C.A. No. 18-2010

IN THE

# UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

**CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.**
*Appellants,*

*-against-*

**LISA JACKSON, ADMINISTRATOR, U.S Environmental Protection Agency**
*Appellees.*

*-against-*

**STATE OF NEW UNION**
*Intervenor-Appellee.*

ON PETITION FOR REVIEW
FROM THE DISTRICT OF NEW UNION

# BRIEF FOR APPELLEES,

# STATE OF NEW UNION

TEAM NUMBER 37

COUNSEL FOR APPELLEES

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## JURISDICTIONAL STATEMENT

Federal 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. §§ 6901–6992k, and 28 U.S.C. § 1331. The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291 (2006).

## STATEMENT OF THE ISSUES

I. Whether EPA's approval of New Union's hazardous waste program was an order and a discretionary duty not subject to judicial review under the citizen suit provision, taking it outside the scope of RCRA § 7004.

II. Whether CARE's action to compel revocation of New Union's hazardous waste program, under 5 U.S.C. § 553(e), falls outside of the subject matter jurisdiction of 28 U.S.C. §1331.

III. Whether the district court properly held that CARE is not entitled to judicial review under the "constructive submission theory."

IV. Assuming the constructive submission theory is available, whether CARE's suit would compel EPA to perform a nondiscretionary duty, requiring this court to remand to the district court.

V. Whether New Union's resources and performance are within RCRA's approval requirements and, even if the program is not in compliance, whether EPA has the discretion to withdraw its approval.

VI. Whether EPA has the discretion to withdraw its approval of New Union's entire program if this Court found that New Union was not presently regulating railroad hazardous waste facilities under the Environmental Regulatory Adjustment Act.

VII. Whether EPA should continue to approve New Union's program when the Environmental Regulatory Adjustment Act's treatment of Pollutant X is equivalent to the federal program, consistent with the federal program and other state programs, and in compliance with the Commerce Clause.

## STATEMENT OF THE CASE

On January 4, 2010, Citizen Advocates for Regulation and the Environment, Inc. ("CARE") filed two actions: one with the United States District Court for the District of New Union and one in this Court, in order to force the Environmental Protection Agency ("EPA") to begin withdrawal of New Union's hazardous waste program. This Court stayed the proceeding pending the outcome of the district court. (R. at 4.)

On June 2, 2010, the district court entered its judgment, dismissing CARE's citizen suit for lack of jurisdiction under RCRA § 7002(a)(2). Similarly, the district court held that it did not have jurisdiction under 28 U.S.C. § 1331. Both CARE and EPA filed notices of appeal. (R. at 1.)

This Court does not have jurisdiction over EPA's actions under RCRA. Any such jurisdiction can only be provided by RCRA § 7006(b). This Court's lack of jurisdiction does not cede jurisdiction to the district court. The district court jurisdiction can only be provided by RCRA § 7004 or 28 U.S.C. § 1331.

## STATEMENT OF THE FACTS

After a notice and comment procedure, EPA approved New Union's hazardous waste program in lieu of RCRA. (R. at 5–6.) This 1986 authorization was based on a finding that the state's Department of Environmental Protection ("DEP") had adequate resources to administer and enforce the program. DEP issued permits in a timely fashion, inspected RCRA-regulated facilities at least every other year, and took enforcement actions against significant violations. (R. at 10.)

In 1986, New Union had 1,200 hazardous waste treatment, storage and disposal facilities ("TSDs"), and fifty full-time employees. (R. at 10.) DEP's 2009 Annual Report to EPA indicated that New Union had 1,500 TSDs and thirty full-time employees. (R. at 10.) The Report stated

that New Union issued 125 RCRA permits during the previous year and anticipated issuing 125 during the present year. (R. at 11.) While 900 TSDs had expired permits, they continued by operation of law. (R. at 11.) DEP issues permits on a priority basis to address the backlog of permit applications. (R. at 11.) As a top priority, the agency reviews permits of facilities that have the greatest potential to harm the public health or environment because of the volume or toxicity of hazardous waste handled. (R. at 11.)

DEP and EPA each inspected 150 TSDs during the previous year and expected to perform at the same level during the current year. (R. at 11.) DEP prioritized inspections of facilities that posed the greatest potential for harm to the public health or the environment. (R. at 11.) They determined this by examining the volume or toxicity of the hazardous waste each facility handled. (R. at 11.)

DEP took six enforcement actions in 2008. (R. at 11.) Four were administrative orders, requiring compliance and penalties calculated using EPA's penalty policy. (R. at 11.) Two were civil actions, seeking injunctions and the judicial assessment of penalties. (R. at 11.) EPA also took six enforcement actions in the state. (R. at 11.) Environmental groups filed six citizen suits in the state during the past year for RCRA violations. (R. at 11.) DEP reported twenty-two significant permit violations during the year. (R. at 11.)

