Team No. 35

Civ. App. Nos. 18-2010 and 400-2010

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UNITED STATES COURTS OF APPEALS
FOR THE TWELFTH CIRCUIT

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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.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

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Oral Argument Requested

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BRIEF FOR APPELLEE—CROSS-APPELLANTS,
LISA JACKSON, ADMINISTRATOR,
U.S. Environmental Protection Agency.

## TABLES OF CONTENTS

## TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

UNITED STATES COURT OF APPEALS

UNITED STATES DISTRICT COURTS



FEDERAL STATUTES

FEDERAL REGULATIONS



FEDERAL RULES

LEGISLATIVE HISTORY



OTHER AUTHORITIES

## JURISDICTIONAL STATEMENT

Less than one year after Citizen Advocates for Regulation and the Environment, Inc. ("CARE") served a petition on the Administrator of the Environmental Protection Agency ("EPA") to withdraw approval of New Union's hazardous waste program, CARE filed a citizen suit in the New Union district court under § 7002(a)(2) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(2) (2006). Citizen Advocates for Regulation and the Env't. Inc., v. Jackson, Civ. 000138-2010 at 4 (E.D. New, Jun. 2, 2010), ("CARE I"). CARE sought to enjoin EPA to act on the petition or, in the alternative, judicial review of EPA's constructive determination on the petition that New Union's hazardous waste program meets the agency's approval criteria despite CARE's alleged facts to the contrary. Id.

In pertinent part, 28 U.S.C. § 2401(a) (2006) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." In addition, any action brought under RCRA § 7002(a)(2) "may be brought in the district court for the district in which the alleged violation occurred." Under § 7002(a)(2), jurisdiction is vested in the district court. CARE timely commenced the civil action and the district court had jurisdiction to review CARE's citizen suit filed pursuant to RCRA § 7004(a), 42 U.S.C. § 6974(a) (2006); CARE I at 4.

CARE simultaneously filed a petition for review with this Court, C.A. No. 18-2010, seeking judicial review of EPA's constructive denial and determination. CARE I at 4-5. This Court stayed the proceeding pending the district court decision. CARE I at 5. Because the district court granted summary judgment and a final decision was rendered an all the issues, this Court has jurisdiction over the case pursuant to 28 U.S.C. § 1291 (2006).

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

VII. 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.

4. 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).

4. 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).

4. Whether, if the answer to issue three is positive and the answer to either or both of issues one or two is positive, this Court should lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions or this Court should remand the case to the lower court to order EPA initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program.

5. Whether, if this Court proceeds on the merits of CARE's challenge, EPA must withdraw approval from New Union's hazardous waste program because (1) the program's resources and performance fail to meet RCRA approval criteria, (2) New Union has effectively withdrawn railroads from regulation, or (3) New Union's treatment of Pollutant X is inequivalent with the federal program or inconsistent with other state and federal programs.

6. Whether, if this Court proceeds on the merits of CARE's challenge, EPA must withdraw approval from New Union's program because New Union's treatment of Pollutant X violates the Commerce Clause.

## STATEMENT OF THE CASE

On January 4, 2010, CARE filed suit in the district court under the RCRA citizen suit provision seeking an injunction that EPA act on CARE's petition or, in the alternative, judicial review of EPA's constructive denial and determination of the petition that New Union's program meets EPA's approval. CARE I at 4. New Union's motion to intervene was granted. Id. The district court granted New Union's motion for summary judgment and held the court lacked

jurisdiction under both RCRA § 7002(a)(2), 42 U.S.C. § 6972(a)(2), and 28 U.S.C. § 1331 (2006) to order EPA to act on CARE's rulemaking petition. Id. at 6-9.

The district court held EPA approval of New Union's hazardous waste program was an order and not a rule, thereby taking CARE's petition out of the reach of both RCRA § 7004(a) and § 553(e) of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559 (2006). CARE I at 7-8. But, EPA asserts its approval was a rule and the district court improperly held there was no jurisdiction under § 7002(a)(2) to enjoin EPA to act on the petition filed pursuant to § 7004(a). Meanwhile, the EPA agrees with the district court holding that the court lacked jurisdiction under 28 U.S.C. § 1331 to mandate EPA act on the petition. CARE I at 7-8.

The lower court held, even assuming it enjoined EPA to act on the petition, any sort of judicial review would be time-barred because the facts CARE used to assert New Union's program no longer meets approval criteria occurred more than 90 days ago — exceeding the statute of limitations for judicial review under RCRA § 7006(a)-(b), 42 U.S.C. § 6976(a)-(b) (2006). CARE I at 7.

CARE and EPA simultaneously appealed the summary judgment rendered in the district court. (App. Ct. Order 1.) Both EPA and New Union assert EPA's inaction on the petition is not a constructive action and thus not subject to judicial review. CARE I at 2. CARE takes issue with all of the district court findings. Id. at 1.

CARE requests this Court lift a stay on CARE's petition for review, C.A. No. 18-2010, and consolidate it with the appeal, C.A. No. 400-2010, because both actions seek to address the same issue — EPA's constructive denial and determination on the petition. Id. at 1-2. EPA and New Union oppose lifting the stay and deny EPA's failure to act on the petition was a constructive determination of any kind. Id. at 2.

## STATEMENT OF THE FACTS

In 1986, EPA authorized New Union to administer a state hazardous waste program in lieu of a federal program pursuant to 42 U.S.C. § 6926. (R. doc. 2 at 1.) At the time, EPA found New Union's program was adequate and conformed with the statute's requirements. Id. New Union's program has since changed in numerous ways, two of which are pertinent to this appeal.

First, New Union has cut the resources dedicated to its hazardous waste program following deterioration in the state's finances. (R. doc. 4 at 52, 2009.) The program has since suffered from problems including backlog in its permit applications, reduced ability to inspect hazardous waste facilities, and reduced capability to bring enforcement actions against violators. Id. at 20-24. EPA has brought its own enforcement actions against violators in New Union and provided assistance by inspecting facilities at the request of New Union. Id. at 23.

Second, New Union has enacted the 2000 Environmental Regulatory Adjustment Act ("ERAA"). The act contained a number of amendments to existing legislation, two of which are pertinent here. (R. doc. 6, 2000.) One provision created the New Union Railroad Commission to regulate intrastate railroad activities and transferred "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the Commission." (R. doc. 4 at 103-05.) The amendment also removed criminal sanctions for environmental violations at facilities regulated by the commission. Id. A second provision of the ERAA altered New Union's treatment of a toxin called Pollutant X. Id. at 105-07. The ERAA requires that all generators of Pollutant X develop and submit plans to reduce generation of the toxin, forbids the DEP from issuing permits for certain activities involving Pollutant X except in limited circumstances, and places restrictions on interstate transport of the toxin. Id.

## SUMMARY OF THE ARGUMENT

The district court had jurisdiction under RCRA § 7002(a)(2) to issue an injunction compelling EPA to act on CARE's rulemaking petition, because the petition sought to repeal a regulation. But the district court properly held 28 U.S.C. § 1331 does not confer federal question jurisdiction to compel the EPA to act on the petition because specific authority — RCRA § 7002(a)(2) — trumps general authority. In the event a district court enjoins the EPA to act on the rulemaking petition, the court cannot dictate *how* the agency should act. To do so would be inconsistent with court deference to administrative agency interpretation and implementation of complex statutes the agency oversees.

The district court erroneously held that EPA's failure to act on CARE's § 7004 petition amounted to a constructive denial of the same, and a corresponding determination that New Union's hazardous waste program remained in compliance with the RCRA. Even if the district court were correct in its determination, this Court would lack the power to review EPA's constructive action.

