Team 19

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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT,
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 RESPONDENT - APPELLEE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union had jurisdiction over this case pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992(k) (2010). Federal district courts of appeals have jurisdiction over timely appeals from United States district court decisions. 28 U.S.C. § 1291 (2006). This is a timely appeal from the decision of the United States District Court for the District of New Union and therefore this Court has jurisdiction.

ISSUES PRESENTED FOR REVIEW

I. Whether 42 U.S.C. § 6972(a)(2) provides jurisdiction for district courts to order the EPA to act on CARE's petition for revocation of the EPA's approval of New Union's hazardous waste program, filed pursuant to 42 U.S.C. § 6974.

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

III. Whether the EPA's delay in acting upon CARE's petition constituted a constructive action subject to judicial review under 42 U.S.C. §§ 6972(a)(2) and 6976(b) allowing this Court to lift the stay in C.A. No. 18-2010 and proceed with judicial review of the constructive action or remand the case to the lower court to order the EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program.

IV. Assuming this Court proceeds to the merits of CARE's challenge, must the EPA withdraw its approval of New Union's program because New Union's resources and performance fail to meet RCRA's approval criteria.

V. Assuming this Court proceeds to the merits of CARE's challenge, must the 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.

VI. Assuming this Court proceeds to the merits of CARE's challenge, must the EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act renders New Union's program unequivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause.

STANDARD OF REVIEW

Issues relating to summary judgment are reviewed *de novo*. Wark v. United States, 269 F.3d 1185, 1187 (10th Cir. 2001). A district court's interpretation of federal statutes is also reviewed *de novo*. Parola v. Weinberger, 848 F.2d 956, 958 (9th Cir. 1988). However, a court does not have the power to substitute its judgment over that of an agency's. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). If this Court decides to proceed on the merits of CARE's challenge, the Court may set aside the Agency's actions only if it finds that the actions were arbitrary, capricious, or manifestly contrary to the statute." Id. at 844; see also 5 U.S.C. § 706(2)(A) (2006).

SUMMARY OF THE CASE

The State of New Union is authorized by the Environmental Protection Agency ("EPA" or "Agency") to administer and enforce a hazardous waste management program in lieu of the federal program under subtitle C of the RCRA, 42 U.S.C. § 6921 et seq. (2010), subject to the Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, 98 Stat 3221 (1984), and 42 U.S.C. § 6926(c) and (g) (2006). New Union applied for authorization of its hazardous waste program ("HWP") in 1984. R. at 1. The EPA's approval of New Union's program was effective in 1986. R. at 3. Due to a decline in the economy, the New Union Department of Environmental Protection ("DEP") reported in its 2009 Annual Report, a forty percent decline in its full-time employees. R. at 10. Additionally, since New Union received its authorization, the number of treatment, storage, and disposal facilities ("TSDs") in New Union increased by twenty percent. R. at 10. Despite the decline, the DEP is continuing to issue permits and inspect facilities. R. at 10-11. A reduced work force has translated into a decrease in the amount of inspections and

enforcement actions, but the EPA is assisting New Union during this period of decreased resources. R. at 11.

In 2000, New Union's legislature enacted the Environmental Regulatory Adjustment Act ("ERAA"), which contains two amendments pertinent to New Union's environmental regulations. R. at 11. The first of these amendments modified the Railroad Regulation Act ("RRA") and created the New Union Railroad Commission ("Commission"). R. at 12. The purpose of the Commission was to regulate matters involving New Union's railroad system, which only included one intrastate railroad at the time of the amendment. R. at 12. The RRA amendment delegated the Commission with the authority of environmental regulating, permitting, inspection, and enforcement of railroad hazardous waste facilities. R. at 12. However, the DEP remained the lead state agency with respect to all other environmental matters and issuing annual reports to the EPA. R. at 10-12. The amendment also "removed criminal sanctions for violations of environmental statutes, by facilities falling under the jurisdiction of the Commission." R. at 12.

The second pertinent amendment involved New Union's treatment of Pollutant X ("Pol. X"). R. at 12. Pol. X is a listed substance under 42 U.S.C. § 261 (2010), and the New Union Legislature enacted this amendment because of Pol. X's potency and toxicity. R. Attach. at Q&A #19; R. at 12. The Legislature recognized there were only nine TSDs in the country authorized to treat or dispose of Pol. X, none of which are located in New Union. R. at 12. The amendment contained three requirements involving Pol. X. R. at 12. First, facilities generating Pol. X had to create a reduction plan to ultimately reach a point where Pol. X is no longer generated. R. at 12. Second, permits involving Pol. X were only issued to those facilities to store Pol. X for 120 days prior to transportation to an out of state TSD. R. at 12. Third, vehicles

transporting Pol. X to an out of state TSD were permitted to stop only for emergencies and refueling. R. at 12.

On January 5, 2009, Citizen Advocates for Regulation and the Environment, Inc. ("CARE"), a non-profit organization, petitioned the EPA to commence withdrawal proceedings on New Union's HWP. R. at 4. CARE filed this action on January 4, 2010, in the United States District Court for the District of New Union and a duplicate action in this Court was stayed, pending the outcome of this case. R. at 4-5. CARE alleges the EPA's delay in responding to its petition is either a constructive denial of the petition or a constructive approval of New Union's HWP. R. at 2. Further, CARE alleges New Union's HWP no longer meets the EPA's approval criteria for HWPs and should be withdrawn. R. at 2. The United States District Court for the District of New Union found CARE lacked jurisdiction to bring suit under either 42 U.S.C. § 6926 or 5 U.S.C. § 553 (2009).

SUMMARY OF THE ARGUMENT

Congress authorized the EPA as the federal agency in charge of administering and enforcing the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. §§ 6901-6992(k)). Congress enacted the RCRA to address the national problem of hazardous waste disposal. Specifically, Congress' intent in enacting the RCRA was to (i) facilitate the safe management of hazardous waste in order to protect human health; (ii) keep the environment from dangerous hazardous waste; and (iii) encourage conservation and recovery of natural resources.

State HWP authorization allows the EPA and the states to share the responsibility of accomplishing national environmental goals. Under the RCRA, the EPA has the authority to use the rulemaking process to authorize state HWPs to operate in lieu of the federal

HWP. After notice and comment proceedings, the Administrator of the EPA shall authorize a state's HWP as long as it is (i) equivalent to the RCRA, (ii) consistent with the RCRA and other state HWPs, and (iii) provides adequate enforcement of the RCRA. The EPA also allows a set time period for interested persons to petition the EPA for repeal or withdrawal of a HWP.

Once the EPA receives a petition, it has a reasonable time to investigate and respond to the petition. The investigation into such a drastic measure as withdrawing a state's HWP can be a lengthy process but unless it takes longer than two years, a court should find it reasonable. While the EPA is reviewing a petition and investigating allegations, judicial review is unavailable, because there is no final agency action to review. Additionally, any amendments to an authorized state HWP must also meet the equivalency and consistency requirements of the RCRA.

States with authorized HWPs act for the EPA. Nevertheless, the federal government may enforce an authorized state HWP and criminally prosecute violators of hazardous waste regulations. However, the EPA is without authority to enforce regulations more stringent than those of the RCRA.

