Team No. 36

C.A. No. 400-2010

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

v.

LISA JACKSON, ADMINISTRATOR,
United States Environmental Protection Agency,
Appellee-Cross-Appellant

v.

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

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

Brief for CITIZEN ADVOCATES FOR REGULATION
AND
THE ENVIRONMENT, INC.,
Appellant-Cross-Appellee.

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Twelfth Circuit has jurisdiction over final decisions of the United States District Court for the District of New Union. 28 U.S.C. §§ 1291, 1294(1) (2006). Federal district courts have original jurisdiction over any civil action arising under the laws of the United States, including the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 (2006); 28 U.S.C. § 1331 (2006).

STATEMENT OF THE ISSUES

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

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

III. Whether EPA's failure to act on CARE's petition constituted a constructive denial of that petition and a constructive determination that New Union's program continued to meet RCRA's criteria for program approval under 42 U.S.C. § 6926(b), both subject to judicial review under 42 U.S.C. § 6976(b).

IV. Whether this Court should lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions or remand the case to the lower court and order EPA to initiate proceedings to withdraw of its approval of New Union's hazardous waste program.

V. Whether EPA must withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria.

VI. Whether EPA must withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act effectively withdraws railroad hazardous waste facilities from regulation.

VII. Whether EPA must withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause.

STATEMENT OF THE CASE

CARE filed a petition on January 5, 2009 with the Administrator of the EPA under RCRA and the Administrative Procedure Act ("APA") seeking the withdrawal of EPA approval of New Union's hazardous waste program. In its petition to EPA, CARE provided numerous facts, arising after the approval of New Union's program in 1986, which indicate that the program no longer meets the requirements for EPA approval. (R. at 4.) EPA has taken no action on that petition. (R. at 4.)

On January 4, 2010, CARE filed an action in the United States District Court for the District of New Union under the Citizen Suit provision of RCRA seeking an injunction compelling EPA to act on its petition, or in the alternative, judicial review of EPA's constructive denial of the petition and constructive determination that New Union's program continues to meet RCRA criteria. (R. at 4.) At the same time CARE filed a petition for review with the United States Court of Appeals for the Twelfth Circuit, C.A. No. 18-2010, seeking judicial review of EPA's constructive denial and determination. (R. at 5.) That action was stayed pending the outcome in district court. (R. at 5.) New Union filed motions to intervene in both cases. (R. at 4.) Both motions were unopposed and were granted by the respective courts. (R. at 5.) CARE and New Union then filed cross motions for summary judgment, agreeing that the facts asserted by CARE were uncontested. (R. at 4)

On June 2, 2010 the district court granted New Union's motion for summary judgment and dismissed CARE's action. (R. at 9.) The district court held that: (1) CARE had failed to state a claim because EPA's approval or disapproval of New Union's program was not subject to petition under 42 U.S.C. § 6974 (2006), thus EPA could not be compelled to act on that petition. (R. at 7.) (2) The APA does not provide general jurisdiction for judicial review because RCRA

provides specific jurisdiction over petitions. (R. at 8.) (3) The district court lacked jurisdiction to review CARE's claims of constructive denial and constructive determination because proper jurisdiction is in the court of appeals. (R. at 8.)

CARE and EPA filed appeals of the district court's order. (R. at 1.) CARE appeals the district court's holding that it lacked jurisdiction under either 42 U.S.C. § 6972 (2006), or the APA, to compel EPA to act on its petition. (R. at 1.) EPA also appeals the district court's holding that it lacked jurisdiction under RCRA. (R. at 1.) CARE also requests that the Court of Appeals lift the stay on its request for judicial review of EPA's constructive denial of its petition and constructive determination that New Union's program continues to meet RCRA criteria. (R. at 1, 5.) EPA and New Union take issue with lifting the stay, and with CARE's assertion that EPA's failure to act is a constructive determination. (R. at 2.) New Union also disputes CARE's assertion that New Union's program no longer meets approval criteria. (R. at 2.) EPA also disputes this, but concedes that New Union no longer governs hazardous waste at railroad yards, arguing instead that this does not require disapproval of the state program. (R. at 2.) This court granted review on September 29, 2010. (R. at 3.)

STATEMENT OF THE FACTS

Since 1986 New Union has administered and enforced a hazardous waste program under EPA approval. (R. Doc. 2, p. 1.) At the time of approval EPA made a finding that the New Union DEP had adequate resources to fully administer and enforce the program, including timely issuance of permits, inspection of RCRA regulated facilities at least every other year, and taking actions against all significant violations. (R. Doc. 2, p. 1.) In its recommendation for approval of New Union's application in 1986 EPA noted that with fewer resources New Union's program might not be adequately enforced or administered. (R. Doc. 4, p. 16.)

In its application for approval DEP reported that the state of New Union had 1,200 hazardous waste treatment and disposal facilities ("TSDs") that required RCRA permits, administered by a DEP staff of 50 full time employees. (R. Doc. 1, p. 17, 73.)

Since its approval in 1986 the number of TSDs has grown to 1,500 while full time staffing has decreased to 30 employees. (R. Doc. 5 for 2009, p. 52.) Most of the staffing losses have occurred since 2000, which New Union has attributed to financial difficulties. (R. Doc. 5 for 2009, p. 50.) The staffing of DEP is unlikely to improve as the Governor of New Union has directed a hiring freeze for state employees, and layoffs of between five and ten percent of state employees are likely over the next two years. (R. Doc. 5 for 2009, p. 53.)

The declines in staffing and department resources have hampered hazardous waste administration and enforcement in New Union. (R. at 11.) In its 2009 Annual Report to EPA, DEP indicated that it had performed only 150 inspections of TSDs in the previous year, and anticipated the same in the current year. (R. Doc. 5 for 2009, p. 22.) DEP requested that EPA inspect a comparable number of facilities and EPA carried out inspections in the previous year and promised to do so again in the current year. (R. Doc. 5 for 2009, p. 23.) DEP prioritizes inspection for facilities that have reported unpermitted releases of hazardous waste, and facilities reporting other violations that pose the greatest threat to public health or the environment. (R. Doc. 5 for 2009, p. 23.)

In its 2009 Annual Report DEP reported 22 significant permit violations and hundreds of minor violations. (R. Doc. 5 for 2009, p. 24.) In response, DEP took six enforcement actions, four administrative and two civil. (R. Doc. 5 for 2009, p. 25.)

DEP also indicated in the 2009 Annual Report to EPA that it had issued 125 permits in the previous year and anticipated issuing the same number in the current year. (R. Doc. 5 for

2009, p. 19.) DEP had a backlog of permit applications and reported that it was receiving approximately 50 permit applications a year for new facilities and existing permitted facilities seeking to expand. (R. Doc. 5 for 2009, p. 20.) In addition, in its 2009 Annual Report DEP reported that 900 TSDs had permits that were continued by operation of law, and some of those permits had expired twenty years ago. (R. Doc. 5 for 2009, p. 20.) DEP prioritizes permit issuance in the following order: "new facilities; permitted facilities seeking to expand operations; facilities with permits that expired fifteen or more years ago; and permitted facilities having the greatest potential for harm to public health or environment because of the volume or toxicity of hazardous waste handled." (R. Doc. 5 for 2009, p. 20.)

