Team No. 3

C.A. No. 18-2010
C.A. No. 400-2010

IN THE 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 LISA JACKSON, ADMINISTRATOR,
United States Environmental Protection Agency, Respondent-Appellee-Cross-Appellant

---

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES

UNITED STATES APPELLATE COURT CASES

UNITED STATES DISTRICT COURT CASES

FEDERAL STATUTES

STATE STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This case involves a federal statute, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (hereinafter "RCRA"). (R. at 4.) This is a citizen suit brought pursuant to RCRA's citizen suit provision, 42 U.S.C. § 6972. *Id.* Specifically, the district court had jurisdiction to entertain this matter pursuant to 42 U.S.C. § 6972(a)(2), as Citizen Advocates for Regulation and the Environment, Inc. (hereinafter "CARE") alleged a failure of the Environmental Protection Agency Administrator (hereinafter "Administrator") to perform a non-discretionary duty under RCRA. (R. at 5.)

On January 4, 2010, CARE filed its action against the Environmental Protection Agency (hereinafter "EPA") in the district court. (R. at 4.) New Union filed an unopposed motion to intervene. *Id.* The parties filed cross-motions for summary judgment. *Id.* On June 2, 2010, the district court granted New Union's motion for summary judgment. (R. at 9.)

Also on January 4, 2010, CARE filed related case C.A. No. 18-2010 in this Court, seeking review of EPA's alleged constructive denial of CARE's petition to EPA pursuant to RCRA's judicial review provision, 42 U.S.C. § 6976. (R. at 4-5.) On EPA's motion, this Court stayed that case pending the outcome in the district court. (R. at 5.) Following the issuance of the district court's order on June 2, 2010, CARE and EPA filed timely notices of appeal. (R. at 1.) This Court has jurisdiction to entertain the appeal on all issues pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

I. Whether the District court has jurisdiction under the citizen suit provision of RCRA, 42 U.S.C. § 6972, to order EPA action on CARE's petition filed pursuant to 42 U.S.C § 6974 based on EPA's characterization of New Union's hazardous waste program as a rule and not an order.

II. Whether the district court has federal question jurisdiction under 28 U.S.C. § 1331 to order EPA action on CARE's petition filed pursuant to the Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. § 553(e) when RCRA provides a more specific and applicable provision to order EPA action on CARE's petition.

III. Whether EPA's decision not to act on CARE's petition constituted a constructive action when constructive actions only apply to non-discretionary agency duties and "shall" does not necessarily indicate a mandatory action.

IV. Whether, assuming the district court has jurisdiction to compel EPA to respond to CARE's petition and that EPA's inaction constituted a constructive approval of New Union's hazardous waste program, this Court or the district court should review this matter when EPA has not yet completed its response to the petition by publishing notice of their action in the Federal Register.

V. Whether EPA may continue to approve the hazardous waste plan implemented by the DEP where New Union does not fall within the criterion enumerated for withdrawal of program approval under RCRA.

VI. Whether EPA may continue to approve the hazardous waste plan in New Union where the 2000 Environmental Regulatory Adjustment Act (hereinafter "ERAA") presently fails to regulate hazardous waste at railroad facilities.

VII. Whether EPA may continue to approve the hazardous waste plan in New Union as equivalent to the federal RCRA program, other state programs, and the Commerce Clause of the United States Constitution following passage of ERAA.

STATEMENT OF THE CASE

On January 5, 2009, CARE served a petition on EPA under 42 U.S.C § 6974. (R. at 4.) CARE requested that EPA commence proceedings to withdraw its approval under RCRA of New Union's hazardous waste regulatory program. (R. at 4.) CARE alleged that New Union's program no longer met the criteria for EPA approval. (R. at 4.) EPA took no action on that petition. (R. at 4.)

On January 4, 2010, CARE filed a complaint in the United States District Court for the District of New Union. (R. at 4.) CARE sought an injunction requiring EPA to act on the petition or, in the alternative, judicial review of EPA's constructive denial of the petition and EPA's constructive determination that New Union's hazardous waste program meets the criteria for approval. (R. at 4.) New Union intervened in the suit under Fed. R. Civ. P. 24. (R. at 4.) All parties filed cross-motions for summary judgment. (R. at 4.) CARE also filed a petition seeking judicial review of EPA's constructive denial and determination on the same grounds with the Court of Appeals for the Twelfth Circuit. (R. at 5.) New Union similarly intervened in that case. (R. at 5.) The Court of Appeals stayed the proceeding, pending the outcome of the district court decision, on EPA's motion. (R. at 5.)

On June 2, 2010, the district court determined that it lacked jurisdiction to compel EPA to act on CARE's petition. (R. at 1.) Both EPA and CARE appealed. (R. at 1.) EPA takes issue with the lower court's determination that it lacked jurisdiction under RCRA. (R. at 1.) CARE requests that the Court lift its stay of CARE's direct appeal filed in this Court on January 4, 2010 and consolidate the two actions. (R. at 1-2.) EPA and New Union take issue with lifting the stay and with EPA's failure to act as a "constructive" determination that New Union's program continues to meet RCRA's approval criteria. (R. at 2.) New Union takes issue with all of

CARE's arguments that New Union's program no longer meets the approval criteria. (R. at 2.) EPA admits that New Union's program no longer governs hazardous waste at railroad yards, but argues that lack of regulations for railroad yard waste does not require disapproval of the entire state program. (R. at 2.)

On September 29, 2010, this Court ordered the parties to brief the following issues: (1) Whether RCRA provides jurisdiction for district courts to order EPA action on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program; (2) Whether 28 U.S.C. § 1331 provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program; (3) Whether EPA's failure to act on CARE's petition that EPA initiate proceedings to consider withdrawing approval of New Union's hazardous waste program constituted a constructive denial of that petition and a constructive determination that New Union's program continued to meet RCRA's criteria for program approval under RCRA, both subject to judicial review; (4) Whether the Court should lift the stay and proceed with judicial review of EPA's constructive actions or remand the case to the lower court to order EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program; (5) Whether EPA must withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria; (6) Whether EPA must withdraw its approval of New Union's program because ERAA effectively withdraws railroad hazardous waste facilities from regulation; and (7) Whether EPA must withdraw its approval of New Union's program because ERAA renders New Union's program not equivalent to RCRA, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause. (R. at 2-3.) This action now follows as to those issues.

STATEMENT OF FACTS

In 1986, EPA found that the State of New Union had adequate resources to fully administer and enforce a state hazardous waste program, and approved the program as an adequate substitute of the federal program under RCRA, which encourages states to administer their own hazardous waste programs. (Rec. doc. 2, p. 1.) Since 1986, New Union has naturally made adjustments to the program. (R. at 4.)

Though the Record states that New Union has fewer full-time employees dedicated to the program now than in 1986 and that there is currently a hiring freeze which may continue into the future, (Rec. doc. 5 for 2009, p. 53.), there is no reference to the quality or number of employees in the federal program. Additionally, to help manage inspections in the previous year, New Union's Department of Environmental Protection (hereinafter "DEP") solicited aid from EPA, which was granted. *Id.* at 23. EPA has promised to do the same in the current year. *Id.*

Together, EPA and New Union must inspect 20% of TSD facilities in the state annually. (Rec. doc. 5 for 2009, pp. 22-23.) In addition, New Union has prioritized facilities that "have reported unpermitted releases of hazardous waste into the environment" and "facilities reporting other violations posing the greatest potential for harm to the public health or the environment because of the volume or toxicity of the hazardous waste they are permitted to handle." (Rec. doc. 5 for 2009, p. 23.) By targeting facilities with the most potential for harm, DEP has allocated scarce resources in an effective way. New Union has not failed to inspect and monitor facilities subject to regulation. (Rec. doc. 5 for 2009, pp. 22-23.)

New Union has acted on violations and sought adequate enforcement penalties. (Rec. doc. 5 for 2009, p. 25.) The 2009 Annual Report indicated that DEP took six enforcement actions during the previous year. *Id.* Four were administrative orders requiring both compliance

and the payment of penalties in amounts derived from EPA's penalty policy, and two were civil actions, requesting injunctions and the judicial assessment of penalties. *Id.* During the same year, EPA and environmental groups each filed six actions in the state for violations of the RCRA. (Rec. doc. 5 for 2009, p. 26.) Accordingly, New Union has seen eighteen enforcement actions within the state for RCRA violations over the previous year. (Rec. doc. 5 for 2009, p. 25.) New Union has not failed to act on violations or failed to seek adequate enforcement penalties. (Rec. doc. 5 for 2009, pp. 25-26.)

In 2000, the New Union legislature enacted ERAA, amending the state's existing environmental regulations. (R. at 11.) The ERAA amends the Railroad Regulation Act (RRA) by establishing a new commission, the New Union Railroad Commission, and transferring "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the Commission." (Rec. doc. 5 for 2000, pp. 103-05.)

The ERAA also amends New Union's hazardous waste program to govern the storage and transport of Pollutant X. (Rec. doc. 5 for 2000, pp. 105-07.) Pollutant X is a recognized hazardous waste under regulations governing RCRA. *Id.* Specifically, the amended statute provides: (1) that generators of Pollutant X provided to New Union's DEP a plan to minimize the generation of Pollutant X within ninety days of the amendments effective date and provide a yearly report for additional reduction in waste until generation entirely ceases; (2) the New Union DEP shall not issue permits regarding Pollutant X except for storage less than 120 days while awaiting transportation to a permitted disposal facility outside New Union; and (3) that any person may transport Pollutant X through or out of New Union to a permitted disposal facility provided that transport be direct and as fast as reasonably possible, "with no stops within the state except for emergencies and necessary refueling." *Id.*

Dissatisfied with both the statutory and regulatory changes, CARE submitted a petition to EPA on January 5, 2009, asserting the petition as pursuant to 42 U.S.C. § 6974(a) and the Administrative Procedure Act, 5 U.S.C. 553(e). (R. at 4.) The petition requested EPA to commence proceedings to withdraw its approval of New Union's program in favor of a federal program. *Id.* In its petition, CARE listed facts regarding the state program with which it was no longer pleased. *Id.* EPA has not taken action on CARE's petition as of the date of this appeal. *Id.* Alleging jurisdiction under the citizen suit provision of RCRA, CARE filed an action in the United States District Court for the District of New Union on January 4, 2010, less than one year after submitting the petition to EPA. *Id.* CARE additionally filed a petition, C.A. No. 18-2010 for review with this Court, seeking judicial review of EPA's "constructive denial." (R. at 5.)

