Team No. 69

Case No. 18-2010
Case No. 400-2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION,

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.

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

BRIEF FOR THE RESPONDENT/APELLEE/CROSS-APPELLANT

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Jurisdiction is a contested issue that has been briefed in this appeal. CARE and EPA claim jurisdiction for the district court through RCRA section 7002(a)(2). 42 U.S.C. § 6972(a)(2) (2006). New Union refutes that jurisdiction. CARE also asserts jurisdiction for the district court through federal question jurisdiction, via APA provision 5 U.S.C. section 553(e) (2006). 28 U.S.C. § 1331 (2006). EPA and New Union refute that jurisdiction. CARE additionally claims original jurisdiction in this Court via RCRA section 7006(b). See 42 U.S.C. § 6976(b). EPA and New Union also refute that jurisdiction.

STATEMENT OF THE ISSUES

I. Does RCRA section 7002(a)(2) provide the district court jurisdiction to order EPA to act on CARE's petition to revoke approval of New Union's hazardous waste program? *See infra* Part I.A.

II. Does 28 U.S.C. § 1331 provide jurisdiction for district courts to order EPA to act on CARE's petition to revoke approval of New Union's hazardous waste program? *See infra* Part I.B.

III. Does EPA's failure to act on CARE's petition constitute a constructive denial of that petition and a constructive determination that New Union's program continues to meet RCRA's criteria for program approval under RCRA § 3006(b), subjecting EPA to judicial review under RCRA § 7006(b)? *See infra* Part II.A.-B.

IV. Assuming the Court has jurisdiction and that EPA's delay constitutes a constructive action, should the Court proceed with judicial review or remand the case to the lower court to order EPA to initiate proceedings to withdrawal New Union's program approval? *See infra* Part II.C.

V. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria? *See infra* Part III.A.

VI. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act (ERAA) effectively withdraws railroad hazardous waste facilities from regulation? *See infra* Part III.B.

VII. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because the ERAA renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause? *See infra* Part III.C.-D.

STATEMENT OF THE CASE

The Citizen Advocates for Regulation and the Environment, Inc. ("CARE"), served a petition on Lisa Jackson, Administrator for the U.S. Environmental Protection Agency ("EPA") requesting EPA to withdraw its approval of New Union's hazardous waste program under RCRA. *C.A.R.E., Inc. v. E.P.A.*, No. 138-2010, 400-2010, slip op. at 4 (D. New Union June 2, 2010). EPA did not respond to that petition. *Id.* On January 4, 2010, CARE filed an action against EPA in the United States District Court for the District of New Union, seeking an injunction requiring EPA to act on its petition, or in the alternative, seeking review of EPA's constructive denial of CARE's petition and EPA's constructive determination that New Union's hazardous waste program was in compliance with the criteria for approval of state programs in lieu of the federal program. *Id.* New Union successfully intervened. *Id.* CARE and New Union

filed cross motions for summary judgment. *Id.* CARE simultaneously filed a petition for review on the same issues with the court of appeals, C.A. No. 12-2010. *Id.* at 5. New Union also successfully intervened there. *Id.* On EPA's motion, the Court of Appeals stayed its proceedings pending the outcome of the district court case. *Id.*

The district court held that it lacked jurisdiction to order EPA to make a determination on CARE's petition. *Id.* at 7-8. The district court then granted New Union's motion for summary judgment, dismissing CARE's action. *Id.* at 9. EPA and CARE each filed notices of appeal. *C.A.R.E., Inc. v. E.P.A.*, C.A. No. 18-2010, 400-2010, at 1 (12th Cir. Sept. 29, 2010) (order requesting party briefs). CARE takes issue with the district court's holding that it lacked jurisdiction under 42 U.S.C. § 6972(a) (2) or 28 U.S.C. § 1331. *Id.* EPA takes issue with respect to the district court's holding that it lacked jurisdiction under 42 U.S.C. § 6972(a)(2). *Id.* CARE requested the Court lift its stay in C.A. No. 18-2010 and consolidate the two related actions. *Id.* at 1-2. EPA and New Union take issue with lifting the stay. *Id*. at 2.

STATEMENT OF FACTS

The State of New Union has operated its own hazardous waste program in lieu of the federal program under RCRA since 1986. (Rec. doc. 2, p. 1). When it approved the program, EPA found that the New Union DEP ("DEP") had adequate resources to fully administer and enforce its program through timely issuance of permits, regular inspection of RCRA facilities, and enforcement against significant violators. (Rec. doc. 2, p. 1). In its 2009 Annual Report to EPA, DEP indicated that it issued 125 RCRA permits in the previous year and intended to sustain that number in the current year. (Rec. doc. 5 for 2009, p. 19). The Annual Report indicated that DEP expected to perform 150 inspections this year, the same as in 2009. (Rec. doc. 5 for 2009, p. 22) DEP reported that it took six enforcement actions in 2009, relying on

EPA's policy to compute penalty amounts. (Rec.doc. 5 for 2009, p. 25). EPA brought the same number of actions in the State that year, and environmental groups brought an additional six suits. (Rec. doc. for 2009, p. 26). The total of eighteen actions brought to enforce New Union's hazardous waste program nearly met the reported twenty-two significant permit violations in the State last year. (Rec. doc. 5 for 2009, p. 24).

Recently, several steps have been taken to deal with gradual increases in permit applications and the number of treatment, storage and disposal facilities ("TSDs"). Last year, at DEP's request, EPA supplemented the State's program by inspecting 10% of the state's existing TSD facilities; EPA has pledged to do the same in 2010. (Rec. doc. 5 for 2009, p. 23). DEP indicates that it has policies in place for prioritizing inspections and permit issuance for TSD facilities. (Rec. doc. 5 for 2009, p. 20, 23). DEP reports that it gives priority to inspecting facilities with "violations posing the greatest potential for harm to the public health or the environment because of the volume or toxicity of the hazardous waste they are permitted to handle." (Rec. doc. 5 for 2009, p. 23)

In 2000, the New Union legislature passed the 2000 Environmental Regulatory Adjustment Act ("ERAA"). The ERAA institutes limitations and requirements for the generation and transportation of Pollutant X, one of the most potent and toxic chemicals to public health and the environment, according to EPA and the World Health Organization (Rec. doc. 5 for 2000, pp. 105-107). First, the ERAA requires facilities generating Pollutant X to submit to DEP plans to minimize the generation of wastes containing Pollutant X every year until such generation ends entirely. (Rec. doc. 5 for 2000, pp. 105-07). Second, DEP is forbidden to issue permits allowing the treatment, storage or disposal of Pollutant X, except for storage for less than one hundred twenty days while awaiting transportation to a permitted

facility outside of New Union that is designed to treat or dispose of Pollutant X. (Rec. doc. 5 for 2000, pp. 105-07). In setting out this requirement, the ERAA recognizes that there are no existing TSD facilities in New Union permitted to, or capable of, preventing human or environmental exposure to Pollutant X; in fact, only nine facilities in the country are presently authorized under RCRA to treat or dispose of Pollutant X. (Rec. doc. 5 for 2000, pp. 105-07). Finally, transportation of Pollutant X through New Union to an appropriate out-of-state facility is allowed, but only where such transport is as direct and fast as reasonably possible. (Rec. doc. 5 for 2000, pp. 105-107).