In 2000, New Union legislature enacted the Environmental Regulatory Adjustment Act ("ERAA"). (R. at 11.) First, ERAA delegated to the New Union Railroad Commission all of DEP's setting, permitting, inspection, and enforcement authorities under all state environmental statutes; and removed criminal sanctions for violations. (R. at 12.) The Commission, a state agency, was originally charged with regulating intrastate railroads. (R. at 12.)

Second, ERAA established guidelines for Pollutant X. (R. at 12.) Pollutant X was recognized by EPA and World Health Organization ("WHO") as among the most potent and toxic chemicals to public health and the environment. (R. at 12.) New Union's TSDs are not capable of protecting people or the environment from Pollutant X. (R. at 12.) There are only nine TSDs in the country authorized to treat or dispose of Pollutant X. (R. at 12.) ERAA mandated that every facility generating Pollutant X had to submit, within ninety days, a plan to minimize the generation of Pollutant X. ERAA also requires TSDs to report annually on past and future actions to reduce Pollutant X. (R. at 12.) ERAA stated that Pollutant X could only be stored in New Union for less than 120 days while awaiting transportation to one of the nine facilities capable of handling the hazardous waste. (R. at 12.) Finally, ERAA allowed transporters to carry Pollutant X through or out of New Union, provided that such transportation was as direct and fast as reasonably possible, allowing stops for emergencies and refueling. (R. at 12.)

## STANDARD OF REVIEW

Summary judgment is appropriate if, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "As with all summary judgment determinations, [the court] review[s] the matter *de novo* to decide whether the record as a whole establishes that the defendant was entitled to judgment as a matter of law." *City of Chicago v. Envtl. Def. Fund*, 948 F.2d 345, 347 (7th Cir. 1991).

## SUMMARY OF THE ARGUMENT

The district court correctly granted summary judgment in favor of New Union. RCRA's citizen suit provision provides that any person may commence a civil action on his own behalf against EPA where the Administrator has failed to perform a duty that is not discretionary. Under RCRA § 7004, a citizen can petition EPA for the promulgation, amendment or repeal of rules,

creating a nondiscretionary duty. EPA's decision to allow New Union to implement a hazardous waste program is an order and not a rule. Orders are outside the scope of § 7004. Indeed, under § 7004, orders create a discretionary duty not subject to judicial review under the citizen suit provision. Even if EPA was forced to act on CARE's petition, the approval of New Union's program took place more than ninety day ago. Under § 7006, the statute of limitations established for judicial review has run.

The district court correctly held that it lacked subject matter jurisdiction under 28 U.S.C. §1331. Federal courts have limited jurisdiction and may hear cases only to the extent expressly provided by statute. Under RCRA's citizen suit provision, district courts have subject matter jurisdiction only if the Administrator has failed to perform a nondiscretionary act. EPA's failure to commence withdrawal proceedings is discretionary and, thus, not subject to judicial review.

The constructive submission theory should not be applied to the instant case because it has not been widely accepted and has never been applied under RCRA. Indeed, RCRA's plain language does not permit the application of this theory. Similarly, courts have long held that EPA is entitled to deference; the theory violates that principle of deference by triggering automatic duties on the part of EPA. Even assuming that applying the theory under RCRA was permissible, New Union fits within two well-known exceptions to the theory.

Assuming that the constructive submission theory was permissible, jurisdiction for such action properly lies with the district court. The district court has exclusive jurisdiction over the review of nondiscretionary duties by EPA. EPA's alleged failure to act triggers a nondiscretionary duty. Moreover, jurisdiction does not lie with this Court because EPA's alleged inaction is not a final promulgation.

Assuming this Court proceeds to the merits of CARE's challenge, New Union's resources and performance are sufficient for EPA's continued approval of the program. The operation and enforcement of New Union's program complied with final authorization requirements. Even if the program was insufficient, EPA had discretion to take action other than withdrawing approval. EPA relies on states to implement environmental programs and withdraws authorization only in the most extreme circumstances.

Assuming this Court proceeds to the merits of CARE's challenge, New Union regulated hazardous waste facilities when it delegated responsibility to the Commission. The Commission meets authorization requirements. Even if New Union failed to regulate hazardous waste facilities, EPA is not required to withdraw its approval of the entire program. When a state decides to revise a portion of the program, EPA has no duty to review the state's entire program.