ARGUMENT

I. THE APPROVAL OF NEW UNION'S PROGRAM IS A RULE AND NOT AN ORDER THEREBY MAKING 42 U.S.C. § 6974 THE GOVERNING PROVISION AND PROVIDING CARE WITH JURISDICTION.

The HWP is general in nature, and the EPA has authorized the program pursuant to the rulemaking process. Thus, the lower court erred when it decided the EPA's approval of New Union's HWP was an order. The RCRA does not define the terms "rule" or "order." The court in Chaney v. Heckler stated that nearly every statement made by an agency may

be considered a rule under the broad definition of the word. 718 F.2d 1174, 1186 (D.C. Cir. 1983). The Administrative Procedures Act ("APA") defines a rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency or policy or approval . . . ." 5 U.S.C. § 551(4) (2006). The APA defines an order as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, in a matter other than rulemaking, but including licensing." 5 U.S.C. § 551(6). These definitions clarify that the authorization of a state program is a rule rather than an order because state authorization has a general effect not only on the future of a state's environmental regulations, but also on the regulations of other states.

Moreover, a state achieves the EPA's authorization of its HWP through the rulemaking process, which reinforces that the EPA's authorization is a rule and not an order. 42 U.S.C. § 6926; 5 U.S.C. § 553. The District Court in Rhode Island specifically held the EPA's process of authorizing state HWPs is consistent with the rulemaking process and legally enforceable because it was consistent with 5 U.S.C. § 553. United States v. S. Union Co., 634 F. Supp. 2d 201 (D.R.I. 2009).

Additionally, courts have held even if the EPA authorizes a state HWP, but the state HWP fails to include its own citizen suit provision, the federal RCRA citizen suit provision is available for any person to commence a civil action against violators of the EPA. Sierra Club v. Chem. Handling Corp., 824 F. Supp. 195, 197 (D. Colo. 1993); Glazer v. Am. Ecology Envtl. Servs. Corp., 894 F. Supp. 1029 (E.D. Tex. 1995). But see Dague v. City of Burlington, 935 F.2d 1343 (2d Cir. 1991) (holding the federal RCRA citizen suit provision unavailable to citizens in a state with an authorized HWP).

A. New Union's HWP generally applies throughout New Union and is used as a basis for other state authorizations.

An authorized HWP is general in nature because it is not only applicable to the regulation of an entire state's hazardous waste, but is also compared to the HWPs of other states seeking authorization. Authorized state HWPs are legally enforceable rules because the nature and applicability of the HWPs are general and open-ended. Rules are general and applicable to a class of persons or practices; whereas an order is specific and applicable to a specific named person or action. David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 924 (1965).

The lower court erred in holding New Union's HWP is an order rather than a rule because it found the HWP was specifically applied. The EPA compared New Union's HWP with HWPs from other states when it determined whether to authorize New Union's HWP. Likewise, the EPA will use New Union's HWP for comparison when other states seek authorization of their HWPs. 42 U.S.C. § 6926. These comparisons illustrate New Union's HWP is generally applicable, and fails under the definition of order.

B. The EPA followed the notice and comment process of rulemaking when it authorized New Union's HWP.

In the state HWP authorization process, the EPA follows the notice and comment rulemaking process exactly. 42 U.S.C. § 6926; 5 U.S.C. § 553(b)-(e). The first step in the legislative rulemaking process is to publish the proposed authorization in the Federal Register, which allows for notice and for public comment. See 5 U.S.C. § 553(b)(A). This notice and comment step is only required in the legislative and substantive rulemaking process, and is not required when making interpretative decisions or orders. Lincoln v.

Vigil, 508 U.S. 182, 196 (1993). Next, the public has a thirty-days comment period for the proposed authorization and the EPA announces a time and place for a public hearing within the state. 5 U.S.C. § 553(d); 42 U.S.C. § 6926(b). For example, during Rhode Island's authorization process, the EPA specifically stated the public had one month to oppose any part of the authorization and specifically warned the public "may not have another opportunity to comment." Rhode Island: Authorization of State Hazardous Waste Management Program Revision, 67 Fed. Reg. 51765 (Aug. 9, 2002) (to be codified at 40 C.F.R. pt. 272). After the public makes its comments, the EPA reviews and addresses them during the final authorization phase in determining whether to accept the state's HWP. See Pennsylvania: Final Authorization of State Hazardous Waste Management Program, 51 Fed. Reg. 1791 (Jan. 15, 1986) (addresses three concerns made by commentators during the notice and comment period). Finally, after the submission of the rule granting authorization of a state program, the EPA will adhere to 5 U.S.C. § 553(e), which allows interested persons a ninety-day period to repeal the rule. 42 U.S.C. § 6926(e); 5 U.S.C. § 553(e).

New Union and the EPA followed the authorization process required by Congress in 42 U.S.C. § 6926 and in accordance with 5 U.S.C. § 553(c). New Union applied for the EPA's approval of its HWP in 1985. The EPA, pursuant to 42 U.S.C. § 6926(b), proposed to approve New Union's HWP in 1986. The EPA submitted its approval in 1986 after the required notice and comment period. Therefore, the above process followed by New Union and the EPA leads to the conclusion the New Union HWP is a proper exercise of the EPA's delegated rulemaking authority and not merely an order or policy statement.

C. Regardless of whether a state has an authorized state program, citizens may still bring a citizen suit under the RCRA.

A conflict exists among the courts regarding citizen suits filings under 42 U.S.C. § 6972 (2006) when a state has its own program acting in lieu of the federal program. Sierra Club, 824 F. Supp. at 197 (holding the RCRA citizen suit provision of the RCRA applies in authorized state); but see Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army, 990 F. Supp. 1316, 1319 (D. Utah 1997) (holding the RCRA citizen suit provision is unavailable in an authorized state).

New Union may argue that its HWP supersedes the federal program and therefore CARE should only have jurisdiction in state court and not in federal court. However, the record is absent any evidence that might suggest New Union's program contains a citizen suit. Therefore, as in Sierra Club this Court should determine a citizen suit is available even though New Union has an authorized HWP.

II. GENERAL STATUTORY PROVISIONS LIKE 5 U.S.C. § 553(e) SHOULD NOT BE RELIED UPON BY THIS COURT WHEN A MORE SPECIFIC STATUTORY PROVISION LIKE 42 U.S.C. § 6974 IS AVAILABLE FOR INTERPRETATION.

The EPA authorized New Union's HWP pursuant to the RCRA and followed the requirements of the RCRA; therefore, any action against this authorization should be brought under the RCRA. A general statute should not govern a cause of action unless a more specific statute is unavailable. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989). Authorizations of state HWPs are reviewed pursuant to the RCRA specifically; this means, 5 U.S.C. § 553(e) does not provide the appropriate specific jurisdiction. Under 5 U.S.C. § 553(e) "[e]ach 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). Section 553 of Title 5 of the

United States Code is the general statute that provides guidelines to the rulemaking process. Id. Alternatively, 42 U.S.C. § 6926 and 42 U.S.C. § 6974 give more specific guidelines, which the EPA uses when it authorizes state HWPs. 42 U.S.C. § 6926, § 6974 (2006).