In 2000, the New Union legislature passed the Environmental Regulatory Adjustment Act, ("ERAA") which amended existing legislation. (R. at 11.) Two of the amendments enacted by the ERAA are relevant to New Union's hazardous waste program. (R. at 11.) The first is an amendment to the Railroad Regulation Act, ("RRA") which transfers "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all environmental statutes to the Commission." (R. Doc. 5 for 2000, pp. 103-105.) Additionally, the amendment to the RRA removed criminal penalties for violations of environmental laws by facilities under the railroad commission's jurisdiction. (R. Doc. 5 for 2000, pp. 103-105.) The Railroad Commission is a state agency charged with regulating intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards all to the extent allowed by the Commerce Clause. (R. at 12.) The second amendment enacted by the ERAA was an amendment to New Union's Hazardous Regulation Act, concerning the regulation of Pollutant X. (R. at 12.)

> 1. Every facility generating wastes including Pollutant X shall submit to the DEP within the next ninety days a plan to minimize the generation Pollutant X containing wastes and every year thereafter by December 31, shall submit to the DEP a report stating the reduction in generation of Pollutant X during the

previous year and a plan for additional reduction of such waste in the following year, until such generation entirely ceases.

2. The DEP shall not issue permits allowing the treatment, storage or Disposal of Pollutant X, except for storage for less than 120 days while awaiting transportation to a facility located out side of the state and permitted and designed to treat or dispose of Pollutant X.

3. Any person may transport Pollutant X through or out of the state to a facility designed and permitted to treat or dispose of Pollutant X, provided, however, that such transport shall be as direct and fast as is reasonably possible with no stops within the state except for emergencies and necessary refueling.

(R. Doc. 5 for 2000, pp. 105-107.)

STANDARD OF REVIEW

Summary judgment is appropriate if it is established that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). This court reviews questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Thus, this court's jurisdiction to decide Appellants' claims under RCRA must be reviewed *de novo*.

SUMMARY OF THE ARGUMENT

The district court erred in determining that it did not have jurisdiction to compel EPA to act on CARE's petition. The district court had jurisdiction under RCRA, 42 U.S.C. § 6972 and the APA 5 U.S.C. § 553. These provisions provide overlapping jurisdiction for courts to review required agency actions that are unreasonably withheld. By holding that it lacked jurisdiction to compel EPA action, the court removed that action from judicial review on narrow technical grounds. Such a narrow reading of statute thwarts the broad purpose of the RCRA, which is to protect human health and the environment.

EPA's inaction on CARE's permit was an unreasonable delay that amounts to a constructive denial of that petition. The denial of CARE's petition expresses that the agency

made a determination that further investigation of the grounds that the petition asserted was unnecessary. If the agency had accepted the allegations in CARE's petition it would have to commence withdrawal proceedings. The failure to do so amounts to a constructive determination that New Union's program continued to meet RCRA approval criteria. The district court was correct in holding that proper jurisdiction for the review of EPA's constructive actions lies in this Court.

EPA's constructive determination that New Union's program continues to meet RCRA criteria should be overturned as contrary to RCRA. New Union's program is no longer adequately administered or enforced because it lacks sufficient resources. Because it is inadequate it no longer meets RCRA approval standards.

In 2000 the ERAA removed railroad facilities from New Union's hazardous waste program. This created a partial program, contrary to RCRA criteria for continued approval. Additionally, the ERAA enacted an unconstitutionally broad regulation of Pollutant X that is inconsistent with other states and federal law. New Union's regulation of Pollutant X is contrary to the Commerce Clause of the Federal Constitution.

New Union's hazardous waste program no longer meets approval standards under RCRA therefore this Court should order EPA to commence proceedings to withdraw authorization.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO ORDER EPA TO ACT ON CARE'S PETITION, AS EPA'S INTERPRETATION OF 42 U.S.C. § 6972(A)(2) IS ENTITLED TO DEFERENCE.

In *Natural Resources Defense Council v. Abraham*, the Second Circuit held that "when there is a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals." 355 F.3d 179, 193 (2d Cir. 2004) (citing to *Clark v.*

Commodity Futures Trading Comm'n, 170 F.3d 110, 114 (2d Cir. 1999); *Nat'l Parks & Conservation Ass'n v. F.A.A.*, 998 F.2d 1523, 1529 (10th Cir.1993) ("[i]f there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals"); *Gen. Elec. Uranium Mgmt. Corp. v. U.S. Dept. of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985); *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) (noting "statutory review in the agency's specially designated forum prevails over general federal question jurisdiction in the district courts") (internal citation omitted); *Indiana & Michigan Elec. Co. v. E.P.A.*, 733 F.2d 489, 491 (7th Cir.1984) (invoking "the judge-made presumption in favor of court of appeals review in doubtful cases").

In *Chevron v. Natural Resources Defense Council*, however, the Supreme Court held that a federal agency's interpretation of a federal statute it administers would be upheld if the statute was both ambiguous and reasonably interpreted. 467 U.S. 837, 842-43 (1984). RCRA provides that "[a]ny action brought [against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator] may be brought in the district court for the district in which the alleged violation occurred." 42 U.S.C. § 6972(a)(2). Because EPA asserts that the federal district court had jurisdiction under 42 U.S.C. 6972(a)(2), EPA is arguing that RCRA imposes a nondiscretionary duty to act on CARE's petition for the revocation of approval for New Union's hazardous waste program.

Because EPA administers RCRA, its interpretation that it has a nondiscretionary duty to act on CARE's petition under 42 U.S.C. § 6972(a)(2) is entitled to *Chevron* deference. Thus, the federal district court had jurisdiction to order the EPA to act on CARE's petition.

II. THE APA AND 28 U.S.C. § 1331 PROVIDED JURISDICTION FOR THE DISTRICT COURT TO ORDER EPA TO ACT ON CARE'S PETITION

The United States Supreme Court has held that "the APA does not afford an implied grant of subject-matter jurisdiction permitting judicial review of agency action." *Califano v. Sanders*, 430 U.S. 99, 107 (1977). The Supreme Court has also held that "a claim under [5 U.S.C.] § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Under *Chevron*, however, agency interpretation of a statute it administers will be upheld, as long as that interpretation is reasonable. 467 U.S. at 842-43.

