Team No. 46

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION
AND THE ENVIRONMENT, INC.,

Petitioner-Appellant-Cross-Appellee

v.

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

Respondent-Appellee-Cross-Appellant

v.

STATE OF NEW UNION

Intervenor-Appellee-Cross-Appellant

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

BRIEF FOR PETITIONER-APPELLANT CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.

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STATEMENT OF JURISDICTION

This is a timely appeal from the final order of the United States District Court for the District of New Union granting summary judgment to Intervenor, New Union, under Fed. R. Civ. P. 56(b). The district court has subject matter jurisdiction over the claims Plaintiffs, Citizen Advocates for Regulation and the Environment, Inc. (CARE), brought under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(2) (2006), and under the Administrative Procedure Act (APA), 5 U.S.C. § 702, based on general federal question jurisdiction, 28 U.S.C. § 1331. The Court of Appeals for the Twelfth Circuit has jurisdiction over CARE's appeal of the district court's final decision under 28 U.S.C. § 1291, and has original jurisdiction over CARE's claims under RCRA § 7006, 42 U.S.C. § 6976(b), granting jurisdiction over the authorization of state programs by the U.S. Environmental Protection Agency (EPA).

STATEMENT OF THE ISSUES

I. RCRA § 7006 provides circuit courts with original jurisdiction over EPA's approval and withdrawal of state program authorization. Does EPA's failure to respond to CARE's petition for over a year and failure to commence withdrawal proceedings despite numerous changes to New Union's program constitute a constructive denial of the petition, and hence a constructive authorization of New Union's program changes, providing the circuit court with original jurisdiction over CARE's claim challenging that authorization?

II. Under RCRA, does EPA's process for approval or withdrawal of state authorization, which includes notice, comment, and promulgation in the Code of Federal Regulations, constitute rule making under RCRA § 7004 such that the district court has jurisdiction under RCRA § 7002, which allows a court to compel any nondiscretionary duty, when EPA failed to respond to CARE's petition for withdrawal?

III. In the alternative, do EPA's regulations give citizens a right to petition pursuant to APA § 553(e) such that EPA's failure to respond is agency action unlawfully withheld or unreasonably delayed, and thus provide a cause of action under APA § 702, vesting the district court with jurisdiction under 28 U.S.C. § 1331?

IV. No party disputes the factual record. If the district court has jurisdiction over EPA's failure to respond to CARE's petition pursuant to either RCRA or the APA, and EPA's failure to respond is a constructive approval of New Union's program, should this Court remand to the district court to compel EPA to respond to CARE's petition, or should this Court proceed with review of the merits of EPA's constructive actions?

V. State programs must be equivalent to the federal program, consistent with federal and other state programs, and provide for adequate enforcement. Since EPA first approved New Union's program, New Union's resources and performance have decreased and new legislation has altered the nature of the program. Do these changes render New Union's program not equivalent, inconsistent, or inadequate such that EPA's constructive approval of New Union's program was arbitrary and capricious?

STATEMENT OF THE CASE

On January 5, 2009, CARE petitioned EPA under § 7004 of RCRA, 42 U.S.C. § 6974(a), and § 553 of the APA, 5 U.S.C. § 553(e), to commence proceedings to withdraw authorization of New Union's program implementing the requirements of RCRA. (Dist. Ct. Op. at 1.) EPA has taken no action on the petition. (Dist. Ct. Op. at 1.)

On January 4, 2010, CARE filed suit against EPA in both the United States District Court for the District of New Union, Civ. 000138-2010, and the United States Court of Appeals for the Twelfth Circuit, C.A. 18-2010. (Dist. Ct. Op. at 1–2.) New Union intervened

in both cases pursuant to Fed. R. Civ. P. 24. (Dist. Ct. Op. at 1–2.) On a motion by EPA, this Court stayed C.A. 18-2010 pending resolution of the district court case. (Dist. Ct. Op. at 2.)

At the district court, the parties filed cross-motions for summary judgment. (Dist. Ct. Op. at 1.) The district court granted summary judgment to New Union, holding that the district court lacked jurisdiction under both RCRA's citizen suit provision, § 7002, 42 U.S.C. § 6972(a)(2), and general federal question jurisdiction, 28 U.S.C. § 1331, pursuant to APA petition provisions, 5 U.S.C. § 553(e), and APA judicial review provisions, 5 U.S.C. § 702. (Dist. Ct. Op. at 3–5.) Both CARE and EPA timely appealed this decision. (Cir. Ct. Order at 1 (docketing the case as C.A. 400-2010).) CARE appealed the district court's holding that the district court lacked jurisdiction under both RCRA § 7002 and 28 U.S.C. § 1331. EPA appealed the district court's holding that the district court lacked jurisdiction under RCRA § 7002. This Court consolidated the appeal with the original action CARE filed in this Court, C.A. 18-2010. (Cir. Ct. Order at 1–2.) CARE then requested that this Court lift the stay of C.A. 18-2010 and proceed to review EPA's constructive denial of CARE's petition and constructive determination that New Union's program had adequate enforcement capability and remained equivalent and consistent with the federal and other state programs.

STATEMENT OF FACTS

EPA authorized New Union to implement its hazardous waste program in lieu of the federal program in 1986. (Rec. Doc. 2, p. 1.) At that time the New Union DEP reported 1200 hazardous waste treatment, storage, and disposal facilities (TSDs) in the state, and fifty employees to supervise permitting and enforcement. (Rec. Doc. 1, pp. 17, 73.) Although EPA found that DEP had adequate administrative and enforcement resources at the time, it noted that fewer resources may render the program inadequate. (Rec. Doc. 4, p.16.) By 2009, DEP's staff had dwindled to thirty employees, supervising a total of 1500 TSDs. (Rec. Doc.

5 for 2009, pp. 23, 52.) While the number of TSDs has gradually increased since 1986, DEP's staff losses date from 2000, due mostly to state financial troubles. (Rec. Doc. 5 for 2009, p. 50.) DEP's decrease in resources was up to twenty percent greater than the decrease in other similar state agencies. (Rec. Doc. 5 for 2009, p. 51.) No increase in resources is projected and the funding shortfall could grow (Rec. Doc. 5 for 2009, p.53), particularly if federal resources are available to fill the performance gaps (Rec. Doc. 6, June 6, 2009).

Because of the decrease in resources, DEP is unable to keep pace with new and existing permit applications; some existing permits expired over twenty years ago. (Rec. Doc. 5 for 2009, p. 20.) Further, New Union's ability to inspect hazardous waste facilities has diminished, requiring EPA to assist. (Rec. Doc. 5 for 2009, p. 23.) Even with both EPA and DEP inspecting, no more than twenty percent of TSDs in the state are inspected per year. (Rec. Doc. 5 for 2009, p. 23.) The lack of resources has similarly resulted in minimal enforcement—DEP only undertook six enforcement actions in 2008, the same number as both EPA and citizens brought, despite reporting twenty-two significant and hundreds of minor violations. (Rec. Doc. 5 for 2009, pp. 24–26.)