Assuming this Court proceeds to the merits of CARE's challenge, this Court should find that withdrawal of New Union's program is not warranted. ERAA's treatment of Pollutant X is equivalent to the federal program because ERAA is more stringent than RCRA. Thus, ERAA is federally enforceable. Furthermore, ERAA is consistent with the federal program and other state programs. Indeed, ERAA does not unreasonably restrict the free movement of hazardous wastes across New Union's border; and it is based in human health and environmental protection. Finally, ERAA is in compliance with the Commerce Clause. New Union has a legitimate local interest in not granting TSD permits for Pollutant X and for limiting the amount of time Pollutant X can be stored in the state. ERAA's permit restriction is the least discriminatory method.

## ARGUMENT

### I. CARE'S CLAIM FOR REVOCATION OF NEW UNION'S HAZARDOUS WASTE PROGRAM MUST FAIL BECAUSE RCRA § 7002 DOES NOT PROVIDE JURISDICTION TO ORDER EPA TO ACT.

RCRA Subtitle C establishes a federal program to manage hazardous wastes from cradle to grave by regulating generation, transportation, treatment, storage, and disposal of hazardous wastes. *See* 42 U.S.C. §§ 6901–6992k (2006). Through the authorization process, EPA reviews a state's hazardous waste program and grants the state authority to implement its own program "in lieu of" the federal program, provided that the state program is at least as stringent as and consistent with the federal program. 42 U.S.C. § 6926, RCRA § 3006. While an authorized state has primary responsibility for enforcing its hazardous waste program, EPA retains the ability to exercise its enforcement authority. *See* RCRA § 3006(e). EPA can take back delegated authority if it finds the authorized state is not satisfactorily carrying out its responsibilities; however, the agency is reluctant to take such extreme action. *See* Ellen R. Zahren, Comment, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 Emory L.J. 373, 417 (2000) (stating that EPA relies on states to implement environmental programs and would withdraw delegation only in the most extreme circumstances).

RCRA is usually enforced by the federal government; however, it contains a citizen suit provision that gives individuals the ability to enforce provisions of RCRA. RCRA § 7002. The Supreme Court has explained that Congress intended citizen suits to play an interstitial role rather than a potentially intrusive role. *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 61 (1987). This prevents numerous instances of litigation involving private citizens, the states and the federal government. *McGregor v. Indus. Excess Landfill, Inc.*, 709 F. Supp.

1401, 1407 (N.D. Ohio 1987). The right of private citizens to institute civil litigation under RCRA is strictly limited by jurisdictional prerequisites contained in § 7002.

The citizen suit provision provides: "Any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary." RCRA § 7002(a)(2). Additionally, under RCRA § 7004, a citizen can petition EPA for the promulgation, amendment or repeal of rules. This creates a nondiscretionary duty under § 7002(a)(2).

Here, there is no mandatory duty under § 7002(a)(2) to take action on CARE's § 7004 petition to withdraw EPA's approval because the approval was not a rulemaking. Indeed, approval of the program was a discretionary duty outside the scope of § 7004, and not subject to judicial review under the citizen suit provision.

### A. EPA's Approval Of New Union's Program Was An Order Not Subject To Review Under RCRA § 7004.

RCRA does not define which administrative actions are rulemakings and which actions are orders. (R. at 8.) That distinction is found in the Administrative Procedure Act ("APA"). (R. at 8.) The APA 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) (2006). In contrast, an order is a final disposition of an agency and includes everything not covered by a rulemaking, such as permits. 5 U.S.C. § 551(6) & (8). Rulemakings are legislative in nature, forward looking, and general in application. David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 924 (1965). Conversely, orders are adjudicatory in nature, applying fact to law in specific situations. *Id.* In examining whether agency actions are subject to judicial review, courts have looked to whether the action has a binding effect on interested parties and on

the agency's ability to exercise future discretion. *Am. Portland Cement Alliance v. EPA ("APCA")*, 101 F.3d 772, 776 (D.C.C. 1996).

In *APCA*, EPA determined that cement kiln dust did not warrant full hazardous waste regulation under RCRA. *Id.* at 774. The D.C. Circuit held that EPA's determination was not a rulemaking. *Id.* The court held that the determination was a not rulemaking because EPA did not bind itself in any significant way. *Id.* at 778. The court explained that, although there were notice and hearing proceedings, "the ultimate availability of substantive judicial review is distinct from the question of whether the basic rulemaking strictures of notice and comment and reasoned explanation apply." *Id.* at 777 (quoting *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1134 (D.C.C. 1995)). Indeed, the notice and comment proceedings merely informed EPA's decision and did not amount to a rulemaking. *APCA*, 101 F.3d at 777.

