Team Number: 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 18-2010

C.A. No. 400-2010

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 OF APPELLEE
LISA JACKSON, ADMINISTRATOR, U.S. Environmental Protection Agency

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STATEMENT OF JURISDICTION

The district court's grant of summary judgment is a final order, which this Court has jurisdiction over pursuant to 28 U.S.C. § 1291 (2006), which provides, "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the district court properly find that it did not have jurisdiction under 42 U.S.C. § 6972(a)(2)(2006) to order the Administrator of the Environmental Protection Agency (hereinafter "EPA") to act on Citizen Advocates for Regulation and the Environment, Inc.'s (hereinafter "CARE") 42 U.S.C. § 6974 petition for revocation of the EPA's approval of New Union's hazardous waste program when program approval meets the criteria of a rule under the Administrative Procedure Act (hereinafter "APA")and § 6974 does not always mandate a response to § 6974 petitions?

II. Did the district court properly find that it did not have jurisdiction under 28 U.S.C. § 1331 to order the EPA to act on CARE's 5 U.S.C. § 553(e)(2006) petition for revocation of the EPA's approval of New Union's hazardous waste program when RCRA provides specific authority for filing hazardous waste petitions and that the APA does not mandate a response to petitions?

III. Did the district court properly find that it did not have jurisdiction under 42 U.S.C. § 6976(b) to review the EPA's failure to act on CARE's petition that it initiate withdrawal proceedings as to New Union's hazardous waste program when the constructive submission theory is only available where statutes provide strict deadlines and RCRA explicitly provides the EPA with considerable discretion to respond?

IV. Assuming that jurisdiction exists, should this court review the EPA's "constructive" actions or remand these proceedings to the district court to order the EPA to take action on CARE's petition when the doctrine of primary jurisdiction controls and there is no agency record upon which the district court may base its decision?

V. Under 42 U.S.C. § 6926, must the EPA withdraw its approval of New Union's program when withdrawal is procedurally distinct from approval, the language of RCRA clearly indicates that the EPA has discretion to initiate withdrawal proceedings, and New Union can adequately enforce the statute?

VI. Under § 6926, must the EPA withdraw its approval of New Union's program when the language of RCRA clearly indicates that the EPA has discretion to retain approval and all facilities are still capable of being concurrently regulated through the state program and federal oversight?

VII. Under § 6926, must the EPA withdraw its approval of New Union's program when the constitutionality of the ERAA cannot effectively be challenged, the program is consistent with other programs, and the program is equivalent to the federal program?

STATEMENT OF THE CASE

(1) Procedural History

On January 5, 2009, CARE filed a petition with the EPA under § 7004 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6974 (hereinafter "RCRA"), and under § 553(e) of the APA, 5 U.S.C. § 553(e). CARE's petition requested that the EPA commence proceedings to withdraw its initial approval from the State of New Union's (hereinafter "New Union") hazardous waste regulatory program. (R at 4.) The EPA has not taken action on this petition.

On January 4, 2010, CARE filed an action with the United States District Court for the District of New Union under RCRA § 7002(a)(2), 42 U.S.C. § 6972. Id.In this action, CARE sought an injunction requiring the EPA to act on its January 5, 2009 petition, or judicial review of the EPA's constructive denial of the petition and the EPA's constructive determination that New Union's hazardous waste program meets the criteria for approval. Id.In conjunction with this cause of action, CARE filed a petition for review with the Court of Appeals, C.A. No. 18-2010. Id. at 5. New Union filed a motion to intervene in the cause of action, which was granted by the district court. Id. at 4.CARE and New Union both filed cross motions for summary judgment in the cause of action. Id.New Union also filed a motion to intervene in the petition for review, and the EPA filed a motion to stay any proceeding on the petition for review, both of which were granted by the Court of Appeals. Id. at 5. The district court below granted New Union's motion for summary judgment for lack of jurisdiction.Id. at 4. This appeal followed.

(2) Statement of the Facts

The EPA initially approved New Union's state hazardous waste regulatory program in 1986, utilizing notice and comment procedures and publishing its promulgation in 40 C.F.R. § 272.Id. at 6.At the time of the program's approval, New Union had adequate resources "to fully administer and enforce the program." (Rec. doc. 2, p. 1) Declining resources for the program have been noted in the annual reports that New Union has filed with the EPA since 2009, while the number of treatment, storage, and disposal facilities (hereinafter "TSDF") and permit applications have increased. (Rec. doc. 4 for 2009, pp. 20, 23, 50, 52) The EPA has agreed to aid New Union DEPby performing a comparable number of inspections of TSDFs to what the DEP was able to inspect in 2009, and by promising to inspect a comparable amount of TSDFs again this year. (Rec. doc. 4 for 2009, pp. 22 – 23) According to the 2009 DEP Annual Report to the

EPA, the DEP took six enforcement actions against violators during the previous year.The EPA also took six enforcement actions against violators within New Union, and six citizen suits were filed by environmental groups during the past year for violations of RCRA. (Rec. doc. 4 for 2009, pp. 24 – 25)

In 2000, the New Union legislature enacted the 2000 Environmental Regulatory Adjustment Act (hereinafter "ERAA"), thereby amending existing environmental legislation. The first amendment at issue is to the Railroad Regulation Act (hereinafter "RRA"), and transferred "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the [New Union Railroad] Commission." (R at12.)The second amendment at issue regards the treatment of Pollutant X. First, facilities must submit plans for minimizing the generation of Pollutant X to the DEP every year by December 31. Second, the DEP is not to issue permits for the treatment, storage or disposal of Pollutant X, unless it is being temporarily stored for less than 120 days while awaiting transportation to a facility outside of New Union. Third, "any person may transport Pollutant X through or out of the state to a facility designed to deal with Pollutant X," provided that the transport take place as quickly as possible and that there are "no stops within [New Union] except for emergencies and necessary refueling." (Rec. doc. 4 for 2000, p. 105 – 107)

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's decision to grant New Union's motion for summary judgment, in which it decided that the approval of New Union's hazardous waste program was an order. The approval is a rule because it has particular applicability and the legal effect of binding the agency and other parties. It also fits the criteria of a rule-making as outlined by 5 U.S.C. § 551(4); therefore, CARE can petition for its repeal under 42 U.S.C. § 6974 of

RCRA. However, 42 U.S.C. § 6972(a)(2) of RCRA only provides the court with jurisdiction to force the EPA to comply with mandatory duties. Because the legislative history of RCRA does not indicate that a mandatory duty to respond to every petition exists, and because the weight of legal authority heavily favors committing such decisions to agency discretion, the language of the statute should be interpreted as granting discretion to the EPA.

This Court should affirm the district court's decision to grant New Union's motion for summary judgment, in which it decided that there are no grounds for granting federal jurisdiction under 28 U.S.C. § 1331. Specific statutes control where more general ones are enacted; therefore, RCRA § 7004 is the exclusive means for obtaining judicial review with respect to petitions for withdrawing the approval of New Union's hazardous waste program. In addition, 5 U.S.C. § 553 of the APA does not require that an agency respond to every rule making petition submitted.