In addition, the New Union legislature passed the 2000 Environmental Regulatory Adjustment Act (ERAA) (Summ. of R. at 2), which changed the substance of the program in two ways. First, the legislature established the New Union Railroad Commission, tasked it with regulating intrastate railroad operations, and transferred all of DEP's responsibilities "under any and all state environmental statutes to the Commission." (Rec. Doc. 5 for 2000, pp. 103–05.) The ERAA removed criminal penalties for facilities subject to the Commission's jurisdiction. (Rec. Doc. 5 for 2000, pp. 103–05.) Additionally, the ERAA amended the state's program to require facilities generating Pollutant X to devise a plan to

minimize the pollutant's generation and to submit a progress report to DEP each year, with the goal of eventual cessation of such generation. (Rec. Doc. 4 for 2000, pp. 105–07.) At the time of the amendment, no facilities within New Union were equipped or permitted to handle Pollutant X; however, nine such facilities existed in the United States. (Rec. Doc. 4 for 2000, pp. 105–07.) The amendment prohibited DEP from issuing permits for Pollutant X, "except for storage for less than 120 days while awaiting transportation to a facility located outside of the state," effectively banning the construction of TSDs to handle Pollutant X within New Union. (Rec. Doc. 4 for 2000, pp. 105–07.) Neither EPA nor New Union denies any of the aforementioned facts. (Dist. Ct. Op. at 5.)

CARE petitioned EPA to begin proceedings to withdraw its authorization of New Union's program because CARE believes New Union has failed to maintain a program that is equivalent to the federal program, consistent with the federal program and other state programs, and that contains adequate provisions for enforcement. EPA has yet to respond. (Dist. Ct. Op. at 1.)

SUMMARY OF THE ARGUMENT

With this case, the Twelfth Circuit has the opportunity to clarify, for the benefit of regulators, regulated parties, and concerned citizens, how RCRA operates to ensure compliance with its requirements. Because the standard of review of the district court's ruling on motions for summary judgment is de novo, *see Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 781 (4th Cir. 1996), and because this Court has original jurisdiction over EPA's constructive action and hence the merits of CARE's claim, *see* 42 U.S.C. § 6976(b), this Court may fully examine the entire record to assess the wisdom of EPA's actions.

CARE initiated this suit because of its concern and belief that the state of New Union is not currently regulating hazardous waste facilities in accordance with federal law. Between

New Union's inability to adequately implement its program and EPA's failure to hold New Union accountable for its program's deficiencies, facilities may be endangering human health and the environment with minimal or no oversight. Out of this concern, CARE petitioned EPA to begin withdrawal proceedings to bring the New Union program in line with federal requirements, or withdraw authorization for New Union's program and implement the federal program.

When an agency fails to respond to a petition for an unreasonable amount of time, that failure may become constructive final agency action. Because EPA failed to respond to CARE's petition for over a year, it effectively denied the petition and constructively determined that New Union's changes do not warrant the initiation of withdrawal proceedings, a tacit authorization of the changes. EPA's authorization is reviewable by this Court under RCRA § 7006, which provides jurisdiction to review final agency actions concerning state program authorizations.

Concurrent with suit in this Court, CARE filed suit in the district court. The district court erroneously characterized EPA's actions in authorizing state programs as issuing "orders" instead of the proper characterization, a rule making. Because the effect of EPA approval or withdrawal of state authorization has a prospective effect on a broad range of persons, such action is a rule. Therefore, CARE's petition came under RCRA § 7004 and the district court has jurisdiction under RCRA § 7002 to compel EPA's response.

Alternatively, RCRA does not preempt the APA. Because EPA has given citizens a right to petition the agency for withdrawal of authorization, EPA's failure to act on CARE's petition is a violation of APA § 553(e). This violation grants CARE a cause of action under

APA § 702, and the district court has jurisdiction to compel EPA's response under general federal question jurisdiction, 28 U.S.C. § 1331.

If both this Court and the district court have jurisdiction, this Court should lift the stay and proceed to the merits of EPA's actions. In this case wisdom counsels a more immediate decision because there is an undisputed record on which to judge EPA's actions, and extenuating circumstances exist in the form of threats to human health and the environment due to the state's inability to effectively implement its program. This Court should therefore assert its jurisdiction and discretion to promptly instruct EPA as to the proper next steps.

On the merits, EPA's action in denying CARE's petition and authorizing the changes to New Union's program was arbitrary and capricious. EPA cannot explain how, in the face of New Union's drastic changes, it could refuse to begin proceedings to withdraw authorization. Considering New Union's resource depletion, its increasing need for resources, and legislative changes to its program, EPA should have begun withdrawal proceedings. These proceedings would have either required New Union to account for its changes and come into compliance, or would have withdrawn authorization of New Union's program entirely, allowing the EPA to implement the federal program. This Court should assert jurisdiction, rule on the merits of CARE's claim, and require EPA to comply with its own regulations.

ARGUMENT

Congress enacted RCRA, 42 U.S.C. §§ 6901–6992k (2006), because it found that "inadequate controls on hazardous waste management will result in *substantial risks* to human health and the environment." 42 U.S.C. § 6901(b)(5) (emphasis added). "RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste . . . so as to minimize the present and future

threat to human health and the environment." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (citing 42 U.S.C. § 6902(b) (internal quotation marks omitted)). To achieve these goals, EPA must promulgate regulations governing hazardous waste generators and TSDs in order to protect human health. *See* 42 U.S.C. §§ 6922–25. As with other environmental laws implemented through a cooperative federalism model, a state can become authorized to administer its own program. *Id.* § 6926.

EPA has developed a comprehensive regulatory scheme for implementing RCRA's mandate that approved state programs be equivalent to the federal program, consistent with federal and other state law, and provide adequate enforcement of compliance with the law. 42 U.S.C. § 6926(b); 40 C.F.R. pt. 271 (2009). While states may choose to implement hazardous waste programs in a distinct manner, state law may be no less stringent than federal law. 40 C.F.R. § 271.1(i). EPA's regulations and guidance enunciate the requirements for state approval and what may render a state's program inconsistent with federal and other state law. 40 C.F.R. § 271.4; State Authorization Manual Vol. I, OSWER 9540.00-9A, 1990 WL 608679 (Oct. 1990).

CARE asks this Court to lift the stay on the original action filed in this Court, review New Union's program, hold EPA's denial of CARE's petition to commence withdrawal proceedings arbitrary and capricious, and remand the case to EPA to take non-arbitrary and non-capricious action on CARE's petition.

I. THIS COURT HAS JURISDICTION OVER CARE'S CLAIM UNDER RCRA § 7006 BECAUSE EPA'S YEAR-LONG FAILURE TO RESPOND TO CARE'S PETITION IS A CONSTRUCTIVE DENIAL OF THE PETITION, WHICH CONSTITUTES A CONSTRUCTIVE DETERMINATION THAT NEW UNION'S PROGRAM CONTINUES TO MEET FEDERAL STANDARDS.

The Supreme Court has recognized that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). This Court has original jurisdiction over CARE's claim as a final agency action reviewable under RCRA § 7006, which provides jurisdiction to review of EPA's actions "in granting, denying, or withdrawing authorization or interim authorization" of state programs. 42 U.S.C. § 6976(b). This broad grant of jurisdiction extends to CARE's claim because EPA constructively denied its petition by failing to respond for over a year, which amounts to a constructive determination that New Union's program meets the requirements for authorization.[1] The district court did not decide this precise issue, holding instead that any challenge to EPA's action concerning state program approval resides with the circuit court. (Dist. Ct. Op. at 5.) This Court does have jurisdiction and should review EPA's constructive actions.