The ERAA also amended the state's Railroad Regulation Act ("RRA") by transferring the standard setting, permitting, inspection, and enforcement authorities of the DEP under New Union's environmental statutes to the New Union Railroad Commission ("NURRC"). Furthermore, the ERAA removed criminal sanctions for violations of environmental statutes for facilities falling under the jurisdiction of NURRC. (Rec. doc. 5 for 2000, pp. 103-105).

DEP has experienced reductions in state resources comparable to reductions in other statewide public health regulatory programs. (Rec. doc. 5 for 2009, p. 51). DEP attributes its recent decreases in number of employees to such deteriorating state finances. (Rec. doc. 5 for 2009, p. 50). Most of this reduction in workforce took place after 2000, when the ERAA transferred some of DEP's responsibilities to the New Union Railroad Commission. (Rec. doc. 5 for 2009, p. 50). In 1986, DEP employed fifteen permit writers, fifteen inspectors, three laboratory technicians, two lawyers and fifteen administrators. (Rec. doc. 1, p. 73). DEP has since reduced its staff to seven permit writers, seven inspectors, two laboratory technicians, one lawyer and thirteen administrators. (Rec. doc. 5 for 2009, p. 52). The DEP reports that the Governor has directed a freeze on hiring state employees, which he has stated is likely to last for

the next two years. (Rec. doc. 5 for 2009, p. 53). A small layoff of 5-10% of state employees remains a possibility. (Rec. doc. 5 for 2009, p. 53).

SUMMARY OF THE ARGUMENT

The district court erred in finding that it lacked jurisdiction under RCRA section 7002(a)(2) because CARE has *alleged* that EPA has failed to perform a non-discretionary duty. However, EPA has discretion in deciding whether to respond to petitions. The district court correctly concluded that CARE lacks federal question jurisdiction because CARE has jurisdiction through RCRA and because whether EPA responds to CARE's petition is an action committed to agency discretion.

The Court of Appeals ("the Court") does not have jurisdiction to proceed on the merits. EPA's delay in responding to CARE's petition does not constitute a constructive action because EPA's delay has not been unreasonable. Additionally, the Court's review is improper because EPA's decision not to commence withdrawal proceedings was committed to agency discretion under the APA. Also, the Court's review is improper because EPA has not conducted a public hearing and New Union has not been given ninety days to correct deficiencies in its program, both required by RCRA section 3006(e).

If the Court must proceed to the merits of the case, EPA is not required to withdraw approval of New Union's program. New Union's resources and performance continue to meet RCRA approval criteria. Also, the ERAA does not deregulate railroads from RCRA regulations but instead transfers regulatory power to other state and federal entities. Additionally, New Union's program remains equivalent the federal RCRA program and consistent the federal and other approved state programs because there is nothing in the record or law to indicate otherwise. New Union's program does not violate the Commerce Clause because the ERAA was not

enacted for economic protectionist reasons, but for the purpose of protecting public health and the environment.

STANDARD OF REVIEW

The Court reviews summary judgment decisions of the district court *de novo. See Pierce v. Underwood*, 487 U.S. 552, 558 (1995). Summary judgment is appropriate if there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). "[A]ny doubt as to the existence of a genuine issue for trial should be resolved against the moving party." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 n. 2 (1986).

ARGUMENT

The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq. (2006), directs EPA to establish a comprehensive "cradle to grave" system regulating the generation, transport, storage, treatment, and disposal of hazardous wastes. 42. U.S.C. §§ 6921-6939 (2006). While EPA is charged with the authority to administer RCRA, the statute contemplates and favors administration and enforcement by states with programs authorized by EPA to act in lieu of the federal program. 42 U.S.C. § 6901(a)(4) (2006); 42 U.S.C § 6902(a)(7) (2006). RCRA requires that EPA approve state programs which are equivalent to the federal program, which are consistent with the federal program and other approved state programs, and which provide adequate enforcement. 42 U.S.C § 6926(b) (2006). One of Congress' main objectives in enacting RCRA was:

> To promote the protection of health and environment and to conserve valuable material and energy resources by . . . *establishing a viable Federal-State partnership* to carry out the purposes of this Act and insuring that the Administrator will . . . *give a high priority to assisting and cooperating with States in obtaining full authorization of State programs*. . .
>
> 42 U.S.C. § 6903(a)(7) (2006) (emphasis added).

RCRA provides for judicial review of EPA action and non-action in the district court. 42 U.S.C. § 6972(a)(2). Here, jurisdiction in the district court was proper. RCRA also provides for judicial review of EPA action in approving, denying, or withdrawing of approval of a state program in the court of appeals. 42 U.S.C. § 6976(b). Here, jurisdiction in the appellate court is not proper. RCRA additionally provides that EPA can withdraw approval of a state program. 42 § U.S.C. 6926(e). Here, EPA is not required to withdraw.

I. THE DISTRICT COURT ERRED IN FINDING THAT IT LACKED JURISDICTION UNDER RCRA SECTION 7002(a)(2) TO DECIDE WHETHER EPA MUST RESPOND TO CARE'S PETITION.

CARE claims that the district court had jurisdiction on two separate grounds: through RCRA section 7002 (a)(2), *see* 42 U.S.C. § 6972 (a)(2), and through federal question jurisdiction, *see* 28 U.S.C. § 1331. The only jurisdiction truly available to the district court was under RCRA section 7002(a)(2).

A. RCRA Section 7002(a)(2) Provides the District Court Jurisdiction To Decide Whether EPA Must Respond to CARE's Petition.

RCRA section 7002(a)(2) provides the Court with jurisdiction because it specifies that an allegation grants jurisdiction and CARE has made an allegation. RCRA section 7002(a)(2) however, also requires that the jurisdiction granted is to decided whether EPA has failed to perform an action or duty that is not discretionary. Accordingly, this jurisdiction only gives the Court the authority to determine whether EPA must respond to CARE's petition. EPA is not required to respond to CARE's petition. Additionally, the RCRA 7004 petition was a valid action by CARE.

1. <u>RCRA Section 7002(a)(2) Provides the District Court Jurisdiction Because of CARE's Allegation.</u>

RCRA section 7002(a)(2) provides: "In general . . . any person may commence a civil action on his own behalf . . . against the Administrator [of EPA] where there is an *alleged* failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator." 42 U.S.C. § 6972 (a)(2) (emphasis added).

Here, CARE has *alleged* that the EPA has failed to perform an act or a duty that is not discretionary. *C.A.R.E., Inc.*, No. 138-2010, at 4. CARE, through its filed injunction, *alleged* that EPA is required to respond to its petition. *Id.* The fact that a mere allegation gains jurisdiction is inherit in the construction of the statute because the word "alleged" is used. *See* 42 U.S.C. § 6972 (a)(2). Otherwise, the word "alleged" would have been left out entirely, and the statute would read: "Any person may commence suit against the Administrator where there is a failure of the Administrator to perform any act or duty which is not discretionary." That is not the case. If that were the case, EPA would take an opposing stance on this jurisdiction because EPA does not support the allegation that CARE asserts, that EPA must respond to CARE's petition.