A. The APA grants district courts subject matter jurisdiction to compel unreasonably delayed agency action.

Regarding unreasonable delay of a non-discretionary duty, numerous courts have held that federal district courts have subject matter jurisdiction pursuant to the Administrative Procedures Act. *See Tang v. Chertoff*, 493 F. Supp. 2d 148, 158 (D. Mass. 2007) (holding that a district court could compel the processing of an alien's immigration application that was non-discretionary with agency); *Nigmadzhanov v. Mueller*, 550 F. Supp. 2d 540 (S.D.N.Y. 2008) (holding that an alien's claim of a right to have her application adjudicated within a reasonable time was not patently without merit since she sufficiently alleged an unreasonable delay); *Hamandi v. Chertoff*, 550 F. Supp. 2d 46 (D.D.C. 2008) (holding that alien's claim under the APA permitted the court to compel adjudication of naturalization applications).

The District Court for the District of Columbia articulated that "[w]hile the APA does not confer subject matter jurisdiction by itself, the APA in conjunction with 28 U.S.C. § 1331 (which gives federal district courts federal question jurisdiction) gives the Court jurisdiction to compel unreasonably delayed agency action." *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 50 (D.D.C.

2008) (citing to *Califano*, 430 U.S. at 99); *also see Liberty Fund, Inc. v. Chao*, 394 F.Supp.2d 105 (D.D.C. 2005).

Because the EPA's admits that it failed to take a discrete action that it was required to take under RCRA, which it administers, it is entitled to *Chevron* deference. Thus, the federal district court had jurisdiction to compel agency action unreasonably delayed under the APA.

B. 28 U.S.C. § 1331 confers jurisdiction on the federal district court to consider CARE's right to petition the EPA.

The Supreme Court has held that "[t]he right to petition for a redress of grievances is... fundamental." *Wilkinson v. U.S.*, 365 U.S. 399, 427 (1961). The U.S. Supreme Court recently held that the "First Amendment protects the right of corporations to petition legislative and administrative bodies." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 907, 913 (2010) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 792 (1978)). Because CARE is a non-profit corporation organized under the laws of the State of New Union, it possesses a fundamental right to petition EPA.

1. The district court had jurisdiction to review EPA's inaction absent a showing of 'clear and convincing evidence' of a contrary legislative intent.

The Second Circuit, quoting the D.C. Circuit, has held that "a challenge to the Administrator's refusal to [perform a discretionary act] is *in effect* a challenge to the [matter subject to the discretionary act] itself [which statutorily permits judicial review] and so can be brought... in [petitioner's local circuit court of appeals]." *Envtl. Def. Fund v. Thomas*, 870 F.2d 892 (2d Cir. 1989) (quoting *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), overruled on other grounds). Furthermore, courts generally hold agency action nonreviewable "only upon a showing of 'clear and convincing evidence' of a contrary legislative

intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, (1967).

Therefore, CARE's petition to the EPA for the revocation of prior authorization of a New Union's hazardous waste program is, in effect, a challenge to the program itself, which statutorily permits judicial review under § 6976(b)(2) by Petitioner's local circuit court of appeals if based solely on grounds occurring after the 90th day.

2. The district court had jurisdiction to review EPA's inaction to avoid abridging CARE's First Amendment right to petition the agency.

The D.C. Circuit has acknowledged "Congress' indisputable intent to encourage proper disposal and recycling of hazardous wastes" in passing the RCRA. *Hazardous Waste Treatment Council v. U.S. E.P.A.*, 861 F.2d 277, 283 (D.C. Cir. 1988) (citing 42 U.S.C. §§ 6901(a)(4), 6902(a)(6)). Therefore, because CARE seeks to enforce proper disposal and recycling of hazardous wastes, the interests sought to be protected in the instant case are within the zone of interests of Congress' legislative intent.

This raises a federal question as to whether the First Amendment imposes a nondiscretionary duty on EPA of responding to a petition addressing matters within the scope of interests sought to be protected by RCRA since it is the only means by which to exhaust administrative remedies.

The U.S. Supreme Court has held that the First Amendment of the federal Constitution extends to all departments and administrative agencies of the Government and guarantees the right of access to the courts to petition for redress of grievances. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The Supreme Court broadened its holding in a later case by stating "the right of access to the courts is an aspect of the First Amendment right to petition." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

Additionally, although 28 U.S.C. § 2401 requires all actions against the United States to

be commenced within 6 years from when the right first accrues, the statutory period for review... was effectively renewed by the EPA when it constructively denied CARE's petition in violation of federal law, and, in doing so, authorized New Union's revised state program. *Envtl. Def. Fund v. E.P.A.*, 852 F.2d 1316, 1325 (D.C. Cir. 1988) (explaining that agency action construed as a reiterating of a policy or finalization of a controversy can result in a renewal of the statute of limitations).

III. EPA'S FAILURE TO ACT ON CARE'S PETITION TO INITIATE PROCEEDINGS TO WITHDRAW AUTHORIZATION OF NEW UNION'S HAZARDOUS WASTE PROGRAM CONSTITUTES A CONSTRUCTIVE DENIAL OF THAT PETITION, AND A CONSTRUCTIVE DETERMINATION THAT NEW UNION'S PROGRAM CONTINUES TO MEET RCRA CRITERIA.

EPA's unreasonable delay in responding to CARE's petition amounts to a constructive denial of that petition. RCRA provides that "[w]ithin a reasonable time following the receipt of such petition, the Administrator shall take action with respect to such petition[.]" 42 U.S.C. § 6974(a) (2006). Additionally, RCRA explicitly incorporates APA 5 U.S.C §706 (2006), which provides the reviewing court authority to compel agency action that has been "unreasonably delayed." 42 U.S.C. 6976(b) (2006).

A. EPA unreasonably delayed in responding to CARE's petition

On January 5, 2009 CARE petitioned the EPA to consider withdrawing RCRA authorization of New Union's hazardous waste program. The EPA failed to take any action on that petition over the course of one year, ended by CARE's filing suit on January 4, 2010. While the EPA may be entitled to a "slow, but deliberate" pace of action, *Beyond Pesticides/ Nat'l Coal. Against the Misuse of Pesticides v. Johnson* 407 F. Supp. 2d 38, 39 (D.D.C. 2005), the EPA, in this instance, failed to take any action at all.

In *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) the Supreme Court

limited the reviewability of unreasonable delay under 5 U.S.C. § 706(1) to discrete agency action, as listed under 5 U.S.C. § 551(13) (2006), and only to those discrete actions required by law. Thus a court may review agency acts, including rules, orders, license, sanction, or relief, but can only compel action that is required. *Id*. at 65. When an agency is required to act, either by statute or the APA, within a reasonable time the courts may exercise discretion in determining what is an unreasonable delay. *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1272 (10th Cir. 1998).

1. CARE's petition was a discrete agency action that EPA was required to act on.

In petitioning the EPA to commence withdrawal proceedings against New Union, CARE sought a sanction as defined in 5 U.S.C. § 551(10)(F) (2006), which is a *discrete* agency action. Under RCRA, 42 U.S.C § 6974(a)(2006), the EPA Administrator is required to take action on petitions within a reasonable time, and has failed over the course of one year, to respond to CARE's petition.