[1] The requirement that an application for review "shall be made within ninety days" of an authorization decision, 42 U.S.C. § 6976(b), does not bar CARE's claim. Each time New Union submitted an annual report and EPA took no action, EPA authorized the program anew. Because EPA has not issued any public statements about its process, CARE had no notice of the date on which EPA's decision was made, tolling the ninety-day review period. *Cf. Am. Canoe Ass'n v. Envtl. Prot. Agency*, 30 F. Supp. 2d 908, 925 (E.D. Va. 1998) (reasoning that an unreasonable delay cannot be time-barred because it is in the nature of a continuing violation).

A. Both RCRA and EPA's regulations require the agency to respond to a petition for withdrawal; its failure to do so after more than one year constitutes a constructive denial of the petition.

1. Both RCRA and EPA's implementing regulations require EPA to respond to petitions for withdrawal.

By its terms, RCRA § 7004 authorizes "any person" to "petition the Administrator for the promulgation, amendment, or repeal of any regulation," and mandates that "[w]ithin a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition." 42 U.S.C. § 6974(a). The most persuasive evidence of Congressional intent is the wording of the statute. *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543 (1939). The word "shall" is generally a command.[2] The express terms of RCRA § 7004 clearly impose an obligation, not discretion.[3]

Furthermore, Congress's particular use of "shall" in RCRA distinguishes the term from its use elsewhere. When "both 'may' and 'shall'" are used within the same rule, "the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). Within RCRA § 7004 Congress used the word "may" in direct contrast to the word "shall," stating that "any person *may* petition the Administrator," as compared to requiring that "the Administrator *shall* take action." 42 U.S.C. § 6974(a) (emphasis added). Congress expressly distinguished between an authorization and a mandated duty for EPA to respond.

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[2] *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977); *Edmonds v. U.S. Dep't of Labor*, 749 F.2d 1419 (9th Cir. 1984).

[3] Reliance on the footnote in *Guiterrez de Martinez v. Lamagno* is misplaced. (Dist. Ct. Op. at 3.) In *Gutierrez*, the Supreme Court interpreted the word "shall" in light of a statutory scheme rife with ambiguities. 515 U.S. 417, 422 (1995). Even acknowledging the word "shall" is not always mandatory, because the ambiguity of the statute *as a whole* was "susceptible to divergent interpretation," the Court found the agency action reviewable based on the presumption favoring judicial review. *Id.* at 434, 436. The presumption in favor of judicial review should, as in *Gutierrez*, counsel in favor of interpreting "shall" as mandatory.

EPA also granted citizens the right to petition EPA to commence withdrawal proceedings, 40 C.F.R. § 271.23(b)(1), which is EPA's codification of the right granted to citizens under the APA, 5 U.S.C. § 553(e). The regulations require EPA to respond. 40 C.F.R. § 271.23(b)(1). Again, the use of "may" to describe EPA's discretion to commence withdrawal proceedings, in contrast with the use of "shall" with respect to EPA's duty to respond, *see id.*, indicates EPA recognizes the distinction between the two, and intends to behave accordingly, *see Anderson*, 329 U.S. at 485.[4] EPA, as an administrative agency, must follow its own rules. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). EPA's duty to respond to a petition is therefore mandatory under both statute and regulation.

2. EPA's failure to respond for a year is a constructive denial of CARE's petition.

"At some point administrative delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review." *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1100 (D.C. Cir. 1970) (holding that although the Secretary of Agriculture's inaction constituted a denial of the petition, meaningful review was impossible in the absence of any administrative record). EPA has taken no action on CARE's petition for over a year, yet it has known about the facts underlying the petition for far longer. Given the severity of the issues at stake, this Court should consider EPA's inaction to be a constructive denial.

Agency inaction may be "effectively final agency action that the agency has not frankly acknowledged." *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987). An agency's failure to comply with a mandatory duty may also "ripen into a refusal to act." *Cf. Scott v. City of Hammond, Ind.*, 741 F.2d 992, 997–98 (7th Cir. 1984) (a state's protracted failure to submit information to EPA amounted to a "constructive submission" of no

[4] Even where the statutory language is permissive, a court may still find judicial review to be available. *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970).

information). An agency's "refusal to engage in rulemaking" is reviewable when a petition alleges inaction, the agency has had ample time to consider the issue, and there are sufficient facts to review. *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1236 (D.D.C. 1986) (holding as arbitrary and capricious an agency's decision not to undertake rule making where the record demonstrated danger to human health in the absence of a rule). Courts are not reticent to find finality in a refusal to respond.

In the Federal Tort Claims Act (FTCA) context Congress recognizes that, after six months of agency silence, a petitioner may deem a petition constructively denied. 28 U.S.C. § 2675(a). Although Congress did not prescribe specific deadlines in RCRA, the FTCA serves as a strong indication of what Congress deems to be a reasonable time for response. Here, EPA has known about New Union's changes for ten years and has failed to respond to CARE's petition for a year, twice the reasonable time specified in the FTCA. CARE cannot wait indefinitely to decide how to proceed, especially given the potential danger to human health and the environment. While EPA may assure the Court that it plans to take action,[5] its failure to do so thus far shows that it has in fact made a decision it has not frankly acknowledged—a decision to deny CARE's petition. Effectively, EPA has let its silence be its response.

[5] EPA's reassurances of the ability to take action have failed to persuade other courts, as well. *See Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422, 1428 (W.D. Wash. 1991) (EPA's reassurances were "not particularly comforting in light of the fact that EPA Region X has failed to take action on this matter for over ten years").

B. EPA's constructive denial of CARE's petition amounts to a constructive determination that New Union's program meets federal requirements, which is reviewable by this Court pursuant to RCRA § 7006.

By denying New Union's petition and concurrently failing to initiate withdrawal proceedings, EPA constructively determined that New Union's program still meets the requirements for authorization. This determination, a de facto authorization of the amended program, is a final agency action reviewable under § 7006.

First, general principles of what constitutes a final agency action demonstrate that EPA's determination is reviewable. For an action to be final, it must mark the consummation of an agency's decisionmaking process, and have legal consequences on the affected parties. *Bennett v. Spear*, 520 U.S. 154, 178 (1996); *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Courts take a "pragmatic" view of final agency action. *Fed. Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 239 (1980). Furthermore, where "immediate judicial review would speed enforcement" of a statutory scheme, courts more readily find that an agency's action is final. *CEC Energy Co. v. Pub. Serv. Comm'n*, 891 F.2d 1107, 1110 (3d Cir. 1989). Where an agency's silence could result in dangers to human health and the environment, policy concerns about protecting the integrity of the administrative process cannot overcome the need for the court to undertake a thorough review of agency action. *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 30, 34 (D.C. Cir. 1984) (citations omitted).

More particularly, courts may review an agency's decision to maintain the status quo. *New York v. U.S. Envtl. Prot. Agency*, 350 F. Supp. 2d 429, 435 (S.D.N.Y. 2004), *aff'd sub nom. Natural Res. Def. Council v. Johnson*, 461 F.3d 164 (2d Cir. 2006). An agency's continued consideration of an issue does not as a matter of law render the agency's actions not final. *Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n*, 280 F.3d 1027, 1037–38

(D.C. Cir. 2002) (deciding that an FCC report amounted to a decision not to institute rule making, satisfying the requirement for final agency action). Furthermore, the APA includes "the failure to act" in its definition of "agency action." 5 U.S.C. § 551(13). Ultimately, "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d at 1099. Following this practical, results-oriented approach, a constructive decision to maintain the status quo is reviewable.

