Team 33

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION
AND THE ENVIRONMENT, INC.,
Appellant-Cross-Appellee,

v.

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

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Appeal No. 400-2010 is based on a district court order from June 2, 2010 finding a lack of subject matter jurisdiction under 42 U.S.C. § 6972(a)(2) and 28 U.S.C. § 1331 to decide Appellant CARE's action on the merits. This Court has jurisdiction to review a district court's final decision under 28 U.S.C. § 1291. EPA timely filed a Notice of Appeal.

Appeal No. 18-2010 is based on an action filed by CARE in this Court under 42 U.S.C. § 6976(b), which was stayed pending the District Court's decision on an action based on identical grounds, C.A. No. 400-2010. Because CARE has failed to establish a reviewable EPA action, 42 U.S.C. § 6976(b) does not provide subject matter jurisdiction for judicial review. Therefore, this Court has no jurisdiction to lift its stay and decide CARE's claim on the merits.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does RCRA § 7002(a)(2) provide jurisdiction for district courts to order EPA action on a RCRA § 7004(a) petition for withdrawal of state hazardous waste program authorization?

II. Does 28 U.S.C. § 1331 provide jurisdiction for U.S. district courts to order EPA action on a petition for withdrawal of state hazardous waste program approval, filed pursuant to 5 U.S.C. § 553(e)?

III. Does EPA's lack of response after one year to a RCRA § 7004(a) petition for withdraw authorization for a state hazardous waste program constitute constructive action, judicially reviewable under RCRA § 7006(b)?

IV. If both the district court and this Court have subject matter jurisdiction over this case, should this Court lift its stay or remand the case to the district court?

V. On the merits of the case CARE has alleged, must the EPA withdraw its approval of New Union's program due to insufficient resources and performance?

VI. On the merits of the case CARE has alleged, must the EPA withdraw its approval of New Union's program because New Union is presently failing to regulate railroad hazardous waste facilities?

VII. On the merits of the case CARE has alleged, must the EPA withdraw its approval of New Union's program because New Union's amendments on the treatment of Pollutant X render the program not equivalent, inconsistent, or in violation of the Commerce Clause?

STATEMENT OF THE FACTS

In 1986 the Environmental Protection Agency (EPA) approved the State of New Union's hazardous waste regulatory program to operate in lieu of RCRA. R. at 10. The EPA found that the New Union DEP (DEP) had adequate resources to fully administer and enforce the program by issuing permits in a timely fashion, inspecting hazardous waste treatment, storage, and disposal facilities (TSDs) at least every other year, and taking action against significant violations. R. at 10. Since 2000, New Union's hazardous waste program has lost 20 full-time employees of its original 50. R. at 10. Originally, DEP had devoted 15 permit writers, 15 inspectors, 3 laboratory technicians, two lawyers, and 15 administrators to the program. R. at 10. In 2009 personnel declined to 7 permit writers, 7 inspectors, 2 laboratory technicians, 1 lawyer and 13 administrators. R. at 10. The overall decrease in positions was similar to that faced by other New Union public health regulatory programs. R. at 10. The Governor's Director of Budget expects New Union's 2009 hiring freeze to continue to for at least two years, with additional layoffs of 5-10% of all state employees. R. at 10-11. Lay-offs are speculated to concentrate on discretionary and federally delegated state programs. R. at 11.

In 1986 there were 1,200 TSDs in New Union, with a 25% gradual increase over 23 years to 1,500 in 2009. R. at 10. In 2008 DEP issued 125 RCRA permits, and anticipated issuing the same number for 2009. R. at 11. Permit applications are backlogged, with many expired permits continued by operation of law, but DEP has a policy in place to prioritize permit issuance. R. at 11. In 2008 DEP inspected 150 TSDs, with the same expected for 2009. R. at 11.

DEP solicited and received EPA assistance in inspecting approximately 150 additional TSDs in 2008, and EPA promised to do so again for 2009. R. at 11. If TSDs are to be inspected every other year, then for 2008 and 2009, the combined efforts of EPA and DEP yield inspections of approximately 40% of facilities that should be inspected each year. R. at 10-11. DEP has a priority policy in place for inspection of TSDs. R. at 11. In 2008 DEP took 6 enforcement actions resulting in injunctive relief and penalties, while the EPA initiated 6 other enforcement actions, and citizens brought 6 suits. R. at 11. There were 22 significant permit violations in 2008, and hundreds of minor violations. R. at 11.

In 2000 the New Union legislature enacted the 2000 Environmental Regulatory Adjustment Act (ERAA), which amended environmental legislation, among other things. R. at 11. An amendment to the Railroad Regulation Act established the New Union Railroad Commission, which regulates intrastate railroad freight rates, tracks, rights of way, and railroad yards. R. at 12. The amendment transferred "all standard setting, permitting, inspection, and enforcement authorities of the DEP … to the Commission." R. at 12. It also removed criminal sanctions for environmental statute violations by facilities falling under Commission jurisdiction. R. at 12.

The 2000 ERAA also amended the state hazardous waste program to include a provision requiring generators to develop a plan to minimize output of Pollutant X. R. at 12. Another provision provided that "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." R. at 12. A final provision stated that "[a]ny person may transport Pollutant X through or out of the state … [if] such transport [is] as direct and fast as is reasonably possible." R. at 12.

The perambulatory language of the statute recognized that New Union did not have any TSDs capable of handling Pollutant X and that only 9 TSDs existed elsewhere that were capable and authorized to treat or dispose of Pollutant X. R. at 12.

STATEMENT OF THE CASE

On January 5, 2009, Citizen Advocates for Regulation and the Environment, Inc. (CARE), a New Union corporation, petitioned the EPA Administrator under § 7004(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6974(a) (1980), and under § 553(e) of the Administrative Procedure Act (APA), 42 U.S.C. § 553(e) (1980). R. at 4. The petition demanded that EPA commence withdrawal proceedings for New Union's hazardous waste regulatory program, approved in 1986 under RCRA § 3006(b), 42 U.S.C. § 6926(b) (1984). R. at 4. CARE asserted that circumstances at the time of approval had since changed so that the state's program no longer met § 3006(b) criteria. R. at 4.

On January 4, since EPA had not yet taken action on the petition, CARE filed an action in the U.S. District Court for the District of New Union, C.A. No. 400-2010, pursuant to RCRA's citizen suit provision, § 7002(a)(2), 42 U.S.C. § 6972 (1984) (with all notice requirements fulfilled), and alternatively under 28 U.S.C. § 1331 (1980). R. at 4. The complaint asked the court to order EPA action on the petition pursuant to § 7002(a)(2), or in the alternative, to find that EPA's inaction amounted to constructive action, and therefore grant judicial review on the merits of CARE's allegations under federal question jurisdiction. R. at 4. In this action, CARE asserted that in not responding to the petition, EPA had constructively determined not to withdraw authorization, which is not covered by the language of RCRA § 7006(b), and must therefore remain within § 1331 federal question jurisdiction.

New Union filed an unopposed motion to intervene, which the District Court granted. R. at 4. The parties agreed that the facts alleged by CARE were uncontested and sufficient to decide the matter, and accordingly filed cross motions for summary judgment. R. at 4.