2. EPA's delay was unreasonable considering the time of inaction, the interests that were prejudiced, and the statutory preference for timeliness in RCRA.

Once a court has determined that agency delay is unreasonable, it must compel agency action. *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1272 (10th Cir. 1998). When the agency has a clear statutory duty to act, but not a clear timeline in which to act, agency delay must be "egregious" for a court to convert agency inaction into an action. *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'r*, 335 F.3d 607, 617 (7th Cir. 2003). However, reviewing courts are empowered to compel unreasonably delayed agency action to ensure that an agency does not defeat the courts jurisdiction by withholding a reviewable decision. *In re Am.*

Rivers & Idaho Rivers United, 372 F.3d 419 (D.C. Cir. 2004). The D.C. Circuit has applied a six-factor inquiry as guidance to determine if agency delay is unreasonable. This inquiry includes;

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. (Citations omitted)

Telecommunications Research & Action Ctr. v. F.C.C., 750 F.2d 70, 80 (D.C. Cir 1984) (*TRAC*). What is reasonable is not an abstract determination depending solely on the time that has passed, but will depend largely on "the complexity of the task at hand, the significance (and permanence of the outcome), and the resources available to the agency." *Mashpee Wampanoag Tribal Council Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003).

The court in *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004) considered the factors from *TRAC* to determine that a six year delay by the Federal Energy Regulatory Commission (FERC) in responding to a petition seeking FERC's formal consultation with the National Marine Fisheries Service under the Endangered Species Act was unreasonable. "There is no *per se* rule as to how long is too long, but a reasonable time for agency action is typically counted in weeks or months, not years." *Id* at 419. *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987) also considered the *TRAC* factors, holding that an EPA delay in regulating emissions from strip mining was not unreasonable. Finding no statutory guide to timeliness the court considered factors other than the length of the delay. Because the court found no statutory preference for this type of regulation, and the agency had begun to study the issue and hold

public meetings, the court held that the agency must be afforded the time to analyze complex questions while conducting rulemaking. *Id* at 798.

In RCRA congress has indicated its intent that the Administrator respond within a reasonable time to petitions. Additionally, RCRA proclaims that the Administrator shall provide for, encourage, and assist public participation in development of any regulation or program under the Act. 42 U.S.C. § 6974(b) (2006). These provisions indicate a clear preference for encouraging and responding to public participation. Any understanding of reasonableness must account for this preference.

When the agency has failed to take any action the agency delay is more likely unreasonable. Unlike *Sierra Club* where the agency was actively engaged in a lengthy rulemaking, the Administrator in this case has taken no action regarding CARE's petition, a substantially less complex task.

The interests that are prejudiced by this delay are significant. CARE has a substantial interest in receiving a timely response to their petition, and in preventing the EPA from defeating its statutorily imposed oversight role of New Union's hazardous waste program. Additionally, as CARE's petition for withdrawal of authorization asserts, New Union's hazardous waste program is no longer equivalent to the Federal program, or those of other states. This lack of compliance prejudices CARE's interest in having a minimum standard of storage, handling, transportation, and disposal of hazardous waste for the protection of their health and the environment.

3. EPA's unreasonable delay amounts to a constructive denial of CARE's petition.

In RCRA Congress indicated its intent that the EPA Administrator respond in a timely manner to petitions, and encourage public participation in the permitting process. This intent, coupled with the substantial interests that agency inaction on CARE's petition to withdraw

authorization from New Union's hazardous waste program prejudices, support that EPA's delay of one year in responding to the petition is unreasonable and amounts to a constructive denial of that petition.

B. EPA's constructive denial of CARE's petition for withdrawal of authorization of New Union's hazardous waste program is a constructive determination that New Union's program continues to meet RCRA criteria.

RCRA provides a set of criteria that State hazardous waste programs must meet to be authorized under the act. The failure of the state program to meet the criteria may result in the withdrawal of EPA authorization and the establishment of a Federal program. 42 U.S.C. § 6926(b),(e) (2006). The Clean Water Act ("CWA") promotes a similar regime of cooperative federalism, where states proposes pollution controls ("TMDLs"), and the EPA must either authorize the state controls, or impose standards that meet the criteria of the CWA. 33 U.S.C. 1313(c)(3) (2006). When a state fails to propose TMDLs that inaction can amount to a constructive submission that TMDLs are unnecessary. This constructive submission in turn triggers EPA's duty to either approve or disapprove that constructive submission. *Scott v. City of Hammond, Ind.*, 741 F.2d 992, 996 (7th Cir. 1984). Similarly the failure of EPA to act on CARE's petition amounts to a constructive determination by the EPA that the New Union program continues to meet the authorization criteria and withdrawal proceedings are unnecessary.

1. Like the Clean Water Act RCRA imposes corresponding duties on states and EPA.

When EPA constructively denied CARE's petition for withdrawal of authorization of New Union's hazardous waste program it made a constructive determination that the program continued to meet RCRA criteria. 42 U.S.C. § 6926(b) (2006). RCRA largely follows the same

statutory patterns as the Clean Air Act and the Clean Water Act regarding the relationship between the federal statute and the approved state programs. Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two: Statutory Preclusions on EPA Enforcement*, 29 Harv. Envtl. L. Rev. 1, 84 (2005). The similarities between these cooperative federalist programs include standard setting by the EPA under RCRA § 3006 and CWA § 303(d), the implementation of these standards by the states, and ongoing federal oversight. 42 U.S.C. 6926 (2006), 33 U.S.C. 1313(d) (2006).

To protect the nations waterways the Clean Water Act requires that states adopt water quality standards. These standards, including the determination of total maximum daily loads (TMDLs), must then be submitted to the EPA. *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 880 (9th Cir. 2002). Once the state submits TMDLs the EPA must review the state's submission. *Id.* If the EPA does not approve the state's submission it must establish TMDLs necessary to meet water quality standards. *Id.*

Similarly RCRA authorizes states to administer and enforce a hazardous waste program in lieu of a federally run program. 42 U.S.C. 6926(b) (2006). EPA authorization allows states to issue and enforce permits for the treatment, transport and storage of hazardous waste. *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 897-898 (8th Cir. 1999). EPA may withdraw authorization if it finds the state program is not equivalent to the federal program; the state program is inconsistent with the federal program or those in other states; or the state program is failing to provide adequate enforcement in compliance with requirements of federal law. *Id.* Upon withdrawal of authorization, like in the Clean Water Act, the EPA Administrator shall establish a federal program pursuant to RCRA. 42 U.S.C. 6926(e) (2006).

2. When a state fails to execute its duty under the Clean Water Act, that failure may amount to a constructive submission of the required information.