EPA's constructive decision to authorize New Union's amended program is final agency action. Here, EPA's constructive denial of CARE's petition and commensurate determination that New Union remains in compliance marks the consummation of the agency's decision making. By neither initiating withdrawal proceedings nor taking any other action to address New Union's program changes, EPA signaled its decision to maintain the status quo. While EPA may attempt to argue it is still considering the issue, for all intents and purposes its decade of inaction is final for the purposes of judicial review.

Finally, real legal consequences flow from EPA's determination, whether it was issued in a formal written statement or not. By authorizing New Union's altered program, facilities continue go uninspected, expired permits languish in the system, violations remain unenforced, intrastate railroad operations are not subject to criminal penalties, and TSDs are subject to requirements inconsistent with federal law and other state programs. To speed enforcement of RCRA's requirements, this Court should consider EPA's longstanding inaction to be final action reviewable under RCRA § 7006.

II. EPA'S WITHDRAWAL OF STATE AUTHORIZATION IS A RULE MAKING, HENCE THE DISTRICT COURT ALSO HAS JURISDICTION TO COMPEL EPA TO ACT ON CARE'S PETITION FOR SUCH RULE MAKING UNDER EITHER RCRA § 7002 OR UNDER THE GAP-FILLING PROVISIONS OF THE APA.

The district court has jurisdiction to compel EPA to act on CARE's petition because the approval or withdrawal of state authorization is a rule. CARE's petition falls within the bounds of RCRA § 7004 hence the district court can compel EPA's response to CARE's petition under RCRA § 7002. Alternatively, the district court can compel action under APA § 702 because EPA has granted citizens a right, pursuant to APA § 553(e), to petition for the withdrawal of state authorization, and EPA's failure to respond is agency action unlawfully withheld or unreasonably delayed.

A. The authorization and withdrawal of authority to implement a state program in lieu of the federal program are rules, not orders.

The district court based its dismissal of CARE's suit to compel EPA's action primarily on the erroneous view that the petition was for the issuance of an order, not a rule. (Dist Ct. Op. at 4 ("Having determined that EPA approval or disapproval of New Union's program was an order rather than a rule making, it is not subject to petition under 7004 . . ."")); (Dist Ct. Op. at 5.) However, a thorough review of the effect of approval or withdrawal of authorization shows it falls squarely within the definition of a rule making.

The APA defines "rule" as "the whole or a part of any 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) (2006) (emphasis added). Rule making is the "*process* for formulating, amending, or repealing a rule." *Id.* § 551(5) (emphasis added). An order, meanwhile, is defined as "the whole or a part of a final disposition . . . of an agency matter other than rule making but including licensing." *Id.* § 551(6). Agencies formulate orders through adjudication. *Id.* § 551(7). Rule makings are "legislative in nature" and are

"primarily concerned with policy considerations for the future rather than evaluation of past conduct." *Am. Express Co. v. United States*, 472 F.2d 1050, 1055 (C.C.P.A. 1973) (citing the legislative history of the APA and the Attorney General's Manual on the APA). Rule makings typically also have a prospective effect on a broad range of people not before the agency. *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448–49 (9th Cir. 1994). An adjudication, meanwhile, is "judicial rather than legislative in nature, has an accusatory flavor and may result in some form of disciplinary action, and is concerned with issues of facts under stated law." *Am. Express Co.*, 472 F.2d at 1055 (citations omitted).

The district court misconstrued the nature and effect of the approval or withdrawal of state authorization under RCRA when it determined that the act was an order. When EPA authorizes a state under RCRA, the state program operates "in lieu of the Federal program," and the state may "issue and enforce permits for the storage, treatment, or disposal of hazardous waste." 42 U.S.C. § 6326(b). The district court focused only on the permit-issuing aspect of authorization. (Dist. Ct. Op. at 4.) This narrow focus mistakenly avoids the larger context in which authorized programs operate "in lieu of" the federal program. When a state program operates "in lieu of" the federal program, the state's standards supersede federal standards to govern the conduct of regulated entities. *See, e.g.*, *AM Intern., Inc. v. Datacard Corp.*, 106 F.3d 1342, 1350 (7th Cir. 1997). If EPA withdraws authorization, EPA's own program governs. *See United States v. Power Eng'g Co.*, 303 F.3d 1232, 1238 (10th Cir. 2002). Properly understood, the approval or withdrawal of state authorization has a direct effect on "proscrib[ing]" what the law in the state is. *See* 5 U.S.C. § 551(4).

The district court erred by not deferring to EPA's decision to treat a petition for withdrawal as a petition for rule making because this decision is entitled to deference. *See*

Chem. Waste Mgmt., Inc. v. U.S. Envtl. Prot. Agency, 873 F.2d 1477, 1480–83 (D.C. Cir. 1989) (deferring to EPA's interpretation of RCRA's corrective action provisions to only require informal hearings).[6] EPA is interpreting RCRA, not the APA.

Approval or withdrawal of authorization lacks the "accusatory flavor" of adjudication. No one contends that New Union is in violation of RCRA; rather, the question is only whether New Union's program is equivalent, consistent, and adequate. While a decision to approve of or withdraw authorization from a state program may affect the administration of permits,[7] by far the largest effect is on the requirements that generators and TSDs have to meet. The approval or withdrawal of authorization is therefore a rule making. *See United States v. S. Union Co.*, 643 F. Supp. 2d 201, 212–13 (D.R.I. 2009) ("[T]his inexorably leads to the conclusion that the decision [to authorize the state program] was an exercise of the EPA's legislative authority . . . .").

Approval or withdrawal of state authorization has a prospective effect on a broad range of people not before the agency because it modifies the underlying law regulating the conduct of generators and TSDs. The district court's reliance on the fact that EPA compares a state program to regulatory requirements in determining approval or withdrawal is misplaced: the effect of the action governs over the form. *Yesler*, 37 F.3d at 449.

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[6] *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), is not to the contrary. *Adams Fruit* involved an agency construction of enforcement provisions that were instead the countenance of the judiciary and thus no deference was warranted. *Id.* at 649–50. In contrast EPA is construing what procedures are necessary to approve or withdraw authorization. Agencies are given deference for construing procedural requirements to fulfill their statutory duties. *Atochem N. Am. v. U.S. Envtl. Prot. Agency*, 759 F. Supp. 861, 868 (D.D.C. 1991).

[7] Authorization may affect federal grants to develop state programs, but it appears that monies were only appropriated through fiscal year 1988. 42 U.S.C. § 6931. Any incidental effect authorization may have on money that the state is eligible for still does not change the fact that the main effect is changing what law regulates conduct in the state.

The district court also erroneously relied on the division of responsibility for review in RCRA § 7006 as a basis for determining that approval or withdrawal of state authorization is an order, not a rule. (Dist. Ct. Op. at 4.) RCRA § 7006 divides review of EPA action between regional courts of appeal and the D.C. Circuit: the promulgation of regulations must be challenged in the D.C. Circuit while the denial of permits and authorization of state programs must be challenged in the regional courts of appeal. 42 U.S.C. § 6976 (2006). When compared to the parallel provisions of the Clean Air Act (CAA) on which this provision is based, it becomes apparent that Congress did not intend the distinction the district court drew.

