TEAM 68

C.A. No. 18-2010, 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

Respondent-Appellee-Cross-Appellant

On Order from the

United States Court of Appeals for the Twelfth Circuit

BRIEF FOR RESPONDENT

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JURISDICTION

The jurisdiction of the United States District Court for the District of New Union is invoked under the Resource Conservation and Recovery Act ("RCRA") § 7002(a)(2), 42 U.S.C. § 6972(a)(2). The jurisdiction of the United States Court of Appeals for the Twelfth Circuit is invoked under 28 U.S.C. § 1294(1), pursuant to an order from this court dated September 29, 2010.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Union was decided on June 2, 2010, in Citizen Advocates for Regulation and the Env't, Inc., v. Jackson, which is not published. The District Court dismissed Citizen Advocates for Regulation and the Environment's ("CARE") suit for failing to state a claim. The United States Court of Appeals for the Twelfth Circuit ordered all parties to brief the issues enclosed herein on September 29, 2010.

ISSUES PRESENTED

1. Does RCRA § 7002(a)(2) provide jurisdiction to the district courts to order the EPA to fulfill its non-discretionary duty under RCRA § 7004 in regards to CARE's petition for the revocation of EPA's approval of New Union's hazardous waste program?
2. Is CARE unable to claim a civil action under the general provision of 5 U.S.C. § 553(e), and therefore cannot garner jurisdiction in federal courts under 28 U.S.C. § 1331, since specific provisions of RCRA speak to the same issue?
3. Can the EPA's discretion to not respond to CARE's petition be construed as not a constructive denial of the petition and, therefore, a constructive re-approval of New Union's hazardous waste program, since the EPA has not initiated any investigatory proceedings on the current status of the state's program?
4. If the EPA's lack of response to CARE's petition is a constructive denial of the petition and a constructive re-approval of New Union's program, should this case then be remanded to the court below and not continue in the Court of Appeals?
5. Are New Union's resources and performance sufficient to satisfy the statutory requirements of RCRA, and if not, does the EPA have other options besides withdrawing authorization?
6. Is New Union's regulation of railroad hazardous waste facilities sufficient to allow EPA the discretion to keep authorization in place?
7. Is New Union's non-discriminatory, stricter regulation of Pollutant X acceptable under the Commerce Clause and does its presence have no effect on its equivalency with RCRA such that New Union's hazardous waste program may continue to be consistent with RCRA and other EPA approved state programs?

STATEMENT OF THE CASE

In a world of limited resources, trade-offs are inevitable. It is important that parties best suited to assess situations make the ultimate decisions at the appropriate time. The State of New Union has recently been struggling financially and many state agencies, including the DEP, have

experienced cuts. In response, CARE wants the EPA to completely withdraw authorization for its hazardous waste program from New Union and implement a federal program. The EPA, however, has the discretion to use its expertise and knowledge to best use its resources to ensure that environmental requirements are adequately met. The EPA is also subject to resource limitations and would rather continue to cooperate with New Union as long as the Agency feels that New Union has been making the most of its resources and is still protecting the public.

STATEMENT OF THE FACTS

In 1986, the EPA approved New Union's hazardous waste program because New Union's Department of Environmental Protection ("DEP") had adequate resources to administer and enforce the program by issuing permits in a timely fashion, inspecting RCRA regulated facilities once every other year, and taking enforcement actions against significant violations. (R. Doc. 2, 1.) At the time, the EPA noted that if the program had fewer resources it might not be adequate for the program under review in 1986. (R. Doc. 3, 16.)

New Union's DEP reported that at the time of initial approval in 1986, it had fifty full-time employees: fifteen permit writers, fifteen inspectors, three laboratory technicians, two lawyers and fifteen administrators. (R. Doc. 1, 73.) Additionally, when the EPA initially approved the program, New Union had 1,200 hazardous waste treatment, storage, and disposal facilities which required RCRA permits. (R. Doc. 1, 17.) By 2009, twenty-three years later, the number of facilities requiring permits gradually grew by 300, totaling 1,500. (R. Doc. 5, 23, 2009.) In that same period, the DEP had eliminated twenty positions. (R. Doc. 5, 52, 2009.) The elimination of jobs was gradual until 2000 when the State began to experience economic distress and had to react accordingly. (Summ. of the R. 10.)

During this time of economic hardship, New Union found itself having to trim many state programs, but the DEP's decrease in resource allocation was no more than 20% of the decrease in allocations to other public health regulatory programs. (R. Doc. 5, 51, 2009.) In an effort to mitigate a deepening budget crisis, New Union has indicated that a hiring freeze is likely to continue through the next two years and that 5-10% of state employees may face unemployment. (R. Doc. 5, 53, 2009.) Newspapers have speculated that the losses would be concentrated in programs where federal employees could perform the necessary tasks and other discretionary programs. (R. Doc. 6, June 6, 2009.)

Though the DEP's issuance of permits is holding steady at 125 a year, it has acknowledged that it has had some difficulty organizing permit allocation. (R. Doc. 5, 19, 2009.) For instance, it receives fifty applications a year from facilities that would like to expand their operations by acquiring an amended permit. (R. Doc. 4, 20, 2009.) Additionally, about 900 hazardous waste treatment, storage, and disposal facilities ("TSDs") have permits, some of which expired twenty years ago. (R. Doc. 5, 20, 2009.) The DEP recognized that to get permit issuance in order it would need to reorganize the method of permit issuance such that the it could first get new facilities on line and second, get old facilities in line. (R. Doc. 5, 20, 2009.)

The DEP has continued to make adjustments to ensure its program is achieving its stated goals. From 2008-2009, the DEP had performed 150 inspections of TSDs, 10% of the total. (R. Doc. 5, 22-23, 2009.) The EPA, at the behest of the DEP, inspected the same number of facilities. (Id.) To make inspections most effective in reaching the Act's goals, the DEP has prioritized inspections by focusing on unpermitted releases of hazardous waste and other violations posing the greatest potential for harm. (R. Doc. 5, 23, 2009.) Despite the fact that the inspections resulted in a finding of twenty-two significant permit violations and hundreds of

minor ones, the EPA and the DEP each only found six to be appropriate for enforcement actions. (R. Doc. 5, 25, 2009.) Furthermore, of these actions, eight were administrative orders requiring compliance and payment of penalties and only four were subject to civil actions requests for civil injunctions and judicial assessment of penalties. (R. Doc. 5, 25-26, 2009.)

In 2000, facing an impending budget crisis that, unbeknownst to them, would characterize the decade, the New Union Legislature enacted the 2000 Environmental Regulatory Adjustment Act ("ERAA"), which resulted in (1) trimming away an unnecessary regulation and its cost from the DEP and (2) reformulating of New Union's treatment of Pollutant X to allow for reduction of production and expediency of disposal. (R. Doc. 5, 50, 2009; R. Doc. 5, 103-105, 2000; R. Doc. 5, 105-107, 2000.)

Prior to the New Union's legislative intervention, the DEP shared responsibilities for railroad regulation with the New Union Railroad Commission ("NURC"). (R. Doc. 5, 103-105, 2000.) The first amendment of concern in this case is the amendment made by the elected officials of the legislature to the Railroad Regulation Act ("RRA"), which had established the NURC. To the extent allowed by the commerce clause, initially, this commission was charged with regulating intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards.

In 2000, the New Union Legislature adjusted the purview of the DEP by withdrawing some of its railroad regulatory powers and financial obligations and redistributed them to NURC. (Summ. of the R. 10.) The ERAA amended the RRA such that NURC now must assume full responsibility of the railroads including: standard setting, permitting, and inspection and enforcement with respect to railroad hazardous waste facilities. (R. Doc. 5, 103-105, 2000.)