If this Court proceeds on the merits of CARE's challenge, EPA argues the following: (1) New Union's resources and performance are adequate to satisfy RCRA; (2) even if New Union's program is not in accordance with RCRA, EPA is not required to withdraw authorization; and (3) New Union's treatment of Pollutant X does not render the state program inequivalent with the federal program or inconsistent with federal and state programs in other states. This Court should uphold EPA's conclusions on these matters, because these conclusions are reasonable and not contrary to RCRA. This Court should also find that New Union's treatment of Pollutant X does not violate the Commerce Clause, because the ERAA acts evenhandedly, serves important local interests, and affects interstate commerce only minimally and incidentally.

## STANDARD OF REVIEW

An appellate court reviews a district court's grant of summary judgment de novo. Salve Regina Coll. v. Russell, 499 U.S. 225, 238 (1991). During de novo review, the appellate court must apply the same standard used by the district court, Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co., 22 F.3d 1527, 1529 (10th Cir. 1994), and must determine whether the district court correctly applied the relevant substantive law. Southeast Alaska Conservation Council v. U.S. Army Corps of Engr's, 486 F.3d 638 (9th Cir. 2007). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and the movant is entitled to the entry of judgment as a matter of law." Fed. R. Civ. P. 56(c). Judicial review of administrative decisions under RCRA is governed by § 706 of the APA. Under the APA, a court may set aside an agency action if the court determines the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706 (2006).

## ARGUMENT

### I. THE DISTRICT COURT IS VESTED WITH JURIDICTION UNDER RCRA 7002(a)(2) TO ENJOIN EPA TO ACT ON CARE'S PETITION TO REVOKE APPROVAL OF NEW UNION'S HAZARDOUS WASTE PROGRAM FILED PURSUANT TO RCRA § 7004(a).

The district court erred in holding it lacked jurisdiction to adjudicate a RCRA citizen suit to enjoin EPA action on a nondiscretionary duty filed pursuant to RCRA § 7004(a), which states, "any person may petition [EPA] for the promulgation, amendment, or repeal of any regulation under this chapter. Within a reasonable time following receipt of such petition, [EPA] shall take action with respect to such petition." 42 U.S.C. § 6974(a); see CARE I at 6-7. Meanwhile, RCRA § 7002(a)(2) confers district court jurisdiction to adjudicate claims "where there is alleged a failure of [EPA] to perform any act or duty under this chapter which is not discretionary with [EPA]" and "to order [EPA] to perform the act or duty." 42 U.S.C. §

6972(a)(2). Because EPA approval of New Union's hazardous waste program is reasonably considered a rule, CARE correctly sought a district court injunction to compel EPA to act on a petition to revoke the approval pursuant to RCRA § 7002(a)(2).

EPA treated the approval process of New Union's waste program as rulemaking and courts have long recognized administrative agencies are entitled to broad deference when characterizing its own actions. See Am. Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 797 (5th Cir. 2000). Furthermore, EPA approval resembles a rule with its widespread, uniform and future-looking effects. See David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 925, 933-36, 953 (1965). Also the emphatic language of RCRA § 7004(a) that EPA "shall" take action with respect to a rulemaking petition means at the minimum, EPA must timely consider the petition.

RCRA § 7002(a)(2) gives district courts the authority to compel EPA to consider the petition, but does not grant authority to review how the nondiscretionary duty is performed. See Envtl. Def. Fund v. Gorsuch, 713 F.2d 802, 812-13 (D.C. Cir. 1983); Sierra Club v. Browner, 130 F. Supp. 2d 78, 82 (D.D.C. 2001) (noting the district court is "precluded from assessing the substance of the agency's decision"), aff'd, Sierra Club v. Whitman, 285 F.3d 63, 68 (D.C. Cir. 2002). Consequently, the district court erred in holding the court lacked jurisdiction to adjudicate the citizen suit under RCRA § 7004(a).

A. EPA's approval of New Union's hazardous waste program falls reasonably within the legal definition of rulemaking.

EPA approval of New Union's hazardous waste program more closely resembles rulemaking than adjudication. The widespread and prospective effect EPA approval had on New Union leads to the reasonable conclusion that the approval was a rule and not an order. See Hazardous Waste Treatment Council v. EPA, 910 F.2d 974, 976 (D.C. Cir. 1990).

Moreover, EPA subjected New Union's application through formal rulemaking procedure. Rulemaking invites broad public participation and is extended to all interested persons, whereas adjudication only considers the views of litigants. See Shapiro, supra, at 930; 32 Charles Alan Wright & Charles H. Koch, Jr., Federal Practice and Procedure Judicial Review § 8123 (1st ed. 2006). EPA observed formal rulemaking procedure by subjecting New Union's application to notice-and-comment and incorporated the application result in 40 C.F.R. § 272. See 40 C.F.R. § 271.20 (2010); CARE I at 6.

1. *Relevant environmental statutes confirm original jurisdiction over citizen suits is vested in the district court.*

Courts often turn to other statutes to interpret a similar provision and the RCRA nondiscretionary duty citizen suit provision is virtually identical to those found in the Clean Air Act and the Clean Water Act. See, e.g., Clean Air Act § 304, 42 U.S.C. § 7604(a) (2006); Clean Water Act § 505(a)(2), 33 U.S.C. § 1365(a)(2) (2006). The U.S. Supreme Court found the citizen suit provisions in these other acts were useful in interpreting RCRA's provision. See U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992) ("[W]e examine first the [RCRA and the Clean Water Act] citizen-suit sections, which can be treated together because their relevant provisions are similar.") Like RCRA § 7002(a)(2), these statutes place original jurisdiction over citizen suits in the district court. See Clean Air Act § 304; Clean Water Act § 505(a)(2).

2. *The widespread, uniform and prospective effects flowing from EPA approval of New Union's hazardous waste program strongly suggests the action was a rule.*

Rulemaking has widespread and uniform effect on an entire industry, whereas an order is aimed at just one or a few businesses in the industry and unevenly burdens a select few market participants. See Shapiro, supra, at 935-36. Clearly, EPA's approval of New Union's hazardous waste program had a widespread and uniform effect on the hazardous waste treatment, storage

and disposal ("TSD") industry in New Union. (R. doc. 2 at 1.) After the decision, all the TSD facilities residing in New Union had to abide by the state's hazardous waste program. Id. Unlike an order, which has the effect of just putting a select few facilities under the state's supervision, EPA's decision put the entire TSD industry under DEP auspices. See Shapiro, supra, at 935-36; (R. doc. 2 at 1.) Courts define rulemaking as having "uniform or widespread application." Cf. Hazardous Waste Treatment Council v. EPA, 910 F.2d at 976 (holding EPA's action that concerns a single well in a single town does not constitute a regulation).

The district court distinguishes an order from a rule by asserting an order tends to have a purely retroactive effect and a rule has prospective effect, but this distinction has exceptions as illustrated by the many rules with retroactive effects. See Wright, supra at § 8123; Shapiro, supra, at 925, 933-34, 953; CARE at 6-7. Rules, not just orders, substantially impact past conduct and transactions. See Shapiro, supra, at 933-34 (describing Federal Trade Commission rules declaring the use of a particular trademark or trade name will be considered deceptive practice, plainly affects substantial past investment and advertising). The district court admitted EPA approval authorizing New Union to issue permits for hazardous waste programs had a future impact, but EPA determination was based on the state's program as it stood at one particular moment in time. CARE I at 6-7. However, relying on the distinction between prospective and retroactive effects can be tenuous. Rules usually have a "future effect," but this does not negate the fact that rules also possess retroactive effects. See Shapiro, supra, at 953.