The CAA, like RCRA, provides split review between the regional courts of appeal and the D.C. Circuit. 42 U.S.C. § 7607(b). Like RCRA, nationally applicable standards under the CAA are reviewable only in the D.C. Circuit. *Id.* Actions that are reviewable in the regional courts of appeal include permits and compliance orders, but also include the "approv[al] or promulgat[ion] of *any* implementation plan under section 7410." *Id.* (emphasis added). Review in the regional courts of appeal therefore include both state implementation plans (SIPs), the parallel to RCRA's state authorization procedures, and federal implementation plans (FIPs), which EPA creates and promulgates. *See id.* § 7410(c) (requiring that the "Administrator shall *promulgate*" a FIP if a state does not have an approvable SIP (emphasis added)); *id.* § 7410(k) (laying out methods for EPA approval of SIPs). The regional courts of appeal have review of *both* orders and rules under the CAA.[8]

A more reasonable interpretation of the split review in RCRA and the CAA is that Congress intended to divide review between issues of regional and national significance. *See*

[8] EPA promulgation of a FIP is clearly a rule making. *See* 42 U.S.C. § 7607(d) (creating a specific rule making procedure for the Clean Air Act, including the promulgation of FIPs).

Natural Res. Def. Council v. U.S. Envtl. Prot. Agency, 512 F.2d 1351, 1357 (D.C. Cir. 1975) ("[T]he designation of this court as the exclusive forum for appeals from standard-setting actions by the Administrator was to ensure uniformity in decisions concerning issues of more than *purely local or regional impact*." (emphasis added)). Permits, orders, and issues affecting only one state—state authorization under RCRA, SIPs and FIPs under the Clean Air Act—are only of regional significance, hence resort to the regional courts of appeal is appropriate. Therefore, review of EPA's approval or withdrawal of state authorization in this Court does not diminish the fact that EPA's action has a prospective effect on a broad category of unspecified people not before the agency, and is therefore a rule. Because rule making includes the *process* of formulating a rule, 5 U.S.C. § 551(5), CARE's petition for EPA to commence withdrawal proceedings is a petition for EPA to undertake a rule making.

B. Because authorization and withdrawal are rules, CARE's petition falls within the bounds of RCRA § 7004 and the district court has jurisdiction to compel EPA's response to this petition under RCRA § 7002.

Because EPA's approval or withdrawal of authorization is a rule, it falls under RCRA § 7004, which mandates that EPA respond to CARE's petition. 42 U.S.C. § 6974(a). The district court has jurisdiction to compel nondiscretionary duties under RCRA's citizen suit provision. 42 U.S.C. § 6972(a)(2). Thus, EPA's failure to respond to CARE's petition under RCRA § 7004 is reviewable in district court under RCRA § 7002.

1. Judicial review in the district court is not precluded by exclusive jurisdiction in the courts of appeal over discretionary duties.

The judicial review provisions of RCRA authorizing jurisdiction in the courts of appeal over discretionary action do not preclude district court jurisdiction over nondiscretionary action. The fact that "some acts are made reviewable should not suffice to support an implication of exclusion as to others," because "the right to review is too

important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Labs.*, 387 U.S. at 141. Therefore, holding that this Court has jurisdiction does not necessarily divest the district court of jurisdiction.

RCRA's provisions authorizing judicial review in the courts of appeal do not by their express terms preclude a district court's authority to review an agency's failure to respond to a petition. The plain language of RCRA § 7006 "clearly places exclusive jurisdiction in the Court of Appeals," *Beyond Pesticides v. Whitman*, 360 F. Supp. 2d 69 (D.D.C. 2004), but this provision is specifically limited to review of actions within EPA's *discretion*, 42 U.S.C. § 6976. In contrast, the judicial review authorized under RCRA § 7002 is expressly limited to *nondiscretionary* duties. 42 U.S.C. § 6972(a)(2). Because RCRA § 7006 is by its terms limited to discretionary duties, the exclusive judicial review in the courts of appeal does not preclude district court jurisdiction.[9]

Analogous judicial review provisions in the CAA have been similarly interpreted to limit the exclusive jurisdiction in the courts of appeal to discretionary duties. *See Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 894 (2d Cir. 1989) (EPA's discretionary decision as to the substance of the rule was not reviewable in district court, but the nondiscretionary duty to make some formal decision was). The relevant language in RCRA § 7002 is exactly the same as CAA § 304 and RCRA § 7006 mirrors the analogous provision in CAA § 307. Just as CAA § 304 authorizes district court jurisdiction to compel EPA to "mak[e] *some* decision

[9] Although the D.C. Circuit has held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals," *Telecomm. Research and Action Ctr. v. Fed. Commc'ns Comm'n (TRAC)*, 750 F.2d 70, 75 (D.C. Cir. 1984), our case is not analogous to the unreasonable delay at issue in *TRAC*. CARE claims EPA failed to conduct a nondiscretionary duty, which is committed to review in the district court. 42 U.S.C. § 6972(a)(2).

within the stated deadlines," *Envtl. Def. Fund v. Thomas*, 870 F.2d at 897 n.1, RCRA § 7002 likewise authorizes district court jurisdiction to compel EPA to take nondiscretionary action.

2. RCRA § 7004 imposes a nondiscretionary duty to respond to CARE's petition, reviewable in district court under RCRA § 7002.

As set out above, Congress imposed a nondiscretionary duty on EPA to respond to a petition under RCRA § 7004. Because this nondiscretionary duty imposes a deadline the district court can compel EPA to act on CARE's petition.

A provision that establishes a date-certain deadline, either explicitly or implicitly, imposes a nondiscretionary duty to avoid unreasonable delay. *Sierra Club v. Thomas*, 828 F.2d at 792; *Envtl. Def. Fund v. Thomas*, 870 F.2d at 900 (holding the statutory mandate "to take some formal action" by "December 31, 1980, and at five year intervals thereafter" imposed a nondiscretionary duty). In contrast, statutory provisions prescribing EPA action for which there is no date-certain deadline impose a discretionary duty reviewable in the courts of appeal. *Envtl. Def. Fund v. Thomas*, 870 F.2d at 900. For instance, Congress's definition of "major stationary source" under the CAA as including "any major emitting facility . . . *as determined* by the Administrator," 42 U.S.C. § 7602(j) (emphasis added), lacked a date-certain deadline and the court of appeals had jurisdiction because EPA had only a discretionary duty to avoid unreasonable delay. *Sierra Club v. Thomas*, 828 F.2d at 792.

RCRA § 7004 creates a deadline within which EPA must respond to CARE's petition. EPA's response is required "[w]ithin a reasonable time." 42 U.S.C. § 6974(a). Although a "reasonable time" is not as specific as the five-year interval in *Environmental Defense Fund v. Thomas*, it does create a margin of time within which EPA must act. Unlike the CAA provision at issue in *Sierra Club v. Thomas* that suggested a discretionary duty because it lacked any language directing a timely response, EPA's duty to respond under

RCRA § 7004 is not discretionary because RCRA § 7004 specifically requires a timely response. As noted above, EPA's failure to respond within one year is beyond the margin of "reasonable time" in light of RCRA's language and purpose and thus is a violation of a nondiscretionary duty.

C. Federal question jurisdiction and the APA provide the district court with an alternative basis for jurisdiction.

In the event that this Court holds that RCRA does not provide jurisdiction in the district court over CARE's claim, the district court still has jurisdiction to compel EPA to respond to CARE's petition under the APA as agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).[10] The presumption favoring judicial review counsels review "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Labs.*, 387 U.S. at 140 (1967).

1. Where RCRA fails to confer jurisdiction, the district court has federal question jurisdiction and authority under the APA to review EPA's failure to respond to a petition.

