Team 77

C.A. No. 18-2010

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,
United States Environmental Protection Agency,
Respondent-Appellee-Cross-Appellant

v.

STATE OF NEW UNION
Intervenor-Appellee-Cross-Appellant

On Appeal from The United States District Court
For The District of New Union

BRIEF FOR APPELLANTS, CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.,

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ORAL ARGUMENT REQUESTED

Table of Contents

Table of Cited Authorities

United States Supreme Court Cases

Federal Circuit Cases

STATEMENT OF THE ISSUES

I. Whether RCRA § 7002(a)(2) provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004.

II. Whether 28 U.S.C. § 1331 provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed under 5 U.S.C. § 553(e).

III. Whether EPA's failure to act on CARE's petition that EPA initiate proceedings to consider withdrawing approval of New Union's hazardous waste program under RCRA § 3006(e) constituted a constructive denial of that petition and a constructive determination that New Union's program continued to meet RCRA's criteria for program approval under RCRA § 3006(b), subject to judicial review under RCRA 7006(b).

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

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?

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 effectively withdraws railroad hazardous waste facilities from regulation.

VII. 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 renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs.

STATEMENT OF THE FACTS

I. Procedural History

On January 5, 2009, the Citizen Advocates for Regulation and the Environment, Inc. (CARE), a non-profit corporation organized under the laws of the State of New Union, served a petition on the Administrator of the Environmental Protection Agency (EPA), under §7004 of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, 6974 (RCRA) and § 553(e) of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (APA), requesting that EPA commence proceedings to withdraw its approval in 1986, of New Union's hazardous waste regulatory program to operate in lieu of the federal program under RCRA, pursuant to RCRA § 3006(b), 42 U.S.C. § 6926(b). In support of its petition to EPA, CARE recited a litany of facts arising after that approval suggesting that New Union's program no longer met the criteria for EPA approval, *see* Appendix A. EPA has taken no action on that petition. On January 4, 2010, CARE filed (with all notice requirements fulfilled) an action in this court under RCRA §7002(a)(2), 42 U.S.C. § 6972, first seeking an injunction requiring EPA to act on that petition or, in the alternative, judicial review of EPA's constructive denial of the petition and EPA's constructive determination that New Union's hazardous waste program meets the criteria for approval despite the alleged facts. New Union filed an unopposed motion to intervene under FRCP Rule 24, which this court granted. The parties filed cross-motions for summary judgment, agreeing that the facts alleged by CARE were uncontested and no further facts were necessary to decide the matter. Unsure of its jurisdictional claims, CARE filed simultaneously with this complaint a petition for review with the Court of Appeals, C.A. No. 18-2010, seeking judicial review of EPA's constructive

denial and determination on the same grounds. New Union also filed an unopposed motion to intervene in that case, which the Court of Appeals granted. On EPA's motion, the Court of Appeals stayed that proceeding, pending the outcome of this action.

II. Factual Background:

When EPA approved New Union's hazardous waste program in 1986, EPA made a finding that the New Union DEP had adequate resources to fully administer and enforce the program, including issuance of permits in a timely fashion, inspecting RCR regulated facilities at least every other year, and taking enforcement actions against all significant violations. (R2, p. 1) EPA noted that with fewer resources the program might not be adequate. (R4, p. 16) At that time, the DEP reported in the application for approval of its program that there were 1,200 hazardous waste treatment, storage and disposal facilities (TSDs) in the state requiring permits under RCRA. (R1, p. 17) It further reported that at that time it had 50 full-time employees dedicated entirely to that program, including: 15 permit writers, 15 inspectors, 3 laboratory technicians, two lawyers and 15 administrators. (R1, p. 73) Since that time the number of TSDs in the state has grown, while the resources devoted to the program has shrunk. In its 2009 Annual Report to EPA, the DEP reported 1,500 TSDs (R5 for 2009, p. 23) and 30 full time employees, including: 7 permit writers, 7 inspectors, 2 laboratory technicians, 1 lawyer and 13 administrators. (R5 for 2009, p. 52) New Union's annual reports indicate that the increase in TSDs has been gradual since 1986, while most of the loss of employees has occurred since 2000. New Union's 2009 Annual Report to EPA attributed that decrease to the deterioration of the state's finances. (R5 for 2009, p. 50) New Union's 2009 Annual Report to EPA also indicates

that the decrease in the DEP's hazardous waste resources was no greater than 20% more than decreases in resources the state devotes to other public health regulatory programs. (R5 for 2009, p. 51) DEP's 2009 Annual Report to EPA also indicated that the Governor directed a freeze on hiring state employees, except for 25% of vacancies he has deemed critical to protection of civil order and that there are no DEP vacancies falling within that exception. (R5 for 2009, p. 53) The DEP's 2009 Annual Report to EPA also indicated that the Governor's Director of Budget has stated publicly that the freeze is likely to continue for at least the next two years and that lay-offs of between 5 and 10% of state employees is likely during that time. (R5 for 2009, p. 53) Newspaper accounts of his statement indicate he would concentrate resource cuts on discretionary programs and programs in which state employees performed functions that federal employees would otherwise perform. (R6, *New Union Bugle,* June 6, 2009)

