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C.A. No. 18-2010
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,
U.S. 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

BRIEF FOR PETITIONER-APPELLANT

Citizen Advocates for Regulation and the Environment, Inc.

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This is a review of two related actions. (R. at 1-2). The first is an appeal from the final order of the United States District Court for the District of New Union. (R. at 4). Specifically, the District Court's subject matter jurisdiction under RCRA or under 28 U.S.C. § 1331 (2006) is at issue on appeal. This Court has jurisdiction based on 28 U.S.C. § 1291 (2006), which grants jurisdiction over all final decisions of the lower courts.

The second is a motion to lift a stay on an action filed in this Court. (R. at 1). This Court has jurisdiction based on 42 U.S.C. § 6976 (2006), which grants jurisdiction for review of certain actions under 42 U.S.C. § 6926 (2006).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court had jurisdiction under RCRA to order EPA to act on CARE's petition for withdrawal of EPA's approval of New Union's hazardous waste program.

II. Whether the District Court had federal question jurisdiction to order EPA action under the APA on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program.

III. Whether EPA's failure to act on CARE's petition constituted a constructive denial of the petition and a constructive determination that New Union's program continued to meet RCRA's criteria for program approval.

IV. If the District Court had subject matter jurisdiction over this claim and if EPA's failure to act on CARE's petition constituted a constructive denial and a constructive determination, whether this Court should lift the stay on C.A. No. 18-2010 and proceed with judicial review.

V. Assuming this Court proceeds to the merits of CARE's petition, must EPA withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria.

VI. Assuming this Court proceeds to the merits of CARE's petition, 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.

VII. Assuming this Court proceeds to the merits of CARE's petition, 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.

STANDARD OF REVIEW

An appellate court reviews a lower court's grant of summary judgment *de novo*, a standard of review in which no form of appellate deference is acceptable. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). Summary judgment is proper only if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ((*quoting* Fed. R. Civ. P. 56(c)). A motion for summary judgment may only be granted where there is no genuine issue of material fact. *Twiss v. Kury,* 25 F.3d 1551, 1554 (11th Cir.1994). Moreover,"(o)n summary judgment the inferences to be drawn from the underlying facts contained in (the moving party's) materials must be viewed in the light most favorable to the party opposing the motion." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Thus, this Court's review of whether the District Court had

jurisdiction to order the EPA to act on CARE's petition is *de novo*. Additionally, this Court reviews *de novo* whether the EPA's failure to act on CARE's petition constituted a constructive denial of that petition and a constructive determination on the merits of the State of New Union's hazardous waste program.

An appellate court's review of agency action under 42 U.S.C. § 6976(b) (2006) must be in accordance with section 706 of the Administrative Procedure Act (APA), which requires that a reviewing court find agency conduct unlawful which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2006); *Vineland Chemical Co., Inc. v. United States Envtl. Prot. Agency*, 810 F.2d 402, 409-10 (3d Cir. 1987). Thus, should this Court determine that the United States Environmental Protection Agency's (EPA) failure to act on Citizen Advocates for Regulation and the Environment, Inc.'s (CARE) petition constituted constructive action, this Court must then review whether the EPA's constructive action was arbitrary or capricious.

STATEMENT OF THE CASE

On January 5, 2009, CARE served a petition on the Administrator of the EPA under § 7004 of the Resource Conservation and Recovery Act (RCRA) and § 553(e) of the APA, requesting that the EPA commence proceedings to withdraw its 1986 approval of New Union's hazardous waste regulatory program to operate in lieu of the federal program under RCRA. (R. at 4.) In support of the petition, CARE listed various facts suggesting that New Union's program no longer met the criteria for EPA approval. (R. at 4.) EPA has taken no action on the petition. (R. at 4.) On January 4, 2010, CARE filed an action in the United States District Court for the District of New Union ("District Court") seeking an injunction requiring the EPA to act on that petition or, in the alternative, judicial review of the EPA's constructive denial of the petition and

constructive determination that New Union's hazardous waste program meets the criteria for approval. (R. at 4.)

New Union filed an unopposed motion to intervene and it was granted by the District Court. (R. at 4.) The parties filed cross-motions for summary judgment. (R. at 4.) At the same time as the filing of the complaint, CARE filed a petition for review with the Court of Appeals, C.A. No. 18-2010, seeking judicial review of the EPA's constructive denial and constructive determination. (R. at 5.) New Union successfully filed a motion to intervene in that case also. (R. at 5.) On EPA's motion, the Court of Appeals stayed that proceeding, pending the outcome of this action. (R. at 5.)

STATEMENT OF THE FACTS

New Union is a state that was authorized in 1986 by the EPA to administer a state hazardous waste program under the relevant RCRA statutes. (Rec. doc 2, p. 1). At the time of issuance, DEP reported in the application for approval of its program that there were 1,200 hazardous waste treatment, storage and disposal facilities in the state requiring permits under the 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 then, the number of treatment, storage and disposal facilities has increased while the budget and personnel resources have decreased. (Rec. doc. 4 for 2009, p. 23) The Governor of New Union has publicly stated that he will not put any more financial resources into the program, particularly because it is a program that can be taken over by the EPA. (Rec. doc 6, June 6, 2009).

In 2000, the New Union legislature enacted the 2000 Environmental Regulatory Adjustment Act (ERAA), containing a number of amendments to existing environmental and other legislation. (Rec. doc. 4 for 2000, pp. 103-105). The ERAA amended the Railroad Regulation Act (RRA) by transferring "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the Commission." (Rec. doc. 4 for 2000, pp. 103-105). Additionally, it deregulated Pollutant X, an extremely toxic and potent chemical. (Rec. doc. 4 for 2000, pp. 105-107).

CARE is a non-profit corporation organized under the laws of the State of New Union. CARE petitioned the EPA Administrator to commence proceedings to withdraw the approval of New Union's hazardous waste regulatory program. When the EPA did not respond, CARE filed an injunction. CARE finally brought this suit in an attempt to compel the EPA to withdraw approval of New Union's state authorized program.

SUMMARY OF THE ARGUMENT

Judicial review of the EPA's failure to act on CARE's petition will result in a finding that this Court must compel the EPA to withdraw approval of New Union's hazardous waste regulatory program. Jurisdiction, judicial review and compelled withdrawal of approval are appropriate in the circumstances at hand for the following reasons.

The district court erred in granting intervener New Union's motion for summary judgment based on a lack of jurisdiction. The district court has jurisdiction to order the EPA to act on CARE's petition for two reasons: one, the EPA's approval of New Union's hazardous waste program was a rule, not an order, and two, the EPA had a non-discretionary duty to take action on the petition. The approval constituted a rule because of the process the EPA used and because the EPA's action had a substantial impact on the public. The EPA had a non-

discretionary duty to act because the RCRA stipulates that the EPA Administrator "shall take action with respect to such petition." 42 U.S.C. § 6974 (2006). Absent a clear indication otherwise, statutory construction is to interpret language according to its ordinary meaning. Here, there is no such indication and the language, in its ordinary meaning, purports that the EPA Administrator has a mandatory duty to act—thus, a nondiscretionary duty to act.