SUMMARY OF THE ARGUMENT

The district court erred in granting summary judgment on CARE's first claim, that the court had jurisdiction to entertain a properly filed petition under 42 U.S.C. § 6974(a) through RCRA's citizen suit provision. The court erred for several reasons, including its improper analysis as to EPA's position that its approval of New Union's hazardous waste program in 1986 was a rule and not an order. EPA promulgated the rules approving New Union's program through notice and comment, published the rules in 40 CFR Part 272, and the rule affects numerous individuals, potentially all residents of the state of New Union. Further, EPA is entitled to deference on its determination that the approval was a rulemaking. Further, RCRA specifically grants direct review of petitions to the appellate courts, and the district court should not engage in hypothetical reasoning in an attempt to absolve itself of jurisdiction where it properly lies. While jurisdiction is appropriate in the district court under RCRA's citizen suit provision, it is not appropriate under 28 U.S.C. § 1331 federal question jurisdiction. RCRA is a

specific statute that authorizes petitions to EPA and is accompanied by regulations dictating EPA action under the statute. This specific statute must govern over the general, and thus the district court was correct to dismiss CARE's claim of federal question jurisdiction.

Further, EPA did not make a constructive action of any kind on CARE's petition. EPA must only take actions on non-discretionary duties, and the language in RCRA and the accompanying regulations indicate that the duty to take substantive action on citizen petitions under RCRA is discretionary. However, if the Appellate Court finds EPA's silence on the petition was a constructive action, this case must be remanded to the court below to order EPA to initiate proceedings under 42 U.S.C. § 6972 and 42 U.S.C. § 6974. RCRA does not confer jurisdiction to the Court of Appeals for review of EPA's decision not to withdraw authorization from a state hazardous waste program. Further, appellate review is inappropriate at this time because if EPA has made a constructive action, it must be ordered by the district court to complete the notice and publication actions required by RCRA.

As to the merits of CARE's direct petition in this Court, New Union continued to issue permits, inspect and monitor facilities, act on violations, and seek adequate enforcement penalties, the hazardous waste plan implemented by DEP in New Union does not fall within the criteria enumerated for withdrawal of an approved state program under RCRA. 40 C.F.R. § 271.22(a). Thus, the hazardous waste program in New Union is not "inadequate," and EPA may not withdraw its approval. EPA has discretion whether or not to withdraw state authorization in New Union when it has not "exhausted all other alternatives." Even now, EPA may take independent enforcement action while still allowing New Union to administer its hazardous waste program. Moreover, New Union must be given the opportunity to "take corrective action" before EPA may withdraw authorization. EPA has at least two options in lieu of program

withdrawal where ERAA presently fails to regulate hazardous waste. EPA may grant enforcement authority over railway facilities to the New Union Railroad Commission or EPA may itself enforce criminal sanctions against facilities regulated by the New Union Railroad Commission. Finally, New Union's ERAA amendment regulating Pollutant X does not render its hazardous waste program in violation of RCRA, other state program equivalents, or the Commerce Clause. The ERAA complies with all provisions of RCRA, and any interstate transport restrictions placed on Pollutant X by New Union are only evenhanded attempts to ensure the safety of New Union's citizens from the dangers of Pollutant X.

For these reasons, this Court should reverse and remand this matter for proceedings under the citizen suit and agency petition provisions of RCRA, affirm the district court's grant of summary judgment as to federal question jurisdiction, and deny CARE's direct petition for appellate review.

ARGUMENT

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Courts review the grant of summary judgment and other questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Consequently, this Court should review the district court's grant of summary judgment as to the jurisdictional claims, EPA's constructive denial of CARE's petition, and whether or not to lift the stay in C.A. No. 18-2010 *de novo*. In contrast, Courts of review declare an agency action invalid only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(a); *Conservation Law Found. of New England, Inc. v. Sec'y of the Interior,* 864 F.2d 954, 957 (1st Cir. 1989). As this

Court assumes for purposes of Parts V, VI, and VII that it proceeds to the merits of CARE's challenge, it also assumes a constructive decision by EPA on New Union's state program. This decision, and thus EPA's position on these issues, is reviewed for abuse of discretion.

I. JURISDICTION IS APPROPRIATE IN THE DISTRICT COURT UNDER THE CITIZEN SUIT PROVISION OF RCRA BECAUSE CARE APPROPRIATELY FILED ITS PETITION UNDER 42 U.S.C. § 6974.

The district court erred in finding that it did not have jurisdiction to order EPA action on CARE's petition for the repeal of regulations under 42 U.S.C. § 6974 because the petition for repeal of regulations trigger a non-discretionary duty on behalf on the Administrator under the citizen suit provision of the RCRA. 42 U.S.C. § 6972(a)(2) (2006); 42 U.S.C. § 6974(a) (2006). The citizen suit provision of RCRA states that "any person may commence a civil action . . . against the Administrator where there is an alleged failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator." 42 U.S.C. § 6972(a)(2). It follows that when a citizen "may petition the Administrator for the . . . repeal of any regulation under this chapter . . . [and that] the Administrator shall take action with respect to such petition," a duty which is not discretionary arises. 42 U.S.C. § 6974(a). Further, contrary to the district court's ruling, the approval of New Union's hazardous waste program has all necessary characteristics of a rule, not an order, thus 42 U.S.C. § 6974 applies. 42 U.S.C. § 6974 is also applicable here because deference should be granted to EPA, which characterized its actions as a rulemaking. Finally, RCRA's judicial review provision does not destroy jurisdiction under this section. Thus, jurisdiction appropriately lies under the citizen suit provision of RCRA.

A. Approval of New Union's hazardous waste program was an EPA rulemaking and not an order, thus the petition under 42 U.S.C. § 6974 was appropriate.

The approval of New Union's hazardous waste program created a rule and not an order of EPA. Thus, as a rule any petition for repeal of New Union's hazardous waste program properly

lies under the petition for regulations section of RCRA. 42 U.S.C. § 6974. The district court erred when it placed excessive and improper emphasis on portions of the definitions of "rule" and "order" in the APA. In addition, the court ignores the critical differences between the processes of rulemaking and adjudication. *See Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441, 445-46 (1915) (establishing that an agency adjudication applies to a small number of people where each individual is exceptionally affected while a rulemaking affects a larger class of people). While the District court was correct that the definition of a rule is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency" and that an order constitutes "a matter other than a rule but includes licensing," it incorrectly applied the these definitions. 5 U.S.C. § 551 (4),(6),(8) (2006).

First, rulemaking "is typically a proceeding that is entirely open ended in form" but can also have particular applicability. David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 924 (1965); 5 U.S.C. § 551(4). This distinction is illustrated in *Capitol Airways, Inc. v. Civil Aeronautics Bd.*, 292 F.2d 755, 757 (D.C. Cir. 1961). In *Capitol Airways*, the Board issued a notice of proposed rule-making to grant exemptions for particular air carriers doing business with the military. The court found that promulgation of these exemptions was a rulemaking rather than adjudication, stating that "Congress could . . . give all firms engaged in air transportation the broad privilege of doing business with the military establishment, free of restrictions . . . [and] equally . . . deny any such broad privilege." *Id.* at 758. The court went on to state that agency rulemaking in order to deny specific firms such a privilege was valid. *Id.*

Similarly here, EPA promulgated rules that governed the hazardous waste program of New Union, as well as many other states and incorporated those rules into 40 CFR Part 272. Simply because each subpart of 40 CFR Part 272 applies to an individual state does not convert those rules into orders as the district court incorrectly asserts. (R. at 6.) Rather, when Congress enacted RCRA, it granted EPA authority to allow states the privilege of operating individual hazardous waste programs and also to deny such a privilege. 42 U.S.C. § 6926(b). This approval or denial of state hazardous waste programs is analogous to the Civil Aeronautics Board granting exceptions to certain aviation carriers, and supports EPA's contention that the approval of New Union's program was a rule, not an order.

Further, while the district court is correct that EPA's determination is not entitled to *Chevron* deference, the court erred in asserting that simply because *Chevron* does not apply, EPA's ruling is not entitled to deference. (R. at 6.) It is true that *Chevron* deference is granted only when an agency interprets a statute it is charged with administering. *See American Forest and Paper Ass'n. v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) (reasoning that no *Chevron* deference is granted when the statute at issue is not one EPA was charged with administering). However, the district court erred in failing to differentiate *Chevron* deference from deference to an agency's choice to engage in rulemaking rather than adjudication. Agencies have broad discretion in choosing between rulemaking and adjudication as a means of setting policy. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). When exercising that discretion, "[w]e also accord significant deference to an agency's characterization of its own action." *American Airlines Inc.*, v. *Dept. of Transportation*, 202 F.3d 788, 797-98 (5th Cir. 2000) (citing *British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 992 (D.C. Cir. 1978).

Here, while it is true that RCRA does not have a definition of rule or order, rulemaking or adjudication, significant deference should be granted to EPA's characterization of its actions. EPA treated the approval of New Union's program as a rulemaking by calling it such, using a notice and comment procedure, and incorporating the result in 40 CFR Part 272. (R. at 6.) EPA followed all procedures it routinely takes to promulgate rules, and deference should be granted to EPA's determination that the approval was a rule. Even though EPA's approval of New Union's program was a rule, however, EPA need not take substantive action on the petition, as the "shall" clause in 42 U.S.C. § 6974 does not indicate a mandatory action. *See* Part III *infra*. Thus, this Court should find that approval of the program was a rule.

