Team Number 30

IN THE

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

C.A. Nos. 18-2010, 400-2010

CITIZEN ADVOCATES FOR REGULATION
AND THE ENVIRONMENT, INC.,
Petitioner/Appellant/Cross-Appellee,

v.

LISA JACKSON, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Respondent/Appellee/Cross-Appellant,

v.

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

Brief for Petitioners

Attorney for Citizen Advocates for Regulation and the Environment, Inc.

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STATEMENT OF JURISDICTION

Jurisdiction is proper in the District Court for the District of New Union based on 42 U.S.C. § 6972(a)(2) and 28 U.S.C. § 1331 because the Environmental Protection Agency ("EPA") failed to perform a nondiscretionary duty when it refused to respond to Citizen Advocates for Regulation and the Environment's ("CARE's") petition. In the interests of avoiding inconsistency with the district court and ensuring a timely and efficient resolution of the matter, however, jurisdiction is more appropriate in this court under 42 U.S.C. § 6976(b) (2009). Jurisdiction is also proper under 28 U.S.C. § 1291, which grants jurisdiction to this Court over appeals from final judgments of district courts of the United States. This appeal is from a final order or judgment that disposes of all parties' claims.

QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 6972(a)(2) and 28 U.S.C. § 1331 grant district courts jurisdiction to review EPA's failure to respond to a citizen petition.

2. Whether EPA's refusal to respond to a citizen petition constitutes a constructive denial of that petition which is subject to judicial review in the court of appeals.

3. Whether this Court should lift its stay and proceed with judicial review of CARE's claims.

4. Whether EPA must withdraw authorization of New Union's hazardous waste program because it fails to meet RCRA's approval criteria; effectively withdraws railroad hazardous waste regulation; and is inconsistent with and not equivalent to the federal program to the point that it violates the Commerce Clause.

STATEMENT OF THE CASE

On January 5, 2009, CARE served a petition on EPA Administrator Lisa Jackson under § 7004 of RCRA and § 553(e) of the Administrative Procedure Act ("APA") requesting that EPA commence proceedings to withdraw its approval of New Union's hazardous waste regulatory program. CARE v. Jackson, No. 000138-2010 (D. N.U. June 2, 2010). On January 4, 2010,

CARE filed an action in the United States District Court for the District of New Union under RCRA § 7002(a)(2) and 28 U.S.C. § 1331 seeking an injunction requiring EPA to act on its petition. Id.

Simultaneously, CARE petitioned for review in the United States Court of Appeals for the Twelfth Circuit under RCRA § 7006(b). Id. CARE sought review in this Court of EPA's action in "granting, denying or withdrawing authorization" under RCRA Section 3006(b). Id. This Court stayed the proceeding, pending review in the district court. Id. The district court found it lacked jurisdiction to review CARE's claims and granted New Union's motion for summary judgment. Id. CARE appeals.

STATEMENT OF FACTS

In 1985, the state of New Union applied to EPA for approval of its hazardous waste program under RCRA. Rec. doc. 1. In 1986, EPA authorized the program. Rec. doc. 3. At the time, according to EPA, New Union had adequate resources to administer and enforce the program. Rec. doc. 2, p. 1. EPA used a notice and comment procedure to approve the program and incorporated the result in 40 C.F.R. Part 272. CARE v. Jackson, No. 000138-2010 (D. N.U. June 2, 2010).

Since 1986, New Union's program has deteriorated. In its 2009 Annual Report to EPA, the New Union Department of Environmental Protection ("DEP") indicated that it had issued 125 RCRA permits during the previous year and anticipated issuing 125 during the present year. Rec. doc. 5 for 2009, p. 19. Currently, the state is unable to address its growing backlog of new permit applications, its 900 currently permitted programs (some of which have been expired for twenty years), and its fifty applications for expansion. Rec. doc. 5 for 2009, p. 20. The state program's lack of resources leaves it able to address slightly more than one quarter of its major

permit violations each year. Rec. doc. 5 for 2009, p. 25, and it continues to ignore hundreds of minor violations. Id. at 24.

In 2009, New Union also reported that it could not inspect more than ten percent of the treatment, storage, and disposal facilities in the state per year. Rec. doc. 5 for 2009, p. 23. Unable to take appropriate action, New Union relies on EPA to execute part its enforcement of the program and limits its inspections to only those facilities that report unpermitted releases of hazardous waste and those "posing the greatest potential for harm to the public health or the environment." Id.

New Union attributes its inability to properly implement its program to dwindling state resources. Rec. doc. 5 for 2009, p. 50. In response to the state's fiscal crisis, the governor of New Union instituted a hiring freeze on state employees in 2009. Rec. doc. 5 for 2009, p. 53. The governor's director of budget stated publicly that the freeze is likely to continue for at least the next two years and will result in the elimination of between five and ten percent of state employees. Rec. doc. 5 for 2009, p. 53. The governor will concentrate resource cuts on programs where state employees perform functions that federal employees would otherwise perform—such as environmental programs. Rec. doc. 6, June 6, 2009.

In 2000, New Union enacted the Environmental Regulatory Adjustment Act ("ERAA"). Rec. doc. 4 for 2000, pp. 103–05. This legislation amended the New Union Railroad Regulation Act by establishing the New Union Railroad Commission ("NURC"). The Commission regulates intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards. Id. The Governor, State Senate, and State House of Representatives each appoint a member to the commission. Id. Without notifying EPA, New Union transferred all "standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental

statutes" to the Commission. Id. The legislation also removed criminal sanctions for violations of environmental statutes by facilities under the Commission's jurisdiction. Rec. doc. 5 for 2000, pp. 103–05. There is only one intrastate railroad in New Union—the New Union RR Co. The president of the New Union RR Co. is Nat Greenleaf, the twin brother of Luther Greenleaf, Majority Leader of the State Senate. Rec. doc. 6, Aug. 14, 2000.

Furthermore, ERAA amended the state hazardous waste program by requiring generators to phase out and eventually cease producing Pollutant X. Rec. doc. 5 for 2000, pp. 105–07. The legislation directed DEP not to issue permits allowing the treatment, storage, or disposal of Pollutant X within the state, except for storage for less than 120 days while awaiting transportation to a facility located outside of the state. Id. Finally, ERAA permits transporting Pollutant X through the state but requires that "transport shall be as direct and fast as is reasonably possible, with no stops within the state except for emergencies and necessary refueling." Id. In response to New Union's failures, CARE petitioned EPA to revoke its authorization of the state's hazardous waste program.