CARE simultaneously filed a petition in this Court under RCRA §7006(b), 42 U.S.C. § 6976(b) (1984), C.A. No. 18-2010, requesting judicial review of EPA's constructive action on the same grounds as the complaint filed in the District Court. R. at 5. CARE argued opposite its district court action: jurisdiction for EPA's constructive action is with this Court under the language of § 7006(b), and not under § 1331. New Union also filed an unopposed motion to intervene in that case, which was granted by this Court. R. at 5. On EPA's motion, this Court stayed that action, pending the District Court's review of CARE's § 7002(a)(2) citizen suit and its request for judicial review under § 1331. R. at 5.

Without addressing the merits of CARE's case, the District Court granted summary judgment to EPA and New Union, and dismissed CARE's action. R. at 9. First, it found that because EPA's initial approval of the state program was an order, and not a rule, it was not subject to petition under § 7004(a), and therefore CARE's § 7002(a)(2) action to compel EPA action should be dismissed for lack of subject matter jurisdiction. R. at 7. Second, 28 U.S.C. § 1331 does not provide federal question jurisdiction for the petition. R. at 8. Although APA §553(e) allows citizens to petition federal agencies for the issuance, amendment, or repeal of a rule, EPA's 1986 approval of New Union's program was an order, not a rule. R. at 8. Also, RCRA §7004(a), not the APA, is the appropriate tool for petitioning the EPA for state program deauthorization. R at 8. Moreover, while the court saw RCRA § 7004(a) as requiring timely action on petitions, APA § 553(e) contains no such requirement. R. at 8.

Finally, the District Court found that judicial review for CARE's constructive action lies with this Court under § 7006(b), if at all, because that provision plain language clearly indicates that "jurisdiction for review of all EPA actions regarding whether state programs meet RCRA's criteria for approval be in the Court of Appeals," and not in district courts under § 1331. R. at 8. Accordingly, since jurisdiction was lacking, the District Court dismissed CARE's action.

Following the District Court's order, CARE and EPA each filed a Notice of Appeal with this Court. R. at 1. CARE disputes the District Court's holding that it lacked jurisdiction under both RCRA § 7002(a)(2) and 28 U.S.C. §1331 to order EPA to act on CARE's petition submitted under RCRA § 7004(a) and APA §553(e). R. at 1. EPA takes issue with the District Court's holding that it lacked jurisdiction under RCRA § 7002(a)(2) solely because the petition was invalid. R. at 1. In addition to the appeal arising from the District Court, C.A. No. 400-2010, CARE requested this Court to lift its stay on the petition for judicial review under RCRA § 7006(b), C.A. No. 18-2010. R. at 1. EPA and New Union oppose this request. R. at 2.

SUMMARY OF THE ARGUMENT

The District Court incorrectly concluded that it lacked jurisdiction under RCRA § 7002(a)(2) solely because CARE's petition was invalid. EPA's 1986 approval of New Union's hazardous waste program was a rule, not an order, thus CARE's petition was otherwise valid and reviewable in that respect. CARE's claim should instead be dismissed for lack of subject matter jurisdiction because EPA's decision whether to respond or act on a § 7004(a) petition to commence withdrawal proceedings is discretionary and unreviewable under § 7002(a)(2). § 1331 federal question jurisdiction to order EPA action is lacking because the proper provision for petitioning EPA for state program deauthorization is RCRA § 7004(a), not APA § 553(e).

Furthermore, if jurisdiction exists for the alleged constructive determination not to withdraw authorization, it is with this Court under § 7006(b), not with the District Court under § 1331.

RCRA § 7006(b) does not provide judicial review with this Court because EPA's inaction on CARE's petition does not amount to constructive action. However, if this Court determines that both it and the lower court have subject matter jurisdiction, this Court should remand the case to the lower court because there is no meaningful standard that this Court could apply to the EPA's constructive actions, there is no record to review, and it is in the interest of justice to do so because remanding to the lower court it will promote continued protection of New Union's environment and public health.

If this Court instead lifts its stay, it must find that EPA is not required to withdraw its approval of New Union's hazardous waste program. CARE's allegation that New Union's program lacks sufficient resources and performance to meet RCRA requirements does not necessitate withdrawal. The DEP has sufficient resources and performance to administer and enforce New Union's program, and even if it does not, EPA has discretion to take actions other than withdrawal that will aid the State's administration and enforcement measures. CARE's allegation that the ERAA amendment effects DEP's authority to regulate railroad hazardous waste facilities does not require the EPA to withdraw approval of the program because EPA retains discretion to initiate program revision. Finally, CARE's allegation that the EPA must withdraw approval on the basis of the ERAA amendments regarding Pollutant X is unfounded because those amendments do not violation the Commerce Clause, are not inconsistent, and are equivalent regulations found in the Federal and other state programs.

STANDARD OF REVIEW

In ruling on a dismissal for lack of jurisdiction, this Court reviews the lower court's legal conclusions *de novo*. *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009). Jurisdictional findings of fact are reviewed for clear error. *See Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947). The party asserting federal court jurisdiction bears the burden of proving by a preponderance of the evidence that jurisdiction exists. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-104 (1998).

In ruling on a motion to dismiss for lack of subject matter jurisdiction, an appellate court should construe the complaint's allegations and factual inferences in favor of the appellant. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). However, it is not required to "accept as true a 'legal conclusion couched as a factual allegation,' nor inferences that are unsupported by the facts set out in the complaint." *West Virginia Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 133 (D.D.C. 2008), quoting *Trudeau v. Federal Trade Commission*, 456 F.3d 178, 193 (D.C. Cir. 2006).

ARGUMENT

I. The District Court Lacks Jurisdiction under RCRA § 7002(a)(2) Because CARE Fails to Allege a Nondiscretionary Duty.

A. EPA's 1986 Approval of New Union's Hazardous Waste Program was a Rule, not an Order.

A "rule" is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). In contrast, an order is a "final disposition … of an agency in a matter other than rule making." *Id.* §551(6). To promulgate a rule, an agency must first publish notice of the proposed rulemaking, and provide opportunity for the public to submit "data, views, or arguments" relevant to the proposed rule. 5

U.S.C. § 553(b), (c). Ultimately, publication in the Federal Register provides force of law. 5 U.S.C. § 553(d), 40 C.F.R. § 271.20(e). Once EPA issues final authorization of a state program, "[a] state is authorized to carry out [the] program in lieu of the Federal Program … and to issue and enforce permits for the storage, treatment, and disposal of waste." 42 U.S.C. § 6926(b).

The District Court characterized EPA's 1986 approval of New Union's program as an order because the "action was not general in applicability; it considered a single and particular party: New Union." R. at 6-7. The court also saw the rule/order distinction in the language of RCRA § 7006. While § 7006(a) grants jurisdiction to the D.C. Circuit Court of Appeals for review of final regulations and denial of petitions for promulgation, amendment, or repeal of regulations, § 7006(b) grants jurisdiction to the local Court of Appeals for review of "the Administrator's action … in issuing, denying, modifying, or revoking any permit… or in granting, denying, or withdrawing authorization under [§ 3006]." Because permits are orders rather than rules, the District Court reasoned by coupling them with approvals, denials, and deauthorizations of state programs, Congress intended to categorize the latter as orders. R. at 7.