Accordingly, the Court has jurisdiction to decide whether the duty or action that CARE is alleging, responding to CARE's petition, is discretionary.

2. <u>EPA has Discretion as to Whether it Responds to CARE's RCRA Section 7004 Petition at all Because RCRA Section 7004 Provides Discretion</u>.

EPA has discretion as to whether it responds to CARE's petition at all. The word "shall" in RCRA section 7004(a) is meant to give EPA discretion. Additional language of RCRA section 7004 also dictates that EPA should have discretion.

RCRA section 7004 sets up the petition that CARE has filed. *See* 42 U.S.C. § 6974(a) (2006). It provides: "[T]he Administrator *shall* take action with respect to such petition and *shall* publish notice of such action in the Federal Register, together with the reasons therefor."

42 U.S.C. § 6974(a) (emphasis added). "Shall" does not always mean must. "Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.' For example, certain [parts] of the Federal Rules use the word 'shall' to authorize, but not require, judicial action." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432-33 n.9 (1995) (citations omitted). *See* D. Mellinkoff, Mellinkoff's Dictionary of American Legal Usage 402-03 (1992) (stating that "shall" and "may" are "frequently treated as synonyms" and their meaning depends on context); B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995) ("[C]ourts in virtually every English-speaking jurisdiction have held-by necessity- that *shall* means *may* in some contexts, and vice versa."). *See, e.g.,* Fed. R. Civ. P. 16(e) ("The order following a final pretrial conference *shall* be modified only to prevent manifest injustice.") (emphasis added); Fed. R. Crim. Proc. 11(b) (A *nolo contendere plea* "*shall* be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.") (emphasis added).

Also, the same RCRA section, section 7004, provides: "Public participation . . . shall be provided for, encouraged, and assisted by the Administrator . . . [t]he Administrator . . . *shall develop* and publish minimum guidelines for public participation in such processes." 42 U.S.C. § 6974(b)(1). Notably, RCRA section 7004 does not provide for any sort of time frame in which the EPA must respond to petitions. *See* 42 U.S.C. § 6974. Nor does the corresponding regulation promulgated by EPA. *See* EPA Procedures for Withdrawing Approval of State Programs, 40 C.F.R. § 271.23(b)(1) (2010). However, within the same RCRA section, section 7004, time limits are set for mandatory actions. *See* 42 U.S.C. § 6974(b)(2)(B) (setting a forty-five day limit for requesting a hearing). Additionally, administrative agencies are often granted discretion in determining what procedures to follow in carrying out a statute. *Meister v. U.S.*

Dept. Agriculture, 623 F.3d 363, 367 (6th Cir. 2010). *See, e.g., Save Our Cumberland Mountains v. Kempthorne,* 453 F.3d 334, 339 (6th Cir. 2006) (stating that the courts review agencies' "decision that an environmental impact statement need not be prepared, under the deferential 'arbitrary and capricious' standard"); *Hughes River Watershed Conservancy v. Johnson,* 165 F.3d 283, 289 (4th Cir.1999) ("Agencies are entitled to select their own methodology as long as that methodology is reasonable, and [the] reviewing court must give deference to an agency's decision.").

Here, "shall" is being used to mean either "should" or "may." Also, EPA has discretion in the handling of such petitions because EPA has been delegated the task of developing the public participation process. 42 U.S.C. § 6974(b)(1). Had Congress intended for EPA to be required to respond to each petition, it would have specified a time limit in which EPA was required to respond. Neither Congress in the statute, see 42 U.S.C. § 6974, nor EPA in the regulation, see 40 C.F.R. § 271.23 (2010), did that. This discretion allows EPA to choose whether to respond to petitions. Additionally, this is the sort of procedural issue where agencies are generally inclined to use discretion. As emphasized in the record by the district court, this is the only fitting interpretation of RCRA section 7004(a) because Congress could not have expected EPA to squander its resources by responding to what could be an unlimited number of petitions. *C.A.R.E., Inc.*, No. 138-2010, at 6.

3. CARE Properly Petitioned for Withdrawal of New Union's Program under RCRA Section 7004 Because of EPA's Interpretation.

New Union contends the Court somehow does not have jurisdiction because EPA's approval of New Union's program was an order rather than a rule. *Id.* Regardless of the proposition that CARE has jurisdiction from the mere act of alleging that EPA did not fulfill a

nondiscretionary act or duty, CARE's claim should not be dismissed on grounds that EPA's approval of New Union's program was an order and not a rule.

RCRA section 7004(a) states that "[a]ny person may petition the Administrator for the promulgation, amendment, or repeal of any *regulation.*" 42 U.S.C. § 6974(a) (2009) (emphasis added). However, RCRA section 7004(b)(1) provides for "[p]ublic participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or *program.*" *Id.* (emphasis added). Additionally, RCRA section 7004 regulations state that petitions can be used to request withdrawal proceedings. 40 C.F.R. § 271.23(b)(1) ("The Administrator may order commencement of withdrawal proceedings . . . in response to a petition from an interested person alleging failure of the State to comply. . .").

The *Chevron* two-step analysis is used to determining whether agencies' interpretations of statutes should be followed. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, Courts ask whether Congress has spoken directly to the precise question at issue. *Id.* at 842-43. If the intent of Congress is clear, then it should be followed. *Id.* However, if not clear, the issue for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* If the agency's answer is a permissible construction, it is termed to be entitled to *Chevron* deference, simply meaning that the agency's method should be followed.

Here, the district court and New Union have looked to the Administrative Procedures Act ("APA") to define and determine the differences between a rule or rulemaking and an order. Such inquiry is out of line because the language of the statute includes neither word ("rule" or

"rule making").[1] *See* 42 U.S.C. § 6974. Instead, the word "regulation" is used. 42 U.S.C. § 6974(a). Under the Chevron two-step analysis, the petition was a valid one because CARE succeeds under both steps.[2] The Court should reason that Congress's intent, that people be able to petition for a program's withdrawal, is clear because the word "regulation" is explained within RCRA section 7004(b), which expressly allows for public participation with regards to state programs, among other items. *See* 42 U.S.C. § 6974(b)(1). Or, in the alternative, if the Court concludes that "regulation" is not clear, and the question is whether counting the program as a regulation within EPA's promulgated regulations is permissible, the answer is yes. Certainly, calling the program a regulation is a permissible interpretation of RCRA section 7004 as the program most definitely regulates waste and was treated as a rule. *C.A.R.E., Inc.*, No. 138-2010, at 6. *See also Yuen Jin v. Mukasey*, 538 F.3d 143, 152 (2d Cir. 2008) (granting the immigration authority *Chevron* deference on a procedural application issue).

B. The District Court Did Not Have Jurisdiction under 28 U.S.C. Section 1331 to Decide Whether EPA Must Respond to CARE's Petition.

CARE contends that it is entitled to federal question jurisdiction under the APA. However, this is improper because the RCRA jurisdiction statute governs in place of the APA jurisdiction statute. Additionally, there is no jurisdiction under the APA because the action requested, response to CARE's petition, is committed to agency discretion.