The constructive submission theory is not available to confer jurisdiction upon this Court to review the EPA's inaction on CARE's petition. The EPA cannot be deemed to have "constructively" denied CARE's petition or reapproved New Union's hazardous waste program because Congress did not provide mandatory deadlines for the EPA to respond to submitted petitions. Rather, RCRA has been imbued with administrative discretion and allows the EPA to respond within a reasonable time. Due to the significance of resources that the EPA must commit to initiating a withdrawal proceeding, the sheer volume of welfare-related petitions before the agency, and the broad deference usually accorded to such agency decisions, the EPA's delay in responding to CARE's petition cannot be deemed unreasonable.

Assuming this court has jurisdiction, it should remand to the district court to order the EPA to take action on CARE's petition. Due to the complexity of the withdrawal decision, the

agency's expertise, and its unique ability to further RCRA's goals, Congress properly placed original jurisdiction in the hands of the EPA. In order for the court to properly review the agency's actions or lack thereof, the APA requires that a record be developed by the EPA.

Once authorization has been obtained, a failure to meet approval criteria is not grounds for withdrawal of a state's hazardous waste program. The Administrator has discretion to determine whether resources are inadequate and must follow the procedure indicated in 42 U.S.C. § 6926(e), which includes providing an opportunity for corrective action. The availability of other remedies indicates that the EPA has options other than withdrawal. The EPA can reasonably determine that present circumstances do not demand a finding that New Union's program is inadequate to enforce hazardous waste standards.

No matter what arises, the language of RCRA clearly indicates that the Administrator has discretion to institute withdrawal proceedings and must follow a specific procedure, which allows the state to correct any deficiencies before withdraw becomes mandatory. The requirements of RCRA are aimed at regulating the effects of hazardous waste facilities; therefore, a state can deviate from the federal method of regulating treatment, storage, and disposal facilities (TSDF) without triggering withdrawal. Even if a state program could not effectively regulate the effects of such facilities, 42 U.S.C. § 6918 gives the EPA authority to ensure that individual TSDFs are compliant without requiring withdrawal of a state program.

The EPA does not have authority to consider constitutional issues and the district court has not yet considered whether the ERAA violates the Commerce Clause; therefore, this court does not have jurisdiction to consider the issue. Considerations of consistency and equivalency are not relevant to the withdrawal process. If consistency were relevant, the ERAA is not likely to have a significant adverse affect on the flow of hazardous waste into the state; it has a basis in

human health and environmental protection; it does not act as a complete prohibition on the treatment, storage or disposal of hazardous waste within New Union; and it does not affect the program's manifest requirements as originally approved by the EPA. If equivalency were relevant, the ERAA is not less strict than the federal requirements and it achieves goals established under RCRA.

STANDARD OF REVIEW

A determination of subject matter jurisdiction is reviewed de novo. Tex. Disposal Sys.Landfill v. EPA, 377 Fed.Appx 406 (5th Cir. 2010).Discretionary agency action is reviewed under an arbitrary and capricious standard. 5 U.S.C. § 706 (2006).

ARGUMENT

I. ALTHOUGH CARE'S PETITION WAS PROPERLY FILED UNDER 42 U.S.C. 6974, BECAUSE THIS PROVISION DOES NOT MANDATE THAT THE EPA ACT ON SAID PETITION, THE DISTRICT COURT HAS NO JURISDICTION UNDER 42 U.S.C. 6972(a)(2) TO ORDER THE AGENCY TO ACT.

A. The EPA's approval of Respondent New Union's hazardous waste regulatory program is a ruleunder 5 U.S.C. § 551(4).

42 U.S.C. § 6974(a) states that "(a)ny person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under this chapter." "Regulation" may be interpreted "under an analogous judicial review provision as 'a statement that has general applicability and that has the legal effect of binding the agency or other parties.'" Fla. Power & Light Co. v. EPA, 145 F.3d 1414, 1418 (D.C. Cir. 1998) (quoting Kennecott Utah Copper Corp. v. DOI, 88 F.3d 1191, 1207 (D.C. Cir. 1996)). Whether agency action constitutes a "regulation" or a "rule" is not specifically addressed in RCRA; however, the "question of whether an agency document is a final 'regulation... or requirement' under RCRA is substantially similar to the question of whether it is a legislative rule under the APA." Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 226 (D.C. Cir. 2007).

A "rule" is defined by the APA as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4) (2006) (emphasis added). A rule may be applicable in general situations ("statements of policy") or in particular situations ("substantive rules"). Id.§ 553(d).It has been found that, "(t)o determine whether a regulatory action constitutes promulgation of a regulation (pursuant to the APA definition), we look to three factors: (1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." Molycorp, Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999).

1. The EPA declared its initial approval of New Union's hazardous waste program to be a "rule."

"An agency's characterization of an administrative action . . . may provide guidance as to whether a pronouncement is a regulation." Am. Portland Cement Alliance v. EPA, 101 F.3d 772, 776 (D.C. Cir. 1996). How an agency characterizes its action must be taken into serious consideration by the court when it makes the determination of whether the Agency action in question is in fact a regulation. SeeNat'lAss'n of Broad. v. FCC, 569 F.3d 416, 269 (D.C. Cir. 2009) (holding that when the commission "characterized its announcement as a 'clarification,'" the action at issue was a general statement policy rather than a regulation). Since the EPA has stated that its initial approval of New Union's programconstitutes a rule-making, the court must consider this characterization when deciding if the program approval is a "rule" pursuant to APA § 551(4).

2. The EPA published its initial approval of New Union's state program in the Code of Federal Regulations.

The APA outlines a specific procedure in 5 U.S.C. § 553 that an agency must follow for its action to be considered a "rule making." Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).First, there must be publication of the proposed rule in the Federal Register. 5 U.S.C. § 553(b) & (d).Such publication acts as a clear demarcation, separating regulations from general statements of policy.Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986). Second, the agency must provide for a "notice and comment" period, which gives interested persons an opportunity to participate in the rule making through the submission of data, opinions, or arguments. 5 U.S.C. § 553(c).When it initially approved New Union's program, the EPA utilized these steps as required by § 553 to promulgate a rule. The court must consider this fact when deciding if the program approval is a "rule" pursuant to APA § 551(4).

3. The EPA's initial approval of New Union's program has binding effect on private parties.

The defining characteristic of a rule or regulation is "whether the agency action binds private parties or the agency itself with the 'force of law.'" General Electric Co. v. EPA, 290 F.3d 377, 382 (D.C. Cir. 2002). An agency action may appear "on its face to be binding, or [a]s applied by the agency in a way that indicates it is binding . . . the mandatory language of a document alone can be sufficient to render it binding." Id. at 383. Further, "[a] document will have practical binding effect before it is actually applied if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as ... denial of an application." Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Find the Public?, 41 Duke L.J. 1311, 1338–39 (1992).