DEP's shortage of resources has translated directly into less than robust implementation and enforcement of RCRA in the state. In its 2009 Annual Report to EPA, the DEP indicated that it had issued 125 RCRA permits during the previous year and anticipated issuing 125 during the present year. (R5 for 2009, p. 19) This accomplishment is against the background of a growing backlog of permit applications. The DEP's 2009 Annual Report to EPA indicated that some 900 TSDs had permits, but were continued by operation of law, some of them expired as long as 20 years ago. (R5 for 2009, p. 20) At the same time, the DEP reported that it had about 50 applications a year from new facilities or permitted facilities that wish to expand their operations but need an amended permit to do so. (R5 for 2009, p. 20) The DEP reported that its stated policy is "to prioritize permit issuance in the following order: new facilities; permitted

facilities seeking to expand operations; facilities with permits that expired fifteen or more years ago; and permitted facilities having the greatest potential for harm to the public health or environment because of the volume or toxicity of hazardous waste handled." (R5 for 2009, p. 20)

The DEP's 2009 Annual Report to EPA also indicated that it performed inspections of 150 TSDs during the previous year and expected to perform at the same level during the current year. (R5 for 2009, p. 22) Since it could not inspect more than 10% of the TSDs a year, the Report indicated that DEP solicited EPA to inspect a comparable number of facilities both years and that EPA did so last year and promised to do so in the present year. (R5 for 2009, p. 23) The DEP reported that its stated policy to prioritize inspections is "to give priority to inspecting facilities that have reported unpermitted releases of hazardous waste into the environment and to facilities reporting other 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." (R5 for 2009, p. 23)

The 2009 DEP Annual Report to EPA also indicates the DEP took six enforcement actions during the previous year; four were administrative orders requiring both compliance and the payment of penalties in amounts derived from EPA's penalty policy, and two were civil actions, requesting injunctions and the judicial assessment of penalties. (R5 for 2009, p. 25) EPA took the same number of comparable actions in the state and environmental groups filed 6 citizen suits in the state during the past year for violations of RCRA. (R5 for 2009, p. 26) The DEP reported there were 22 significant permit violations during the year and hundreds of minor violations. (R5 for 2009, p. 24)

In 2000, the New Union legislature enacted the 2000 Environmental Regulatory Adjustment Act (the "ERAA"), containing a number of amendments to existing environmental and other legislation, two of which are pertinent here. The first was an amendment to the Railroad Regulation Act (the "RRA"), which had established a New Union Railroad Commission charged with regulating intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards, all to the extent allowed by the Commerce Clause in the federal Constitution.

The Commission is a state agency and its Commissioners are state employees, one - the Chair - appointed by the Governor, one appointed by the State Senate, and one appointed by the State House of Representatives, serving staggered terms. The ERAA amended the RRA by transferring "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the Commission." Moreover, it removed criminal sanctions for violations of environmental statutes, by facilities falling under the jurisdiction of the Commission. (R5 for 2000, pp. 103-105) At the time of enactment, there was only one intrastate railroad in New Union, the New Union RR Co. The president of the New Union RR Co. was Nat Greenleaf, the twin brother of Luther Greenleaf, Majority Leader of the State Senate. (R6, *New Union Bugle*, Aug. 14, 2000)

The second pertinent provision was an amendment to the state hazardous waste program, as follows:

> Recognizing that Pollutant X is said by EPA and the World Health Organization to be among the most potent and toxic chemicals to public health and the environment; and
>
> Recognizing further that there are presently no treatment or disposal facilities in New Union designed and permitted to, or capable of, preventing

exposure of persons or the environment to releases of Pollutant X; and
Recognizing further that there are only nine treatment and disposal facilities in the country presently authorized by EPA under RCRA to treat or dispose of Pollutant X;

NOW, THEREFORE, the Hazardous Regulation Act is amended to include the following:

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. (R5 for 2000, pp. 105-107)

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). This court reviews questions of *law de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Therefore, this court must review the dismissal of C.A.R.E.'s request for constructive determination of EPA's decision *de novo*.

SUMMARY OF ARGUMENT

The district court erred when it determined that it did not have jurisdiction to order EPA to act on CARE's petition for revocation of EPA's authorization under RCRA § 7002(a)(2).

The district court erred when it determined that EPA approval or disapproval of New Union's program was an order rather than a rule making, it is not subject to petition under § 7004, which authorizes petitions only for promulgating, amending or revoking rules. CARE's cause of action against EPA to compel it to act on the petition is dismissed should not have been dismissed on summary judgment.

The district court erred when it determined that an exception to jurisdiction in the D.C. Circuit was time-barred from judicial review, pursuant to § 7006(a) & (b). CARE argues that many factors occurred since 1986 that have rendered New Union's hazardous waste program no longer approvable under RCRA. New Union's program is neither equivalent to nor consistent with the federal program or other authorized state programs. Therefore, EPA should revoke authorization to run the state program in lieu of the federal program.

ARGUMENT

I. RCRA § 7002(a)(2) provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004.

The language and scheme of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984, codified at 42 U.S.C. §§ 6901 et seq., (hereinafter RCRA or "the Act") clearly provide jurisdiction for district courts to order EPA to act on petitions for revocation of approval of state programs, particularly when read in conjunction with the relevant regulations.

RCRA § 7002(a)(2) provides for citizen suit "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act

which is not discretionary with the Administrator." 42 U.S.C. § 6972. A mandatory duty to "take action with respect to" petitions "for the promulgation, amendment, or repeal of any regulation under this Act…[w]ithin a reasonable time following receipt of such petition" is found in RCRA § 7004(a). 42 U.S.C. § 6974. Under the Act the EPA may grant authorization to states "to administer and enforce a hazardous waste program." 42 U.S.C. § 6926; *see also U.S. v. Power Engineering Company,* 303 F.3d 1232 (10th Cir. 2002) (explaining EPA's secondary role in authorized states). Authorization to states is clearly treated as rulemaking. Authorization is promulgated pursuant to the formal notice and comment rulemaking process, 42 U.S.C. § 6926(b), and is incorporated in the Code of Federal Regulations at 40 C.F.R. § 272.