1. Federal Question Jurisdiction through the APA is Improper Because RCRA Jurisdiction Trumps.

[1] It does not include "order" either, see 42 U.S.C. section 6974; however, that is beside the point because New Union would agree with jurisdiction if the statute specified "order." *C.A.R.E., Inc.*, No. 138-2010, at 6.

[2] What is meant in saying that the petition was a valid one is that CARE properly petitioned EPA for withdrawal. Not that the petition should be granted or that EPA was required to respond to the petition.

A basic principle of statutory construction is that a specific statute governs over a general statute. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-25 (1989). CARE contends that APA section 553(e) grants federal question jurisdiction. However, APA section 553(e) does not govern because RCRA section 7004 is the specific statute that governs over the general APA statute.

The principle that a specific statute governs over a general statute is one of the most basic canons of statutory interpretation. *United States v. Perry*, 360 F.3d 519, 535 (6th Cir. 2004). The principle is true even when there is no direct conflict between the general statute and the specific one. *See Green*, 490 U.S. at 524 ("A general statutory rule usually does not govern unless there is no more specific rule."). APA section 553(e) states: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). RCRA section 7004 provides: "Any person may petition the Administrator [of EPA] for the promulgation, amendment, or repeal of any regulation. . ." 42 U.S.C. § 6974(a). APA section 553(e) is obviously the general statutory provision that gives citizens rights to file suits against any agency (unless there is a more specific statute to gain jurisdiction against the agency). RCRA section 7004, however, is the specific statute that Congress has intended citizens to use for RCRA challenges. Because of this, and because there is no "clear intention otherwise", the principle of statutory construction, that the specific governs over the general, requires RCRA section 7004(a) to govern here, rather than APA section 553(e). *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (deciding that a specific venue statute governed rather than a general venue statute).

2. <u>Federal Question Jurisdiction is Improper Because EPA's Decision Whether to Respond a Petition is Committed to Agency Discretion.</u>

Actions are not judicially reviewable when they are committed to agency discretion by law. 5 U.S.C. § 701(a)(2) (2006). Therefore, the district court did not have jurisdiction under the APA, because EPA's decision not to respond to CARE's petition is not judicially reviewable.

In *Chaney*, the Court ruled that the Food and Drug Administration's ("FDA") inaction on a petition asking FDA to take enforcement action under the Federal Food, Drug, and Cosmetic Act ("FDCA") was unreviewable. *Heckler v. Chaney*, 470 U.S. 821, 837 (1985). Several prison inmates petitioned FDA, requesting that it take various enforcement actions under the FDCA. *Id.* at 823. FDA refused to take enforcement action. *Id.* at 824. Furthermore, the Court stated that the APA exception to judicial review in section 701(a)(2) applies in situations where statutes are "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* (quoting *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971)). The Court expanded on the narrow "no law to apply" standard of *Overton Park*[3] by recognizing that the case at hand involved, not an affirmative act, but an agency's *refusal* to take enforcement action. *Id.* at 831. The Court held that when an agency chooses to not act, there is a presumption against judicial review for such inaction. *Id.* at 832. The presumption can be "rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833. The Court ruled that the decision not to take enforcement actions was committed to agency discretion because the FDCA only provided that the Secretary was "authorized" to take certain actions, giving no indication of when the actions would be required. *Id*. at 835.

[3] The Supreme Court stated in *Overton* that the (a)(2) exception is "applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." 401 U.S. at 410.

Here, the Court should follow *Chaney* and find that EPA was free to decide not to respond to RCRA petitions. Like the inmates who petitioned the FDA, CARE has petitioned EPA to take enforcement action. *C.A.R.E.* No. 138-2010, at 5. Like the FDCA, which merely "authorized" FDA to take certain actions, RCRA allows for EPA to respond to petitions, but does not require a specific type of response or time in which response is required. *See* 42 U.S.C. § 6974. The Court should adopt the *Chaney* presumption that such refusal to take action is not reviewable. The presumption is not rebutted because RCRA gives no indication of when a response to a petition would be required, and thus there are no "guidelines for the agency to follow in exercising its enforcement powers." *See Cheney*, 470 U.S. at 833. *See also Li v. Chertoff*, 482 F. Supp. 2d 1172 (S.D. Cal. 2007) (ruling that where no statute or regulation specified a time period within which the immigration authority was required to complete an alien's name check, the APA did not provide subject matter jurisdiction to entertain the alien's petition to require adjudication on the action).

The Court should find that the district court erred in finding it lacked jurisdiction under RCRA section 7002(a)(2) because CARE has *alleged* that EPA failed to perform a non-discretionary act. However, EPA does have discretion in deciding whether to respond to CARE's petition. The Court should affirm the district court's holding that it did not have federal question jurisdiction under 28 U.S.C. section 1331 because the specific RCRA jurisdiction statute governs over the general APA statute and because the action is committed to agency discretion.

II. THE COURT OF APPEALS DOES NOT HAVE JURISDICTION TO PROCEED ON THE MERITS.

This case involves not only an appeal from the district court, but also CARE's request that the Court of Appeals lift its stay in C.A. No. 18-2010, an action previously filed by CARE

seeking judicial review of EPA's constructive denial of CARE's petition. When CARE filed this petition with the Twelfth Circuit, it relied on RCRA section 7006(b), which states:

> Review of the [EPA] Administrator's action…in granting, denying, or withdrawing authorization or interim authorization under section 3006 of this title, may be had by any interested person in the Circuit Court of Appeals for the United States for the Federal 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…Such review shall be in accordance with sections 701 through 706 of Title 5.
>
> 42 U.S.C. § 6976(b).

EPA's delay in acting on CARE's petition does not constitute an "action" for purposes of RCRA section 7006(b) and is thus not reviewable by the Court. However, even if the Court finds that EPA's delay was a constructive action, this was a decision committed to EPA's discretion under the APA. Finally, EPA has not conducted a public hearing and New Union has not been notified or given a chance to correct its program's deficiencies, both required under RCRA's section 3006(e) withdrawal procedure. Accordingly, the Court should not exercise judicial review and remand the case to the district court to order EPA to act on CARE's petition.

A. EPA's Delay in Responding to CARE's Petition Does Not Constitute a Constructive Action Because EPA Has Not Been Unreasonable.

RCRA Section 7006(b) grants the courts of appeals jurisdiction to review the Administrator's *action* in withdrawing authorization under section 3006. "Within a *reasonable* time following receipt of [a] petition, the Administrator shall take action with respect to such petition. . ." 42 U.S.C. § 6974(a) (emphasis added). To find a constructive action, it must at least be held that EPA's response time has been unreasonable. EPA's response time has not been unreasonable and does not constitute a constructive denial of CARE's petition or a constructive determination that New Union's program continues to meet RCRA standards.

Where EPA's lack of action has been considered unreasonable under other statutes, it has been for failure to perform precise duties over very long periods of time, like twelve years. *See Alaska Center for the Env't. v. Browner*, 20 F.3d 981 (9th Cir. 1994) (EPA failed to establish total maximum daily loads (TMDL) under the Clean Water Act for twelve years). On the other hand, where no time limit was set in the statute, a three and a half year delay in response has been considered reasonable. *See Li*, 482 F. Supp. 2d at 1172.