Once a state program is approved it then has the duty of submitting information to EPA, and EPA has the corresponding duty of either approving or disapproving that submission. In response to state inaction in Clean Water Act cases courts have developed the "constructive submission" theory. When a state fails to submit proposed TMDLs under the CWA, over a long period of time, this failure may amount to the "constructive submission" by the state that no TMDLs are required. The EPA is still bound to either approve or disapprove of the state's "constructive submission." *Scott v. City of Hammond, Ind.*, 741 F.2d 992, 996-997 (7th Cir. 1984). When the EPA fails to act on a constructive submission of no TMDLs, that inaction is equivalent to a constructive approval of the state's submission that no TMDLs are necessary. *Id.* at 998. Where a state has, through inaction, constructively submitted no TMDLs the EPA is required to initiate its own process of establishing TMDLs for that state. *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991).

The constructive-submission theory is necessarily a narrow one and only applies when, through inaction, a state has clearly expressed its intent to submit no TMDLs. *Hayes v. Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001). When a state has submitted some TMDLs, even if inadequate, the constructive submission theory is inapplicable. *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 882 (9th Cir. 2002). *See also Natural Res. Def. Council, Inc. v. Fox*, 93 F.Supp.2d 531, 539 (S.D.N.Y. 2000) (Where New York submitted TMDLs to EPA during the pendency of litigation constructive submission was inapplicable.)

As the CWA requires the EPA to either approve or disapprove of state proposed TMDLs RCRA requires the EPA to act on petitions for review of state programs. EPA regulations provide that "[t]he Administrator may order the commencement of withdrawal proceedings on

his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements" for EPA approval. The Administrator must then respond to the petition in writing, and "may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph." 40 C.F.R. 271.23(b)(1) (2009).

Like in constructive submission cases, when faced with a petition for withdrawal of authorization under RCRA, the EPA must act, and that action may take the form of further investigation or denial of the petition. EPA's failure to take action on CARE's petition has denied the petition and expressed that further investigation of New Union's program is unnecessary because the program continues to meet RCRA criteria.

If the Administrator did not deny CARE's petition she would be compelled to commence proceedings relating to the withdrawal of New Union's hazardous waste program. RCRA compels the Administrator, after determining that a state is no longer administering and enforcing it hazardous waste program consistent with the requirements of RCRA, to commence withdrawal proceedings against that state. 42 U.S.C. 6929(e) (2006).

IV. THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT SHOULD PROCEED TO REVIEW EPA'S CONSTRUCTIVE ACTIONS BECAUSE ULTIMATE JURISDICTION LIES IN THE COURT OF APPEALS; AND EPA'S CONSTRUCTIVE DETERMINATION THAT NEW UNION'S PROGRAM CONTINUES TO MEET RCRA CRITERIA IS A FINAL AGENCY ACTION.

A. RCRA commits review of EPA's denial of CARE's petition to this Court.

RCRA commits review of the Administrator's actions in "granting, denying, or withdrawing authorization, or interim authorization under section 3006" to the Circuit Court of Appeals for the federal judicial district where CARE conducts business, the Twelfth Circuit. 42

U.S.C. § 6976(b)(2) (2006). The New Union District Court correctly held that the language of RCRA indicated Congress' intent that "jurisdiction for review of all EPA actions regarding whether state programs meet RCRA's criteria for approval be in the Court of Appeals." (R. at 8.) Statutes that authorize review of specific agency actions should be construed broadly, to allow for review of actions that are functionally similar to those specified agency actions. *Vineland Chem. Co., Inc. v. E.P.A.*, 810 F.2d 402, 405 (3d Cir. 1990). The court of appeals must have jurisdiction to review EPA's decision not to withdraw authorization, as well as for decisions to withdraw authorization to avoid an "irrationally bifurcated system" of review. *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 (1980).

RCRA expressly commits review of EPA actions regarding New Union's program to the Twelfth Circuit Court of Appeals. When EPA constructively denied the petition it made a constructive determination that New Union's program continued to meet RCRA requirements and thus did not commence withdrawal proceedings. While the decision not to withdraw authorization is not a specifically listed action in RCRA that decision is functionally similar to the decision to withdraw authorization, as described in *Vineland*. Additionally, this Court has jurisdiction to review the continued authorization of New Union's program to avoid an "irrationally bifurcated system" of review.

B. EPA's constructive denial and constructive determination that New Union's plant continues to meet RCRA criteria is a final agency action, reviewable by the this Court.

EPA's determination that New Union's hazardous waste program continues to meet authorization under RCRA is a final agency action, reviewable by the Court of Appeals. 28 U.S.C. § 1296 (2006). For agency action to be "final" it must satisfy two conditions; first the agency action must "mark the consummation of the agency's decision making process"; and

second the action must be one through "which rights or obligations have been determined", or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). When an agency has completed its decision making process, and the result of the process has a direct effect on the parties, the agency action is final. *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'r*, 335 F.3d 607, 614 (7th Cir. 2003).

1. EPA's constructive denial of CARE's petition and its constructive determination were the completion of its decision making process.

EPA's constructive denial of CARE's petition was the culmination of agency action regarding that petition. When EPA constructively denied CARE's petition it expressed that withdrawal proceedings, or investigation of CARE's claims, were unnecessary. By expressing that withdrawal proceedings were unnecessary EPA constructively determined that New Union's program was sufficient under RCRA. Because EPA determined that New Union's program would continue to be authorized this determination marked the "consummation of the decision making process."

2. EPA's constructive actions determined rights and obligations.

The denial of CARE's petition determined that CARE did not have the right to compel the agency to commence withdrawal proceedings for New Union's hazardous waste program; it also determined that EPA was not obligated to commence withdrawal proceedings. EPA's constructive determination that New Union's program continued to meet RCRA requirements was also a final agency action as defined in *Bennett v. Spear*. By continuing the authorization of New Union's program EPA has determined that it is not obligated to pursue withdrawal and establish a federal program in its stead.

The Twelfth Circuit Court of Appeals should proceed with judicial review of EPA's constructive actions because those actions are committed to this Court by statute and those actions are final agency actions.

V. NEW UNION'S RESOURCES AND PERFORMANCE ARE INSUFFICIENT AND DO NOT MEET RCRA'S CRITERIA FOR STATE PROGRAM APPROVAL, THUS EPA MUST WITHDRAW ITS APPROVAL OF NEW UNION'S PROGRAM

Under Congressional mandate, RCRA's federal requirements operate as a floor for authorized state hazardous waste programs. An authorized state hazardous waste program must at a minimum, be equivalent to the federal program and it must be consistent with the federal program and other state programs. 42 U.S.C. § 6926 (2006). Additionally, states must adequately enforce the federal RCRA requirements. *Id.* Furthermore, EPA regulations require that "[a]ny State program approved by the Administrator shall *at all times* be conducted in accordance with the requirements of this subpart." 40 C.F.R. § 271.1(g) (2009) (emphasis added).