§ 7004 only provides for petitions made with regard to "regulations," which may be read to mean only rules. Authorization to states under the Act may be interpreted to be a "permit" to the state, *see* 42 U.S.C. § 6926(d), "Effect of State Permit," and permits normally are treated as orders, not rules. *See* 5 U.S.C. § 551(6) & (8) ((6) defining an order to include licensing, and (8) defining a license to include "the whole or a part of an agency permit"). However, since "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator," 42 U.S.C. § 6926(d), authorization to states is also "an agency statement of general *or particular* applicability and future effect." 5 U.S.C. § 551(4) (defining "rule") (emphasis added). Authorization is also never clearly stated to be a "permit" under the Act, and the EPA has never treated authorization to states as a permit or order, but rather as a rule. The EPA follows notice and comment process as required by the Act at § 3006(b), and codifies such rules in the Code of Federal Regulations.

Further, even were authorization to states determined to be an order and not a rule, this does not prevent it from being considered a regulation under RCRA § 7004. Blacks Law Dictionary defines a regulation as "[a] rule *or order*, having legal force, usu. issued by an administrative agency." (9th ed. 2009) (emphasis added). Authorization to the states granted under the act has legal force, and considering that it is also "of general or particular applicability and future effect," there is special reason in this situation to interpret state authorization as fitting within "regulation" under § 7004. Further, considering the relevant interpretation in this case would be of the word "regulation" as used in the Act, the interpretation of EPA is entitled to deference under *Chevron*, or at least *Mead*. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

Finally, even if § 7004 were determined not to apply to create a mandatory duty on the part of the Administrator in and of itself, the regulations do create a mandatory duty. Agency regulations having the force of law may also create a mandatory duty. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004). 40 C.F.R. § 271.23(b)(1) states that "[t]he Administrator shall respond in writing to any petition to commence withdrawal proceedings." While "shall" does not always mean "shall," *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432-33 n.9 (1995), between the statute and the regulations it is quite clear that this is not a case involving "a text most interpreters have found far from clear." *Id*. at 434.

There is also no reason for RCRA § 7006(b) to exclude district court jurisdiction in this situation. § 7006(b), discussed in more detail in part 3 below, provides in part that "[a]ction of the Administrator with respect to which review could have been obtained

under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 6976(b). However, there is a critical distinction between the jurisdiction provided for in the citizen suit provision of § 7002(a)(2), and the judicial review provided for in § 7006(b). Essentially, the action under § 7002(a)(2) is for EPA's failure of it's mandatory duty to take action on or respond to the petition, while the action under § 7006(b) is for EPA's specific failure to review and withdraw authorization of New Union's state program. Therefore, because the action under § 7002(a)(2) is distinct from the action under § 7006(b), the exclusion provision in § 7006(b) does not apply.

II. 28 U.S.C. § 1331 also provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed under 5 U.S.C. § 553(e).

For the same reasons that RCRA § 7002(a)(2) provides jurisdiction for district courts, 28 U.S.C. § 1331 provides jurisdiction for review of APA's constructive denial of CARE's right under 5 U.S.C. 553(e) to petition for rulemaking. Additionally, RCRA § 7004 does not preclude an action under 5 U.S.C. § 553(e), but rather works in conjunction with it.

RCRA § 7004(a) and 40 C.F.R. § 271.23(b)(1) work together to ostensibly provide the rights required under 5 U.S.C. § 553(e). That is to say, they provide for the right to petition for amendment of the rules granting New Union authorization to operate a state program under RCRA. Additionally, RCRA 7004(a) requires action on the part of the Administrator "[w]ithin a reasonable time," and 40 C.F.R. § 271.23(b)(1) provides for at least a loose timeline, including provisions requiring state response to allegations within 30 days after the Administrator makes known the allegations against a state. The

Act and regulations therefore work concomitantly to provide procedures by which the rights required under § 553(e) may be realized.

However, when, as in this situation, an agency fails to actualize a scheme laid out an enabling act and regulations to provide the right of "an interested person . . . to petition for the issuance, amendment, or repeal of a rule," there is not only a violation of the act and regulations, but also of the separate provision in § 553(e) of the right to petition.

In this case, when EPA failed to follow the requirements of § 7004 and 40 C.F.R. § 271.23(b)(1) to respond within a reasonable time, they not only violated those provisions, but also denied CARE a right guaranteed under 5 U.S.C. § 553(e), a right to petition the agency for a needed change.

III. EPA's failure to act on CARE's petition for proceedings to consider withdrawal of approval of New Union's hazardous waste program under RCRA § 3006(e) constituted and constructive denial of that petition and a constructive determination that New Union's program continued to meet RCRA's criteria for program approval, both subject to judicial review under RCRA § 7006(b) as well as § 7002(a)(2).

While there is no clear line at which EPA's failure to act on CARE's petition became a constructive denial of that petition, and therefore a constructive determination that New Union's program continued to meet the requirements for authorization, it is clear that EPA's failure to even respond in the nearly one year after the petition was filed before these actions were brought by CARE is arbitrary and unreasonable, and therefore constitute a constructive denial of the petition.

It has been held that a constructive denial of a petition may be found where it is found that an "agency has a duty to act and that it has 'unreasonably delayed' in discharging that duty." *In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 418

(D.C. Cir. 2004). *See also Consolidation Coal Co. v. Donovan*, 656 F.2d 910, 916 (3d Cir. 1981) ("There is no indication that . . . deferral of a final decision on the petition [was] unreasonably or arbitrary," and therefore finding no constructive denial).