Similarly in *Hazardous Waste Treatment Council v. EPA ("HWTC")*, EPA approved a "no migration" exemption permitting disposal of hazardous waste. 910 F.2d 974, 976 (D.C.C. 1990). The court held that EPA's approval was not a promulgation of a regulation subject to judicial review. *Id.* The court reasoned that EPA rulemaking involves either the interpretation of a governing standard or whether the decision has widespread application. *Id.* Here, EPA's action concerned a single town, and did not interpret or refine a governing standard. *Id.*

Like EPA's decision in *HWTC*, EPA's decision to approve New Union's program involved a single state. *See id.* EPA only considered whether the state's program met EPA's criteria at that particular time, and did not interpret or refine a governing standard. EPA merely applied facts to law in this specific situation. Like *APCA*, EPA's use of notice and comment procedure in its initial approval of New Union's program does not compel a contrary conclusion. *See* 101 F.3d at 777. Thus, EPA's initial approval of New Union's program is not a rulemaking,

and is not subject to petition under § 7004, which authorizes petitions only for promulgating, amending, or revoking rules.

### B. Judicial Review Of EPA's Actions Is Time-Barred Under § 7006.

Even if EPA was forced to act on CARE's petition, the petition is time-barred. The statute of limitations is ninety days, as set forth in § 7006. The approval of New Union's program took place more than ninety day ago and, thus, the statute of limitations established for judicial review has run. In *Waste Management, Inc. v. EPA* ("*WMI*"), WMI challenged the validity of EPA's regulation, which authorized EPA to review state hazardous waste permit applications. 945 F.2d 419, 419–20 (D.C.C. 1991). However, WMI's challenge was eight years after program approval and was, therefore, time-barred. *Id.*at 420. Similarly, here, CARE brought the claim more than a decade after program approval, long after the ninety-day statute of limitations. Thus, CARE's claim is time-barred under the statute.

## II. THE DISTRICT COURT LACKED JURISDICTION UNDER 28 U.S.C. § 1331 TO FORCE EPA TO REVIEW THE PETITION.

Federal courts are courts of limited jurisdiction and may hear cases only to the extent expressly provided by statute. *See* U.S. Const Art. III, § 2, cl. 1 (granting federal district courts jurisdiction over cases "arising under . . . the laws of the United States"). Jurisdiction must be established as a threshold matter. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94–95 (1998). Review of an agency action falls under the general "federal question" provision, 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106–07 (1977).

CARE failed to establish subject matter jurisdiction for its claim under 5 U.S.C. § 553(e). Section 553(e) provides: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). This provision creates a nondiscretionary duty for the Administrator. However, EPA's refusal to initiate revocation

proceedings is not a rule. That inaction is presumptively unreviewable under the statute and EPA must be afforded deference.

### A. EPA Must Be Afforded Deference Under *Chevron* Because RCRA Provides No Substantive Law For A Reviewing Court To Apply.

Because EPA is an administrative agency, it is entitled to *Chevron* deference. *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under this analysis, the first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If the statute is "silent or ambiguous," however, the court defers to the agency's interpretation "if it is based on a permissible construction of the statute." *Id.* at 843. More specifically, if there is "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the court must accept the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843–44; *see* 5 U.S.C. § 706(2)(A). This deferential standard presumes the validity of agency actions and upholds them if they satisfy minimum standards of rationality. *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998).

Here, the statutory text is silent on when EPA must commence withdrawal proceedings. The text mandates that EPA "shall withdraw authorization" if it determines that a state program does not meet RCRA's federal regulatory scheme. RCRA § 3006(e). However, RCRA provides no guidance as to when EPA should exercise its discretion to begin the revocation process. The statute only provides that the determination, whether a state's hazardous program is consistent with RCRA's requirement, must be made "after [a] public hearing." *Id*. Thus, the statute is silent as to when EPA should hold a revocation hearing.

Moreover, RCRA's legislative history provides no insight as to when EPA must exercise its discretion to commence withdrawal of authorization. *See, e.g.*, H.R. Rep. No. 94-1491(I), at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6269 ("[I]f the state program…becomes not equivalent . . . the Administrator . . . is authorized to enforce the federal minimum standards."). This legislative silence indicates that EPA has discretion to decide when commencement of withdrawal proceedings is proper. Simply put, EPA's regulations provide no criteria to decide when to commence revocation proceedings. This lack of criteria indicates that EPA's decision should be discretionary. *See, e.g., Pub. Citizen v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003) (searching for "meaningful standards" whereby to review a nonenforcement decision, and concluding that "[s]uch standards are not present").