Additionally, the New Union Legislature, recognizing Pollutant X to be among the most potent and toxic chemicals to the public health, added the following amendment:

> 1. Every facility generating wastes including Pollutant X shall submit to the DEP within the next ninety days a plan to minimize the generation of Pollutant X containing wastes and every year thereafter by December 31, shall submit to the DEP a report stating the reduction in generation of Pollutant X during the previous year and a plan for additional reduction of such waste in the following year, until such generation entirely ceases.
> 2. The DEP shall not issue permits allowing the treatment, storage or Disposal of Pollutant X, except for storage for less than 120 days while awaiting transportation to a facility located outside of the state and permitted and designed to treat or dispose of Pollutant X.
> 3. Any person may transport Pollutant X through or out of the state to a facility designed and permitted to treat or dispose of pollutant X, provided, however, that such transport shall be as direct and fast as is reasonably possible, with no stops within the state except for emergencies and necessary refueling.

(R. Doc. 5, 105-107, 2000.)

SUMMARY OF THE ARGUMENT

Since the EPA Administrator did not publish notice of her decision, as required by RCRA § 7004, to not act on CARE's petition to revoke authorization of New Union hazardous waste program, the District Court has jurisdiction to order the EPA to fulfill this nondiscretionary duty under RCRA § 7002(a)(2). Given that the district court already has jurisdiction through a specific rule, CARE cannot also invoke federal jurisdiction through the more general rules of 28 U.S.C. § 1331 and 5 U.S.C. § 553(e), which orders all agencies to allow interested parties to petition for the issuance, amendment, or repeal of a rule.

The Administrator's decision not to respond to CARE's petition is subject to the EPA's discretion and cannot be construed as a constructive denial of the petition or as a constructive re-approval of New Union's hazardous waste program. To allow CARE's argument that "no action" is equivalent to approving the program would disregard Congress's explicit approval

process laid out in RCRA and would undermine the EPA's authority to decide when to invest its time, money, and other resources into investigating and responding fully to petitions.

If the Court of Appeals does find that the EPA's lack of action is a constructive denial of the petition and constructive approval of the program, however, this case should then be remanded to the District Court. Construing the EPA's non-action as a constructive determination of any sort means that the court views review of petitions as non-discretionary duties, over which the District Court has exclusive jurisdiction. With respect to the constructive decision not to withdraw authorization, the Court of Appeals does not have jurisdiction. While Congress granted specific jurisdiction to this Court to review formal withdrawal of authorization upon Administrator action, there has only been non-action and an absence of formal withdrawal proceedings.

Should this Court review the merits of the case, New Union's resources and performance, granting of authority to NURC, and granting of permits for Pollutant X are not sufficient grounds for withdrawal of authorization. New Union's resources and performance do not reach the point of failure to comply with statutory requirements. However, even if this Court finds that one or more of the above is a sufficient cause for withdrawal of authorization, complete de-authorization of New Union's hazardous waste program is neither necessary nor practical. New Union continued to act within the purpose and constraints of RCRA when it chose to continue the regulation of railroad hazardous waste facilities under NURC rather than the DEP. Lastly, the addition of a specific provision with respect to Pollutant X is above and beyond RCRA, which is allowed under the statute and in case law, and does not violate the commerce clause because it is not a discriminatory provision against interstate commerce.

STANDARD OF REVIEW

The District Court granted New Union's motion for summary judgment based on lack of subject matter jurisdiction. CARE v. Jackson, civ. 000138-2010, 6 (D.N.U. 2010). All courts of appeal review de novo summary judgment based on lack of subject matter jurisdiction. See e.g., Hastings v. Wilson, 516 F.3d 1055, 1058 (8th Cir. 2008); Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir. 2000); Brady v. U.S., 211 F.3d 499, 502 (9th Cir. 2000); U.S. West, Inc. v. Tristani, 182 F.3d 1202, 1206 (10th Cir. 1999); Boudreau v. U.S. 53 F.3d 81, 82 (5th Cir. 1995).

ARGUMENT

I. THE DISTRICT COURT HAS JURISDICTION UNDER RCRA § 7002(A)(2) TO ORDER THE EPA TO PUBLISH NOTICE IN THE FEDERAL REGISTER OF THE AGENCY'S "NO ACTION" RESPONSE TO CARE'S PETITION.

The EPA authorized New Union's hazardous waste program through formal rulemaking, subject to 5 U.S.C. § 553(c), 556, and 557. Under RCRA § 7004(a), 42 U.S.C. § 6974(a) (2006) ("§ 7004(a)"), any person may petition the EPA Administrator to promulgate, amend, or repeal rules, such as hazardous waste program authorizations. This law additionally provides that the EPA Administrator shall take action on these petitions and publish notice of that action in the Federal Register. Id. Failure to perform this non-discretionary duty allows a party to bring suit pursuant to RCRA § 7002(a)(2), 42 U.S.C. § 6972(a)(2) (2002) ("§ 7002(a)(2)").

Since CARE properly submitted a petition under § 7004(a) to repeal the EPA's regulation[1] regarding New Union's program and since the EPA Administrator failed to publish notice of her action in the Federal Register, CARE may bring a complaint under § 7002(a)(2) against the Administrator in the District Court.

[1] The term "rules" is synonymous with "regulation" in this context.

A. New Union's hazardous waste program is a regulation and is subject to petition under RCRA §7004(a).

The EPA's authorization of New Union's hazardous waste program is a rule under the Administrative Procedure Act ("APA") § 551, 5 U.S.C. § 551 (2006) ("§ 551") and is subject to the non-discretionary duty under § 7004(a). Regulations include, but are not limited to, substantive rules applicable to a particular matter that allow an exemption or relieve a restriction. 5 U.S.C. § 551(4), 553(d)(1). Since the EPA's approval of New Union's waste program exempts the state's hazardous waste facilities from federal administration and enforcement, state programs clearly correspond with Congress's definition of "regulation."

The EPA's rule exempting New Union can further be demonstrated when comparing regulations to orders. While the District Court correctly noted that "permits are orders rather than rules," it is clear that the EPA's approval of New Union's program is not a permit as characterized by the APA. CARE v. Jackson, Civ. 000138-2010, 3 (D.N.U. 2010). The APA specifically notes that licenses, such as permits and permissions, are orders. 5 U.S.C. §551(6), (7) (2006). A license is a "a revocable permission to commit some act that would otherwise be unlawful." Black's Law Dictionary, 931 (9th ed. 2009) (defining further that a "permit" is a license). See also RCRA § 3005(a), 42 U.S.C. § 6925(a) (1996) ("[A]fter such date [in which the act becomes effective] the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is *prohibited except in accordance with such a permit*.") (emphasis added); Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 129 S.Ct. 2458, 2459 (2009) (noting that the Clean Water Act allows the EPA to grant permits for the discharge of pollutants, which would be illegal to do without the permit).

The EPA's authorization of state programs, however, is not allowing the state to do something that would otherwise be illegal, such as discharging pollutants into waterways, but instead allows a state to administer and enforce hazardous waste programs as a supplement to the EPA's authority. Without such authorization, it would not be *illegal* for states to regulate hazardous waste; their regulations would simply be preempted by RCRA. State programs are not permits recognizing that a state is allowed to engage in actions that would otherwise be against the law, but instead are rules exempting a state from RCRA's power to preempt state oversight. See, e.g., Thompson v. Thomas, 608 F.Supp. 1, 3 (D.D.C. 1987) (holding that because an authorized state under RCRA administers a hazardous waste program in lieu of the EPA and that state's program supersedes RCRA, alleged violations under the state program should be brought in that state's court). Petitions regarding the promulgation, amendment, or repeal of a state's hazardous waste program authorization, therefore, are subject to § 7004(a).

