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

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IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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CITIZENS ADVOCATES FOR REGULATION
OF THE ENVIRONMENT, INC. (CARE),
Petitioner/Appellant/Cross-Appellee,

*v.*

ENVIRONMENTAL PROTECTION AGENCY,
Respondent/Appellee/Cross-Appellant,

*v.*

STATE OF NEW UNION,
Intervenor/Appellee/Cross-Appellant.

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

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Brief for CARE, Petitioner/Appellant/Cross-Appellee

**ORAL ARGUMENT REQUESTED**

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## Jurisdictional Statement

This is an appeal from a grant of summary judgment for New Union. Federal district courts have jurisdiction over civil actions arising under the constitution, including the Commerce Clause, and the laws of the United States including the Resource Conservation and Recovery Act (RCRA) and the Administrative Procedure Act (APA). 28 U.S.C. § 1331 (2006). The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. §1291 (2006).

## Statement of Issues Presented for Review

I. Whether RCRA section 6972(a)(2) ("section 6972(a)(2)") provides jurisdiction for the District Court to order the Environmental Protection Agency ("EPA") to act on the Citizen Advocates for Regulation and the Environment, Inc.'s ("CARE's") petition for revocation of EPA's approval of New Union's HWP ("HWP"), filed pursuant to RCRA section 6974 ("section 6974"), when (1) the EPA promulgated New Union's HWP using a notice and comment procedure and published it in the Federal Register, (2) New Union's program may be stricter than federal standards, (3) New Union's HWP is binding on its citizens and (4) the legislative intent of EPA action in citizen suits is to decrease adjudication.

II. Whether the District Court has jurisdiction under 28 U.S.C. section 1331 ("section 1331") to order the EPA to act on CARE's petition for revocation of EPA's approval of New Union's HWP under APA section 553(e) ("section 553(e)") when (1) the standards of review under RCRA and the APA are different, (2) jurisdiction under the APA is made

in the alternative to jurisdiction under RCRA and (3) CARE claims New Union violated the Commerce Clause.

III. Whether (1) the EPA constructively denied CARE's petition by failing respond to CARE's petition for over a year and stating that EPA's review of the petition is discretionary and (2) the EPA's constructively approved New Union's HWP when it failed to review the program for over a decade and New Union will continue to violate federal standards for at least two more years.

IV. Whether this court should proceed to the merits of CARE's allegations or remand the case to the District Court with instructions to order the EPA to initiate withdrawal proceedings where only questions of law remain and the record is clear on what action EPA must take.

V. Whether New Union's HWP is adequately enforced and, if not, whether the EPA must initiate withdrawal proceedings where (1) New Union's Department of Environmental Protection ("DEP") lost a great deal of its resources, (2) the demand for permits outpaces their distribution, (3) New Union cannot inspect more than 10% of its facilities, and (4) only six enforcement actions out of twenty-two significant violations were taken.

VI. Whether the EPA must initiate withdrawal proceedings against New Union because the 2000 Environmental Regulatory Adjustment Act ("ERAA") removes railroads from RCRA regulation under the DEP and removes criminal sanctions for owners of such facilities.

VII. Whether the ERAA's regulation of Pollutant X renders the state program inconsistent with or not equivalent to the federal program, or in violation of the Commerce Clause, where (1) transporters of Pollutant X must pass directly through New Union without

stopping, (2) transporters no longer need to register with the regional administrator, and (3) no permits for the treatment, storage, or disposal of Pollutant X will be issued.

## Statement of the Case

On January 5, 2009, CARE filed a petition under RCRA sections 6901-6992(k) and 6974 and APA sections 551-559 requesting that the EPA withdraw its approval of New Union's HWP. (R. at 4.) On January 4, 2010 -- following EPA's continued failure to respond -- CARE filed an action with the District Court seeking either an injunction requiring the EPA to act on their petition or judicial review of EPA inaction as "constructive" action. (*Id.*) The District Court joined New Union as a party under the Federal Rules of Civil Procedure rule 24. (*Id.*) CARE, New Union, and the EPA filed cross motions for summary judgment. (*Id.*) CARE also filed a simultaneous 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." (R. at 5.) The Court of Appeals stayed the proceeding on motion from the EPA, deferring its ruling until the District Court made a final decision. (*Id.*) The District Court granted New Union's motion for summary judgment on June 2, 2010 and held that (1) EPA's approval of New Union's program was an order rather than a rule, (2) CARE failed to state a claim for relief because the petition only allows review of rules, (3) CARE is barred from review under the APA, and (4) congressional intent bars judicial review of "constructive" determinations by the District Court under RCRA section 6976(b). (R. at 8.)

## Statement of Facts

In 1986 the EPA approved New Union's HWP. At that time the program met all of RCRA's approval requirements. The difference between implementation of the HWP in 1986 and today is stark. In 1986, New Union had fifty full-time employees including: fifteen permit

writers, fifteen inspectors, three laboratory technicians, two lawyers, and fifteen administrators. (R. at 10.) Today New Union has opted to reduce the number of full-time employees to thirty. (*Id.*) Further, in 2009 New Union directed a freeze on hiring state employees with an exception for 25% of vacancies within programs deemed "critical to protection of civil order." (*Id.*) No HWP position falls within this exception. (*Id.*)

In the immediate future the HWP's lack of resources is likely to get worse. New Union stated that the hiring freeze is likely to continue for at least two more years. (*Id.*) The lack of employees from which the HWP suffers will worsen since lay offs of between 5%-10% in "programs in which state employees performed functions that federal employees would otherwise perform" are likely. (R. at 11.) The HWP is just such a program.

New Union's annual reports to the EPA indicate that this reduction in resources is largely a result of New Union's low prioritization of its HWP. The state's DEP 2009 report stated that decreases in resources for the HWP were 20% higher than decreases in resources for other public health regulatory programs. (R. at 10.) This fact, coupled with the targeted hiring freeze and future lay offs make it clear that New Union made a conscious decision to gouge its HWP.