42 U.S.C. § 6926(d) instructs that "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the *same force and effect as action taken by the Administrator* under this subchapter" (emphasis added). The language of this provision indicates that RCRA authorization, on its face, requires private parties to follow state hazardous waste laws as they would a federally-created law.Private parties dealing with hazardous wastes submit their permit applications directly to the state, indicating their reasonable belief that states are authorized to issue, deny or withdraw permits. By creating "adverse consequence" for any failure to comply with state standards, RCRA effectively binds by "force of law" any private parties who engage in hazardous waste activities within an authorized state. General Electric Co., 290 F.3d at 382; Anthony, at 1338–39.

With its initial approval of New Union's hazardous waste program, the EPA has stated that its action is a rule, has followed APA procedural requirements, and has bound private parties to state regulations with the force of law. Thus, the EPA's approval of New Union's program constitutes a "rule" as outlined in 5 U.S.C. § 551(4), and CARE properly petitioned for its repeal under § 6974 of RCRA.

B. Although CARE properly petitioned for repeal of a rule, the language and legislative history of § 6974 do not necessarily indicate that the EPA has a mandatory duty to respond to every petition.

42 U.S.C. § 6972(a) of RCRA states that "any person may commence a civil action on his own behalf . . . (2) against the Administrator where there is alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." Although the district court has jurisdiction to order the EPA to act upon a non-discretionary duty under § 6972, the duty created under § 6974 should be considered discretionary.

Section 6974 of RCRA states that "[w]ithin a reasonable time following receipt of such petition [to repeal a regulation], the Administrator *shall* take action with respect to such petition . . ." (emphasis added). Although the word "shall" commonly denotes a mandatory duty or action, "legal writers sometimes use, or misuse 'shall' to mean 'should,' 'will,' or even 'may.'" Gutierrez de Martinez v. Lamagno, 515 U.S. 417 n.9 (1995). According to the Dictionary of Modern Legal Usage, "courts in virtually every English-speaking jurisdiction have held – by necessity – that shall means may in some contexts, and vice versa." Id.(quoting, B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995))."The use of 'shall' is not conclusive. Particularly when used in a statute that prospectively affects government action, 'shall' is sometimes the equivalent of 'may.'" Sierra Club v. Whitman, 268 F.3d 898, 904 (9th Cir. 2001).In order to determine whether the word "shall" is mandatory or discretionary, a court must examine "whether the prescribed mode of action is of the essence of the thing to be accomplished." LeConche v. Elligers, 579 A.2d 1, 6 (Conn. 1990).To arrive at the "essence" of the action depends on the legislative history and objectives of the statute. Id.; Sierra Club, 268 F.3d at 904.

When inquiring into the legislative history of the statute, it becomes clear that the objective of § 6974 is the assurance of public input during the rule-making process. H.R. Rep. No. 94-1491(I)(1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6264.Allowing the public to petition for new regulations ensures that there will be "sufficient protection from both overzealous or lax regulation." Id. There is no mention in the legislative history that the EPA is required to act on these petitions; there is only the assurance the EPA will allow the petitions to be made. Based on the sheer multitude of petitions that the EPA receives, Congress could not have intended and/ or required that the EPA act on every petition filed pursuant to § 6974 – it

would heavily tax the available resources of the agency. The United States Supreme Court has recognized that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985).The agency charged with administering a statute is in the best position to know:

> whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

Id.(emphasis added). The EPA is in the best position to know how to utilize its finances, time, and personnel in choosing whether or not to respond to petitions filed under RCRA § 7004. Because the legislative history of RCRA does not indicate that the objective of public participation can only be met through agency response to petitions, such action is not "the essence of the thing to be accomplished." LeConche, 579 A.2d at 6. This objective can still be served, while reducing the burden placed on the EPA's resources, if the language "shall" is construed to mean "should" or "may." The inclusion of "shall" does not necessarily force agency action on petitions filed pursuant to § 6974. Although § 6972(a)(2) provides a court with jurisdictionto force the agency to act on mandatory duties, this particular decision by the EPA not to act on CARE's petition to repeal New Union's program authorization should be considered discretionary. The court below erred in granting New Union's motion for summary judgment on this issue.

II. THE DISTRICT COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1331 TO ORDER THE EPA TO ACT ON CARE'S PETITION BECAUSE THERE IS A SPECIFIC STATUTE UNDER RCRA WHICH CONTROLS AND APA 553 § (e) DOES NOT COMPEL AGENCY ACTION ON PETITIONS.

A. The specific provisions of RCRA § 6974rather than the general provisions of APA § 553 govern this issue.

Federal question jurisdiction under 28 U.S.C. § 1331 is not available in this case.The APA broadly states that "(e)ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). However, "the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions." Califano v. Sanders, 430 U.S. 99, 105 (1977). Moreover, "[i]f . . . a special statutory review procedure [exists], it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies." Media Access Project v. FCC, 883 F.2d. 1063, 1067 (D.C.Cir.1989).The United States Supreme Court has stated that "(w)here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Morton v. Mancari, 417 U.S. 535, 550–51 (1974) (emphasis added).As directed by APA § 553(e), RCRA specifically allows for an interested person to petition the Administrator for "the promulgation, amendment, or repeal of any regulation." 5 U.S.C. § 6974(a).Although §6974 was enacted almost a decade after APA § 553, the specific statute cannot be preempted by the general statute, regardless of "priority of enactment." Morton at 550–51.Because RCRA § 6974 provides "special statutory review procedure" with respect to petitions for withdrawing approval of state hazardous waste programs, it must be "the exclusive means of obtaining judicial review" in this case, and the district court was correct in granting New Union's motion for summary judgment. Media Access Project at 1067.

B. Even if RCRA § 6974 did not provide the sole grounds for jurisdiction, APA § 553(e) still does not compel the EPA to act on CARE's petition.

When evaluating APA § 553, the D.C. Circuit Court of Appeals found that it is "clear from the legislative history that Congress did not intend to compel an agency to undertake

rulemaking merely because a petition has been filed." WWHT, Inc. v. FCC, 656 F.2d 807, 813 (1981).The Senate Judiciary Committee report accompanying § 553 "emphasized that the mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings." Id. As the WWHT, Inc.court found, according to the Attorney General's Manual on the APA, this provision "simply requires the reception and consideration of petitions, but does not compel an agency to undertake any rule making procedure merely because a petition is filed." Id. at 814.Because the APA does not compel agency action on CARE's § 553(e) petition, and because there has been no action on the petition by the EPA, there are no grounds for granting federal jurisdiction under 28 U.S.C. § 1331 to the district court. Therefore, this court should affirm the district court's grant of summary judgment to New Union.

III. THE EPA'S PRESENT FAILURE TO ADDRESS THE PETITION SUBMITTED BY APPELLANTS IS NOT A CONSTRUCTIVE ACTION WHICH WOULD CONFER JURISDICTION UNDER 42 U.S.C. § 6976(b).

The EPA has not denied CARE's petition for withdrawal of approval of New Union's RCRA program. The justifications asserted by courts when applying the ever-narrowing "constructive submission" doctrine do not apply in response to rule-making petitions or inaction as to state RCRA programs. Even if the doctrine did apply in this case, there is no basis for review under 42 U.S.C. § 6976(b) because the EPA's delay in responding to CARE's petition is not unreasonable and, therefore, does not constitute a "constructive" action.