*3. Significant deference should be given to EPA's characterization of its own actions*

Generally, courts accord considerable deference to how an agency characterizes its own actions, as such the district court should have deferred to EPA's characterization that its decision was a rule rather than an order. See Am. Airlines, Inc., 202 F.3d at 797; CARE I at 6. Courts

consistently hold agencies are entitled to significant deference when construing statutes they enforce. See Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985); Beazer E., Inc. v. EPA, 963 F.2d 603, 606-07 (3d Cir. 1992). When courts review an administrative agency's interpretation of its own regulatory scheme, courts must uphold the interpretation as long as it is a reasonable construction; a court cannot substitute it's own judgment in place of the agency. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-5 (1984); Beazer E., Inc., 963 F.2d at 606; Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. at 125.

Traditionally, administrative agencies have broad discretion in choosing between rulemaking or adjudication to set policy. See British Caledonian Airways, Ltd. v. C. A. B., 584 F.2d 982, 992-94 (D.C. Cir. 1978); Am. Airlines, Inc., 202 F.3d at 797. Consequently, when determining whether an agency's actions amounts to adjudication or rulemaking, courts look to the "product of agency action" and give "significant deference to an agency's characterization of its own action." See Am. Arlines, Inc., 202 F.3d at 797. In this case, the "product of agency action" with its uniform, prospective and widespread effects on the TSDs in New Union resembles a rule. See Shapiro, supra, at 925, 933-36, 953; (R. doc. 2 at 1.)

Given EPA's discretion to elect between rulemaking and adjudication and the fact EPA treated the application as rulemaking, it is reasonable to say EPA promulgated a rule. CARE I at 6. As such, the district court erred in holding it does not have jurisdiction under RCRA § 7002(a)(2) to compel EPA to act on CARE's rulemaking petition to revoke the rule.

B. The district court is only empowered to compel EPA to act on the nondiscretionary duty without directing how the agency should act.

In a RCRA citizen suit, a district court has jurisdiction to compel the Administrator to perform a nondiscretionary duty, but presently § 7004(a) only requires EPA to respond according

to how the agency sees fit. According to the plain text of RCRA § 7004(a)-(b), Congress enacted the petition provision to encourage public participation in promulgating, repealing and amending RCRA regulations and expressed a commanding intent that EPA "shall" take some action in response to the petition. However, agency action is left undefined and the word "shall" is understood in the legal community as sometimes meaning "may" instead of "must." See B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995) (finding "shall" and "may" are "frequently treated as synonyms" and their meaning depends on context).

Legislative history, rules of construction, and court deference to agency statutory interpretation all suggest EPA has a duty to act on the petition, but the agency has complete discretion in choosing how to act. At most, the district court can enjoin EPA to consider the petition and nothing more. See Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 65 (2004).

1. *Legislative history shows Congress intended to give EPA wide discretion when responding to rulemaking petitions.*

Legislative history clearly shows Congress meant to give EPA wide latitude in responding to petitions by merely saying EPA "will" act on rulemaking petitions if the action is necessary. See H.R. REP. NO. 94-1491, at 69 (1976) reprinted in 1976 U.S.C.C.A.N. 6308 ("the Administrator will take such actions as necessary, and shall publish notice of such action together with his reasons for taking such actions in the Federal Register"). Similarly, EPA regulations governing withdrawal of approved state programs vest the decision completely in EPA discretion. See 40 C.F.R. § 271.23 (2010) ("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 . . ."). Furthermore, courts recognize no existing regulation or statute gives courts the authority to review EPA decisions not to commence withdrawal proceedings. See Texas Disposal Sys. Landfill Inc. ("TDSL") v. EPA., 377 F. App'x. 406, 408

(5th Cir. 2010) (per curium) (holding the court can not review EPA's determination not to commence withdrawal proceedings.)

*2. EPA has the expertise to decide how best to administer the statute it oversees.*

In addition to interpreting the statute to effectuate the intent of the authors, courts consider the practical effects of certain statutory interpretations. See United States v. Christensen, 419 F.2d 1401, 1403-04 (9th Cir. 1969). During trial court proceedings, EPA asserted a court injunction compelling EPA to do more than consider a petition would result in sheer waste of resources. CARE I at 6. EPA would be forced to respond to possibly thousands of petitions. Id. Such an injunction surpasses the scope of the RCRA petition provision and binds EPA with a duty above and beyond what is required. It is settled law that "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." See Norton, 542 U.S. at 65. The Court should find RCRA § 7004(a) only requires EPA to consider rulemaking petitions — any other action is discretionary.

Administrative agencies are tasked with overseeing complex statutes and regulations and their specialized knowledge puts them in a better position to construe the statutes. See Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. at 125. Furthermore, agencies are better able to assess the practical effects statutory interpretations create. See Beazer E., Inc., 963 F.2d at 607; Christensen, 419 F.2d at 1403-04 (9th Cir. 1969) (finding "it is axiomatic that any regulation should be construed to effectuate the intent of the enacting body. Such intent may be ascertained by . . . reflecting on the practical effect of the possible interpretations"). As a result, the Court should defer to the reasonable construction that the RCRA petition provision only mandates EPA to consider a petition and any further action is discretionary.

*3. In enforcing citizen suit violations, the judicial role is to only determine whether there was a clear-cut violation.*

The U.S. Supreme Court recognized Congress provided for citizen suit enforcement for clear EPA violations in district court "where the only required judicial role would to make a clear-cut factual determination of whether a violation did or did not occur." Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987) (quoting Natural Res. Def. Council, Inc. v. Train, 510 F.2d 692, 699 (D.C. Cir. 1974)). Similarly, the U.S. Supreme Court explained that a court can only compel an agency to perform a nondiscretionary act "without directing *how* it shall act." Norton, 542 U.S. at 64 (emphasis in original).

A citizen suit claiming nondiscretionary duty violation does not provide the district court authority to consider challenges that agency action should have been more comprehensive. See Envtl. Def. Fund v. Gorsuch, 713 F.2d at 812-13 (rejecting citizen suit challenge to manner and extent of duties performed); see also Colorado v. Dep't of Interior, 880 F.2d 481, 485-86 (D.C. Cir. 1989).

## II. DISTRICT COURTS HAVE NO FEDERAL QUESTION JURSIDICTION UNDER 28 U.S.C. § 1331 TO ENJOIN EPA TO ACT ON CARE'S PETITION FILED PURSUANT TO 5 U.S.C. § 553(e).

Under 28 U.S.C. § 1331, "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States" and under the Administrative Procedure Act "each 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, as a non-profit corporation, qualifies as an interested "person" with the right to petition. See 5 U.S.C. § 551(2) (defining "person" as corporation). But § 553(e) does not impose a nondiscretionary duty on EPA to act on the petition. Consequently, CARE's citizen suit seeking to compel EPA to act on

the petition was correctly dismissed for lack of federal question jurisdiction under 28 U.S.C. § 1331.

In addition, the district court correctly invoked the rule of construction that specific authority governs over the general and found the correct authority vesting the district court with jurisdiction over the claim is RCRA § 7002(a)(2) and not 28 U.S.C. § 1331.