SUMMARY OF ARGUMENT

EPA has failed to perform a nondiscretionary duty under federal law, and RCRA's citizen suit provision provides for judicial review of this action. Federal question jurisdiction under 28 U.S.C. § 1331 is also proper in the district court because EPA did not allow CARE to petition for the repeal of a rule under the Administrative Procedure Act. Furthermore, CARE's failure to act constitutes a constructive denial of CARE's petition and a constructive determination that New Union's program meets the federal requirements. Because this Court has jurisdiction, it should lift its stay and find that New Union's gross failures to implement its hazardous waste program in accordance with federal law require EPA to withdraw approval of the state program.

ARGUMENT

I. RCRA AND THE APA GRANT JURISDICTION IN THE DISTRICT COURT FOR THE DISTRICT OF NEW UNION.

RCRA's citizen suit provision requires that CARE's petition is properly before the EPA under 42 U.S.C. § 6974. Thus, the decision that CARE petitions must be a "regulation." Furthermore, to grant jurisdiction, § 7002(a)(2) requires EPA to fail to perform a nondiscretionary duty. A plain reading of RCRA and the APA demonstrates that the action CARE initially challenged—EPA's approval of New Unions hazardous waste program—was in fact a "regulation." Thus, EPA has a mandatory duty to respond.

Moreover, 28 U.S.C. § 1331 grants original jurisdiction in the district courts over all civil actions arising under federal law. CARE properly petitioned for the repeal of a rule under the APA. EPA improperly denied them this right to petition, thus creating another cause of action under the APA. 5 U.S.C. § 704 (2009).

A. CARE's petition under § 7004 was proper because it challenged a regulation.

Section 7004 of RCRA permits citizens to petition EPA for the promulgation, amendment, or repeal of a "regulation." 42 U.S.C. § 6974(a) (2009). EPA's authorization of New Union's hazardous waste program meets the plain-language definition of a "regulation" and is therefore properly subject to citizen petition, regardless of whether it is a rule. See Black's Law Dictionary 1398 (9th ed., 2009) (defining "regulation" as "a rule or order, having legal force, usually issued by an administrative agency"). Additionally, even if New Union is correct, and § 7004 only applies to "rules," jurisdiction is proper because EPA's authorization is a rule.

1. EPA's action was a rule, not an order.

RCRA does not define "rules" or "regulations." While the APA does not define "regulations," it defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (2009). The United States Court of Appeals for the Federal Circuit has explained that "rule making is legislative in nature, is primarily concerned with policy considerations for the future rather than the evaluation of past conduct, and looks not to the evidentiary facts but to policy-making conclusions to be drawn from the facts." Paralyzed Veterans of Am. v. Sec'y, Dep't of Veterans Affairs, 308 F.3d 1262, 1265 (Fed. Cir. 2002) (quoting LeFevre v. Sec'y, Dep't of Veterans Affairs, 66 F.3d 1191, 1196 (Fed. Cir. 1995)). EPA's approval of New Union's program fits this definition. It is primarily concerned with how solid and hazardous waste will be regulated in the future and adopts New Union's local plan into federal implementation of the Act.

The district court was incorrect in finding that EPA's action is an order. Rules are distinguishable from orders because they "affect[] the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitively touched." J. Dickinson, Administrative Justice and the Supremacy of Law 2 (1927). Orders, on the other hand, "operate[] concretely upon individuals in their individual capacity." Id. In this case, EPA's authorization of New Union's program affects all state citizens rather than affecting just one in an individual capacity.

Furthermore, a rule's unique effect on one entity does not, by default, make it an order. The legislative history of the APA indicates that the inclusion of the "particular" as well as the "general" applicability of rules was "necessary in order to avoid controversy and assure coverage

of rulemaking addressed to named persons." 1 Richard J. Pierce, Jr., Administrative Law Treatise 302 (2002 Aspen Law & Business). Congress defined the term "rule" broadly to include actions like the one in question.

Additionally, by using the notice and comment procedure and incorporating the result in 40 C.F.R. Part 272, EPA indicated that it was creating a rule. CARE v. Jackson, No. 000138-2010 (D. N.U. June 2, 2010). The United States Court of Appeals for the District of Columbia Circuit has ruled that "an agency's characterization of an administrative action, though not dispositive of reviewability, may provide guidance as to whether a pronouncement is a regulation." Am. Portland Cement Alliance v. EPA, 101 F.3d 772, 776 (D.C. Cir. 1996). Furthermore, EPA's decision to treat authorizations of state programs as rule makings is not an interpretation of the APA, as the District Court held. It is an interpretation of RCRA—thus requiring this Court to grant the agency deference in this respect. In this case it is the action under RCRA that must be characterized, and the RCRA statute that must be interpreted to decide what process is required to give it effect

EPA's construction of RCRA is a reasonable interpretation of the statute where Congress left the statute ambiguous on the "precise question at issue." Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984). Congress did not delineate whether state authorization was a rule or an order, and the court may not simply impose its own construction of RCRA's authorization procedures. Id. at 843. Rather, EPA's interpretation must stand because it is based on a reasonable and permissible interpretation of the statute. Id. at 843–44. Hence, the legislative nature of the program approval; its codification in the Code of Federal Regulations; and EPA's treatment of the action as a rule making demonstrate that it was a rule and is subject to petition under § 7004.

Moreover, § 7004 does not provide for a hearing that allows the State to appear and argue in support of a finding of consistency with the federal statute, as would be required for an order. While the statute and regulations contemplate substantial public involvement, there is nothing that allows or requires the State to argue in its favor. Furthermore, this is not as straightforward as applying facts to law. The "facts" are proposed law that can change during the authorization process if they are insufficient to meet RCRA's requirements. The "application," in this case, is a comparison between proposed rules and what is required of them.

In sum, state authorization plans are codified in the Code of Federal Regulations and affect citizens generally. Thus, they are subject to petition under § 7004(a). Because a rule is also a regulation, and the EPA authorization is a rule, jurisdiction is still proper under if the court requires a rule.