B. The District Court has jurisdiction under RCRA § 7002(a)(2) because the EPA failed to publish notice about the Agency's decision to take no action regarding CARE's petition under RCRA § 7004(a).

The EPA failed to perform a non-discretionary duty when the agency did not publish notice of its decision not to respond to CARE's petition and should be ordered by the District Court to fulfill this duty. Section 7002(a)(2) grants jurisdiction to district courts over citizen-suit claims alleging that the EPA failed to perform a non-discretionary duty. Doe v. Browner, 902 F.Supp. 1240, 1244 (D. Nev. 1995); § 7002(a)(2). In Browner, former employees of an Air Force facility brought a citizen's suit against the EPA, alleging that the agency failed to conduct annual inspections as mandated by RCRA § 3007(c). Id. Before the case was brought to trial, however, the EPA conducted the non-discretionary inspection and claimed that the citizen's suit was now moot. Id. The court held that since the EPA Administrator performed her non-

discretionary duty under RCRA before the trial, the plaintiffs were no longer entitled to relief. Id. at 1250.

Although the Browner court found that the EPA's pre-trial actions ultimately mooted the plaintiff's claims, the court nevertheless noted that the EPA Administrator had previously failed to perform a non-discretionary duty that would have been cause for relief if she had not subsequently complied. Id. Section 3007(c) orders that the "Administrator *shall* undertake on an annual basis a thorough inspection of each [federal] facility . . . ." RCRA § 3007(c), 5 U.S.C. § 6927(c) (emphasis added). Section 7004 similarly notes that the "Administrator *shall* publish notice of such action in the Federal Register." § 7004(a) (emphasis added). While RCRA does not mandate the type of action the EPA must take regarding petitions to promulgate, amend, or repeal a regulation, the act does mandate that the EPA must publish notice of what action is taken in the Federal Register. Id. Like the EPA Administrator's failure to inspect the Air Force base in Browner, the Administrator's failure to publish notice of the EPA's no action is subject to § 7002(a)(2). See also Sierra Club v. EPA, 992 F.2d 337, 346 (D.C. Cir. 1993) ("[T]his Court has established that the district court possesses jurisdiction [under § 7002(a)(2)] over claims alleging that an agency has violated a non-discretionary duty of timeliness imposed by a statutory deadline.").

II. 528 U.S.C. §1331 DOES NOT GRANT JURISDICTION TO DISTRICT COURTS TO ORDER THE EPA TO ACT ON CARE'S PETITION BECAUSE THE SPECIFIC RULES OF RCRA HAVE SUPERSEDED THE GENERAL RULES REGARDING JURISDICTION OVER AGENCIES PROVIDED BY THE APA.

The APA's direction that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule" is a general rule. APA § 553(e), 5 U.S.C. § 553(e) ("§ 553(e)"). Since RCRA is a specific statute which allows interested parties to submit such petitions, Congress clearly intended for RCRA to replace the APA in regards to the

regulation of hazardous wastes. Furthermore, because the EPA, under RCRA and other specific statutes, provides interested parties a method by which to petition the Agency, it satisfies the APA's mandate and makes additional jurisdiction under 28 U.S.C. § 1331 moot.

A. The specific rules in RCRA supersede the APA's general mandate to provide interested persons the right to petition for the issuance, amendment, or repeal of a rule.

The extensive jurisdictional rules of RCRA clearly indicate that Congress intended for RCRA to be a specific rule that supersedes general rules. Morton v. Mancari, 417 U.S. 535, 536 (1974). See also Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989) (noting that general rules only govern cases in which legislators have not enacted a specific rule); Marcello v. Bonds, 349 U.S. 302, 310 (1955) ("Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute [in the Immigration Act] expressly supersedes the hearing provisions of that Act."). In Morton, the Supreme Court held that the 1972 Equal Employment Opportunity Act did not take preference over the Indian Reorganization Act of 1934, which granted employment preferences to qualified Native Americans for positions in the Bureau of Indian Affairs. 417 U.S. at 537, 554. The Court noted that since the Indian Reorganization Act is a detailed law speaking directly to a specific situation, plaintiffs could not rely on a more general law to control or nullify it. Id. at 550. Congress, the Court concluded, intended for the Reorganization Act to survive the later act given its continued enactment of Native American preference laws and the relationship between Native Americans and the Government. Id. at 548-49.

Similarly, CARE cannot rely on the general laws of the APA in order to garner jurisdiction if RCRA already allows or bars it. Congress laid out over forty jurisdictional schemes in RCRA. Surely Congress did not clarify so many specific situations in which courts

do and do not have jurisdiction only to have those plans trumped by a general rule allowing for federal question jurisdiction under 28 U.S.C. § 1331. If all agencies rules were automatically subject to 5 U.S.C. § 553(e), and therefore granted jurisdiction under § 1331 regardless of what more specific statutes dictate, Congress would not have taken the time to speak to questions of jurisdiction in RCRA.

B. The EPA fulfills its duty to provide the opportunity to petition the Agency and therefore jurisdiction under 28 U.S.C. § 1331 and APA §553(e) is moot.

Section 553(e) only mandates that an agency allow interested parties to petition for the issuance, amendment, or repeal of a rule, which RCRA has provided for in § 7004. A case becomes moot and may be dismissed if it is reasonably certain the alleged wrongful behavior cannot happen in the future. Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 171 (2000); See also Arizonans for Official English v. Arizona, 520 U.S. 43, 45 (1997) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."); Doe v. Browner, 902 F.Supp. 1240, 1250 (D. Nev. 1995) (holding that a citizen's suit claiming that the EPA administrator failed to perform a non-discretionary duty became moot when the Administrator performed the required action).

In Friends of the Earth, the plaintiff instituted a citizen's suit against the defendant for violating their National Pollutant Discharge Elimination System ("NPDES") permit. 582 U.S. at 176. In response, the defendant came into compliance under their permit and, by the time the case reached the Supreme Court, shut down the facility in question. Id. at 189. The Supreme Court remanded the question of whether the closing of the facility mooted the plaintiff's claim to the lower court. Id. at 171; See also Friends of the Earth, Inc. v. Laidlaw Environmental

Services, 208 F.3d 209 (4th Cir. 2000) (noting that the question of mootness was remanded by an unpublished opinion).

Similar to the correction of outstanding violations at issue in Friends of Earth and Browner (*see above*), the APA became moot in regards to petitioning hazardous waste rules when RCRA was enacted. Much like coming into compliance with a permit or performing a previously incomplete non-discretionary action, the EPA fulfilled its duty under the APA by accepting petitions under § 7004(a). Since the EPA is undoubtedly satisfying its duty under APA by accepting petitions, CARE cannot allege any case or controversy in which to hang a federal question upon under § 1331.

III. THE EPA'S NON-ACTION ON CARE'S PETITION IS NOT A CONSTRUCTIVE ACTION AND THE EPA'S FAILURE TO RESPOND DOES NOT RE-APPROVE AUTHORIZATION UNDER RCRA § 7006(B).