Those two cases may provide the guideposts, perhaps, for what is and is not a constructive denial of a petition. In *American Rivers*, an agency delay of over six years, with no response to a petition, was found clearly to constitute a constructive denial of that petition. *American Rivers*, 372 F.3d at 51. Further, the court there found that "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." *Id*. at 51. In *Consolidation Coal*, on the other hand, the court found no constructive denial where the agency was "still examining" the petition, and further had "communicated by letter with" petitioner. *Consolidation Coal*, 656 F.2d at 916.

In the current case there is no indication that EPA is still considering CARE's petition, and EPA has taken no action on the petition. Far from having responded to, or asking for more materials from CARE, or indicating that it is "still examining" the petition, the EPA has given no indication that it has ever or will ever consider the petition as required. It is clear that the EPA has for all intents and purposes denied CARE's petition.

Additionally, EPA's constructive denial of CARE's petition also amounts to a constructive determination on that petition that New Union's program continues to meet the requirements of authorization.

RCRA § 7006(b) provides that "[r]eview of the Administrator's actions . . . (2) in granting, denying, or withdrawing authorization or interim authorization under section 3006 may be had by any interested person in the Circuit Court of Appeals of the United

States for the Federal judicial district in which such person resides . . . ." 40 C.F.R. § 271.23(b)(1) provides that "The Administrator may order the commencement of withdrawal proceedings . . . in response to a petition from an interested person alleging failure of the state to comply with the requirements of this part as set forth in § 271.22. The Administrator shall respond in writing to any petition to commence withdrawal proceedings." The operation of § 7006(b) and the regulation implementing it in part in conjunction makes it clear that if the response of the Administrator is a denial of a petition, it also constitutes a determination that the state is still in compliance with the requirements of § 271.22, which should then be reviewable under § 7006(b) as the equivalent of a continuing grant of authorization. *Cf. Calif. Energy Comm'n v. Dep't of Energy*, 585 F. 3d 1143 (9th Cir. 2009) ("statutes authorizing review of specified agency actions should be construed to allow review of agency actions which are functionally similar or tantamount to those specified actions." (quoting *Thermalkem, Inc. v. EPA*, 25 F.3d 1233 (3d Cir. 1987), internal quotes omitted)). It should be no less clear, then, that a constructive denial of a petition amounts to a constructive determination of the same. Further, the time bar of § 7006(b) does not operate to bar review in the present action. While § 7006(b) normally requires "application [for review] shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal." It further clearly provides that review may be had "after such date only if such application is based solely on grounds which arose after such ninetieth day." Much case law has made clear that "when changed circumstances have allegedly deprived regulations of their factual foundation and have thereby brought them into conflict with . . . legislation." *Natural Res. Def. Council v. NRC*, 666 F.2d 595 (D.C. Cir. 1981). Certain

Circuits have found exceptions to explicit time bars in other situations as well. *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 324 (D.C. Cir. 1994) (substantive challenges outside of time limit may be heard); *NLRB Union v. FLRA*, 834 F.2d 191 (D.C. Cir. 1987) (providing for narrow review of substantive issues other than lack of statutory authority in limited circumstances, and wider review of a claim of conflict with a statute); *Louisiana Envt'l. Action Network v. Browner*, 87 F.3d 1379 (D.C. Cir. 1995) & *Baltimore Gas & Elec. Co. v. ICC*, 672 F.2d 146 (D.C. Cir. 1982) (providing that time limitations may only run against ripe claims).

There is no provision in the exception to the time bar explicitly requiring application for review based on new grounds to be made within any specific amount of time at all. For this reason CARE's application is not time-barred. However, if it were to be read in that application must be made within ninety days such new information comes to light, it is still clear that CARE's application is still not time-barred. First, there is no clear line at which it could be said the statute began to run again. The increase in TSDs has been gradual over a number of years. Rec. Doc. 4 for 2009, p. 50. Additionally, while the elimination of oversight employees has mostly occurred since 2000, *id*., this is still quite a span of time, over which it would be impossible to determine when the statute should be said to begin to run. Also, it would be impossible to determine when EPA could be said to have made its constructive determination that New Union's program continues to meet statutory requirements. Finally, under the mandatory language of § 3006(e), requiring the Administrator to withdraw authorization of a state program which continues to fail to operate in accordance with the requirements of that section, the time limit could

be said to begin running again each day New Union fails to bring its program into compliance.

IV. If this court finds that it has jurisdiction pursuant RCRA § 7006(b) due to EPA's constructive denial of CARE's petition, or EPA's constructive determination that New Union's program continued to meet RCRA's criteria for program approval, and also finds jurisdiction was proper in the district courts pursuant to RCRA § 7002(a)(2) or 28 U.S.C. § 1331, it should nonetheless lift its stay and proceed with judicial review.

If jurisdiction is found to be appropriate in either the district court or this court, there is no reason why this court should not prevent further delay and simply lift its stay on decision in order to promote judicial economy and efficiency.

The Ninth Circuit has stated that while "[i]t is true that review of agency action is typically located in the district courts," under a statutory scheme where some matters are clearly designated for original jurisdiction in circuit courts, and other matters for original jurisdiction in district courts, where a matter is not clearly designated for either "considerations of efficiency, consistency with the congressional scheme, and judicial economy may be employed to determine whether initial review in the circuit courts best accomplishes the intent of Congress." *Cal. Energy Comm'n v, Dep't of Energy*, 585 F.3d 1143, 1148 (9th Cir. 2009).