B. RCRA § 7002(a)(2) provides jurisdiction for district courts to review EPA's failure to act on CARE's petition.

EPA has a nondiscretionary duty to respond to citizen petitions. Despite EPA's argument to the contrary, the agency has a mandatory obligation under RCRA to act on citizen petitions for the repeal of regulations. The statute requires that "[w]ithin a reasonable time following receipt of such petition, the Administrator *shall* take action with respect to such petition." 42 U.S.C. § 6974 (2009) (emphasis added). It is generally accepted that "'shall' is the language of command." Escoe v. Zerbst, 295 U.S. 490, 493 (1935); cf. Sierra Club v. Train, 557 F.2d 485, 489 (5th Cir. 1977) (holding that use of the word "shall" generally indicates a mandatory duty). Furthermore, basic canons of statutory construction indicate that "shall" communicates an intent to create a mandatory duty. Norman J. Singer, Sutherland Statutory Construction § 25.04 (5th ed. 1992). Under Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984), "the judiciary is the

final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Id. at 843 n.9.

In RCRA, Congress articulated its intent clearly. It used mandatory language to require EPA to respond to any citizen petition. 42 U.S.C. § 6974(a) (2009). It then required EPA to publish its response in the Federal Register. Id. There is no language in the statute to blunt the meaning of these words, and agencies may not impose their own interpretation of a statute when the language is clear. Here, EPA asserts that Congress's intent was not to require it to squander its resources by responding to citizen petitions. CARE v. Jackson, No. 000138-2010 (D. N.U. June 2, 2010). Not only is there no support in the statute or its legislative history for the EPA's reading, but such a reading would effectively eliminate a citizen's right to petition the agency to promulgate, amend, or repeal a regulation. The very next provision of § 7004 mandates that states and the EPA provide for, encourage, and assist public participation in the process of developing, revising, and enforcing regulations. 42 U.S.C. § 6974(b) (2009). If EPA's authority to respond to petitions was discretionary, the agency could ignore citizen petitions without repercussions. A reading of the statute requiring EPA to provide for public participation, while at the same time allowing the agency to ignore citizen petitions, would lead to absurd results. This reading would strip the federal courts of jurisdiction to review such blatant denial of public participation. It would also render the citizen petition statute meaningless, since a citizen may send petitions to agencies without any assurance of response or action without a congressional grant of such a right.

Congress knows how to use permissive language to form discretionary duties and did so in other sections of RCRA. See 42 U.S.C. § 6904(a) (2009) ("The provisions of this chapter to be carried out by States *may* be carried out by interstate agencies and provisions applicable to States

may apply to interstate regions where such agencies and regions have been established by the respective States and approved by the Administrator."); 42 U.S.C. § 6908a (2009) ("[T]he Administrator *is authorized* to enter into assistance agreements with Federally recognized Indian tribes on such terms and conditions as the Administrator deems appropriate for the development and implementation of programs to manage hazardous waste.") (emphasis added). Congress is presumed to intend the plain meaning of the words it uses.

Finally, Congress left no gaps for the EPA to fill when it drafted this section of RCRA. It explicitly identified the importance of public participation in the rulemaking process and required EPA to respond to citizen petitions. 42 U.S.C. § 6974(a)–(b) (2009). In addition to the Act's requirement that EPA take action regarding a citizen petition, the legislative history shows that the "Act requires the Administrator to make a finding as to whether or not the state hazardous waste program meets the federal minimum standards." H.R. Rep. No. 91-1491, at 29 (1976). Congress clearly stated that "[t]his section is necessary if there is to be any judicial review of the Administrator's actions relating to the approval of state hazardous waste programs." Id. This offers yet another concrete indication that Congress intends to provide for active citizen participation in the RCRA rulemaking process.

C. CARE has a right to judicial review under the Administrative Procedure Act.

The APA provides for judicial review of agency actions made reviewable by statute and "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (2009). Additionally, it provides a right of review to citizens when they suffer a "legal wrong" because of agency action or are adversely affected or aggrieved by agency action under the statute. Id. § 702. As a limitation, the APA denies access to the courts "to the extent that statutes preclude judicial review." Id. § 701(1).

In interpreting whether an agency action is reviewable, courts begin with a strong presumption in favor of judicial review. INS v. St. Cyr, 533 U.S. 289, 298 (2001). The extent to which a statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984). Therefore, in order to overcome the presumption in favor of judicial review, Congress's intent to preclude review must be "fairly discernable in the statutory scheme." Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 157 (1970).

In determining whether 28 U.S.C. § 1331 grants district courts jurisdiction to review a petition for a rulemaking under RCRA, a court must look at the entirety of the statutory scheme. One administrative law expert notes that "[i]n the absence of a statutory provision to the contrary, 28 U.S.C. § 1331 confers on district courts exclusive jurisdiction to review any reviewable action of a federal agency." 3 Richard J. Pierce, Jr., Administrative Law Treatise § 18.2 p. 1680. Thus, RCRA's judicial review provision is controlling unless such review would be inadequate. 5 U.S.C. § 703 (2009); Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys., 551 F.2d 1270, 1280 (D.C. Cir. 1977). In this case, RCRA provides jurisdiction to review EPA's denial of CARE's petition. Even if it did not, however, the APA would provide an alternate avenue of judicial review because review under RCRA would be inadequate.

In RCRA, Congress provided two avenues for judicial review of agency action, including specifically granting jurisdiction for courts to review withdrawal of a state program's authorization. 42 U.S.C. § 6976(b) (2009). Furthermore, the statute specifically encourages and mandates that EPA allow for public participation in its development of regulations, and nothing in the statute's legislative history indicates any intent to preclude judicial review. See 42 U.S.C.

§ 6974(b)(1) (2009) ("Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this Act *shall* be provided for, encouraged, and assisted by the Administrator and the States.") (emphasis added).

The language of RCRA indicates that the statute works in concert with other acts, including the APA. The citizen suit provision of RCRA states:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

42 U.S.C. § 6972(f) (2009). This language demonstrates Congress's intent to preserve other rights like judicial review under the APA. This is consistent with RCRA's goals and purposes of protecting the public health and environment. In addition, the Ninth Circuit Court of Appeals has held that this section of the Act leaves a citizen's independent right to judicial review unrestricted. Parola v. Weinberger, 848 F.2d 956, 959 (9th Cir. 1988). While CARE cannot use the APA to bypass the requirements of the citizen suit provision, it can use it to supplement its grant of jurisdiction where review under RCRA would be inadequate.

Congress clearly explained its rationale for implementing RCRA as to protect the public from the dangers of improperly disposed of waste. RCRA itself notes the dangers of improper solid waste disposal and its effects on public and environmental health. 42 U.S.C. § 6901(b)(4)–(5) (2009). It also emphasizes the national policy that generation of hazardous waste be eliminated and existing waste should be treated, stored, or disposed of to minimize threats to human health and the environment. 42 U.S.C. § 6902(b) (2009). Congress is also clear of its intent to require EPA to keep a watchful eye on state programs and to allow for public oversight

to maintain high standards for the protection of health and the environment. See 42 U.S.C. § 6926(b) (noting that EPA may approve state programs, but such programs must be equivalent to the federal program).