The EPA's inaction on CARE's petition was not a constructive action but a permissible response to CARE's request under § 7004(a). By not responding to CARE, the EPA exercised its discretion to decide whether or not to initiate investigative or enforcement proceedings; the Agency's lack of response cannot be interpreted as effectively disagreeing with CARE's observations regarding New Union's hazardous waste program. The EPA's discretion over appropriate actions is further demonstrated by the apparent loophole CARE's argument creates. If simply not responding to a petition from a citizen's group was "re-approving" a state program, this loophole would bypass the list of procedural hurdles the EPA must overcome in order to approve state programs. Congress would not have mandated a number of prerequisites in order to approve a program and yet intend for "re-approval" to be as easy as allowing a petition to go unanswered. As such, the EPA's decision to not review CARE's petition must be discretionary and is not subject to judicial review under RCRA § 7006(b), 42 U.S.C. § 6976(b) ("§ 7006(b)").

A. The EPA has the discretion to determine what type of action, including inaction, is warranted in response to petitions.

Although § 7004(a) has mandated that the Administrator "shall take action with respect to such petition," Congress left what type of action is appropriate to the EPA's discretion. Unless Congress has directed otherwise, an agency has the discretion whether or not to institute enforcement or investigative procedures. Heckler v. Chaney, 470 U.S. 821, 832 (1985). In Heckler, prison inmates sentenced to death petitioned the FDA to take enforcement action against the use of lethal injection of drugs, in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"). 470 U.S. at 823. The FDA commissioner denied the petition, and the inmates filed a suit in the district court. Id. at 825. After a series of appeals, the Supreme Court held that the FDCA did not provide guidelines for the courts to review the FDA's decision regarding the petition. Id. at 838. Without such guidelines, the FDA had the discretion to not institute enforcement proceedings and the agency's action could not be reviewed. Id. See also APA § 701(a)(2) ("[Judicial review] applies, according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law."). Notably, the Court explains that an "agency generally cannot act against each technical violation of the statute it is charged with enforcing" and an agency decision whether to enforce an action depends on a complicated assessment only the agency is equipped with handling. Id. 832-33.

The EPA has a similar discretion whether or not to initiate proceedings to withdraw authorization of a state program. RCRA does not provide the court any guidance on how the EPA should respond to a petition and, besides mandating that their action be published in the Federal Register, gives no indication what factors the EPA must take into consideration when reviewing a petition.

One could argue that Heckler and the present case differ in that the FDA in Heckler takes a positive action with regards to the inmates' petition by denying their request, while the EPA has essentially made no action at all. Under the APA, however, an "agency action" includes "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or a *failure to act*." APA § 551(13), 5 U.S.C. § 551(13) (emphasis added). Congress only mandated that the Administrator "shall take *action* with respect to . . . petitions." § 7004(a) (emphasis added). Without further direction from Congress as to what type of action is appropriate, "failure to act" is a permissible response to CARE's petition under RCRA.

This point is further demonstrated when one takes into account the vast amount of resources the EPA would need to spend to sufficiently respond to every petition submitted under RCRA. As the Supreme Court noted in Heckler, an agency cannot possibly respond to every alleged violation of every statute under the agency's umbrella. If Congress intended § 7004(a) to saddle the EPA with the responsibility of actively investigating, analyzing, and responding to every petition, RCRA would have been accompanied with a large apportionment of funds. See also Chevron v. Natural Resources Defense Council, Inc., 67 U.S. 837 (1984) (holding that a court must defer to agency's decision if Congress has not directly spoken on the precise issue at hand and if the agency's conclusion is a "permissible construction of the statute"). Since Congress has not spoken as to what type of action the Administrator must take and since "no action" is a permissible interpretation of RCRA and the APA, the EPA's action to not respond to CARE's petition is not a constructive approving New Union's hazardous waste program.

B. No action on a petition is not a sufficient evaluation of New Union's program to warrant reauthorization and judicial review under RCRA § 7006(b).

The EPA's discretion to not act on a petition can also be demonstrated by the rigorous approval process laid out in RCRA § 3006. CARE is essentially arguing that by not responding

to its petition, the EPA has "re-approved" New Union's program without reconsidering any of the factors the agency needed to review to initially approve the program. In order to authorize a state program, the EPA must accept a state application, developed by the state after notice and an opportunity for a public hearing. RCRA § 3006(b). The Administrator then has ninety days to notify the state about the likelihood for approval. Id. After such notice, the Administrator has another ninety days to review the application and determine whether the state program is equivalent to the Federal program, whether the program is consistent with other state programs, and whether the program provides appropriate enforcement of RCRA standards. Id. Petitioners have ninety days from the date of authorization to request judicial review of the Administrator's action regarding the state program. § 7006(b).

Should the EPA's inaction on CARE's petition be deemed to be a "reauthorization" of New Union's program, the court would essentially be indicating that while approval of a program includes a burdensome and detailed review of the state program, "reauthorization" is as simple as not responding to a petition and not publishing the agency's "no action" decision in the Federal Register. Congress would not have outlined the approval process and conditioned a statute of limitations under § 7006(b) if no action on a petition was a constructive determination on a state program. To find that the EPA's no action on CARE's petition is a reauthorization and grants judicial review under § 7006(b) would disregard the ninety-day statute of limitations to challenge an authorization and the important procedures necessary to sufficiently review a state hazardous waste program.

IV. THE DISTRICT COURT HAS EXCLUSIVE JURISDICTION OVER NON-DISCRETIONARY DUTIES OF THE ADMINISTRATOR; THE COURT OF APPEALS DOES NOT HAVE § 3006(E) JURISDICTION.

Review of a constructive denial of the petition and the constructive determination that there is no need to withdraw authorization from New Union both belong in the court below, not

in the Court of Appeals. First, if the Court finds that there is a constructive denial, the action must have been non-discretionary, and therefore the case belongs in the District Court. Second, since the EPA has not acted formally to withdraw authorization, the Court of Appeals lacks jurisdiction under RCRA § 3006(e).

A. The Court of Appeals of the Twelfth District should remand to the District Court of New Union because the District Court has exclusive jurisdiction over the allegation that the Administrator failed to perform the non-discretionary duty of reviewing citizen petitions.

Assuming the Court finds that EPA's failure to respond to CARE's petition is a constructive denial of the petition and a constructive determination that New Union's hazardous waste program continues to meet RCRA requirements, it should remand this case to the District Court of New Union to order the EPA to perform its non-discretionary duty. Viewing inaction as a constructive denial and constructive determination means that the agency failed to perform a non-discretionary duty required by statute. Scott v. Hammond, 741 F.2d 992, 996-97 (7th Cir. 1984). District courts have jurisdiction over alleged failures of the Administrator to perform non-discretionary acts and the ability to order the Administrator to perform those acts. RCRA § 7002(a)(2), 42 U.S.C. § 6972(a)(2) (2006) ("§ 7002(a)(2)").