CARE submitted its petition to EPA, asking EPA to withdraw authorization for New Union's hazardous waste program, on January 5, 2009, less than one year later, CARE filed actions in both the district court and the court of appeals. *C.A.R.E., Inc.*, No. 138-2010, 400-2010, at 4-5. This delay is far shorter than the twelve year unacceptable period in *Alaska Center for the Env't* or the three and a half year acceptable period in *Li*. Such a delay does not rise to the level of unreasonable.

Despite EPA's relatively short delay in responding to the petition, CARE sought to have EPA withdraw New Union's hazardous waste program entirely. Withdrawing a state's in-lieu program would be a major dismantling of a complex, state-run operation. If this court does consider the short delay unreasonably long and therefore a constructive action on the part of EPA, it would exhaust the entire nation-wide RCRA program by requiring the Administrator to respond within a short period of time to every petition, no matter how frivolous.

Even if the Court finds that EPA's delay constituted a constructive action, CARE has not shown that their petition for judicial review under RCRA section 7006(b) was filed before the ninety-day statute of limitations. Under RCRA section 7006(b), any interested person can apply for judicial review with the Court of Appeals within ninety days from the date that the EPA Administrator grants, denies, or withdraws authorization. 42 U.S.C § 6976(b). While CARE

alleges that constructive action has been taken, it does not specify at what point such constructive action occurred. Therefore, CARE is unable to meet its burden of establishing that they applied within the ninety-day period following the constructive action of the Administrator.

In considering the reasonableness of EPA's delay in responding to CARE's petition, the Court should find that the delay of less than one year was not unreasonable, and thus did not constitute a constructive action. Because EPA has not taken a "final agency action" within the meaning of 5 U.S.C. section 704 (2006), there is no action of the Administrator to review under RCRA section 7006(b). 42 U.S.C. § 6976(b). Even if the Court finds that EPA has taken constructive action, it is not clear that CARE has filed their RCRA 7006(b) petition within the ninety-day period.

B. Judicial Review is Improper Because EPA's Decision Not to Commence Withdrawal Proceedings is Committed to Agency Discretion under the APA.

RCRA section 7006(b) states that judicial review by the Court of Appeals shall be in accordance with the APA provisions found at 5 U.S.C. sections 701-706 (2006). According to the APA, a Court of Appeals may not exercise judicial review of an action committed to agency discretion by law. 5 U.S.C. § 701(a)(2); *see supra* Part I.B.2. In *Chaney*, the Supreme Court held that an agency's decision not to invoke a statutory enforcement mechanism is generally presumed to be immune from judicial review under 5 U.S.C. section 701(a)(2). *Chaney,* 470 U.S. at 832. The Court allowed that the presumption against reviewability may be rebutted if the statute "circumscribes agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion. *Id.* at 834-35. *See also Texas Disposal Systems Landfill, Inc. v. E.P.A.*, 377 Fed.Appx. 406 (5th Cir. 2010) (standards did not exist by which the Court could review EPA's decision not to commence proceedings to withdraw its authorization of Texas' hazardous waste program under RCRA).

In this case, the Court should apply the *Chaney* presumption in order to find that EPA's decision not to initiate withdrawal proceedings was committed to EPA's discretion. There are no standards by which the Court can review EPA's decision not to initiate withdrawal proceedings. Under RCRA, after the Administrator determines that a state is not in compliance, he *shall* notify the state and, if corrective action is not taken, he *shall* withdrawal authorization. 42 U.S.C. § 6926(e). Under EPA regulations, the Administrator *may* order the commencement of withdrawal proceedings on his own initiative or in response to a petition; the Administrator *may* conduct an informal investigation of the allegations to determine whether cause exists to commence withdrawal proceedings. 40 C.F.R. § 271.22(a) (2010). While the "may" language of the regulations seems to grant EPA wide discretion, the "shall" language of RCRA suggests a more affirmative duty (the meaning of "shall" here is disputed; *see supra* section I.A.2.). Because there is a lack of certainty as to EPA's obligation after its constructive determination, there is no standard by which the Court can review EPA's decision not to commence withdrawal proceedings, and thus the *Chaney* presumption against judicial review cannot be rebutted.

The *Chaney* Court noted several policy reasons for not exercising judicial review over an agency's decision not to act, stating: "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Chaney*, 470 U.S. at 831. These factors include: "not only . . . whether a violation has occurred, but whether agency resources are best spent on this violation . . . whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all." *Id*. *See also N.Y Pub. Interest Research Group v. Whitman*, 321 F.3d. 316, 331 (2d Cir. 2003) (the presumption against judicial review of a refusal to act "avoids entangling courts in a calculus involving variables better appreciated by the

agency . . . and respects the deference often due to an agency's construction of its governing statutes.").

In our case, the Court should be aware of the same policy concerns mentioned by the *Chaney* court. The Court should consider: whether EPA has sufficient resources to substitute and enforce its own federal hazardous waste program in the state; whether the particular violation is worth the immense cost of withdrawing authorization, or whether less drastic and more cooperative measures may be taken to remedy the problem; whether the consequences of withdrawing authorization fits within the agency's overall policy goals, etc. To require EPA to commence withdrawal proceedings every time a state program is found to have technically violated federal guidelines would be to strip EPA of the ability to choose where best to commit its finite resources and to choose different remedies to fit particular situations.

The Court should find that the 5 U.S.C. § 701(a)(2) exception to judicial review applies because a decision not to commence withdrawal proceedings is committed to EPA's discretion. In so finding, the Court should apply the Supreme Court's presumption framework from *Chaney* and also consider the policy implications in requiring EPA to commence withdrawal proceedings upon every finding that a state hazardous waste program violates RCRA.

C. Judicial Review is Improper Because EPA Has Not Conducted a Public Hearing and New Union Has Not Been Given Ninety Days to Correct Deficiencies, Both Required by RCRA section 3006(e).

The provision of RCRA governing the withdrawal of a state's hazardous waste program authorization provides:

> Whenever the administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify that State and, if appropriate corrective action is not taken within a reasonable time, not to exceed 90 days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. [EPA] shall not

> withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.
>
> 42 U.S.C. § 6926(e).

Thus, before EPA may withdraw authorization for a state's hazardous waste program, RCRA requires that EPA meet the following procedural criteria: conduct a public hearing, determine that the State is not administering and enforcing its program in accordance with RCRA, send notification to the State of its deficiencies, and allow ninety days for the state to take corrective action. *Id.* Only after these steps have been taken does EPA have an affirmative duty to withdraw authorization of the State's hazardous waste program. In addition to statutory requirements, EPA regulations provide detailed guidance for what steps must be taken once the Administrator chooses to commence proceedings to determine whether to withdraw approval of a state program. 40 C.F.R. § 271.23(b). Under the regulations, the Administrator is to provide states with the specific allegations and give states thirty days to respond before a hearing is held. *Id.* § 271.23(b)(1). The party seeking withdrawal of a state's program has the burden of producing evidence at the hearing. *Id.* In our case, EPA has not had a chance to conduct a public hearing at all. Because an administrative hearing has not occurred, EPA has not made a determination on the status of New Union's program. To avoid disrupting legislative intent and long-standing procedural norms, the Court should not exercise judicial review and instead remand to the district court to order EPA to hold withdrawal proceedings pursuant to the procedures prescribed by RCRA and EPA regulations.