While the HWP's resources continue to diminish, the demands upon the program sharply increased. In 1986, New Union had 1,200 hazardous waste treatment, storage, and disposal facilities ("TSDs") within its borders requiring RCRA permits. (*Id.*) Since that time, the number of TSDs requiring permits ballooned to 1,500. (*Id.*) Worse, especially in light of the resources the HWP once had, is that of the 1,200 TSDs that were in need of permits in 1986, only 900 received them. (R. at 11.) Thus, in twenty-three years since the EPA approved the HWP, New Union managed to permit only 75% of the facilities requesting permits. Since then, the number of new TSDs grew and many more permits expired, some as long as twenty years ago. (*Id.*)

Additionally, a large number of TSDs wish to expand their operations but need an amended permit to do so. (*Id.*) To keep up with the demand, DEP prioritized its permit issuance. (*Id.*) New Union placed the lowest priority facilities "having the greatest potential for harm to the public health or environment because of the volume or toxicity of hazardous waste handled" at the bottom of the list. (*Id.*) The DEP is increasingly unable to keep up with the demands from new facilities (at the top of the priority list). Therefore, it seems likely that facilities at the bottom of the priority list, which pose the greatest threat to human health and the environment, will never receive the requested permits. These facilities continue to operate by operation of law, like so many other facilities in New Union. (*Id.*)

In addition to permit issuance, the DEP failed to uphold its second duty under RCRA; enforcement. In 2009, the DEP could only perform inspections of 10% of TSDs and plans to continue this level of enforcement for at least two years. (*Id.*) Out of this handful of inspections, twenty-two "significant permit violations" occurred during the year along with hundreds of minor violations, yet the DEP took only six enforcement actions. (*Id.*) Of these six, not a single one resulted in the revocation of a permit. (*Id.*)

In 2000 New Union enacted two relevant portions of the ERAA. (R. at 12.) First, the ERAA amended the Railroad Regulation Act ("RRA"), which established the state's Railroad Commission ("Commission")[1] and charged it with regulating intrastate railroad freight rates, tracks, rights of way, and yards. (*Id.*) The ERAA transferred "all standard setting, permitting, inspection, and enforcement authorities of the DEP" under all state environmental statutes to the Commission. (*Id.*) Further, it removed all criminal sanctions for environmental violations for TSDs under the Commission's authority. (*Id.*) At the time of enactment only one railroad existed

[1] The Commission in question is a state agency, which is run by state employees appointed on a rotating basis by the Governor, the State Senate, and the State House of Representatives.

within New Union, the president of which happened to be the twin brother of the Majority Leader of New Union's Senate. (*Id.*)

The ERAA amended the approved HWP by changing how it regulates Pollutant X. (*Id.*) Today, given the extreme toxicity of Pollutant X, every facility generating Pollutant X must submit a plan to minimize its generation and the plan for future additional reduction to the DEP. (*Id.*) Further, the ERAA prevents the DEP from issuing any permits allowing the treatment, storage or disposal of Pollutant X within its borders, despite the lack of any facilities capable of handling the Pollutant. (*Id.*) Finally, the ERAA amends the HWP to allow any person to transport Pollutant X through or out of the state, provided that the transporter must not make any stops within the state except for emergencies and refueling. (*Id.*) Only nine facilities capable of storing, treating, and disposing of Pollutant X exist within the country. (*Id.*)

## Standard of Review

This Court reviews determinations of subject matter jurisdiction under the *de novo* standard. *Lundeen v. Mineta*, 291 F.3d 300, 303 (5th Cir. 2002). Determinations of the adequacy of an agency decision are made using the arbitrary and capricious standard. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

## Summary of the Argument

The District Court has jurisdiction to review CARE's petition under section 6972(a)(2) because CARE's petition requested the review of a rule and because the EPA has a nondiscretionary duty to review petitions. The District Court also has jurisdiction to review CARE's petition under section 1331 because section 6926(b) is a rule and because judicial review under section 6972(a)(2) does not preclude submission of the petition under section 553(e). Furthermore, section 553(e)'s lack of a mandatory deadline does not preclude EPA

action because New Union's noncompliance is ongoing. Even if review is unavailable under either the APA or RCRA, the court has supplemental jurisdiction over the petition because CARE asserts a federal question under the Commerce Clause. The EPA constructively denied CARE's petition by failing to respond to it for over a year. Additionally, the EPA constructively approved New Union's HWP by failing to review or withdraw it for ten years. Therefore, this Court should reverse the District Court's grant of summary judgment on New Union's motion and proceed with judicial review.

This court should proceed to the merits of this case before remanding it. No facts are disputed and only questions of law remain. The state program is clearly in violation of RCRA and the EPA must initiate withdrawal proceedings. Since only one course of action is available to the EPA, this court should require the EPA to withdrawal its approval of New Union's HWP, rather than create unnecessary additional delay through a remand.

New Union's has not adequately enforced its HWP, which is a violation of RCRA, and thus approval must be revoked. When initial approval for the HWP was granted, the EPA noted that with less resources the HWP may not be adequate. Since that time resources sharply declined and New Union is not adequately monitoring its TSDs and issues permits at a slower rate below demand while demand continually increases. Furthermore, New Union remains unable to undertake enforcement actions against the majority of known violations. Authorization for the HWP must be revoked.

The ERAA's removal of railroads from DEP regulation renders the program inconsistent with and not equivalent to the federal program. The result has been a bifurcation of New Union's HWP (between the Railroad Commission and the DEP), which is inconsistent with the federal program's concentration of power in the EPA. Further, the ERAA removed criminal sanctions

for those regulated by the Railroad Commission and thus the state program no longer functions as stringently as the federal program, rendering it not equivalent.

Due to the ERAA, New Union regulates Pollutant X in a manner inconsistent with and not equivalent to the federal program, and is in violation of the Commerce Clause. By restricting the movement of the pollutant through New Union, the ERAA frustrates the purposes of RCRA and is thus inconsistent. It further frustrates Congress' purpose by prohibiting the treatment, storage, or disposal of the pollutant within the state's borders. Additionally, this inevitably burdens other states and highways outside New Union because the ERAA incentivizes transporting Pollutant X around and not through the state. This violates the Commerce Clause. Finally, the ERAA allows all people to transport Pollutant X, which conflicts with RCRA's stringent requirements for transporters of large quantities of hazardous waste and it also violates the Commerce Clause.

## Argument

### I. The District Court has jurisdiction to order the EPA to act on CARE's petition because (1) the EPA promulgates HWPs as rules and (2) the EPA has a nondiscretionary duty to review of petitions. (Issue One)

Congress created doorways for citizen participation by allowing citizen suits under section 6972(a)(2). While the door to citizen participation is often open, petitions submitted under section 6974(a) serve as important doorknobs allowing access to citizen participation when that door is closed. The EPA's lack of a nondiscretionary duty to review New Union's HWP closes a door to an important area of public participation. CARE is entitled to enter the doorway under section 6972(a)(2) because the petition requested review of a rule and the EPA had a nondiscretionary duty to review CARE's petition under section 6974(a). Therefore, denying

District Court jurisdiction is tantamount to removing the doorknob on an invited guest. This Court should reverse the District Court's denial of CARE's motion for summary judgment in order to leave an important portal of public participation open and ensure that RCRA is enforced according to federal standards.