In Scott, the court reviewed Illinois's obligation under the Clean Water Act ("CWA") to submit total maximum daily loads ("TMDL") of certain pollutants to the EPA for approval by a set deadline. 741 F.2d at 996 n.10; Federal Water Pollution Control Act § 303(d)(2), 33 U.S.C. § 1313(d)(2) (2000) ("§ 303(d)(2)"). After receiving state submissions, the EPA should have either disapproved or approved the proposed TMDLs. Id. If the EPA did not approve a state's proposed TMDLs, then the EPA had to establish its own standards for that state. Id. In Scott, Illinois ought to have submitted TMDLs by June 1979, but had still not done so a year later. 741 F.2d at 993, 996 n.10. The appellate court viewed the state's inaction as a "'constructive

submission' of no TMDL's," placing the EPA under a non-discretionary duty to approve or disapprove Illinois's submission of no TMDLs. Id. at 997. The court took the EPA's inaction as an approval of the state's lack of submission and, therefore, the EPA had a non-discretionary duty of setting TMDLs for Illinois; the case was remanded to the district court to require the performance of a non-discretionary duty. Id. at 996, 998. See also Armco, Inc. v. EPA, 869 F.2d 975, 981 (6th Cir. 1989) (holding that only the district courts had proper jurisdiction to compel the EPA to establish sludge removal regulations); Trs. for Alaska v. EPA, 749 F.2d 549, 558 (9th Cir. 1984) (finding that only the district courts had the jurisdiction to compel the EPA to fulfill its duty to promulgate point source effluent guidelines for the mining industry); Envtl. Def. Fund v. EPA, 598 F.2d 62, 91 (D.C. Cir. 1980) (deciding that only the district courts have jurisdiction to compel the EPA to make a rule regulating past manufacturers and users of PCBs).[2]

Similar to the EPA's lack of response to Illinois's failure to propose TMDLs under the CWA by the deadline, here, the EPA has not responded within a "reasonable time" to CARE's petition under § 7004(a) requesting that the EPA withdraw New Union's authorization. Just as the EPA's lack of response to the nonexistent TMDLs meant that the EPA had approved the submission of no TMDLs, the EPA's lack of response to CARE's petition, if this court takes it as a constructive decision, means that EPA denied the petition and thereby re-approved New Union's program. Though the parallels between the situation here and the situation in Scott are

[2] Since there are few cases litigating jurisdictional issues under RCRA, CWA cases are more appropriate and useful here. The jurisdictional grants of the CWA and RCRA are similar enough to apply the principles set forth in CWA cases to this RCRA case. Both statutes grant jurisdiction to district courts to review non-performance of non-discretionary actions. FWPCA § 505(a)(2), 33 U.S.C. § 1365(a)(2) (2006); RCRA § 7002 (a)(2), 42 U.S.C. § 6972(a)(2) (2006). Both statutes also describe specific situations where the appellate courts have jurisdiction. The CWA allows courts of appeal to review the issuance or denial of effluent standards while RCRA allows them to review the granting, denying, or withdrawing of authorization. FWPCA §509 (b)(1), 33 U.S.C. § 1369 (b)(1) (date); RCRA § 7006(b)(2), 42 U.S.C. § 6976(b)(2) (2006).

imperfect, the core of these cases are similar enough to say that if this court construes the EPA's inaction as a constructive action, this court also construes the Agency's failure to act as a failure to perform a non-discretionary duty. Under the CWA, non-discretionary duties are under the exclusive jurisdiction of district courts. 598 F.2d at 91. Since the statutory grant of jurisdiction to district courts under the RCRA uses the exact same wording as that of the CWA, RCRA must also grant jurisdiction over non-discretionary duties to the district court. In addition, given the court's reasoning in Scott, it would be prudent for the appellate court to remand this case to the District Court of New Union for more fact-finding as to why the EPA chose not to respond to the petition for the length of a year. There may be legitimate reasons for the EPA's lack of response which are simply not on the record.

Though the EPA does not consider itself to have constructively denied CARE's petition by its silence, if this court determines that the EPA's inaction is a constructive denial, then the EPA's responses to citizen petitions under § 7004(a) are non-discretionary duties and therefore belong in the District Court.

B. The Court of Appeals of the Twelfth District should not decide whether the EPA ought to withdraw authorization from New Union because the EPA has not initiated any action under RCRA 3006(e) that would make its actions reviewable in the Court of Appeals.

Even if the EPA's lack of response to CARE's petition means that the EPA has constructively reapproved New Union's hazardous waste program, the Court of Appeals is not the proper venue to adjudicate the merits of the EPA's constructive determination because the EPA's total inaction is quite different from an actual action to withdraw authorization. Under RCRA, federal appellate courts have jurisdiction to "review. . . the Administrator's action. . . in granting, denying, or withdrawing authorization." § 7006(b). In order for an Administrator to perform the *act* of withdrawing authorization, he or she must first hold a "public hearing that a

State is not administering and enforcing a program authorized under [§ 3006]." RCRA § 3006(e), 42 U.S.C. § 6926(e) (2006) ("§ 3006(e)").

Likewise, under the CWA, appellate courts have jurisdiction when the Administrator performs an action which "[promulgates] any 'effluent standard, prohibition or pretreatment standard,'" but not when the EPA has taken no action to do so. Armco, Inc. v. EPA, 869 F.2d 975, 982 (6th Cir. 1989). In Armco, the plaintiff, a steel-making factory tried to obtain removal credits for phenols and ammonia-n for its steelmaking plant. 869 F.2d at 979. The Ohio EPA approved these removal credits, but the U.S. EPA did not, issuing a letter to the Ohio EPA explaining that removal credits were not legally available because the federal EPA did not have sludge regulations, which were a precondition for these credits as decided in NRDC v. EPA. Id. at 979-980 (citing to NRDC. v. EPA, 790 F.2d 289, 292 (3d Cir. 1986)). In NRDC, however, the Third Circuit held that the EPA violated its non-discretionary duty to issue federal sludge management regulations under the CWA. Id. at 980 citing to 790 F.2d 289, 314. In response, the Armco court held that Armco's only recourse was to sue in the district court to compel the EPA to issue sludge management regulations so as to no longer delay the approval of removal credits. Id. at 981. The court further stated that it did not have jurisdiction under 33 U.S.C. §1369(b)(1), which grants jurisdiction to courts of appeal to review the EPA's action when it promulgates effluent standards, because the appellate court only had jurisdiction when "there is 'action' by the USEPA to promulgate any 'effluent standard, prohibition or pretreatment standard under section 307,'" and "[n]o such action by USEPA has been taken." FWPCA § 509(b)(1); 869 F.2d at 982. The Sixth Circuit characterized Armco's suit as an "attempt to by-pass original district court jurisdiction." Id. at 982. Furthermore, the court admitted that the district court was better "equipped for hearings and to take evidence as to . . . why [the new

sludge regulations] have not been issued heretofore" and what sort of relief would be most appropriate. Id. at 982.

Like the Sixth Circuit in Armco, this court does not have jurisdiction over the EPA's inaction. Just as Armco wanted the Sixth Circuit to force the EPA to issue sludge regulations, CARE wants this court to compel the EPA to withdraw state program authorization. The Sixth Circuit determined that the U.S. EPA took no action to propose sludge regulations that the court of appeals could review and, similarly, the EPA in this case took no actual action to withdraw New Union's authorization that the Court of Appeals can review. By asking the Court of Appeals to decide the question of whether the EPA ought to withdraw New Union's program, CARE, like Armco, is trying to by-pass the original jurisdiction of the district court over citizen suits alleging the failure to perform non-discretionary actions. Finally, the District Court of New Union is in a better position to hear the EPA's evidence as to why withdrawal would not be appropriate, just as the lower court in Armco was the better court to take evidence on the lack of sludge regulations. Only if the EPA determines that withdrawal is appropriate, notifies New Union, and gives the state time to correct shortcomings, should this case go to the Court of Appeals.

V. NEW UNION'S RESOURCES AND PERFORMANCE MEET RCRA CRITERIA; HOWEVER, IF THIS COURT DETERMINES THAT NEW UNION'S RESOURCES AND PERFORMANCE FALL SHORT OF STATUTORY REQUIREMENTS, WITHDRAWAL IS NOT REQUIRED.