B. RCRA's judicial review provision specifically grants direct appellate court jurisdiction and is irrelevant to the district court's analysis of CARE's petition under 42 U.S.C § 6974, but even if relevant CARE's petition would not be time barred.

The district court also erred in stating that the judicial review provision in RCRA, 42 U.S.C. § 6976, demonstrates that jurisdiction under 42 U.S.C. § 6972, the citizen suit provision, is inappropriate here. The district court posits, without support, that because the judicial review provision in RCRA is divided into two sections, this must support the assertion that EPA's approval of New Union's program is an order and not a rule. (R. at 7.) Rather, RCRA grants jurisdiction "in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business" in order that local permits and local issues of state programs be handled by local courts. 42 U.S.C. § 6976(b). The dual judicial review provision makes no statement about the type of provision being reviewed, and as stated in Part I (A), *supra*, EPA's approval of New Union's hazardous waste program was a rulemaking.

Finally, while EPA approved New Union's program in 1986, and the judicial review provision requires petition for review within ninety days of promulgation, CARE's petition is

based on an exception that allows review when the petition is based "solely on grounds which arose after the ninetieth day." *Id.* As an initial matter, the judicial review provision of RCRA provides for direct review in the appellate courts, thus the district court's analysis of the provision's time limitation is improper. 42 U.S.C. § 6976(b). Even if the district court's review was relevant, however, CARE's petition was not time barred. In *State of Washington Dept. of Ecology v. EPA*, 752 F.2d 1465, 1468 (9th Cir. 1985), the court stated that it had jurisdiction to review Washington's challenge to EPA regulations barring the application of its state hazardous waste program to Indian reservations even though the ninety day petition period had passed. The court reasoned that the regulations did not "squarely set forth the interpretation of RCRA that [defendant] now advances." *Id.* Additionally, the court stated that the relief sought could not be seen as a "belated attempt to review the regulations themselves." *Id.*

Similarly here, and contrary to the district court's analysis, facts as to grounds arising after the ninetieth day are clearly presented in the New Union DEP's 2009 annual report, and continue to occur to this day. (Rec. doc. 5 for 2009.) Further, the New Union hazardous waste program when approved did not squarely set forth the interpretation of RCRA that New Union now advances. The evidence in the record demonstrates that New Union does not have the capacity for environmental protection it had at the time of approval, and the relief CARE seeks is not a belated attempt to review the regulations themselves, but rather an attempt to apply the new factual situation in New Union to the regulations. (R. at 5-6.) For these reasons, this court should disregard the district court's out of time argument as improper, but even if it does not, CARE's petition is not time barred under 42 U.S.C. § 6976(b). Further, EPA's approval of New Union's hazardous waste program was a rulemaking, allowing jurisdiction to appropriately lie in the district court under RCRA's citizen suit provision.

II. JURISDICTION IS NOT APPROPRIATE UNDER CARE'S 28 U.S.C. § 1331 FEDERAL QUESTION CLAIM BECAUSE ONLY RCRA, AND NOT THE APA, GOVERN CARE'S RIGHT TO PETITION EPA.

While jurisdiction is appropriate in the district court under the citizen suit provision of RCRA, the district court was correct in granting summary judgment as to CARE's claim of federal question jurisdiction under the APA. While the APA states that all agencies "shall give an interested person the right to petition for the issuance, amendment or repeal of a rule," this section of the APA is simply a general statement of administrative law supplanted by a more specific RCRA provision. 5 U.S.C. § 553(e) (2006).

It is commonplace of statutory construction that the specific governs the general. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-25 (1989); *See St. Tammany Parish v. FEMA*, 556 F.3d 307, 318-19 (5th Cir. 2009) (dismissing APA claims for want of jurisdiction when Stafford Act more specifically governed issues regarding government response to Hurricane Katrina). Importantly, for the more specific statute to govern the more general, the difference in statutory language should in a "meaningful way render [the governing statute] more specific than the [general statute]." *De Vries v. Tower Semiconductor Ltd.*, 449 F.3d 286, 300 (2d Cir. 2006). This is exactly what occurred in the case at bar. The provisions of RCRA clearly demonstrate that they render the RCRA provision meaningfully more specific than the APA as to petitions for repeal of a rule, and thus govern CARE's ability to petition EPA action.

The general petition provision in the APA states that agencies "shall give an interested person the right to petition for the issuance, amendment or repeal of a rule." 5 U.S.C. § 553(e). In contrast, the specific provision in RCRA states:

> [a]ny person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under this chapter. Within a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition and

> shall publish notice of such action in the Federal Register, together with the reasons therefor. 42 U.S.C. § 6974(a).

The meaningful differences between the petition provisions of the two statues are numerous. First, the APA limits petitions to "interested" parties where the RCRA allows "any person to petition EPA administrator. 5 U.S.C. § 553(e); 42 U.S.C. § 6974(a). Secondly, and more importantly, the APA provides no mechanism for action on the petitions it authorizes, while RCRA provides that the Administrator take action with respect to petitions and publish notice of those actions in the Federal Register. *Id.* Third, RCRA is buttressed with additional EPA regulations that further specify how EPA is to act on petitions for repeal of a regulation. These additional requirements state that the Administrator shall respond in writing to any petition to commence withdrawal proceedings. 40 CFR § 271.23(b)(1) (2010). They further state that the administrator may then conduct an informal investigation of the petition's allegations, may commence a hearing and require a state to admit or deny allegations contained in the petition in writing. *Id.* The regulations further state that the petitioner will have the burden of proof in any subsequent hearing under the regulations, and set forth the procedures applicable to these hearings. *Id.*

The district court was correct in stating that only RCRA "supports an action for an injunction requiring EPA to act on a petition." (R. at 8.) This in itself is a meaningful difference between RCRA and the APA. The district court could have gone even further, however, as RCRA not only supports an action for injunction where the APA does not, but the APA also lacks further explanatory rules that the regulations applicable to RCRA provide. For all these reasons, RCRA, and not the APA, applies here because RCRA's petition provision provides a meaningful difference from the general APA provision, thus the district court correctly held it lacked jurisdiction for CARE's claim on that basis. *See St. Tammany Parish*, 556 F.3d at 326.

III. EPA'S DECISION NOT TO ACT ON CARE'S PETITION IS NOT A CONSTRUCTIVE ACTION OF ANY KIND AND IS THEREFORE NOT SUBJECT TO JUDICIAL REVIEW BECAUSE ANY SUBSTANTIVE RESPONSE TO CARE'S PETITION WAS DISCRETIONARY.

The district court was correct in its determination that EPA's decision not to act on CARE's petition is not a constructive action. The constructive submission theory relied upon by CARE only applies to an agency's non-discretionary duties. *See generally Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). Review of CARE's petition was a discretionary duty because the language of RCRA § 7004 does not necessarily indicate a mandatory action. 42 U.S.C. § 6976(b) gives a Circuit Court of Appeals of the United States judicial review for the agency's Administrator's action of granting, withdrawing, or authorizing, and because a permit was not constructively granted, denied, or withdrawn, EPA's inaction is not subject to judicial review. 42 U.S.C. § 6976(b).

A. The construction submission doctrine only applies to an agency's mandatory, non-discretionary duties.

Any inaction by EPA on a discretionary duty cannot be construed as a constructive action. Citizen suits brought against EPA are limited to suits alleging that EPA failed to perform a non-discretionary duty. 33 U.S.C. § 1365(a)(2) (2006). A court's decision to construe an agency inaction as an action to realize the purpose of a statute is termed a constructive action under the "constructive submission" doctrine. *San Francisco BayKeeper v. Whitman*, 287 F.3d 764, 768 (9th Cir. 2002). The constructive submission doctrine is often used in cases requiring EPA to approve or set Total Maximum Daily Levels (TMDLs) under the Clean Water Act (CWA). *See generally Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). In *Scott*, which CARE relies upon, when the state did not propose any TMDLs at all, the court found that because EPA had a duty to approve or deny the TMDLs, the inaction constituted a constructive

submission by the state of no TMDLs and an approval by EPA that no TMDLs were necessary. *Scott*, 741 F.2d at 998. Under the constructive submission doctrine, "a complete failure by a state to submit TMDLs will be construed as a constructive submission of no TMDLs, which in turn triggers EPA's non-discretionary duty to act." *BayKeeper*, 287 F.3d at 881.

The constructive submission doctrine is used to give "teeth" to Congress' intent. *Scott*, 741 F.2d at 998. While the theory "cannot allow the states' refusal to act to defeat the intent of Congress that TMDL's be established promptly—in accordance with the timetable provided in the statute," *Scott*, 741 F.2d at 999, there is a strong presumption against such a construction, and the constructive-submission theory that courts accept under the CWA's citizen-suit provision is necessarily narrow. *Id.; Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001).

CARE's reliance on *Scott* is misplaced for two reasons. First, *Scott* simply stands for the principal that if a state has not submitted a TMDL, this absence of a submission is a construction submission of no TMDLs, which EPA must then review. Nothing in *Scott* suggests that EPA's action or inaction regarding an absent submission by the state constitutes a constructive action, only that the state's lack of submission may be a constructive submission.

Second, the determination of whether EPA had a duty to respond in these cases centers on whether the duty was discretionary or non-discretionary. Congress could not possibly have intended that EPA be burdened with a duty to respond to every single petition submitted by disgruntled watchdog organizations. To do so would render EPA overburdened and stretched too thin to complete its duties that are actually mandatory. Further, the language and context of the statute does not suggest that a duty to respond to every petition is mandatory.

B. EPA did not have a mandatory duty to respond to CARE's petition because in RCRA context, "shall" does not indicate a mandatory action.