When an agency fails to take non-discretionary action, RCRA provides that any person may file an action in district court to compel the EPA to act. 42 U.S.C. § 6972(a)(2) (2006). Under the RCRA, the district court has jurisdiction to order the EPA to perform its unperformed non-discretionary act. 42 U.S.C. § 6972(a)(2).

The EPA's failure to act on CARE's petition is judicially reviewable for two reasons. First, judicial review is appropriate because RCRA specifically provides for it in the circumstance at hand. Second, the EPA's failure to act constituted a constructive denial of the petition and a constructive determination that New Union's hazardous waste program continued to meet RCRA's criteria for program approval. Both the constructive denial and constructive determination constitute final agency action, which is subject to judicial review under the APA, which is incorporated into RCRA. 42 U.S.C. § 6976(a)(2) (2006).

Judicial review is further appropriate because "it is the rule and nonreviewability the exception which must be demonstrated" and here, there is no such demonstration. *Barlow v Collins,* 397 U.S. 159, 166-67 (1970). Therefore, judicial review is appropriate and this Court should lift the stay in C.A. No. 18-2010 and proceed with judicial review.

In reviewing the EPA's failure to act on CARE's petition, this Court will find that the EPA failed to perform its nondiscretionary duty. Under the APA and the Mandamus and Venue

Act, when an agency fails to perform a non-discretionary duty, a court is justified in compelling the agency to perform that duty. 5 U.S.C. § 706 (2006); 28 U.S.C. § 1361 (2006). Thus, this Court must compel the EPA to withdraw approval of New Union's hazardous waste regulatory program. Compelled withdrawal, although severe, is necessary over compelled commencement of proceedings for the following reasons: New Union's resources and performance fail to meet RCRA's approval criteria; New Union fails to regulate all facilities regulated by RCRA; and New Union's state program is inconsistent with the Federal program and other approved state programs, in violation of the Commerce Clause.

In the alternative and at the very minimum, this Court must compel the EPA to commence proceedings to consider withdrawing approval of New Union's program.

ARGUMENT

I. The District Court has Jurisdiction Under RCRA to Order the EPA to Act on CARE's Petition for Withdrawal of the EPA's Approval of New Union's Hazardous Waste Program.

For the district court to have jurisdiction to order the EPA to act on CARE's petition, it must be established that the EPA's approval of New Union's hazardous waste program was a rule, not an order, and that the EPA had a non-discretionary duty to take action on the petition. RCRA § 7004 authorizes citizens to petition the EPA to make, amend, or repeal any regulation under the statute. 42 U.S.C. § 6974(a) (2006). In the instant case, the EPA's approval of the New Union hazardous waste program constitutes a rule, not an order. After receiving a RCRA § 7004 petition, the statute provides that the EPA "shall take action with respect to such petition . . .". 42 U.S.C. § 6974(a) (2006). Thus, the EPA had a non-discretionary duty to act on CARE's petition.

The EPA has taken no action on CARE's petition. (R. 4). RCRA § 7002(a)(2) provides that "any person may commence a civil action" against the EPA for the failure to perform a non-discretionary duty, and that such action may be brought in the district court where the alleged violation occurred. 42 U.S.C. § 6972(a)(2) (2006). Further, the provision provides the district court with jurisdiction to order the EPA to perform the non-discretionary act under RCRA. *Id*. Therefore, the district court has jurisdiction to order the EPA to act on CARE's petition for withdrawing its approval of the New Union hazardous waste program.

A. CARE's Petition Was Properly Submitted Under RCRA § 7004 as the EPA's Approval of New Union's Hazardous Waste Program is a Rule, Not an Order.

The lower court should have found that the EPA's approval of the New Union hazardous waste program was a rule, not an order, and thus subject to petition pursuant to RCRA § 7004. RCRA itself does not define what agency actions constitute rule making and what constitute orders. Thus, resolution of the issue requires a determination under the Administrative Procedure Act ("APA"). The APA 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) (2006).

It defines "rule making" as an "agency process for formulating, amending, or repealing a rule". 5 U.S.C. § 551(5) (2006). An "order" is defined under the APA 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". 5 U.S.C. § 551(6) (2006).

While "[t]he line between rule-making and adjudication is sometimes not easy to draw", it is apparent that the EPA's action here is appropriately categorized as a rule. *Capitol Airways, Inc. v. C.A.B.*, 292 F.2d 755, 758 (D.C. Cir. 1961). When an agency action "has a 'substantial impact' upon private parties and 'puts a stamp of [agency] approval or disapproval on a given type of behavior," the action is a rule subject to rule making procedure. *Chamber of Commerce v. Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (quoting *Am. Hosp. Ass'n v. Bowen,* 834 F.2d 1037, 1047 (D.C. Cir. 1987)).

"The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (quoting *Dixon v. United States,* 381 U.S. 68, 74 (1965)). An agency's approval of a state program implementing federal law is a rule under the APA. *See Ohio River Valley Envt. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 101-02 (4th Cir. 2006) (in reasoning that rulemaking is not limited to the promulgation of national rules and standards, Court held that Secretary of the Interior's approval of amendments to state program for the control of surface coal mining constituted rulemaking under the APA for purposes of judicial review); *W. Nebraska Res. Council v. United States Envtl. Prot. Agency*, 793 F.2d 194, 196-97 (8th Cir. 1986) (Court explaining that the EPA approval of a state's UIC program is accomplished by rule).

RCRA was enacted to protect public health and the environment, in part, through regulating the management of hazardous waste. *See* 42 U.S.C. § 6902 (2006). The EPA is charged with implementation and enforcement authority under the RCRA to ensure the realization of the statute's mandates. *See* 42 U.S.C. §§ 6912 & 6928 (2006). Through RCRA,

Congress has also provided for state operated hazardous waste programs which, after receiving the EPA authorization, operate in lieu of the federal hazardous waste program. 42 U.S.C. § 6926(b) (2006). As a result, those persons whose activities are governed by the RCRA are not subject to the federal program but rather to the state program. Therefore, a state's regulation and enforcement of its hazardous waste program has a substantial impact on those persons under its authority.

However, the EPA is still charged with ensuring that hazardous waste is managed in compliance with the RCRA. By approving a state's hazardous waste program, the EPA is essentially stating that if persons operating within the state comply with the state program then those persons have complied with the RCRA. In this way, the state's implementation and enforcement of its program satisfies the EPA's duty of ensuring the RCRA's mandates are executed.