Because EPA's delay in responding to CARE's petition was reasonable, such delay does not constitute a constructive action, and thus the Court does not have jurisdiction to exercise judicial review under RCRA section 7006(b). Even if the Court finds that a constructive action has been made, the decision whether to commence withdraw proceedings is committed to EPA

discretion and entitled to a presumption of unreviewability. Finally, EPA has not given New Union notice of its program's deficiencies or provided it ninety days to remedy the deficiencies, as required for withdrawal of state authorization under RCRA section 3006(e).

III. EPA IS NOT REQUIRED TO WITHDRAW APPROVAL OF NEW UNION'S HAZARDOUS WASTE PROGRAM.

"Withdrawal of authorization for a state program is an extreme and drastic step that requires the EPA to establish a federal program to replace the cancelled state program. 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." *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1238-39 (10th Cir. 2002) (quotation marks and citations omitted) *cert. denied*, 538 U.S. 1012 (2003). Nothing in the record suggests that the New Union program's resources and performance have become inadequate since it was approved in 1986. Although ERAA removed railroad facilities from DEP regulation under the New Union program, such facilities are still regulated by a combination of federal and state entities. The New Union program remains equivalent to the federal program and consistent with the federal and other approved state programs. Finally, New Union's of treatment of Pollutant X does not violate the Commerce Clause.

A. New Union's Resources and Performance Continue to Meet RCRA's Approval Criteria.

EPA approved New Union's hazardous waste program in 1986, finding that New Union DEP had adequate resources to fully administer and enforce the program in compliance with RCRA. (Rec. doc. 2, p. 1). Despite decreases in DEP's staff and the gradual increases in TSDs and permit applications since 1986, there is still no evidence showing that New Union's program doesn't meet the approval criteria under RCRA section 4003. 42 U.S.C. § 6926(b).

1. CARE Has Not Established that New Union's Current Hazardous Waste Program Does Not Meet RCRA Approval Criteria.

Under RCRA section 4003, to be approved, a state must: identify responsibilities of the state authorities, prohibit establishment of new open dumps, provide for the closing or upgrading of all existing open dumps, provide for the establishment of state regulatory powers, provide for the disposal of solid waste in landfills in a manner that is environmentally sound, etc. 42 U.S.C § 6943 (2006). While providing many criteria for a state's approval, the statute does not provide specific guidance for state programs relating to the number of staff needed, the number of permits issued annually, the number of inspections to be conducted, or the number of enforcement actions to be taken in order to maintain compliance with RCRA standards.

While there are countless cases dealing with state's that have been accused of abandoning, abusing, or otherwise not living up to these approval criteria, *see, e.g., C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994); *Philadelphia v. State*, 73 N.J. 562 (1977); *Grassroots Recycling Network, Inc. v. U.S. E.P.A.*, 429 F.3d 1109 (D.C. Cir. 2005), there do not appear to be any states that have been accused of impermissibly reducing their number of staff under an increase in TSD permits.

CARE relies on a decrease from fifty to thirty DEP staff, an increase from 1200 TSD sites to 1500 TSD sites, and a freeze on New Union's state budget. (Rec. doc. 5 for 2009, p. 53). There is also an ambiguous EPA statement from 1986, noting that with less resources, New Union's program might not be adequate. (Rec. doc. 4, p. 16). But nowhere in CARE's compliant does it show that these factors are, or have ever been, justiciable issues under RCRA approval criteria. CARE's evidence of reductions in DEP staff is particularly ineffective when considering that most of the staff reductions occurred after 2000, when the ERAA transferred some of DEP's authority and obligations to NURRC. (Rec. doc. 5 for 2000, pp. 103-105).

While CARE may be concerned about the decrease in DEP's staff amidst the increase in TSD permit requests, their concerns fail to rise to the level of making the case that EPA should take the drastic measure of de-authorizing the state in-lieu program. Additionally, EPA's vague statement from 1986 does not constitute legitimate grounds for requiring EPA to withdraw New Union's hazardous waste program; it bares no substance in this argument.

2. EPA and New Union Act Cooperatively to Ensure Compliance with RCRA Standards.

Even if New Union's resources and performance are found to be inadequate, there are additional remedies available to EPA other than the complete shut down of New Union's hazardous waste program. Legislative history from 1976 suggests that Congress contemplated a flexible, cooperative arrangement between states and EPA in enforcing RCRA:

> [T]here is enough flexibility in the act to permit the Administrator, in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the Administrator is required to give notice of violations of this title to the states with authorized state hazardous waste programs the Administrator is not prohibited from acting in those cases where the state fails to act, *or* from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to title III of this act.
>
> 1976 U.S.C.C.A.N. 6238, 6269 (emphasis added).

The above displays how Congress expected that withdraw of a state program's authorization would be only one option among several for EPA to consider. EPA can also take action to enforce the federal program in areas where states are deficient, without resorting to the drastic step of shutting down the state program entirely.

As the record shows, EPA has taken several of its own enforcement actions in New Union in the last year, and has assumed some of the inspection responsibilities in the State as well. (Rec. doc. 5 for 2009, p. 23-25). Completely revoking New Union's program

authorization would place on EPA a very large burden, which can be more easily carried by the cooperative efforts of DEP, NURRC, and EPA together. EPA, NURRC, and DEP continue to work together in enforcement and inspection efforts, and such relationship should be allowed to continue in the absence of any legally cognizable grounds to the contrary.

New Union's current hazardous waste program resources and performance are as adequate today as they were when New Union was granted authorization in 1986. EPA is already vastly invested in the success of New Union's hazardous waste program through cooperative enforcement and inspection efforts of the State's TSD facilities. Accordingly, the Court should find that EPA is not required to withdraw authorization of New Union's program.

B. EPA Is Not Required to Withdraw Program Approval Based on ERAA's Treatment of Railroad Facilities Because ERAA Merely Transferred Regulatory Enforcement Powers to Other State and Federal Entities.

New Union's deregulation of its railroad hazardous waste facilities does not require the EPA to take the drastic measure of state program approval withdrawal. New Union's railroad hazardous waste facilities are still subject to EPA's enforcement powers.