The United States Supreme Court held in Dep't of Housing & Urban Dev. v. Rucker that a general statutory provision does not overrule the clear language of a more specific statute. 535 U.S. 125, 134 (2002). Additionally, the Court determined an action could not be brought under a general statute in Preiser v. Rodriguez, where a suit was brought under 42 U.S.C. § 1983 (2006) challenging disciplinary action in correctional facilities. 411 U.S. 475 (1973). In that case, the Court held 42 U.S.C. § 1983 was unavailable, because Congress had passed a more specific habeas corpus statute. Id. at 489. The Court reasoned "[i]t would wholly frustrate explicit congressional intent to hold that [a party] could evade [the specific statute] by the simple expedient of putting a different label on their pleadings," and "Congress has determined . . . the appropriate remedy . . . and that specific determination must override the general." Id. at 489-90.

The more specific statute applicable to the facts of this case is 42 U.S.C. § 6974 because it explicitly addresses public participation in the RCRA. Appellants claim they have a right to petition for the amendment or repeal the New Union HWP, even though it was approved through the rulemaking process that follows the guidelines of the RCRA. The only way for Appellants to properly petition the EPA regarding New Union's HWP is through 42 U.S.C. § 6974 because the RCRA incorporates all of 5 U.S.C. § 553 in its rulemaking process. In accordance with 5 U.S.C. § 553(e), 42 U.S.C. § 6926 requires the EPA to allow the public to petition for the amendment or repeal. Congress enacted the RCRA to more specifically address problems involving hazardous waste disposal and

management. Therefore, this Court should follow the guidance given by the Supreme Court in Preiser, Green, and Rucker, and find jurisdiction in this case is only proper through the more specific 42 U.S.C. § 6974.

III. THE EPA'S INACTION SHOULD NOT BE VIEWED AS A CONSTRUCTIVE ACTION; THEREFORE JUDICIAL REVIEW BY THIS COURT IS INAPPROPRIATE.

Even if the EPA is required to respond to every petition, the EPA's delay in its response to CARE's petition is not unreasonable, is not tantamount to final agency action, and is therefore unavailable for judicial review. The EPA has the discretion to withdraw a state's authorization. 40 C.F.R. pt. 271.23 (2010). The process of withdrawal is extreme; if a state HWP is withdrawn, the obligations under the RCRA fall squarely on the EPA with no assistance from the state. See United States v. Power Eng'g Co., 303 F.3d 1232, 1238-39 (10th Cir. 2002). Following the notice and comment procedure during the rulemaking process as described in 5 U.S.C. § 553, any petitions to repeal a state authorization must be submitted to the EPA within ninety days of the promulgation of the state's HWP. 42 U.S.C. § 6926. The only limitation the RCRA imposes on the EPA, in the state authorization context, is that after the EPA has determined a state HWP is not in compliance, the state's HWP *may* be withdrawn. See Pub. Citizen, Inc. v. EPA, 343 F.3d 449, 452 (5th Cir. 2003). Once the EPA receives a petition to begin withdrawal procedures of a state's HWP, the EPA has the option to conduct an informal investigation of the allegations of the petition. 40 CFR § 271.22 (2010). While a specified time limit does not exist, the EPA is required to respond within a reasonable time. 42 U.S.C. § 6926.

Pre-enforcement review of the EPA's inaction is not available. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994). The EPA, through the RCRA, has a process for

pre-enforcement review and if that process is not followed, judicial review is unavailable. See id. at 216 (finding judicial review was not available in a case of pre-enforcement in an effort to evade statutory-review process). Additionally judicial review is generally unavailable when an agency decides not to invoke an enforcement mechanism. Texas Disposal Sys. Landfill, Inc. v. E.P.A, 377 Fed. Appx. 406, 408 (5th Cir. 2010). A presumption of immunity exists when an agency chooses not to take action if "agency action is committed to agency discretion by law." Heckler v. Chaney, 470 U.S. 821, 832 (1985); see 5 U.S.C. § 701(a)(2) (2006). The Court noted when an agency does not vigorously act in every case, it "does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance." Heckler, 470 U.S. at 834. In Oljato Chapter of Navajo Tribe v. Train, the court noted that a failure to respond or an unreasonable delay in response might be appealable under the APA. 515 F.2d 654 (D.C. Cir. 1975); see 5 U.S.C. § 706(1). Additionally, all administrative remedies must be exhausted prior to seeking redress through the judiciary. Renegotiation Bd. v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 24 (1974).

A. Judicial review is unavailable because CARE's petition is untimely.

Initially, this Court must ask if the Appellants are time barred under 42 U.S.C. § 6976(b) (2006), thereby making judicial review inappropriate. Under 42 U.S.C. § 6976(b), any interested person may petition state authorization withdrawal, but any petition "shall be made within ninety days from the date of issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day." 42 U.S.C. § 6976(b). Any request for review of an Agency rule after the permitted ninety days is time barred and unavailable for judicial review.

Molycorp, Inc. v. EPA, 197 F.3d 543, 547 (D.C. Cir. 1999). Although, the court in Greenpeace, Inc. v. Waste Techs. Indus. determined the agency could be petitioned beyond the ninety-day limitation, if the petition is based on facts that arose after the agency's decision. 9 F.3d 1174, 1182 (6th Cir. 1993). The court clarified by limiting the extraneous facts to those "that would have changed the agency's . . . decision," therefore the facts had to be present at the time of the decision. Id.

The ninety-day filing period should not be enlarged or altered by the court. Natural Res. Def. Council v. NRC, 666 F.2d 595, 602 (D.C. Cir. 1981). However, "the period for seeking judicial review may be made to run anew when the agency in question by some new promulgation creates the opportunity for renewed comment and objection." Ohio v. EPA, 838 F.2d 1325, 1328 (D.C. Cir. 1988). In Ass'n of Am. RRs v. ICC, the ICC sought to promulgate supplementary rules to "harmonize" certain provisions. 846 F.2d 1465, 1473 (D.C. Cir. 1988). The court held "the search for harmony might lead to a rethinking of old positions," and the renewed adherence may be reviewable. Id.

The facts in this case which led to CARE's petition arose after the ninety-day limit allowed under 42 U.S.C. § 6976(b) and does not pertain to the information used by the EPA authorizing New Union's HWP. Therefore, based on the holding in Greenpeace, the extraneous facts in this case do not allow for a petition after the ninety-day limit. Even if this Court finds the time limit was renewed, similar to Ass'n of Am. RRs, by the revisions made to New Union's HWP in 2000, the record is silent as to any EPA authorization of such revisions. Eleven years have passed since New Union made considerable revisions to its HWP and therefore the renewed ninety-day period has expired. As in Molycorp, Inc., this

Court should find CARE's petition is time barred and judicial review is unavailable under 42 U.S.C. § 6976(b).