As a result, the EPA's approval of the New Union hazardous waste program had a substantial impact on those private parties involved hazardous waste management in the state of New Union. This is a substantial number of businesses and individuals. At the time of the EPA's approval of the program, there were 1,200 hazardous waste treatment, storage, and disposal facilities in New Union requiring permits under RCRA. (R. at 10). Once the EPA approved New Union's program, all of the business and individuals involved in the use of these facilities became subject to administration and enforcement under the state program. The EPA's stamp of approval on New Union's program was a rule, and thus, was subject to rule making procedure. *Chamber of Commerce*, 174 F.3d at 211.

Additionally, by operating in lieu of a federal program, an approved state program essentially carries into effect the will of Congress to regulate hazardous waste in the manner expressed in the RCRA. Congress has assigned this task to the EPA, but has given the states an opportunity to operate, upon the EPA's approval, in the EPA's stead. *See* 42 U.S.C. § 6901 et seq. (2006). In this way, the EPA's approval of a state's program essentially gives the authority of rule to the regulations promulgated by the state regarding the implementation and enforcement of RCRA. Thus, the EPA's approval is a rule made in the exercise of its authority under the RCRA to adopt regulations to carry into effect the will of Congress. The lower court should have found that approval of the New Union hazardous waste program was a rule, not an order.

Further, the RCRA itself contains notice and hearing requirements, which a state and the EPA must follow where a state seeks to administer and enforce a hazardous waste program. 42 U.S.C. § 6926(b) (2006). Specifically, an opportunity for notice and for public hearing is required before a state is permitted to submit its application for authorization of its hazardous waste program. *Id*. Further, the EPA has promulgated a notice and comment procedure, which satisfies the requirements of the notice and comment procedure mandated by the APA § 553. *See* 40 C.F.R. § 271.20 (2010) (involving requirements designed to provide interested persons with adequate notice and opportunity to comment on a proposed state program).

The lower court was incorrect in concluding that the EPA, in determining that approval of New Union's program constituted a rule making, is not entitled to *Chevron* deference. Instead, the EPA is entitled to such deference. Though Congress mandates a notice and hearing opportunity prior to the EPA's approval of such a program, Congress has not spoken directly to what constitutes adequate opportunity for notice and hearing. *See Chevron, U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 US 837 (1984). It has left this determination to the EPA. *Id*.

Therefore, the EPA, in promulgating notice and hearing criteria at 40 C.F.R. § 271.20, has exercised its authority to fill in the gap in Congress's legislative mandate. In this way, the EPA is not interpreting the APA, but is interpreting the RCRA, the statute it administers, and is therefore entitled to *Chevron* deference.

B. The EPA Had a Non-discretionary Duty to Act on CARE's RCRA § 7004 Petition.

Even though the RCRA's mandates are typically enforced by the EPA, the statute contains a citizen suit provision which affords an individual the ability to require the EPA to perform a non-discretionary duty. 42 U.S.C § 6972(a)(2) (2006). In the instant case, CARE filed a petition under the RCRA § 7004 requesting that the EPA withdraw its approval of the New Union hazardous waste program. (R. at 4). While the statute provides that the EPA "shall take action with respect to such petition . . .", the EPA has yet to take any action. 42 U.S.C. § 6974(a) (2006); (R. at 4).

Here, the district court incorrectly found that the RCRA § 7004 does not mandate the EPA to act on petitions. The court determined that the word "shall" in the provision does not necessarily indicate a non-discretionary action. (R. at 6). In fact, the RCRA, by inclusion of the word "shall", does impose a non-discretionary duty on the EPA to take action on a § 7004 petition.

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). "We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant." *United States*

v. LaBonte, 520 U.S. 751, 757 (1997). In applying this rule of statutory construction, the court is required to give the word used its ordinary meaning. *Id*.

Here, the use of the word "shall" in § 7004 is unambiguous in the context of the provision. “Statutory language articulating that an act ‘shall’ be carried out is generally regarded as mandatory.” *South Carolina Wildlife Fed’n v. Alexander*, 457 F.Supp. 118, 130 (D. S.C. 1978) (citing *See, e.g.*, *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *Boyden v. Comm’r of Patents*, 353, 441 F.2d 1041, 1043 (D.C. Cir. 1971)). Applying this rule of statutory construction, the inclusion of the word “shall” in § 7004 makes the EPA’s action mandatory.

Justice Benjamin Cardozo’s analysis in *Escoe v. Zerbst*, 295 U.S. 490 (1935) is dispositive as to this issue. In *Escoe*, Justice Cardozo undertook a two-step approach in analyzing the mandatory quality of a statute’s use of the term “shall”. First, he considered the “words alone”, determining that “shall” “is the language of command”. *Id*. at 493. However, this is not controlling. *Id*. Next, Justice Cardozo reasoned that any doubt as to the command “is dispelled when we pass from the words alone to a view of ends and aims” of the statute. *Id*.

In the instant case, “shall” is language of command which mandates that the EPA take action on CARE’s petition. Further, doubt is dispelled when the mandate is viewed in light of the ends and aims of the provision. The ends to be promoted in requiring the EPA to take action is to protect an individual’s right to petition for rule making to ensure compliance with the mandates of the RCRA by giving the right actual substance. Otherwise, the exercise of such right would amount to little more than the right to certify mail to the EPA.

“Statutes are not directory when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect.” *Escoe*, 295

U.S. at 494. The public and private interest protected by rule making under the RCRA is the protection of public health and the environment through hazardous waste management. *See* 42 U.S.C. § 6902 (2006). § 7004 gives a person the right to petition the rule maker to direct hazardous waste management in furtherance of this interest. When a person perceives that the management of hazardous waste is insufficient, § 7004 is the vehicle by which that person is able to bring the insufficiencies to the attention of the RCRA's administrator, the EPA. Therefore, the district court's interpretation of § 7004 as non-mandatory, significantly impairs CARE's right to petition the EPA to consider withdrawing its approval of the New Union hazardous waste program.

Additionally, the EPA has promulgated a rule confirming its non-discretionary duty to take action on a § 7004 petition to withdraw approval of a state hazardous waste program. 40 C.F.R. § 271.23(b)(1) (2010) states that "[t]he Administrator shall respond in writing to any petition to commence withdrawal proceedings." By failing to take any action on CARE's petition for withdrawal of approval of New Union's hazardous waste program, the EPA violated its own rule.

This is not to say that the EPA is required to expend significant resources in taking action to § 7004 petition's. The lower court is mistaken in reasoning that a finding of a non-discretionary duty to act under § 7004 will force the EPA to do so. Rather, the mandate merely requires that EPA, within a reasonable time after receiving a petition, do more than nothing. This mandate is not foreign to the district court, as the court itself state that § 7004 "requires EPA to take timely actions on [§ 7004] petitions". (R. at 8).

