decrease to the deterioration of the state's finances. (Rec. *doc. 5* for 2009, p. 50) New Union's 2009 Annual Report to EPA also indicates that the decrease in the DEP's hazardous waste resources was no greater than 20% more than decreases in resources the state devotes to other public health regulatory programs. (Rec. *doc. 5* for 2009, p. 51) DEP's 2009 Annual Report to EPA also indicated that the Governor directed a freeze on hiring state employees, except for 25% of vacancies he has deemed critical to protection of civil order and that there are no DEP vacancies falling within that exception. (Rec. *doc. 5* for 2009, p. 53) The DEP's 2009 Annual Report to EPA also indicated that the Governor's Director of Budget has stated publicly that the freeze is likely to continue for at least the next two years and that layoffs of between 5 and 10% of state employees is likely during that time. (Rec. *doc. 5* for 2009, p. 53) Newspaper accounts of his statement indicate he would concentrate resource cuts on discretionary programs and programs in which state employees performed functions that federal employees would otherwise perform. (Rec. *doc. 6*, June 6, 2009)

DEP's shortage of resources has translated directly into less than robust implementation and enforcement of RCRA in the

state. In its 2009 Annual Report to EPA, the DEP indicated that it had issued 125 RCRA permits during the previous year and anticipated issuing 125 during the present year. (Rec. *doc. 5* for 2009, p. 19) This accomplishment is against the background of a growing backlog of permit applications. The DEP's 2009 Annual Report to EPA indicated that some 900 TSDs had permits, but were continued by operation of law, some of them expired as long as 20 years ago. (Rec. *doc. 5* for 2009, p. 20) At the same time, the DEP reported that it had about 50 applications a year from new facilities or permitted facilities that wish to expand their operations but need an amended permit to do so. (Rec. *doc. 5* for 2009, p. 20) The DEP reported that its stated policy is "to prioritize permit issuance in the following order: new facilities; permitted facilities seeking to expand operations; facilities with permits that expired fifteen or more years ago; and permitted facilities having the greatest potential for harm to the public health or environment because of the volume or toxicity of hazardous waste handled." (Rec. *doc. 5* for 2009, p. 20)

The DEP's 2009 Annual Report to EPA also indicated that it performed inspections of 150 TSDs during the previous year and expected to perform at the same level during the current year. (Rec. *doc. 5* for 2009, p. 22) Since it could not inspect more than 10% of the TSDs a year, the Report indicated that DEP solicited EPA to inspect a comparable number of facilities both years and that EPA did so last year and promised to do so in the present year. (Rec. *doc. 5* for 2009, p. 23) The DEP reported that its stated policy to prioritize inspections is "to give priority to inspecting facilities that have reported unpermitted releases of hazardous waste into the environment and to facilities reporting other violations posing the greatest potential for harm to the public health or the environment because of the volume or toxicity of the hazardous waste they are permitted to handle." (Rec. *doc. 5* for 2009, p. 23)

The 2009 DEP Annual Report to EPA also indicates the DEP took 6 enforcement actions during the previous year; four were administrative orders requiring both compliance and the payment of penalties in amounts derived from EPA's penalty policy, and two were civil actions, requesting injunctions and the judicial assessment of penalties. (Rec. *doc. 5* for 2009, p. 25) EPA

18 *PACE ENVIRONMENTAL LAW REVIEW ONLINE* [Vol. 1

took the same number of comparable actions in the state and environmental groups filed 6 citizen suits in the state during the past year for violations of RCRA. (Rec. *doc. 5* for 2009, p. 26) The DEP reported there were 22 significant permit violations during the year and hundreds of minor violations. (Rec. *doc. 5* for 2009, p. 24)

In 2000, the New Union legislature enacted the 2000 Environmental Regulatory Adjustment Act (the “ERAA”), containing a number of amendments to existing environmental and other legislation, two of which are pertinent here. The first was an amendment to the Railroad Regulation Act (the “RRA”), which had established a New Union Railroad Commission charged with regulating intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards, all to the extent allowed by the Commerce Clause in the federal Constitution. The Commission is a state agency and its Commissioners are state employees, one—the Chair—appointed by the Governor, one appointed by the State Senate, and one appointed by the State House of Representatives, serving staggered terms. 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.” Moreover, it removed criminal sanctions for violations of environmental statutes, by facilities falling under the jurisdiction of the Commission. (Rec. *doc. 5* for 2000, pp. 103-105) At the time of enactment, there was only one intrastate railroad in New Union, the New Union RR Co. The president of the New Union RR Co. was Nat Greenleaf, the twin brother of Luther Greenleaf, Majority Leader of the State Senate. (Rec. *doc. 6*, Aug. 14, 2000)

The second pertinent provision was an amendment to the state hazardous waste program, as follows:

Recognizing that Pollutant X is said by EPA and the World Health Organization to be among the most potent and toxic chemicals to public health and the environment; and
Recognizing further that there are presently no treatment or disposal facilities in New Union designed and permitted

2011] *NELMCC COMPETITION PROBLEM* 19

to, or capable of, preventing exposure of persons or the environment to releases of Pollutant X; and

Recognizing further that there are only nine treatment and disposal facilities in the country presently authorized by EPA under RCRA to treat or dispose of Pollutant X;

NOW, THEREFORE, the Hazardous Regulation Act is amended to include the following:

1. Every facility generating wastes including Pollutant X shall submit to the DEP within the next ninety days a plan to minimize the generation of Pollutant X containing wastes and every year thereafter by December 31, shall submit to the DEP a report stating the reduction in generation of Pollutant X during the previous year and a plan for additional reduction of such waste in the following year, until such generation entirely ceases.
2. The DEP shall not issue permits allowing the treatment, storage or disposal of Pollutant X, except for storage for less than 120 days while awaiting transportation to a facility located outside of the state and permitted and designed to treat or dispose of Pollutant X.
3. Any person may transport Pollutant X through or out of the state to a facility designed and permitted to treat or dispose of Pollutant X, provided, however, that such transport shall be as direct and fast as is reasonably possible, with no stops within the state except for emergencies and necessary refueling.

(Rec. doc. 5 for 2000, pp. 105-107)