Similar to that case, the two issues involved here are intertwined. *Id*. Also similar to that case, this case falls into that class where additional fact-finding, in which a district court decision would be useful, is not required. *Id*. at 1149. Additionally, considering the practicalities of the situation, in that many of the defenses to jurisdiction and the issues involved intertwine statutes granting contradictory jurisdiction, it would be easier to settle all issues at once in a single court, rather than continuing a semi-artificial

bifurcation. This would also prevent the need for remand, and later appeals based on that decision, thereby promoting efficiency and economy.

V. EPA must withdraw its approval of New Union's program, because the state program falls so short of RCRA criteria as to no longer be "in lieu of" the federal program and is contrary to congressional intent behind RCRA.

RCRA is a complicated statutory scheme, but the provisions governing delegation of hazardous waste disposal to the States are straight-forward. Subtitle C of RCRA, §§ 6921-6939(b), regulates hazardous waste and requires the EPA to promulgate regulations to govern the treatment, storage and disposal of such waste. *Envt'l Def. Fund v. EPA*, 852 F.2d 1309, 1310 (D.C. Cir. 1988). "RCRA is a comprehensive statute that empowers EPA to regulate hazardous waste from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C." *City of Chi. v. Envt'l Defense Fund*, 511 U.S. 328, 331(1994).

Section 6926 relates to the authorization of state hazardous waste programs. Through this section, states are authorized to carry out their own hazardous waste program in lieu of the federal program under Subtitle C of RCRA, if they demonstrate to the EPA that the state program is equivalent to the federal program, consistent with the federal and state programs applicable in other states, and provides adequate enforcement of compliance with the requirements of Subtitle C. *See* 42 U.S.C. § 6926(b). In essence, this section seeks to implement the "federal-state partnership" for managing hazardous waste that constitutes one of the objectives of RCRA. *See* 42 U.S.C. § 6902(a)(7).

States are not precluded from, and are in fact encouraged to, create more stringent criteria than the requirements of Subtitle C. However, Subtitle C requirements are the minimum that a state needs to comply with in order to have its own program. *See* 42 U.S.C.A. §

6929. This is because RCRA's primary purpose is to reduce the generation of hazardous waste and insure 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" *Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996)*. Once the state gains authorization to run its own program, EPA cedes enforcement control of the state. However, the Tenth Circuit held that notwithstanding the invitation in RCRA § 6929 for states and political subdivisions to adopt their own hazardous waste regulations, authorized state programs do not pre-empt EPA enforcement. *Blue Cir. Cement, Inc. v. Bd. of County Commr's*, 27 F.3d 1499, 1506 (10th Cir. 1994). A state law may be said to conflict with federal law in two situations: (1) when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and (2) when compliance with both federal and state regulations is a physical impossibility, the Agency tasked with ensuring compliance may withdraw their original approval. EPA may even override the more stringent state programs when certain provisions "imperil" RCRA goals. *Id.*

If that reasoning applies to statutes meant to be more restrictive than RCRA requirements, then it must it apply with equal, if not greater force, to statutes that fall short of these requirements. In the case *sub judice*, New Union is both unable to meet its own environmental obligations under its state statute and appears unwilling to do so, as evidenced by the passage of the 2000 statute that effectively nullifies certain RCRA requirements. Therefore, EPA must withdraw its original authorization pursuant to § 6926(e).

Federal preemption applies because New Union's program, as amended by the

2000 statute, stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and compliance with both RCRA and the state statute is a physical impossibility. RCRA was enacted to respond to the growing public concern about the disposal of solid and hazardous waste. The 1976 statute authorized Environmental Protection Agency to create national standards for the storage and disposal of hazardous waste materials. Congress did not leave it there. Concerned that EPA and the states would be slow to respond, it added a number of provisions deal with specific hazardous waste problems because it believed that EPA and the various states were not moving fast enough to create workable disposal guidelines. [cite]

EPA approved DEP, New Union's hazardous waste program, in 1986, after a finding that DEP had "adequate resources to fully administer and enforce the program." (R2, p. 1). However, EPA noted that with less resources "the program might not be adequate." (R3, p. 16). In its 1986 application for approval of DEP, New Union reported that there were 1,200 hazardous waste treatment, storage, and disposal facilities (TSDs) that required permits under RCRA. (R1, p.17). DEP allotted 50 employees dedicated solely to the program. (R1, p.73). It had 15 permit writers, 15 inspectors, 15 administrators, three laboratory technicians, and two lawyers. (R1, p. 73) The number of TSDs has progressively grown over 20 years, as has the number of facilities with expired permits. *Id.* Meanwhile, the number of employees has declined steadily since 2000**.** (R5 for 2009, p. 23) In its 2009 report, DEP stated that New Union now had 1500 TSDs and only 30 employees[1] dedicated solely to the program. (R5 for 2009, p. 23) It further reported that the Governor was issuing pay freezes, which would last two years and could

[1] 7 permit writers, 7 inspectors, 13 administrators, 2 laboratory technicians, and 1 lawyer. (R5 for 2009, p. 23).

potentially be followed by a reduction in state jobs. (R5 for 2009, p. 50-53) The only exempt jobs were ones deemed “critical” by the Governor. (R5 for 2009, p. 51) None of the DEP positions fell under the exception. *Id.*

The numbers are incontrovertible. In 1986, the ratio of TSDs to people charged with permitting was 24 to 1. In 2009, the ratio was 50 to 1, more than double what it was when EPA made the determination that DEP was a "sufficient" substitute for the federal program. Between EPA's own admonishment in 1986 that the problem would be inadequate with less resources and DEP's admission in the 2009 of a two year hiring freeze on all state , it is impossible for EPA to argue with a straight face that New Union DEP still meets RCRA criteria. The raw numbers in New Union’s report imply it to be a mathematical impossibility, considering the rising numbers both facilities seeking permits and those with expired permits, and the cutbacks in staff.