Where the EPA fails to take a non-discretionary action, the RCRA § 7002(a)(2) provides that any person may file an action in district court to compel the EPA to act. 42 U.S.C. § 6972(a)(2) (2006). Further, the provision gives the district court jurisdiction to order the EPA to perform the non-discretionary act under the RCRA. *Id*. Therefore, the district court was incorrect in concluding that it did not have jurisdiction to order the EPA to act on CARE's petition. It was error for the district court to grant Intervener New Union's motion for summary judgment.

II. The District Court Has Federal Question Jurisdiction to Order the EPA Action Under the APA on CARE's Petition for Revocation of the EPA's Approval of New Union's Hazardous Waste Program.

Should this Court find that the RCRA does not provide jurisdiction, CARE can still have its claim heard in district court under federal question jurisdiction. The EPA's failure to act on CARE's petition for revocation of the EPA's approval of the New Union hazardous waste program violated the APA's requirement that every agency "give an interested person the right to petition for the issuance, amendment or repeal of a rule." 5 U.S.C. § 553(e) (2006). The district court has federal question jurisdiction over this claim under 28 U.S.C. § 1331 (2006) which grants federal district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The district court erred in granting Intervener New Union's motion for summary judgment on this issue.

While the APA itself does not grant jurisdiction to the federal courts to review agency action, 28 U.S.C. § 1331 (2006) does. *McCartin v. Norton*, 674 F.2d 1317, 1320 (9th Cir. 1982) (citing *Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Glacier Park Found. v. Watt*, 663 F.2d 882,

885-86 (9th Cir. 1981); *Hayes Int'l, Inc. v. United States Dep't of Navy*, 685 F. Supp. 228, 230-31 (M.D. Ala. 1987).

The district court's reliance on the old maxim of statutory interpretation referenced in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-25 (1989), is misplaced. This maxim, that the specific governs over the general, is limited to matters involved in the same enactment. In *Green*, the Court applied this statutory maxim to resolve an issue involving a general and a specific rule, both of which were a part of the Federal Rules of Evidence. *Id*. at 524-25. Further, the *Green* Court, in relying on the maxim, cites *D. Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208 (1932), as supporting authority. In the *Ginsberg* opinion, the Court stated that the "[g]eneral language of a statutory provision . . . will not be held to apply to a matter specifically dealt with in another part of the same enactment." 285 U.S. at 208; *But see Kepner v. United States*, 195 U.S. 100, 125 (1904) (although the Court states that specific terms will prevail over "general language of the same or another statute which might otherwise prove controlling", this is merely dicta as the Court only applies the maxim to different sections of the same statute).

In sum, both *Green* and *Ginsberg* applied the statutory maxim to resolve an issue involving matters in the same enactment. Here, the authority for rule making petitions under the APA and under RCRA are not part of the same enactment, and therefore the maxim that the specific governs over the general is inapplicable. Therefore, the RCRA § 7004 does not replace APA § 553(e) when it comes to the RCRA.

Additionally, as discussed supra at Issue I of this brief, the EPA's approval of the New Union hazardous waste program was a rule, not an order. The district court was incorrect in

determining otherwise. Thus, the district court has jurisdiction to order the EPA to act on CARE's petition under APA § 553(e) to repeal its approval of New Union's program.

Finally, the district court incorrectly concluded that only the RCRA § 7004 supports an action for an injunction requiring the EPA to act on CARE's petition. APA § 553(e), as the district court correctly stated, requires the EPA to allow interested parties to file rule making petitions. 5 U.S.C. § 553(e) (2006). However, the statute's mandate does not end there.

After receiving such a petition, an agency is required to respond to the petition. *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 328 (7th Cir. 1983); *WWHT, Inc. v. Fed. Commc'n Comm'n*, 656 F.2d 807 (D.C. Cir. 1981). As the United States Court of Appeals for the District of Columbia discussed in *WWHT*, the legislative history of APA § 553(e) overwhelmingly supports this conclusion. The *WWHT* Court demonstrated that, in the legislative history of the section, Congress stated that "this section 'requires agencies to receive and consider requests" for rulemaking." *WWHT*, 656 F.2d at 813 (quoting "Senate Judiciary Committee Print, June 1945," reprinted in Administrative Procedure Act: Legislative History, 79th Cong. 1944-46, S.Doc.No. 248, 79th Cong., 2d Dess. 11, 21 (1946)). Thus, under the APA § 553(e), the EPA is required to respond to CARE's petition for withdrawal of the EPA approval of the New Union hazardous waste program.

III. The EPA's Failure to Act on CARE's Petition Constituted a Constructive Denial of the Petition and a Constructive Determination that New Union's State Program Continued to Meet RCRA's Criteria for Program Approval.

A. Constructive Denial

In determining whether the EPA has constructively denied a petition, in the absence of a statutory deadline, this Court must undertake an analysis of whether agency action was unlawfully withheld or unreasonably delayed. *Beyond Pesticides/Nat'l Coal. Against the Misuse of Pesticides v. United States Envtl. Prot. Agency,* 407 F. Supp. 2d 38 (D.C. Cir. 2005). Although agencies are typically given deference in the speed of their action, courts have discretion to determine whether agency action was unlawfully withheld or unreasonably delayed. Administrative Procedure Act, 5 U.S.C. § 706(1) (2006)*; Mt. Emmons Min. Co. v. Babbitt,* 117 F.3d 1167, 1170 (10th Cir. 1997). "Absent a precise statutory timetable or other factors counseling expeditious action," an agency's speed of action is accorded deference. *Sierra Club v Gorsuch,* 715 F.2d 653, 658 (D.C. Cir. 1983).

The first step in determining whether agency action was unlawfully withheld or unreasonably delayed is to "ascertain the length of time that has elapsed since the agency came under a duty to act." *Beyond Pesticides,* 407 F. Supp. 2d at 39-40 (citing *Cutler v Hayes,* 818 F.2d 879, 897 (D.C. Cir. 1987)). An agency is obligated to act from the time a petition is filed. *Beyond Pesticides,* 407 F. Supp. 2d at 39-40. In *Beyond Pesticides,* the Court found that the EPA did not become obligated to respond to the environmental groups' request for suspension or cancellation of three wood preservative pesticides until the environmental groups filed a formal petition. *Id.* at 40.

In considering whether agency action was unlawfully withheld or unreasonably delayed, the Court must apply the so-called *TRAC* factors:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it

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

Telecomm. Research & Action Ctr. v. Fed. Commc'n Comm'n, 750 F.2d 70, 80 (D.C. Cir. 1984) (*internal citations omitted*). Although the *TRAC* factors expressly refer to "delay" and not to "withholding," this distinction is insignificant because withheld action includes delayed action. If an actor withholds action, he necessarily delays it. Additionally, it is not always known whether the action will be withheld or delayed; an action may appear to be delayed, but turn out to be withheld, and vice versa.