Under the second prong of *Chevron*, CARE must show that EPA's interpretation fails a highly deferential reasonableness test. *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40 (2d Cir. 1993) (holding that EPA's refusal to include a termination provision in the original permit and its refusal to provide for immediate termination of federal permits is not unreasonable). Here, like EPA's inaction in *Ciba-Geigy Corp.*, EPA's decision not to terminate New Union's hazardous waste program satisfies the minimum standard of rationality. Thus, EPA's inaction was not arbitrary, capricious, or manifestly contrary to the statute, and EPA must be afforded deference.

### B. The Decision Not To Commence Permit Revocation Proceedings Is Presumptively Unreviewable.

EPA's decision not to commence withdrawal proceedings of New Union's hazardous waste program is presumptively unreviewable. RCRA grants EPA the power to revoke the authorization of a state's hazardous waste program after it has notified the state of a deficiency in the program, and the state has failed to take corrective measures within a reasonable time. RCRA § 3006(e).

Under RCRA's citizen suit provision, district courts have subject matter jurisdiction only if there has been a failure of the Administrator to perform a nondiscretionary duty. RCRA § 7002(a)(2). Traditionally, courts have been wary of second-guessing agency decisions not to enforce administrative actions, given the "agency's expertise and better understanding of its enforcement policies and available resources." *Heckler v. Chaney*, 470 U.S. 821, 827 (1985). In *Heckler*, the Supreme Court held that an agency's decision not to institute an enforcement action is unreviewable. *Id.* Therefore, the decision "not to invoke an enforcement mechanism provided by statute . . . [is] not typically subject to judicial review." *Pub. Citizen*, 343 F.3d at 464.

In *Public Citizen*, the petitioners brought an action to compel EPA to revoke Texas' operating permit program under the Clean Air Act ("CAA"). 343 F.3d at 452. The court held that the clear language of the CAA grants EPA authority to initiate the notice of deficiency ("NOD") process when it deems it appropriate. The court explained, "Congress left the decision whether, and when to issue an NOD 'to the institutional actor best equipped to make it.' " *Id*. at 465 (quoting *New York Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 332 (2d Cir. 2003)). EPA had discretion to determine whether to engage its formal enforcement mechanism to revoke a state's permitting program. *Pub. Citizen*, 343 F.3d at 464. EPA was not obligated to issue an NOD whenever it is made aware of deficiencies in the program. *Id.* Therefore, EPA's decision not to issue a NOD was not subject to review. *Id.* at 465.

Similarly, in *Weatherby Lake Improvement Co. v. Browner*, the petitioners sued EPA through the citizen suit provision of the Clean Water Act ("CWA") to withdraw the approval of Missouri's permitting program. No. 96-1155-CV-W-8, 1997 WL 687656, at *1 (W.D. Mo. April 17, 1997). The court held that the plain language of CWA does not compel EPA to investigate complaints or to make findings of violations which would force EPA to withdraw Missouri's

permitting authority. *Id*. The court explained, "to hold otherwise would frustrate the purposes of the Act by requiring the EPA to alter its priorities and expend its limited resources to investigate citizen complaints, regardless of their relative importance." *Id.*

RCRA's citizen suit provision mirrors CWA's provision. In both, the Administrator's failure to act must be nondiscretionary in order to establish federal jurisdiction. Here, EPA has yet to make a determination that New Union has not complied with RCRA provisions governing hazardous waste programs. This defect is fatal to CARE's claim. Like EPA's inaction in *Public Citizen* and *Weatherby Lake Improvement Co.*, EPA's failure to begin formal permit revocation proceedings constituted a discretionary action, not subject to review. Thus, CARE's claim must be dismissed for lack of subject matter jurisdiction under 28 U.S.C. § 1331.

## III. CARE IS NOT ENTITLED TO JUDICIAL REVIEW UNDER THE "CONSTRUCTIVE SUBMISSION" THEORY.

The constructive submission theory is a judicial remedy created to address state inaction under CWA. CWA requires states to develop pollution limits for certain troubled waters. *See Hayes v. Whitman*, 264 F.3d 1017, 1020 (10th Cir. 2001). CWA further requires that these limits (called TMDLs) be submitted to EPA for approval. If EPA disapproves of the TMDLs, it must specify the changes necessary for compliance. If those changes are not taken, EPA has a duty to promulgate its own TMDLs for the troubled waters. 33 U.S.C § 1313(d)(2) (2006).

The Seventh Circuit held that when a state fails for many years to submit any TMDLs, that failure is a "constructive submission" of no TMDLs. *Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984). That constructive submission triggers a duty on the part of EPA to: deem the state submission deficient, and to promulgate substitute TMDLs where the state has failed to do so. *Natural Res. Def. Counsel, Inc., v. Fox ("Fox")*, 30 F. Supp. 2d. 369, 375 (S.D.N.Y. 1998).