However, the language of § 7006 need not be subjected to the District Court's narrow interpretation for two reasons. First, while the "final regulations" contemplated in § 7006(a) are generally applicable, the fact that state program approval, denial, and deauthorization are excluded from that section does not necessary mean they are not also generally applicable. While such action is applicable only with regard to one state, it is generally applicable to all entities in relation to that state for the foreseeable future. Congress could have sensibly concluded that such decisions, though generally applicable, are of an especially local character. While the D.C. Circuit may be better suited to make decisions concerning truly general regulations that will affect national application of environmental laws, local courts should review local decisions.

Second, even § 7006(b) is meant to confirm the particular, rather than general applicability of state program approval, denial, and deauthorization, it does not necessarily follow that decisions of particular applicability are not rules. On the contrary, the plain language of APA § 551(4) makes clear that agency statements of "*particular applicability and future effect* designed to implement … or prescribe law or policy" are rules. 5 U.S.C. § 551(4) (emphasis added). A decision regarding state program status is particularly applicable in the sense that it applies only to one state, and has the future effect of authorizing a state to operate its own program with force of law, in lieu of the federal program.

At first blush, the language of § 7006 would seem to infer that Congress intended to classify judicial review by order and rule, respectively. However, upon closer inspection, such placement does not label approvals, denials, and deauthorizations of state programs as such. The fact that EPA submitted the 1986 approval of New Union's state hazardous waste program to notice, comment, and opportunity for public hearing further confirms the fact that it was exercising its rulemaking, rather than adjudicatory function. *See United States v. Southern Union Co.*, 643 F. Supp. 2d 201, 212-13 (D.R.I. 2009) (holding that EPA authorization of changes to Rhode Island hazardous waste management program was exercise of EPA's legislative rulemaking authority, and not merely interpretive or policy statement). Therefore, EPA's 1986 approval of New Union's program was a rule, not an order.

B. The District Court Lacks Jurisdiction to Order the Administrator to Act because the Decision Whether to Withdraw State Program Authorization is Discretionary.

While the District Court does not lack jurisdiction for the reasons cited in its order, it lacks subject matter jurisdiction because CARE's claim does not allege a nondiscretionary duty. RCRA § 7002(a)(2) states that "any person may commence a civil action … where there is alleged a failure of the Administrator to perform any act or duty under [RCRA] which is *not*

discretionary with the Administrator." 42 U.S.C. § 6972(a)(2) (emphasis added). § 7004(a) allows "any person [to] petition the [EPA] Administrator for the promulgation, amendment, or repeal of any regulation under [RCRA]. 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).

Significantly, there is no requirement that the Administrator *must* respond to *every* petition validly made under § 7004(a), nor does the statute specify what constitutes a "reasonable time" in which the EPA is required to respond, if at all. While EPA's own regulations state that "[t]he Administrator shall respond in writing to any petition to commence withdrawal proceedings," this merely specifies the method of response, rather than codify a nondiscretionary duty. 40 C.F.R. § 271.23(b)(1). A successful § 7002(a)(2) claim alleging failure to act on a § 7004(a) petition would require a finding that EPA has a nondiscretionary duty of timeliness in responding, and a nondiscretionary duty to perform the act petitioned.

i. <u>*Discerning a Nondiscretionary Duty*</u>

In *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987), the court explained when a nondiscretionary duty exists, how it can be discerned, and what it means for EPA. *Id.* at 790-97. The court concluded that "(1) a nondiscretionary duty of timeliness may arise … if it is readily-ascertainable by reference to some other fixed date or event; and (2) such a deadline may or may not impose a nondiscretionary duty of timeliness." *Id.* at 790-91. Moreover, "in order to impose a clear-cut nondiscretionary duty, … a duty of timeliness must 'categorically mandate' that *all* specified action be taken by a date-certain deadline." *Id.* at 791, quoting *Natural Resources Defense Council v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1974).

Where a deadline may be readily ascertained by reference, "this type of inferable deadline is likely to impose merely a 'general duty' of timeliness, one which does not result in *per se* violations … [and] is likely to impose [only] a discretionary duty." *Thomas*, 828 F.2d at 791. If such a deadline cannot be readily ascertained, "it will be impossible to conclude that Congress accords a particular agency action such high priority as to impose upon [it] a 'categorical mandate' that deprives it of all discretion over the timing of its work." *Id.*

Considering the proposition that EPA has a nondiscretionary duty to respond or act on § 7004(a) petitions to commence withdrawal proceedings, several U.S. district court decisions have flatly discredited such assertions. In *Sierra Club v. EPA*, 377 F. Supp. 2d 1205 (N.D. Fla. 2005), the EPA was petitioned under the Clean Water Act to commence withdrawal proceedings for authorization of a state NPDES program. *Id.* at 1206. When EPA did not responded to the petition, the plaintiffs brought a citizen suit under 33 U.S.C. § 1365(a)(2), a provision with language identical to that of § 7002(a)(2). *Id.* at 1207. Noting that EPA was required by rule to "respond in writing to any petition to commence withdrawal proceedings," the court found that

> "neither the statute nor the regulations impose any prescribed method by which, or specific time within which, the EPA must evaluate a complaint or evidence of a state's noncompliance and make a determination. The most that could be said is that [it] must make a reasonable inquiry, and must do so within a reasonable time. But these are standards that ring of discretion[, and a] citizens' suit to enforce such discretionary duties is not available."

Id. at 1208.

Similarly, in *Johnson County Citizen Committee for Clean Air and Water v. EPA*, No. 3:05-0222, 2005 WL 2204953 (M.D. Tenn. Sept. 9, 2005), the court found that "[t]he Administrator is under no mandatory duty to investigate complaints, hold hearings, or make findings of violations," and a nondiscretionary duty "to withdraw approval arises only *after* the Administrator has determined that a state … program [is not] in compliance with federal

standards." *Id.* at 4 (interpreting 33 U.S.C. § 1342(c)(3), the language of which is substantially similar to that of RCRA § 3006(e) for relevant purposes here) (emphasis in original).

ii. Analyzing the Statutory Language and Agency Interpretation

EPA discretion must be judged in light of the plain language and structure of the Act, "in order to determine the legislative intent and the true meaning of the statute." *Sierra Club v. Train*, 557 F.2d 485, 490 (5th Cir. 1977), citing *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977). While use of the word "shall" "generally indicates a mandatory intent," a contrary argument is viable "when extrinsic aids such as the purpose of the statute, [or] the statute as a whole … indicate[] … that the statute be given a discretionary effect." *Train*, 557 F.2d at 489.

The analysis begins with the "traditional presumption that an agency's refusal to investigate or enforce is within the agency's discretion." *Sierra Club v. Whitman*, 268 F.3d 898, 902 (9th Cir. 2001), citing *Heckler v. Chaney*, 470 U.S. 821, 838 (1985). This can be rebutted if a statute "circumscribes agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion." *Heckler*, 470 U.S. at 834-35. However, an "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities, … EPA must decide … the most effective way to accomplish the objectives of the Act as a whole." *Whitman*, 268 F.3d at 903.