**A. The EPA authorizes state HWPs as rules.**

The EPA utilizes a system of cooperative federalism to ensure that "the collection and disposal of solid waste should continue to be primarily the function of the State, regional, and local agencies." 42 U.S.C. § 6901(a)(4) (1984). The EPA authorizes states to implement HWPs under RCRA section 6926(b) ("section 6926(b)"). 42 U.S.C. § 6926(b) (1986). States create a HWP by submitting an application to the EPA, which then holds a public hearing. If the state's program meets the federal RCRA guidelines, the EPA provides a notice of approval within ninety days of the application, and publishes the state's program in the Federal Register. *Id.* Once approved, the state can issue permits for the storage, treatment or disposal of hazardous waste. *Id.*

Under the APA, a rule is "an agency statement of *general and 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." 5 U.S.C. § 551(4) (1994) (emphasis added). Promulgation of rules includes a notice and comment procedure and printing in the federal register. *United States v. S. Union*, 643 F. Supp. 2d 201, 212 (D.R.I. 2009). The EPA's treatment of a statute as a rule is determinative even if the EPA intended to propagate the statute as a policy. *McLouth v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (holding that the VHS model is a rule because EPA treated it as a rule).

For example, "[t]he EPA intended to use its legislative rulemaking authority when it authorized changes to Rhode Island's HWP." *S. Union*, 643 F. Supp. 2d at 212. The EPA used notice and comment procedures, approved Rhode Island's program, published it in the Federal Register, and "the authorization imposed new standards and affirmative obligations on hazardous waste generators." *Id.* Thereby, the D.C. Circuit Court held that a citizen of Rhode Island was bound by the state hazardous waste provisions despite more lenient federal requirements and inconsistent requirements among states. *Id.* at 214.

Under the APA, orders are "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6) (1994). Orders are made through informal rulemaking, i.e., administrative orders, or adjudication. Adjudication means the "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1994). Orders enforce action only on the named parties, apply fact to law, and generally apply retrospectively. David Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965).

Rules are distinguished from orders, "which are accorded deference but may be disregarded in favor of some other position after giving the decision the appropriate weight." *S. Union*, 643 F. Supp. at 212. For example, the District Court in *Olaa Sugar* remanded a case decided by the National Labor Relations Board (NLRB) under the established "Clinton Foods doctrine" because "it [was] within the power of the Board to abandon that policy whenever it sees fit to do so." *NLRB v. Olaa Sugar*, 242 F.2d 714, 721 (9th Cir. 1957).

**CARE's properly petitioned for EPA review under section 6974(a) because the EPA promulgated New Union's HWP as a rule.**

EPA's authorization of New Union's HWP conforms to the definition of a rule because it has general and particular applicability, implements law, and has future effect. 5 U.S.C. § 551(4). First, the RCRA state authorization section applies particularly because it applies to individual states such as New Union's HWP. (R. at 10.) The RCRA state authorization section also has general applicability because, like Rhode Island's HWP in *Southern Union*, the EPA intended to make New Union's HWP generally applicable to New Union's citizens. 643 F. Supp at 214. If the statute was inapplicable to New Union's citizens, the EPA would have undermined RCRA's intent of granting states the authority to be primary administrators of hazardous waste disposal within their borders. 42 U.S.C 6901(a)(4).

Second, the program satisfies a rule's design of "implement[ing], interpret[ing], or prescrib[ing] law" by implementing the New Union's HWP. 5 U.S.C. § 551(4). New Union had the option of creating more stringent regulations than required under RCRA, like Rhode Island's revised HWP. *S. Union*, 643 F. Supp. at 212. Thereby, creating New Union's HWP did not merely apply fact to law by considering whether the state's program met EPA's criteria; it created new law. The EPA intended to create legislation because it authorized New Union's hazardous waste plan in a similar manner to the Rhode Island plan revision; by notice and comment procedure, authorization, and publishing in the Federal Register. *Id.*

Finally, New Union's program meets a rule's requirements of "future effect" because the EPA intended the rule to govern all of New Union's future activities as Administrator of the program. 5 U.S.C. § 551(4) (1994). Like the citizens of Rhode Island, the citizens of New Union became bound by state law rather than federal law once the EPA authorized New Union's program. *S. Union*, 643 F. Supp. at 214. Unlike the court order by the NLRB in *Olaa Sugar*, the district courts cannot selectively enforce New Union's HWP. 242 F.2d at 721. Therefore, even if

the language promulgating EPA action under 40 CFR 271 has elements characteristic of an order, EPA's treatment of New Union's HWP as a rule is determinative. *McLouth,* 838 F.2d at 1324.

**B. "Shall" indicates a nondiscretionary EPA duty under section 6974(a).**

Under the RCRA citizen suit provision, any person may commence a civil action in the Unites States district court against the EPA for "failure to perform any *nondiscretionary* act or duty." 42 U.S.C. § 6972(a)(2) (1984) (emphasis added). Under RCRA, "any person *may* petition the Administrator for the promulgation, amendment, or repeal of a regulation" and the "Administrator *shall* take action [on] such a petition and *shall* publish the notice [in] the Federal Register, together with the reasons therefore." 42 U.S.C. § 6974(a) (1980) (emphasis added). The legislative intent of the citizen suit provision is to balance the need for encouraging environmental enforcement and avoiding burden on the courts. *Hallstrom v. Tillamook,* 493 U.S. 20, 29 (1989) (holding sixty day notice provision mandatory precondition to bringing citizen suit under RCRA). Requiring notice and delay requirements allows government agencies to "take responsibility for enforcing environmental regulations" and allows violators to come into compliance. *Id.* Both courses of action "obviate[ed] the need for citizen suits." *Id.*

When interpreting statutes, courts first look to the word's plain meaning. *Chevron USA Inc. v. Natural Res. Def. Council ("NRDC"),* 467 U.S. 837, 859 (1984). A statute's use of two different words indicates that they have distinctive meanings within the statute, unless the meaning is expressly altered. *See Dep't of Energy (DOE) v. Ohio,* 503 U.S. 607, 618 (1992) (discussing the different meaning of "person" through express alterations in the citizen suit provisions). The plain meaning of words may also become clear in context even if the word is ambiguous in isolation. *See Id.* at 622. The Fifth Circuit interpreted the plain meaning of 40

CFR 271.23(b)(1) to mean that "the EPA Administrator *must* respond in writing to any petition to commence withdrawal proceedings." *Texas Disposal Landfill Inc. v. EPA*, 377 Fed. Appx. 406, 408 (5th Cir. 2010) (holding the EPA decision to order commencement proceedings discretionary); *see also Hernandez v. ESSO Standard Oil*, 597 F. Supp. 2d 272, 278 (D.P.R. 2009) (interpreting "may" in RCRA section 6972(a)(1)(B) expansively); *but see Guitierrez v. Lamagno*, 515 U.S. 417, 432-433 n.9 (1995) (holding that "shall" indicates a discretionary duty, because to hold otherwise would open the Administrator to thousands of tort suits).

If the language of the statute is ambiguous, then courts look to the agency's interpretation of the statute. *Chevron*, 467 U.S. at 859. However, a court will find an agency's interpretation of ambiguous language arbitrary and capricious if it runs counter to the intent of the statute. *See Meghrig v. KFC Western*, 516 U.S. 479, 483 (1996) (holding EPA's interpretation of "person" arbitrary and capricious because it violated RCRA's primary purpose of "reduc[ing] the generation of hazardous waste and [ensuring] the proper treatment, storage, and disposal of that waste"); *see also Nw. Envtl. Advocates v. EPA*, 268 F. Supp. 2d 1255, 1261 (D.Or. 2003) (interpreting "shall" as mandatory because deciding otherwise defeated the "[Clean Water Act's] purpose").