### A. The Constructive Submission Theory Has Been Applied In Only A Few Instances And Is Not Universally Accepted.

The constructive submission theory has been harshly criticized. *See, e.g., Fox*, 30 F. Supp. 2d 369 (S.D.N.Y. 1998). In *Fox,* New York failed for nineteen years to submit TMDLs. *Id.* at 372. The court considered and rejected the constructive submission theory. *Id.* at 375–77. First, the court noted that the text of CWA does not require EPA to deem state action a constructive submission or determination. *Id.* at 375–76. Therefore, "it is only by way of judicial gloss on the act that EPA has . . . any duty at all to deem state inaction a 'constructive submission'." *Id.* Here, CARE attempts to extend the constructive submission theory to apply not only to CWA, but also to RCRA. (R. at 2.) CARE maintains that EPA's failure to act on CARE's petitions constituted a "constructive denial" of those petitions and a "constructive determination" that New Union's program continued to meet RCRA's standards. However, no court has applied the constructive submission theory within the context of RCRA. Additionally, similar to *Fox*, RCRA does not require EPA to deem state inaction a constructive submission. *See* RCRA § 7004(a). Because CARE's argument is unsupported by statute or opinion it must fail.

RCRA does not set forth a specific deadline for replying to citizen petitions, and does not contemplate deeming state inaction a constructive determination. In *Fox*, the court rejected the constructive submission theory in part because CWA does not set forth a deadline for deeming state inaction a "constructive submission." *Id.* at 376. Therefore, any alleged deadline would have to be judicially inferred. "Heaping inference upon inference to divine a precise date for exercise of an implied duty does not . . . make for persuasive statutory construction." *Id.* Moreover, any inferable deadline imposes merely a "general duty of timeliness" to be determined by EPA. *Id.* at 377 (internal quotations omitted). Here, similar to *Fox*, the text of RCRA does not mandate a precise date for replying to petitions. RCRA § 7004(a) ("Within a

reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition"). Further, RCRA is void of *any* mention of "constructive determination," much less a deadline for the same. It is improper for the court to infer any deadlines because the governing statute does not contain them.

### B. New Union's Action, However Slight, Brings It Within An Exception To The Constructive Submission Theory.

The constructive submission theory does not apply because New Union has taken some action to remain in compliance with RCRA. Courts have held that where the state has submitted some TMDL's, and therefore has not "clearly and unambiguously" failed to act, the constructive submission theory is inapplicable. *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 883 (9th Cir. 2002); *see also, Hayes*, 264 F.3d at 1024 ("The constructive-submission theory that we accept . . . is necessarily a narrow one. It applies only when the state's actions clearly and unambiguously express a decision to submit no TMDL[s]"). Here, New Union's actions, admittedly restricted by budget woes, have nevertheless shown a willingness to comply with RCRA. (R. at 5.) Therefore, those actions bring New Union within an common exception to the constructive submission theory.

The constructive submission theory does not apply because any alleged inaction on the part of New Union is justified. In *Scott*, the seminal constructive submission theory case, the court noted that the theory is inapplicable when there is some justification for state inaction. 741 F.2d at 997 ("There may be reasons . . . which may justify the states' failure to submit TMDL's and the EPA's concomitant failure to act.") Here, there are many reasons that justify New Union's alleged failure to act. Indeed, budget deficits of the type experienced by New Union are the exact kind of justifications that the court had in mind in *Scott.* Because New Union is justified in any alleged inaction, the constructive submission theory is inapplicable.

### C. The Court Must Defer To EPA's Discretion As To Matters Governed By RCRA.

The court must defer to EPA's superior knowledge of a complex statutory scheme. In *Fox*, the court rejected the constructive submission theory in part because EPA was uniquely positioned as an expert of CWA's requirements. *See Fox*, 30 F. Supp. 2d at 377. Those requirements are implemented solely by EPA, who has "superior knowledge" of the problems occasioned by CWA. The court further held that EPA was entitled to deference as a result of the complex nature of the statute. *Id.* at 376–77. Indeed, the "[c]ourt must be wary of infringing upon the deference due to administrative agencies, especially as regards implementation of a labyrinthine statutory scheme." *See also Am. Iron & Steel Inst. v. EPA*, 526 F.2d 1026, 1042 (10th Cir. 1975) ("the Administrator's interpretation of this very complex Act . . . should be given appropriate deference.") Here, as with CWA in *Fox*, EPA is uniquely positioned as the expert of RCRA, a complex statutory scheme. Therefore, the court must afford EPA the discretion to make decision, and defer to those decisions when they involve RCRA.