With regard to the duty to investigate, "requiring the EPA to 'expend its limited resources investigating multitudinous complaints, irrespective of the magnitude of their environmental significance' could lead to an inability to investigate and enforce those violations the Administrator believes to be the most serious." *Id*. at 902-03, citing *Dubois v. Thomas*, 820 F.2d 943, 947-48 (8th Cir. 1987). A different interpretation of investigation and enforcement provisions would impede the objectives of the Acts that provide EPA's statutory authority, and

"[o]nly if the Administrator has discretion to allocate [EPA's] own resources can a rational [investigation] and enforcement approach be achieved." *Dubois*, 820 F.2d at 948.

Absent an unambiguous Congressional mandate, the "agency's interpretation of a statute which it administers is entitled to a high degree of judicial deference[;] … if the statute is silent or ambiguous [on a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 948-49, quoting *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

RCRA § 3006(e) discusses EPA's authority to withdraw state program authorization. Once it "determines after public hearing" that the program no longer meets approval criteria, it "shall withdraw authorization of such program and establish a Federal program." 42 U.S.C. § 6926(e). Absent any clarification in the provision of how Congress expects the Administrator to arrive at that determination, the EPA has interpreted that the Administrator "*may conduct* an informal investigation to determine whether cause exists to commence [withdrawal] proceedings," and "*may order* the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person." 40 C.F.R. § 271.23(b)(1) (emphasis added). Further, upon determining after withdrawal proceedings that a state program no longer meets federal standards, the "Administrator *may withdraw* program approval." 40 C.F.R. §271.22(a). (emphasis added). In light of the *Heckler* presumption of discretion for agency investigation and enforcement decisions, 40 C.F.R. §§ 271.22 & 271.23 are reasonable, permissible interpretations of § 3006(e).

As applied to RCRA §§ 7002(a)(2) & 7004, the Administrator's duties to respond to petitions and to commence withdrawal proceedings are plainly wrought with discretion. The presumption of unreviewability is strengthened by the consequences of adopting the alternative

view. Requiring EPA to respond to every petition, take action accordingly, and publish it in the Federal Register with reasons would be a wasteful expenditure of limited agency resources in a reactive, rather than proactive, manner. EPA's priorities would essentially be controlled by the criticisms of "any person" willing to write a petition.

§ 7004(a) imposes at most a discretionary duty to act on a petition for deauthorization. One could argue that EPA has a nondiscretionary duty to *respond* to a § 7004(a) petition within a reasonable time, but this is an empty command, since the agency has no duty to act on the petition. EPA could satisfy such an obligation by writing to the petitioners that it will not decide whether to act upon the petition or investigate its claims. Because Congress could not have intended such a meaningless requirement, any duty to respond or act must be discretionary. *See Texas Disposal Systems Landfill Inc. v. EPA*, 377 Fed. Appx. 406 (5th Cir. 2010) (holding EPA's decision not to commence § 3006(e) withdrawal proceedings is discretionary and unreviewable).

EPA's interpretation of § 3006(e) is entitled to substantial deference since the agency is charged with administering RCRA. If the duties to investigate and enforce, determine whether to commence withdrawal proceedings, and withdraw authorization were nondiscretionary, EPA would be bound in its affairs by the demands of the citizenry. RCRA's goal of "[a]ssuring that hazardous waste management practices are conducted in a manner which protects human health and the environment" would be significantly impeded if EPA was required to react to "what could be thousands of … citizen petitions." 42 U.S.C. § 6902(a)(4); (Order 6).

While the District Court was correct that it lacked jurisdiction under § 7002(a)(2), it reached that conclusion through incorrect reasoning. However, since EPA's duty to act on § 7004(a) petitions for state program deauthorization is at most discretionary, subject matter jurisdiction was still lacking because the claim failed to allege a nondiscretionary duty.

II. The District Court Lacks Jurisdiction Under 28 U.S.C. § 1331 to Decide CARE's Claim.

A. RCRA § 7004(a), not 5 U.S.C. § 553(e), is the Proper Tool for Petitioning All EPA Actions Regarding State Hazardous Waste Program Authorization.

28 U.S.C. § 1331 allows U.S. district courts to hear cases or controversies arising under federal law. APA § 553(e) states that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. §553(e). However, RCRA § 7004 specifies that "[a]ny person may petition the [EPA] Administrator for the promulgation, amendment, or repeal of any regulation *under this chapter*." 42 U.S.C. § 6974(a) (emphasis added). Although § 553(e) petitions undoubtedly raise federal questions, otherwise justiciable under § 1331, Congress has specified that all matters arising under RCRA be petitioned under § 7004(a). The logical corollary is that RCRA, not the APA, governs such petitions and EPA's response to them. CARE's 553(e) petition was improperly submitted because § 7004(a) was the exclusive route designated for deauthorization petitions.

A general statutory rule will govern absent a more specific rule. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524 (1989). This is a basic rule of statutory construction: "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Radnazower v. Touche Ross & Co*., 426 U.S. 148, 152 (1989). It is thus established law that "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 229 (1957).

§ 553(e) is the default general petitioning provision that is superseded by other petition provisions applying to specific agencies under specific Acts. As evidenced by Congress' particularity, § 7004(a) governs petitions made regarding matters under RCRA. A petition made under APA § 553(e) for withdrawal of state program authorization is improper and cannot trigger

§ 1331 jurisdiction. Allowing such a procedure would essentially permit a petitioner to circumvent the prescribed route under RCRA, via the APA, to ask a court to order EPA action under RCRA.

B. RCRA § 7006(b), not 28 U.S.C. § 1331, Provides Judicial Review for EPA Actions Regarding State Hazardous Waste Program Authorization.

Congress further confirmed the "specific over general" concept as applied to RCRA by assigning all judicial review of "final regulations promulgated pursuant to [RCRA]," and EPA's "denial of any petition" of the agency's rulemaking actions specifically to the Court of Appeals for the D.C. Circuit under § 7006(a). Even more explicit is the exclusive judicial review placed in the local Court of Appeals under § 7006(b) for EPA action "granting, denying, or withdrawing [state hazardous waste program] authorization under [§ 3006]."

CARE alleges that "granting, denying, or withdrawing authorization," does not embrace a constructive determination not to deauthorize, and therefore only § 1331 provides a remedy. §7006(b); R. at 8. However, as the District Court aptly observed, "[t]his is a distinction without a difference." R. at 8. Congress clearly intended to confine questions of EPA state program authorization (or lack thereof) to the realm of § 7006(b). Allowing § 1331 jurisdiction for judicial review of any issue regarding state hazardous waste program authorization would conflict with the purpose and express terms of § 7006(b).

More significantly, where a statute commits review of final agency action to a Court of Appeals, it has exclusive "jurisdiction to hear claims concerning nonfinal agency action (or inaction) that might affect [its] future statutory review of final agency action." *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) [hereinafter *TRAC*]. If CARE could show that EPA's inaction amounts to constructive action, § 7006(b) would commit judicial review exclusively to this Court, not the District Court.

III. RCRA § 7006(b) Does Not Provide Judicial Review in This Case because EPA's Inaction on CARE's petition did Not Constitute Reviewable Agency Action.

Even though the District Court lacks jurisdiction, "[i]t does not automatically follow that … it must lie in this [C]ourt, for both courts have just so much jurisdiction as Congress has provided by statute." *Thomas*, 828 F.2d at 792. This Court's judicial review does not encompass EPA's determination not to withdraw authorization, nor does it extend to the decision whether to investigate or even to make such a determination at all.