A. The "constructive submission" theory does not apply in this case.

The "constructive submission" theory is inapplicable to determinations under both 42 U.S.C. § 6974, regarding rulemaking petitions, and§ 6926, regarding withdrawal procedures of stateapproved programs. This theory was first discussed by the Seventh Circuit in Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984), in the context of a state's failure to submit Total

Maximum Daily Loads (TMDL) under the Clean Water Act (CWA). The state in question had 180 days after December 28, 1978 to submit TMDLs to the EPA. Id. at 996. In fabricating the "constructive submission" theory, the court considered the strict statutory deadlines of the CWA which indicated Congress' intent that the TMDL process be relatively swift. Id. at 998.Under RCRA, there are no strict statutory deadlines to indicate that Congress anticipated swift action by the EPA in responding to petitions and instituting withdrawal procedures.See, e.g., H.R. Rep. No. 94-19491 (1976); S. Rep. No. 96-172 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019. Further, unlike a state's submission of TMDLs under the CWA, the language of RCRA gives the Administratorclear discretion with regard to whether it will address § 6974 petitions and whether withdrawal of a state program is necessary under § 6926.

B. The EPA has not constructively denied CARE's petition.

42 U.S.C. § 6974(a) states that the Administrator need only act "within a reasonable time following receipt" of a petition to repeal a regulation or withdraw authorization. In evaluating unreasonable delay, particularly in the context of environmental statutes, courts generally give deference to an agency in matters regarding the allocation of resources to higher or competing priorities and the effect of agency delay on human health and welfare.

Because an agency's ability to "allocate its resources among competing priorities is at the core of [its] policy making discretion," courts should gauge their deference according to the importance of resource allocation to the agency's decision. Eric Biber, Two Sides of the Same Coin, 26 Va. Envtl. L.J. 461, 462, 467 (2008). In Mashpee Wampanoag Tribal Council, Inc. v. Norton, the D.C. Circuit held that in determining whether the Bureau of Indian Affairs (hereinafter "BIA") had unreasonably delayed their response to the plaintiff's petition for recognition as an Indian tribe, a court should look at "the complexity of task at hand, the

significance (and permanence) of the outcome, and the resources available to the agency." 336 F.3d 1094, 1102 (D.C. Cir. 2003). There were ten petitions already filed with the BIA when the plaintiff's filed their petition, each requiring evaluation against "a demanding set of regulatory criteria." Id. at 1100. The court cited In re Barr Laboratories, Inc., 930 F.2d 72, 75 (D.C. Cir. 1991), a case in which the delay was reasonable because ordering the agency to act on the petition would merely put the plaintiffs ahead of others who were also waiting for agency action on their petition. The court noted that "the agency is in a unique . . . position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." Id. at 76.

Because RCRA does not set mandatory deadlines for response to § 6974 petitions, and because determining when to address such petitions involves very important decisions concerning resource allocation within the agency, a great deal of deference should be given to the EPA. Much like Mashpee, addressing CARE's petition will involve a highly complex task both procedurally and substantively. See 40 CFR § 271.23 (2009); 42 U.S.C. §§ 6943, 6924, 6925. Along with being highly complex and taxing upon the EPA's resources, consideration of the petition could have an outcome that will be very significant and fairly permanent. If the Administrator decides to withdraw New Union's program, the agency will have to take on the huge task of developing and implementing a hazardous waste program for the state. Id. § 6926(e).In order to regain approval, New Union will have to develop a satisfactory program, give notice, submit to a public hearing, and gain approval of the Administrator. Id.This process could take a significant amount of time, meaning that the agency's substitute RCRA program will be fairly permanent.

Also, like Mashpee, CARE's petition is one of many petitions before the EPA regarding withdrawal of state approved environmental programs. For example, Alabama, Iowa, Indiana, Alaska, Illinois, and Maryland all have petitions pending before the agency in regards to state NPDES programs under the Clean Water Act. InsideEPA.com, Activists' Petitions Forcing Stricter EPA Oversight of State Water Rules, Feb. 2, 2010, available at www.alabamarivers.org/press-room (enter "InsideEPA.com" in the search box). Petitions regarding withdrawal of State Implementation Plans under the Clean Air Act and state programs under RCRA are also competing for attention from the agency. See, e.g.,Wisconsin; Approval and Promulgation of Air Quality Implementations Plans, 40 C.F.R. § 52 (2009).Forcing the EPA to spend its time and resources to address CARE's petition would simply sublimate equally important matters pending before the agency.

When balancing deference to agency decisions against prejudice to the complaining party, courts consider the effect of agency delay on human health and welfare. Beyond Pesticides v. Johnson, 407 F.Supp.2d 38, 40 (D.D.C. 2005).However, this consideration alone is not dispositive where "virtually the entire [EPA] docket . . . involves issues of this type." Id. In Beyond Pesticides, the court found that the EPA's four year delay in addressing the plaintiff's petition for suspension of certain pesticides was reasonable.Id. at 41.While petitions regarding the suitability of a state hazardous waste program do implicate important issues regarding human health, the agency should be given much deference by the court in balancing the pace at which it addresses issues pending before it. It is the EPA, not the courts, which has the expertise to acutely comprehend and balance complex issues regarding human health and the environment. Judicial interference with the EPA's comprehensive strategic plan and regulatory agenda would undermine a scheme designed to address the pressing issues before the agency in the most

efficient way possible. See EPA, Spring 2010 Semiannual Regulatory Agenda (2010), available at www.reginfo.gov; EPA, FY 2011–1025 EPA Strategic Plan (2010), available at www.epa.gov (type "EPA strategic plan" into the search box; click "search"; follow the first link).

Considering the substantial deference owed to the EPA in allocating its resources and the fact that every issue before the agency touches human health, the agency has not unreasonably delayed its response to the Appellant's petition. Since there has been no "constructive" denial of CARE's petition, nor has the EPA has not constructively determined that New Union's program continues to meet RCRA's criteria for program approval, there is no basis for jurisdiction under § 6976(b).

IV. IF THE COURT DETERMINES THAT IT HAS JURISDICTION, IT SHOULD REMAND TO THE LOWER COURT WITH DIRECTION TO ORDER THE EPA TO TAKE ACTION ON CARE'S PETITION.

Federal courts consistently avoid directing agency action when Congress has placed the power to make a particular decision in the hands of the agency. See, e.g.,In re Am. Rivers and Idaho Rivers United, 372 F.3d 413, 420 (D.C. Cir. 2004) (holding that a federal agency had unreasonably delayed its response to the appellant's petition and remanding to the agency with direction to issue a judicially reviewable response); Norton v. SUWA, 542 U.S. 55, 65–66 (2004) ("[W]hen an agency is compelled by law to act . . . , but the manner of its action is left to [its] discretion, a court . . . has no power to specify what the action must be... The principal purpose . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.") In Marbury v. Madison, Justice Marshall wrote:

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political, or which are, by Constitution and laws, submitted to the executive, can never be made in this court."