Review of EPA' s constructive approval of New Union's hazardous waste program is "in accordance with sections 701 through 706 of Title 5." 42 U.S.C. § 6976(b) (2006). "[Th]e reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (2006).

A. EPA approval or disapproval of revisions to New Union's hazardous waste program is non-discretionary.

Once authorized, states must apply to EPA for approval of its hazardous waste program revisions. 40 C.F.R. § 271.21 (2009). Each year, authorized states are required to modify their hazardous waste programs to reflect federal program changes that have occurred in the prior

year. 40 C.F.R. § 271.21(e) (2009). Furthermore, these states must submit a program revision to EPA whenever the state changes "its basic statutory or regulatory authority, its forms, procedures, or priorities" or "proposes to transfer all or part of any program from the approved State agency to any other State agency." 40 C.F.R. §§ 271.21(a), 271.21(c) (2009).

"The Administrator shall approve or disapprove program revisions based on the requirements of this part and of the Act." 40 C.F.R. § 271.21(b) (2009). "EPA reviews the state's proposed modifications by applying the same standards used to review the state's initial program application." Office of Solid Waste, EPA, *RCRA Orientation Manual* III-142, III-143 (2008), *available at* http://www.epa.gov/osw/inforesources/pubs/orientat/.

In a state program structured similar to RCRA's, the Supreme Court held that transferring "NPDES permitting authority is not discretionary, but rather is mandated once a state has met the criteria set forth in § 402(b) of the [Clean Water Act]." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 673 (2007). Recognizing this non-discretionary requirement, in *United States v. Southern Union Co.*, 643 F. Supp. 2d 201, 208 (D.R.I. 2009), the court noted, "In each instance [of changes to its authorized hazardous waste program], Rhode Island sought the required EPA authorization for the changes and the EPA performed its mandated statutory function" of reviewing and approving the changes if the state meets the requirements.

B. New Union fails to issue permits before expiration in violation of RCRA.

Identified or listed hazardous waste treatment, storage, and disposal facilities must have a permit. 42 U.S.C. § 6925(a) (2006). RCRA permits are issued for a fixed period, not exceeding ten years. 40 C.F.R. § 270.50(a) (2009).

EPA-issued permits continue by operation of law, remaining fully effective and

enforceable past the permit's expiration date until a new permit is issued, if the permittee has complied with application requirements and the lack of permit is not the permittee's fault. 40 C.F.R. § 270.51 (2009). This is the case whether an authorized state issues the new permit, rather than EPA or if EPA issues the new permit. *Id*.

Expired permits continued by operation of law allow facilities to operate with outdated hazardous waste criteria. A facility with a permit continued by operation of law is compliant with its permit, under what is termed "permit-as-a-shield." Office of Solid Waste and Emergency Response, EPA, *Introduction to Permits and Interim Status Training Module, EPA530-K-05-016* at 8 (Sept. 2005). Facilities with "continued by operation of law" permits do not have to meet new hazardous waste standards promulgated for TSDs (in Parts 264 and 266) since the issue date of their permit. *Id.*

New Union's poor permitting began not long after EPA authorized its state program. Almost immediately after authorization in 1986, New Union began falling behind in its permitting responsibilities. In 1990, only four years after authorization, EPA-issued permits began to reach their expiration dates and were continued by operation of law. This unresponsive trend continued, reaching 900 by 2009. While this enabled these facilities to continue operating without interruption due to administrative inadequacy and inefficiency, it renders New Union's hazardous waste program in violation of RCRA requirements "to exercise control over activities required to be regulated under this part, including failure to issue permits." 40 C.F.R. § 271.22 (2009).

Furthermore, New Union's permit prioritization policy, by focusing its highest priority on new and expansion permits, coupled with its limited resources for issuing permits, has the effect of leaving at least 825 existing, plus newly expired "continued by operation of law" permits,

untouched. Additionally, by placing its lowest priority on facilities with the greatest potential for harm to the public health or environment, it is in complete opposition to EPA's recognition of the need to focus on facilities posing the greatest threat to health and the environment. Office of Solid Waste, EPA, *RCRA Orientation Manual* III-42 (2008), *available at* http://www.epa.gov/osw/inforesources/pubs/orientat/.

C. New Union fails to inspect permitted facilities every other year in violation of RCRA.

A state must inspect permitted facilities at least every two years. 42 U.S.C. § 6927(e)(1) (2006). A state is no longer compliant with the requirements for a state program when it fails "to inspect and monitor activities subject to regulation." 40 C.F.R. § 271.22 (2009).
In contrast to its capability in 1986 to inspect 600 of its 1200 TSDs each year, New Union is now able to inspect only 150 of its 1500 TSDs per year, falling far short of RCRA's every other year inspection requirement.

D. New Union fails to provide authority for criminal remedies in violation of RCRA.

A state must have criminal remedies, in addition to civil remedies, available for violations of state program requirements and is in violation RCRA when it does not provide this authority. C.F.R. § 271.16 (2009). A state is no longer compliant with the requirements for a state program when it fails "to act on violations of permits or other program requirements" or it fails to "seek adequate enforcement penalties or to collect administrative fines when imposed." 40 C.F.R. § 271.22 (2009).

New Union does not have criminal remedies available, in violation of RCRA, because the ERAA statute gave the Railroad Commission authority for standard setting, permitting, inspection and enforcement of state environmental statutes and removed the Railroad

Commission's criminal sanction authority for environmental violations. Furthermore, even for other facilities, New Union is not issuing criminal sanctions. None of the six enforcement actions New Union reported in its 2009 report were criminal citations.

Furthermore, because New Union, with EPA's help, is only inspecting twenty percent of its permitted facilities, rather than fifty percent as required by RCRA each year, it does not actually know how many violations are going undetected. Even though it reported twenty-two significant violations New Union only brought enforcement actions in six of those cases

E. New Union's resources are inadequate to fully administer and enforce a state hazardous resources program.

After initial program authorization, EPA considers a state capability assessment needed when state program revisions "result in significant impacts on the State's workload." Office of Solid Waste and Emergency Response, EPA, *OSWER Directive 9540.00-10, Capability Assessment Guidance* 4 (Jan. 30, 1992). EPA identifies five components for evaluating a state's capability: 1) permitting, 2) compliance monitoring and enforcement, 3) corrective action Program, 4) management Program, and 5) future expectations. *Id.* at 7.

Using OSWER's Capability Assessment Guidance, EPA determined that Idaho's program was not understaffed and not experiencing high staff turnover, two factors EPA considered in responding to a petition for commencement of withdrawal proceedings. Idaho: Final Authorization of State Hazardous Waste Management Program Revision, 67 Fed. Reg. 44,069, 44,070–71 (July 1, 2002). EPA subsequently approved Idaho's state hazardous waste program revisions. Id. at 44,069.