A. The EPA has the discretion to decide whether New Union's resources and performance continue to meet RCRA requirements.

If the court decides that the EPA has constructively re-approved New Union's program under RCRA and the EPA has not initiated formal withdrawal proceedings, then New Union's resources and performance presumably continue to meet RCRA requirements. In reviewing an

agency's interpretation of a statute, this Court must first examine whether Congress has spoken directly to the issue, and if not, whether the agency's decision was a "permissible construction." Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984). See, e.g., Nat'l R.R. Passenger Corp. v. Bos. and Me. Corp., 503 U.S. 407, 408 (1992) (holding that the word "required" was ambiguous given its dictionary definition and the Commerce Commission, under Chevron, could reasonably read "required" to mean "useful" instead of "necessary" in the phrase "required for intercity rail passenger service").

Here, CARE claims that New Union's resources and performance fall short of RCRA requirements; however, Congress has not mandated the denial of authorization or withdrawal of authorization based on inadequate resources in RCRA or the Federal Register. RCRA only stipulates that a state needs to have "adequate enforcement of compliance with requirements" of RCRA to receive initial authorization. RCRA § 3006 (b)(2), 42 § U.S.C. 6926 (b)(2). Under the first prong of Chevron, Congress did not clarify the term "adequate enforcement." Does "adequate" mean enforcement in each and every case or more than fifty percent of the time? Does it mean that the state must enforce to the best of its ability to address the greatest threats to the public health? Without further guidelines, Congress has clearly left the exact determination of "adequate enforcement" to the EPA's discretion. Additionally, the Federal Register notes that the "Administrator may" withdraw authorization for the following: the "failure to issue permits," the "failure to act on violations of permits" or "the failure to seek adequate enforcement penalties or to collect administrative fines when imposed." 40 C.F.R. § 271.22 (2010). However, when drafting these bases the EPA neither wrote "any failure," nor "complete failure," leaving the decision open to the Administrator as to what degree of noncompliance constitutes a "failure."

As to the second prong of Chevron, given the EPA's discretion to determine the meaning of "adequacy" and "failure," it is a "permissible construction" for the EPA to conclude that New Union's current program is sufficient to meet RCRA requirements. "Adequate" can mean "barely satisfactory or sufficient." American Heritage Dictionary 79 (2d ed. 1985). "Failure," on the other hand, is "nonperformance of what is requested or expected." Id. at 486. The current state of New Union's administration of the program is not a "failure" or "nonperformance" of requirements, but instead adequately satisfies baseline requirements.

Most notably, the EPA has not interpreted resource constraints and performance similar to New Union's as a "failure" which warrants withdrawal. In the past, a number of states have suffered resource constraints and the resulting difficulties with enforcement. U.S. Gov't Accountability Office, GAO/RCED-95-64, EPA and the States: Environmental Challenges Require a Better Working Relationship 19 (1995). The State of New Union gradually cut its staff by exactly 40% from 1986 to 2009. (R. Doc. 2, 73; R. Doc. 5 for 2009, 52.) The State of New York, however, experienced a 38% reduction in full-time staff over the same time period due to a drop in EPA funding between 1997 and 2006, yet the EPA did not withdraw authorization. U.S. Gov't Accountability Office, GAO-07-883, Envtl. Prot.: EPA-State Enforcement P'ship Has Improved, but EPA's Oversight Needs Further Enhancement 21 (2007) [hereinafter Envtl. Prot.]. Undoubtedly, the EPA should not and cannot be expected to withdraw authorization for all struggling states. Since the EPA has constructively determined that the resources and performance of New Union's hazardous waste program are sufficient for the EPA's continued approval, this court should only review whether or not the EPA's decision was reasonable under Chevron.

B. Even if this Court determines that New Union's hazardous waste program does not meet the requirements of RCRA, there are better solutions than compelling withdrawal of authorization.

The EPA should not be forced to commence proceedings to withdraw authorization from New Union even if New Union's resources are insufficient and its performance inadequate because the EPA, having made no determination of insufficiency and inadequacy, has discretion to take action other than withdrawing authorization. Courts view withdrawal quite negatively:

> Withdrawal of authorization for a state program is an "extreme" and "drastic" step that requires the EPA to establish a federal program to replace the state program. Nothing in the text of the statute suggests that such a step is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement.

U.S. v. Power Eng'g Co., 303 F.3d 1232, 1238-39 (10th Cir. 2002). Between 1997 and 2006, although the EPA's funding increased, regional offices decreased the number of enforcement officials by 5%. GAO-07-883, Envtl. Prot. 7 (2007). It would be economically impossible for the EPA to replace all those state programs with an EPA-administered program especially since so many states are struggling with budget cuts. The EPA could take over New Union's hazardous waste program, for example, and due to the EPA's resource constraints, the EPA permits, inspects, and enforces even fewer cases than the number currently handled. Would CARE then petition the EPA to reauthorize the old state program in this probable scenario?

New Union is not alone. Many states' are struggling with limited resources and the ensuing decrease in quality of RCRA administration. GAO-07-883, Envtl. Prot. 21-23 (2007). To address this problem of lack of resources and the resulting inconsistency in state enforcement, the EPA has not responded by withdrawing authorization in similar situations, but by implementing new procedures that would allow for more consistent enforcement of federal environmental statutes and setting clearer and more uniform standards for evaluation of state performance. GAO-07-883, Envtl. Prot. 28-30 (2007) (describing a State Review Framework to

assess states' compliance in administering federal environmental statutes and the need to improve states' capacity). For example, the EPA has helped West Virginia by conducting some inspections of underground storage tanks. GAO-07-883, Envtl. Prot. 22 (2007). If New Union's DEP were not making the most of its limited resources by prioritizing facilities and seeking help where needed, there would be a better case for withdrawal of authorization. As it is, the New Union DEP has made its best efforts as seen by its prioritization. (R. Doc. 5, 20, 23, 2009). Instead, a better solution is to allow New Union to continue operating the state hazardous waste program and supplement with EPA resources where necessary.

Given that the EPA has just recently begun to implement these standards, withdrawal of authorization would hardly be fair to New Union because of the lack of uniform standards. Complete withdrawal of authorization is too drastic of a step since it greatly increases the EPA's burden and would not necessarily result in the better performance of RCRA requirements. Withdrawal could result in even worse enforcement and damage the relationship between the EPA and New Union's DEP.

VI. NEW UNION'S DECISION TO REDISTRIBUTE REGULATORY AUTHORITY TO THE NEW UNION RAILROAD COMMISSION DOES NOT MANDATE A WITHDRAWAL OF THE EPA'S AUTHORIZATION OF THE NEW UNION HAZARDOUS WASTE PROGRAM.

In an effort to streamline the DEP and remove unnecessary expenditures, New Union granted the regulation of railroad hazardous waste facilities to NURC, which simply resulted in changing the administration of the EPA-approved regulatory scheme. The change in the administration of railroad hazardous waste facilities does not require the EPA to withdraw authorization from New Union's entire program because: (1) The EPA authorized the redistribution of regulatory authority of railroad hazardous waste facilities from the DEP to the NURC and (2) even if the removal of railroad regulation from the DEP resulted in some

violations of RCRA, the EPA still has the discretion to keep authorization in place. Constructive determination results in the authorization and thus the approval of NURC's regulatory authority over railroad hazardous waste facilities.

A. New Union railroad hazardous waste facilities are properly regulated because RCRA allows the state to determine what agency should act as the administrative body for a state hazardous waste scheme.