B. The language of 42 U.S.C. § 6974 does not create a mandatory obligation for the EPA to act on CARE's petition.

Congress used the word "shall" in 42 U.S.C. § 6974 to reinforce that the EPA is the sole agency to address state approval petitions, but Congress did not intend for the EPA to mandatorily respond to every petition received. Further, the words "shall" and "may" are often synonymous. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 n.9 (1995). In Gutierrez de Martinez, the Supreme Court stated the word "shall" is a non-obligatory word that authorizes but does not require judicial action in the Federal Rules. Id. Furthermore, the word "shall," as used in 42 U.S.C. § 6972 has been held to be discretionary. Davis v. Sun Oil Co., 148 F.3d 606 (6th Cir. 1998) (holding that the word "shall" does not divest state courts of jurisdiction).

There is evident ambiguity in the use of the word "shall." Scholl v. United States, 54 Fed. Cl. 640, 647 (2002). Where there is statutory ambiguity, the court should defer to the agency's interpretation, as long as the agency's interpretation is reasonable. Chevron, 467 U.S. at 843. There are two inquiries a court must make to determine whether Chevron deference applies. Id. at 842. First, the court must determine if Congress has specifically addressed the question at issue. Id. If this first inquiry is answered in the affirmative, the analysis stops, and "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. In determining the intent of Congress, the court must examine the language and design of the whole statute. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). Second, if there is silence or ambiguity with respect to the specific issue, the court must ask if the agency's interpretation is based on reasonable

construction of the statute. Chevron, 467 U.S. at 843. Further, greater deference is granted to an agency's interpretation when the agency is charged with enforcing the statute, if the agency's interpretation is reasonable and not in conflict with the express intent of Congress. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985).

A court may examine the plain language and legislative history of a statute when determining if the agency's interpretation of "shall" is reasonable. Dubois v. Thomas, 820 F.2d 943 (8th Cir. 1987). The statute in Dubois provides, if the Administrator discovers any person in violation, "he shall issue an order requiring such person to comply with such section . . . or he shall bring a civil action in accordance . . . ." Id. at 946; see 33 U.S.C. § 1319(a)(3) (2006). The court found the statutory language to be discretionary despite the use of "shall," and stated a mandatory obligation on the EPA, under the particular subsection, might hinder the Agency's overall objectives in the entire statute. Id. at 947-48. This obligation would burden the efficiency and effectiveness of the EPA examining the most egregious violations because the obligation could compel the EPA to expend its limited resources investigating a multitude of insignificant issues. Id.

The legislative history of 42 U.S.C. § 6926(e), demonstrates the word "shall" does not impose a mandatory obligation on the EPA. H.R. Rep. No. 94-1491(I) (1976), reprinted in 1976 U.S.C.C.A.N. 6238. Legislators specified the EPA "*may* withdraw" the state HWP if the HWP does not meet the RCRA requirements. Id. at 31 (emphasis added). Additionally, legislators determined "the Administrator, after public hearings, *can* withdraw a states [sic] authorization . . . ." Id. at 58 (emphasis added).

This Court should find, similar to the court in Dubois, that regardless of the use of the word "shall" the obligation under 42 U.S.C. § 6974 is discretionary rather than

mandatory. Further, similar to the holding in Dubois, if the EPA is mandated to respond to every petition received, no matter the significance, the limited resources of the EPA will be used in an inefficient manner, thwarting the EPA's objectives under the RCRA. Finally, as illustrated in Dubois and the legislative history of 42 U.S.C. § 6926(e) the EPA is owed Chevron deference in interpreting the language of a statute (42 U.S.C. § 6974) for which Congress directly authorized the EPA to administer. See Riverside Bayview Homes, 474 U.S. at 131. Thus, judicial review is unavailable because the EPA's interpretation of 42 U.S.C. § 6974 regarding the EPA's obligation is reasonable and therefore no final agency action is necessary.

C. There is no constructive action because Congress has granted the EPA a "reasonable" amount of time to respond to petitions.

If this court finds the use of the term 'shall' creates a mandatory obligation on the EPA to respond to CARE's petition, rather than specifying a time period, Congress expressed the EPA has "a reasonable time" to take action pursuant to 42 U.S.C. § 6974. When a statute imposes an indefinite time interval on agency action, the court must question whether the delay was reasonable. Am. Lung Ass'n v. Reilly, 962 F.2d 258, 263 (2d Cir. 1992). Reasonable time is determined on a case-by-case basis and defined by the circumstances of each case. Alleghany Valley Brick Co. v. C.W. Raymond Co., 219 F. 477, 480 (2d Cir. 1914). The court may determine a reasonable time by examining "the course of business and the ordinary transactions of life." Am. Surety Co. v. Pauly, 72 F. 470, 476 (2d Cir. 1896).

In Connecticut Fund for the Env't, Inc. v. EPA, the court held the eleven-month time period taken by the EPA to publish notice of a proposed rule was not unreasonable despite the four-month time period provided by statute. 672 F.2d 998, 1003 (2d Cir. 1982). Additionally,

the court concluded it was not unreasonable for the EPA to "conditionally" approve Connecticut's plan revisions eighteen months after the statutory deadline. Id. Although the D.C. Circuit held that "[a]t some point administrative delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review," it also decided a reasonable time for agency action could encompass "months, occasionally a year or two, but not several years or a decade." Envtl. Def. Fund, Inc. v. Hardin, 428 F.2d 1093, 1100 (D.C. Cir. 1970).

Due to Congress using the term "reasonable time" rather than a set time period and the ambiguity of the term, the Court should apply the Chevron doctrine and find that one year to to act upon a petition is reasonable. The EPA requires more time due to the amount of data it must review thoroughly in order to respond to a petition that requests such a drastic measure. It has only been one year since CARE submitted its petition, which is only one month more than the reasonable eleven month time period found in Connecticut Fund for the Env't. The amount of time to review the allegations in CARE's petition, requesting such extreme action by the EPA, and to conduct the discretionary investigation of New Union's HWP is reasonable. Therefore, since the delay in the EPA's response to CARE's petition is warranted and reasonable, there is no constructive action open to judicial review.

D. Judicial review is not available because the administrative record is incomplete.

Prior to deciding if judicial supervision is required, the court must ask "whether judicial review will unnecessarily impede the agency in effectively carrying out its congressionally assigned role and whether the issues are appropriate for judicial review." Chaney v. Heckler, 718 F.2d at 1185. Ripeness is a justiciability doctrine designed to protect the agencies from judicial interference until an administrative decision has been

formalized and its effects felt concretely by the challenging parties. Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 807 (2003).

In Save the Bay, Inc. v. Administrator of the EPA, an environmental association brought a claim in the United States Court of Appeals against the EPA for allowing the state commission to authorize a permit contrary to EPA guidelines. 556 F.2d 1282, 1287-88 (5th Cir. 1977). The court agreed with the EPA's argument that "full administrative development should proceed litigation over claims that a state's program . . . should be withdrawn." Id. at 1288. The court assumed "Congress drafted the provision with reference to the rule . . . original jurisdiction can only extend to agency action capable of review on the basis of the administrative record." Id. at 1292 (internal quotes and citations omitted). The court further expressed that actions taken by a federal agency are reviewable in federal court. Id. at 1293; see also Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (finding that agency action is subject to judicial review unless there is a congressional prohibition on such review or where agency action is discretionary). However, each of these courts reviewed final agency action pursuant to 5 U.S.C. § 706, allowing a court to either "compel agency action unlawfully withheld or unreasonably delayed" or "hold unlawful and set aside agency action[s], findings, and conclusions" the court concludes fit into one of six categories. 5 U.S.C. § 706. Under 42 U.S.C. § 6976, judicial review is available for final regulations promulgated under the RCRA and any judicial review shall be in accordance with 5 U.S.C. §§ 701-706 (2006). Further, when agency rulemaking occurs in stages, the court should defer judicial review until the regulatory process is complete. Am. Portland Cement Alliance v. EPA, 101 F.3d6 772, 776 (D.C. Cir. 1996); see 5 U.S.C. § 704 (2006).