Combining the third, fourth and fifth factors, the court in *Envtl. Def. Fund, Inc. v. Hardin,* 428 F.2d 1093, 1098 (D.C. Cir. 1970) recognized the heightened role of agency inaction in the case of imminent hazards. In *Hardin*, the Court found that the Secretary of the Department of Agriculture's failure to act on environmental organizations' petition for suspension of the registration of DDT was "tantamount to an order denying suspension." *Id.* at 1099. The Court reasoned that "exigent circumstances render [a failure to act] equivalent to a final denial of petitioners' request." *Id.* at 1098. (citing L. Jaffe, Judicial Control of Administrative Action 358-9 (1965) (administrative action that denies all relief should be construed as final.) Although ultimately remanding the case due to the lack of a sufficient record, the Court found that the

issue of constructive denial of suspension of the registration of DDT was ripe for judicial review because the Secretary's inaction resulted in a denial of interim relief from an imminent hazard (exposure to DDT) to which the public might have been entitled. *Id.* at 1099-1100.

In sum, a constructive denial of a petition by an agency will be found if the agency violated a clear statutory timetable or, in the absence of such, if an agency unlawfully withheld or unreasonably delayed action on a petition. The determination of whether action was unlawfully withheld or unreasonably delayed involves an analysis of the *TRAC* factors and a consideration of whether the conduct attempting to be stopped by an environmental group poses an imminent hazard, invoking the need for interim relief.

Here, the EPA Administrator's failure to act in response to CARE's petition (that the EPA initiate proceedings to consider withdrawing approval of New Union's hazardous waste program under the RCRA 3006(e)) is a constructive denial of the petition.

The RCRA does not impose a specific deadline for the EPA Administrator to act on petitions: "Within a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition" 42 U.S.C. 6974 (2006). Thus, we turn to the two step analysis of whether the EPA's action was unlawfully withheld or unreasonably delayed.

First, under the *Beyond Pesticides* rule, the agency came under a duty to act on January 5, 2009, when CARE served the petition on the EPA. (R. at 4.)

Second is the analysis of the *TRAC* factors. The first two factors may be analyzed together as Congress, though vaguely, required that the EPA Administrator take action "within a reasonable time." 42 U.S.C. § 6974 (2006). Although CARE petitioned the EPA in 2009, the degradation of New Union's program has been occurring for many more years, the specifics of

which the EPA has known about for years—because New Union reports these specifics directly to the EPA. (R. at 8.) Although precedent requires that the duty for the EPA to act did not begin until the 2009 petition, the fact that the EPA has had first-hand knowledge of the program's degradation for years makes it reasonable for the EPA to take action on the petition in less than one year.

The third and fifth factors are highly pertinent here. Delay in correcting hazardous waste emission significantly affects human health and welfare—the very interests that are prejudiced by delay. Although Courts hold that this factor alone cannot be dispositive when the entire docket of an agency involves issues of the same type, the factor is not forgotten. *E.g. Sierra Club v. Thomas,* 828 F.2d 783 (D.C. Cir. 1987) *; Beyond Pesticides,* 407 F. Supp. 2d at 401. The severity of the human health and welfare at stake clearly militates toward prompt action by the EPA. The emission of hazardous waste constitutes an imminent hazard necessitating interim relief at the least. The sixth factor is not relevant here as no impropriety is alleged. Thus, an application of the *TRAC* factors shows that the EPA unlawfully withheld or unreasonably delayed action on CARE's petition.

Much like the inadequate labeling of pesticides containing DDT in *Hardin*, inadequate management and regulation of hazardous waste disposal qualifies as an exigent circumstance. *Hardin,* 428 F.2d at 1098. According to DEP's 2009 Annual Report to EPA, DEP does not have the resources to properly inspect New Union's hazardous waste facilities or to take all the enforcement actions that need to be taken. (R. at 11.) Like the DDT in *Hardin*, proliferation of hazardous wastes into the environment would result in environmental harm and biological harm to humans and animals. Because the improper disposal of solid waste poses such an urgent threat, the EPA's failure to act on the petition constitutes a constructive denial of the petition.

In conclusion, the EPA Administrator's failure to act on CARE's petition within a reasonable time constituted unlawfully withheld or unreasonably delayed action, or in other words, a constructive denial, of CARE's petition.

B. Constructive Determination

Similar to a constructive denial, a constructive determination may be made by a failure to act. In *Scott v. City of Hammond, Ind.*, 741 F.2d 992, 997-98 (7th Cir. 1984), the court found that when states failed to submit proposed TMDL's, the states' inaction "ripened into a refusal to act" which amounted to a "constructive submission" by the states that TMDL's aren't necessary. *Id.* The EPA has a duty to approve or disapprove states' constructive submission and a failure of the EPA to do either is a failure to perform a nondiscretionary duty. *Id.* at 997.

Conjointly, a state's unsatisfactory performance of its federal statutory duties should not stand in the way of that statute's important goals. Although states often have a major role in federal statutes whose objective is to decrease pollution, Congress did not intend for a state's inaction or unsatisfactory action in the face of statutory duty to frustrate the goals of that statute. *Id.* at 997-98. In *E.I. Du Pont De Nemours v. Train,* 430 U.S. 112 (1977), the Supreme Court examined Congress' grant of authority to the EPA. The Court held, "We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted." *Id.* at 132 (quoting *Permian Basin Area Rate Cases,* 390 U.S. 747, 777 (1968)).

Here, the EPA's continued failure to commence proceedings to withdraw authorization constituted a constructive determination that New Union's state program continued to meet RCRA's criteria for program approval under the RCRA § 3006(e). Similar to the inaction of the states in *Scott,* the continued inadequacies of New Union's state program constituted a

constructive submission to the EPA that required EPA's approval or disapproval. The EPA knew about the degradation of New Union's state program years before the petition was served. (R. at 10.) By failing to disapprove New Union's state program over a period of years, the EPA's action was tantamount to a constructive determination of program approval.

IV. The EPA's Failure to Act is Subject to Judicial Review Under RCRA § 7006(b). Thus, this Court Should Lift the Stay on C.A. No. 18-2010 and Proceed with Judicial Review.

A. Judicial Review is Appropriate Because RCRA § 7006(b) Specifically Provides for It in These Circumstances.

When petitioners seek relief for harm from an administrative agency, the "threshold question" is "whether petitioners are entitled to any judicial review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 402 (1971). However, the entitlement to judicial review is rarely denied. The Supreme Court has construed the APA as providing a "basic presumption of judicial review." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967). *See also Guiterrez de Martinez v. Lamagno,* 515 U.S. 417 (1995).