D. EPA's failure to act on CARE's petition constitutes a constructive denial and determination that New Union's program is sufficient under RCRA.

Once a citizen petitions EPA for the promulgation, amendment, or repeal of a regulation, EPA must respond within a "reasonable time." 42 U.S.C. § 6974(a) (2009). The Administrator must publish notice of her action and reasons for it in the Federal Register. Id. In this case, the Administrator refused to act on CARE's petition and has, thus, frustrated the requirement that she "provide[] for, encourage[], and assist[]" "[p]ublic participation in the development, revision, implementation, and enforcement of any regulation . . . or program under this chapter." Id. § 6974(b)(1).

Again, New Union and the EPA argue that this departure from statutory guidance is acceptable because the word "shall" is not always mandatory. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 432–33 n.9 (1995). This footnote, however, does not stand for the proposition that EPA and New Union claim it does. In Gutierrez, the court acknowledged that in some cases, "shall" could reasonably be interpreted to not require a specified action. The examples the court gave are clearly distinguishable from the commands in RCRA at issue in this case. See id. (citing Fed. Rule Civ. Proc. 16(e), which states that an order "shall be modified only to prevent manifest injustice"). While "shall" may indicate less than a command in some instances, the statute as a whole must support such an interpretation because it is inconsistent with the ordinary definition of the word. Robinson Farms Co. v. D'Aquisto, 962 F.2d 680, 684 (7th Cir. 1992).

When the Administrator failed to respond in accordance with the statute, it constructively denied CARE's petition. The judicial review section directly referring to § 7004 states that sections 701–06 of the APA apply to the Administrator's denial of a citizen petition. 42 U.S.C. §6976(a) (2009). Those sections, in turn, include authorization for courts to "compel agency action unlawfully withheld." 5 U.S.C. § 706(1) (2009). This clause allows plaintiffs to bring claims asserting that an agency "failed to take a *discrete* agency action that it is *required to take*." Norton v. Southern Utah Wilderness Alliance, 524 U.S. 55, 64 (2004) (emphasis in original). The Administrator's failure to act on CARE's petition is a failure to perform a specific statutory duty that the Administrator is required, by law, to fulfill.

The interests of timely justice and the statute require that EPA respond to citizen petitions within a "reasonable time." EPA claims that requiring it to act in a timely fashion would result in an overflow of citizen petitions and that responding to such petitions would require an immense amount of resources. CARE v. Jackson, No. 000138-2010 (D. N.U. June 2, 2010). This statement finds no basis in the statute itself, which requires the agency merely to act on a petition and explain its reasoning by publishing it in the Federal Register. 42 U.S.C. § 6974(a) (2009). This slight requirement contains little potential for depleting the EPA's time and resources, and certainly no more than Congress expected.

Due to the nature of the RCRA state authorization program and CARE's withdrawal petition, a denial, whether explicit or constructive, inherently contains a conclusion that the state's program continues to meet RCRA's criteria for program approval under § 3006(b). Under 42 U.S.C. § 6947(a), the Administrator must withdraw approval of a state plan if it is found to be out of compliance with the minimum requirements for approval of state plans under § 4003. 42 U.S.C. § 6943 (2009).

Similar to the language of § 7004(a), the Administrator is guided by a statutory "shall," and does not have discretion in this matter. 42 U.S.C. § 6947 (2009). If the Administrator finds that the plan meets the minimum requirements, she must approve it. Id. Furthermore, if she finds that a state must revise or correct its approved plan to bring it into compliance, she must, after notice and opportunity for a public hearing, withdraw approval. Id. In this case, the Administrator's decision that CARE's claim regarding the insufficiency of New Union's program was not worthy of a statute-mandated response preserved the approved status of New Union's hazardous waste program. This, effectively, constitutes a determination in fact, if not in law. To give meaningful effect to RCRA's requirements regarding citizen suits and policies of public involvement, a determination of this sort *must* be reviewable in court.

Furthermore, courts have found that EPA has a mandatory duty to act in interpreting a nearly identical provision dealing with withdrawal of state implementation of the Clean Water Act. Johnson Cnty. Citizen Comm. for Clean Air & Water v. EPA, 2005 WL 2204953 (M.D.Tenn. Sept. 9, 2005); Save the Valley, Inc. v. EPA, 99 F. Supp. 2d 981, 984 (S.D. Ind. 2000). In Save the Valley, the District Court for the Southern District of Indiana found that a withdrawal of authorization provision imposed a mandatory duty on EPA to initiate the process of program withdrawal, when he finds widespread enforcement problems. 99 F. Supp. 2d 981, 984 (S.D. Ind. 2000). Another district court held that, once EPA determines that a state is not administering a federal environmental statute in accordance with federal standards, it must withdraw state approval. See Johnson Cnty. Citizen Comm. for Clean Air & Water v. EPA, 2005 WL 2204953 (M.D.Tenn. Sept. 9, 2005) ("If the EPA determines that a state is not administering the program in compliance with federal standards, the EPA must provide an opportunity to cure, and, if the deficiency continues, the EPA must withdraw the state's authorization.").

The issue before the Court presents a similar situation under a different statute. The program withdrawal provisions are nearly identical. Compare 42 U.S.C. 6926(e) with 33 U.S.C. § 1342(c)(3). Here, also, EPA knows of clear inconsistencies between federal baselines and the state's program. See Rec. doc. 5 (demonstrating inadequate resources and enforcement). Therefore, EPA must withdraw program approval. Its failure to do so, in this case, constitutes a constructive determination that New Union's program is adequate. This is grounds for judicial review because it is against the law.

E. CARE's petition is not barred by the § 7006 statute of limitations because the petition for review is based on grounds which arose more than ninety days after EPA approved New Union's program.

In denying review, the district court found that CARE's petition is barred by 42 U.S.C. § 6976(b) because the facts CARE alleges occurred more than ninety days after EPA approved New Union's program. CARE v. EPA, No. 000138-2010 (D. N.U. June 2, 2010). This position is contrary to both RCRA's plain language and various federal court interpretations. First, under RCRA, any interested person may seek review of state authorization under § 3006 within ninety days 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) (2009). CARE's complaint is based on events occurring more than ninety days after EPA's authorization for state implementation of RCRA in New Union. Rec. doc. 5. It is not based solely on the 1986 authorization of New Union's state program.