Under 42 U.S.C. § 6926(e) Congress delegated the responsibility of withdrawing state HWPs to the EPA. 42 U.S.C. § 6926. In doing so, Congress implemented a process for withdrawal, including the requirement that the EPA hold a public hearing regarding the proposed withdrawal, notice to the state of the proposed withdrawal, and give the state an opportunity to correct any insufficiencies that prompted the proposed withdrawal. 42 U.S.C. § 6926; 40 C.F.R. pt. 271.23. Legislators further defined the process and Congress' intent by stating the Administrator can withdraw authorization of HWP after the notification to the state, after a public hearing and if the state does not take corrective action within ninety days. H.R. Rep. No. 94-1491(I) at 58.

In the present case, the EPA's inaction should not be found to be a constructive action. However, if this Court finds there was a constructive action, equitable to a final action, it should not lift the stay, but rather remand this case to the lower court. If this Court lifts the stay as requested by the Appellants, the Court would essentially be circumventing the process designed by Congress. If the Court is unable to dismiss the case all together, remanding the case to the lower court would allow for the EPA to respond, thereby creating a full and objective administrative record based on the EPA's expertise rather than a defense to litigation, which could then be judicially reviewed. Like Save the Bay, Inc., this Court is privy to an incomplete administrative record to examine and cannot make an informed decision as to whether the EPA acted within its discretion.

IV. DESPITE A DECLINE IN RESOURCES, IT WAS REASONABLE FOR THE EPA TO FIND NEW UNION'S HWP SUFFICIENT TO MEET THE APPROVAL CRITERIA UNDER THE RCRA.

Although, for the foregoing reasons, this Court should not reach the merits of this case, if the Court finds judicial review is proper, it should conclude New Union's HWP is

sufficient to conform to the RCRA's approval criteria and the EPA was not arbitrary or capricious in not proceeding with withdrawal procedures. See Gee v. Boyd, 471 U.S. 1058, 1058-59 (1985). The legislative history of 42 U.S.C. § 6926 shows legislators contemplated the issue of a state's HWP changing. H.R. Rep. No. 94-1491(I) at 31-32. Congress granted the EPA the authority to enforce the federal minimum standards if the state's HWP falls below the standard required in the RCRA, but only after the EPA has provided the state with notice and an opportunity to have a hearing regarding further EPA action. Id. at 31.

Therefore, authorized states retain the authority to implement their HWP, but with the oversight authority maintained by the EPA to enforce the RCRA if the state fails to remain compliant to the federal program. Id. at 32. After authorization of a state HWP, the RCRA requires the EPA to review a state's HWP, and after notice and hearing, if the EPA finds the state HWP is no longer in compliance with the RCRA, the EPA "*may* withdraw [its] approval and any federal financial assistance." Id. at 41 (emphasis added). This failure to comply may be due to substantive changes to the authorized state HWP or a failure in the implementation of the program. Id.

In order for a state HWP to obtain authority approval, it must (i) be equivalent to the federal program; (ii) be consistent with the federal program and other authorized state programs; and (iii) provide adequate enforcement against violations of the program. 42 U.S.C. § 6926. The intent behind the RCRA approval criteria is to ultimately provide uniformity among states and industries regarding hazardous waste regulation and to prevent a state from becoming overloaded with hazardous waste by having more lenient regulations. H.R. Rep. No. 94-1491(I) at 30. Furthermore, the plaintiff has the burden of proof to show

the EPA acted unreasonable. See Organic Chemicals Site PRP Group v. Total Petroleum, Inc., 6 F. Supp. 2d 660, 665 (W.D. Mich. 1998).

A. New Union's program should not be withdrawn because the program meets the RCRA's approval criteria.

The EPA should not be compelled to withdraw New Union's HWP because pursuant to Congressional direction the EPA interpreted its own approval criteria which requires a court to grant the EPA a high degree of deference. Chevron, 467 U.S. at 843. If the EPA constructively approved New Union's HWP, it did not act in an unreasonable or arbitrary and capricious manner because the New Union HWP is in fact equivalent, consistent, and adequate. See 42 U.S.C. § 6926.

1. *New Union's program is consistent with the federal program and other state programs.*

Appellants have not set forth any evidence that New Union's HWP is inconsistent with the RCRA or other state HWPs. According to Congress, an inconsistent state HWP is one that (i) "unreasonably restricts, impedes or operates a ban on the free movement" of hazardous waste across a state border; (ii) "has no basis in human health or environmental protection;" or (iii) prohibits the treatment, storage, or disposal of hazardous waste within the state. Id.

As to the first requirement of the consistency test, the Chief of the Oversight Section, State Programs Branch in the Office of Solid Waste, testified the EPA "did not have any hard and fast rules and that the facts of each individual situation had to be examined." In the Matter of Proceedings to Determine Whether to Withdraw Approval of North Carolina's Hazardous Waste Management Program, (May 31, 1990) Docket No. RCRA-SHWPAW-IV-01-87. at 110 ("North Carolina Proceedings"). This first requirement implicates the

Commerce Clause of the United States Constitution as it applies to the interstate flow of hazardous waste. Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 782 (4th Cir. 1996). In order to meet the second requirement of the analysis, the "EPA's advice to Regional Offices was that there had to be a reasonable or plausible basis for the state prohibition." North Carolina Proceedings at 95 (internal citations omitted). This basis need only be "tied to health or environmental protection." Id. Finally, the HWP cannot "act as a prohibition on the treatment, storage or disposal of hazardous waste. 40 C.F.R. pt. 271.4(b) (2010); see North Carolina Proceedings at 3.

The Appellants have again failed to allege facts that lead to a conclusion that New Union's program is inconsistent with the RCRA or other state HWPs. Additionally, the record is insufficient for this Court to decide if the EPA acted arbitrarily in approving the New Union's HWP. The record does not show any restrictions contained within the original New Union HWP that impedes or prohibits the flow, treatment, storage, or disposal of hazardous waste in interstate commerce. The record does show New Union's HWP has a basis in human health and the environment by prioritizing the issuance of permits and the process of inspecting facilities. New Union demonstrates its basis in human health and the environment by the DEP issuing permits last to facilities "having the greatest potential for harm to the public or environment because of the volume or toxicity of hazardous waste handled." (R. Doc. 4 for 2009 at 20). New Union's HWP also establishes the importance of human health and environment by making it the DEP's top priority to inspect those 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" (Rec. doc. 4 for 2009 at 23). This Court should find the EPA's decision in authorizing New Union's HWP was reasonable because the HWP was consistent as required by 42 U.S.C § 6926.