Here, any doubt as to whether judicial review is appropriate can be swept away because the RCRA specifically grants judicial review. The RCRA § 7006(b) provides for judicial review of certain actions under § 6926, the section regarding authorization of state hazardous waste programs. 42 U.S.C. § 6976 (2006). The provision permits judicial review of the EPA Administrator's action in "granting ... authorization or interim authorization under section 6926 of this title." 42 U.S.C. § 6976 (2006).

The EPA's action at issue here is judicially reviewable under the RCRA § 7006(b). 42 U.S.C. § 6976 (2006). The EPA's constructive denial and determination allowed for the continued existence of New Union's program. The allowance of the program's continued

existence is the logical equivalent of a grant of interim authorization. Because the Administrator has not yet withdrawn authorization, the Administrator impliedly granted interim authorization. Thus, judicial review is proper under the RCRA § 7006(b).

B. Judicial Review is Appropriate Because the EPA's Failure to Act Fulfills the APA's Finality Requirement for Judicial Review.

The RCRA § 7006(b) requires judicial review to be in accordance with §§ 701-706 of the APA. 5 U.S.C §§ 701-706 (2006). Under § 704 of the APA, agency action is reviewable if it constitutes final agency action. 5 U.S.C. § 704 (2006).

An agency's failure to act may constitute final agency action The APA explicitly defines "agency action" to include "failure to act." 5 U.S.C. § 551(13) (2006). However, a failure to act does not automatically satisfy the finality requirement. According to the Supreme Court, the determination of finality is to be applied in a "flexible" and "pragmatic" way. *Abbott,* 387 U.S. 136, 149-50 (1967). Under this broad approach, there are several overlapping inquiries to determine whether agency action qualifies as final.

The first inquiry examines whether action is "definitive" and has a "'direct and immediate ...effect on the day-to-day business'" of the party challenging the action in order to be final. *F.T.C. v. Standard Oil Co. of California,* 449 U.S. 232, 239 (1980); *citing Abbott,* 387 U.S. at 151-2; *See also Ciba-Geigy Corp. v. United States Envtl. Prot. Agency,* 801 F.2d 430, 435-6 (D.C. Cir. 1986). The evaluation of whether this standard is met involves balancing the immediate harm to petitioners against the advantage of allowing the agency to consider the issue more fully or when it is more concrete. *Indep. Bankers Ass'n v. Smith,* 534 F.2d 921, 929 (D.C. Cir. 1976).

A second inquiry set forth by the Supreme Court in *Bennett v. Spear* defines final agency action as one that: (1) "marks the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature"; and (2) "by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citing *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.,* 333 U.S. 103, 113 (1948); then citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 71 (1970)). In *AT&T,* the court elaborated on the first prong of the *Bennett* test, "[t]he agency must have made up its mind, and its decision must have inflicted an actual, concrete injury upon the party seeking judicial review." *AT&T v. EEOC*, 270 F.3d 420, 428 (D.C. Cir 2004). In *Chemical Mfrs. Ass'n v. United States Envtl. Prot. Agency,* the court found that the second prong of the *Bennett* test was not satisfied because the EPA's document regarding settlements at municipal solid waste co-disposal sites had no "independent or legally binding effect." 26 F.Supp.2d 180, 185 (D.C. Cir 1998).

Recently, the Supreme Court interpreted "failure to act" of the APA as limited to a "discrete" and "circumscribed" agency action. *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 64 (2004). The *SUWA* Court ultimately found that the Bureau of Land Management's (BLM) failure to act did not qualify as a "discrete" and "circumscribed" agency action. *Id.* The Court reasoned that it did not qualify because the nature of the mandate that was allegedly violated was not discrete—although the BLM's act of failing to act qualifies as a discrete action. *Id.* at 66.

Agency inaction need not be acknowledged by the agency to constitute final action. In *Sierra Club v. Thomas*, the Court found that "Agency inaction may represent effectively final agency action that the agency has not frankly acknowledged." 828 F.2d at 793.

Similarly, because EPA acknowledgment of inaction is often in the form of a notification that the matter is still pending, a lack of acknowledgement suggests the opposite: that agency inaction is final. In *Her Majesty the Queen in Right of Ontario v. United States Envtl. Prot. Agency*, the EPA responded to environmental groups' petition with a letter indicating that it would "continue to assess its ability to take action" on the petition. 912 F.2d 1525, 1530 (D.C. Cir. 1990). This being a practice the EPA has employed on at least one occasion, the lack of any communication over an extended period of time suggests that the EPA is not continuing to assess the issue. The EPA's failure to act and failure to communicate progress, places environmental organizations in an "administrative purgatory" and presuming the EPA does intend to cause such dire results to an organization, the EPA would have no reason to withhold updates from interested parties. *Citizens for a Better Env't v. Costle*, 515 F. Supp. 264, 274 (N.D.Ill. 1981).

Here, the EPA's failure to act on CARE's petition constituted final agency action. The EPA's inaction has a "direct and immediate effect on the day-to-day business" of CARE. *Abbott,* 387 U.S. at 152. CARE's petition asked for the withdrawal of approval of New Union's hazardous waste program. CARE's purpose is to advocate for regulation of the environment. The allowance of continued unsatisfactory regulation of the environment—resulting from EPA's failure to withdraw approval of New Union's program—directly and immediately affects CARE's day-to-day business. This standard is also met because weighing the EPA's interest in taking more time to consider the issue clearly does not outweigh the harms to CARE and the public at large. The continuation of improper hazardous waste disposal is a serious threat to not only CARE, but the public and environment.

The EPA's failure to act on CARE's petition meets the *Bennett* test. First, the EPA's refusal to act is a consummation of its decisionmaking process due to the extended period of time

over which the EPA should have withdrawn approval of New Union's program, per the RCRA's provision on authorization. 42 U.S.C. § 6926 (2006). Similarly, when taken in context, the EPA's inaction was not temporary. The EPA had first-hand knowledge of the substandard conditions of New Union's program for years—not merely beginning January 5, 2009, when CARE filed its petition. Thus, the passage of an entire year with no action by the EPA on an issue it knew so deeply about for many years, is not merely temporary, and instead marks the consummation of its decisionmaking process. Moreover, the EPA's failure to notify CARE of the receipt or status of its petition substantiates the argument that the EPA's inaction was not temporary. Because the EPA issues letters of status on petitions, the EPA failure to communicate suggests that its inaction was not temporary.