RCRA provides the State with the authority to determine what agency will administer an EPA approved hazardous waste program and thus, redistribution of regulatory authority to an agency is in compliance with RCRA. If the EPA's non-action was indeed a constructive determination of authorization, then the non-action also authorizes New Union's reformed hazardous waste program and the state's redistribution of regulatory authority to NURC. NURC, therefore, continues to properly regulate New Union railroad hazardous waste facilities.

In general, the State has the authority to determine which administrative body shall regulate any given part of the State's hazardous waste program. RCRA § 4006(b), 42 U.S.C. § 6946 (2006) ("§4006(b)"). Section 4006(b) provides in pertinent part:

> The State shall [] (A) identify an agency to implement such plan, and (B) identify which solid waste management activities will, under such State plan, be planned for and carried out by the State and which management activities will, under such State plan . . . [will] be carried out by a regional or local authority or a combination of regional or local and State authorities.

Id. This section continues to provide guidance as to what a state may do in the initial stages of the formulation and administration of a State hazardous waste plan; however, it does not discuss what a state may or may not do many years past initial authorization. Id. RCRA focuses on withdrawal of authorization for inadequate enforcement and administration, yet is silent as to specific changes within the State's choice of administrative authority. RCRA §§ 1001-11012, 42 U.S.C. §§ 6901–6992k (2006).

The Code of Federal Regulations helps to shed light on how a state is to proceed in the event of revision of State programs. In pertinent part Procedures for Revision of State Programs provides:

> States with approved programs shall notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and shall identify any division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section.

40 C.F.R. § 271.21 (2010). This requires New Union to notify the EPA when it amends the approved State program. In the present case, New Union reasonably chose to re-delegate the regulatory authority of certain aspects of its hazardous waste program, specifically the regulation of railroad hazardous waste facilities, to the NURC.

As CARE argues, constructive determination may be an effective reauthorization and thus, the EPA's non-action is a constructive determination which effectively authorizes New Union's redistribution of regulatory authority to the NURC. The resulting authorization occurs despite both EPA and New Union not having gone through the required steps (*See above*, section III).

B. The EPA has discretion to keep authorization in place even if removal results in some violations of RCRA.

Violations of EPA-authorized state hazardous waste programs do not automatically result in the de-authorization of the program. The withdrawal of federal authorization is "an extreme step, one that requires the Administrator to establish a federal program to replace the repudiated state program." Waste Mgmt. of Ill., Inc. v. U.S. E.P.A., 714 F.Supp. 340, 341 (N.D.Ill. 1989).

In Harmon Industries, Inc. v. Browner, for example, when Harmon Industries' management discovered that some of its staff was practicing improper disposal techniques, it halted the practice and conducted an investigation. 19 F.Supp. 2d 988, 990 (W.D.Mo. 1998).

The Missouri Department of Natural Resources ("MNDR") did not assess monetary penalties. Id. at 992. The EPA concluded that MNDR's decision not to assess penalties was not proper treatment under RCRA and thus, it wanted to override the decision made by the state agency; however, the court held that "Section 3006(e) of the RCRA gives the EPA the only option of withdrawing authorization of a state program which *fails to administer or enforce the program*" and that it was not an "option to reject part of a program or course of action . . .." Id. at 996 (emphasis added). The EPA is not required to withdraw when faced with a failure to administer and enforce. RCRA § 3006(e), 42 U.S.C. § 6926(e) (2006).

Although the facts differ slightly in the present case, the court's explanation of the EPA's power to de-authorize a State regulatory scheme is informative. There are only two instances where withdrawal of authorization is appropriate: a failure in administration and a failure in enforcement; neither is present in this case. Harmon, 19 F.Supp.2d at 996; RCRA §3006(e), 42 U.S.C. §6929(e) (2006). Here, the State has determined that the NURC is a more appropriate administrator of regulations for railroad hazardous waste facilities. As the facts suggest, DEP's budget for the regulatory scheme is dwindling and by trimming DEP's financial responsibilities, New Union has taken a proactive measure to keep the regulatory scheme effective and funded. (R. Doc. 5, 50-53, 2009.) The determination that NURC is the appropriate place for all railroad regulations is not a failure in administration and enforcement, but rather a redistribution of regulatory authority to a more appropriate body.

CARE's argument that this reallocation of regulatory authority has resulted in deregulation of railroad hazardous waste facilities is patently incorrect. As the record shows, New Union determined that the NURC, instead of the DEP, was the appropriate agency to regulate hazardous waste program as it applies to railroad hazardous waste facilities and has

allocated to them the power to continue the regulation outlined in the original act. (Summ. of the R. 12.)

While CARE may highlight the fact that criminal sanctions for violations of environmental statutes are no longer part of the scheme, RCRA itself does not require them to be part of a state scheme. Section 2002, Authorities of Administrators, provides that "the Administrator, and duly-designated agents and employees of the Environmental Protection Agency, are *authorized* to initiate and conduct investigations under the criminal provisions of the act . . .." RCRA § 2002(c), 42 U.S.C. § 6912 (2006) (emphasis added). Authorization, the permission or approval to conduct a given action, is not equivalent to a mandatory provision of the Act. American Heritage Dictionary 142 (2d ed. 1985). New Union's reallocation of regulatory authority to NURC and its choice to remove criminal sanctions for railroad hazardous waste facilities that violate environmental statutes is permissible under RCRA, because neither implicates issues of failed administration and enforcement of the EPA approved hazardous waste program.

VII. NEW UNION'S TREATMENT OF POLLUTANT X DOES NOT AFFECT THE EQUIVALENCY OF ITS PROGRAM WITH THE FEDERAL OR OTHER APPROVED STATE PROGRAMS AND BECAUSE IT DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE IT DOES NOT VIOLATE THE COMMERCE CLAUSE.

New Union took the initiative to regulate Pollutant X, acknowledged by both the EPA and the World Health Organization to be among the most potent and toxic chemicals to public health and the environment. The creation of hazardous waste regulatory schemes more robust than RCRA does not affect the consistency such that authorization must be removed. Moreover, a violation of the Commerce Clause cannot be established when such schemes do not discriminate against interstate commerce nor where a disparate impact cannot be established.

A. New Union's hazardous waste program is consistent with RCRA and other EPA approved state programs despite being more robust and thus the EPA does not need to withdrawal authorization.

New Union's addition of a regulatory scheme with respect to Pollutant X does not make the Hazardous Waste Act inconsistent with RCRA or other EPA approved state programs because more robust provisions are allowed. "RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" Mehrig v. KFC W., 516 U.S. 487, 483; 116 S.Ct. 1251, 1254 (1996) (quoting 42 U.S.C. § 6902(b)). In achieving this goal, RCRA "expressly reserves to States the authority to impose [] standards that are 'more stringent' than those imposed by federal authority." Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390, 1396 (D.C. Cir. 1991).

Adding robust provisions concerning a specific pollutant to the authorized regulatory scheme does not implicate problems of enforcement and administration. The EPA only has the authority to withdraw authorization of a state regulatory scheme, after public hearing, if it determines that the "State is not administering and enforcing a program authorized under this section in accordance with requirements of this section . . .." RCRA § 3006(e), 42 U.S.C. § 6926(e) (2006). See also Harmon Industries, Inc. v. Browner, 19 F.Supp.2d 988, 996 (W.D.Mo. 1998) (determining withdrawal of authorization is only appropriate for failed administration and enforcement of an EPA approved hazardous waste program).