Under the Purpose and Scope of Requirements for Authorization of State Hazardous Waste Programs, 40 C.F.R. § 271.22(a), in a direct reference to permits approved by the administrator under 42 U.S.C. § 6926(b), states, "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." 40 C.F.R. § 271.22(a) (2010) (emphasis added).

There is no mandatory language in this section of the C.F.R. that requires an action by EPA when a State program is no longer in compliance. Instead, EPA is given the ability, but not a mandate, to withdraw program approval with the use of "may." The Code of Federal Regulations later returns to the use of discretionary language in reference to approval withdrawal proceedings. "The Administrator *may* order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in § 271.22." 40 C.F.R § 271.23(b)(1) (2010) (emphasis added). In contrast to the Code of Federal Regulations, 42 U.S.C. § 6974(b) enables EPA to respond to citizen petitions by stating, "[T]he Administrator *shall* take action with respect to such petition…" 42 U.S.C. § 6974(a) (2006) (emphasis added). "However, although 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean should,' 'will, or even 'may.'" *Guiterrez de Martinez v. Lamagno*, 515 U.S. 417, 432-433 n. 9 (1995). In *Guiterrez*, the Supreme Court refers to D. Mellinkoff's Dictionary of American Legal Usage which asserts that "shall" and "may" are frequently treated as synonyms, and their use depends on context. *Id.* Additionally, the Court cites B. Garner's Dictionary of Modern Legal Usage which notes, "Courts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa." *Id.* As an example, the

Federal Rules of Civil Procedure (FRCP) used the word "shall" to authorize, but not to require, judicial action. *Id.* At the time of *Guiterrez*, the FRCP stated, "The order following a final pretrial conference *shall* be modified only to prevent manifest injustice." *Id.* (emphasis added). The easy mistake has since been corrected, and the same statute now reads, "The court *may* modify an order issued after a final pretrial conference only to prevent manifest injustice." Fed. R. Civ. P. 16(e) (emphasis added).

42 U.S.C. § 6974 uses "shall" to mean "may," not "must." The Supreme Court has noted that mistakes like this are often made in law, and to distinguish statutory interpretation that should be strictly interpreted rather than corrective, the court may look to context. *Guiterrez*, 515 U.S. at 432-433 n. 9. 42 U.S.C. § 6974 groups petitions and public participation together under one section. 42 U.S.C § 6974 (2006). Under § 6974(a), EPA arguably has an unlikely duty to respond to every petition submitted to it by every single disgruntled environmental watchdog organization. However, under § 6974(b), public participation is encouraged, without a specific duty by the agency except to generally encourage this participation. *Id.* Though these provisions could have been separated into two distinct sections, the structure of RCRA demonstrates Congress' intent to encourage public participation. However, it is not a likely interpretation that in doing so, Congress desires to overburden EPA with a mandatory duty to use its limited resources in response to petitions brought under this section of RCRA.

C. EPA's action is not a constructive action of any kind because EPA has not yet been afforded a "reasonable" amount of time to respond to CARE's petition, and an agency interpretation of a statute it administers is given deference.

EPA has not made a constructive action on CARE's petition because a reasonable amount of time has not yet passed since CARE submitted its petition to EPA. After a person petitions the Administrator for the promulgation, repeal, or amendment of any RCRA regulation,

the RCRA affords the Administrator a "reasonable time." § 6974(a). The statute does not define "reasonable time."

When a matter of statutory interpretation is clear, the agency's interpretation may be afforded deference. *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* Court noted, "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'" *Id.* at 844.The *Chevron* analysis is two step: first, a court must determine whether the statutory language being interpreted is ambiguous or clear, using traditional tools of statutory construction. *Id.* at 842. Next, the court must determine whether the agency's interpretation is reasonable or permissible, or if the interpretation is outside the range of ambiguity in the provision. *Id.* at 842-843.

The determination of a "reasonable time" is entitled *Chevron* deference because it related to an environmental statute that EPA administers. *See generally Chevron*, 467 U.S. 837. While the meaning of "reasonable time" in § 6974 is ambiguous, EPA must be allowed deference to determine what a reasonable time is because it is clear that the statute favors a state's own implementation of a hazardous waste program. (R. at 5.) EPA may not have had enough time yet to make a response to CARE's petition. Therefore, if any action by a court needs to be taken, it should be an injunction by the district court ordering EPA to not let more time pass before responding to the petition so that RCRA preference of state implementation may be honored.

Other sections of RCRA impose a clear time constraint. 42 U.S.C. § 6976 (2006). ("[S]uch petition shall be filed within *ninety days* from the date of such promulgation or denial...") (emphasis added). The decision to leave response time at a vague "reasonable time" is a conscious decision made by the drafters which necessarily allows agency determination to factor generally challenges and complications of properly carrying out the statute.

For these reasons, an EPA response to CARE's petition was not mandatory because the decision to respond was discretionary, and the constructive submission doctrine applies to mandatory duties.

IV. IF JUDICIAL REVIEW IS AVAILABLE, THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT BECAUSE EPA'S "CONSTRUCTIVE" ACTION IS NOT ONE THAT CONFERS JUDICIAL REVIEW TO THE COURT OF APPEALS UNDER RCRA.

The District court's decision that this case should be reviewed, if at all, under 42 U.S.C. § 6976(b) in the Appellate Court rather than under 42 U.S.C. § 6972 in the district court should be reversed. As CARE itself argued, 42 U.S.C. § 6976(b) only confers jurisdiction in the Court of Appeals for judicial review of EPA's action in "granting, denying, or withdrawing authorization," however CARE seeks judicial review of EPA's constructive decision not to withdraw authorization.

A. RCRA does not confer jurisdiction to the Court of Appeals for the agency's decision not to withdraw authorization from a state hazardous waste program.

If this Court finds that this case deserves judicial review, CARE must bring its action to the district court to order EPA to initiate RCRA withdrawal proceedings under 42 U.S.C. 6972 because 42 U.S.C § 6976 does not apply. While it is generally true that "specific governs over the general," this statement has no meaning if, as in this case, a specific statute does not apply. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-525 (1989). 42 U.S.C § 6976 confers

judicial review to a Court of Appeals only under limited circumstances: for EPA's decision to grant, deny, or withdraw authorization under RCRA § 3006(b). 42 U.S.C. § 6976(b) (2006).

In deciding not to withdraw approval from New Union's hazardous waste program, EPA performed neither a grant, denial, nor a withdrawal of authorization under RCRA. Rather, if EPA's inaction was a constructive action of any kind, it was a decision to not withdraw authorization. While, the lower court dismisses the difference between a grant and an absence of a withdrawal as a distinction without a difference, (R. at 8.), this distinction is quite pivotal. For example, if one person gives another a pen, then fifteen years later decides not to take the pen back, he is not re-gifting the pen; he is simply deciding not to withdraw his original gift. Again, according to *Chevron*, if the statute is silent or ambiguous with respect to a specific issue, agency's interpretation must be based on a permissible construction of the statute. *Chevron*, 467 U.S. at 842-842.

This action must be brought under the citizen suit provision of RCRA. *See* Part I *supra.* According to 42 U.S.C. § 6972, "Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred." EPA's interpretation of § 6976 is reasonable and permissible. Under CARE's interpretation of RCRA, at each moment EPA is not withdrawing approval, it would be approving the program.

B. Appellate review is inappropriate at this time because if EPA has made a constructive action, it must be ordered by the district court to complete the actions required by RCRA § 7004(a).

If EPA has made a constructive decision regarding New Union's hazardous waste program, it must complete additional steps required by the statute before this decision is subject to judicial review. 42 U.S.C § 6974(a) states that "within a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition and shall publish

notice of such action in the Federal Register, together with the reasons therefore." 42. U.S.C. § 6974(a) (2006).

When the appellate courts are granted jurisdiction to review EPA's actions under 42 U.S.C. § 6976(b), the standard of review is arbitrary and capricious, otherwise known as the "hard look" analysis. *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 217 (D.C. Cir. 2007) (stating, "A court may overturn an agency regulation only if it finds that it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C.S. § 706(2)(A), or that it was promulgated without observance of procedure required by law.") 42 U.S.C. § 6976(a) requires courts to review those objections under the standard set forth in the APA. 42 U.S.C. § 6976. Appellate Review of EPA's constructive action is completely inappropriate at this time. To review EPA's actions, the reviewing court must have access to the full record. Instead, EPA must have the opportunity to publish notice and reasons of its decision in the Federal Register, so that a reviewing court may actually look to the reasons behind the agency action. Because EPA has not yet had a chance to complete this action, EPA action under 7004(a) is not yet reviewable. Therefore, this case must be remanded to the lower court to order EPA to complete the § 6974(a) proceedings.

Affording EPA a chance to complete RCRA proceedings, rather than having a court review a constructive action with the agency never intended to make, is far better public policy. It affords EPA a chance to rectify the situation and perform its intended actions, rather than substituting a court's opinion for an agency determination which the agency never intended to make. Therefore, this case must be reviewed, if at all, in the district court under 42 U.S.C. § 6972. For the reasons above, if this court determines that EPA did perform a constructive action, this Court should not lift the stay on C.A. No. 18-2010, and instead remand to the court below.

V. EPA NEED NOT WITHDRAW ITS APPROVAL OF NEW UNION'S PROGRAM BECAUSE ITS RESOURCES AND PERFORMANCE CONTINUE TO MEET RCRA APPROVAL CRITERIA.