The EPA's failure to act meets the second part of the *Bennett* finality test because legal consequences flow from the EPA's failure to act. By failing to act and making a constructive denial, which constitutes final agency action, the EPA made a binding determination as to the adequacy of state hazardous waste programs. This determination has a direct consequence on the public because it allows a substandard hazardous waste program to continue. By allowing the program to continue, the environment and public health are at risk of physiological effects resulting from the exposure to hazardous waste. Unlike *Chemical Manufacturers Association*), the EPA's failure to act had an independent legal effect: the inaction resulted in the tacit approval of New Union's inadequate hazardous waste program.

The EPA's failure to act on CARE's petition is not in conflict with *SUWA.* Despite contrary ultimate results, the EPA's failure to act qualifies as a discrete and circumscribed action, just like the BLM's failure to act.

C. Judicial Review is Not Precluded

Judicial review is the rule, not the exception. The APA § 701(a) requires that judicial review apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion." 5 U.S.C. § 701(a) (2006). "[J]udicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated." *Barlow v Collins,* 397 US 159, 166-67 (1970).

Preclusion of judicial review is only permitted if it is properly demonstrated. Preclusion is "not to be lightly inferred." *Leedom v. Kyne,* 358 U.S. 184, 185 (1958). In *Abbott,* the Court held that Courts should not restrict judicial review except upon "a showing of clear and convincing evidence of a contrary legislative intent." *Abbott,* 387 U.S. at 141.

Congressional intent must exist in order to preclude judicial review. The *Abbott* Court held that judicial review can not be precluded unless there is a "persuasive reason to believe that such was the purpose of Congress." *Id.* at 140. Courts must determine whether Congress intended, expressly or impliedly, for judicial review to be barred. *Barlow*, 397 U.S. at 165.

If preclusion of judicial review "thwarts" the purpose of the underlying statute, it must not be allowed. *Texas & N.O.R. Co. v. Brotherhood of Ry & S.S. Clerks,* 281 U.S. 548 (1930); *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515 (1937). "The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized." *Barlow,* 397 U.S. at 200.

Here, the grounds necessary to preclude judicial review of the EPA's action are not met. There is no "clear and convincing evidence of a legislative intent" to restrict judicial review.

Abbot, 387 U.S. at 141. The RCRA's judicial review section makes no reference to preclusion of review. 42 U.S.C. § 6976 (2006). Furthermore, the RCRA explicitly calls for judicial review to be in accordance with the APA. 42 U.S.C. § 6976(a) (2006). Additionally, there is no "persuasive reason" to believe that Congress intended to preclude judicial review. *Abbott,* 387 U.S. at 140. Because the RCRA explicitly calls for judicial review, a proponent of preclusion of judicial review would have a large hurdle to overcome to prove a "persuasive reason." 42 U.S.C. § 6976 (2006).

Additionally, the purpose of the RCRA is to "promote the protection of health and environment and to conserve valuable material and energy resources." 42 U.S.C. § 6903(a) (2006). This purpose would be thwarted by precluding judicial review of a petition to withdraw approval of New Union's program. Precluding judicial review would allow the EPA not only to subvert its statutory duty to take action on the petition, but also to constructively approve the continuation of New Union's unsatisfactory hazardous waste program.

In sum, because the EPA's failure to act (resulting in a constructive denial and constructive determination) is subject to judicial review, this Court should lift the stay on C.A. No. 18-2010 and proceed with judicial review.

V. State Program Authorization Criteria Under RCRA

The RCRA statute allows states to obtain authorization of a state hazardous waste program that serves to "administer and enforce" the regulations set forth in the RCRA. 42 U.S.C. § 6926 (b)(2006). To obtain authorization for a state program under the RCRA, the program must be: fully equivalent to the federal program (42 U.S.C. § 6929 (b) (2006)), no less stringent than the federal program (42 U.S.C. § 6929(b)), and consistent with the federal program.

Additionally, a state program cannot be approved if the program does not provide adequate enforcement of compliance with the criteria of authorization. *Hazardous Waste Treatment Council v. Reilly,* 938 F.2d 1390, 1392 (D.C. Cir. 1991).

A. The Requirement that the State Program is Equivalent to the Federal Program

Once a state program is authorized, it acts "in lieu of" the federal program, and thus the state must adhere to the same regulations as the federal program. 42 U.S.C. § 6926 (b) (2006). The statute requires that the state program control all hazardous waste that is outlined in the Identification and Listing of Hazardous Waste. 40 C.F.R. § 271.9 (2010). The program must identify and list the hazardous waste facilities under the state's jurisdiction. 40 C.F.R. § 261 (2010). The state program must comply with generator standards. 40 C.F.R. § 262 (2010). The state program must comply with transporter standards. 40 C.F.R. § 263 (2010).. The state program must comply with the hazardous water management facility regulations. 40 C.F.R. § 264-6 (2010). The state program must comply with permitting requirements. 40 C.F.R. § 270 (2010). The statute must inspect any facility that treats, stores, or disposes of hazardous waste at least every two years. 42 U.S.C. § 6927 (2006). The statute specifies that in cases where the state has an authorized hazardous waste program, the duty to carry out the biennial inspections of facilities falls on the state. *Id*. Finally, the state must provide a continuing program to compile, publish, and submit an inventory of hazardous waste facilities in the state. 42 U.S.C. § 6931 (2006).

B. Approval Must Be Withdrawn Because New Union's State Program is No Longer Equivalent to the Federal Program

Even at the outset of New Union's State Program in 1986, the program was on the cusp of the approval requirements. The EPA approved the program but also "noted that with less

resources the program might not be adequate." (Rec. doc. 4, p. 16). New Union's barely adequate resources have since depleted significantly (Rec. doc. 4 for 2009, p. 53), while the number of facilities that require attention in the State grows. (Rec. doc. 4 for 2009, p. 23).

Among the deficiencies of the program are decreases in employees, a backlog of permits, and inability to meet inspections requirements. In 1986, when it received State program approval, New Union had 50 dedicated employees: 15 permit writers, 15 inspectors, 3 laboratory technicians, 2 lawyers, and 15 administrators. (Rec. doc. for 2009, p. 52). According to a 2009 report, this has since dropped to 30 employees: 7 permit writers, 7 inspectors, 2 laboratory technicians, 1 lawyer, and 13 administrators. (Rec. doc. 4 for 2009, p. 52). This decrease in employees occurred amidst a background of 300 additional hazardous waste treatment, storage and disposal facilities. (Rec. doc. 1, p. 17). It is not as if this is a temporary situation. The Governor issued a hiring freeze on state employees (Rec. doc. 4 for 2009, p. 53). Further, the hiring freeze is expected to last for at least the next two years, and more state employees are forecasted to be fired, somewhere between 5 and 10%. (Rec. doc. 4 for 2009, p. 53).