A. The statutory rule, the specific governs over the general, should control the case.

The district court properly held specific EPA petition authority should govern over the general APA authority. APA provides only the minimum procedural requirement EPA need to follow when formulating rules. See WWHT, Inc. v. F.C.C., 656 F.2d 807, 813 (D.C. Cir. 1981). Also § 553(e) merely gives interested parties a right to petition without requiring EPA to respond in any way. In contrast, RCRA § 7004(a) specifically requires timely EPA action on the petition and any action taken in pursuit of the petition shall be published in the Federal Register. Moreover, statutory language in RCRA § 7004(a) with the commanding force that the EPA "shall" act on the petition is absent from the APA petition provision.

Based on the longstanding rule that "a general statutory rule usually does not govern unless there is no more specific rule," the district court correctly held § 7002(a)(2) supersedes 28 U.S.C. § 1331 in vesting district court jurisdiction to enforce citizen suit violations. See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989).

## III. EPA'S FAILURE TO ACT ON CARE'S PETITION DID NOT CONSTITUTE CONSTRUCTIVE DENIAL OF THE SAME, OR A CONSTRUCTIVE DETERMINATION THAT NEW UNION'S HAZARDOUS WASTE PROGRAM CONTINUES TO MEET THE CRITERIA FOR APPROVAL.

The district court misapplied precedent when it construed EPA's failure to act on CARE's petition as "a 'constructive' determination . . . that New Union's hazardous waste program continues to meet RCRA's criteria . . . " See CARE I at 8 (citing Scott v. Hammond,

741 F.2d 992 (7th Cir. 1984)). First, reliance upon Scott is generally questionable. Other courts have been reluctant to invoke the doctrine of constructive submission, casting considerable doubt on the continuing validity of Scott and its progeny. Even if that were not the case, the purpose underlying Scott's doctrine is not applicable in the context of RCRA. In fact, prior to the district court's mistake, no court suggested that the constructive submission theory is applicable to RCRA. This Court should adhere to long-standing precedent and reverse the district court's determination.

A. The district court overestimated the doctrinal legitimacy of *Scott's* constructive submission theory.

The constructive submission theory was first recognized in Scott v. Hammond, 741 F.2d 992 (7th Cir. 1984). In Scott, an individual brought a citizen suit under § 505(a)(2) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a)(2) (2006),[1] challenging EPA's failure to establish Total Maximum Daily Loads ("TMDLs")[2] for Lake Michigan. Scott, 741 F.2d at 994. The district court dismissed Scott's claim, believing EPA was not obligated to act until and unless a state submitted proposed TMDLs.[3] Id. at 996.

The Seventh Circuit disagreed with the district court's conclusion and stated its belief that "if a state fails over a long period of time to submit proposed TMDLs, this prolonged failure

[1] The language of CWA's mandatory-duty citizen suit is nearly identical to the RCRA's. See, e.g., Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992) (examining the RCRA and CWA citizen suit provisions together because "their relevant provisions are similar").

[2] A TMDL is simply the largest amount of a pollutant that a stream or lake can receive on a daily basis and not violate water quality standards. John T. Holleman, In Arkansas Which Comes First, the Chicken or the Environment?, 6 Tul. Envtl. L.J. 21, 55 (1992)

[3] Under § 303(c) of CWA, 33 U.S.C. § 1313(c), the states are intended to take the lead role in establishing TMDLs, and must submit proposed TMDLs to EPA for review. 33 U.S.C. § 1313(c). If EPA disapproves of a state's TMDL submission, the agency must take action to establish TMDLs on its own. 33 U.S.C. § 1313(d)(2).

may amount to the 'constructive submission' by that state of no TMDLs." Id. The decision in Scott was motivated by the court's belief that state inaction amounting to a refusal to submit TMDLs should not frustrate the federal scheme of water pollution control. Id. at 997. The court justified its liberal construction of § 303(d), 33 U.S.C. § 1313(d), by explaining that a more literal interpretation would have "render[ed] it wholly ineffective." Id. at 998.

Subsequent circuit rulings have applied Scott narrowly, and in doing so have greatly limited its reach and relevance.[4] Scott's constructive submission theory is "necessarily narrow" and has been deemed to apply only when the state's actions clearly and unambiguously express a decision not to comply with an environmental mandate. See, e.g., San Francisco BayKeeper v. Whitman, 297 F.3d 877, 882 (9th Cir. 2002) (citation omitted).

It is presumed that Congress acts intentionally and purposely when it drafts statutes. Russello v. United States, 464 U.S. 16, 23 (1983) (citations omitted). The cool reception to Scott is not remarkable in light of its strained interpretation of CWA. The Seventh Circuit essentially ignored Russello's presumption and re-wrote § 303(d) of the CWA to further what it deemed to be the objectives of Congress. See Scott, 741 F.2d at 997. Such a liberal statutory reading is unjustified. As one district court correctly remarked: "[Scott's] constructive submission doctrine is an exercise in judicial lawmaking, existing only by judicial gloss on the CWA." American Littoral Society et al. v. EPA et al., 199 F.Supp. 2d 217,241 (D. N.J. 2002). This Court should reject the moribund constructive submission theory and reverse the court below.

B. To the extent the constructive discharge theory might remain viable, it is not applicable to the present case.

[4] One Professor lamented that "despite the hype, the constructive submission doctrine and related theories appear moribund." James R. May, Recent Developments in TMDL Litigation: 1999-2002, 2002 ALI-ABA Course of Study Materials 133, 135, available at SH041 ALI-ABA 133.

Even if this Court were inclined to follow the Scott decision, it is inapplicable here. There has been no constructive submission by New Union, and there can be no corresponding duty for the EPA to make a determination concerning the adequacy of the State's program. See Scott, 741 F.2d at 997 (explaining that EPA's duty to review a state's TMDLs is not triggered until constructive or actual submission of TMDLs by the state). Contrary to the district court's assertion, New Union's less than robust implementation and enforcement of RCRA does not amount to a constructive submission by the State that enforcement is unnecessary. Cf. Hayes v. Witman, 264 F.3d 1017, 1024 (10th Cir. 2001) (refusing to apply the doctrine of constructive submission where the state had submitted at least some TMDLs). Like the state in Hayes, New Union has taken at least some action to adhere to its environmental mandate. Thus, this is not a case where the state has clearly and unambiguously chosen not to take action. See BayKeeper, 297 F.3d at 882 (citing Hayes, 264 F.3d at 1024). Accordingly, New Union has made no constructive submission to EPA related to its RCRA program, and no review by EPA is necessary. See Scott at 997.

Even if this Court determines New Union's lackluster enforcement of RCRA demonstrates a clear decision by the State that it will no longer adhere to its obligations under § 3006(b), EPA has statutory authority to enforce the requirements of the State's program on its own, without waiting for the state to act. See 42 U.S.C. §§ 6928(a), 6929. Because EPA can act without waiting for any submission from New Union, the constructive submission theory is unnecessary[5] under RCRA § 3006(b). See Nat'l Wildlife Fed'n v. Browner, CIV. A. 95-1811(JHG), 1996 WL 601451 (D.D.C. Oct. 11, 1996) aff'd, 127 F.3d 1126 at *3 n. 4 (D.C. Cir.

[5] The record below demonstrates that EPA has exercised its authority to enforce New Union's state program. For instance, in 2009, EPA brought six suits against violators.

1997) (citing Scott, 741 F.2d at 997) (declaring that "the Scott doctrine was crafted to allow EPA to take federal action without relying upon a submission by the states"). For the reasons above, Scott is not relevant to the case at bar, and this Court should decline to uphold the district court.

## IV. IN THE ALTERNATE, EVEN IF EPA'S FAILURE TO ACT AMOUNTS TO A CONSTRUCTIVE DENIAL OF CARE'S PETITION, RCRA § 7006(b)(2)[6] DOES NOT GRANT THIS COURT JURISDICTION TO REVIEW EPA'S ACTION.