Further, allowing the program to continue runs contrary to Congress’ stated objective of seeking, through RCRA, to regulate land disposal facilities “so as to minimize the present and future threat to human health and the environment”. 42 U.S.C. §6902(a)(3)-(7). DEB's inadequate resources make RCRA's objective to establish a "viable Federal-State partnership" empirically almost impossible in New Union. *Id.* at § 6902(a)(7). The state program has not been viable for a number of years and shows no sign of becoming viable in the near future. In fact, DEP has already resorted to asking for EPA's assistance in inspecting TDSs for 2009 and 2010 because it did not have the resources for inspection of more than 10% of the facilities.

Furthermore, in 2000, the New Union legislature enacted the 2000 Environmental Regulatory Adjustment Act (ERAA), which amended the Railroad Regulation Act to

transfer "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the Commission." Therefore, it rendered DEP toothless by removing its mission to act "in lieu of" RCRA and because DEP could no longer be run "in accordance with" 40 C.F.R. § 271.1. Moreover, it removed criminal sanctions for violations in environmental statutes in direct contradiction of the federal statute which provide for criminal penalties. §§ 3008 (c), (e). Because RCRA "envisaged that . . . enforcement activities are [to be] performed by the states," (*Hazardous Waste Treatment Council v. S.C.*, 766 F. Supp. 431, 438 (D.S.C. 1991)) New Union abdicated its enforcement responsibilities when it revoked criminal penalties. It also put the state and federal statutes in direct conflict. The latter issue alone triggers federal preemption.

Finally, any remedy other than withdrawal of authorization would be insufficient and contrary to the intent of Congress. Congress tasked EPA with the responsibility of ensuring authorization in order to ensure that the specific requirement of § 6926 have been met to make state programs "fully part of an integrated national program to control hazardous waste." *See* 24 U.S.C. § 6926(b); *see also Hazardous Waste Treatment Council*, 766 F. Supp. at 438. Because DEP no longer meets RCRA requirements, it is outside the "national program to control hazardous waste." Therefore, EPA is statutorily required to withdraw authorization of New Union's program, and take over its responsibilities for ensuring compliance with RCRA.

EPA's argument that it has discretion to resort to action other than withdrawing approval is disingenuous. It may pursue less aggressive means if the state has shown a sincere attempt to take appropriate corrective action within "a reasonable period of time."

Section 6926(e), 40 C.F.R. § 271.23(b)(1). There is no evidence that New Union has attempted or is even capable of "appropriate corrective action," considering the facts stated in its 2009 report. Further, EPA was on notice that DEP was failing in its responsibilities when it agreed to help permit TSDs in New Union.

RCRA's objectives of public safety have not flagged, as evidenced by the revision to 40 C.F.R. §271 that implement changes in trans-national movements of hazardous waste. 75 FR 1236-01. If the Act was expanded to add further restrictions on international hazard waste exports, it stands to reason that legislature remains just as concerned about the "imminent and substantial endangerment to health or the environment" of hazardous waste *inside* the United States. *Lefebvre v. Central Maine Power Co.*, 7 F. Supp. 2d 64 (D. Me. 1998).

The entire rationale for creation of a federal program was to ensure national uniformity, promote standards and overcome "stubborn local particularism."[2] To that end, RCRA authorizes citizen suits to ensure compliance with federal criteria, but the chief responsibility for enforcement of RCRA remains with EPA. *Otay Land Co. v. U.E. Ltd., L.P.*, 440 F. Supp. 2d 1152 (S.D. Cal. 2006). Even *Harmon* decision interpreted § 3006(e) to be the remedy Congress intended for EPA to use where a state is either "not administering and enforcing the program" according to criteria that complies with or exceeds RCRA criteria. *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999). The only thing EPA is statutorily required to do before it revokes authorization is provide notice to the state in violation of RCRA.

24 U.S.C. § 6928(a)(1)-(2). While not mandated to do so, only EPA's only viable is the

[2] *See* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1141-47, 1171 (1995).

revocation of authorization of New Union's program, as any other remedies would be too little too late.

VI. EPA must withdraw wither full or partial approval of New Union's program because ERAA effectively withdraws hazardous facilities from regulation.

When EPA grants authorization for a state program in lieu of RCRA, the state becomes the primary administrator and enforcer of the statutory provisions. § 6926. However, there is no evidence that Congress intended to revoke EPA's power of enforcement under *section* 3013, even when a state program is in effect. *Wyckoff Co. v. Envt'l Prot. Agency*, 796 F.2d 1197, 1199 (9th Cir. 1986). On the contrary, § 6926(e) unambiguously states the following:

> 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 the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter.