The ninety-day time constraint pertains to only the action upon which review is sought. 42 U.S.C. § 6976(b) (2009). CARE's petition is free of such constraints. In this case, CARE seeks review of EPA's failure to act on its petition. Because the Administrator need only act "within a reasonable time following receipt of such petition," the time constraint cannot bar suit

until ninety days after a "reasonable time." 42 U.S.C. § 6974 (2009). CARE's complaint is timely because it was brought after a reasonable time had passed since the petition and when it became clear that EPA did not intend to act on it.

Furthermore, "a petitioner's contention that a regulation should be amended or rescinded because it *conflicts with the statute* from which its authority derives is reviewable outside of a statutory limitations period." Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth., 834 F.2d 191, 196 (D.C. Cir. 1987) (emphasis in original). In this case, EPA issued a rule delegating authority to implement RCRA to the State of New Union and published it in the Code of Federal Regulations. Due to events that occurred more than ninety days after the promulgation of this regulation, that delegation is no longer consistent with the statute. Specifically, the regulation conflicts with § 3006 of the statute, which requires consistency between state programs and federal programs. 42 U.S.C. § 6926(b) (2009).

Moreover, accepting, *arguendo*, New Union's contention that the relevant event was the initial authorization, the EPA may renew the time period for judicial review by reaffirming a prior position. See Envtl. Def. Fund v. EPA, 852 F.2d 1316, 1325 (D.C. Cir. 1988) (finding EPA's decision to renew prior interpretation renewed review period for that decision); Geller v. FCC, 610 F.2d 973, 977–78 (D.C. Cir. 1979) (statutory period for review renewed by later events). Here, the Administrator tacitly approved its authorization of New Union's program by failing to review New Union's plan "from time to time" and withdrawing her approval in response to the clear evidence of insufficiency. See 42 U.S.C. § 6947 (2009). Judicial review of a similar provision in the Clean Air Act led the Court of Appeals for the District of Columbia Circuit to find that a provision for review based on denial of a petition, as opposed to the original promulgation of a regulation, was designed to "assure that standards were raised whenever

necessary" on the basis of new information. Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 660 (D.C. Cir. 1975).

In Oljato, the court required only "presentation to the Administrator of any new information thought to justify revision of a standard of performance" to allow review of a denial. Id. at 666. Here, CARE submitted new, uncontested evidence that clearly demonstrates the inadequacy of New Union's program, including its failure to meet the requirements of RCRA. This information is the type that allows petitioners to take judicial action when the Administrator refuses to acknowledge new evidence showing a need for change in agency action.

Finally, although EPA's action constitutes a constructive determination that New Union's program is adequate, the agency has not taken one particular action that would trigger the statute of limitations. Failure to revoke an inadequate state environmental protection program is considered a failure to act and therefore cannot logically trigger a statute of limitations. Save the Valley v. EPA, 223 F. Supp. 2d 997, 1001 (S.D. Ind. 2002). Here, where there is no specific act that approved the program, but the EPA's delay resulted in harmful effects on the citizens of New Union, it would be unfair to allow an agency to shield itself from a lawsuit by perpetually refusing to act then pointing to a statute of limitations as a defense.

F. This Court should lift its stay and proceed with judicial review.

RCRA and the APA grant jurisdiction in both the district court and the court of appeals. RCRA § 7006 grants jurisdiction in the local court of appeals to review EPA's decision granting, denying, or withdrawing authorization for state programs. 42 U.S.C. § 6976(b) (2009). Additionally, RCRA § 7002 grants jurisdiction in the district courts over actions against the EPA Administrator for failure to perform a nondiscretionary duty. 42 U.S.C. § 6972(a)(2). Finally, 28 U.S.C. § 1331 grants original jurisdiction in the district courts for claims arising under federal

law. Jurisdiction exists under all three of these provisions. CARE challenges EPA's failure to withdraw New Union's hazardous waste program and its tacit approval each year with knowledge that the program was failing and inconsistent with RCRA. Even if judicial review under RCRA would be inadequate, the APA allows for a separate avenue for judicial review under federal question jurisdiction because the claim is made under federal law.

Several circuit courts, in comparable cases, have decided that judicial review is appropriate in the court of appeals when claims are brought under multiple statutes, providing original jurisdiction in both the district court and the court of appeals. Media Access Project v. FCC, 883 F.2d 1063, 1066–69 (D.C. Cir. 1989); Int'l Brotherhood of Teamsters v. Pena, 17 F.3d 1478 (D.C. Cir. 1994). In Pena, the Court of Appeals for the District of Columbia Circuit found it had jurisdiction to review a claim brought under Interstate Commerce Commission regulations and the Commercial Motor Vehicle Safety Act—one of which provided original jurisdiction in district court and the other in the court of appeals. Id. at 1482. The court found that denying review because it had original jurisdiction would also strip the district court of jurisdiction, writing "if we lack jurisdiction over this petition because the district court has exclusive original jurisdiction to review rules issued under the Safety Act, then the district court would also lack jurisdiction over this petition because *we* have exclusive original jurisdiction." Id. (emphasis in original). The D.C. Circuit decided to review the case.

Other circuit courts have decided accordingly. See Suburban O'Hare Comm'n v. Dole, 787 F.2d 186, 192–93 (7th Cir. 1986) (holding that when a single decision encompasses four "orders," three issued under authority leading to exclusive jurisdiction in the court of appeals, and the fourth leading to review initially in the district court, entire proceeding is to be reviewed in court of appeals); Ruud v. United States DOL, 347 F.3d 1086, 1090 (9th Cir. 2003) ("[T]he

court of appeals should entertain a petition to review an agency decision made pursuant to the agency's authority under two or more statutes, at least one of which provides for direct review in the courts of appeals, where the petition involves a common factual background and raises a common legal question."). In Ruud, the Ninth Circuit Court of Appeals found that consolidated review made under multiple statutes would eliminate inconsistency between the district courts and appellate courts and ensure timely and efficient resolution of administrative cases. Ruud at 1090. Here, petitioners filed claims under two statutes, both arising under a common factual background—EPA's constructive denial of CARE's petition and its constructive approval of New Union's RCRA program.