Judicial review under the APA is limited to actions that are not statutorily precluded or committed to agency discretion by law. 5 U.S.C. § 701(a). EPA's action is not "committed to agency discretion by law" because as previously explained, the clear text of RCRA § 7004 imposes a nondiscretionary duty on EPA to respond to CARE's petition. [11] To the extent that judicial review under RCRA § 7002 is ambiguous, the presumption favoring judicial review

[10] At the very least, the district court has jurisdiction under the APA and general federal question jurisdiction because holding otherwise would create "a bureaucratic twilight zone, in which many of the Act's purposes might become subject to evasion." *Envtl. Def. Fund v. Thomas*, 870 F.2d at 900.

[11] The Fifth Circuit's decision in *Texas Disposal Systems Landfill Inc. v. U.S. Envtl. Prot. Agency*, 377 Fed. Appx. 406 (5th Cir. 2010), erroneously came to the conclusion that EPA's decision to not commence withdrawal proceedings was committed to agency discretion by law. *Id.* at 408. However, EPA's regulations circumscribe the decision to commence withdrawal proceedings, and hence provide the court with standards against which to review EPA's actions. There is "law to apply." *Heckler v. Chaney*, 470 U.S. 821, 834–35 (1985).

and the APA itself, 5 U.S.C. § 704 (authorizing review only when "there is no other adequate remedy in a court"), suggest the district court nonetheless has jurisdiction to hear CARE's claim under federal question jurisdiction and the APA.

The context of RCRA § 7002 supports that Congress did not intend to preclude judicial review under the APA in district court. The savings clause in RCRA § 7002 states in sweeping language that the citizen suit provision does not limit the ability to seek relief "under any statute or common law" or "to seek any other relief" including against the EPA. 42 U.S.C. § 6972(f). The exact same savings clause provision in the CWA has been interpreted as a "limitation[] on the expansion of jurisdiction in [the citizen suit provision]," and not as a "restriction[] to curtail federal court jurisdiction that would have been maintainable even in the absence of this special citizen suit provision." *Natural Res. Def. Council v. Train*, 510 F.2d 692, 701 (D.C. Cir. 1974); *see also Bennett*, 520 U.S. at 165 (holding that the citizen suit provision of the Endangered Species Act did not preclude review of agency action under the APA).

2. EPA's failure to respond is agency action unlawfully withheld or unreasonably delayed that the district court should compel.

The APA authorizes judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The challenged conduct must therefore be both "agency action" and "final." Under the APA's definition of agency action, "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. § 551(13), the failure to take one of the discrete acts listed is agency action. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004).

The agency action must be "final." 5 U.S.C. § 704. The APA directs agencies to provide "[p]rompt notice" of denial of a petition, and unless the denial is "self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." 5 U.S.C. § 555(e). The APA also requires that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." *Id.* § 555(b). The APA authorizes the district to compel agency action unlawfully withheld. *Id.* § 706(1). Taken together, § 555(b), § 555(e) and § 706(1) "indicate a congressional view that agencies should act within reasonable time frames and that courts designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed." *Telecomm. Research & Action Ctr. v. Fed. Commc'ns Comm'n (TRAC)*, 750 F.2d 70, 77 (D.C. Cir. 1984). Where, as here, "Congress has established a specific, nondiscretionary time within which the agency must act," and the agency fails to act, the failure is agency action unlawfully withheld. *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1273 (10th Cir. 1998). EPA's failure to respond to CARE's petition is therefore final and the district court can compel the response unlawfully withheld.

Even if EPA's regulations are insufficient to impose a mandatory deadline within which EPA must respond, EPA's year-long delay is agency action "unreasonably delayed." 5 U.S.C. § 706(1). A claim of unreasonable delay is reviewable because "the benefits of agency expertise and creation of a record will not be realized if the agency never takes action." *TRAC*, 750 F.2d at 70. Determination of whether an agency action has been unreasonably delayed "is made on a case-by-case basis." *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 590 (1989) (Scalia, J., concurring in part and concurring in the judgment). To determine "whether the agency's delay is so egregious" such

that the court should compel agency action, a court considers: 1) whether the agency's pace of decision follows a "rule of reason"; 2) whether the agency's enabling statute provides a timetable to give substance to the "rule of reason"; 3) whether human health and welfare are at stake, rendering delays less tolerable; 4) the effect of expediting delayed action on the agency's own prioritization; 5) the nature and extent of the interests prejudiced by delay; and 6) whether the agency behaved improperly, though such a finding is not essential. *TRAC*, 750 F.2d at 80 (describing the "hexagonal contours of a standard").

The reasonableness of delay "is informed by the relevant statutes and regulations." *Aronov v. Napolitano*, 562 F.3d 84, 111 n.11 (1st Cir. 2009). Here, the statute mandates a response "within a reasonable time," giving substance to the "rule of reason." Further, human health and welfare are at stake, so delay in this instance is less tolerable. For example, a three year delay in promulgating an OSHA standard regulating workplace exposure to a potentially harmful chemical was "simply too long given the significant risk of grave danger." *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983); *see also Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d at 32, 34. The concern for human health is even greater in a RCRA case considering Congress' recognition of the grave dangers present in the improper handling of hazardous waste. *See* 42 U.S.C. § 6901(b). EPA's delay in responding to CARE's petition for one year is so egregious as to constitute action unreasonably delayed, and the district court should compel EPA to act.

Regardless of where this Court determines jurisdiction lies, EPA's failure to comply with its own regulations should not bar the enforcement of those regulations. If this Court does not have jurisdiction over EPA's constructive actions, the district court has jurisdiction under either RCRA § 7002 or general federal question jurisdiction, 28 U.S.C. § 1331,

pursuant to a cause of action under APA § 702, to compel EPA's response to CARE's petition.

III. IF BOTH THE DISTRICT COURT AND THIS COURT HAVE JURISDICTION, THIS COURT SHOULD LIFT THE STAY AND PROCEED TO THE MERITS OF EPA'S CONSTRUCTIVE DECISIONS.

If this Court holds that it has jurisdiction over C.A. No. 18-2010 and that the district court has jurisdiction over C.A. No. 400-2010, this Court should lift the stay on C.A. No. 18-2010, proceed to the merits of CARE's claims, and remand to EPA to commence withdrawal proceedings to either bring New Union's program in line with the requirements of RCRA or withdraw New Union's authorization. The record in this case, comprised of information known to EPA for at least a year, and in some circumstances almost a decade, is sufficient for this Court to review the merits of EPA's decisions and hold them arbitrary and capricious.

While bifurcated jurisdiction between district courts and circuit courts is not favored, *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 660 (D.C. Cir. 1975), the situation presented in this case is sufficiently different that this Court should review EPA's determination. First, unlike *Oljato*, 515 F.2d at 666–67, or *Save the Bay, Inc. v. Administrator, U.S. Environmental Protection Agency*, 556 F.2d 1282, 1291–92 (5th Cir. 1977), this case has an undisputed record. (Dist. Ct. Op. at 5.) While the record in *Save the Bay* was "wholly inadequate" because it did not provide any indication of the factors EPA relied upon, thus creating a factual dispute, 556 F.2d at 1292, the record in this case details all of the information that New Union submitted and no *factual* dispute exists between the parties.