**The EPA has a nondiscretionary duty to respond to CARE's petition under section 6974 because "shall" indicates a nondiscretionary duty.**

The EPA's duty to respond to CARE's petition is nondiscretionary under the plain meaning of "shall." *Chevron*, 467 U.S. at 859. The words "shall" and "may" must have distinct meanings because "may" is in the sentence immediately preceding "shall" within RCRA section 6926(a) ("section 6926(a)"). *DOE*, 503 U.S. at 622. "May" indicates a discretionary function by its plain meaning because it implies "expansiveness" in EPA action. *Hernandez*, 597 F. Supp. 2d at 278. While "shall" may be ambiguous in isolation, an interpretation of "shall" as discretionary

conflicts with the plain meaning of "may." *DOE*, 503 U.S. at 622. Interpreting "shall" as nondiscretionary also conforms with the court in *Texas Landfill*, which interpreted "shall" under RCRA 7004(a) to mean "must." 377 Fed. Appx. at 408. The interpretation of "shall" in other contexts, such as in tort law under *Guitierrez*, is less persuasive. 515 U.S. at 432-433 n.9.

Even if the word "shall" was ambiguous, the court should find the EPA's interpretation of "shall" as nondiscretionary to be arbitrary and capricious because it runs counter to RCRA's intent. The EPA has no affirmative duty to review state HWPs under any other provision of RCRA. Therefore, interpreting the EPA's duty as discretionary denies Congress of an important mechanism to prompt EPA review of state HWPs. *See Meghrig*, 516 U.S. at 483. Unfettered EPA discretion runs counter to the EPA's intent of "ensuring the proper treatment, storage, and disposal of waste." *Id.* at 483. Therefore, the EPA's interpretation of the word "may" as nondiscretionary is arbitrary and capricious.

Interpreting "shall" as nondiscretionary also facilitates the EPA's intent of minimizing lawsuits brought under the citizen suit provision. Like the sixty-day notice period requirement under RCRA section 6972(a), nondiscretionary action on petitions under section 6974(a) obviates the need for a lawsuit by allowing agency action to address the petitioner's claims without litigation. *Hallstrom*, 493 U.S. at 29. Without a vehicle for mandatory EPA review of state HWPs, New Union also has no notice or opportunity to come into compliance prior to litigation. *Id.* The need for EPA review of citizen suits is highlighted by the protracted litigation in the current case. Therefore, this Court should hold that "shall" indicates a nondiscretionary duty for the EPA to review CARE's petition.

## II. The District Court has jurisdiction to order the EPA to act on CARE's petition because (1) the EPA promulgates the authorization of state HWP as rules, (2) judicial review is available under both the APA and RCRA, and (3) the court can act because the New Union's noncompliance continues unabated. (Issue Two)

The District Court erred in granting summary judgment on New Union's motion denying the court's jurisdiction under section 1331 because section 6926(b) is a rule, as discussed above, and because judicial review under section 6974(a) does not preclude submission of the petition under section 553(e). Furthermore, section 553(e)'s lack of a mandatory deadline does not preclude EPA action because New Union's noncompliance is ongoing. Therefore, this Court should reverse the District Court's denial of CARE's motion to grant summary judgment on jurisdiction under section 1331.

### A. The District Court has jurisdiction to hear CARE's petition under the APA and more specific statute when the standards of review and the claim for relief are distinct.

Under section 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1980). Questions arising under the APA are federal questions arising under section 1331. *See Dep't of the Army v. Blue Fox*, 525 U.S. 255, 258 (1999). Additionally, violations of the Commerce Clause are federal questions subject to 28 U.S.C 1331. *See Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1163 (9th Cir. 2006).

Under section 553(e), "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e) (1966). Courts have divided over the applicability of the general and specific statutes. For example, the Ninth Circuit granted jurisdiction to consider a citizen suit alleging the EPA's approval of inadequate Total Maximum

Daily Load ("TMDL") submissions under the APA. *See Hayes v. Browner*, 117 F.Supp.2d 1182, 1196 (D.C. Cir. 2000). The Tenth Circuit granted jurisdiction to consider a similar suit under the Clean Water Act ("CWA"). *Hayes v. Whitman,* 264 F.3d 1017, 1025 (10th Cir. 2001) (holding that the since the court granted jurisdiction under the Clean Water Act, review was not available under the APA for the state's failure to timely submit TMDLs).

Finally, the Ninth Circuit allowed citizen's suits claims under both the CWA and the APA, reasoning that the "standards of analysis were different" under the two statutes. *See San Francisco Baykeeper (SF Baykeeper) v. Brown*, 147 F. Supp. 991, 997 (9th Cir. 2001) (holding the EPA's duty to establish TMDLs discretionary and its decision to not establish TMDLs reasonable). The *SF Baykeeper* court also determined that the "primary time-frame for the analysis of the need for declaratory or injunctive relief is the present level of performance by the EPA." *Id.*

Courts also grant review under section 553(e) when review is unavailable under a specific environmental statute. *See Northside Sanitary Landfill v. Thomas*, 849 F.2d 1516, 1519 (D.C. Cir. 1988). For example, the D.C. Circuit court granted a plaintiff to a right to appeal the classification of his property on the National Priorities List under CERCLA by making a claim in District Court under section 553(e). *Id.* The D.C. Circuit also allowed petitioners to request a revision to the RCRA rule incorporating biodegradation data under section 553(e). *Edison Electric v. United States*, 2 F.3d 438, 439 (D.C. Cir. 1993).

**B. A district court has jurisdiction to hear a petition under the APA.**

CARE can bring suit under section 553(e) either in conjunction with a claim under section 6976(b) or in the alternative. While courts have divided over the applicability of bringing a suit under the APA when a more specific provision is available, this Court has yet to rule on this

issue. Since relief brought under APA and RCRA are under different standards of analysis; this court should follow the Ninth Circuit in granting both forms of relief. *See SF Baykeeper*, 147 F. Supp. at 997. This maximizes the plaintiffs' chances of finding relief and thereby better serves the court's interest in serving justice.

Alternatively, if this Court finds no jurisdiction under RCRA, the court should grant jurisdiction under section 553(e). *See generally Dep't of the Army*, 525 U.S. at 258. Like the Courts in *Edison Electric* and *Northside*, this Court should grant jurisdiction under the APA because no review was available under the specific statute. *Edison Electric*, 2 F.3d at 439; *Northside*, 849 F.2d at 1519.