To the extent EPA's inaction is rooted in the agency's constructive determination that New Union's state program remains in compliance with RCRA § 3006(b), such a "constructive" action is not reviewable by this Court. Instead, jurisdiction properly lies in the court below pursuant to § 7002(a)(2). The case should be remanded to force EPA to initiate proceedings under § 3006(e).

### A. EPA's "constructive" determination does not qualify as a grant, denial, or withdrawal of authorization under RCRA § 3006.

RCRA § 7006(b)(2) only provides jurisdiction to this Court to "review the [EPA]'s action . . . "in granting, denying, or withdrawing authorization or interim authorization under [§ 3006]." 42 U.S.C. § 6976(b)(2). In contrast, CARE seeks review of EPA's "constructive" decision not to commence withdraw proceedings under § 3006(e). In TDSL, the Fifth Circuit explained that the agency's decision not to commence withdrawal proceedings is a discretionary, non-enforcement decision that is unreviewable." TDSL, 377 F. App'x. at 408. In that case an environmental group in Texas, TDSL, petitioned the EPA to withdraw approval of Texas' state RCRA program. Id. at 407. The EPA rejected the petition, finding no cause existed to commence withdraw proceedings. Id. at 408. TDSL subsequently sought review of the determination in the Fifth

[6] RCRA § 7006(b)(1) provides the jurisdiction over the EPA actions related to individual RCRA permits. Because CARE's petition seeks review of EPA's constructive determination concerning the compliance of New Union's state program, and not an action related to any particular RCRA permits, further discussion of § 7006(b)(1) is unnecessary. See 42 U.S.C. § 6976(b)(1).

Circuit. The court denied the request, stating that "the EPA is only limited in that it must withdraw authorization after it has determined that the state is not in compliance . . . the EPA did not find as such, and thus, the Determination is not subject to review." Id. (citation omitted). In the present case, to the extent EPA has made a constructive determination that there is not cause to withdraw New Union's RCRA authorization, that decision is unreviewable by this Court. See id. (citing Pub. Citizen, Inc. v. EPA, 343 F.3d 449, 452 (5th Cir.2003)) ("[T]he EPA is only limited in that it must withdraw authorization after it has determined that the state is not in compliance").

The agency's present decision not to commence withdrawal proceedings cannot rightfully be characterized as a grant, denial, or withdrawal of New Union's state program. That being the case, this Court does not have jurisdiction to entertain CARE's petition. See Hazardous Waste Treatment Council v. EPA, 910 F.2d 974, 976 (D.C. Cir. 1990) (citing Lancellotti v. Office of Pers. Mgmt., 704 F.2d 91, 97 (3d Cir. 1983)) (dismissing a petition for review because agency action did not satisfy the express terms of § 7006).

B. In the alternative, CARE's petition for review EPA's acquiescence to New Union's program amendments is an untimely challenge to prior EPA action.

To the extent CARE's petition is a challenge to EPA's constructive authorization of the amendments New Union made to its state program in 2000 (i.e., its passage of the ERAA), CARE's petition is untimely. RCRA § 7006(b) requires petitions for review to be filed within ninety days of the challenged agency action. 42 U.S.C. § 6976(b). CARE did not bring this petition until January 4, 2010 — nearly a full decade after the ninety-day period had closed. CARE could have challenged the amendments in 2000 but chose not to. Thus, CARE forfeited any right to challenge EPA's constructive authorization of the amended state program in this Court. See, e.g., Waste Mgmt. of Ill., Inc. v. EPA, 945 F.2d 419, 422 (D.C. Cir. 1991) (quoting

Eagle-Picher Industries, Inc. v. EPA, 759 F.2d 905, 914 (D.C.Cir.1985) (characterizing a petition for review as "time-barred" when it was submitted after the statutory window)).

Because this Court does not have power to review EPA's petition for judicial review, the case should be remanded to the district court. Cf. Scott, 741 F.2d at 996 (noting that a complaint alleging that EPA failed to promulgate certain TMDLs for Lake Michigan was "the kind [of allegation] for which the citizen's suit was designed"). For the reasons just stated, this Court should reverse the judgment of the court below and remand for proceedings under § 7002(a)(2).

## VIII. IF THIS COURT PROCEEDS ON THE MERITS OF CARE'S CHALLENGE, THIS COURT SHOULD ACCORD DEFERENCE TO EPA'S CONCLUSION THAT ALLEGED DEFICIENCIES IN NEW UNION'S PROGRAM DO NOT MERIT WITHDRAWAL, BECAUSE EPA'S CONCLUSION RESTS ON REASONABLE INTERPRETATIONS OF AMBIGUOUS RCRA PROVISIONS.

If this Court finds that CARE has standing, EPA argues the following: (1) New Union's resources and performance are sufficient for continued authorization of the program; (2) even if New Union's resources and performance are insufficient, EPA is not required to withdraw authorization; (3) New Union's current failure to regulate railroads within the state program does not necessitate that EPA must withdraw authorization; and (4) New Union's treatment of Pollutant X does not render the state program inequivalent with the federal program or inconsistent with federal and state programs in other states.

These contentions rest on EPA's interpretations of RCRA. The legal analysis is therefore governed by Chevron. United States v. Power Eng'g Co., 303 F.3d 1232, 1236 (10th Cir. 2002) (holding that Chevron analysis is the appropriate standard to determine the validity of an EPA determination under RCRA). When a court reviews an agency's interpretations of a statute the agency administers, the court is faced with two questions. Chevron, 467 U.S. at 843.

First, the court must determine whether Congress has clearly expressed its intent with respect to the question at issue. Id. at 843-44. If the court finds that Congress has clearly expressed its intent, then the court must give effect to Congress's intent. Id.; see Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981). The court should look to the language of the statute and conduct its analysis under the assumption that legislative purpose is expressed in the ordinary meaning of a statute's language. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004); see Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985). Judicial analysis should interpret the statute in its context and as a "symmetrical and coherent regulatory scheme." Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 569 (2010); see FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (U.S.N.C. 2000). Further, the court should attempt to fit provisions of the statute into a "harmonious whole." Brown & Williamson, 529 U.S. at 133; see FTC v. Mandel Bros., Inc., 359 U.S. 385, 389 (1959). The court should also look to common sense to determine the manner in which Congress is likely to have intended to delegate authority to an administrative agency. Brown & Williamson, 529 U.S. at 133; see MCI Telecommunications Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994).

Second, if the statute is "silent or ambiguous" on the issue under review, the court should determine whether the agency's construction of the statute is permissible. Chevron, 467 U.S. at 843. If the agency's construction of a statute is permissible, the court should uphold the agency's construction rather than impose a judicial construction of the statute. Id.; Barnhart v. Walton, 535 U.S. 212, 217-18 (2002). The court should find EPA's interpretation of RCRA permissible so long as the interpretation is reasonable and consistent with statutory purpose.

Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390, 1395 (D.C. Cir. 1991); Chem. Mfrs. Ass'n v. EPA, 919 F.2d 158, 163 (D.C. Cir. 1990).

Additionally, some of EPA's conclusions rest on the agency's interpretations of the regulations it has promulgated under RCRA. A standard of heightened judicial deference applies to an agency's interpretations of its regulations. The court should uphold an agency's construction of the agency's own regulations unless the construction is " 'plainly erroneous or inconsistent with the regulation.' " Udall v. Tallman, 380 U.S. 1, 17 (1965) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); see Chem. Mfrs. Ass'n v. EPA, 919 F.2d at 170 (holding that this standard was the correct approach for determining if EPA interpretations of regulations promulgated under RCRA should be upheld). If this Court proceeds on the merits of CARE's challenge, EPA requests that this Court accord deference to EPA's conclusions for reasons discussed below.