### D. The Constructive Submission Theory Should Not Be Extended Beyond The Scope Of CWA.

This court does not have the authority to amend RCRA to include the constructive submission theory. Indeed, this was the holding of the D.C. Circuit in *APCA*. 101 F.3d at 779. There, the court considered whether to adopt the constructive submission theory and apply it to RCRA, as CARE urges. *Id.* The court declined to do so. To wit, EPA urged the court to exercise "judicial review of actions akin to denials of petitions." *Id.* The court held that it did not have the authority to amend RCRA. *Id.* Here, CARE urges the court to allow for review of "constructive determinations." Because this court is similarly without authority to amend RCRA, CARE's argument must fail.

There are significant procedural differences between CWA cases that apply the constructive submission theory and this case. First, in the CWA cases, applying the constructive submission theory compels EPA to *disapprove* of the states' failure to submit TMDLs. *See, e.g., Fox*, 30 F. Supp. 2d. at 375. Here, applying the same theory compels EPA to *approve* of New Union's program. CARE's nonsensical assertion is that to address New Union's alleged non-compliance with RCRA, EPA must first declare that New Union complies with RCRA.

### E. Even If EPA's Inaction Was To Be Considered A Constructive Denial Of CARE's Petition, This Cannot Indicate A Determination In The Absence Of A Public Hearing.

RCRA § 3006(e) is unambiguous that EPA must first decide to hold a public hearing and then formally "determine" that a state is not administering and enforcing a program in accordance with the requirements before EPA has any actionable duty under the citizen suit provision. *See* RCRA § 3006(e); *Sierra Club v. EPA*, 377 F. Supp. 2d 1205 (N.D. Fla. 2005). In other words, a hearing is the necessary predicate to a determination. *See* RCRA § 3006(e); *Sierra*, 377 F. Supp. 2d at 1207. Since the EPA has not exercised its discretion to hold a public hearing, there could have been no determination, constructive or otherwise.

## IV. BECAUSE CARE'S SUIT SEEKS TO COMPEL EPA TO PERFORM A NONDISCRETIONARY DUTY, THE SUIT MUST BE REMANDED TO THE DISTRICT COURT.

Judicial control over RCRA is split between the district court and the circuit court. *Compare* RCRA § 7002 (citizen suit; district court has jurisdiction) with *id.* § 7006 (review of Administrator's actions; circuit court has jurisdiction). CARE has filed complaints in both the district court and this Court, both of which seek to compel EPA to act. (R. at 4.) New Union and EPA assert that the case belongs to the district court, pursuant to § 7002, whereas CARE maintains that review is proper in this Court, pursuant to § 7006.

The district court's jurisdiction is much broader than that of the circuit court. *Compare* RCRA § 7002(a)(2) ("Any person may commence a civil action . . . against the Administrator where it is alleged a failure of the Administrator to *perform any act or duty* under this act which is not discretionary"; district court) (emphasis added) with *id.* § 7006(a)(1) ("A petition for review of action of the Administrator in *promulgating* any regulation"; circuit court) (emphasis added). In other words, the district court has jurisdiction to review any nondiscretionary duty, whereas the circuit court has jurisdiction over only final actions. *See Pennsylvania v. EPA*, 618 F.2d 991, 997 (3d. Cir. 1980).

### A. CARE's Complaint Fits Squarely Within The District Court's Jurisdiction Under RCRA § 7002.

Where EPA fails to act on an existing regulation, or fails to promulgate new regulations, jurisdiction lies with the district court. *Pennsylvania*, 618 F.2d at 995. In *Pennsylvania*, EPA deferred the promulgation of regulations for certain water polluting discharges. The plaintiffs sought review of that deferral. The Third Circuit held that such a deferral was akin to a failure to act on the part of EPA. The court further held that EPA had a nondiscretionary duty to act on existing regulations. The circuit court dismissed the case for lack of jurisdiction. Similarly, CARE seeks review of EPA's failure to perform a nondiscretionary duty. EPA has a nondiscretionary duty to inspect state authorized facilities. *See* RCRA § 3007(e)(1) ("The Administrator . . . shall . . . thoroughly inspect every facility for the treatment, storage, or disposal of hazardous waste . . . no less often than every two years."). Indeed, this is the only way to determine whether, as CARE alleges, New Union's program no longer meets the requirements of RCRA. EPA's alleged failure to perform nondiscretionary inspection duties fits squarely within the jurisdiction of the district court conferred under § 7002.