Either way, the district court should have jurisdiction to hear the petition under 28 U.S.C. 1331. Actions arising under section 553(e) are presently reviewable by this Court despite the statute's failure to indicate a timeframe for review. The primary time frame for reviewing this action is now since the EPA's failure to withdraw New Union's HWP is ongoing. *See SF Baykeeper*, 147 F. Supp. at 997. Like the citizen's group in *SF Baykeeper*, CARE's claim for injunctive and declaratory relief compels immediate review. *Id.*

Even if the Federal court has no jurisdiction to hear the claim under section 553(e), the district court can hear CARE's claim under supplemental jurisdiction arising under 28 U.S.C. section 1367. 28 U.S.C. 1367 (1990). In this case, the court's jurisdiction under section 1331 arises under CARE's claim that New Union's HWP violates the Commerce Clause, see issue 7. *See generally Cent. Valley Chrysler-Jeep*, 456 F. Supp. 2d at 1163. Therefore, the court has jurisdiction under section 1331 either under section 553(e) for the EPA's failure to reply to CARE's petition or for New Union's violation of the Commerce Clause.

## III. This Court has jurisdiction to review the EPA's constructive denial of CARE's petition and its constructive approval of New Union's HWP. (Issue 3)

The District Court committed reversible error in holding that constructive submission is inapplicable to the EPA's actions because the EPA's failure to review CARE's petition for over a year constituted constructive denial of the petition. Additionally, the EPA's failure to review or withdraw New Union's HWP for ten years was a constructive approval of the program. Therefore, this Court should reverse and remand the District Court's decision.

### Constructive submission and constructive approval occur when an Administrator fails to act on a nondiscretionary duty over an extended period of time and has no plans to remedy its failure to act.

Under section 6926(e), "whenever the Administrator determines [] that a State is not administering an enforcing a program authorized under [RCRA], he shall so notify the State." 42 U.S.C. § 6926(e) (1986). "[I]f 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." *Id.*

An administrator constructively submits a response when it fails to comply with a nondiscretionary duty and has no plans to comply in the future. *Hayes*, 264 F.3d at 1023 (citing *S.F. Baykeeper*, 147 F. Supp. 2d at 1002). Similarly, constructive approval occurs when the EPA, as an Administrator, fails to take any enforcement action despite state noncompliance over an extended period of time. *Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984) (holding that the "EPA's inaction appears to be tantamount to approval of [Indiana's] decision that TMDL's are unneeded"). This prevents state agency inaction from thwarting the implementation of federal law. *See Id.* at 997. However, the constructive submission doctrine does not apply when an agency complies partially or inadequately. *Hayes*, 264 F.3d at 1024

(holding the constructive submission doctrine inapplicable for reviewing Oklahoma's partial submission of TMDLs). No bright line rule determines when a state's noncompliance becomes a constructive submission. *See Scott*, 741 F.2d at 998. Courts hold that constructive submission occurs whenever noncompliance is substantially longer than the timeframe contemplated by the statute. *Id.*

Where a district court finds constructive approval of inadequate state action by the EPA, the court may order the EPA to remedy the inadequacies. *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986-7 (9th Cir. 1994). The Eleventh Circuit upheld a court injunction aimed at bringing the EPA into compliance with the CWA after the EPA showed "total inaction" for approximately twelve years. *Alaska Ctr. for the Env't*, 20 F.3d at 983. The district court ordered the EPA to develop a schedule for establishing TMDLs for Alaska's water bodies, submit a report to the court summarizing the water quality monitoring, and propose a schedule for implementation of appropriate measures. *Id.* at 984. The appellate court praised the district court's exercise of restraint in ordering the EPA to take affirmative steps "undeniably necessary" to achieve compliance while leaving the "substance and manner of achieving compliance" to the EPA's discretion. *Id.* at 987-8.

**1. The EPA constructively denied CARE's petition by failing to respond for over a year and stating that its response was discretionary.**

The EPA constructively denied CARE's petition by failing respond to the petition within a "reasonable period of time." 42 U.S.C. § 6974(a). Like the TMDL statute in *Scott*, EPA's inaction was considerably longer than the statute intended. 741 F.2d at 998. The petition contemplates a fast turnaround, stating that the response would be within a "reasonable time." 42 U.S.C. § 6974(a). In other parts of the RCRA statute, such as RCRA section 6926(e), a "reasonable period of time" is set at no more than ninety days. 42 U.S.C. § 6926(e). Similar to

the state of Illinois in *Scott*, the EPA took no action on CARE's petition for over a year, which well exceeds the reasonable time limit set in the statute. 741 F.2d at 998.

The EPA also constructively denied CARE's petition by refusing to evaluate New Union's HWP. Evaluating New Union's HWP is a necessary precondition to responding to CARE's claim of program inadequacy. Unlike the EPA's review of Oklahoma's partial submissions, the EPA's indication that its response to CARE's petition is discretionary suggests that the EPA has no future plans to respond to CARE's petition and nothing in the record suggests that the EPA has taken even partial action. *Hayes*, 264 F.3d at 1024. Therefore, the EPA's constructively denied CARE's petition.

**2. The EPA constructively approved New Union's HWP by failing to evualate the program for a decade.**

The EPA constructively approved New Union's program though its total failure to evaluate or withdraw New Union's hazardous program for a decade. *Id.* at 1023. The EPA's constructive approval includes New Union's current HWP because New Union has planned to continue noncompliance for at least the next two years due to state hiring freezes and planned layoffs. *Id.* RCRA, on the other hand, contemplates continuous state compliance with federal hazardous waste laws through oversight and withdrawal authority under section 6926(e). 42 U.S.C. § 6926(e). The EPA should not frustrate an important aspect of the federal scheme by refusing to act. *Scott*, 741 F.2d at 997. A lack of EPA oversight is contrary to the intent of the statute and would render the withdrawal proceedings provision meaningless. 42 U.S.C. §6962(e).

This court should order the EPA to take steps to bring New Union's HWP into compliance. New Union's noncompliance with federal HWPs since 2000 is as egregious as Alaska's failure to comply with TMDL requirements for twelve years. *Alaska Ctr. for the Env't*, 20 F.3d at 983. Ordering the withdrawal of New Union's HWP is also "undeniably necessary"

in light of the continued inadequacy of New Union's program. *See Id.* at 987-8. After the EPA initiated withdrawal proceedings, the "substance and manner" of achieving New Union's compliance would be within the EPA's discretion. *Id.* Therefore, the EPA constructively approved of New Union's inadequate HWP and this Court should order the EPA to bring New Union into compliance through withdrawal of the state program and implementation of federal standards.

## IV. This Court should lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions because only questions of law remain and, due to the undisputed facts in the record, those questions have but one answer. (Issue Four)

Generally, an appellate court remands a case to an agency for decision of a matter squarely in agency hands. *INS v. Ventura*, 537 U.S. 12, 16 (2002). However, when the action is an "interpretation of law and application of the law to undisputed facts, the court must form its own independent conclusions." *Reed v. Missouri Dept of Social Services,* 193 S.W.3d 839, 841 (Mo.App. E.D. 2006). Thus, if the action is based on an interpretation of law and the agency has misconceived that law, the court may choose to reverse the agency decision. *Securities and Exchange Commission v. Chenery Co.*, 318 U.S. 80, 94 (1943).