5 U.S. 137, 170 (1803).Congress placed original jurisdiction for withdrawal of state RCRA plans with the EPA and gave the Administrator the discretion to make the decision. 42 U.S.C. § 6926.

A. The Court should exercise the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction is used by courts to avoid substituting judicial policy determinations for those of an agency where both the court and the agency have concurrent jurisdiction over the matter and "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." U.S. v. W. Pac. R. Co., 352 U.S. 59, 63–64 (1956). In deciding whether to apply this doctrine, a court should consider the necessity of the agency's "expert and specialized knowledge" and whether use of the doctrine would further the purpose of the statute. Id. at 64.

First, this court must consider that expert and specialized knowledge is absolutely necessary when deciding to approve or withdraw state hazardous waste programs. Making these determinations requires a thorough understanding of the general and particular regulations developed by both state and federal authorities. 40 C.F.R. §§ 271.1 et seq. (2009). The EPA is in better position to evaluate state programs because it has promulgated many of these regulations. It has also considered the purposes of RCRA and issued legally binding decisions interpreting ambiguities in the statute. This expertise and special knowledge weighs heavily in favor of allowing the EPA make an initial determination as to CARE's petition.

Second, this Court must also consider whether the doctrine of primary jurisdiction will further the purposes of the statute. The purposes of RCRA are more likely to be served by exercising the primary jurisdiction doctrine in this case. One of the goals of RCRA is that the Administrator will "give high priority to assisting and cooperating with States in obtaining full authorization of State programs." 42 U.S.C. § 6902(a)(7). The legislature also sought to achieve

uniformity among state programs through a single source of approval and oversight.H.R. Rep. No. 94-1491, pt. 1, at 30("(1)[I]t provides uniformity among the states . . . (2) it provides industry and commercial establishments that generate [hazardous]wastes uniformity among states . . . .").If this Court requires the EPA to institute withdrawal proceedings on the basis of CARE's petition, the Administrator will be prevented from "cooperating" with New Union by imposing one of the less severe penalties available under the statute. Further, a judicial order requiring withdrawal proceedings will set a dangerous precedent, potentially resulting in varied state hazardous waste standards across the country. This result would be directly contrary to the legislative goal of uniformity under RCRA.

This Court does not know how the EPA, the government entity with expertise and specialized knowledge in hazardous waste management matters, would ultimately decide on CARE's petition after the proper procedures were followed. Because of the clear need for agency expertise in furtherance of the clearly stated goals of RCRA, this Court should apply the doctrine of primary jurisdiction and remand the issue of withdrawal back to the EPA.

B. The court cannot review the "constructive" denial of CARE's petitionbecause there is an inadequate record on which to base a decision.

When reviewing an administrative action, the court is limited to the agency record and the grounds stated by the agency for the action. Dunlop v. Bachowski, 421 U.S. 560, 571 (1975) ("[S]ince the statute relies upon the special knowledge and discretion of the Secretary . . . the reviewing court is not authorized to substitute its judgment for the decision of the Secretary . . . [T]herefore, to enable the reviewing court intelligently to review the Secretary's determination, the Secretary must provide . . . a statement of reasons supporting his determination."); S.E.C. v. Chenery, Corp., 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted by [sic] clearly disclosed

and adequately sustained.").Further, review by this court "shall be in accordance with sections 701 through 706 of Title 5." 42 U.S.C. § 6976(b).Title 5 provides that judicial review shall be limited to the "whole record or those parts of it cited by a party." 5 U.S.C. § 706.This language refers to the record created by the agency, not by the court. Robert L. Glicksman& Richard E. Levy, Administrative Law: Agency Action in Legal Context 149 (2010).

In a case brought under 5 U.S.C. § 706, the D.C. Circuit was asked to direct the U.S. Department of Agriculture to grant interim suspension of the pesticide DDT. EDF, Inc. v. Ruckelshaus, 439 F.2d 584, 595 (D.C. Cir. 1971).The Federal Insecticide, Pesticide, and Rodenticide Act required suspension when it was necessary "to prevent an imminent hazard to the public," but it left the decision to the discretion of the Secretary. Id. at 596. Because the Secretary had not promulgated any regulations or made any statements as to what factors should influence this determination, the court concluded that it had no basis on which to review the decision not to suspend DDT. Id.The court remanded to the USDA because it did not have an adequate statement of the reasons why the Secretary had refused to suspend the pesticide. Id.; see alsoAm. Horse Prot.Ass'n, Inc. v. Lyng, 812 F.2d. 1,7 (D.C. Cir. 1987)(remanding the issue to the agency to determine whether changed circumstances necessitated amendment of the earlier rule, noting that this remedy is "particularly appropriate when the agency has failed to provide an adequate explanation of its denial").Similarly, in Tex. Disposal Sys. Landfill, the Fifth Circuit concluded that it could not review the EPA's decision not to withdraw Texas' RCRA program because the Administrator had not promulgated standards on which to base review.

Review of this case must be in accordance with 5 U.S.C. § 706, which limits review to the agency record. EDF, Inc. and Texas Disposal were decided under section 706 and should inform this Court's decision. Just like these cases, the EPA has not promulgated standards on

which this Court can base review of a "constructive" refusal to withdraw New Union's RCRA program. Tex. Disposal, 377 Fed.App'x at 408. Nor does this Court have an adequate explanation as to why the EPA chose not to act on CARE's petition. (R. at 10–12.) Thus, just like the courts in EDF, Inc. and Texas Disposal, this Court needs a more developed record to adequately exercise review of the agency decision. For this reason, this Court should remand to the EPA and order the agency to take action on CARE's petition.

V. THE EPA DOES NOT HAVE A DUTY TO AUTOMATICALLY WITHDRAW AUTHORIZATION OF NEW UNION'S HAZARDOUS WASTE PROGRAM UPON A DETERMINATION THAT THE STATE'S PROGRAM DOES NOT PROVIDE ADEQUATE ENFORCEMENT OF COMPLIANCE UNDER 42 U.S.C. § 6926(b).

One of the primary objectives of RCRA is to ensure that "the [EPA] Administrator will . . . give a high priority to assisting and cooperating with the States in obtaining full authorization of State [hazardous waste] programs . . . ." 42 U.S.C. § 6902(a)(7). Congress has tailored the program authorization and withdrawal provisions ofthe statuteto allow the Administrator enough flexibilityto achieve this objective.Section 6926(b) of RCRA allows a state to apply for authorization to administer and enforce a hazardous waste program in lieu of the Federal Program. The program will be authorized after a certain time period, "unless . . . *[the Administrator] finds* that . . . such program does not provide adequate enforcement of compliance with the requirements of [Title III]" (emphasis added).Id.A different subsection details the process for withdrawal of that authorization, stating that:

> *Whenever the Administrator determines* after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with the requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time . . . the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

42 U.SC. § 6926(e) (emphasis added).

The language of RCRA is very clear – withdrawal of a state's hazardous waste program is absolutely dependent upon the EPA's determination that the state's enforcement of statutory requirements is inadequate. Failure to maintain resources and performance at the level originally approved by the Administrator does not automatically mandate a withdrawal action. In the instant case, the Administrator has not determined that New Union is not administering and enforcing its authorized program in accordance with the requirements of RCRA. Even if such a determination had been made, the Administrator must provide New Union with notice of the deficiencies and an opportunity to correct them before withdrawal is required.