2. *New Union's hazardous waste program is equivalent to the federal RCRA program.*

There is no evidence to show the EPA was unreasonable in finding New Union's HWP equivalent to the RCRA. In 1990, Chief of the Oversight Section, testified that when examining state programs for equivalence to the federal program pursuant to RCRA § 3006(b), the EPA examined the requirement in two ways. North Carolina Proceedings at 93. The first inquiry is whether the state is "regulating the same universe of handlers and treatment, storage, and disposal facilities as EPA." Id. at 93-94. The second inquiry is "whether the state regulation of these facilities is at least as stringent as [the] EPA's." Id. at 93-94. Further the legislative history behind the RCRA reveals the EPA is authorized to implement and enforce the RCRA if a state HWP fails to remain equivalent to the RCRA. H.R. Rep. No. 94-1491(I) at 32.

Additionally, each federal regulation is not required to have a corresponding state regulation. EPA. Memorandum from Matthew Hale, Director of Solid Waste, EPA, to RCRA Directors, Regions I – X. Sept. 7, 2005, www.epa.gov/osw/laws-regs/state/policy/fe-9-7-05.pdf (last visited Nov. 17, 2010). The state may combine regulation, but must have the same overall effect as every federal regulation. Id. Thus, the focus for equivalency is on having the same effect for protection of human health and the environment, even if it is in a different manner. Id. at 2-3.

Applying the inquiries in North Carolina Proceedings to the facts in this case, the Court should find New Union's HWP is managing TSDs to the same or higher degree of

stringency than the federal RCRA program. The record is silent as to circumstances in which New Union is not regulating the same universe of handlers. Therefore, CARE has not met its burden of proof in showing the EPA arbitrarily authorized New Union's HWP or that the EPA did not follow the procedures set by Congress in 42 U.S.C. § 6926.

3. *New Union's program provides adequate enforcement of compliance with the requirements of the RCRA.*

Although the economy impacted New Union's DEP, the HWP has remained sufficiently adequate to meet the requirements of the RCRA. Neither the RCRA nor the EPA specifies the amount of resources required by a state to retain authorization. Texas; Decision on Final Authorization of State Hazardous Waste Management Program, 49 Fed. Reg. 48,300, 48,301 (Dec. 12, 1984). Additionally there are no "specific resource and staffing requirements because each state or tribe has different resource requirements and strategies for ensuring compliance." Campo Band of Mission Indians: Final Determination of Adequacy of Tribal Municipal Solid Waste Permit Program, 60 Fed. Reg. 21,191, 21,203-04 (May 1, 1995).

The EPA expected nationwide enforcement of the RCRA by the states would be more effective. Texas Final Authorization, 49 Fed. Reg. at 48,302. Due to pressures that arise after the initial authorization, whether due to economic changes or state legislative changes, the "EPA is prepared, if necessary, to assist the State in meeting its commitment." Id. Additionally, "state strategies for ensuring compliance must allow the states flexibility in determining the best allocation of resources." Subtitle D Regulated Facilities; State Permit Program Determination of Adequacy; State Implementation Rule, 63 Fed. Reg. 57,026, 57,033 (Oct. 23, 1998). Examining compliance report statistics from 2009, no state inspected fifty percent of its TSDs to be consistent and equal to the RCRA requirement in

42 U.S.C. § 6927(e) (2006) that the states should inspect each TSD facility no less than biannually. EPA Office of Compliance. 2009 State Summary Data for Resource Conservation and Recovery Act All Facilities (Combined). June 2010, www.epa.gov/compliance/resources/reports/performance/rcra/2009-combinedrcrafacilities.pdf (last visited Nov. 20, 2010).

Although the decline in the economy has significantly influenced the enforcement of New Union's HWP, the EPA should not be required to commence withdrawal procedures. Following the statements made in Texas Final Authorization, the EPA will assist New Union in enforcing its HWP. In 2009, New Union's DEP inspected twenty percent of facilities within New Union with the assistance of the EPA. When compared to the percentage of inspections for other states, only four states had a higher percentage of facility inspections than New Union. In fact, New Union's percentage of inspections was over twelve percent higher than the national average. Even with the reduction in the DEP's work force and the possibility of more financial cuts to the program, with the assistance of the EPA, there is no evidence New Union's enforcement percentage will drop to even the 2009 national average percentage of inspection. Thus, New Union is adequately enforcing its program, and its resources to ensure such adequate enforcement are sufficient. Due to the statutory silence, and the EPA's reasonable discretion to provide states with flexibility for their own specific needs, the EPA's determination that New Union's HWP is adequate is not arbitrary, capricious, or unreasonable. Thus, under the Chevron doctrine, this Court should grant the EPA deference in its decision to not commence withdrawal procedures against New Union's HWP.

B. Withdrawal of a state's HWP is not the best course of action.

The EPA has options other than the extreme choice of withdrawing a state's HWP. In enacting the RCRA, Congress defined the scope of the EPA's regulatory discretion. Chevron, 467 U.S. at 842. The RCRA provides flexibility, allowing the EPA to notify an authorized state of any RCRA violations. H.R. Rep. No. 94-1491(I) at 31. Additionally, the EPA may overfile when the state fails to perform. Id. Moreover, the EPA and the states may enter into a Memorandum of Understanding to agree upon "explicit responsibilities of the states and [the] EPA with regard to enforcement and oversight." Texas Final Authorization. 49 Fed. Reg. at 48,302. This flexibility gives the EPA options beyond the extreme choice of withdrawing approval of the state's HWP. Id. The EPA should not withdraw an authorization "except upon a clear showing of failure on the part of the State to follow the guidelines or otherwise comply with the law." Save the Bay, Inc., 556 F.2d at 1287.

Due to the flexibility afforded to the EPA, withdrawal of New Union's HWP is not the best plan of action. The record is silent of any notification to New Union regarding any deficiencies of its HWP. Furthermore, there is no evidence in the record of a Memorandum of Understanding between the EPA and New Union. The EPA is using the process of overfiling in New Union to assist New Union with enforcement actions.

A reduction of state resources due to a struggling economy, which is being experienced across the entire nation, is but a single event beyond the control of both New Union and the EPA. Such a reduction of resources should not be tantamount to a total failure of New Union's HWP in maintaining its equivalency, consistency, and adequacy requirements. It is reasonable for the EPA not to commence with withdrawal procedures on

New Union's HWP because keeping the HWP follows the purpose and policy of the RCRA to maintain such authorization within the states.

V. REGARDLESS OF WHETHER ERAA REMOVES CRIMINAL SANCTIONS PERTAINING TO RAILROAD HAZARDOUS WASTE FACILITIES, THE EPA IS NOT OBLIGATED TO WITHDRAW THE NEW UNION HWP.