Similarly, the courts of appeal have been hesitant to review agency action when there was no record because the court "was not in a position to take evidence to evaluate the merits" of the plaintiffs claims. *See Oljato*, 515 F.2d at 665; *see also Hempstead Cnty. &*

Nev. Cnty. Project v. U.S. Envtl. Prot. Agency, 700 F.2d 459, 462 (D.C. Cir. 1983). However, this Court has no need for additional evidence to review the merits of EPA's decision. New Union has submitted all of the necessary information directly to EPA. (Dist. Ct. Op. at 5 ("[A]ll of the factors . . . were reported directly by New Union to EPA . . . .").) This information constitutes an undisputed administrative record. Unlike where EPA creates a pollution or health standard, *see Oljato*, 515 F.2d at 665, here additional testing or study would not be useful because the underlying facts are not in question. The record provides both EPA and this Court with a complete understanding of New Union's program.

Even if this Court were to grant EPA's litigation position the deference it does not deserve, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988), as demonstrated below, EPA's decision to deny CARE's petition and not commence withdrawal proceedings was arbitrary and capricious. Because the remedy that CARE seeks—a remand to EPA—is all that CARE can receive from either this Court or the district court, "there seems to be no reason to inject another tribunal into the process." *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d at 1099. This is especially true when the reason for this suit was EPA's delay: this Court should not allow EPA to continue delaying the instigation of proceedings to bring New Union's program in line with RCRA or implement the federal program in its stead. As shown below, New Union's program has serious deficiencies that put New Union's residents at risk.

IV. EPA'S TACIT AUTHORIZATION OF NEW UNION'S PROGRAM WAS ARBITRARY AND CAPRICIOUS BECAUSE THE PROGRAM FAILS TO MEET EPA'S REQUIREMENTS OF EQUIVALENCE, CONSISTENCY, AND ADEQUATE ENFORCEMENT.

Changes to New Union's program since its initial authorization in 1986 make the program sufficiently different from federal and other state programs to merit withdrawal. EPA has been aware of these changes for ten years. Neither EPA nor New Union denies the contents of New Union's record of inadequacy. Admittedly, EPA's authority to withdraw New Union's program from authorization is discretionary. *See* 40 C.F.R. § 271.22 (EPA "may" withdraw a state's program). However, once EPA has decided not to take action, the court applies an "arbitrary and capricious" standard of review which requires the agency to demonstrate "a rational connection between the facts found and the choice made." *Pub. Citizen v. Heckler*, 653 F. Supp. at 1239 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted)). In light of a complete record detailing the decade-long decline of New Union's implementation capacity, EPA's failure to enforce its own regulations, its denial of CARE's petition, and its tacit approval of New Union's program, this Court should reject EPA's actions as arbitrary and capricious.

A. New Union's allocation of inadequate resources to DEP to sufficiently implement its program has rendered the state program's enforcement inadequate.

EPA may withdraw approval of a state program when the state lacks the proper capacity for enforcement, including inadequate action on permit violations, "failure to seek adequate enforcement penalties," and "failure to inspect and monitor activities subject to regulation." 40 C.F.R. § 271.22(a)(3). RCRA § 3007(e)(1) requires that each permitted facility be inspected "no less often than every two years." 42 U.S.C. § 6927(e)(1). EPA

requires state programs to be "capable of making comprehensive surveys of all facilities and activities" and to have "[a] program for periodic inspections." 40 C.F.R. § 271.15(b). Neither New Union nor EPA denies that since EPA's initial approval in 1986, New Union's ability to implement its program has diminished, (Dist. Ct. Op. at 2), and the state can no longer implement its program without EPA's assistance. Even with assistance, its program does not meet federal requirements. EPA's decision not to commence withdrawal proceedings in the face of such blatant inadequacy was arbitrary and capricious.

New Union's severe decline in staffing, especially as the need for permit issuance and enforcement has increased, makes New Union's program inadequate. Combining New Union's and EPA's resources, only twenty percent of facilities are inspected each year. (Rec. Doc. 5 for 2009, p. 22–23.) At this rate, it is impossible that every facility is inspected every two years, as federal law requires. Instead, optimistically, a facility may be inspected only every five years.[12] The cavalier indication by the Governor's Director of Budget that the state would continue to cut resources where federal authorities could assist signals the intention to continue relying on EPA to carry out a program that should be operating in lieu of federal authority.

The most urgent implication of the diminished resources for New Union's program is the lack of adequate enforcement leading to an increased risk to human health and the environment. With new facilities needing permits and existing facilities operating under expired permits there is a high probability that facilities are not operating in compliance with federal law. New Union's prioritization policy for permitting only exacerbates this problem: by ranking the most potentially dangerous facilities last on the list of priorities (Rec. Doc. 5

[12] Particularly because DEP is prioritizing certain facilities over others, (Rec. Doc. 5 for 2009, p. 23), it is possible that some facilities may not even be inspected every five years.

for 2009, p. 20), DEP leaves New Union vulnerable to toxic releases and future Superfund sites. Current enforcement actions do not even address all "significant" permit violations, and dangerous releases of hazardous waste have occurred without consequence. (Rec. Doc. 5 for 2009, pp. 24–26.) The danger to the public alone counsels against allowing EPA to avoid addressing New Union's inadequacies.

Ultimately, the dramatic decrease in New Union's programmatic resources, resulting in inadequate implementation of its program, renders New Union's program not equivalent to the federal program. EPA's tacit approval of New Union's program was thus arbitrary and capricious.

B. The New Union legislature's Environmental Regulatory Adjustment Act rendered its program not equivalent to the federal program and inconsistent with both the federal program and that of other states.

EPA may withdraw approval when a state's legal authority becomes insufficient, including "[a]ction by a state legislature . . . striking down or limiting State authorities." 40 C.F.R. § 271.22(a)(1)(ii). By passing the ERAA, the New Union legislature eviscerated DEP's authority to enforce hazardous waste requirements at railroad hazardous waste facilities by transferring its authority and removing criminal penalties. The resulting program is not equivalent to the federal program and is inconsistent with federal and other state programs. Further, the legislature's specific requirements for Pollutant X run counter to RCRA's consistency requirement, providing additional grounds for withdrawal. In the face of these changes, EPA's continued authorization was arbitrary and capricious.

1. New Union's transfer of authority from DEP to the Railroad Commission renders its program not equivalent because it effectively withdraws railroad hazardous waste facilities from regulation.

A state may transfer some or all of an agency's regulatory authority to another agency; however, the state must notify EPA prior to any proposed transfer and receive EPA's approval for the transfer to be effective as part of the state's authorized program. 40 C.F.R. § 271.21. EPA's State Authorization Manual specifies that "[i]f a major shift of responsibilities is made to an unapproved State agency, EPA may withdraw the State's authorization until the program revision is approved." OSWER 9540.00-9A, 1990 WL 608679, at *10 (Oct. 1990). If a state transfers authority to a new agency prior to EPA approval, a lapse in coverage occurs. *See* Final Decision on Revisions to the State's Hazardous Waste Management Program, Texas, 51 Fed. Reg. 3952, 3952–53 (Jan. 31, 1986). In the case of Texas, EPA found the state's transfer of its municipal hazardous waste program from the Texas Department of Health to the Texas Water Commission resulted in such a lapse, but the new agency agreed not to issue any permits until it had received EPA approval. *Id.* at 3953.