Further, courts need remand for a final determination if the agency has only one choice. The Ninth Circuit held that "[they] do not remand a matter to the [agency] if, on the record before [them], it is clear that [they] would be compelled to reverse [their] decision if it had decided the matter against the applicant." *Chen v. INS*, 266 F.3d 1094, 1101 (9th Circ. 2001), overruled on other grounds by INS v. Ventura, 537 U.S. at 16. If the record clearly demonstrates what action the agency must take, remanding the case serves no purpose.

### A. The record here is sufficient and reveals what action the EPA must take.

Despite the requirement of a response, the EPA disputed none of the factual allegations found in the petition. Consequently, the record contains only undisputed facts and the EPA's action constituted interpretations of RCRA's requirements of adequate enforcement, equivalency to the federal program, and consistency with the federal program. 42 U.S.C. 6926. Thus, this case can be described as one in which the EPA's decision "involves the interpretation of law and application of the law to undisputed facts." Reed at 841.

These undisputed facts leave the EPA with one option; list the deficiencies of the HWP, submit the list to New Union, and demand corrective action. 42 U.S.C. § 6926. If, despite the clear failings of the HWP, the EPA on remand found the state to be in compliance, the reviewing court would be compelled to reverse that finding. The Court should compel this inevitable agency action now, especially since this is not a "highly technical question" on which "courts necessarily must show considerable deference to an agency's expertise." *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1539 (D.C. Cir. 1989).

Here, the court faces the EPA's misinterpretation of law (i.e., RCRA) and its application to facts, warranting a review of the EPA's findings. A remand would result in increased delays when the matter has already been delayed since January of 2009. A remand is inappropriate given the ongoing violations of RCRA, which risks the health of New Union's environment and citizens. Additionally, reviewing the merits in this case and finding for CARE simply compels the EPA to promulgate a list of deficiencies (which already exists in CARE's petition) and forces them to submit that list to New Union for action. These simple and necessary steps leave the "substance and manner of achieving compliance" to the EPA. *Alaska Ctr. for the Envt.*, 20 F.3d at 986-7. . This Court should follow the example of the Ninth Circuit and order the EPA to take

this "undeniably necessary" step to achieve compliance with RCRA while leaving the "substance and manner of achieving compliance" to the EPA's discretion. *Id.* at 987-8.

Finally, the EPA has had multiple, substantial opportunities to respond to CARE's petition.[2] Through both proceedings in the lower court and this one the EPA could have requested a "voluntary remand;" it has not. *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 831 (5th Circ. 2010). The EPA has been clear that it will not take action on the petition despite the requirement of section 6974(a). 42 U.S.C. § 6974(a). This Court should force EPA to act given the sufficiency of the facts alleged. To hold otherwise would remove any incentive to respond to petitions, because the consequences simply constitute a command to do so.

### B. EPA'S constructive approval of New Union's HWP was not committed to agency discretion and is not reviewable by this court. (Issue Five)

Unless an agency commits to agency action to its discretion by law, that action is reviewable to determine whether it was arbitrary, capricious, or an abuse of discretion. *Heckler v. Chaney*, 470 U.S. 821, 821 (U.S.D.C. 1985) (holding the Food and Drug Administration's refusal to take action against drugs used for human executions to be a "refusal to take enforcement action"). Congress commits actions to agency discretion if they draw the statute so "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* Courts construe this exception to the general reviewability of agency actions very narrowly. *Citizens to Preserve Overton Park, Inc. v. EPA*, 401 U.S. 402, 410 (1971). However, the court emphasized that "the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Heckler, 470 U.S. at 832.

[2] First upon initial receipt of the petition, the year that followed, and even after CARE filed suit.

The decision not to take enforcement action has been characterized one "committed to agency discretion." *Id.* at 822. However, the EPA constructively approved rather than simply refused to enforce New Union's HWP (see above). The *Texas Disposal* court characterized the EPA's denial of a petition for review of Texas's HWP as a "refusal to enforce." *Texas Disposal*, 377 Fed.Appx. at 408. However, the *Texas Disposal* court misinterpreted the CFR by viewing the use of "may" in section 271.22 as granting the EPA discretion to not take enforcement action and thus the court considered the action a "refusal to enforce." *Id*. However, since initiation of withdrawal proceedings is a nondiscretionary duty upon a finding of noncompliance, this conclusion is incorrect (see discussion *infra* section VI).

The situation is akin to *Kemmons*, where, in response to complaints alleging violations of the Federal Aviation Act, the Federal Aviation Administration dismissed the complaint in a "perfunctory and conclusory fashion." *Kemmons Wilson, Inc. v. Federal Aviation Administration*, 882 F.2d 104, 1046 (6th Cir. 1989). The *Kemmons* court stated that "a perfunctory adjudication of a case which the agency has not taken sufficiently seriously is not the same as the exercise of prosecutorial discretion." *Id.* The EPA dismissed CARE's complaint without any review or adjudication. Since the EPA dismissed CARE's complaint without any review or adjudication whatsoever, the process was "perfunctory and conclusory" and therefore reviewable by this Court. *Id.* .

Regardless of how this Court characterizes EPA's dismissal of the petition, Congress never committed the action to EPA discretion. Contrary to the holding in *Texas Disposal*, RCRA provides the courts with meaningful standards to apply. *Texas Disposal*, 377 Fed.Appx. at 408. RCRA is littered with standards by which to judge the EPA's approval of the HWP.

RCRA requires that a state HWP be at least as stringent as the federal standards. 42 U.S.C. § 6929 (1984). The EPA has stated that this should be measured by the results of a state's HWP. Memorandum from Matthew Hale, Office of Solid Waste, Determining Equivalency of State RCRA Hazardous Waste Programs (Sep. 7, 2005); http://www.epa.gov/osw/laws-regs/state/policy/fe-9-7-05.pdf. If a state's HWP does not provide equal environmental protection, then it is not adequately enforced and not equivalent to the federal program. Therefore, a clear, easily applicable standard exists by which the courts can judge the EPA's decision.

Further, a HWP must be "capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority to identify persons subject to regulation who have failed to comply" with the program's requirements. 40 CFR § 271.5(b)(1) (2007). This guideline, like the one above it, is a clear, justiciable, easily interpretable guideline. Thus, EPA's approval of New Union's program is reviewable by this court.

## V. A state hazardous waste program must be consistent with and equivalent to the federal program, and must be adequately enforced. (Issue Five, Six, and Seven)

New Union's HWP fails to meet federal minimum standards, is not equivalent to or consistent with the federal program, is insufficiently enforced and consequently remains in violation of RCRA. Accordingly, the EPA must take action by initiating withdrawal procedures. 42 U.S.C. § 6929; 40 CFR § 271.23 (2007).