A. Agency Action Only Results In Constructive Action Under Limited Circumstances Not Present in This Case.

When an agency opts not to make a determination or fails to act, judicial review may be available when such inaction takes any of three forms: action that is effectively final yet unacknowledged; agency recalcitrance in the face of a clear statutory duty; and unreasonable delay, which encompasses a petitioner's statutory right to timely decision making, and an agency's statutory duty to avoid unreasonable delay. *Thomas*, 828 F.2d at 792-97. All except the first category require a nondiscretionary statutory duty to act.

i. Effectively Final Yet Unacknowledged

Effectively final action that an agency has not acknowledged exists "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief." *Id*. at 1099. In such a case, an agency essentially "cast[s] its decision in the form of inaction rather than in the form of an order denying relief." *Id*. Accordingly, the reviewing court "can undertake review as though the agency had denied the requested relief and can order an agency to either act or provide a reasoned explanation for its failure to act." *Thomas*, 828 F.2d at 793, quoting *Public Citizen Health Research Group v. FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984).

In *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1979), the petitioners challenged the Secretary of Agriculture's inaction on their request to suspend the registration of DDT in interstate commerce, arguing that while no reviewable final action existed, a court could review the constructive determination not to suspend. *Id.* at 1095-96. Finding that the petitioners had standing to challenge the constructive determination, the D.C. Circuit noted that the suspension power was "designed to protect the public from an imminent hazard[, and] if [the] petitioners [we]re right … that DDT presents a hazard sufficient to warrant suspension, then even a temporary refusal to suspend results in irreparable injury on a massive scale." *Id*. at 1099. However, the court remanded the case to the Secretary "either for a fresh determination, … or for a statement of reasons for his … refusal to suspend," since he had no statutory duty to issue an interim suspension prior to a final determination. *Id*. at 1099.

In sharp contrast, inaction on CARE's petition to withdraw state program authorization propagates no pressing urgency or threat of imminent hazard. Rather, the facts show a slow, gradual, and marginal decline in New Union's program resources. Furthermore, even accepting *arguendo* CARE's "constructive determination" argument, inaction on the petition has no effect on the "rights" of that group, since no such rights exist. As discussed above, EPA's duty to respond and act on petitions to withdraw state hazardous waste program authorization are discretionary and akin to decisions not to investigate or enforce. Such inaction cannot harm the rights of those not entitled to the action withheld.

A distinguishable case illustrating agency inaction amounting to constructive action is *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). In *Scott*, the State of Illinois had failed to submit total maximum daily load limits (TMDLs), which are daily discharge limits for water pollutants under the Clean Water Act. Illinois was required by statute to submit TMDLs to the

EPA within 180 days of December 28th, 1978, after which the Administrator was statutorily obligated to "either approve or disapprove such [TMDLs] not later than thirty days after the date of submission." *Id.* at 996. If approved, they would become part of the state's continuing planning process. If disapproved, the Administrator would be required within thirty days to establish TMDLs "as he determines necessary to implement the water quality standards applicable to such waters," which the State would then incorporate into its plan. *Id.* The court found that EPA had a clearly defined nondiscretionary statutory duty to review and then approve or disapprove a state's proposed TMDLs, which would be triggered by Illinois' submission of no TMDLs. *Id.* at 998. However, the court remanded to the District Court to decide whether the State's failure to submit TMDLs in fact constituted a "constructive submission." *Id.* at 997 n.11.

Scott is distinguishable from the case at bar for two important reasons. First, EPA's inaction regarding Illinois' TMDLs was incompatible with the goals of federal water pollution control – it was "tantamount to approval of state decisions that TMDLs are unneeded." *Id*. at 998. Second, EPA was under a clear nondiscretionary statutory duty to review and approve or disapprove of a State's proposed TMDLs. Contrary to the facts in *Scott*, mandating EPA action on each citizen petition is far removed from the importance of ensuring that a State has proper water quality standards in place. Congress unequivocally required the latter by imposing a clear, nondiscretionary statutory duty, but clearly relegated the former to the realm of agency discretion. A different interpretation would frustrate the goals of RCRA, which require effective investigation, enforcement, and prioritization within the administrative structure of EPA.

ii. Recalcitrance in the Face of Statutory Duty and Unreasonable Delay

Naturally, if agency inaction amounts to recalcitrance, a clearly defined statutory duty must exist, e.g. "provisions that require an agency to take specific action where certain

preconditions have been met." *Thomas*, 828 F.2d at 793. CARE's petition asks EPA to commence withdrawal proceedings. Responding to the petition and acting to commence the proceedings are both wholly discretionary duties, and even if they were not, they are certainly not "clear statutory duties." *Id*. Recalcitrance cannot exist without a mandate of obedience.

The third category, unreasonable delay, may exist where an agency has a statutory obligation of "final action within a reasonable amount of time," or where the petitioner has a statutory "right to timely decisionmaking." *Id.* at 794. However, what "differentiates 'unreasonable delay' from 'unacknowledged final action' is that the petitioner who pleads the former concedes that the agency is still analyzing the matter, but complains that the process is taking too long." *Id*. In C.A. No. 18-2010, CARE alleges that EPA's inaction on its § 7004(a) petition constitutes constructive action, not that EPA has unreasonably delayed taking such action. Therefore, this Court should not engage in judicial review of a claim not alleged. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); Fed. R. Civ. P. 8(a)(2). However, CARE's claim would fail under either theory.

B. Unreasonable Delay Has Not Been Established in This Case.

RCRA § 7006(b) ensures that judicial review of EPA action "shall be in accordance with sections 701 through 706 of Title 5." 42 U.S.C. § 6976(b). 5 U.S.C. § 706(1) provides that "the reviewing court shall … compel agency action … unreasonably delayed."

A reviewing court considers several factors in assessing a claim of unreasonable delay, including time taken in decisionmaking in light of any indications of congressional expectations for expediency, whether a delay affects human health and welfare; the effect of expedition on agency activities of higher or competing priority, the nature and extent of interests affected by the delay, and whether the delay involves agency impropriety. *TRAC*, 750 F.2d at 80.

Absent any deadlines or timetables, "an agency is entitled to considerable deference in how expeditiously it proceeds with [the] action." *Beyond Pesticides v. Johnson*, 407 F. Supp. 2d 38, 39 (D.D.C. 2005), citing *Thomas*, 828 F.2d at 797. Indeed, congressional placement of deadlines in some provisions warrants a conclusion that failure to impose them elsewhere is not inadvertent. *Thomas*, 828 F.2d at 797 n. 99. While delays affecting human health and welfare are more serious than those affecting economic interest, "this factor can hardly be considered dispositive when … virtually the entire docket of the [EPA] involves issues of this type." *Id*. at 798. Such cases are better measured by the effect of delays on agency activities of competing priority, "since an[] acceleration [of one action] may come at the expense of delay[ing] action elsewhere." *Id*. However, absent a statutory right to performance of the underlying action, a petitioner cannot allege harm done to a right to timely decisionmaking. *Thomas*, 828 F.2d at 798. Lastly, a petitioner alleging agency bad faith must "overcome 'the well established presumption that public officials … act in good faith and are conscientiously proper in the discharge of their duties." *Id*., quoting *Bayshore Resources Co. v. U.S.*, 2 Cl.Ct. 625, 632 n. 4 (1983).