The New Union State Program decreased its resources to a degree that drops it below the required criteria. The effect of the loss of the program's resources is that the program fails to "administer and govern" the regulations set forth in the RCRA. 42 U.S.C. § 6926 (b). The DEP's 2009 Annual Report to the EPA indicates that New Union could not inspect more than 10% of the state's hazardous waste treatment, storage and disposal facilities; 150 inspections in 2008 and about 150 in 2009. (Rec. doc. 4 for 2009, p. 22). It is clear from the numbers that New Union is not even close to the required inspection every two years for each hazardous waste facility. 42 U.S.C. § 6927 (2006). This Court cannot find the state program equivalent because it fails to meet inspection requirements due to a lack of available employees and resources.

C. The Requirement that the State Program is No Less Stringent than the Federal Program

The RCRA requires that any state authorized hazardous waste program must be no less stringent that the regulations provided for in the statute. 42 U.S.C. § 6929 (2006). Further, the statute states that there is no prohibition on a state to create a program that is any more stringent than the regulations provided for in the RCRA. 42 U.S.C. § 6929. These two elements taken together effectively stipulate that the RCRA requirements are a floor and not a ceiling for any state authorized program of hazardous waste. *Old Bridge Chemicals, Inc. v. New Jersey Dep't of Envtl. Prot.,* 965 F.2d 1287 (3d Cir. 1992). Standards that are more stringent are expressly permitted in U.S.C. § 6929. *LaFarge Corp. v. Campbell,* 813 F. Supp. 501 (W.D. Tex. 1993). While the RCRA allows for a state to increase the amount of regulation and compliance standards and requirements that a state program implements, it does not allow for a state to continue a program that dips below the minimum requirements set forth in the statute. So, the RCRA is the minimum of regulation and a state is free to expand upon it, but not lessen the requirements.

D. Approval Must Be Withdrawn Because The Environmental Regulatory Adjustment Act Drops New Union's Program Below the Regulatory Threshold

New Union's 2000 Environmental Regulatory Adjustment Act (the "ERAA") removed the regulation of railroads and transferred responsibility for "all standard setting, inspection, and enforcement authorities of DEP under any and all state environmental statutes to the [New Union Railroad] Commission". (Rec. doc. 4 for 2000, pp. 103-105). Additionally, the ERAA removed criminal sanctions for violations of environmental statutes. (Rec. doc. 4 for 2000, pp. 103-105).

This revision to the sites regulated under the state approved program cannot be made without approval from the EPA. According to 40 C.F.R. § 271.21 (2010), all program revisions

require approval from the EPA. States with approved programs shall notify the EPA when they propose to transfer all or part of any program from the approved State agency to another State agency, and shall identify any new division of responsibilities among the agencies involved. 40 C.F.R. § 271.21 (2010). New Union was under an obligation to propose this revision to the EPA, open the proposed modification for public comment, notify interested parties of the proposed change, and indicate whether the EPA is likely to approve or disapprove the change. 40 C.F.R. § 271.21 (b)(4)(i-iii) (2010). Nothing in the record suggests that New Union followed this protocol when it decided to transfer all of the duties associated with the regulation of railroads to the New Union Railroad Commission. The failure to follow this protocol, and the transfer of the regulation of railroads leaves New Union's state approved program less stringent than the RCRA mandates. Because New Union's deregulation of railroads leaves the state program less stringent than the federal program, the EPA's approval must be withdrawn.

E. The Requirement that the State Program is Consistent with the Federal Program

To deem a state program inconsistent with the relevant federal program, the EPA will consider three elements. First, the EPA will examine whether the state program restricts, impedes, or bans interstate movement of waste. 40 C.F.R. § 271.4(a) (2010). Second, the EPA will examine whether the state program's regulation has a basis in protection of human health or the environment and whether it acts to prohibit the treatment, storage, and disposal of hazardous waste. 40 C.F.R. § 271.4(b) (2010). Finally, the EPA will examine whether the state program's system meets the federal requirements, discussed above. 40 C.F.R. § 271.4(c) (2010). If a state program is found to be inconsistent under any of these elements, the EPA may withdraw the approval of the program.

F. Approval Must Be Withdrawn Because New Union's State Program is Inconsistent with the Federal Program

New Union's program is no longer consistent with the federal program because it does not meet the three elements of consistency. First, the state program now "restricts" and "impedes" the movement of waste as a result of the ERAA treatment of Pollutant X. The ERAA states that transportation of Pollutant X is allowed only if it is "direct and fast... with no stops within the state except for emergencies and necessary refueling." (Rec. doc. 4 for 2000, pp. 105-107). This regulation on transportation of Pollutant X "impedes" the ability of other states to transport interstate waste. Second, the ERAA acts to "prohibit the treatment, storage, and disposal" of Pollutant X. The ERAA effectively phases out the ability of any facilities in the state to generate Pollutant X, calling on current facilities to "minimize" Pollutant X over a time period and refusing to issue permits to any facility for the "treatment or storage" of Pollutant X. (Rec. doc. 4 for 2000, pp. 105-107). Finally, both of these inconsistencies of New Union's state program in the treatment of Pollutant X pose commerce clause issues. Congress did not intend to authorize a state to discriminate against waste generated outside that state. *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001) (*interpreting* 42 U.S.C. §§ 6941-6949a, 6941, 6942(c)). Further, "nothing in RCRA or any other federal statute comes close to authorizing different treatment of out-of-state waste." *In re Se. Arkansas Landfill, Inc.*, 981 F.2d 372, 377 (8th Cir. 1992).

VI. Withdrawal of New Union's State Program is Necessary

Undoubtedly, withdrawal of an approved state program is a large step, not the least of which is due to the fact that withdrawal requires the federal government to step in and take over the program. 42 U.S.C. § 6926(e) (2006). *See Waste Mgmt. of Illinois, Inc. v. United States Envtl. Prot. Agency,* 714 F. Supp. 340, 341 (N.D. Ill. 1989). However, in these exigent

circumstances, the Court must find that New Union's program is no longer sufficient to meet the regulations set forth in the RCRA.

New Union has all but stated that the state program is not adequate to proceed under the required regulations. The Governor of New Union publicly stated that he was going to proceed with the state employee cuts in sectors in which federal employees could perform. (Rec. doc. 6, June 6, 2009) This statement shows a clear understanding that at some point, the state program could be taken over by the EPA, and the Governor is content to let this happen as he has cut funding and resources to such an extreme.

Lack of proper state regulation combined with a lack of proper process on the part of the EPA, requires that this Court find that New Union's state program approval must be withdrawn.

CONCLUSION

The EPA improperly failed to act on CARE's petition and this failure is subject to judicial review. Judicial review will reveal that the only appropriate step is to compel the EPA to withdraw approval of New Union's hazardous waste regulatory program.

Respectfully Submitted,

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Counsel for the Citizen Advocates for Regulation and the Environment, Inc.