RCRA and the CFR lay out clear standards that state programs must meet in order to receive federal approval. To obtain approval for a state program, that program must be equivalent to and consistent with the federal program. 42 U.S.C. § 6926(b). Additionally, the proposed state program must provide for adequate enforcement. *Id*.

The CFR states that "any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent." 40 C.F.R. § 271.4 (2007). Inconsistency occurs if any aspect of the HWP "unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States." Id. Approved HWPs must function in conjunction with the federal program, and other approved state programs, and cannot impede or frustrate the purposes of the federal program.

Further, a state program must be "equivalent to" the federal program. The EPA's interpretation of "equivalency" is consistent with RCRA, which requires that "no State or political subdivision may impose any requirements less stringent than those authorized under this subtitle." 42 U.S.C. § 6929. The EPA stated that "state programs must provide equal protection of health and the environment as the federal regulations." Memorandum from Matthew Hale. Like Rhode Island in *Southern Union*, New Union may create more stringent regulations than those required under RCRA, but not less stringent. *S. Union*, 643 F. Supp. at 212.

Finally, the EPA will not approve a state program if "such program does not provide adequate enforcement of compliance." 42 U.S.C. § 6926(b). RCRA requires operators of TSDs to comply with HWP standards, create implementation plans which are subject to inspection and enforcement and document their compliance. 40 C.F.R. § 264 (2007). The regional Administrator enforces these requirements by reviewing many reports to ensure compliance and physically inspecting TSDs. The DEP is required to inspect and conduct other surveillance procedures for all permittees. Further, the DEP must be capable of "making comprehensive

surveys of all facilities." 40 CFR §271.15(b)(1) (2007). New Union must oversee the continued TSD compliance with its HWP.

The requirements for initial approval of a state program are relevant to our inquiry regarding withdrawal of approval for New Union's program. Congress explicitly states that the above standards are the minimum that must be met by a state before the EPA can approve of their program and allowing otherwise would frustrate RCRA's purpose, as discussed in Section I.

### A. New Union has not provided adequate enforcement of RCRA. (Issue Five)

The EPA must revoke New Union' HWP because New Union's resources are inadequate. They have sharply decreased from a level that was already on the cusp of inadequacy, which is largely a result of New Union's low prioritization if its HWP. Between the hiring freeze, the massive and on-going downsizing, and the ever growing increase in demand upon the DEP, New Union is unable to adequately enforce its HWP. Even if New Union were to find the means to, for example, periodically update the technological requirements for TSDs, as required by RCRA section 3004(m), the effort would be meaningless given the growing backlog of operating permits that have expired. (R. at 11.)

New Union's HWP, as it exists now, is not adequate for EPA approval; therefore, it should not be valid today. *See United States Brewers Ass'n v. EPA*, 600 F.2d 974, 979 (D.C. Cir. 1979). New Union does not meet the standard because it lost twenty of the original fifty full time positions and can no longer adequately carry out any of its duties under RCRA. For example, the DEP is only able to issue permits to a fraction of the facilities that require them. (R. at 11.) Also, the DEP is unable to inspect a sufficient number of TSDs to confirm compliance with RCRA's requirements and substantiate the veracity of their submissions. (R. at 11.) States that do not

meet that minimum level of regulation clearly frustrate RCRA's purpose of "reduc[ing] the generation of hazardous waste, and [ensuring] the proper disposal of hazardous waste." *Meghrig*, 516 U.S. at 483.

### B. The 2000 Environmental Regulatory Adjustment Act's removal of criminal sanctions and bifurcation of enforcement authority for railroads renders the HWP not consistent with and not equivalent to the federal program. (Issue Six)

New Union's HWP is no longer equivalent to or consistent with the federal program. RCRA authorizes the use of injunctive relief, sanctions, and criminal penalties for violators of RCRA. 42 U.S.C. § 6961 (1986). Any "agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any . . . hazardous waste law." *Id.* Exemptions may only be granted upon a showing to Congress that it is "in the paramount interest of the United States to do so." *Id.* This is an integral component of RCRA because it forbids TSD facility exemption from these sanctions unless the President expressly allows it. *Id.* The failure to exempt clearly evinces Congress's intent to apply criminal sanctions when enforcing RCRA.

In 2000, New Union enacted the ERAA which, among other things, amended the Railroad Regulation Act ("RRA"). (R. at 12.) The revision to the RRA transferred "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the [New Union Railroad] Commission." *Id*. The ERAA transferred the DEP's authority under RCRA to regulate railroads, to the Commission. Additionally, the ERAA removed criminal sanctions for violations of environmental statutes for facilities that fall under the jurisdiction of the Commission. Id.

New Union bifurcated its HWP by ceding authority away from the DEP and granting it to the Commission, which is not consistent with the federal program. This significant departure from that original agreement, the outsourcing of important, non-discretionary responsibilities to a second organization, is not consistent with the federal plan's use of a single organization to execute RCRA.

The ERAA's provision removing criminal sanctions for certain violations of RCRA renders the HWP all the more inconsistent. One of the primary tools for enforcement of regulations is criminal sanctions against those TSD operators who would violate its provisions. *Id.* Under the ERAA, no criminal sanction may be imposed upon a facility regulated by the Commission. This provision renders New Union's HWP in direct conflict with RCRA.

The ERAA has changed the mechanics of New Union's HWP in a way that renders it inconsistent and not equivalent to the federal program. The bifurcation of enforcement responsibilities between the DEP and the Commission and the removal of criminal sanctions are sufficient grounds to find the program inconsistent. If one factors in how ill equipped the Commission[3] is to execute its new duties under RCRA, then it becomes clear that the HWP is not in compliance.

### C. The ERAA regulation of Pollutant X (1) renders the HWP inconsistent with and not equivalent to the federal program and other state programs and (2) violates the Commerce Clause. (Issue Seven)

The ERAA requires that New Union desist treatment, disposal, or storage of the Pollutant, allow *all* citizens to transport the hazardous waste, and unreasonably restricts the free movement of the Pollutant through the state. All of which render the program inconsistent with and not

[3] Up until enactment of the ERAA, the Commission has been tasked with regulating railroad rights of way, freight rates, tracks, and yards. (R. at 12.)

equivalent to the federal program. Additionally, these same provisions tend to burden interstate commerce, which is a direct violation of the Commerce Clause.

### 1. The ERAA's regulation of Pollutant X is not consistent with or equivalent to the federal program.

First, the ERAA regulates Pollutant X by minimizing its production and prohibiting all treatment, disposal, or storage of the pollutant within its borders. (R. at 12.) This scheme is not equivalent to the federal program, which Congress designed to minimize the generation of hazardous waste "and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment." 42 U.S.C. § 6902(a)(6) (1984). The ERAA functions to prohibit the second objective, the disposal of hazardous waste through treatment, in this case of Pollutant X. This cost cutting measure will not increase the reduction of Pollutant X, but slows it down by eliminating a large component (treatment and disposal) of how RCRA removes hazardous wastes from our environment.