EPA's inaction after one year is clearly reasonable. The absence of a timetable or statutory deadline in § 7004(a), particularly considering the presence of one in other RCRA provisions, e.g. §§ 7004(b), reveals congressional intent to give EPA discretion in response time. Further, there is good reason behind a delay in determining to withdraw state program authorization:

> [Such a question] often involves complex scientific, technological, and policy questions. EPA must be afforded the amount of time necessary to analyze such questions so that it can reach considered results … that will not be arbitrary and capricious… [B]y decreasing the risk of judicial invalidation and remand to the agency, additional time spent reviewing … may well ensure earlier, not later, implementation.

Thomas, 828 F.2d at 798-99 (EPA inaction after 3 years in determining whether to regulate strip mine emissions not unreasonable). Like virtually all EPA cases, human welfare considerations are at stake, yet CARE's petition competes with a multitude of other agency activities of higher priority. Moreover, because EPA's duty to determine whether to commence withdrawal proceedings is discretionary, CARE has no statutory right to the action for which it has petitioned, and thus no right to timely decisionmaking on the action. *See also Beyond Pesticides*, 407 F. Supp. 2d at 41 (3 year delay in responding to petition was reasonable, despite EPA's slow but deliberate pace in evaluating eligibility for pesticide registration).

EPA's inaction does not amount to action that is effectively final yet unacknowledged because the petition carries no urgency or threat of imminent hazard, CARE has no statutory right to a determination whether to withdraw state program authorization, and EPA has discretion over such a decision, since it is akin to unreviewable action of opting not to investigate or enforce. A different interpretation of § 7004(a) would frustrate the effective investigation, enforcement, and prioritization within the administrative structure of EPA.

CARE has alleged constructive action, not unreasonable delay of action, so this Court should not engage in judicial review using that analysis. Even under that analysis, however, CARE's claim fails under *TRAC*. This Court does not have jurisdiction to hear CARE's claim.

IV. If EPA Inaction on CARE's Petition Constitutes Reviewable Action under RCRA § 7006(b), This Court Should Not Lift its Stay and Instead Remand to the District Court

A. There Is No Meaningful Standard For This Court To Apply, Thus Meaningful Judicial Review In This Court Cannot Be Had On Otherwise Presumptively Reviewable Claims.

Even if EPA inaction constitutes constructive action, judicial review is not feasible because there are no meaningful standards or substantive law that this Court could apply. 5 U.S.C. § 701(a)(2) precludes judicial review where there is no meaningful standard to apply

because agency discretion is so broad that review would be ineffective. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). In *Texas Disposal Systems Landfill Inc.*, 377 Fed. Appx. at 408, the court held that neither RCRA statutes nor regulations presented standards by which the court could review EPA's determination as to whether cause existed to commence withdrawal proceedings. Although in that case EPA had issued a written determination denying a petition to commence withdrawal proceedings, *id.* at 409*,* this case involves the same lack of meaningful standards for review.

As discussed above, the initiation of withdrawal proceedings, is a discretionary action. 40 C.F.R. § 271.23(b)(1). There is a non-exclusive list of circumstances under which a state's authorization *may* be withdrawn, but withdrawal is not required. 40 C.F.R. § 271.22(a). Even in that non-exclusive list of circumstances there is nothing to guide a determination of whether specific facts rise to such circumstances. *Id.* Ultimately, there is *nothing* in the statute or regulations to guide the Administrator's decision over whether or not cause exists to commence the withdrawal proceedings, and thus there is no meaningful standard to apply. *Texas Disposal System Landfill Inc.*, 377 Fed. Appx. at 408.

Further, there is no meaningful standard that can be applied to a determination of continued approval if this Court couches its review in terms of continued approval as opposed to failure to withdraw. There are no statutory or regulatory provisions explicitly setting forth a process for continued approval or stating that continued approval is contingent on affirmative evidence that the state program meets the initial approval requirements. Rather, a state hazardous waste program remains authorized so long as approval has not been withdrawn. 42 U.S.C. § 6926, 40 C.F.R. § 271.22-.23. Because of this, there is no meaningful standard that this Court could apply to EPA's constructive action of continued approval. This Court must remand to the

lower court because review of the EPA's constructive action is precluded by the *Overton Park* standard.

B. Even If There Is A Meaningful Standard For This Court To Apply, This Court Should Not Review Because There Is No Record.

The remedy for constructive, effectively final action that is committed to the discretion of an agency is remand to the agency for a "fresh determination," since "meaningful appellate review … is impossible … in the absence of any record of administrative action." *Hardin*, 428 F.2d at 1099-1101. Because state hazardous waste program approval is a formal rulemaking process, and because under 5. U.S.C. § 706 a court reviewing agency action must "review the whole record," such review is impossible here because there is no record. The EPA has not published anything in the Federal Register that could constitute a reviewable record, nor were hearing and testimony taken in making the constructive determination of continued approval. Further, if this Court couches its review in terms of determination not to withdraw, then under RCRA § 3006(e) notice and a public hearing are required before authorization can be withdrawn. A public hearing constitutes the body of the record for withdrawal proceedings, along with the Administrator's written explanation of reasons for withdrawal if authorization is indeed withdrawn. *Id.* Here, no such hearing has been held. Because there is no record for either the continued approval or withdrawal proceedings, this Court cannot adequately conduct judicial review under RCRA § 7006(b), and it must therefore remand to the lower court to initiate further proceedings so that a record can be formed.

C. The Case Should Be Remanded To The Lower Court Because It Is In The Interest Of Justice And Protection Of The Environment And Public Health To Do So.

In a Clean Water Act case similar to the case at bar, a district court determined that the drastic act of requiring EPA to withdraw authorization of a state's NPDES program was not

appropriate because the state, as intervenor, must be compelled to act before the EPA could be compelled to act. *Save the Valley, Inc., v. EPA*, 223 F. Supp. 2d 997, 1013 (S.D. Ind. 2002). That court made the initiation of withdrawal proceedings contingent on the intervenor state's failure to take corrective action. *Id.* As that court pointed out, "harmful effects…could result from the immediate withdrawal" of the program, and such a withdrawal would "impose significant administrative burdens on the EPA." *Id.* at 1014. Here, remand to the lower court is in the interest of justice, because the lower court could similarly require the state to take corrective action before the EPA is required to act, which would serve the government's and CARE's interests in preventing harm to New Union's environment and public health. Remand to the lower court for further proceedings is preferable to the immediate withdrawal of approval that would result from a positive outcome on any one of the remaining issues before this Court.

V. EPA Is Not Required To Withdraw Its Approval of New Union's Hazardous Waste Program Because The Program's Resources And Performance Are Sufficient And EPA Retains Discretion In Taking Action Even If They Are Not.