C. This Court should accord deference to EPA's conclusion that New Union's resources and performance are sufficient for EPA's continued approval of New Union's program, because RCRA is ambiguous on the issue of what level of state performance and resources are required and EPA's conclusion is reasonable and consistent with RCRA's purpose.

CARE contends that New Union's resources and performance are insufficient to satisfy RCRA and that EPA must withdraw approval from New Union's program. This Court should reject this argument and accord deference to EPA's reasonable and permissible contention that New Union's resources and performance are adequate under RCRA's ambiguous provisions.

i. *RCRA is ambiguous and silent on what level of resources and performance, if any, a state program must maintain in order to receive continued EPA authorization under RCRA.*

RCRA notes that a state program should not receive EPA approval if the program "does not provide adequate enforcement of compliance with the requirements of this subchapter." 42

U.S.C. § 6926(a) (2006). However, RCRA does not specify what "adequate" means. On the specific issue of withdrawal, RCRA demands only that EPA shall begin proceedings to withdraw authorization if EPA "determines after public hearing that a State is not administering or enforcing a program authorized under this section in accordance with requirements of this section." 42 U.S.C § 6926(b) (2006). RCRA is ambiguous because the language of the statute does not clearly necessitate that EPA determine a program is inadequate or not in accordance with RCRA upon finding that a state program has deficiencies. See New York Pub. Interest Research Grp. v. Whitman, 321 F.3d 316, 330 (2d Cir. 2003) (holding that the language, "Whenever the Administrator makes a determination" granted discretion to EPA when used in a provision of the Clean Water Act that is analogous to 42 U.S.C. § 6926(b)); cf. Her Majesty the Queen in Right of Ontario v. U.S. E.P.A., 912 F.2d 1525, 1533 (D.C.Cir.1990) (finding "[w]henever the Administrator . . . has reason to believe" implies "a degree of discretion"). The non-discretionary obligation to commence withdrawal proceedings is triggered only after the discretionary determination is made. Cf. New York Pub., 321 F.3d at 331. As such, the language of § 6926 is ambiguous and grants EPA discretion to apply numerous interpretations.

Here, a broad reading of RCRA harmonizes with the statute and fits the provision into a coherent statutory scheme for numerous reasons. For example, the loosely defined constraints in § 6926 allow EPA discretion to balance RCRA's competing purposes and avoid commencement of withdrawal proceedings for every minor state violation. Further, common sense suggests that Congress could have intended to afford such discretion to EPA, because for instance, EPA has specialized knowledge of the complex regulatory schemes the agency administers and is thus particularly well positioned to determine when withdrawal proceedings are necessary.

***ii.*** *This Court should accord deference to EPA's reasonable finding that New Union's resources are sufficient to support continued authorization under RCRA.*

EPA's regulations take a flexible approach to assessing state compliance with 42 U.S.C. § 6926. See Corrective Action for Solid Waste Management Units at Hazardous Waste, 64 Fed. Reg. 54,604 (announced Oct. 7, 1999). EPA's regulation on withdrawal of authorization from state programs specify that EPA "may" but not necessarily shall initiate withdrawal proceedings for specific violations that the regulation enumerates. 40 C.F.R. § 271.22 (2010). The regulation does not require EPA to initiate withdrawal proceedings because "may" implies that EPA enforcement actions under 40 C.F.R. § 271.22 are discretionary. TDSL, 377 Fed. Appx. at 408.

EPA's conclusion therefore does not violate agency regulations. If EPA's conclusion that New Union's program is adequate is not permissible, it could only be because the conclusion is unreasonable or contrary to RCRA. See, e.g., Reilly, 938 F.2d at 1395. EPA concludes that the resources and performance of New Union's program are sufficiently adequate and in accordance with RCRA to merit continued approval for at least three reasons.

First, New Union's resources and performance are adequate for continued EPA approval in light of Congress's express preference for state-run programs. The requirement that state programs act "in accordance with" RCRA should be read in light of statutory purpose and policies. See Brown & Williamson, 529 U.S. at 133. In RCRA's statement of its objectives, the statute expressly notes that "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." 42 U.S.C. § 6901 (2006). In conformity with RCRA's objectives, EPA aims to encourage development of state programs by avoiding "very tight standards." Additional Requirements for State Hazardous Waste State Program Requirements, 45 Fed. Reg. 33,385 (1980). If EPA applies tight standards to determine if state programs are "adequate" under and "in accordance with" 42 U.S.C. § 6926, this would undermine statutory purpose by requiring costly withdrawal proceedings, discouraging state

administration of hazardous waste programs, and draining resources that could otherwise be used for other EPA activities such as providing guidance and education to assist state administration. Corrective Action for Solid Waste Management Units at Hazardous Waste, 64 Fed. Reg. at 54,604. Withdrawal of authorization is an extreme and drastic measure that revokes a state's ability to administer its own program. See Power Eng'g, 303 F.3d at 1238-39; see Waste Mgmt., Inc. v. EPA, 714 F. Supp 340, 341 (N.D.III. 1989). While New Union's program is imperfect, its resources and performance are not sufficiently inadequate to merit withdrawal proceedings that would undermine New Union's ability to run its own program.

Second, New Union's resources and performance are adequate because the program's deficiencies can be more effectively addressed via remedial actions other than EPA withdrawal proceedings. RCRA's text does not suggest that withdrawal of authorization is EPA's only remedy for inadequate enforcement at the state level. Power Eng'g, 303 F.3d at 1238-39. If New Union's resources and performance are deficient, EPA's resources would likely be better spent pursuing more cost-effective enforcement actions or providing further guidance, education, and assistance to the state in order to improve compliance. Cf. Corrective Action for Solid Waste Management Units at Hazardous Waste, 64 Fed. Reg. at 54,604. Other EPA actions are preferable to withdrawal, because withdrawal is unnecessarily extreme and costly.

Third, New Union's resources and performance are adequate because the deficiencies are not substantial enough to demand prioritization from EPA. EPA has neither the resources nor the ability to act against every technical violation that occurs under regulatory regimes the agency administers. See New York Pub., 321 F.3d at 332 (noting "An agency generally cannot act against each technical violation of the statute it is charged with enforcing"). EPA must necessarily prioritize activities that consume the agency's limited resources and the violations

here do not command priority over other EPA compliance and enforcement activities. Because EPA's conclusion that New Union's resources and performance are adequate under RCRA is reasonable and not contrary to RCRA, this Court should accord deference to EPA's conclusion.

## IX. Even if New Union's program is not in accordance with RCRA, either because New Union currently fails to regulate railroad facilities under the statute or because resources and performance are insufficient, this Court should not require EPA to withdraw approval.

CARE contends that problems in New Union's program is not in accordance with RCRA, because its resources and performance are inadequate and it effectively withdraws railroads from regulation. EPA reasons that (1) RCRA is ambiguous on what corrective actions are necessary to satisfy the requirements of 42 U.S.C. § 6926 and (2) RCRA allows EPA to avoid withdrawal of authorization and take other corrective actions.