The interests of efficiency and prudence, therefore, demand consolidated review now in the court of appeals. Furthermore, remand to the district court would allow for further delay and further harm to human health and the environment—exactly the destructive actions RCRA was drafted to prevent. See 42 U.S.C. § 6902(b) (2009) (declaring the national policy to "minimize the present and future threat to human health and the environment").

II. THE ADMINISTRATOR MUST WITHDRAW APPROVAL OF NEW UNION'S HAZARDOUS WASTE PROGRAM.

The state of New Union is unable to operate a hazardous waste program that meets the requirements and criteria of the RCRA statute and regulations. Therefore, the Administrator must withdraw her approval of the program. The driving force behind the program's failure is its lack of resources, which results in its inability to operate under the federal program and requirements.

The decrease in funding, employees, and other assets has left the program unable to meet the requirements of RCRA. Rec. doc. 5. First, the New Union state program is incapable of performing adequate enforcement of its permits and violations. Rec. doc. 5 for 2009, p. 24.

Second, in an attempt to relieve the strain on the program, New Union improperly delegated its responsibility to an unapproved state agency. Rec. doc. 5 for 2000, pp. 103–05. This delegation also leaves New Union's program not equivalent to the federal program, by removing the program's power to enforce criminal sanctions against certain RCRA violators. Finally, the program's refusal to permit the treatment, storage, and disposal of Pollutant X renders the program inconsistent with the federal program, as well as in violation of the Commerce Clause. These failures, both individually and cumulatively, require the Administrator's withdrawal of approval.

A. New Union's resources and performance are not sufficient to meet the criteria of an authorized state program.

RCRA requires that state programs provide adequate enforcement of compliance with its requirements. 42 U.S.C. § 6926(b)(3). Where a state fails to perform this duty, the Administrator "shall withdraw authorization of such program." 42 U.S.C. § 6926(e) (2009). In this case, New Union admits it is unable to offer even a semblance of adequate enforcement. Therefore, the Administrator must withdraw her approval of New Union's state program.

1. New Union's insufficient resources and performance result in its inadequate administrative and enforcement policies.

Although registering an initial approval in 1986, New Union's state program has taken a dramatic downturn in effectiveness and capability. Its lack of resources results in New Union's inability to address its growing backlog of permit applications, including 900 currently expired permitted programs (some of which have been expired for over twenty years) and more than fifty applications from new facilities and those looking to expand. (Rec. doc. 5 for 2009, p. 20). Most importantly, New Union's lack of resources leaves it able to address only slightly more than one-

fourth of its significant permit violations, in addition to being completely unable to address hundreds of minor violations. Id. at 25.

Adequacy of state enforcement programs is imperative to the functioning of RCRA. See 40 C.F.R. § 271.15 (2009) (outlining the procedures for state enforcement programs). Accordingly, EPA must "pay special attention to the review of state enforcement authority." U.S. Envtl. Prot. Agency, OSWER 95400.00-1C, Draft State Consolidated RCRA Authorization Manual 1 (1990). Furthermore, in recognition of the congressional concern over enforcement, a state enforcement program's failure to meet the federal standards is specifically enumerated as "criteria for withdrawing state approval." 40 C.F.R. § 271.22 (2009). Thus, when a state program is unable to enforce its permits and regulations, the Administrator must withdraw her approval.

2. The Administrator lacks the discretion to take any action but to withdraw approval because New Union is unable to administer or enforce its program.

New Union not only fails to *enforce* individual permits and violations, but it also fails to *administer* its program as a whole. Rec. doc. 5. Under § 3006(e), EPA is required to withdraw authorization of a state program which fails to administer or enforce its program. Harmon Indus. Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999). This contention, however, is not without its challenges. There is debate amongst the circuits as to whether EPA has the discretion to take action *other than* withdrawal in certain situations. The outcome of this debate, however, does not affect this case and the necessity that the Administrator withdraw approval.

The issue focuses on the language found in § 3006(b), which states that authorized state programs are carried out "in lieu of the federal program." 42 U.S.C § 6926(b) (2009). The question is whether this language allows state authority to supplant EPA's ability to institute enforcement proceedings if that state has already initiated its own enforcement proceedings (commonly referred to as "overfiling") or if EPA must withdraw its approval of the entire state

program before it can remedy what it deems to be a failure on the state's part to enforce. See generally Harmon Indus. Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999); United States v. Power Eng'g Co., 303 F.3d 1232 (10th Cir. 2002). Thus, the issue is whether the "in lieu of" language applies to a state's administration of a program or to its enforcement.

Those who argue that this language only refers to administration of a program rely on the fact that administration and enforcement are dealt with in separate clauses. United States v. Power Eng'g Co., 125 F. Supp. 2d 1050, 1059 (D. Col. 2000). See also 42 U.S.C § 6926(b) (2009) ("[A] state is authorized to [administer] such program in lieu of the federal program . . . *and* to issue and enforce permits for the storage, treatment or disposal of hazardous waste.") (emphasis added). By this argument, only the administration of a state program operates "in lieu of" a federal program, and federal enforcement and overfiling is not precluded. Therefore, EPA may withdraw its approval only where a state fails to administer its program, and not where it simply fails to enforce a permit or two.

Conversely, those who contend that "in lieu of" restricts the federal authority to institute enforcement proceedings claim that administration and enforcement of state programs are "inexorably intertwined." Browner, 191 F.3d at 899 (8th Cir. 1999). Thus, it is impossible to withdraw approval of only the enforcement aspect of a program without also having to withdraw approval of the entire administration. In this light, the Browner court found that EPA may enforce (overfile) only when the state has taken no enforcement action whatsoever or when approval of the entire state program has been withdrawn, i.e. when the state fails to administer its program. Id. at 901. In this case, New Union fails to both administer *and* enforce its program. Therefore, under either line of precedent, the Administrator must withdraw approval.

New Union's program fails to administer and to enforce a majority of its violations. Therefore, EPA has no choice but to withdraw its approval. A key distinction between this case and the Browner and Power Eng'g Co. cases is that those cases dealt with specific and singular examples of a state's failure to enforce, while the state's ability to administer its program was not in question. Here, there is a widespread failure to enforce, as well as a failure to administer. In this situation, the revocation of the entire program is necessary.