New Union's removal of criminal sanctions from railroad hazardous waste facilities does not require the EPA to withdraw New Union's HWP because the EPA has regulatory authority against violators and New Union can nevertheless regulate with civil enforcement proceedings. The authorization of New Union's hazardous waste program does not enjoin the EPA from filing criminal or civil sanctions against violators, upon which New Union has not acted. If there are differences between the penalties assessed by the EPA and the state such that the EPA finds the state's penalty inadequate, the EPA has authority to take further action. Harmon Industries, Inc. v. Browner, 191 F.3d 894, 901 (8th Cir. 1999). In Wycoff Co. v. EPA, the defendants sought to enjoin the EPA from bringing a civil action against them. 796 F.2d 1197 (9th Cir. 1986). The Wycoff defendants argued since they were in a state with an authorized state HWP, the EPA was precluded from bringing an action against them. Id. at 1199. The Ninth Circuit addressed this issue again in United States v. Elias, when the EPA sought a criminal enforcement action against the defendant. 269 F.3d 1003 (9th Cir. 2001). In both cases, the court reviewed the language of 42 U.S.C. § 6928 (2006), which authorizes a state "to carry out such program in lieu of the Federal program under this subchapter . . . ." Id. at 1009; Wycoff, 796 F.2d at 1199. The court in both cases held "the EPA did not interpret [the] RCRA to cede exclusive enforcement authority to states," and further, used the Chevron doctrine to hold the EPA's interpretation was required deference and was reasonable. Wycoff, 796 F.2d at 1010 (citing Elias, 269

F.3d at 1200). The Elias court also specified "under [the] RCRA, the federal government retains both its criminal and civil enforcement powers." Elias, 269 F.3d at 1011.

Additionally, the EPA's ruling on Idaho's HWP authorization expresses, "with respect to such enforcement action, the Agency will rely on Federal sanctions, [and] Federal inspection authorities . . . rather than the authorized State analog to these requirements" and that the EPA did not intend to codify the authorized state's enforcement authorities. Hazardous Waste Management Program Codification of Approved State Hazardous Waste Program for Idaho, 55 Fed. Reg. 50,327, 50,327-28 (Dec. 6, 1990). Although the Eighth Circuit in Harmon, held the "in lieu of" language preempted federal enforcement, the state court approved a consent decree between the state and the defendant prior to the EPA's enforcement action. Harmon, 191 F.3d at 900. The court in Harmon found the consent decree binding because "any action taken by a State under a HWP authorized under [the RCRA] [has] the same force and effect as an action taken by the [EPA] under this subchapter." Id. at 897-88. Further, the Harmon court concluded "the EPA can initiate an enforcement action if it deems the state's enforcement action inadequate." Id. at 901.

The only other way the EPA's enforcement is precluded is when a state's regulation is more stringent or broader in scope than the federal counterpart of such regulation or when the RCRA does not contain a federal counterpart to the state regulation. United States v. Recticel Foam Corp., 858 F. Supp. 726, 741 (E.D. Tenn 1993). In Recticel Foam, the court held the EPA was precluded from enforcing the Tennessee Mixture Rule, when there was no counterpart of the mixture rule contained in the RCRA. Id.

New Union's lack of criminal enforcement should not rise to the level of requiring the EPA to commence with withdrawal procedures. In 2000, the EPA became aware New

Union had removed criminal sanctions for those facilities under the jurisdiction of the new Commission through the New Union DEP's annual report. Due to the silence in the record regarding communication between the EPA and New Union, it is presumed all regulations under the ERAA have RCRA counterparts and therefore the EPA is not precluded from instituting its own criminal enforcement actions as it was in Recticel Foam. Further the EPA, in a vow to assist New Union, has been overfiling and intends to continue overfiling. The EPA is using this technique in New Union to reduce any inadequacy of New Union's HWP, consistent with the rulings in Wycoff, Elias, and Harmon. The EPA is not using overfiling as a means to apply enforcement more stringent than already instituted by New Union, similar to the actions of the EPA in Harmon. Additionally, New Union may institute the same degree of human health and environmental protection and deterrence through civil sanctions as that of criminal sanctions, consistent with the RCRA's purpose. Thus, such removal of criminal sanctions pertaining to railroad hazardous waste facilities does not require the EPA to withdraw New Union's program because the EPA has authority to implement and enforce such sanctions against violators, and New Union can nonetheless regulate with civil enforcement proceedings.

VI. THE ERAA'S TREATMENT OF POL. X IS NOT VIOLATIVE OF THE COMMERCE CLAUSE AND DOES NOT BAR THE EQUIVALENCY OR CONSISTENCY OF NEW UNION'S HWP TO THE RCRA AND OTHER STATE HWPS.

New Union's treatment of Pol. X is sufficient even though the treatment may be more stringent. Similar to the review of New Union HWP in its entirety, the treatment of Pol. X must also be reviewed to show it is (i) equivalent to the federal program, and (ii) consistent with the federal program and other authorized state programs. 42 U.S.C. § 6926(b). The RCRA requires the EPA to review authorized state HWPs to ensure minimum

requirements remain in compliance. H.R. Rep. No. 94-1491(I) at 41. If the EPA finds the state is not compliant, "either because of substantive changes in the plan or because of failure to implement the plan, [the EPA] *may* withdraw [its] approval and any financial assistance." Id. (emphasis added). Additionally, authorized states must modify their programs to reflect any changes in the federal program, which are subject to approval by the EPA. EPA. Authorizing States to Implement RCRA. www.epa.gov/osw/inforesources /pubs/orientat/rom311.pdf (last visited Nov. 1, 2010).

Further, Congress granted the EPA the discretion, not the obligation to withdraw approval of a state's HWP or apply other options against an authorized state whose HWP is not in compliance. Id.; see 40 C.F.R. pt. 271.22; 42 U.S.C. § 6926(e). In the case of whether North Carolina Senate Bill 114 warranted withdrawal of the North Carolina HWP, the Administrator found that even if 40 CFR 271.22(a)(1)(ii) and 271.22(a)(2)(i) were met, the single instance was not an adequate basis for withdrawal of North Carolina's HWP. North Carolina Proceedings at 105. Additionally, the RCRA requires the EPA to take certain steps prior to a drastic withdrawal decision, including (i) notification to the state of non-compliance, (ii) a reasonable time for the state to remedy said non-compliance, and (iii) if the state remains in noncompliance status, the EPA must notify the state and the public of the reasons for the possible withdrawal. Id.

A. The ERAA's treatment of Pol. X is equivalent to the federal program despite being more stringent than the RCRA.

New Union's Pol. X amendment is equivalent to the federal RCRA program because it handles the same universe of handlers and is at least as stringent as the federal program. Similar to the examination made when reviewing the entire program for equivalency, a court must make two determinations: (i) whether a regulation keeps the state from "regulating the

same universe of handlers" which are TSDs; and (ii) whether the regulation is at least as stringent as the RCRA. North Carolina Proceedings at 93; 42 U.S.C. §6929 (2006).

Because Congress did not define equivalency in the RCRA, the EPA has interpreted equivalency to mean having the same effect for human health and environmental protection, "even though they differ from the federal regulations in the method or approach by which they achieve the intended . . . effect." Hale, supra at 3. The RCRA allows states to have regulations more stringent and broader in scope than the federal program. 42 U.S.C. § 6929. During the process of amending 42 U.S.C. § 6929, Ark. Senator Bumpers stated "[n]othing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." Solid Waste Disposal Act Amendments of 1980, Pub. L. 96-482, 94 Stat. 2334, (1980) ("Bumper's Amendment").