### *1. RCRA is ambiguous on whether EPA must withdraw approval from a state's program upon a determination that the program is not in accordance with RCRA's requirements.*

The only express requirement RCRA places on EPA is that the agency must initiate withdrawal proceedings once EPA determines that a state is not sufficiently in accordance with 42 U.S.C. § 6926. TDSL, 377 Fed. Appx. at 408; cf. Pub. Citizen, 343 F.3d at 464. Even if proceedings are required under the given circumstances, withdrawal of authorization is not. Under the process enumerated in the statute, withdrawal is required only if a state fails to take "appropriate corrective action" within 90 days of notification. 42 U.S.C. § 6926.

Here, a broad reading of "appropriate corrective action" is in harmony with the statute and fits the provision into a coherent statutory scheme, because for example, a broad reading allows EPA to determine case-by-case if withdrawal of authorization serves RCRA's objectives. RCRA is thus ambiguous on what corrective actions are necessary to satisfy the statute and thus leaves open a wide range of plausible readings.

2. *Even if New Union's program is not in accordance with RCRA, this Court should find that EPA is not required to withdraw approval because other corrective actions are permissible.*

EPA's regulations govern withdrawal proceedings. When EPA determines a state is in violation of 6926(b), EPA "shall list the deficiencies in the program and provide the State a reasonable time [within 90 days] . . . to take such appropriate corrective action as the Administrator determines necessary." 40 C.F.R. § 271.23 (2010). Withdrawal can occur only after EPA determines appropriate corrective actions have not been taken. Id. EPA's regulation does not require EPA to withdraw approval from New Union's program, because (1) EPA has not yet provided a list of deficiencies, (2) EPA has not determined what corrective actions are necessary, and (3) New Union has not yet failed to take appropriate corrective actions.

Because EPA's regulation has not been violated, it is only necessary to consider if EPA's conclusion that RCRA does not necessitate withdrawal of authorization from New Union's program is permissible. Withdrawal of authorization is not EPA's only remedy for inadequate enforcement at the state level. Power Eng'g, 303 F.3d at 1239. Other corrective actions would likely prove more effective and would better balance RCRA's purposes. More appropriate remedies could include providing additional EPA assistance to New Union, forming plans to modify New Union's program, or taking various enforcement actions to bring New Union's program back into compliance. EPA reasons that guidance and education are better uses of the agency's resources than costly withdrawal actions. Cf. Corrective Action for Solid Waste Management Units at Hazardous Waste, 64 Fed. Reg. at 54,604. As argued in detail above (see in Section V.A.ii), withdrawal of authorization from New Union's program (1) would undermine RCRA's preference for state program, (2) would drain EPA's resources unnecessarily, and (3) does not command priority over the EPA's other activities. This Court

should find that EPA has discretion to take action other than withdrawal, because other corrective actions are reasonable and not contrary to RCRA.

C. This Court should accord deference to EPA's reasonable conclusions that (1) New Union's treatment of Pollutant X is equivalent to the federal program and (2) such treatment does not render the program inconsistent with state and federal programs in other states.

RCRA specifies that state programs should not receive approval if EPA finds that "(1) such state program is not equivalent to the Federal program under this subchapter, [or] (2) such program is not consistent with the Federal or State programs applicable in other States." 42 U.S.C. § 6926(a). New Union's program is sufficiently equivalent and consistent, because the meanings of these terms are ambiguous and EPA's conclusion that the state is compliant is reasonable and consistent with RCRA and permissible under EPA regulations.

*1. This Court should accord deference to EPA's conclusion that the treatment of Pollutant X under New Union's program does not render New Union's program inequivalent to the federal program for the purposes of 42 U.S.C. § 6926.*

RCRA specifically authorizes EPA to make determinations whether state programs are equivalent with the federal program. United States v. S. Union Co., 643 F. Supp. 2d 201, 213 (D.R.I. 2009). RCRA does not define the term "equivalent." However, RCRA clearly does not require "uniformity" between state programs and the federal program. Reilly, 938 F.2d at 1396. Many possible interpretations of "equivalent" are plausible in the act's context, harmonize with the statute as a whole, and accord a degrees of discretion that Congress could've plausibly intended to grant EPA. RCRA is therefore ambiguous on the issue of when a state program is not equivalent to the federal program.

EPA concludes New Union's program is equivalent to the federal program. This conclusion rests largely on EPA's interpretations of regulations. EPA does not apply a strict rule in determining if state programs are equivalent for the purposes of 42 U.S.C. § 6926(a).

Corrective Action for Solid Waste Management Units at Hazardous Waste, 64 Fed. Reg. at 54,604. The agency instead applies flexible assessments that encourage development of state programs and direct EPA's resources away from withdrawal proceedings and toward providing guidelines, education, and other forms of assistance to state programs. Id. EPA prefers to avoid "very tight standards" which could require withdrawal unnecessarily and undermine RCRA's aims to develop state programs and show preference for state-run hazardous waste programs. See Additional Requirements for State Hazardous Waste State Program Requirements, 45 Fed. Reg. 33,385. It is true that EPA has promulgated regulations that require state equivalence with respect to certain technical standards. These regulations do not merit a finding that New Union's program is not equivalent to the federal program for at least two reasons.

First, the facts do not clearly establish that New Union has violated EPA regulations in this regard. Second and perhaps more importantly, EPA's regulations that require equivalency of state programs in specific areas assess equivalency in the context of compliance with specific technical requirements of RCRA rather than in the context the full program's compliance with the equivalency requirement in § 6926(a). In other words, if a state program violates regulations requiring "equivalency" in specific areas, it does not follow that the entire program is "not equivalent to the Federal program" as the phrase appears in § 6926(a). For reasons already discussed, EPA applies flexible standards in assessing the overall equivalence of a state's program. However, the agency may choose to apply different, stricter standards in assessing equivalency of state compliance with specific technical requirements.

EPA's regulations do not require the conclusion that New Union's program is not equivalent to the Federal program. The only remaining question can be whether or not EPA's conclusion is reasonable and consistent with RCRA. The flexible approach outlined in EPA's

regulations is reasonable and consistent with RCRA because (1) it allows the agency to honor RCRA's preference for state-run programs, (2) it prevents unnecessary and costly withdrawal proceedings, and (3) it grants EPA flexibility to take corrective actions that the agency deems most effective. Each of these points has already been argued in detail above (see sections V.A.ii and V.B.ii). In light of the above considerations, this Court should accord deference to EPA's conclusion that New Union's program is equivalent to the federal program.

2. *This Court should accord deference to EPA's conclusion that the treatment of Pollutant X under New Union's program does not render New Union's program inconsistent with the state and federal programs in other states for the purposes of 42 U.S.C. § 6926.*

RCRA is ambiguous on the meaning of the term "consistent" and affords EPA "enormous latitude" in implementation of the statute. Reilly, 938 F.2d at 1396. Consistency does not require uniformity. Id. There are many plausible readings of "consistent" that conform to the act's broader context, are in harmony with the statute, and do not defy common sense with respect to Congress's intention. Here, RCRA is ambiguous.

The term "consistency" is instead given more specific definition in EPA's regulations, which specify three specific ways in which a state program may be inconsistent. See 40 C.F.R. § 271.4 (2010). The ERAA creates special requirements for treatment of Pollutant X, but none of the requirements render New Union's program inconsistent with other programs under the three rules promulgated by EPA. See id.

First, New Union's treatment of Pollutant X does not violate 40 C.F.R. § 271.4(a). A state's action is inconsistent under this rule only if the state's approach is "unreasonable." 40 C.F.R. § 271.4(a). Here, New Union's action is reasonable. The state's legislature made a reasoned determination, upon finding that no New Union contains no treatment facilities adequately equipped to treat Pollutant X, that the state should limit treatment, storage, and

disposal of the toxin within its borders (R. doc. 4 at 105-07.) New Union's restrictions on movement of Pollutant X are also reasonable, because it is reasonable to carefully regulate movement and encourage expedient transport and treatment of a harmful toxin. Id.