Additionally, it would be against the public interest to revoke only part of New Union's program. To find, in this case, that EPA can avoid withdrawing its approval of the entire New Union program by instituting its own enforcement proceedings, so as to pick up the state's slack, would require the federal agency to take over the state's entire enforcement program—not just enforce against a single violator—thus accomplishing the equivalent to a total withdrawal of approval. A partial revocation of approval would lead to the bifurcation of the administration and enforcement of hazardous waste, thus leaving the public uncertain of which entity it must deal with regarding these issues. Browner, 191 F. Supp. 2d at 996. As the Browner court noted, any kind of "schizophrenic" approach to this issue must be avoided. Id. Thus, in this case, the Administrator must withdraw her approval of New Union's entire program.

B. New Union's program is not equivalent to the federal program.

New Union's legislated revision to its program is unapproved, less stringent than, and not equivalent to the federal program. First, the ERAA delegates all regulatory authority over railroad hazardous waste facilities to the NURC. Rec. doc. 5 for 2000, pp. 103–05. All transfer of responsibility must be approved by the Administrator. 40 C.F.R. § 271.21 (2009). In this case, the delegation of responsibility to the NURC is not approved. Second, state programs must be able to enforce criminal sanctions against violators falling under its jurisdiction. 40 C.F.R. §

271.16(a)(3)(ii) (2009). In this case, the ERAA eliminates the ability for the newly-created NURC to impose criminal sanctions for RCRA violations. Thus, the program is less stringent and not equivalent to the federal program. The unapproved transfer of authority and the elimination of criminal sanctions violate several provisions of the federal requirements and leave the state program not equivalent to the federal program.

1. New Union's delegation of responsibility to the NURC is an unauthorized shift of responsibilities to an unapproved state agency.

A state must notify EPA and receive approval before it transfers part of its program to any other state agency. 40 C.F.R. § 271.21(c) (2009). Furthermore, "the new agency is not authorized to administer the program until approved by the Administrator." Id. In this case, New Union transferred its responsibility to regulate railroad hazardous waste facilities from its approved state program to its unapproved and newly-created NURC without seeking authorization from the EPA. Rec. doc. 5 for 2000, p. 103–05. Any major shift of responsibilities that is made to an unapproved state agency is grounds for withdrawal of the state's authorization. U.S. Envtl. Prot. Agency, OSWER 95400.00-9A, State Authorization Manual 11 (1990). Thus, the Administrator should withdraw her authorization.

2. The inability to impose criminal sanctions renders the state program less stringent than and not equivalent to the federal program.

The ERAA's elimination of the state's ability to impose criminal sanctions is not equivalent to the federal program under RCRA. RCRA requires that an authorized state program be equivalent to the federal program. 42 U.S.C. § 6926(b) (2009). While state programs need not be identical to the federal program, certain criteria must remain equivalent between state programs and the federal program in order to qualify as approved or authorized. Furthermore, a state must "regulate at least the same universe of handlers (i.e., generators, transporters and

facilities) as EPA . . .” and “each aspect of the regulation must be *as stringent* as EPA’s regulations.” See U.S. Envtl. Prot. Agency, OSWER 95400.00-1C, Draft State Consolidated RCRA Authorization Manual 2 (1990) (summarizing §3009) (emphasis added). EPA will not approve any change in a state’s program “which decreases the scope of the state program relative to the federal program.” Id.

The NURC’s inability to impose criminal sanctions is not as stringent as and not equivalent to the federal program. Any state agency administering a program must have the ability to seek criminal remedies. 40 C.F.R. § 271.16(a)(1)(3)(ii) (2009). The ERAA expressly withdraws the power to enforce criminal sanctions from the newly established NURC. Rec. doc. 5 for 2000, p. 103–05. Thus the legislature’s unauthorized removal of the power to pursue criminal violations and violators under RCRA is not equivalent to the federal program.

Furthermore, the requirement that a state program be no less stringent means that a state *is* allowed to impose requirements that are more stringent than those required by RCRA. 42 U.S.C. § 6929 (2009). This allowance of a *more* stringent requirement is qualified by the fact that, “although § 3009 allows states to adopt more stringent regulations, it does not authorize them to defeat safe federal solutions.” Hermes Consol., Inc. v. People, 849 P.2d 1302, 1311 (Wyo. 1993). Thus, an outright ban on the storage, treatment, or disposal of a certain waste “directly subvert[s] RCRA and [EPA] decisions by [instituting an] outright ban[] on activities federal authorities considered safe.” Id.; see also ENSCO, Inc. v. Dumas, 807 F.2d 743, 744–45 (8th Cir. 1986) (holding that a prohibition on storage, treatment, or disposal of hazardous waste in a county is preempted by RCRA because of actual conflict with federal law).

Taken in conjunction, the state’s transfer of significant responsibilities to an unapproved state agency; the fact that the legislature also deprived this unapproved state agency of the

essential power to enforce criminal sanctions; and the outright ban in contradiction to safe federal practices and the purpose of RCRA, require the withdrawal of authority of the entire state program. Complete withdrawal also allows the state to reorganize its program in compliance with the statute.

Finally, the Administrator is permitted "to decline to authorize an alternative state approach based solely on lack of enforceability of the alternative approach." Memorandum from Matthew Hale, Director, Office of Solid Waste, to RCRA Directors Regions I-X (Sept. 7, 2005) available at http://www.epa.gov/osw/laws-regs/state/policy/fe-9-7-05.pdf. Thus, the fact that New Union's state program is incapable of administration and enforcement (as discussed above) requires withdrawal of approval of the entire program.

C. New Union's program is inconsistent with the federal program.

New Union's program is inconsistent with the federal RCRA program. RCRA § 3006(b) requires that a state program be consistent with the federally-implemented program. A state program is inconsistent when "any aspect of the State program . . . unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the federal or an approved State program." 40 C.F.R. § 271.4(a) (2009). An example of an inconsistent program includes one that "bans the importation of hazardous waste from out-of-state." U.S. Envtl. Prot. Agency, OSWER 9541.03, RCRA Final Authorization Guidance Manual 12 (1983). Furthermore, it is well accepted that "[s]tate programs which contain provisions that prohibit storage or disposal of hazardous wastes within the state will be deemed inconsistent." Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 790 (4th Cir. 1991). This case clearly falls within these definitions.

In this case, the New Union program does not allow the importation of Pollutant X by other states. Rec. doc. 5 for 2000, p. 105–07. Pollutant X coming from other states may only be transported through New Union on the condition that the transporter does not make any stops in the state. Id. This kind of restriction is inconsistent unless it has a basis in human health or the environment. 40 C.F.R. § 271.4(b) (2009). For example, a restriction addressing specified, local concerns of health and environmental quality has such a basis. See In The matter of Whether To Withdraw Approval of North Carolina's Hazardous Waste Management Program, 1989 WL 253197 (EPA 1989) (finding the imposition of state-wide mandatory dilution levels as having a basis in human health and the environment because the imposition of such standards was aimed at remedying a problem at a specific, local discharge site). In this case, there is no example or showing of a need for this type of restriction on Pollutant X. A regulation that simply implements broad overarching restrictions has no basis in human health or the environment—it must actually achieve the preservation of such concerns in a specified and effective manner.