The court in *Harmon* looked to both statutory language and congressional intent to reinforce that EPA's enforcement responsibilities did not seize even though they were delegated to the state program, citing the House Report which stated that it is "the Committee's intention that the [s]tates are to have primary enforcement authority and if at any time a state wishes to take over the hazardous waste program it is permitted to do so, provided that the [s]tate laws meet the [f]ederal, minimum requirements for both administering and enforcing the law"). *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 901 (8th Cir. 1999) (citing to H.R. 1491, 94th Cong., at 24, reprinted in 1976

U.S.C.C.A.N. 6262). The court further cited that the House Report stated the following: that although the "legislation permits the state to take the lead in the enforcement of the hazardous wastes [sic] laws...the Administrator [of the EPA] is not prohibited from action 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..." *Id.* Other case law remains consistent on this point: "[w]here a state program is in effect, EPA retains certain oversight and enforcement powers, including the power to withdraw authorization if the state program fails to comply with the federal requirements." *State of Washington, Dept. of Ecology v. U.S.E.P.A.*, 752 F.2d 1465, 1467 (9th Cir. 1985). Thus, pursuant to both statute and case law, EPA has discretion to revoke authorization for the entire state program or parts of it.

EPA and New Union argue that New Union's present failure to regulate railroad hazardous waste facilities does not require EPA to withdraw its approval of the entire program. While this argument would have merit if DEP showed vigorous enforcement of its other provisions, the facts show otherwise. In addition to its inadequate handling of the non-railroad hazardous waste facilities, New Union showed bad faith when it removed administration and enforcement from DEP and statutorily transferred them to the Commission. Further, the legislative action evoked the specter of nepotism and corruption. At the time of enactment, there was only one intrastate railroad in New Union, the New Union RR Co. Its president of the New Union RR Co. was Nat Greenleaf, the twin brother of Luther Greenleaf, Majority Leader of the State Senate. (R6 *New Union Bugle,* Aug. 14, 2000).

New Union's actions are precisely the kind of parochialism and protectionism that resulted in the passage of the RCRA. Therefore, ERRA is both counter to congressional intent behind the passage of RCRA an it is attempt to avoid complying with RCRA criteria and deserves full revocation of authorization under the terms set out in § 3008. Statutory interpretation is further evidence that that nothing prevents the EPA from exercising that option. The only congressional limit on EPA's enforcement authority under RCRA is the "notice" requirement. *See* 42 U.S.C. §6928. No other requirements are listed. Further, U.S. Supreme Court decisions has articulated that the clearest congressional intent can be best discerned via the enforcement provisions, invoking the maxim that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (quoting *United States* v. *Wong Kim Bo*, 472 F. 2d 720, 722 (5th Cir. 1972)).[3]

Traditionally, the word "shall" indicates an imperative command. Thus, the "shall" in § 3006(e) supports this assertion. If the preliminary requirement of notice is met and the state has not taken "appropriate corrective action" within "a reasonable time, not to exceed ninety days," the Administrator of the EPA "*shall* withdraw" authorization. *Id.* (emphasis added). The language does not indicate whether it means partially or fully, thus to leaving it to the discretion of the Administrator which means that the decision will hinge on specific facts. The facts in this situation advocate strongly for revoking the state program and substituting the federal program in its stead, because the state has failed to

[3] For examples of this reasoning, see *Clay v. United States,* 537 U.S. 522 (2003), *Rodriguez v. United States,* 480 U.S. 522 (1987).

meet its part of the federal-state partnership that is one of RCRA's objectives.

Finally, when RCRA allows for the delegation of federal power to state agencies by the EPA. *see* 42 U.S.C. § § 6901-6992k, it is with the intent that the state agency will uphold the policies and interests of the EPA. In effect, the state agency acts as an agent of the EPA. *Id.* Thus, the delegation of power by the EPA to the state presupposes analogous interests between both agencies. *See* 42 U.S.C. § 6926(b); *see also* 42 U.S.C. § 6926(d). If the interests become dissimilar, the EPA is authorized under RCRA to simply revoke the delegated power. *Id.* at §§ 6926(b), (e).

Congress enacted RCRA to protect national health and environment. ERRA negated that purpose by obliterating DEP's role as an agent of the EPA, when New Union by switched hazardous railroad waste to the oversight of the Commission. Additionally, it directly contradicted the enforcement function of the EPA by removing criminal sanctions.

The delegation of § 6912(a) powers[4] to the state means that the state acts as EPA's agent in administering these regulations. 42 U.S.C. § 6912(a). The actions of New Union legislature have vividly demonstrated that its goals and the goals of the EPA are not the same. ERRA also carries with it implication of corruption and closeness between states and the companies that fuel their economies. This is precisely the kind of state conduct that brought RCRA into being and the reason RCRA provides a safeguard against this eventuality via EPA’s authority to police what the states are doing. New Union clearly has not complied with federal criteria and has in fact taken affirmative steps to nullify RCRA requirements in its jurisdiction. Because the "in lieu of" language was not intended to allow EPA to abdicate its responsibilities of ensuring public health and safety,

[4] RCRA confers on the EPA Administrator broad powers to regulate the storage, treatment, transportation, and disposal of potentially hazardous materials.

EPA is statutorily bound to maintain oversight over state programs.

RCRA also grants EPA other enforcement means in pursuing the objective of federal-state cooperation. However, federalism and comity are a delicate balance even when both the state and federal agency are singing from the same hymnal. While EPA is not precluded from negating a part, rather than all of, the delegated powers, the simplest possible solution for both the federal government, New Union, and its citizens is to revoke delegation altogether and return to federal enforcement of RCRA. It is also most consistent with Congressional intent behind passing RCRA.

As such, EPA cannot demur from its enforcement responsibility. Its argument that ERRA's withdrawal of railroad hazardous waste facilities from under the aegis of DEP does not necessitate full revocation is casuistry at best. Management of hazardous waste is at the heart of RCRA. Congress authorized EPA in ensuring the objectives of RCRA. Furthermore, in 1992 Congress re-iterated its dedication to RCRA objectives when it passed Federal Facility Compliance Ace (FFCA) to clearly and unambiguously expand EPA and state agency power to in order to bring federal agencies into compliance with RCRA. Clearly, Congress intends for the EPA to be vigilant in enforcing the provisions of RCRA.