Second, New Union's treatment of Pollutant X does not violate 40 C.F.R. § 271.4(b). This rule applies only to state actions that have "no basis in human health or environmental protection." 40 C.F.R. § 271.4(b). New Union's program has a basis in human health and environmental protection. Pollutant X is a potent and toxic chemical, which is harmful to human health and environment. (R. doc. 4 at 105-07.) New Union's controls over a harmful toxin necessarily have a basis in human health. Such basis could include but is not limited to promoting health and environmental protection by deterring generation of the toxin, ensuring the toxin is treated at proper facilities, and promoting efficient, safe transport and storage.

Third, New Union's treatment of Pollutant X does not violate 40 C.F.R. § 271.4(c). The ERAA states that any person may transport Pollutant X through or out of the state to a permissible treatment facility but only if the transport is "as direct and fast as is reasonably possible, with no stops within the state except for emergencies and and necessary refueling." (R. doc. 4 at 105-07.) However, the ERAA has little, if any, effect on New Union's manifest system. The statute does not state that "any person" includes persons who do not comply with the RCRA manifest requirements. Any effect ERAA has on manifest requirements would therefore be purely incidental and would not establish that New Union's statutory scheme violates EPA regulations or is inconsistent with other programs.

New Union hasn't violated EPA's regulations on consistency with other programs. If New Union's program necessitates a conclusion that the program is inconsistent, it could only be because EPA's conclusion to the contrary is not permissible under RCRA. However, the

approach outlined in EPA's regulation is reasonable, because it effectively balances RCRA's aims and promotes effective administration. The regulation promotes RCRA's preference for state programs by providing clear, transparent rules for states to abide by. The regulation also promotes effective administration by providing clear definitions against which administrators can assess the compliance of state programs. Further, the regulations are not contrary to RCRA, because EPA's regulations merely provide specific and reasonable interpretations of the meaning of "consistency" within 42 U.S.C. § 6926(a) and define a finite set of ways in which a state program could be inconsistent. RCRA provides no clear basis to support the conclusion that a broader definition of "consistency" is required.

EPA's conclusion that New Union's program is consistent with other federal and state programs is reasonable, consistent with RCRA, and not contrary to agency regulations. This Court should therefore accord deference to the agency's conclusion.

## VII. IF THIS COURT PROCEEDS ON THE MERITS OF CARE'S CHALLENGE, THIS COURT SHOULD FIND NEW UNION'S TREATMENT OF POLLUTANT X DOES NOT VIOLATE THE COMMERCE CLAUSE, BECAUSE THE ERAA ACTS EVEN-HANDEDLY, AFFECTS INTERSTATE COMMERCE ONLY INCIDENTALLY, SERVES IMPORTANT LOCAL PURPOSES, AND IS MINIMALLY BURDENSOME.

Hazardous waste is an object of commerce and state restriction of that movement is subject to constitutional review. Nat'l Solid Wastes Mgmt. Ass'n v. Alabama Dept. of Envtl. Mgmt., 910 F.2d 713, 719-20 (11th Cir. 1990); see City of Philadelphia v. New Jersey, 437 U.S. 617, 622-23 (1978). When a state law discriminates against interstate commerce facially, in its practical effect, or in its purpose, there is a virtually per se rule that the state's action is invalid. Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992) (quoting City of Philadelphia, 437 U.S. at 624). The standard is more lenient when a state program does not discriminate so openly: "Where the statute regulates even-handedly to effectuate a legitimate local 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." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (internal citations omitted). If there is a legitimate local purpose, whether or not the extend of the burden on interstate commerce is constitutional depends on the nature of the local interest and whether or not the same purpose could be promoted as well by a less burdensome law. Id.

Even if the ERAA does discriminate against interstate commerce, it is somewhat likely that New Union's program would pass even the stricter standard of scrutiny, because Pollutant X is a very potent toxin and the facts here parallel cases where the Supreme Court upheld state laws that openly discriminated against interstate commerce. Cf. Maine v. Taylor, 477 U.S. 131 (1986). However, it is unnecessary to consider in detail if New Union's program would pass scrutiny under the stricter test, because the ERAA acts evenhandedly and affects interstate commerce only incidentally. There are three ways in which New Union's program could plausibly affect interstate commerce.

First, the ERAA places requirements on generators of Pollutant X and thereby reduces generation of an article of state commerce. Cf. (R. doc. 4 at 105-07.) Reducing local generation of a dangerous and harmful toxin like Pollutant X necessarily promotes local health and environmental protection. Further, as a practical and local matter, it is desirable to reduce production of Pollutant X, because New Union has no facilities authorized to treat the substance and the act discourages improper handling of the toxin by facilitating transfer to proper treatment centers. This rule's effect on interstate commerce is minimal, conjectural, and purely incidental: At most, the program reduces the transportation of a harmful toxin out of the state. Here, the

ERAA serves an important local interest with minimal burden on interstate commerce, and there is no apparent way to reduce generation of Pollutant X in a less burdensome manner.

Second, the ERAA forbids DEP from granting permits for treatment, storage and disposal Pollutant X, except for storage for under 120 days while the substance awaits transport to a suitable treatment facility. (R. doc. 4 at 105-07.) This requirement serves local interests in numerous ways. For example, the limitations on storage reduce environmental and health risks by encouraging expedient treatment of a harmful toxin and preventing reserves from building up unnecessarily and placing human health and the environment at risk. This aspect of the act should stand because effect on interstate commerce is merely that Pollutant X may not be stored long-term in the state and a less burdensome law would be unlikely to sufficiently encourage expedient transit to treatment facilities.

Third, the ERAA perhaps burdens interstate commerce by imposing a set of requirements on transporters moving Pollutant X through or out of New Union: The transport must be "as direct and fast as is reasonably possible, with no stops within the state except for emergencies and necessary refueling" (R. doc. 4 at 105-07.) This requirement is evenhanded in its treatment of interstate commerce, because all transportation of Pollutant X is subjected to the same standard, regardless of its source. Given that Pollutant X is one of the most potent and toxic chemicals to human health and the environment, New Union effectuates an important local interest by ensuring that transport to proper treatment facilities occurs expediently, and minimizes risk of accidents and contaminations that could do great harm the public. The effect on interstate commerce is purely incidental to New Union's aim encourage promote treatment of Pollutant X and protect persons from exposure to a very potent toxin. A less burdensome

approach would allow unnecessary slowdowns and stops that could encourage accidents, put public health at risk, and discourage expedient transit to proper treatment facilities.

Because all of the ERAA's requirements treat interstate commerce evenhandedly, effectuate a local public interest, affect interstate commerce only incidentally, and are no more burdensome to interstate commerce than necessary, this Court should find that the ERAA does not violate the Commerce Clause.

## CONCLUSION

For the foregoing reasons this Court should reverse the district court's holding and remand the case for further review because RCRA § 7002(a)(2) vests the lower court with jurisdiction to enjoin EPA to consider CARE's rulemaking petition. Furthermore, this Court should reverse the district court's holding that EPA's failure to act on CARE's petition amounted to a constructive denial and a corresponding determination that New Union's hazardous waste program remained in compliance with the RCRA. In addition, the Court should hold it lacks the power to review EPA's constructive action. Even if this Court proceeds on the merits of CARE's challenge, it should find that EPA is not required to withdraw approval from New Union's program.