As to New Union's transfer of authority from DEP to the New Union Railroad Commission, there is no indication that the state ever submitted its proposed revisions to EPA for approval. Further, there is no indication that the Railroad Commission suspended its exercise of authority over hazardous waste permitting until EPA approved the transfer. Whether the Commission is issuing permits without EPA approval or is simply not issuing permits for railroad hazardous waste facilities is unclear. Regardless, by creating a lapse in coverage during which the state is not complying with EPA regulations, New Union has effectively withdrawn facilities under the Commission's jurisdiction from regulation. This withdrawal makes New Union's program not equivalent to the federal program, which

regulates all hazardous waste facilities, regardless of type. *See* 42 U.S.C. §§ 6923, 6924. Because New Union's program is not equivalent, EPA's failure to commence withdrawal proceedings was arbitrary and capricious.

2. New Union's removal of criminal penalties for violations at railroad hazardous waste facilities contradicts EPA's requirements for approved state programs.

In addition, the substantive alteration to hazardous waste regulation at intrastate railroad facilities renders New Union's program not equivalent to the federal program and inconsistent with the federal program and other state programs. Congress made knowing violations of RCRA a criminal offense. 42 U.S.C. § 6928(d). To receive EPA's authorization, states "shall have available" the ability to seek "criminal remedies, including fines." 40 C.F.R. § 271.16. EPA's State Authorization Manual reiterates this requirement, stating that "[r]eductions in civil or criminal penalties below the levels specified in § 271.16(a)(3)" are grounds for withdrawal. OSWER 9540.00-9A, 1990 WL at *9. Both Congress and the EPA have made evident the necessity of having criminal sanctions available to enforce RCRA violations.

The New Union legislature went further than merely reducing criminal penalties by completely removing their applicability to violations at intrastate railroad hazardous waste facilities. (Rec. Doc. 5 for 2000, pp. 103–105.) RCRA violators at these facilities will thus be immune from criminal penalties, but similar violators at different types of facilities will not. This is hardly the equivalent of the federal program, which imposes criminal penalties regardless of location. Because EPA failed to initiate withdrawal proceedings to require New Union to account for its deficiencies, EPA's actions were arbitrary and capricious.

3. New Union's regulation of Pollutant X fails to meet EPA's regulations, and as such renders New Union's program inconsistent with the federal program and other state programs.

Provisions of the ERAA that ban the treatment of Pollutant X make the New Union program inconsistent with the federal program and other state programs because these provisions have no basis in human health or environmental protection and act as a prohibition on the treatment, storage and disposal of hazardous waste within New Union. By forbidding DEP from permitting any facility to treat, store, or dispose of Pollutant X except for temporary storage, New Union has effectively banned the construction of TSDs that handle Pollutant X. This renders New Union's program inconsistent.

EPA's regulations require that a "State program must be consistent with the Federal program and State programs applicable in other states." 40 C.F.R. § 271.4. To be consistent, a state program cannot unreasonably restrict, impede, or operate as a ban on the flow of hazardous waste across state borders. *Id.* § 271.4(a). In addition, a state cannot ban the treatment, storage, or disposal within the state unless the ban has a basis in human health or environmental protection. *Id.* § 271.4(b). EPA has grounded these requirements in its conception of the dormant Commerce Clause. *See* Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,395 (May 19, 1980). As EPA explained at the time,

> *A State that refuses entirely to allow a necessary part of national commerce—the disposal of hazardous wastes—to take place within its boundaries is impeding the flow of interstate commerce*. . . . [States with these restrictions] *will be deemed inconsistent* if the prohibition has no basis in human health or environmental protection.

Id. (emphasis added). Though the test of consistency is not actually a test of constitutionality, dormant Commerce Clause jurisprudence should inform the consistency determination.

EPA's view is consistent with dormant Commerce Clause jurisprudence. *See Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs*, 27 F.3d 1499, 1510–12 (10th Cir. 1994). As the

Tenth Circuit noted in *Blue Circle*, while complete bans may not fall within the nearly per se rule of invalidation for facially discriminatory statutes, *id.* at 1511–12, they must still be justified under the *Pike* balancing test. *Id.* at 1512. The *Pike* balancing test prohibits evenhanded statutes where the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Statutes aimed at public health or safety can be upheld even when facially discriminatory, *see, e.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding Maine's ban on the importation of out-of-state baitfish as a valid exercise of the state's police power), but the "mere 'incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack.'" *Blue Circle*, 27 F.3d at 1512 (quoting *Kassel v. Consol. Freightways Corp.,* 450 U.S. 662, 670, (1981) (plurality opinion)). If protection of public health or safety is advanced so marginally and the law substantially interferes with interstate commerce, it will still be held invalid. *Id.*

Here the record shows no evidence that the *treatment, storage, or disposal of* Pollutant X is dangerous or harmful to human health or the environment; the ERAA only notes it is "potent and toxic" and that no facilities *currently* exist in New Union to safely treat Pollutant X. (Rec. Doc. 5 for 2000, pp. 105–07). However, the ERAA also notes that nine TSDs handling Pollutant X have been approved by EPA under RCRA, *id.*, suggesting disposal and treatment can be accomplished in a manner "protect[ive of] human health and the environment," as Congress requires. 42 U.S.C. § 6923(a). Because the treatment and disposal of Pollutant X can be achieved in a safe manner, the putative local benefits of New Union's complete ban on the TSDs handling Pollutant X is "clearly excessive" and would be struck down if challenged as contrary to the dormant Commerce Clause. Because the ban

violates the tenets of the dormant Commerce Clause, and EPA has incorporated these tenets into its regulations implementing the consistency requirements, the ban on the treatment and disposal of Pollutant X makes New Union's program inconsistent with the federal program and other state programs.[13] EPA's decision not to commence proceedings to either make New Union's program consistent with the federal program and other state programs or withdraw authorization was therefore arbitrary and capricious.

CONCLUSION

Because this Court has jurisdiction over EPA's denial of CARE's petition and the constructive authorization of New Union's program, this Court should lift the stay on the case CARE originally filed with this Court. Because EPA's constructive authorization of New Union's program was arbitrary and capricious, this Court should remand with guidance to EPA for reconsideration of this decision.

Alternatively, because the district court has jurisdiction under either RCRA § 7002 or general federal question jurisdiction, 28 U.S.C. § 1331, pursuant to APA § 702 for violations of APA § 553(e), this Court should remand the case to the district court to order EPA's action on CARE's petition within a reasonable time, as required by the statute.

[13] The D.C. Circuit's decision in *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991), is not to the contrary. EPA's decision was upheld because the court found that the law in question did not actually ban the construction or permitting of all facilities, instead only limiting their size and location. *Id.* at 1395–96. The law also had an announced basis in human health and environmental protection and was thus merely stricter. *Id.* New Union's program, in contrast, has no basis in human health and completely bans the construction of TSDs handling Pollutant X.

Appendix– Statutory Provisions

Administrative Procedure Act (APA)

5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions therefore, except to the extent that there is involved–

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts

....

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 555. Ancillary matters

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . .

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Resource Conservation and Recovery Act (RCRA)

42 U.S.C. § 6972. Citizen suits

(a) In general.

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

. . .

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. . . .

42 U.S.C. § 6974. Petition for regulations; public participation

(a) Petition.

Any person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under this chapter. Within a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition and shall publish notice of such action in the Federal Register, together with the reasons therefor.

42 U.S.C. § 6976. Judicial review

(b) Review of certain actions under sections 6925 and 6926 of this title.

Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any permit under section 6925 of this title (or in modifying or revoking any permit which is deemed to have been issued under section 6935(d)(1) of this title), or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day. Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement. Such review shall be in accordance with sections 701 through 706 of Title 5.