RCRA came into being as a response to citizens' concerns about environmental protection. Prior to 1970s, federal environmental protection was "either non-existent, not oriented to environmental protection, or lacking federal enforcement authority and entirely state deferential." Even though the Act encourages cooperative federalism, Congress provided EPA oversight of state implementation because the main purpose behind RCRA is effective enforcement. Effective enforcement lies at the very heart of

RCRA. To insure against the possibility that federal or state authorities would not fully enforce against statutory violations, Congress added a third enforcement cadre - the citizen suit provision. 42 U.S.C. § 7002.

EPA's Hazardous Waste Enforcement Policy states that the goal of RCRA is "to attain and maintain a high rate of compliance within the regulated community." (p.2) 7002 allows for suits against the EPA for failing to perform a duty mandates by statute, because EPA is ultimately in charge of RCRA enforcement mechanisms.

New Union's argument against full revocation is entirely self-serving. While most "authorized states" have more stringent criteria than required by RCRA, data from New Union shows the state is not able to meet the minimum RCRA requirements, has been unable to "maintain a high rate of compliance" for two decades, and has taken actual affirmative steps to avoid enforcing RCRA criteria. The state, itself a violator, tried to hide behind tits delegation powers in order to preserve its autonomy to protect local business interest against hazardous waste disposal requirements. New Union has a vested interest in getting the most lenient possible interpretation because it cannot expand the funds to bring DEB into compliance with RCRA. It is provincialism, cloaked in the guise of federalism.

New Union has shirked its responsibilities as an agent of the EPA. Therefore, EPA must perform its statutory duty to ensure compliance. Because "[i]n any regulatory program involving Federal and State participation, the allocation of or division of enforcement responsibilities is difficult[,]"[5]the most effective way for EPA to honor congressional

[5] Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions*, 28 Harv. Envtl. L. Rev. 401, 407 (2004).

intent and ensure RCRA objectives is to commence full revocation proceedings under 42 U.S.C. § 3008.

VII. EPA must withdraw its approval of New Union's program because ERRA renders the state program to both not equivalent to and inconsistent with the federal program, as well as other approved state programs.

RCRA authorized EPA to create national standards for storage and disposal of hazardous waste materials and created the mechanism for a "viable Federal-State partnership" to implement its purpose. *See* 42 U.S.C. § 6902. RCRA criteria serve as minimum requirement for the states. *Id.* at § 6929. States are generally empowered to adopt more strict regulations regarding hazardous waste. *See id.* States that have been "authorized" to carry out their own hazardous waste programs "in lieu of" federal programs become the sole permitting authority for the storage, treatment, or disposal of hazardous waste within that state. *Id.* at § 6925(b). At present, eighty percent of the states are "authorized states" under 40 CFR § 272.2201.

EPA is vested with the power to place substances on the list of hazardous waste subject to RCRA's provisions. *See* 42 U.S.C. § 6921(e)(1). Thus, the provisions of RCRA governing "hazardous waste" set out the floor for state safety standards. Section 40 CFR 271.1(j) requires mandatory compliance with all regulations and statutory provisions governing Hazardous and Solid Waste Amendments.

Pollutant X has been identified by EPA to be one of the most potent chemicals dangerous to public health and environment. Standards for treatment, storage, and disposal of hazardous waste are set out in 42 U.S.C.A. §§ 6921-6939. The amendment to New Union Hazardous Waste Statute is inconsistent with federal regulatory criteria, as articulated in 40 CFR § 272 and HSWA provisions at RCRA § 3001(c), (g), and (h) which modify or

clarify EPA's authority for regulating specific hazardous waste characteristics. Notably, it does not provide for either treatment or disposal of Pollutant X. Because it fails to lay out two out of the three responsibilities delegated to it by EPA, the New Union hazardous waste program as amended in 2000 is neither equivalent to or consistent with federal provisions. It is an inadequate substitute for RCRA because it cannot administer hazardous waste "from cradle to grave." Therefore, EPA must revoke the previous authorization permitting the regulation to function in lieu of the federal program.

ERRA is also not equivalent to or consistent with other state programs. Most states have more stringent criteria than the requirements of Subtitle C. Those that do not, comply with the minimum Section C criteria, required for a state have its own program. *See* 42 U.S.C.A. § 6929. By comparison to other state statutes [6], ERRA does not even meet the minimum requirements.

Therefore New Union's program is also inadequate when compared to other "authorized states." Therefore, because the ERRA is not equivalent to or consistent with the federal program and other approved state programs, EPA must withdraw its approval of New Union's program.

CONCLUSION

Pursuant to its jurisdiction under § 7002, this court should find that that EPA approval of New Union's program was rule-making rather than an order and thus subject to petition under §7004. This court should also find that the action is not time-barred from judicial

[6] See among others California (Cal Health & Saf Code § 25135.9), Minnesotta (Minn. Stat. § 115A.96), Pennsylvania (35 P.S. § 6020.90), Texas (Tex. Health & Safety Code § 361.136 (2010))

review under § 7006(a) & (b). Finally, this court should find that EPA must fully revoke New Union's authorization to run the state program in lieu of the federal program because New Union's program is neither equivalent to nor consistent with the federal program or other authorized state programs. Ordering EPA to commence proceedings to consider withdrawing approval of New Union's program is not necessary, since EPA has been confronted with egregious evidence of the inadequacy of New Union's program for almost a decade and chose to delay taking action.