Once a state is authorized to implement and enforce a hazardous waste program, EPA cannot withdraw approval unless it finds that the state program is "inadequate or is failing to enforce compliance with the federal law." *United States v. Murphy Oil USA, Inc.,* 143 F. Supp. 2d 1054, 1115 (W.D. Wis. 2001). If EPA determines that a state program is "inadequate or failing to enforce compliance with federal law," EPA must "hold a public hearing and give the state a reasonable period of time to correct the alleged deficiencies." *Id.*

A. New Union's resources and performance are sufficient for EPA's continued approval of New Union's program.

Failure of a state to perform certain regulatory functions adequately is grounds for program withdrawal. 40 C.F.R. §§ 123.14, 123.136 (2010). The criteria for withdrawing state authorization is enumerated in the Code of Federal Regulations. *See id.* § 271.22. 40 C.F.R. § 271.22(a) provides that EPA may withdraw program approval where a state fails to issue permits, fails to act on violations, fails to seek adequate enforcement penalties, or fails to inspect and monitor facilities subject to regulation. *Id.* § 271.22(a).

New Union has continued to issue permits. In 2009, the DEP indicated in its Annual Report to EPA that it had issued 125 permits the previous year and anticipated issuing 125 permits the present year. (Rec. doc. 4 for 2009, p. 19.) Although New Union has a backlog of permit applications, DEP has implemented a system to maximize the efficacy or permit issuance. *Id.* DEP's policy is to prioritize, "new facilities; permitted facilities seeking to expand operations; facilities with permits that expired fifteen or more years ago; and permitted facilities having the greatest potential for harm to the public health or environment because of the volume

or toxicity of hazardous waste handled." (Rec. doc. 4 for 2009, p. 20.) New Union is adequately addressing the backlog of permits by implementing a system to prioritize the allocation of scarce resources. New Union has not "failed to issue permits" as defined by 40 C.F.R. § 271.22(a).

New Union has continued to inspect and monitor regulated facilities. In 2009, DEP indicated in its Annual Report that it had inspected 150, or 10%, of TSD's the previous year. (Rec. doc. 4 for 2009, p. 22.) EPA also inspected 150 TSD's and anticipated inspecting the same amount during the present year. (Rec. doc. 4 for 2009, p. 23) Together, EPA and New Union have to inspect 20% of TSD facilities in the state annually. (Rec. doc. 4 for 2009, p. 22-23.) In addition, New Union has prioritized facilities that "have reported unpermitted releases of hazardous waste into the environment" and "facilities reporting other violations posing the greatest potential for harm to the public health or the environment because of the volume or toxicity of the hazardous waste they are permitted to handle." (Rec. doc. 4 for 2009, p. 23.) By targeting facilities with the most potential for harm, DEP has allocated scarce resources in an effective way. New Union has not "failed to inspect and monitor facilities subject to regulation" under 40 C.F.R. § 271.22(a).

New Union has acted on violations and sought adequate enforcement penalties. The 2009 Annual Report indicated that DEP took six enforcement actions during the previous year. (Rec. doc. 4 for 2009, p. 25.) Four were administrative orders requiring both compliance and the payment of penalties in amounts derived from EPA's penalty policy, and two were civil actions, requesting injunctions and the judicial assessment of penalties. (Rec. doc. 4 for 2009, p. 25.) During the same year, EPA and environmental groups each filed six actions in the state for violations of the RCRA. (Rec. doc. 4 for 2009, p. 26.) Accordingly, there have been eighteen enforcement actions within the state for violations over the previous year. (Rec. doc. 4 for 2009,

p. 25-6.) New Union has not "failed to act on violations" or "failed to seek adequate enforcement penalties" under 40 C.F.R. § 271.22(a).

Since New Union continues to issue permits, inspect and monitor facilities, act on violations, and seek adequate enforcement penalties, the hazardous waste plan implemented by DEP in New Union does not qualify for withdrawal of program approval under RCRA, nor is it "inadequate." *Id.*; *Murphy Oil USA, Inc.,* 143 F. Supp. 2d at 1115.

B. Even if New Union's resources and performance were not sufficient, EPA has discretion to take action other than withdrawing approval.

Under RCRA, a State program must be consistent with the Federal program. 40 C.F.R. § 271.4 (2010). Paragraphs (a) and (b) of 40 C.F.R. § 271.4 list the criteria for determining "consistency with a state program." *Id.* Pursuant to paragraph (a), any part of state program that "unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program *shall* be deemed inconsistent." *Id.* (emphasis added). Under paragraph (b), any part of a state program or state law that "has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State *may* be deemed inconsistent." *Id.* (emphasis added).

It is clear that "inconsistency" between a state and Federal program as described in paragraph (a) of 40 C.F.R. § 271.4 results the mandatory withdrawal of state authority, because the term "must" is used. *Id.* However, it is not clear that "inconsistency" between a state and Federal program as described in paragraph (b) that section results the mandatory withdrawal of state authority because the term "shall" is used instead. *Id.* The D.C. Circuit addressed the dichotomy between the terms "must" and "shall." *Hazardous Waste Treatment Council v. Reilly,*

938 F.2d 1390, 1397 (D.C. Cir. 1991). In *Hazardous Waste,* EPA argued that withdrawal of federal authorization under paragraph (b) of section 271.4 is discretionary based on the "use of "may" in paragraph (b) as contrasted with the use of the mandatory "shall" in paragraph (a)." *Id.*

While the court in *Hazardous Waste* did not reach the question of EPA's discretionary construction of paragraph (b) of 40 C.F.R. § 271.4, they did state, "Because the EPA is charged with the administration of RCRA, we defer to its interpretation whenever the statute is silent or ambiguous with respect to a specific issue. So long as the agency's interpretation is reasonable and consistent with the statutory purpose, we must uphold it." *Id.* (internal citations omitted).

CARE alleges that New Union's "resources and performance fail to meet RCRA's approval criteria." (R. at 4.) CARE's allegation falls within the purview of paragraph (b) of 40 C.F.R. § 271.4, namely that New Union's hazardous waste treatment plan "acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State." 40 C.F.R. § 271.4. EPA has discretion to withdraw federal authorization under paragraph (b) of § 271.4. *See Hazardous Waste,* 938 F.2d 1390, 1397 (D.C. Cir. 1991). Therefore, EPA is not required to withdraw New Union's authorization. *Hazardous Waste,* 938 F.2d 1390, at 1397.

Withdrawal of federal authorization is a severe measure. The Northern District of Illinois stated that, "Withdrawal of authorization for a state program is an 'extreme' and 'drastic' step that requires the EPA to establish a federal program to replace the cancelled state program." *Waste Mgmt. Inc. v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill. 1989). Furthermore, the authority to withdraw state approval and implement a federal program in its place has never been completely exercised. Ellen R. Zahren, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 Emory L.J. 373, 417 (2000). As one author described it, "This version of environmental bankruptcy is a nice expression of the strong moralism found in the

Acts, but it has about as much chance of being applied as a provision enabling the Administrator to seek imprisonment of the Governor. A federal takeover obviously would be a gross institutional insult...." Vickie L. Patton, *A Balanced Partnership*, Envtl. F., May/June 1996, at 16. EPA is not likely to withdraw federal authorization "unless the state program is astoundingly deficient and the EPA has exhausted other alternatives." Zahren, *Overfiling, supra*, at 417.

New Union's Hazardous Waste Plan is not "astoundingly deficient" nor has EPA "exhausted other alternatives" in the state. New Union continues to issue permits, inspect and monitor facilities, act on violations, and seek enforcement penalties. (Rec. doc. 4 for 2009, p. 19-26.) The state targets the most hazardous polluters in spite of recent budget cuts. (Rec. doc. 4 for 2009, p. 19-26.) There is no evidence to suggest that EPA should exercise discretion and withdraw state authorization without first exhausting other alternatives.

EPA has the authority to "overfile" in lieu of program withdrawal. RCRA's Orientation Manual states that, "the Agency can take other action without officially withdrawing authorization. In such instances, EPA may take independent enforcement action by overfiling, or enforcing a provision for which a particular state has authorization." The U.S. Environmental Protection Agency Office of Solid Waste/ Communications, Information, and Resources Management Division, RCRA Orientation Manual 141 (2006). The Ninth Circuit has recognized that, "[RCRA] manifests a congressional intent to give the EPA a secondary enforcement right in those cases where a state has been authorized to act is triggered." *United States v. Elias*, No. 00-30145, 2001 U.S. App. LEXIS 27064, at *15 (9th Cir. Oct. 23, 2001). While EPA has discretion to withdraw state authorization in New Union, it has not "exhausted all other alternatives." In this case, EPA "overfiling" is an appropriate alternative to withdrawal. EPA may take independent enforcement actions while still allowing New Union to administer program.

VI. EPA NEED NOT WITHDRAW ITS APPROVAL OF NEW UNION'S ENTIRE PROGRAM BECAUSE ERAA PRESENTLY FAILS TO REGULATE HAZARDOUS WASTE.

Pursuant to RCRA, where EPA determines "after public hearing that a state is not in compliance, he shall notify the state. If the state does not take corrective action within a reasonable time, then the Administrator shall withdraw authorization." *Tex. Disposal Sys. Landfill Inc. v. United States EPA*, No. 09-50274, 2010 U.S. App. LEXIS 9401, at *3 (5th Cir. May 7, 2010)(*citing* 42 U.S.C. § 6926(e). The regulations governing RCRA provide a list of circumstances under which a state's authorization may be withdrawn. 40 C.F.R § 271.22. In particular, paragraph (a) states, "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. Such circumstances include the following: ". . . (1) . . . (ii) Action by a State legislature or court striking down or limiting State authorities." *Id.* (emphasis added).

New Union legislature enacted ERAA. (Rec. doc. 4 for 2000, pp. 103-105.) 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 [New Union Railroad] Commission." (Rec. doc. 4 for 2000, pp. 103-105) RRA also "removed criminal sanctions for violations of environmental statutes" by "intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards." (Rec. doc. 4 for 2000, pp. 103-105.)