EPA found New Union's resources "adequate" to "fully administer and enforce the program" when it authorized New Union's state hazardous waste program in 1986. In contrast to Idaho's adequate staffing, and its own staffing levels when authorized in 1986, New Union's

DEP staff levels have dropped forty percent since authorization. Also, staffing will likely get worse with state layoffs of five to ten percent in the coming years. During the same period, TSDs in New Union have increased by twenty-five percent to 1500 facilities. When New Union's hazardous waste program was initially authorized, EPA issued findings that with fewer resources its program might not be adequately administered or enforced. This is the presently the situation.

F. EPA is not entitled to *Chevron* deference in its determination not to withdraw approval when New Union's program fails to meet RCRA criteria.

While EPA's argument that New Union's resources and performance are sufficient for EPA's continued approval may constitute a reviewable determination in and of itself; its argument that "even if New Union's resources and performance were insufficient, EPA would have discretion," contradicts the Supreme Court's holding in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842-43 (1984). An agency's interpretation of a federal statute it administers is entitled to "*Chevron* deference" if it is both ambiguous and reasonable. *Id*. If EPA were to admit that New Union's resources and performance were insufficient, withdrawal proceedings would not be discretionary. *See* 42 U.S.C. § 6926(e). Additionally, EPA approval of an insufficient program is "without observance of procedure" required by § 6926(e). 5 U.S.C. 706(2)(D).

New Union's program is inadequate to meet continued RCRA approval. Since 2000, DEP staff administering and enforcing the hazardous waste program has declined by forty percent. New Union has carried out only six enforcement actions in response to twenty-two significant violations. New Union's issuance of permits is similarly lackluster, and all DEP capacities are significantly diminished from when they were approved. RCRA compels the

EPA, when it finds state programs inadequate, to commence withdrawal proceedings. EPA's failure to do so allows state programs to defeat the statutory goals of RCRA by endangering human health and the environment.

VI. NEW UNION DOES NOT REGULATE ALL FACILITIES REGULATED BY RCRA, THEREFORE EPA MUST WITHDRAW ITS APPROVAL OF NEW UNION'S PROGRAM

A. Railroad facilities are not regulated because New Union does not enforce criminal sanctions for railroad hazardous waste facilities.

States must adequately enforce the federal RCRA requirements. 42 U.S.C. § 6926 (2006). A state must have criminal remedies, in addition to civil remedies, available for violations of state program requirements. 40 C.F.R. § 271.16 (2009). New Union does not have criminal sanction authority for railroad hazardous waste facilities in violation of RCRA because its 2000 Environmental Regulatory Adjustment Act removed this authority.

New Union's failure to authorize criminal sanctions for railroad facilities violates the requirements to cover all generators and transporters, which includes railroad facilities. A state program must cover all generators and transporters of hazardous wastes identified or listed in RCRA. 40 C.F.R. §§ 271.10(a), 271.11(a) (2009). RCRA specifically identifies rail as a means of transporting hazardous waste. 40 C.F.R. § 270.2 (2009). Railroad facilities are also potential generators of hazardous waste and must ensure its proper handling. *See* Office of Solid Waste, EPA, *RCRA in Focus: Motor Freight and Railroad Transportation, EPA530-K-00-003* (2000), *available at* http://www.epa.gov/osw/inforesources/pubs/infocus/k00003.pdf.

B. Failing to regulate a hazardous waste facilities creates a partial program in violation of RCRA.

"Partial State programs are not allowed for programs operating under RCRA final

authorization." 40 C.F.R. § 271.1(h) (2009). EPA does not define "partial state program" other than noting that the "inability of a State to regulate activities on Indian lands does not constitute a partial program." Id.

EPA has interpreted the partial program prohibition as requiring a state program to fully cover the program activities and the geographic area authorized. EPA interpreted this rule when it issued its proposed rule on Massachusetts' hazardous waste program revision in 1999. Massachusetts: Final Authorization of State Hazardous Waste Management Program Revision, 64 Fed. Reg. 9110 (Feb. 24, 1999). EPA explained that it could not legally approve a Massachusetts regulation exempting cathode ray tubes (CRTs) from coverage because it violated the RCRA regulation requiring a state program to "'control all the hazardous wastes controlled under 40 CFR part 261.'" Id. at 9112 (quoting 40 C.F.R. 271.9(a)). EPA acknowledged that this would temporarily be a partial program, but allowed itself an exemption to approve "some parts of a State program before others." Id. Seeing merit in Massachusetts' recycling approach, EPA continued to work with the state to "achieve a State approach equivalent to federal requirements with respect to CRTs." Id. at 9112–13. EPA did not allow the exemption, even though doing so temporarily allowed a partial program. Id. at 9113. Significantly, this temporary exception erred toward upholding Congress' intent to protect human health and the environment.

In promulgating Clean Water Act regulations, the EPA responded to public comments about partial programs. Clean Water Act Section 404 State Program Regulations, 53 Fed. Reg. 20,764, 20,766 (June 6, 1988). EPA noted that it "interprets the Act as requiring State programs to have full geographic and activities jurisdiction (subject to the limitation in section 404(g)). Accordingly, partial 404 programs are not approvable." *Id*. Because EPA is interpreting its own rules, these interpretations are due strong deference under *Auer v. Robbins*, 519 U.S. 452 (1997).

Similar to Massachusetts' failure to cover all hazardous wastes, New Union's failure to cover all generators and transporters violates the prohibition against partial programs. However, unlike the debatable appropriateness of allowing a temporary phased approval for a single hazardous waste, failing to cover a complete class of transporters is a much more serious impediment to achieving RCRA's purpose and raises constitutional concerns (discussed below). Railroad facilities are an important mode of transporting hazardous waste from a generation site to a properly permitted and designed treatment facility. Without rail to move hazardous waste through New Union, generators are left with three transportation options, air, highway or water. Depending on the circumstances, none of these may be appropriate for the location, type, or volume of hazardous waste. Without railroad transportation available, a generator may not have a means to properly dispose of its hazardous waste. Unlike EPA's exception in Massachusetts, allowing a partial program here errs on the wrong side and defeats Congress' intent to protect human health and the environment.

C. RCRA requires that state programs are consistent with the federal program and with other state programs.

An authorized state hazardous waste program must be consistent with the federal program and other state programs. 42 U.S.C. § 6926 (2006). EPA regulations define consistency as

> (a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.
> (b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent. 40 C.F.R. § 271.4 (2009).

1. Excluding railroad facilities from RCRA coverage violates the dormant Commerce Clause and is inconsistent with the federal program and other state programs.

"RCRA appears to contain no clear statement or indication of legislative intent to permit states to override the Constitution. EPA may change its interpretation of its own regulation; however, we cannot change the commands of the Constitution and Congress. *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 794 (4th Cir. 1991) (referencing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9, (1983))."