Second, in its haste to rid itself of Pollutant X, the ERAA was drafted to read "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." (R. at 12.) This is directly contrary to RCRA's requirement that hazardous waste from a large quantity generator shall be accompanied by a manifest form. 42 U.S.C. § 6923(a)(3) (1984). This, again, renders the program inconsistent.

Third, the ERAA's prohibition on Pollutant X entering the state, unless traveling straight through, renders the HWP inconsistent. The CFR states that if a HWP "unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for" TSD facilities, then it is inconsistent. 40 CFR §271.4(a). ERAA does just that because transporters will be transporting pollutant X across many states (only nine states

have permitted TSDs for this pollutant) and ERAA prohibits these transporters from stopping in New Union except for emergencies or refueling. (R. at 12.) Thus, unless transporters are willing and able to continue all the way through New Union, they must either stop for the night (thereby burdening neighboring states with an increased exposure to this deadly pollutant) or go around New Union, which burdens the highways of other states. Thus, the ERAA unreasonably restricts and impedes the free movement of pollutant X across the state border.

Additionally, the new regulations for Pollutant X cause inconsistencies between that program and those of other states. State HWPs are meant to function in conjunction with each other for the treatment of hazardous waste. If states were to begin banning the treatment, storage, or disposal of particular hazardous wastes within their borders, it would greatly frustrate the purposes of RCRA by creating blockages throughout the network of HWPs.

**2. The ERAA has resulted in multiple Commerce Clause violations.**

Finally, the ERAA results in two distinct violations of the Commerce Clause.[4] The Commerce Clause dictates that "a State may not attempt to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Philadelphia v. New Jersey*, 437 US 617, 617 (1978). Pollutant X is part of interstate commerce and is thus subject to regulation. *Chemical Waste Management, Inc. v. Hunt*, 504 US 334, 340 (2009).

As detailed above, the ERAA will tend to burden the highways of other states (the channels of interstate commerce) by causing transporters of Pollutant X to avoid New Union. More importantly, the ERAA's approval of unregistered, unregulated transporters of Pollutant X is in direct conflict with Congress' regulations for drivers on interstate highways. RCRA requires

[4] Regulation that burdens interstate commerce will be struck down unless it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *United States v. Lopez*, 514 U.S. 549, 555 (1995).

that all large quantity transporters of hazardous waste register and follow a strict set of regulations. 40 CFR § 273.32 (2007). However, in New Union and nowhere else in the country, one may transport a large quantity of hazardous waste without permission to do so. This is akin to lowering the driving age in a state and the Commerce Clause forbids it.

New Union's purpose in enacting the ERAA is presumably to reduce the amount of Pollutant X within the state as rapidly as possible. While this is a legitimate purpose, it results in multiple violations of the Commerce Clause. This purpose could be adequately served by simply allowing the treatment of this Pollutant within New Union and thereby avoid the imposition on interstate commerce.

## VI. The EPA has a nondiscretionary duty to withdraw approval for a HWP upon a finding of non-compliance with RCRA.

Both RCRA and the CFR require that, upon a finding of non-compliance, corrective action shall be taken. Shall, used in this context, indicates a non-discretionary duty (see above). The EPA's own rules require that, if the State does not take corrective action, "the Administrator shall issue a supplementary order withdrawing approval of the State program." 40 CFR § 271.23(b)(8)(vi) (2007).

The rules of statutory interpretation support this conclusion. Section 271.22 of the CFR is titled "Criteria for withdrawing approval of State programs" while § 271.23 is titled "Procedures for withdrawing approval of state programs." The first, listing the "criteria" for withdrawing approval, is the EPA's non-exhaustive list of what RCRA violations may trigger withdrawal proceedings; it grants discretion to the EPA. For example, § 271.22 holds that the EPA may withdraw authorization if the state continues to issue permits which do not conform to the

requirements of this part. 40 C.F.R. § 271.22(a)(2)(ii) (2007). This is an example of something that may qualify as noncompliance and therefore may be grounds for withdrawal.

Conversely, § 271.23 details what must happen once EPA has exercised its discretion under § 271.22 and found a violation of RCRA. It requires that, upon finding non-compliance, the EPA must list the deficiencies and require corrective action from the state, which must then take such action, and if the state fails to take corrective action the EPA must then "issue a supplementary order withdrawing approval of the state program." 40 C.F.R. §271.23(b)(8)(vi). Much like judicial sentencing guidelines, the EPA has the initial authority to weigh the facts and determine whether a state is administering its HWP in compliance with RCRA but, upon a finding that it is not, the EPA shall initiate withdrawal proceedings.

Interpreting RCRA to require withdrawal proceedings upon finding non-compliance is supported by a look at the Act as a whole. Congress did not pen RCRA with the intention that its provisions could be violated by states. Congress vested the EPA with ultimate authority to implement and enforce RCRA. Given its role as the sole enforcer of the Act, it must be assumed that Congress intended for the EPA to take corrective action when a state is not in compliance. An alternative interpretation would surely frustrate the purpose of the Act.

**EPA'S arbitrary and capricious approval of New Union's program was an abuse of discretion and must be reversed. (Issues Five, Six, and Seven)**

Courts may set aside an agency action if they find it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law " 5 U.S.C. §706(2)(A) (1994). While this standard is quite deferential to the agency's decision, the court must "assure itself that the agency decision was based on a consideration of the relevant factors." *Ethyl Corp. v. EPA*, 541 F.2d 1,

34 (D.C.Cir.1976). It must also ensure that the action is not counter to the intent of the statute. Meghrig 516 U.S. at 483.

Similarly, an agency rule is arbitrary and capricious if the agency "entirely failed to considerer an important aspect of the problem" or "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 US 29, 43 (1983). Further, the failure of an agency to abide by its own rules is per se arbitrary and capricious. *Tri-State Generation and Transmission Ass'n, Inc. v. Environmental Quality Council,* 590 P.2d 1324, 1330-31 (Wyo. 1979).

In addition to running contrary to RCRA's intent, the EPA has not only failed to "consider an important aspect of the problem" but has given the court no reason to believe that it has considered the problem at all. The EPA's approval of the HWP was unreasoned and unsupported; completely arbitrary. Further, a brief consideration of the violations exposes approval of the HWP as implausible to the point that it cannot be ascribed to a difference in view or agency expertise. Finally, the EPA has violated its own rules by both refusing to respond to CARE's petition and by approving a state program that violates RCRA in a multitude of serious ways.

## Conclusion

Based on the aforementioned arguments, this Court should reverse the District Court's decision and order the EPA to withdraw approval for New Union's hazardous waste program.

Dated: November 29 2010 Respectfully submitted,

/s/