The transfer of RCRA enforcement authority over railroad facilities to the New Union Railroad Commission is an "action by a State legislature or court striking down or limiting State authorities." § 271.22. However, it does not follow that EPA must withdraw approval for the entire program. 40 C.F.R § 271.22(a) expressly states that the "Administrator *may* withdraw program approval." *Id.* (emphasis added). The use of the term "may" implies that program

withdrawal falls within the discretion of EPA. Furthermore, 40 C.F.R § 271.22(a) states that approval can only be withdrawn "when a State program no longer complies with the requirements of this subpart, *and* the State fails to take corrective action." *Id.* (emphasis added). Even if EPA chose to withdraw authorization, New Union must first be given the opportunity to "take corrective action."

In lieu of program withdrawal, EPA may grant enforcement authority over railway facilities to the New Union Railroad Commission. In Texas, the Texas Natural Resource Conservation Commission is primarily responsible for administering states hazardous waste management program. *See,* Tex. Water Code § 26.131 (2010). EPA granted the Texas Railroad Commission ("RRC") authority over the discharge, storage, handling, transportation, reclamation, or disposal of waste materials (both hazardous and non-hazardous) that result from the activities associated with the exploration, development, or production of oil or gas or geothermal resources. Similarly, EPA may grant independent authorization to the New Union Railroad Commission.

Even though RRA "removed criminal sanctions for violations of environmental statutes" by "intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards," EPA is not left without recourse. (Rec. doc. 4 for 2000, pp. 103-105) EPA retains the authority to enforce criminal and civil provisions. In *United States v. Flanagan,* the court held, "Congress intended other criminal enforcement provisions of Section 6928(d) [of the RCRA] to survive authorization of state programs, which at least indicates a general congressional intent to maintain Federal involvement in criminal enforcement post-authorization." 126 F. Supp. 2d 1284, 1287-88 (C.D. Cal. 2000) (*citing* 42 U.S.C. § 6926(d). Similarly, in *Elias*, the court determined that RCRA "manifests a congressional intent to give EPA a secondary enforcement

right in those cases where a state has been authorized to act that is triggered … if the state fails to initiate an enforcement action." *Elias*, 2001 U.S. App. LEXIS 27064 at *15. EPA has authority to directly enforce criminal penalties. New Union must be given the opportunity to "take corrective action" before EPA may withdraw authorization. EPA has at least two options in lieu of program withdrawal where ERAA presently fails to regulate hazardous waste. EPA may grant enforcement authority over railway facilities to the New Union Railroad Commission or EPA may itself enforce criminal sanctions against those facilities.

VII. NEW UNION'S 2000 ERAA IS CONSISTENT WITH RCRA REQUIREMENTS AND IS IN HARMONY WITH THE COMMERCE CLAUSE TO THE UNITED STATES' CONSTITUTION.

Finally, ERAA's treatment of pollutant X is consistent with RCRA requirements, other state programs, and the Commerce Clause to the United States Constitution. As a threshold matter, it is imperative to note that similarly to Part VI, *supra*, EPA is not required to immediately withdraw its approval for New Union's program even if it is found in violation of RCRA or other requirements. *See* Part VI, *supra*; *See Tex. Disposal Sys. Landfill Inc.*, 2010 U.S. App. LEXIS 9401 at *3.

A. The ERAA Amendments are consistent with RCRA requirements.

As to the specific provisions of ERAA's amendment to New Union's RAA, it is clear that the treatment of pollutant X is consistent with RCRA which states that a program will not be authorized if "(1) such State program is not equivalent to the Federal Program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other states. . . ." 42 U.S.C. § 6926(b).

The first provision of the ERAA amendment provides that facilities in New Union producing pollutant X shall submit to the New Union DEP within 90 days a plan to minimize the

generation of Pollutant X and further submit yearly reports of the same nature until creation of the waste entirely ceases. (R. at 12.) This provision brings New Union in compliance with 42 U.S.C. § 6930, which states that "any person generating or transporting such [hazardous] substance or owing or operating a facility for treatment, storage, or disposal of such substance shall file . . . with the State[] . . . a notification stating the location and general description of such activity and the identified or listed hazardous waste." 42 U.S.C. § 6930(a). The notification clause in part one of the ERAA amendments was promulgated simply to put New Union on notice of facilities generating Pollutant X. This is the intent of RCRA as well, and thus this first clause is consistent with federal and other state programs. The second clause of ERAA amendment section one requiring yearly reports is also consistent with RCRA in that RCRA requires a generator to certify that it "has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable." 42 U.S.C. § 6925(h). The ERAA requirement that generators provide a yearly report "stating the reduction in Pollutant X during the previous year and a plan for reduction of waste in the following year" specifically addresses this RCRA provision. (R. at 12.)

The second Pollutant X provision similarly complies with RCRA. Under the second provision, New Union DEP will not issue any permits for Pollutant X except for storage for less than 120 days while a generator awaits transportation of Pollutant X to a disposal facility outside New Union. (R. at 12.) Under regulations governing RCRA, generators may store hazardous waste for up to 90 days without the issuance of a permit. 40 C.F.R. § 262.34(a). If, however, waste is stored for over 90 days, and up to the 120 days New Union will allow, generators are subject to the requirements of 40 C.F.R. Parts 264, 265, 267, and 270. *Id.* at § 262.34(b). New Union's facilities storing Pollutant X for up to 120 days will and do comply with these EPA

provisions, as New Union's program as adopted in 1986 meets "all of RCRA's statutory and EPA's regulatory criteria for approval." (R. at 5.) Simply because New Union enacted a stringent short term storage provision for Pollutant X, this does not run afoul of RCRA. *See State of New York Dept. of Envtl. Conservation v. U.S. Dep't of Transp.*, 37 F. Supp. 2d 152, 158 (N.D.N.Y 1999) (stating that RCRA recognizes states are permitted to establish requirements that are "more stringent" than EPA regulations).

Third and lastly, the final provision of the New Union ERAA complies with RCRA similar reasons as the second. RCRA and the accompanying regulations govern the transport of hazardous waste, including requiring proper manifesting, recordkeeping, and permitting. 42 U.S.C. § 6923(a); 40 C.F.R. § 263.10 *et seq.* As with the second section of ERAA's amendments governing Pollutant X, New Union's previous program complied with all RCRA and EPA requirements, and can be more stringent than EPA regulations require. (R. at 5).

B. The New Union ERAA does not violate the Commerce Clause.

New Union's final provision in the ERAA regarding transportation of Pollutant X out of and/or through New Union does not violate the commerce clause. The provision does not prohibit transport of Pollutant X through the state, and is an evenhanded regulation of Pollutant X in order to ensure the safety of New Union citizens through the prompt transport of Pollutant X through New Union. The Supreme Court has stated that an absolute ban on importation of hazardous waste into a state violates the commerce clause. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978). However, "[w]here the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Evergreen Waste Sys., Inc. v. Metro. Serv. Dist.*, 820 F.2d 1482, 1484

(9th Cir. 1987). This is exactly the case here. New Union is not prohibiting the import or transport of Pollutant X. (Rec. doc. 5 for 2000, pp. 105-07.) Rather, it is simply requiring direct transport of Pollutant X through New Union from facilities inside the state or outside of the state. *Id.* This is evenhanded regulation that has obvious local health benefits for the citizens of New Union, and thus does not violate the commerce clause. For all the foregoing reasons, ERAA regulation of Pollutant X is valid under RCRA requirements and constitutionally sound.

CONCLUSION

Jurisdiction is appropriate in the district court only under the citizen suit provision of RCRA, because 42 U.S.C. § 6974 is the proper vehicle for CARE's petition of EPA and the APA's general provision does not govern the case at bar. EPA's action is not a constructive approval of New Union's hazardous waste program, and thus this Court does not have direct appellate review of CARE's 42 U.S.C. § 6796 petition, and if review exists, it is in the district court. EPA may continue to approve the hazardous waste plan implemented by the New Union DEP, the ERAA's failure to regulate railroads does not mandate EPA withdrawal of New Union's hazardous waste program, and ERAA does not in any way conflict with RCRA or the Commerce Clause.

For the foregoing reasons, EPA respectfully requests that this Court reverse the ruling of the District Court regarding citizen suit jurisdiction, affirm the district court's grant of summary judgment on federal question jurisdiction, and deny judicial review with respect to CARE's § 6796 petition, not reaching CARE's petition claims on the merits.

Respectfully submitted,

_____
Counsel for Lisa Jackson, Administrator
U.S. Environmental Protection Agency

Consolidated Appendix of Record on Appeal

C.A. No. 18-2010
CA. No. 400-2010

2011 National Environmental Law Moot Court Competition

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,	)	**C.A. No. 18-2010**
	)	**C.A. No. 400-2010**
Respondent-Appellee-Cross-Appellant,	)	
v.	)	
STATE OF NEW UNION,	)	
Intervenor-Appellee-Cross-Appellant.	)	

ORDER

Following the issuance of the Order of the District Court dated June 2, 2010, in Civ. 000138-2010, Citizen Advocates for Regulation and the Environment, Inc. (CARE) and Lisa Jackson, Administrator, U.S. Environmental Protection Agency (EPA), each filed a Notice of Appeal. CARE takes issue with the decision of the lower court with respect to its holding that it lacked jurisdiction under either 42 U.S.C. § 6976(b) or 28 U.S.C. § 1331 to order EPA to make a determination on a petition submitted by CARE, pursuant to 42 U.S.C. § 6974 and 5 U.S.C. § 553(e), that EPA withdraw its approval of the New Union hazardous waste program to operate in lieu of the federal program under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (RCRA), pursuant to 42 U.S.C. § 6926(b) & (e). EPA takes issue with the decision of the lower court with respect to its holding that it lacked jurisdiction under 42 U.S.C. § 6976(b). At the same time, CARE requested this Court to lift its stay of an action it had filed in this Court on January 4, 2010, C.A. No. 18-2010, seeking judicial review of EPA's constructive denial of CARE's petition, C.A. No. 18-2010, on grounds identical to those stated in the Summary of Record, Appendix A to the decision of the court below, and to consolidate

these two, related actions. EPA and New Union take issue with lifting the stay and with EPA's failure to act as a "constructive" determination that New Union's program continues to meet RCRA's approval criteria. New Union takes issue with all of CARE's arguments that New Union's program no longer meets the approval criteria, while EPA takes issue with all of those arguments except CARE's contention that New Union's program no longer governs hazardous waste at railroad yards, although EPA argues this does not require disapproval of the entire state program.