Preventing out-of-state transporters from stopping anywhere in New Union does not avoid any health or environmental hazard. Stopping to refuel, use a restroom, or eat a meal does not present any hazard of a release of hazardous waste from a transporter. Thus, the legislative findings accompanying the ERAA have no relation to the act itself, except that they recognize the potent and toxic nature of Pollutant X. Rec. doc. 4 for 2000, pp. 105–07. This finding is in no way specific or localized, and simply reiterates the obvious—that Pollutant X is a listed hazardous pollutant under RCRA.

There is no finding that distinguishes Pollutant X from any other hazardous pollutant. Furthermore, there is no finding that this ban would improve human health or environmental protection. Such a ban is simply an excessive and overreaching reaction to evidence of Pollutant

X's hazardous nature. New Union merely seeks to transfer the burden of the pollutant to other locales. Thus, this legislation will not help human health or the environment and is inconsistent with RCRA.

The ERAA does, however, prevent storage facilities in New Union from entering into agreements with out-of-state generators, even if only for the 120-day permitted storage. This act is nothing but an attempt by New Union to keep its storage capacity for itself. In light of RCRA's purpose of "cradle to grave" regulation of hazardous wastes, any situation where generators in one state are disadvantaged by another state's regulations, insofar as their ability to arrange for the safe disposal of waste, is clearly inconsistent.

D. New Union's state program violates the Commerce Clause.

The United States Commerce Clause "directly limits the power of the states to discriminate against interstate commerce." Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 789 n.12 (4th Cir. 1991) (citing New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273 (1988). Although there are instances where a state law may go beyond the reach of the Commerce Clause, the congressional intent that a discriminating state law remain in effect must be "unmistakably clear" or "expressly stated." Envtl. Tech. Council 98 F.3d at 782 (citing South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91–92 (1984)). The various courts have found, however, that there is nothing in the language or legislative history of RCRA that shows any intent by Congress to allow the states to implement restrictive or discriminating policy in regards to the flow of interstate commerce. Id. at 784–85.

In the realm of hazardous waste, the Supreme Court has made clear that a state cannot "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978). Furthermore, it is well

accepted that "a state that refuses entirely to allow a necessary part of national commerce—the disposal of hazardous wastes—to take place within its boundaries is impeding the flow of interstate commerce *just as much* as a state that refuses to allow the transportation of those wastes." Hazardous Waste Treatment Council, 945 F.2d at 790 (emphasis added). New Union's program not only restricts the transportation of a hazardous waste, but it also refuses to permit the treatment, disposal or storage of all out-of-state Pollutant X waste.

Restrictions on transportation of hazardous waste are not a legitimate or neutral means of addressing the concern for health and safety. Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 786 (4th Cir. 1996). Furthermore, the Supreme Court has only found a discriminatory law justified if it worked to prevent the threat of death or disease. Id. at 785 (citing Maine v. Taylor, 477 U.S. 131 (1986)). In this case, although the ERAA appears to base its restrictions on a concern for public health and the environment—a concern which, if legitimate, can override concerns of a restriction on interstate commerce—there is no plausible explanation as to how restricting a transporter from merely *stopping* in New Union could prevent a danger to human health and the environment. If anything, such a prohibition only *increases* the chance of a potentially harmful accident. In reality, this prohibition is merely a poorly-disguised attempt by New Union to retain storage facilities in the state for itself. Although the ERAA refuses to permit the storage, treatment, or disposal of *any* Pollutant X, it is clear that in state generators of the pollutant have an advantage in terms of storage.

The ERAA allows for temporary 120-day storage of Pollutant X within the state. Rec. doc. 5 for 2000, p. 105–07. It is, however, effectively impossible for other states to take advantage of this 120 day allowance. Transporters carrying out-of-state Pollutant X are not able to stop and store their loads in any New Union facilities. Id. Thus, the 120-day allowance is

meaningless for any out-of-state generator or transporter. This gives New Union generators a distinct advantage in having 120 days to thoughtfully and safely plan out the disposal of their wastes. This type of protectionist legislation has repeatedly been struck down as inconsistent with both RCRA and the Commerce Clause. See Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 784–85 (4th Cir. 1996).

Finally, by enacting ERAA, New Union has implemented a protectionist measure that insulates its sole railroad operation from criminal sanctions while still allowing such sanctions for interstate railroad operators. Rec. doc. 5 for 2000, pp. 103–05. Conveniently, the president of New Union RR Co. is the twin brother of the majority leader of the state senate, which appoints a commissioner to regulate intrastate railroad operations. Rec. doc. 6, Aug. 14, 2000. This same agency oversees all environmental laws dealing with intrastate railroad operations. Rec. doc. 4 for 2000, pp. 103–05. Simultaneously, New Union has imposed unduly strict requirements on interstate railroad operations, requiring that they transport Pollutant X through the state as quickly as possible with no stops except for emergencies. Rec. doc. 4 for 2000, pp. 105–07. The Supreme Court has noted that: "The crucial inquiry [in reviewing challenges to the Commerce Clause], therefore, must be directed to determining whether [a measure] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). New Union's measure coddles its local industry while imposing extreme hardship on out-of-state carriers. This protectionist measure cannot stand under well-established Supreme Court jurisprudence.

This inconsistent and unconstitutional attempt by New Union to hoard its resources at the expense of other states is also representative of its inability to operate a successful and effective

state program. By refusing to permit facilities that store, dispose of, or treat Pollutant X, New Union is also attempting to take pressure off of its failing program. Furthermore, it is doing this at the expense of interstate commerce in direct contradiction to the U.S. Constitution. Therefore, in light of such serious inconsistencies and the general inability of New Union to administer and enforce its hazardous waste program, the Administrator must withdraw her approval.

CONCLUSION

In sum, the egregious nature of New Unions failure to implement its hazardous waste program demands immediate action. EPA has failed in its duty to withdraw the program or even respond to a citizens' petition. For the reasons above asserted, CARE respectfully requests that the Court order EPA to immediately withdraw New Union's hazardous waste program.