Courts have found that when a state statute raises a dormant Commerce Clause concern, where no interstate discrimination is involved, the Pike balancing test is the appropriate legal standard, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 783 (4th Cir. 1996); (rejecting EPA's reasonableness standard of 40 C.F.R., section 271.4(a) as being inappropriate to "displace a constitutional dormant Commerce Clause analysis"); *Blue Circle Cement, Inc. v. Bd. of County Com'rs of County of Rogers*, 27 F.3d 1499, 1508,1511 (10th Cir. 1994) (discussing the applicability of Pike balancing, id. at 1511, and noting the similarity of the court's preemption analysis to EPA's reasonableness standard of 40 C.F.R., section 271.4(a), id. at 1508).

Under *Pike*, "[i]f a legitimate local purpose is found, then the question becomes one of degree. …[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike*, 397 U.S. at 142. New Union's failure to provide criminal enforcement for railroad hazardous facilities effects a statewide ban on railroad transportation of hazardous waste generated within New Union. New Union has not stated a local interest. Given the importance of criminal penalties in promoting proper hazardous waste handling and the importance of rail transport in shipping hazardous waste from one state to a facility in another

state, New Union's burden on interstate commerce is not legitimate and as such is unconstitutional and renders its state program inconsistent with the federal program.

2. Not regulating railroad hazardous waste facilities acts as a "ban on the free movement" for the treatment of hazardous waste.

Regarding the second part of 40 C.F.R., section 271.4 (b), the EPA has determined that "a state law 'acts as a prohibition' on the treatment of hazardous wastes when it effects a total ban on a particular waste treatment technology within a State." *Hazardous Waste Treatment Council v. EPA*, 938 F.2d 1390, 1395 (D.C. Cir. 1991). The D.C. Court of Appeals upheld the EPA's decision that a North Carolina statute requiring dilution did not render its state hazardous waste program inconsistent. *Id.* at 1397. The dilution requirement made it economically prohibitive for companies to locate treatment facility at a certain locations within the state. *Id.* at 1395. In reaching its decision, the "Regional Administrator emphasized that of the 485 riparian miles available in North Carolina for a facility of the kind proposed by GSX, 333 remained available under the Act." *Id.*

Here, unlike companies in North Carolina that could find alternate sites to build treatment facilities, railroads cannot transport hazardous waste in New Union. A transporter that cannot be held criminally liable for RCRA violations, is prohibited from transporting hazardous waste within New Union. This operates as a total ban on railroad hazardous waste facilities in the state. Therefore, New Union's program is inconsistent with the federal program and other state programs in violation of RCRA.

3. Criminal sanctions are a tool to deter violations of RCRA and banning this tool defeats the goals of RCRA.

Turning now to the first part of (b), "[a]ny aspect of State law or of the State program which has no basis in human health or environmental protection." 40 C.F.R. § 271.4 (2009).

Criminal penalties are an important tool in deterring violators and encouraging compliance. Office of Solid Waste, EPA, *RCRA Orientation Manual* III-129 (2008), *available at* http://www.epa.gov/osw/inforesources/pubs/orientat/. Eliminating criminal sanctions from railroad hazardous waste facilities leaves New Union without an important tool to protect the State's human health and environment and thus has "no basis in human health or environmental protection." 40 C.F.R. § 271.4 (2009).

VII. EPA MUST WITHDRAW ITS APPROVAL OF NEW UNION'S PROGRAM BECAUSE IT IS IN VIOLATION OF THE COMMERCE CLAUSE

Although the District of Columbia Circuit has acknowledged that "Congress' indisputable intent in RCRA was to encourage proper disposal and recycling of hazardous wastes," the U.S. Supreme Court has held that "recent Commerce Clause cases... have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987). The First Circuit clearly identified the rationale by holding that the "Supreme Court's current dormant Commerce Clause jurisprudence is concerned with preventing economic protectionism and inconsistent regulation [among the several states]." *IMS Health Inc. v. Mills*, 616 F.3d 7, 25 (1st Cir. 2010).

The Second Circuit, citing the Supreme Court, held that a "state regulation might impose a disproportionate burden on interstate commerce if the regulation is in substantial conflict with a common regulatory scheme in place in other states." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 112 (2d Cir. 2001) (citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978)).

The Supreme Court has recognized that a discriminatory law is not unconstitutional if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm v. Heald*, 544 U.S. 460, 463 (2005) (quoting *New*

Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988)).

The Fourth Circuit has held that although a state may show a legitimate state interest in enacting a statute, the statute *still* violates the commerce clause if it is overbroad in its attempt to serve the state interest. *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004). Furthermore, the "determination of severability [is] one of state law." *Wyoming v. Oklahoma*, 502 U.S. 437, 459 (1992) (citing to *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 624 (1985)).

The U.S. Supreme Court has held that "Congress can regulate purely intrastate activity... if it concludes that failure to regulate" would "undermine the orderly enforcement of the entire regulatory scheme." *Gonzales v. Raich*, 545 U.S. 1, 18, 28 (2005).

In the instant case, New Union has indisputably identified a compelling state interest in protecting the health of its citizens from the legitimate dangers posed by the improper storage and treatment of Pollutant X. The second amendment New Union made to the Hazardous Regulation Act ("Amendment Two") wherein it states that the "DEP shall not issue permits allowing the treatment, storage, or Disposal of Pollutant X," however, was not narrowly tailored to achieving its interest and could be accomplished through more reasonable alternative means. Amendment Two discriminates against in-state treatment facilities and substantially burdens interstate commerce by effectively banning the treatment of Pollutant X in the state of New Union. It does so regardless of whether a facility is designed to be capable of properly treating Pollutant X. This creates inconsistent regulation among the several states where a common regulatory scheme is in place with which New Union is now in substantial conflict.

Because the issue of severability concerning the various amendments is a matter of state law but does not appear unreasonable in the instant case, nonetheless EPA must withdraw its approval of New Union's program. Therefore, Amendment Two is unconstitutionally overbroad

in its attempt to promote a state interest, and should be invalidated by this Court under the Commerce Clause of the United States Constitution.

CONCLUSION

CARE has properly brought its claim before this court to compel EPA to commence proceedings to withdraw approval for New Union's hazardous waste program. Due to diminishing resources and increasing administrative and enforcement demands New Union's hazardous waste program no longer meets RCRA approval criteria. EPA should not escape its statutorily imposed supervisory duty of New Union's program through a narrow construction of RCRA's Citizen Suit provision. Nor should EPA escape its duty through unreasonable delay. For the foregoing reasons CARE respectfully requests that this Court REVERSE the decision of the district court as to the reviewability of EPA's inaction, and LIFT THE STAY on CARE's claim regarding EPA's constructive actions, and COMPEL EPA to commence proceedings to withdraw approval of New Union's hazardous waste program.

Respectfully Submitted,

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Counsel for CARE