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

1. Whether RCRA § 7002(a)(2) provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004. (CARE and EPA argue that it does and that the court below erred in granting New Union's motion for summary judgment on this issue; New Union argues that it does not and that the court below was correct in granting summary judgment on this issue.)

2. Whether 28 U.S.C. § 1331 provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed under 5 U.S.C. § 553(e). (CARE argues that it does and that the court below erred in granting New Union's motion for summary judgment on this issue; EPA and New Union argues that it does not and that the court below was correct in granting summary judgment on this issue.)

3. Whether EPA's failure to act on CARE's petition that EPA initiate proceedings to consider withdrawing approval of New Union's hazardous waste program under RCRA § 3006(e) constituted a constructive denial of that petition and a constructive determination that New Union's program continued to meet RCRA's criteria for program approval under RCRA § 3006(b), both subject to judicial review under RCRA §§ 7002(a)(2) and 7006(b). (CARE argues that EPA's failure to act on the petition constituted constructive denial of the petition and a constructive determination that New Union's program continues to meet the criteria for approval and that both actions are subject to judicial review under RCRA §7006; EPA and New Union argue that EPA's inaction on CARE's petition is not a constructive action of any kind and is therefore not subject to judicial review.)

4. Assuming the answer to issue 3 is positive and the answer to either or both of issues 1 and 2 is positive, should this Court lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions or should the Court remand the case to the lower court to order EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program? (CARE argues the Court should lift the stay and proceed with judicial review rather than remanding to the lower court; EPA and New Union argue the Court should not lift the stay, and instead remand to the court below to order EPA to initiate proceedings under RCRA §§ 3006(e) and 7004.)

5. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria? (CARE argues New Union's resources and performance are not sufficient to meet RCRA's criteria for state program approval and that EPA must therefore withdraw its approval of New Union's program; EPA argues that New Union's resources and performance are sufficient for EPA's continued approval of New Union's program and that even if they were insufficient, EPA has discretion to take action other than withdrawing approval.)

6. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act effectively withdraws railroad hazardous waste facilities from regulation? (CARE argues that since New Union does not regulate all facilities regulated by RCRA, EPA must withdraw its approval of New Union's program; EPA and New Union argue that New Union's present failure to regulate railroad hazardous waste facilities does not require EPA to withdraw its approval of the entire program.)

7. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause? (CARE argues the Act's treatment of pollutant X makes New Union's program not equivalent to the federal program, inconsistent with the federal program and other approved state programs, and in violation of the Commerce Clause; EPA and New Union argue the Act's treatment of pollutant X does not adversely effect the equivalency of the state program with the federal program, is not inconsistent with the federal or other approved state programs, and does not violate the Commerce Clause.)

SO ORDERED.

Entered this 29th day of September, 2010.

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

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

Procedural History

On January 5, 2009, the Citizen Advocates for Regulation and the Environment, Inc. (CARE), a non-profit corporation organized under the laws of the State of New Union, served a petition on the Administrator of the Environmental Protection Agency (EPA), under §7004 of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, 6974 (RCRA) and § 553(e) of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (APA), requesting that EPA commence proceedings to withdraw its approval in 1986, of New Union's hazardous waste regulatory program to operate in lieu of the federal program under RCRA, pursuant to RCRA § 3006(b), 42 U.S.C. § 6926(b). In support of its petition to EPA, CARE recited a litany of facts arising after that approval suggesting that New Union's program no longer met the criteria for EPA approval, see Appendix A. EPA has taken no action on that petition. On January 4, 2010, CARE filed (with all notice requirements fulfilled) an action in this court under RCRA §7002(a)(2), 42 U.S.C. § 6972, first seeking an injunction requiring EPA to act on that petition or, in the alternative, judicial review of EPA's constructive denial of the petition and EPA's constructive determination that New Union's hazardous waste program meets the criteria for approval despite the alleged facts. New Union filed an unopposed motion to intervene under FRCP Rule 24, which this court granted. The parties filed cross-motions for summary judgment, agreeing that the facts alleged by CARE were uncontested and no further facts were necessary to decide the matter. Evidently unsure of its jurisdictional

claims, CARE filed simultaneously with this complaint a petition for review with the Court of Appeals, C.A. No. 18-2010, seeking judicial review of EPA's constructive denial and determination on the same grounds. New Union also filed an unopposed motion to intervene in that case, which the Court of Appeals granted. On EPA's motion, the Court of Appeals stayed that proceeding, pending the outcome of this action.

Statutory Background

RCRA regulates the generation, transportation, treatment, storage and disposal of hazardous waste. It authorizes EPA to establish standards governing those activities and requires that persons treating, storing or disposing of hazardous waste have permits to do so. It authorizes EPA to inspect such facilities; indeed, it requires EPA to do so at least once every two years. Finally, it authorizes a range of enforcement options for EPA to use against violators, including criminal sanctions. At the same time, the statute contemplates and favors administration and enforcement by states with approved programs in lieu of the federal program. RCRA §§ 1001(a)(4) & 1003(a)(7), 42 U.S.C. §§ 6901(a)(4) & 6903(a)(7). It requires EPA to approve state programs that are equivalent to the federal program, are consistent with the federal program and the programs of other approved states, and provide adequate enforcement.

RCRA § 7004 authorizes citizens to petition EPA for the promulgation, amendment or repeal of regulations, but provides no jurisdiction for appealing EPA action or non-action. RCRA § 7006(a), 42 U.S.C. § 6976(a) authorizes judicial review of regulations in the Circuit Court of the District of Columbia, within 90 days of promulgation of the regulations. RCRA §7006(b), 42 U.S.C. § 6976(b), authorizes judicial review of EPA's approval or denial of a state's program in lieu of the federal program. Judicial review is available under either subsection only for ninety days following EPA action or later, if based on facts arising after EPA action. Finally, RCRA § 7002(a)(2) authorizes citizens to sue EPA to perform a mandatory duty under the statute.

Factual Background

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

raise justiciable issues, they bear no relation to whether this court has jurisdiction to consider these issues.

Jurisdictional Issues

Citizen Suit Jurisdiction

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

RCRA does not define what administrative actions are rule makings and what administrative actions are orders. That distinction is drawn in the APA. It defines a rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency…," 5 U.S.C. § 551(4), while an order as an action other than a rule, but includes a permit, 5 U.S.C. § 551(6) & (8). Courts and commentators have characterized rule making as legislative in nature, forward looking and general in application, while orders are adjudicatory in nature, applying fact to law in specific situations involving specific parties. David L Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 924 (1965). The significance of the distinction lies in the procedures agencies must follow in taking administrative actions, the jurisdiction for seeking judicial review, and the availability of attorney's fees.

EPA and CARE argue that EPA's initial approval of New Union's program was a rule making. EPA treated it as such by using a notice and comment procedure and incorporating the result in 40 CFR Part 272. EPA's determination that its action is a rulemaking, however, is not entitled to *Chevron* deference because EPA is not interpreting RCRA, the statute it administers, but the APA, a non-environmental statute governing all administrative agencies. Although EPA treated its action as a rulemaking, its action has the characteristics of an order. EPA is applying facts to law; determining whether the program submitted by New Union met the criteria of RCRA and EPA's regulations under RCRA. Its action was not general in applicability; it considered a

single and particular party: New Union. This distinction is seen in the contrast between this EPA action under 40 CFR Part 271 and EPA's promulgation of 40 CFR Part 271, governing the process and criteria it would use in determining whether to approve or disapprove all applications for approval of state programs. Those regulations are general in nature, they apply to all states, and they are forward looking, they govern future decisions by EPA. EPA's approval of New Union's program, however, involves a single state and while the results of the decision govern who issues permits in the future, the decision only considered whether the state's program met EPA's criteria, as they both existed, at one particular moment in time. Moreover, the structure of RCRA's judicial review provision, § 7006, confirms the difference. The first subsection, § 7006(a), grants jurisdiction for judicial review of EPA's promulgation of regulations. The second subsection, § 7006(b), grants jurisdiction for judicial review of EPA's issuance, amendment or denial of permits and of state programs. Permits are orders rather than rules, 5 U.S.C. § 551(6) & (8); program approvals are coupled with them and with no other administrative actions. There is no reason to set § 7006(b) apart from § 7006(a) except that (a) deals with review of regulations and (b) with review of orders. If the actions covered were all regulations, there would be no need for the second subsection and it would be redundant. Admittedly, (a) grants jurisdiction to the Court of Appeals for the District of Columbia, while (b) grants it to the local Court of Appeals. This emphasizes the general/particular distinction between the actions addressed in (a) and (b), again supporting the rule/order distinction. If the actions in (b) were rules, judicial review of all of the actions could have been incorporated in (a), with the minor addition of an exception to jurisdiction in the D.C. Circuit.