"[N]o State or political subdivision may impose any requirements less stringent than those authorized under this subtitle. . . . [However] [n]othing in this title shall be construed to prohibit any State or political subdivision thereof from imposing any requirements . . . which are

more stringent than those imposed by such regulations." RCRA § 3009; 42 U.S.C. § 6929 (2006). "RCRA sets a floor, not a ceiling, for state regulation of hazardous wastes." Ind. Dept. Envtl. Mgmt. v. Steel Dynamics, 894 N.E.2d 271, 276 (Ind. App. 2008); Safety-Kleen, Inc., (Pinewood) v. Wyche, 274 F.3d 846, 863 (4th Cir. 2001); Old Bridge Chems., Inc. v. N.J. Dep't of Envtl. Prot., 965 F.2d 1287, 1296 (3d Cir. 1992).

The amendment in question provides that (1) every facility generating Pollutant X must submit both annual plans to minimize the production and annual reports showing reduction; (2) storage permits for Pollutant X must be at most for 180 days; and (3) any person transporting Pollutant X through or out of the state must proceed as direct and fast as reasonably possible. (Summ. of the R. 12.) Unlike this specific amendment, § 3002 of RCRA provides general standards applicable to generators of hazardous waste. For example, it requires record keeping, accurate labeling practices, use of appropriate containers, use of a manifest system and requires submission of reports. RCRA § 3002(a), 42 U.S.C. § 6922(a) (2006). But more specifically the waste minimization provision requires:

> The manifest required by subsection (a)(5) shall contain a certification by the generator that -- (1) the generator of hazardous waste has a program in place to reduce the volume or quantity an toxicity of such waste to the degree determined by the generator to be economically practicable; and (2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

RCRA § 3002(b)(1-2), 42 U.S.C. § 6922(b)(1-2) (2006). The waste minimization provision of RCRA is general and does not speak to the particular issue of Pollutant X.

If a statute, is "silent or unclear with respect to a particular issue, [the court] must defer to the reasonable interpretation of the agency responsible for administering the statute." Wash. Dept. of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985) (*citing* Chevron, U.S.A. Inc. v.

Natural Resources Defense Council, 467 U.S. 837; 104 S.Ct. 2778, 2782 (1984)). *See also* U.S. v. Power Eng'g Co., 303 F.3d 1232, 1236 (Colo. 2002) ("If the statute is 'silent or ambiguous,' however, we defer to the agency's interpretation 'if it is based on a permissible construction of the statute.''); Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390, 1395 (D.C. Cir. 1991) ("We must accept an agency's construction of its own regulations unless it is 'plainly wrong.'"). As "long as the agency's interpretation is reasonable and consistent with the statutory purpose, [the court] must uphold it." Hazardous Waste, 938 F.2d at 1395.

In Wash. Dept. of Ecology, Washington's Attorney General submitted an application for a hazardous waste program to the EPA that included a provision giving the State the authority to regulate hazardous waste activities on Indian lands. 752 F.2d 1465, 1467. The EPA granted interim authorization to Washington's application "except as to Indian lands." Id. (quoting Fed. Reg. 34954 (1983)). Determining that Washington had not demonstrated its claimed jurisdiction, the EPA concluded that RCRA does not grant jurisdiction to the State over Indian lands; that authority remained with the EPA. Id.

RCRA only mentions Native Americans once in the statute with respect to the meaning of "municipality," and nowhere does it specify who has regulatory authority over Indian tribes or lands. Id. at 1469. Because the legislative history was silent as to the issue of regulatory authority over Indian lands, the court concluded the EPA's interpretation to not grant State jurisdiction under RCRA was appropriate. Id.

Similar to RCRA not speaking to the issue in Wash. Dept. of Ecology, here, RCRA does not speak to the issue of Pollutant X, rather it speaks in general terms about hazardous waste and in specific terms with respect to a number of named substances. See generally RCRA. Because RCRA is silent on this issue, the EPA has the discretion to determine whether the application of

this provision is such that it makes the approved program inconsistent and thus impedes effective administration and enforcement of the program in such a way that EPA may withdrawal its authorization. Wash. Dept. of Ecology, 752 F.2d 1465, 1469; U.S. v. Power Eng'g Co., 303 F.3d 1232, 1236 (Colo. 2002); Hazardous Waste, 938 F.2d at 1395.

This amendment is more robust and specific than RCRA therefore it does not affect the consistency such that it would result in a violation a failure of the enforcement and administration of the originally approved statute; RCRA's requirement of consistency "does not mandate uniformity." Hazardous Waste, 938 F.2d at 1396.

B. New Union's amendment does not violate the Commerce Clause because it does not discriminate against interstate commerce.

New Union's Pollutant X amendment to its Hazardous Waste Act does not violate the Commerce Clause because it does not discriminate against interstate commerce and it effectuates a legitimate public interest. (R. Doc. 4 for 2000, pp. 105-107). "Where a statute regulates evenhandedly 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." Philadelphia v. New Jersey, 237 U.S. 617, 625 (1978) (*citing* Pike v. Bruce Church Inc., 397 U.S. 137, 142; 90 S.Ct. 844, 847 (1970). In pertinent part the statute provides:

> Any person may transport Pollutant X through or out of the state to a facility designed and permitted to treat or dispose of Pollutant X, provided, however, that such transport shall be as direct and fast as is reasonably possible, with no stops within the state except for emergencies and necessary refueling.

(Summ. of the R.12)

In Philadelphia v. New Jersey, the City of Philadelphia took issue with New Jersey's statutory provision that prohibited the transport of "any solid or liquid waste which

originated or was collected outside the territorial limits" of New Jersey. Philadelphia, 237 U.S. at 619. The Court discussed the evils of economic protectionism that results in patent discrimination against interstate trade and found that the statute at issue "imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." Id. at 627. Although the court acknowledged that some quarantine laws have not been forbidden as protectionist measures, the one at issue cannot be classified as such. Id. at 629. The Court held that because there had been no claim that the movement of the waste was endangering health, the statute was an obvious effort to block the importation of waste and to "saddle those outside the state with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites" and thus, was "clearly impermissible under the Commerce Clause of the Constitution." Id. at 630. Unlike the statute at issue in Philadelphia, this statute at issue here does not prohibit the movement of commerce through or out of New Union. To the contrary, the statute provides access to its railways in order to effectuate the fastest and most direct transport of the pollutant as reasonably possible. (Summ. of the R.12) Discrimination against out-of-state commerce would mean that the New Union statute would have to treat the economic interests of in-state differently than the economic interests of out-of-state – such language is absent from this statute. Oregon Waste Systems v. Dept. of Env. Quality, 511 U.S. 93, 100 (1994). Since the Pollutant X amendment is neither protectionist or discriminatory, it does not violate the Commerce Clause.

CONCLUSION

Given that the EPA Administrator failed to publish notice in the Federal Register regarding the Agency's decision not to act on CARE's petition, the Court of Appeals

should remand this case to the district court for that court to order the EPA to perform its non-discretionary duty under § 7004(a).

Although it would be improper for this Court to find that the EPA's no action was a constructive re-approval of New Union's hazardous waste program, should this Court find as such it should not lift its stay, but remand to the district court for further proceedings regarding the EPA's failure to act on CARE's petition.

On the other hand, if the Court of Appeals proceeds to the merits, it should find that New Union's re-distribution of its regulatory authority over railroad hazardous waste facilities to NURC should not result in a removal of authorization. Furthermore, New Union's Pollutant X amendment, though more specific than RCRA, should be found to be consistent with RCRA and the Interstate Commerce Clause.

Respectfully Submitted,

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