A. The plain language of § 6926, EPA regulations, and judicial decisionsmake it very clear that the EPA has discretion to retain authorization of a state hazardous waste program that is struggling to meet the enforcement requirements of RCRA.

Congress includedexplicit discretionary language in both subsections (b) and (e) of § 6926. SeeN.Y. Pub. Interest Research Group v. Whitman, 321 F.3d 316, 330 (2nd Cir. 2003) (Interpreting and analogous provision of the Clean Air Act, stating that "As the EPA correctly notes, the key phrase of § 502(i)(1) is the opening one, "Whenever the Administrator makes a determination," and this language grants discretion.")In addition to being housed in separate provisions, subsection (e) makes no reference to the initial finding of program adequacy under subsection (b). Therefore, the way the statute is structured indicates that the Administrator is permitted to assess withdrawal of a state program in a distinct manner from which authorization was obtained. Both provisions stipulate that it is the Administrator who will evaluate and make findings regarding the adequacy of the enforcement actions undertaken by a state program.Only a few requirements pertaining to enforcement of RCRA hazardous waste programs are located directly in the statutory text itself.See 42 U.S.C. § 6927(e) ("[A] State having an authorized

hazardous waste program under this subchapter shall commence a program to thoroughly inspect every facility for the treatment, storage, or disposal of hazardous waste for which a permit is required under section 6925 of this title no less often than every two years as to its compliance with this subchapter [and regulations].")Congress delegated the establishment of additional requirements to the EPA. SeeId. §§ 6922–6925.

The EPA regulations are written to preserve the broad discretionary power granted to the Administrator in § 6926(e) and precisely track the statute's procedural requirements for withdrawal. Again, the criteria for withdrawing approval of a state program are contained in a regulation distinct from any other regulation that discusses the initial decision to approve. 40 C.F.R. § 271.22(a) (2009) states that "The Administrator *may* withdraw program approval when a State program no longer complies with the requirements of this subpart, and the State fails to take corrective action" (emphasis added). This provision not only preserves the EPA's option to commence withdrawal proceedings, but also indicates that the EPA has a mandatory duty to provide the state with an opportunity to correct any perceived failures at compliance. A subsequent regulation details the procedure that must be followed before withdrawal is allowed. See40 C.F.R. § 271.23(b) (The Administrator has discretion to initiate withdrawal proceedings, which must include a formal hearing, notification to the state regarding specific deficiencies,and allot a reasonable time for the State "to take such appropriate corrective action as the Administrator determines necessary.") Thus, a momentary failure by the state to meet statutory and regulatory requirements cannot force a withdrawal action.

Courts that have considered the issue of withdrawal of a state program authorized under RCRA have noted that:

> [It] is an 'extreme' and 'drastic' step that requires the EPA to establish a federal program to replace the cancelled state program. (citing to Waste Mgmt., Inc. v.

> EPA, 714 F. Supp. 340, 341 (N.D. Ill. 1989).) Nothing in the text of the statute suggests that such a step is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement.

U.S. v. Power Engineering Co., 303 F.3d 1232, 1238-1239 (10th Cir. 2002).The Fifth Circuit Court of Appeals recently found that the Administrator's decision not to commence withdrawal proceedings under RCRA was basically an unreviewable decision not to take enforcement action. Tex. Disposal, 377 Fed.Appx.at 408. In examining withdrawal proceedings under similar provisions of the Clean Air Act and Clean Water Act, courts have consistently upheld the discretionary power granted to the EPA rather than disrupting the administrative process byattempting to evaluate whether a state program has failed to comply with enforcement requirements.See, e.g., Sierra Club v. Johnson, 541 F.3d 1257 (11th Cir. 2008) (CAA § 113(a)(1)); Ohio Pub. Interest Research Group, Inc. v. Whitman, 386 F.3d 792 (6th Cir. 2004) (CAA § 502(i)(1)); N.Y. Pub. Interest, 321 F.3dat 316 (same); City of Seabrook v. Costle, 659 F.2d 1371 (5th Cir.1981) (CAA § 113(a)(1)); Sierra Club, 268 F.3d at 898 (Clean Water Act § 1319(a)(3)); Dubois v. Thomas, 820 F.2d 943 (8th Cir.1987) (same); Sierra Club v. Train, 557 F.2d 485 (5th Cir.1977) (same); cf. Harmon Cove Condominium Ass'n, Inc. v. Marsh, 815 F.2d 949 (3rd Cir.1987) (Federal Water Pollution Control Act § 404).Legal scholars that have studied the three major environmental statutes have determined thatthe EPA retains a great deal of authority over individual violators and has a plethora of other statutory enforcement mechanisms to rely on before resorting to withdrawal of a state program(such as sanctions, withdrawal of federal funding, negotiations of new deadlines, and overfiling). See Ellen R. Zahren, OverfilingUnder Federalism, 49 Emory L. J. 373 (2000). Due to the availability of other these remedies, the statutory preference for state control, and the broad discretionary language found within § 6926, courts are unlikely to require a withdrawal action for a state's failure to

adequately adhere to statutory and regulatory requirements under RCRA unless a formal determination has been made by the Administrator.

B. It is reasonable for the EPA to determine in its discretion that resources and performance of New Union's program do not provide cause for withdrawal under RCRA.

The vague challenge CARE asserts towards New Union's ability to adequately enforce compliance with the requirements of RCRA demonstrates the importance of the EPA conducting a formal hearing before making a determination to withdraw a state's program. CARE specifically alludes to the following three determinations of adequacy that the EPA found when it initially approved New Union's program: the issuance of permits in a timely fashion; inspecting RCRA regulated facilities at least every other year; and taking enforcement actions against all significant violations. Without citing specific statutory or regulatory provisions that have been violated, CARE proceeds to recite a litany of circumstances that suggest that New Union's program is insufficient under RCRA. However, an actual examination of the statute reveals that these circumstances do not yet demand a finding of inadequacy.