EPA's enforcement powers are not taken away when EPA approves a RCRA state program. *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1238-39 (10th Cir. 2002) (EPA overfilling, or right to take concurrent enforcement action, is permissible under RCRA) *cert. denied*, 538 U.S. 1012 (2003); *United States v. Elias*, 269 F.3d 1003, 1012-13 (9th Cir. 2001) (holding that RCRA allows EPA to exercise civil enforcement powers even where a state program is in effect); *United States v. Flanagan*, 126 F. Supp. 2d 1248, 1292 (C.D. Cal. 2000) (holding that EPA's authorization of California's hazardous waste program did not supplant a criminal penalty provided in RCRA). EPA has promulgated regulations permitting it to take such actions. *See* Requirements for Enforcement Authority, 40 C.F.R. § 271.16(c) (2010)

("EPA . . . may commence separate actions for penalties."). Also, the general stance that EPA may step in and regulate whenever a state fails to do so is entitled to *Chevron* deference. *Power Eng'g Co.*, 303 F.3d at 1240; *Elias*, 269 F.3d at 1010. *See also* Hazardous Waste Management Program Codification of Approved State Hazardous Waste Program for Idaho, 55 Fed. Reg. 50327-01 (Dec. 6, 1990) (stating that "[EPA] retains the authority under [section 6928] of RCRA to undertake enforcement actions in authorized states," and that "[w]ith respect to such enforcement action, the [EPA] will rely on Federal sanctions, Federal inspection authorities . . . rather than the authorized Idaho enforcement authorities").

Only one court has concluded that EPA does not have the power to take enforcement action when a state program is in place. *Harmon Indus. v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999). That decision has been largely criticized and disputed by courts concluding the opposite. *See Power Eng'g Co.*, 303 F.3d at 1239-40; *Elias*, 269 F.3d at 1011. Additionally, the Environmental Appeals Board, the administrative adjudicatory body for EPA, has indicated that *Harmon* is controlling precedent **only** for administrative cases under RCRA within the Eighth Circuit's jurisdiction. *See Bil-Dry Corp.*, 9 E.A.D. 575, 590 (E.A.B. 2001).

Here, while New Union's program has deregulated the railroad hazardous waste facilities by removing its criminal sanctions in order to tighten its budgetary belt, (Rec. doc. 5 for 2009, p. 53; Rec. doc. 5 for 2000, pp. 103-05), that deregulation does not mean that New Union's railroad hazardous waste facilities will go unregulated. Where New Union does not regulate in accordance with RCRA, EPA will and has. (Rec. doc. 5 for 2009, p. 26). In the present arrangement, EPA regulates where New Union does not in enforcing criminal sanctions on railroad hazardous waste facilities. The result of a withdrawal for New Union's deregulation of railroad hazardous waste facilities would only cause more of the burden of RCRA enforcement

to fall on EPA. EPA would additionally be responsible for everything else New Union currently does: issuing permits, enforcing all other criminal and civil sanctions, enforcing injunctions, etc.

Additionally, state programs can be administered by any entity of the state and through any state statutes or regulations. *See* 42 U.S.C. § 6926 (listing approval procedures for state program approval and not specifying that a program must be administered by a single entity or single statute); RCRA Statutory Checklist, EPA, http://www.epa.gov/osw/laws-regs/state/revision/models/statcl.pdf (last visited Nov. 25, 2010) (providing spaces to fill in corresponding state statutes that match up with the RCRA plan). *See also* 42 U.S.C. § 6943(a) (listing the minimum requirements for a state solid waste program and stating that "[t]he plan shall identify . . . the responsibilities of State, local, and regional authorities in the responsible for development and implementation of the State plan. . ."). Accordingly, it is immaterial that that New Union has shifted the enforcement of regulation of railroads from New Union DEP to the New Union Railroad Commission. (Rec. doc. 5 for 2000, pp. 103-05) New Union is still involved in regulating railroad facilities.

In conclusion, New Union's deregulation of railroad hazardous waste facilities does not mean that railroad hazardous waste facilities will go unregulated. The Court should rule that EPA can take enforcement action where New Union does not. EPA can, will, and has regulated where New Union has be unable. Therefore, EPA's withdrawal of New Union's program is not necessary or logical.

C. New Union's Program Remains Equivalent to the Federal RCRA Program and Consistent with the Federal and Other Approved State Programs.

Under RCRA section 3006(b), EPA may not approve a state program if "(1) such State program is not equivalent to the Federal program . . . [and] (2) such program is not consistent with the Federal or State programs applicable in other States…" 42 U.S.C. § 6926(b). EPA

approved New Union's program in 1986, and was therefore required to find that the program did not fall into one of the above categories. There has been no showing that New Union's treatment of Pollutant X has made the state program unequal to the Federal program or inconsistent with Federal and other approved state programs. Accordingly, EPA should not be required to withdraw their authorization.

1. New Union's Hazardous Waste Program Is Equivalent to the Federal Program.

Under RCRA section 3006(b), a state program must be equivalent to the Federal RCRA program in order to obtain authorization and operate in lieu of the Federal program. 42 U.S.C. § 6926(b). RCRA section 3009 provides that no state may impose any requirements less stringent than the regulations required by the statute, but nothing prevents a state from adopting and enforcing more stringent requirements than are required by the Federal RCRA program. 42. U.S.C. § 6929 (2006); *see also* 40 C.F.R. § 271.1(i) (2010).

When EPA approved New Union's program in 1986, it was required to find that the program was at least equivalent to the Federal program. CARE's evidence showing a reduction in DEP's staff and a general increase in TSD facilities since the program's authorization in 1986 has no bearing on the question of whether the New Union program is equivalent to the Federal program. *See supra* Part III.A.2. Nothing in the record suggests that the New Union program has ceased to be equivalent with the Federal program. Moreover, New Union has actually instituted more stringent requirements than the Federal program through its regulation of Pollutant X. The ERAA places restrictions on the treatment, storage and disposal of Pollutant X, as well as the transportation of Pollutant X, which are not present in the federal program. (Rec. doc. 5 for 2000, pp. 105-106) The ERAA requires generators of Pollutant X to submit plans to minimize the generation of Pollutant X, with the eventual goal of ceasing generation entirely. *Id.*

EPA has recently taken the approach that states should be encouraged to innovate and deviate from EPA's regulations, without compromising environmental protection or violating statutory or regulatory requirements. Mem. from U.S. E.P.A. to RCRA Directors, Regions I - X 1 (Sept. 7, 2005).[4] Given that Congress chose not to define specific terms in sections 3006 or section 3009 of RCRA, a flexible approach toward equivalence is not precluded under the statute. *Id.* at 2. Rather than focusing on a verbatim match-up between federal and state program requirements, a flexible approach instead focuses on whether the state requirements provides equal environmental results as its federal counterparts. *Id.*

Since neither the statute nor the regulations define exactly what is mean by equivalence, and since there is nothing in the record to establish that New Union's program is not equivalent to the Federal program, the Court should adopt a flexible approach and find that New Union's program is equivalent to the Federal program.

2. New Union's Program Is Consistent with Other Approved State Programs, Despite New Union's Treatment of Pollutant X.

Under RCRA section 3006(b), before it can authorize a state hazardous waste program, EPA must find that the state program is consistent with the federal program and other approved state programs. 42 U.S.C. § 6926(b). Offering additional guidance on the meaning of the word "consistent," the EPA regulations state:

> (a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent. (b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a

[4] This EPA memorandum, which discusses state equivalency, can be found on EPA's website at: http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/57f223c2dca2303e8525744b0045b48e!OpenDocument

> prohibition on the treatment, storage, or disposal of hazardous waste in the State may be deemed inconsistent.
>
> 40 C.F.R. § 271.4.