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

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

28 U.S.C. § 1331 Jurisdiction

A. To order action on the petition under the APA. CARE's second claim is that EPA's failure to act on the petition also violates the Administrative Procedure Act, which requires that every federal agency "shall give an interested person the right to petition for

the issuance, amendment or repeal of a rule." 5 U.S.C. § 553(e). CARE asserts federal question jurisdiction under 28 U.S.C. § 1331 for this claim. The first problem with this alternative is the old maxim of statutory interpretation that the specific governs over the general. *Green v. Bock Laundry Machine Co.,* 490 U.S. 504, 524-525 (1989). The APA is a general authority for rulemaking petitions; RCRA § 7004 is the specific authority for rulemaking petitions under RCRA, replacing APA § 553(3) when it comes to RCRA. This second claim also founders on the same grounds as the first. EPA's action in approving New Union's program was not a rule; it was an order. The wording of RCRA § 7004 demonstrates that APA § 553(e) is of no avail for another reason. The APA provision requires administrative agencies to allow interested parties to file rule making petitions. The RCRA provision requires EPA not only to allow interested parties to file rule making petitions, but also requires EPA to take timely actions on those petitions, an admonition missing in APA § 553(a). Only RCRA § 7004 supports an action for an injunction requiring EPA to act on a petition. But for the reasons enunciated above, such an action does not lie here.

B. To review EPA's "constructive" denial of the petition and "constructive" determination that New Union's program currently meets the approval criteria. CARE argues that many factors occurring since 1986 have rendered New Union's hazardous waste program no longer approvable under RCRA. These factors are set forth in a series of documents that comprise the agreed upon administrative record. A list of those documents and a fair summary of the record, submitted by CARE, appear in Appendix A. CARE argues that, because all of the factors on which CARE relies were reported directly by New Union to EPA, EPA has been aware of them since the dates on which they were reported, many of them years ago. CARE further argues that EPA's continued failure to commence proceedings under RCRA § 3006(e) to withdraw its approval of New Union's hazardous waste program constitutes a "constructive" determination by it that New Union's program continues to meet RCRA's criteria for state program approval. *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). CARE argues that ordering EPA to commence proceedings to consider withdrawing approval of New Union's program is not necessary, since EPA has had years to do so when confronted with egregious evidence of the inadequacy of New Union's program. CARE seeks judicial review of EPA's "constructive" determination. EPA and New Union argue that if such judicial review is available, it is by the Court of Appeals under RCRA § 7006(b), not by this Court under 28 U.S.C. § 1331. CARE replies that § 7006(b) confers jurisdiction on the Court of Appeals for judicial review of EPA's action only in "granting, denying or withdrawing authorization" under RCRA § 3006(b), while CARE seeks judicial review of EPA's determination not to withdraw authorization, which is not covered by RCRA § 7006(b) and remains a federal question subject to judicial review under § 1331. This is a distinction without a difference. The wording of § 7006(b) leaves no doubt that Congress intended that jurisdiction for review of all EPA actions regarding whether state programs meet RCRA's criteria for approval be in the Court of Appeals.

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

SO ORDERED.

Romulus N. Remus
United States District Judge

June 2, 2010

APPENDIX A

RECORD

The record in this case consists of the following documents:

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

SUMMARY OF RECORD

When EPA approved New Union's hazardous waste program in 1986, EPA made a finding that the New Union DEP had adequate resources to fully administer and enforce the program, including issuance of permits in a timely fashion, inspecting RCRA regulated facilities at least every other year, and taking enforcement actions against all significant violations. (Rec. doc. 2, p. 1) EPA noted that with less resources the program might not be adequate. (Rec. doc. 3, p. 16) At that time, the DEP reported in the application for approval of its program that there were 1,200 hazardous waste treatment, storage and disposal facilities (TSDs) in the state requiring permits under RCRA. (Rec. doc. 1, p. 17) It further reported that at that time it had 50 full-time employees dedicated entirely to that program, including: 15 permit writers, 15 inspectors, 3 laboratory technicians, two lawyers and 15 administrators. (Rec. doc. 1, p. 73) Since that time the number of TSDs in the state has grown, while the resources devoted to the program has shrunk. In its 2009 Annual Report to EPA, the DEP reported 1,500 TSDs (Rec. doc. 4 for 2009, p. 23) and 30 full time employees, including: 7 permit writers, 7 inspectors, 2 laboratory technicians, 1 lawyer and 13 administrators. (Rec. doc. 4 for 2009, p. 52) New Union's annual reports indicate that the increase in TSDs has been gradual since 1986, while most of the loss of employees has occurred since 2000. New Union's 2009 Annual Report to EPA attributed that decrease to the deterioration of the state's finances. (Rec. doc. 4 for 2009, p. 50) New Union's 2009 Annual Report to EPA also indicates that the decrease in the DEP's hazardous waste resources was no greater than 20% more than decreases in resources the state devotes to other public health regulatory programs. (Rec. doc. 4 for 2009, p. 51) DEP's 2009 Annual Report to EPA also indicated that the Governor directed a freeze on hiring state employees, except for 25% of vacancies he has deemed critical to protection of civil order and that there are no DEP vacancies falling within that exception. (Rec. doc. 4 for 2009, p. 53) The DEP's 2009 Annual Report to EPA also indicated that the Governor's Director of Budget has stated publicly that the freeze is likely to continue for at least the next two years and that lay offs of between 5

and 10% of state employees is likely during that time. (Rec. doc. 4 for 2009, p. 53) Newspaper accounts of his statement indicate he would concentrate resource cuts on discretionary programs and programs in which state employees performed functions that federal employees would otherwise perform. (Rec. doc. 6, June 6, 2009)

DEP's shortage of resources has translated directly into less than robust implementation and enforcement of RCRA in the state. In its 2009 Annual Report to EPA, the DEP indicated that it had issued 125 RCRA permits during the previous year and anticipated issuing 125 during the present year. (Rec. doc. 4 for 2009, p. 19) This accomplishment is against the background of a growing backlog of permit applications. The DEP's 2009 Annual Report to EPA indicated that some 900 TSDs had permits, but were continued by operation of law, some of them expired as long as 20 years ago. (Rec. doc. 4 for 2009, p. 20) At the same time, the DEP reported that it had about 50 applications a year from new facilities or permitted facilities that wish to expand their operations but need an amended permit to do so. (Rec. doc. 4 for 2009, p. 20) The DEP reported that its stated policy is "to prioritize permit issuance in the following order: new facilities; permitted facilities seeking to expand operations; facilities with permits that expired fifteen or more years ago; and permitted facilities having the greatest potential for harm to the public health or environment because of the volume or toxicity of hazardous waste handled." (Rec. doc. 4 for 2009, p. 20)

The DEP's 2009 Annual Report to EPA also indicated that it performed inspections of 150 TSDs during the previous year and expected to perform at the same level during the current year. (Rec. doc. 4 for 2009, p. 22) Since it could not inspect more than 10% of the TSDs a year, the Report indicated that DEP solicited EPA to inspect a comparable number of facilities both years and that EPA did so last year and promised to do so in the present year. (Rec. doc. 4 for 2009, p. 23) The DEP reported that its stated policy to prioritize inspections is "to give priority to inspecting facilities that have reported unpermitted releases of hazardous waste into the environment and to facilities reporting other violations posing the greatest potential for harm to the public health or the environment because of the volume or toxicity of the hazardous waste they are permitted to handle." (Rec. doc. 4 for 2009, p. 23)

The 2009 DEP Annual Report to EPA also indicates the DEP took 6 enforcement actions during the previous year; four were administrative orders requiring both compliance and the payment of penalties in amounts derived from EPA's penalty policy, and two were civil actions, requesting injunctions and the judicial assessment of penalties. (Rec. doc. 4 for 2009, p. 25) EPA took the same number of comparable actions in the state and environmental groups filed 6 citizen suits in the state during the past year for violations of RCRA. (Rec. doc. 4 for 2009, p. 26) The DEP reported there were 22 significant permit violations during the year and hundreds of minor violations. (Rec. doc. 4 for 2009, p. 24)

In 2000, the New Union legislature enacted the 2000 Environmental Regulatory Adjustment Act (the "ERAA"), containing a number of amendments to existing environmental and other legislation, two of which are pertinent here. The first was an

amendment to the Railroad Regulation Act (the "RRA"), which had established a New Union Railroad Commission charged with regulating intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards, all to the extent allowed by the Commerce Clause in the federal Constitution. The Commission is a state agency and its Commissioners are state employees, one--the Chair--appointed by the Governor, one appointed by the State Senate, and one appointed by the State House of Representatives, serving staggered terms. The ERAA amended the RRA by transferring "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the Commission." Moreover, it removed criminal sanctions for violations of environmental statutes, by facilities falling under the jurisdiction of the Commission. (Rec. doc. 4 for 2000, pp. 103-105) At the time of enactment, there was only one intrastate railroad in New Union, the New Union RR Co. The president of the New Union RR Co. was Nat Greenleaf, the twin brother of Luther Greenleaf, Majority Leader of the State Senate. (Rec. doc. 6, Aug. 14, 2000)

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

> Recognizing that Pollutant X is said by EPA and the World Health Organization to be among the most potent and toxic chemicals to public health and the environment; and
>
> Recognizing further that there are presently no treatment or disposal facilities in New Union designed and permitted to, or capable of, preventing exposure of persons or the environment to releases of Pollutant X; and
>
> Recognizing further that there are only nine treatment and disposal facilities in the country presently authorized by EPA under RCRA to treat or dispose of Pollutant X;
>
> NOW, THEREFORE, the Hazardous Regulation Act is amended to include the following:
>
> 1. Every facility generating wastes including Pollutant X shall submit to the DEP within the next ninety days a plan to minimize the generation of Pollutant X containing wastes and every year thereafter by December 31, shall submit to the DEP a report stating the reduction in generation of Pollutant X during the previous year and a plan for additional reduction of such waste in the following year, until such generation entirely ceases.
>
> 2. The DEP shall not issue permits allowing the treatment, storage or Disposal of Pollutant X, except for storage for less than 120 days while awaiting transportation to a facility located outside of the state and permitted and designed to treat or dispose of Pollutant X.
>
> 3. Any person may transport Pollutant X through or out of the state to a facility designed and permitted to treat or dispose of Pollutant X, provided, however, that such transport shall be as direct and fast as is reasonably possible, with no stops within the state except for emergencies and necessary refueling. (Rec. doc. 4 for 2000, pp. 105-107)