First, there is no requirement under RCRA that the issuance of permits by a state program must be timely. Rather, § 6925(e) allows a facility that complies with the act and has submitted an application to operate as though the permit has issued, "until such time as final administrative disposition . . . is made." SeeSierra Club v. U.S. Dept. of Energy, 734 F. Supp. 946, 947 (D. Colo. 1990) ("Congress deemed it impractical to halt all hazardous waste activity pending the issuance of permits."); 40 C.F.R. § 270.51(d) (2009) (regarding the continuation of expiring permits). Second, although § 6927(e)(1) does require inspection of every TSD that has been issued a permit once every two years, the facts do not indicate a violation at the present time. New Union is not alleged to have failed this requirement based the facts of the 2008 and 2009

annual reports to the EPA. Although it anticipates an inadequacy as to performance in 2010, an opportunity still exists for the EPA and New Union to pool their resources and achieve the requirement. Finally, neither the statute, nor the EPA issued regulations, requires that enforcement actions be taken against all "significant" violations. Rather, § 6928 grants the EPA discretion to impose financial sanctions or institute a civil action against individual violators. See 40 C.F.R. § 271.16 (2009) (EPA requires that state authorized programs shall have available similar remedies for violations). While the EPA and New Union only brought enforcement actions against 12 of the 22 significant violations listed in the 2009 annual report, there has been no indication from these authorities that such action will not be pursued against the remaining violators. As no circumstances presently warrant a finding that New Union's resources or performance are inadequate to retain approval of their state hazardous waste program, the EPA's decision not to commence withdrawal proceedings is reasonable.

VI. THE EPA IS NOT REQUIRED TO WITHDRAW AUTHORIZATION OF NEW UNION'S HAZARDOUS WASTE PROGRAM BECAUSE THE ENVIRONMENTAL REGULATORY ADJUSTMENT ACT COMPLIES WITH REQUIREMNTS UNDER RCRA.

Under 42 U.S.C. § 6921 of RCRA, the EPA Administrator is responsible for establishing a list of hazardous wastes that are subject to regulation. After public notice and comment procedures, the Administrator is empowered to create regulations that will apply to the generation, transportation, treatment, storage and disposal of hazardous wastes. See 42 U.S.C. §§ 6922–6924. However, states are allowed to plan and implement their own enforcement program under § 6926(b); this means that, subject to Administrator approval, a state can design regulations which deviate from federally-selectedmethods of administration and enforcement. The only further restriction that is imposed upon a state program's design is a general statement their requirements cannot be less stringent than those imposed by Administrator in regulated

matters. See 42 U.S.C. § 6929; 40 C.F.R. § 271.1(i) (explicitly allowing more stringent requirements).The statutory text does not specifically reference railroad hazardous waste facilities – it simply requires that the EPA promulgate regulations establishing performance standards for hazardous waste facilities generally.

A. It is reasonable for the EPA to determine in its discretion that railroad hazardous waste facilities are being effectively regulated under New Union's program.

The primary way that RCRA ensures compliance with regulations that are promulgated by the Administrator or a state agency isby requiring that every facilitywhich treats, stores or disposes of hazardous wastes (TSDF) obtain a permit prior to operation.42 U.S.C. § 6925(a).Nothing within the statutory text says that a state must issue permits for every category of hazardous waste facility; rather, a burden is imposed on each TSDF to seek out an available permit or cease operations. Id.Subsection (c)(3) states that "Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." Id.This provision implies that the goal of issuing a permit is to regulate the effects of a hazardous waste facility, rather than the type of facility itself. While the federally-designed regulationsrequire TSDFs to obtain permits in most instances, it specifically exempts certain facilities on the basis of the storage time and quantity of the waste generated.See 40 C.F.R. § 270.1(c)(2)–(3).Thus, the decision by a state program to not make permits available to every TSDF capable of receiving a permit under the federal regulations does not necessarily constitute a failure to regulate oradequately enforce the statutory requirements imposed by RCRA.A closer examination of the effects of a blanket TSDF permit denial is required; if such a denial adequately protects human health and the environment, the Administrator could potentially determine that it qualifies as a more stringent requirement under § 6929.

B. Assuming that New Union's program does not regulate all hazardous waste facilities regulated by RCRA, the plain language of §§6926(e) &6928(a) clearly indicates that the EPA has discretion to retain authorization.

After a state program assumes responsibilities for administration and enforcement under § 6926(b), the Administrator still retains considerable enforcement authority over violators under 42 U.S.C. § 6928(a). This provision states that:

> Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

42 U.S.C. § 6928(a)(1). Paragraph 2 provides that the Administrator must provide notice of the violation to a state with an authorized program prior to issuing an order or commencing a civil action. Id.Several courts have held that this provision continues to allow the EPA to regulate hazardous waste activities even in a state with an authorized program. SeeWyckoff Co. v. EPA, 796 F.2d 1197, 1200 (9th Cir. 1986); Ciba-Geigy Corp. v. Sidamon-Eristoff, 3 F.3d 40, 42 (2nd Cir. 1993); U.S. v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 44 (1st Cir. 1991).Even with this notice requirement, however, TSDFs who continue to operate without a permit as required by § 6925 are always at risk of being sanctioned by the Administrator in lieu of a state enforcement action from an authorized program. SeeHarmon Industries, Inc. v. Browner, 191 F. 3d 894, 894, 902 (8th Cir. 1999) (holding that the EPA does not have the authority under RCRA to overfile when a state has concluded its enforcement action on the same matter.) This provision only requires notice; it does not require the Administrator to withdraw a state program's authorization before proceeding against violators of the TSDF permit requirement.

If a state program was required to regulate all facilities regulated by RCRA, Congress would not have needed to retain any oversight enforcement authority against recalcitrant TSDFs – nor would it have needed toprovide for state authorization programs under § 6926. It could simply have written a provision that requires states to strictly enforce all violations of federal regulations.Section 6928(a) exists as alternative to withdrawal of program authorization under § 6926(e). See infra Part V.A. Both provisions contain similar language, establishing that it is solely within the discretion of the administrator to determine whether there has been a violation of RCRA. Assuming that the Administrator has already conducted a public hearing and determined that New Union's program presently fails to regulate railroad hazardous waste facilities, the state must still be notified of the program's deficiencies in writing and given a reasonable time to undertake corrective action. Since these procedural steps under § 6926(e) have not yet commenced, withdrawal of New Union's authorization program is not required merely because of a present failure to regulate railroad hazardous waste facilities.

VII. THE ERAA IS CONSISTENT AND EQUIVALENT WITH THE FEDERAL REQUIREMENTS, AND THIS COURT DOES NOT HAVE JURISDICTION TO DETERMINE WHETHER THE ERAA IS A VIOLATION OF THE COMMERCE CLAUSE.

A. This Court does not have jurisdiction to determine the Constitutionality of the ERAA.

Assuming this Court has jurisdiction to review the EPA's action, it would be under 42 U.S.C. § 6976(b), which gives federal appellate courts original jurisdiction to "[r]eview the Administrator's action...in granting, denying, or withdrawing approval" of a state RCRA program. In deciding whether to grant, deny, or withdraw a state RCRA program, the Administrator is not required to, and likely does not have the power to, interpret the United States Constitution. See 40 C.F.R. § 271.22; see generally Brian Galle, The Justice of Administration, 33 Fla. St. U. L. Rev. 119 (Fall 2005). Because constitutional issues are not

relevant in reviewing whether the Administrator has correctly granted, denied, or withdrawn a state program, § 6976(b) does not provide jurisdiction to this Court to review whether the ERAA violates the Commerce Clause. If CARE wants to challenge the constitutionality of the ERAA, the proper basis for jurisdiction is 28 U.S.C. § 1331, which gives federal district courts, not the appellate courts, primary jurisdiction to hear matters concerning the Constitution. Since no district court has made a final determination on regarding constitutionality, this Court does not have jurisdiction to hear the matter. Id. § 1291.