One example of a finding of equivalency in a more stringent state regulation is found in North Carolina Proceedings, where Senate Bill 114 treated all facilities the same and simply restricted the size of a facility in a particular area. North Carolina Proceedings at 1. This restriction was found to comport with the equivalency requirement of the RCRA's approval criteria. Id. at 3. In the context of listed hazardous wastes, the EPA explains all requirements of handlers and TSDs of hazardous wastes in 40 C.F.R. pt. 261. See 40 C.F.R. pt. 261. Additionally, the EPA does not require permits for storage of hazardous waste that is stored for less than ninety days. 40 C.F.R. pt. 262.34 (2010).

Similar to Senate Bill 114 in North Carolina Proceedings, the amendment regarding Pol. X is not biased against any party. New Union's amendment lays out requirements of the TSDs and transporters that work with Pol. X, which are the same universe as covered by

the EPA in the RCRA. Further, due to the ERAA amendment, storage permits are limited to 120 days, which is more stringent than the federal regulation, but under the Bumper's Amendment, this increased stringency does not make the ERAA regulation inequivalent to the RCRA. Moreover, since the ERAA regulation is equivalent to the RCRA, New Union's HWP is equivalent and the EPA was reasonable in not commencing withdrawal proceedings.

B. The ERAA's treatment of Pol. X is consistent with the federal program and other state programs because it is based on concerns of health and environmental protection and does not restrict interstate commerce.

A regulation, such as ERAA, based on concerns for human health and environment and does not unreasonably impede interstate commerce is consistent with the RCRA. A state regulation is required to be consistent with the federal program and other state programs. 40 C.F.R. pt. 271.4. The EPA may determine a state program inconsistent if any regulations: (i) are not based on human health and the environment; or (ii) prohibit the treatment, storage or disposal of hazardous waste within a state. 40 C.F.R. pt. 271.4(b). Additionally, the EPA requires all aspects of a state HWP to allow movement of hazardous waste across state borders. 40 C.F.R. pt. 271.4(a). Examination of 40 C.F.R. pt. 271.4(b) reveals there is no mandatory obligation on the EPA, rather it states if either factor is not met the regulation "*may* be deemed inconsistent." 40 C.F.R. pt. 271.4(b) (emphasis added).

1. *The Pol. X regulation is aimed at health and environmental protection.*

The primary goal for enacting the Pol. X amendment was to protect New Union's citizens and environment from Pol. X's potent and toxic nature. North Carolina Senate Bill 114 attempted to reduce the volume of effluent discharged by restricting the size of facilities in the state. North Carolina Proceedings at 2. The EPA found (i) the statute consistent with

the federal program; (ii) the restriction was tied to health and environmental protection based on the idea that "greater discharge posed a greater risk;" and (iii) the statute would provide benefits in instances of permit limit violations. Id. at 100, 110. The former Administrator noted "with our present regulations virtually any environmental benefit is sufficient to allow a state to be more stringent that the national program." Id. at 109.

Similar to NC Statute SB 114, the record provides evidence the restrictions on Pol. X within New Union are aimed at human health and environmental protection, which satisfies the a portion of the consistency analysis. The amendment to the ERAA was due to the potent and toxic nature of Pol. X, a listed RCRA hazardous waste and is therefore based on protecting the people and environment of New Union.

2. *The Pol. X regulation does not restrict or prohibit interstate commerce.*

New Union's amendment regarding Pol. X does not treat intrastate transporters different than interstate transporters. Under 40 C.F.R. pt. 271.4, the EPA deems inconsistent any aspect of a state HWP that "unreasonably restricts, impedes, or operates as a ban on the free movement across [a 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." 40 C.F.R. pt. 271.4(a). Additionally, any portion of a state HWP that prohibits the treatment, storage, or disposal of hazardous waste in may be deemed inconsistent. 40 C.F.R. pt. 271.4(b). The EPA has determined a prohibition on TSDs as an "outright ban or refusal to accept hazardous waste for treatment, storage or disposal." North Carolina Proceedings at 127. These two portions of 40 C.F.R. pt. 271.4 implicate the Commerce Clause of the United States Constitution, which prohibits restrictions on interstate commerce. U.S. Const., art. I, § 8, cl. 3.

In City of Philadelphia v. New Jersey, the Supreme Court found a state statute violated the Commerce Clause when it banned out of state waste from entering the state. 437 U.S. 617 (1978). The Court also weighed the New Jersey statute against admissible quarantine laws which prevented traffic of noxious items and determined the statute was attempting to preserve landfill space for in state waste and not prevent transportation of noxious articles. Id. at 628-29. However, in Exxon v. Governor of Maryland, the Supreme Court held that no impermissible burden on interstate commerce was established upon placing a disparate burden on some interstate companies, or shifting some businesses from one interstate supplier to another. 437 U.S. 117, 126-27 (1978).

Similar to Pennsylvania Statute SB 114, the New Union regulation regarding Pol. X is not facially directed at out-of-state waste, but rather, equally restricting the movement of Pol. X from within New Union and from other states. Although the ERAA amendment prohibits permits for treatment and disposal of Pol. X within New Union, the amendment is distinguished from the law in City of Philadelphia, because the Pol. X amendment does not distinguish between Pol. X generated within New Union or other states. Therefore, the Pol. X amendment does not unreasonably impede the flow of Pol. X across New Union's state border and is consistent with the RCRA and 40 C.F.R. pt 271.4(a). Additionally, the Pol. X amendment is more like the quarantine laws discussed in City of Philadelphia in that Pol. X should be considered noxious due to its potent and toxic attributes.

New Union does not have one of the nine national treatment facilities capable of treating Pol. X; therefore, similar to Exxon, it is not an unreasonable burden for anyone storing Pol. X to transport the material out of New Union to one of the treatment facilities within 120 days. Even though the Pol. X amendment prohibits permits for treatment and

disposal facilities, 40 C.F.R. pt. 271.4(b) gives the EPA discretion to find a regulation inconsistent. Due to the toxicity of Pol. X, it is reasonable for the EPA to find the amendment consistent with the RCRA.

CONCLUSION

For the foregoing reasons, the EPA requests this Court reverse the District Court's finding that CARE does not have jurisdiction under 42 U.S.C. § 6972 pursuant to 42 U.S.C. § 6976(b) and affirm the District Court's finding that CARE does not have jurisdiction under 28 U.S.C. § 1331 (2006) pursuant to 5 U.S.C. § 553(e). The EPA further requests this Court find there has not been a constructive action on the part of the EPA, that judicial review of the case on the merits is unavailable, and that the stay should not be lifted, but that the case should be remanded to the lower court to instruct the EPA to proceed with a decision on CARE's petition. Finally, if this Court finds judicial review is appropriate, the EPA requests this Court to find that New Union's HWP and the ERAA, including its treatment of Pol. X, are appropriate to meet the EPA's approval criteria for the RCRA state authorization program and the EPA was not unreasonable in finding the same.

Respectfully Submitted,

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Counsel for Lisa Jackson, Administrator