A. New Union's Hazardous Waste Program's Resources And Performance Are Sufficient For EPA's Continued Approval.

Nowhere in RCRA or its regulations are quantified minimum levels of resources or performance standards explicitly required for state hazardous waste programs. Rather, under RCRA § 3006(b), which sets forth the statutory requirements for authorization, a state program must "provide adequate enforcement of compliance with the requirements of [RCRA subtitle III]." 42 U.S.C. § 6926(b). The statutory language indicates that the adequacy requirement applies to only enforcement obligations, and not administrative duties. *Id*. However, some courts have found that "the administration and enforcement of the program are inexorably intertwined." *Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 899 (8th Cir. 2000). While EPA contends that a state program's resources and performance are sufficient if that program is only capable of

enforcing compliance with RCRA provisions, assuming *arguendo* that resources and performance are sufficient only if the program is capable of administering *and* enforcing, as CARE seems to allege, New Union's program is sufficient under that standard.

While the lower court characterized the decrease in workforce resources as translating into "less than robust implementation and enforcement of RCRA" by New Union, R. at 11., that does not mean that New Union's resources and performance are so inadequate as to justify withdrawal. Since withdrawal of authorization is considered "an 'extreme' and 'drastic' step," *United States v. Power Engineering Co.*, 303 F.3d 1232, 1238 (10th Cir. 2002), and the congressional intent shows strong preference for state administered and enforced programs, *see* H.R. REP. NO. 94-1491, at 22 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6262, and RCRA § 1003(a)(7), state program administrative and enforcement measures will only be inadequate if they constitute a complete failure to administer and enforce. In essence, withdrawal should only be exercised in circumstances where "there is clear evidence that the entire State program has fallen into disrepair." *Citizens Legal Environmental Action Network, Inc. v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 WL 220464, at *14 n.26 (W.D. Mo. Feb. 23, 2000). The undisputed facts here indicate that New Union's program is capable of enforcing compliance and administering RCRA requirements. Even though resources have admittedly shrunk over time, DEP still has 30 full-time employees devoted to the program. R. at 10. By the time the program even began to lose employees in 2000, R. at 10, it had already been established a significant amount of time and losses were therefore less likely to affect institutional enforcement and administrative competencies. The program issued 125 permits, inspected 150 TSDs, and took 6 enforcement actions resulting in penalties assessments during 2008. R. at 11. These activities show that New Union's program has not utterly failed to inspect and monitor

regulated activities, failed to act on violations of permits, or failed to seek adequate enforcement penalties. There is not a complete failure to enforce or administer RCRA, and thus DEP's resources and performance are sufficient for continued approval.

B. EPA Retains Discretion To Take Action Other Than Withdrawal Of Authorization If New Union's Hazardous Waste Programs Resources and Performance Do Not Provide Adequate Enforcement Of Compliance.

Even if this Court finds that New Union's program is insufficient, it still cannot order the EPA to withdraw authorization because the agency has discretion to take other action. RCRA § 3008(a)(2) allows for federal enforcement in a state with an authorized program if the Administrator "give[s] notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section." 42 U.S.C. § 6928(a)(2). This allows the EPA to initiate enforcement actions when an authorized state has failed to initiate any enforcement action. *Harmon*, 191 F.3d at 901. Further, this provision may allow the EPA to overfile, i.e. take civil enforcement actions against RCRA violators even when a state with an authorized hazardous waste program has already taken civil enforcement action. *Compare Power Engineering Co*., 303 F.3d at 1240, *with Harmon*, 191 F.3d at 901-02.

In working with a state, EPA could determine that the authorization of a hazardous waste management grant will provide the state with the resources needed to adequately implement RCRA. Under RCRA § 3011, the EPA is authorized "to make grants to the States for the purposes of assisting the States in…implementation of authorized State hazardous waste programs." 42 U.S.C. § 6931(a). Given that DEP's resource deficits arise from the state's budgetary problems, R. at 11, such a grant could bring the program's resources back up to a sufficient level. The primary objectives of RCRA are to protect health, protect environment, and conserve valuable resources by "establishing a viable Federal-State partnership to carry out the

purposes" of RCRA, and more specifically by giving "a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subtitle C." 42 U.S.C. § 6902(a)(7). The means of assistance presented above are established as preferable discretionary alternatives to the initiation of withdrawal proceedings, and are direct solutions to the resource and performance problems presented in this case. Forcing the EPA to initiate withdrawal proceedings is neither required nor necessary.

VI. EPA Is Not Required To Withdraw Its Approval of New Union's Entire Hazardous Waste Program Because New Union Is Presently Failing To Regulate Railroad Hazardous Waste Facilities.

EPA regulations provide procedures for revision of state programs. 40 C.F.R. § 271.21. Revisions "may be necessary when controlling Federal or State statutory authority is modified or supplemented." 40 C.F.R. § 271.21(a). CARE alleges that New Union's ERAA modified the state's statutory authority. R. at 11-12. State's with approved programs are required to "notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and shall identify any new division of responsibilities among the agencies involved." 40 C.F.R. § 271.21(c). More explicitly a state with an approved program is required to "keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities." 40 C.F.R. § 271.21(a). New Union did just this in its 2000 Annual Report to the EPA, where it reported the ERAA amendment to the Railroad Regulation Act, which transferred RCRA authorities and duties as they applied to intrastate railroad facilities to the Railroad Commission. R. at 11-12. EPA regulations further provide that "[t]he new agency is not authorized to administer the program until approved by the Administrator." 40 C.F.R. § 271.21(c). Here, the EPA never approved the ERAA amendments and as a result, the real issue at hand is whether the EPA must withdraw when there have been

modifications to a state's statutory authority and the RCRA program revision regulations have not been used to approve or deny those modifications.

The regulatory language indicates that initiation of program revision is a discretionary action. "*Either* EPA or the approved State *may* initiate program revision." 40 C.F.R. § 271.21(a) (emphasis added). Further, "[w]henever the Administrator has reason to believe that circumstances have changed with respect to a State program, he *may* request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as are necessary." 40 C.F.R. § 271.21(d) (emphasis added). Since Congress never spoke directly on the issue of revision and this regulation was made pursuant to a general congressional mandate that the EPA Administrator "promulgate guidelines to assist States in the development of State hazardous waste programs," 42 U.S.C. § 6926(a), these regulations should be given *Chevron* deference. Further, the regulations governing program revision should be given meaning in light of the entire statutory and regulatory context. If initiation of withdrawal proceedings is mandatory under conditions such as the ones presented here, then the regulations allowing revisions would seemingly lose all effect. Even if a revision to a state program is disapproved, there is no indication that such disapproval necessitates the initiation of withdrawal proceedings. *See generally* 40 C.F.R. § 271.21. EPA is not required to withdraw approval of the entire New Union program due to this modification in the state's statutory authority.

VII. EPA Is Not Required To Withdraw Its Approval Of New Union's Hazardous Waste Program Because The ERAA's Treatment Of Pollutant X Does Not Render The Program Not Equivalent, Inconsistent, Or Violative Of The Commerce Clause.

The EPA never approved the ERAA Pollutant X amendments under the regulations for program revisions, and thus the amendments are not an authorized provision of the state

program. See 40 C.F.R. § 271.21. Arguably, since the amendments are not part of the authorized state program, they could be considered either broader in scope or more stringent state requirements, which are allowed under RCRA § 3009. Even if the Pollutant X amendments are considered part of the authorized state program, they do not cause the program to violate the Commerce Clause, be inconsistent, or be not equivalent with federal and other state programs.