B. Consistency and equivalency are not relevant in determining whether to withdraw a state RCRA program.

With respect to withdrawal proceedings, neither RCRA nor its implementing regulations require that the EPA consider whether a state hazardous waste program is consistent with federal and other state programs or equivalent to the federal program. 40 C.F.R. § 271.22; 42 U.S.C. § 6926(b). Rather, such considerations must be made by the Administrator within 180 days of a state's application for approval.Id.A state is authorized to carry out its plan "*unless, within ninety days following submission of the application* the Administrator notifies such State . . . and, within ninety days following such notice . . . [s]he finds that" the program is *not equivalent* or *consistent* with the state and federal programs. Id. (emphasis added). This provision places a burden on the Administrator to deny approval within a specific time period; outside this time frame, inconsistency or non-equivalence will not invalidate a state-designed program.

In contrast, the Administrator has broad discretion to initiate withdrawal proceedings when a state is not administering their program "in accordance with the requirements of this section."Id. § 6926.Because the statute itself is silent as to the circumstances that require withdrawal, the Administrator has provided a non-exclusive list of potential circumstances under40 C.F.R. § 271.22. This section does not reference consistency or equivalency with other

programs, state or federal, as a possible basis for withdrawal. SeeId. Therefore, this Court should limit considerations of consistency and equivalency to decisions made by the Administrator during the time period that leads to program authorization.

C. Assuming arguendo that consistency is relevant, the ERAA is consistent with federal and state hazardous waste programs.

Under the federal regulations pertaining to initial approval, a program is deemed inconsistent when it "unreasonably restricts, impedes, or operates as a ban on the free movement [of hazardous waste] across the State border." 40 C.F.R. § 271.4(a).The agency must assess whether the state program "in fact has or is likely to have a significant adverse effect on the" flow of hazardous waste into the state. South Carolina; Decision on Final Authorization of State Hazardous Waste Management Program, 50 Fed. Reg. 46437, 46439 (Nov. 8, 1985). Further, a program may be inconsistent where it "has no basis in human health or environmental protection and . . . acts as a prohibition on the treatment, storage, or disposal of hazardous waste in the State." 40 C.F.R. § 271.4(b); see alsoHazardous Waste Treatment Council v. Reilly, 938 F.2d 1390, 1394 (D.C. Cir. 1991). A program acts as a prohibition only when it *completely* bans the treatment, storage, or disposal of hazardous waste within its borders. 43 Fed.Reg. 33,395 (May 19, 1980) (emphasis added). Finally, a program will be deemed inconsistent where it does not contain the manifest requirements contained in the regulations. 40 C.F.R. § 271.4(c).

First, CARE has presented no evidence that the flow of hazardous waste into New Union has experienced a "significant adverse effect" or is likely to do so. In fact, the record shows that the DEP continues to receive about 50 applications a year from hazardous waste treatment, storage, and disposal facilities wishing to either to build or expand. (R. at 11.)This indicates that there is a continuous flow of hazardous waste in the state, and a demand for treatment, storage, and disposal. Further, the ERAA only regulates Pollutant X, and explicitly allows the

transportation of the pollutant through the state. (R. at 12.) Second, the ERAA does not operate as a *complete* prohibition on the treatment, storage, and disposal of hazardous waste within the state; it simply limits the issuance of permits with respect to treatment, storage, and disposal of Pollutant X. 43 Fed.Reg. 33395.It even allows for storage of Pollutant X within the state for up to 120 days. (R. at 12.) There has been no complete prohibition with respect to Pollutant X or any other hazardous wastes.Finally, the ERAA program complies with the manifest system as required by the regulations. In 1986, the EPA determined that New Union's manifest system met the requirements of the regulations. (R. at 4, 5.)Nothing in the ERAA changes New Union's manifest system; there is only a requirement that those transporting Pollutant X do so as swiftly as possible. (R. at 12). Accordingly, the Administrator cannot withdraw New Union's program on the grounds of inconsistency.

D. Assuming arguendo that equivalency is relevant, the ERAA is equivalent to the federal hazardous waste program.

The EPA has explained that "[to] be equivalent, States must adopt a set of basic statutes and regulations that are equivalent to EPA's."50 Fed.Reg. 46,440 (Nov. 7, 1985). Equivalent means "no less strict than the Federal program." 61 Fed. Reg. 18,822 (April 29, 1996). State programs are reviewed for equivalency with an eye towards flexibility and to allow states to adopt innovative approaches to the management of hazardous waste. Memorandum from Mathew Hale, Dir. of the Office of Solid Waste to RCRA Dir., Regions I - X, 1 (Sept. 7, 2005) [hereinafter, "Memo"] available at http://www.epa.gov/reg3wcmd/ca/pdf/StateAuthorization.pdf. The state statutes and regulations do not have to be exactly like the federally-written requirements so long as they are "equal in effect." Memo at 3. Equivalency inquiries focus on theresults of the state program to the environment and whether those results meet the goals of RCRA. Id. at 1; 61 Fed.Reg. 18,822.The goals of RCRA include protection of human health and

the environment, minimizing the generation of hazardous waste, and proper management in the first instance. 42 U.S.C. § 6903 (a)(4)–(6), (b) (2006). In accomplishing these goals, the Administrator has a duty to integrate the mandates of RCRA with other "Acts of Congress" over which the Administrator has regulatory authority. This integration must be done in a way that is consistent with the goals and policies of all such Acts of Congress. Id. § 6905. For example, RCRA's goals must be integrated with the Pollution Prevention Act, which was enacted with the goal of preventing pollution at the source whenever feasible. Id. § 13101(b).

The ERAA is no less strict than the federal hazardous waste program and achieves the same environmental results. Itinstructs that there should be a gradual elimination of Pollutant X amongst generators within New Union – complete elimination is certainly more ambitious than what the federal program requires. (R. at 12.)New Union's statute will achieve RCRA's goal of minimization, as well as protection of human health and the environment, while comporting with the goals of the Pollution Prevention Act. The ERAA will only grant storage permits where Pollutant X is en route to a permitted facility designed to treat or dispose of Pollutant X. Id. This accomplishes the goals of protection of human health and the environment and proper management in the first instance through treatment and disposal by a facility that is approved under the dictates of RCRA. Finally, the ERAA requires reasonably swift transport of Pollutant X. Id.This reduces the potential for leaks and accidents, as well asensuring that Pollutant X will efficiently reach a permitted treatment, storage, and disposal facility where the pollutant can be contained and dealt with in a way that protects human health and the environment. Because the environmental results and goals which New Union's statute achieves are no less strict than those of the federal program, the Administrator cannot withdraw New Union's program on the grounds of equivalency.

CONCLUSION

For the foregoing reasons, the EPA respectfully requests that this Court defer to the agency's discretion to determine whether withdrawal proceedings must be initiated against New Union's hazardous waste program.