The ERAA restricts the transportation of Pollutant X through New Union, however these restrictions are minimal and not "unreasonable" under regulation 271.4(a). The ERAA allows people to transport Pollutant X through New Union, however they must do so as fast as reasonably possible. (Rec. doc. 5 for 2000, pp. 105-107). Transporters are even allowed to stop within the State for emergencies and to refuel. (Rec. doc. 5 for 2000, pp. 105-107). The Court should find that EPA's interpretation of its own regulation in section 271.4(a) is a reasonable one, and that New Union's restrictions on the transport of Pollutant X through the State do not "unreasonably restrict, impede, or operate as a ban on the free movement across the State border" of Pollutant X.

Furthermore, the ERAA provisions regulating Pollutant X are fundamentally based on human health and environmental protection concerns, and do not act as a prohibition of treatment, storage or disposal of hazardous waste in New Union. The ERAA expressly recognizes that "Pollutant X is said by EPA and the WHO to be among the most potent and toxic chemicals to public health and the environment." (Rec. doc. 5 for 2000, pp. 105-07). It is reasonable to assume that the ERAA provisions regulating Pollutant X are aimed at minimizing the risks to human health and the environment posed by the generation as well as the treatment, storage, and disposal of Pollutant X in the State. In addition, the ERAA does not prohibit TSDs for Pollutant X entirely; it provides a permit exception for storage of Pollutant X in New Union for one hundred twenty days while awaiting transportation to an outstate facility designed and permitted to treat or dispose of Pollutant X. (Rec. doc. 5 for 2000, pp. 105-07). Such an

arrangement is reasonable because there are no authorized treatment or storage facilities for Pollutant X in New Union, and only nine facilities in the country. *Id.*

The Court should find that the ERAA does not render the New Union program "inconsistent" under EPA regulation 40 C.F.R. section 271.4. New Union's restrictions on transporting Pollutant X through the State are reasonable because the ERAA allows for stops for emergencies and refueling. Furthermore, New Union's restrictions on Pollutant X are based on human health and environmental concerns, and do not prohibit the treatment, storage, or disposal of Pollutant X because there is a permit exception for temporary storage.

D. New Union's Treatment of Pollutant X Does Not Violate the Commerce Clause Because It Serves A Purpose of Protecting Health and the Environment.

Although the Constitution gives Congress the power to regulate commerce among the States ,U.S. Const. art. I § 8, cl. 3, many subjects of potential federal regulation inevitably escape congressional attention "because of their local character and their number and diversity." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) (quoting *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938). In the absence of federal legislation, these subjects are open to state control so long as states act within the restraints of the Commerce Clause itself. *City of Philadelphia*, 437 U.S. at 623. The Court has erected a virtually *per se* rule of invalidity where state legislation is used to effect simple economic protectionism. *Id.* at 624.

In *City of Philadelphia* , the Court ruled that a New Jersey statute prohibiting the importation of most solid or liquid wastes originating outside New Jersey was an unconstitutional violation of the Commerce Clause. *Id.* at 617. Appellees, proponents of the New Jersey statute, argued that the measure was not protectionist, but was enacted to protect New Jersey residents from the harmful health and environmental effects of landfill sites. *Id.* at

628. Appellees pointed to cases in which the Supreme Court upheld state quarantine laws despite appearing to single out interstate commerce for special treatment because such laws banned the importation of articles whose very movement risked contagion or other health risks. *Id. See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 525 (1935); *Bowman v. Chicago & N.W. R.R. Co.*, 125 U.S. 465, 489 (1888). The Court found that the New Jersey statute was not such a quarantine law, and there had been no claim that the movement of waste into or through New Jersey endangered health. *City of Philadelphia*, 437 U.S. at 629. The Court found that New Jersey had no Constitutional basis to distinguish between out-of-state waste and domestic waste, and thus the statute was clearly impermissible under the Commerce Clause. *Id.*

This case is easily distinguishable from *City of Philadelphia*, and thus the per se rule of invalidity should not be applied to the ERAA. Whereas the New Jersey statute in *City of Philadelphia* prohibited the importation of nearly all forms of solid and liquid waste, New Union's ERAA statute only pertains to one type of waste: Pollutant X. Also, transportation of Pollutant X through the state is allowed, as is temporary storage of Pollutant X in New Union. (Rec. doc. 5 for 2000, pp. 105-07). While the New Jersey statute distinguished between out-of-state wastes and wastes generation in the state, the New Union ERAA makes no such distinction. While there were many facilities in New Jersey capable of dealing with the restricted waste, there are absolutely no facilities in New Union designed or authorized to treat or dispose of Pollutant X; in fact there are only nine such facilities in the nation. *Id.* In *City of Philadelphia*, there was little harm caused by the restricted wastes, whereas, in our case, Pollutant X represents a very clear health and environmental risk, recognized as among the most potent and toxic chemicals to public health and the environment. *Id.* The Court should refrain from applying such a *per se* rule of invalidity under the Commerce Clause.

Where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a flexible approach:

> Where the 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. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.
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> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In our case, the Court should apply the flexible framework of *Pike* in order to find that New Union's ERAA does not violate the Commerce Clause. The ERAA's restriction on the transportation, treatment and disposal of Pollutant X is an even-handed regulation, enacted to effectuate a legitimate local public interest: protecting public health and the environment from a dangerous pollutant which cannot currently be treated or disposed of in the State. Under the *Pike* approach, the question of whether the local benefits outweigh the burdens on interstate commerce becomes "one of degree." *Id.* at 142. The ERAA's effect on interstate commerce are merely incidental, in that transporters of Pollutant X must make only necessary stops while traveling through New Union. Although the ERAA also bars future treatment or disposal permits for Pollutant X, there is no claim of anyone seeking such permits and no indication that anyone will seek them in the near future. The local benefits to New Union clearly outweigh the small burdens on Pollutant X transporters and potential treatment or disposal permit-seekers.

For the reasons stated above, the Court should distinguish the case of *City of Philadelphia* and employ the flexible approach of *Pike* in order to find that the ERAA restrictions on Pollutant X do not violate the Commerce Clause.

EPA is not required to withdraw authorization of New Union's hazardous waste program. New Union's resources and performance are adequate. In addition, the New Union ERAA statute's deregulation of railroad facilities from the State program does not require withdraw of authorization because EPA may continue to enforce the Federal RCRA program on such facilities. The Court should adopt a flexible approach in finding that New Union program remains equivalent to the Federal program, is consistent with the Federal and other approved State programs, and does not violate the Commerce Clause of the Constitution.

CONCLUSION

The district court erred in ruling that it did not have jurisdiction under RCRA section 7002(a)(2). However, the Court should dismiss this case because EPA has discretion in deciding whether to respond to petitions. Additionally, the Court should not proceed to the merits because EPA's delayed response does not constitute a constructive action, because EPA's decision not to commence withdrawal proceedings is committed to agency discretion, and because EPA has not conducted a public hearing or given New Union ninety days to correct deficiencies. If the Court must proceed to the merits, the Court should conclude that EPA is not required to withdraw approval of New Union's program because: New Union's resources and performance are adequate, New Union's railroad facilities have not been deregulated, New Union's program remains equivalent and consistent with the Federal program and other approved state programs, and New Union's treatment of Pollutant X does not violate the Commerce Clause.