A. The Commerce Clause Is Not Violated.

Under 40 C.F.R. § 271.4, "a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with" the standards presented in the subsections of § 271.4. The applicable subsection referencing Commerce Clause principles states that "[a]ny aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent." 40 C.F.R. § 271.4(a). The Pollutant X amendment subsection "3," explicitly dealing with the transportation of Pollutant X, does not in any way unreasonably restrict, impede, or prohibit the movement of Pollutant X across the state border. R. at 12. Transportation of Pollutant X is permitted by any person "through or out of the state." R. at 12. Even though stops are limited to emergencies and refueling, this is not unreasonable because "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." R. at 12. Given the extreme danger presented by Pollutant X, the limitations are reasonably imposed for the protection of public health and the environment, therefore this Court must find that Pollutant X amendment subsection 3 does not violate the Commerce Clause.

B. The New Union Program Is Not Inconsistent.

Under 40 C.F.R. § 271.4(b), "[a]ny aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent." This subsection imposes two distinct requirements that must be met before a finding of inconsistency may be made. *Hazardous Waste Treatment Council v. Reilly,* 938 F.2d 1390, 1397 (D.C. Cir. 1991). The Pollutant X amendment subsection 2 prohibits the issuance of permits for TSDs of Pollutant X within New Union, except under limited circumstances. R. at 12. However, the § 271.4(b) requirements are not both present. For the first requirement, which is "no basis in human health or environmental protection," *Hazardous Waste Treatment Council*, 938 F.2d at 1394, the Pollutant X amendments are explicitly premised on the legislative findings that "Pollutant X…is among the most potent and toxic chemicals to public health and the environment." R. at 12. Further, it is also premised on the legislative finding 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." R. at 12. Read within this context, the intention of subsection 2 is to provide protection for the environment and human health, and the first § 271.4(b) requirement is therefore not met.

The second § 271.4(b) requirement, that the aspect of state law or program act "as a prohibition on the treatment, storage, or disposal of hazardous waste in the State," *Hazardous Waste Treatment Council*, 938 F.2d at 1393, is not necessarily met since subsection 2 does still allow "for storage for less than 120 days." R. at 12. Even if it were met, Pollutant X amendment subsection 2 cannot be found to be inconsistent since the first requirement was not met. Further, if this Court finds inconsistency, EPA policy states that if a state places unreasonable restrictions on interstate waste movements, "[t]he CERCLA capacity assurance process should be used as an

initial response to State Actions which prohibit waste management within State boundaries without environmental justification." Memorandum from Lee M. Thomas, the Administrator, to Regional Administrators: Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues 2 (Dec. 23, 1988). Thus, if inconsistent, this Court should order the initiation of the CERCLA capacity assurance process, and not jump straight to ordering withdrawal.

C. The New Union Program is Equivalent To The Federal Program.

For approval, RCRA requires state hazardous waste programs to be equivalent to the federal hazardous waste program developed under RCRA Subtitle C, RCRA § 3006(b), but equivalency is not defined anywhere in RCRA. The EPA has, however, taken the position that the authorization process should allow flexibility, and foster innovative state regulatory approaches that may differ from the EPA's but provide equal environmental and public health results. Memorandum from Matthew Hale, Director of U.S. EPA Office of Solid Waste to RCRA Directors: Determining Equivalency of State RCRA Hazardous Waste Programs 1-3 (Sept. 7, 2005). Ultimately, a state is permitted to use a different approach so long as the same effect as the federal requirement is achieved and the state regulations are not less stringent than the federal regulations. *Id.* at 3, 5. Comparisons are limited to related requirements. *Id.* at 7.

Here, the Pollutant X amendment subsection 1 is equivalent and more stringent than the federal regulations governing waste minimization. Under 40 C.F.R. § 262.27, a generator initiating a shipment of hazardous waste is required to certify that it either has a program in place to reduce the volume and toxicity of generated hazardous waste if it is a large quantity generator, or it must certify that it has made a good faith effort to minimize generation of hazardous wastes if it is a small quantity generator. Pollutant X amendment subsection 1 is equivalent to and more stringent than the federal regulation because it requires every facility generating Pollutant X, not

just those about to transport, to have a program. R. at 12. Since CARE has not alleged that New Union lacks a provision for certification upon shipment, there is no indication that this subsection does anything other than make the waste minimization requirements more stringent.

Pollutant X amendment subsection 2 is equivalent to and more stringent than the federal regulations governing the storage of restricted wastes and the permitting of TSDs. Under federal regulations there is a prohibition on storage of wastes restricted from land disposal, except for up to one year for the sole purpose of accumulation as "necessary to facilitate proper recovery, treatment, or disposal." 40 C.F.R. § 268.50(b). In *Edison Electric Institute v. EPA*, 996 F.2d 326, 337 (D.C. Cir. 1993) the D.C. Circuit held that RCRA § 3004(j) indeed "clearly proscribes the indefinite storage of wastes pending the development of treatment and disposal capacity." Pollutant X likely qualifies as one of these restricted wastes due to its highly toxic nature, R. at 12, *see, e.g.*, 40 C.F.R. § 268.34 & .38, and therefore subsection 2 is just a more stringent and more specific version of the federal prohibition on storage. Even if Pollutant X does not qualify as one of the wastes restricted from land disposal, 40 C.F.R. § 271.14 specifically points out that states may "impose more stringent requirements" on permitting than the federal regulations. In either case, equivalency is not violated, especially because CARE has not alleged that New Union's storage and permitting requirements are otherwise deficient.

Pollutant X amendment subsection 3 is more stringent or broader in scope than the federal regulations governing transportation of hazardous waste, and is equivalent in effect. RCRA § 3003 and 40 C.F.R. § 263.10 *et seq.* govern the transport of hazardous wastes, and neither the statute nor the regulations provide a timeliness standard for the transport of hazardous wastes through a state. Subsection 3 should be viewed as an alternative approach and a broader or more stringent standard placed on transport. It is equivalent because it provides the same

effect as federal transportation requirements by protecting environmental and public health from hazardous waste discharges during transportation. While the federal regulation on discharge during transport does this by requiring "immediate action," 40 C.F.R. § 263.30, New Union achieves the same effect by decreasing the possibility of discharge in the first place. Further, since CARE does not allege that New Union does not also have an immediate action regulation, subsection 3 must be considered equivalent to and not less stringent than federal regulations. For the foregoing reasons, this Court must find that the EPA need not withdraw approval from New Union's hazardous waste program on the bases of violation of the Commerce Clause, inconsistency, or lack of equivalency.

CONCLUSION

Respondent-Appellee Lisa Jackson, Administrator, respectfully requests that this Court vacate in part the District Court's order finding a lack of jurisdiction under 42 U.S.C. § 6972(a)(2), and dismiss CARE's claim for lack of subject matter jurisdiction for the aforementioned reasons.

Respondent-Appellee Lisa Jackson respectfully requests that this Court affirm in part the District Court's order finding a lack of jurisdiction under 28 U.S.C. § 1331.

Respondent-Appellee-Cross-Appellant Lisa Jackson respectfully requests that this Court not lift its stay on C.A. 18-2010.