The district court is also the appropriate forum whenever the reviewing court must gather and evaluate additional evidence. *See Envtl. Def. Fund v. EPA ("EDF")*, 598 F.2d 62, 91 (D.C.C. 1978). In *EDF*, the D.C. Circuit held that the district court had jurisdiction because there had been no administrative record to review, and there was therefore a greater likelihood of need for trial. *Id.* Here, even assuming that EPA has made a constructive determination, there is no administrative record for the circuit court to review. In other words, CARE claims that New Union's program no longer meets the criteria for EPA approval, but there is no information upon which this Court can make such a determination. As a practical matter, review of CARE's claim is proper only in the district court.

### B. CARE's Complaint Is Not Within This Court's Jurisdiction Under RCRA § 7006.

CARE's claim does not fit within § 7006, which authorizes judicial review of certain EPA actions in the circuit court. *APCA*, 101 F.3d at 774. The D.C. Circuit properly held that 7006(a)(1) provides for judicial review of only three types of EPA actions: "the promulgation of final regulations, the promulgation of requirements, and the denial of petitions for the promulgation, amendment or repeal of RCRA regulations." *APCA*, 101 F.3d at 775. In *APCA*, the court addressed whether an EPA determination constitutes "one of the three actions designated as reviewable under RCRA § 7006(a)(1)." *Id.* at 773. First, the court distinguished between determinations and "the actual promulgation of a final regulation." *Id.* at 777. Then, the court held that the circuit court did not have jurisdiction over determinations by EPA. *Id.* at 775. ("[A]lthough congress . . . has expressly given the [circuit] court original jurisdiction over 'determinations' in other statutes, it did not give the [circuit] court jurisdiction to review 'determinations.' ") Even assuming, as CARE alleges, that EPA has made a determination that

New Union's program no longer meets the requirements of RCRA, that *determination* is not subject to review under § 7006(a)(1). *See id.* at 777.

CARE's argument for judicial review under RCRA § 7006(b) is similarly misplaced. That section encompasses only "the Administrator's action . . . in *granting, denying, or withdrawing authorization or interim authorization*" *Id.* at (b)(1) (emphasis added). EPA's alleged "determination" is not a grant of authorization because state programs retain authorization until it is withdrawn. *Compare* RCRA § 3006(b) (authorization of state program) *with id.* § 3006(e) (withdrawal of authorization). New Union's program was authorized once and that authorization has never been withdrawn. Indeed, CARE seeks to compel EPA to withdraw authorization for New Union's program. (R. at 7.) However, until such action is taken, there can be no review under § 7006(b). Because EPA's alleged determination that New Union continued to meet RCRA was neither a grant, denial, or withdrawal of authorization, that determination is not subject to judicial review under § 7006(b).

## V. NEW UNION'S PROGRAM SHOULD REMAIN IN EFFECT BECAUSE ITS RESOURCES AND PERFORMANCE ARE WITHIN RCRA'S APPROVAL REQUIREMENTS, AND IT WOULD BE IMPRACTICABLE FOR EPA TO RESUME PRIMARY ENFORCEMENT AUTHORITY.

EPA relies on states to implement environmental programs and would withdraw delegation only in the most extreme circumstances. *See* Zahren, *supra*, at 417. Here, New Union's resources and performance are sufficient for EPA's continued approval of the state's program. Even if its resources and performance were lacking, EPA has discretion to take action other than withdrawing approval.

### A. New Union's Resources And Performance Are Sufficient For EPA's Continued Approval Of The State's Program.

EPA's continued approval of the state's program is warranted. EPA may use its retained enforcement power to initiate a withdrawal proceeding when a state program is not "equivalent"

to or "consistent" with the federal program. RCRA § 3006(b), (e). Because RCRA does not define "equivalent" and "consistent," the agency must look to EPA regulations. *See Chevron*, 467 U.S. at 865 (stating that when Congress is silent on the interpretation of a statute, the agency to which Congress has delegated policy-making responsibilities may rely on its views to inform wise policy judgments).

EPA may withdraw program approval when: (1) the state program's operations fail to comply with final authorization requirements, or (2) the state's enforcement program fails to comply with final authorization requirements. 40 C.F.R. § 271.22 (2004). Here, (1) the operation of New Union's program complied with final authorization requirements, and (2) New Union's enforcement program complied with final authorization requirements.

**1. New Union's Program Operations Were In Compliance With The Requirements For Final Authorization.**

New Union's program operations complied with RCRA's final authorization requirements. A state program's operations are presumed to be in compliance with final authorization requirements, unless the program: fails to exercise control over activities regulated by RCRA; repeatedly issues permits which do not conform to the requirements of RCRA; or fails to comply with the public participation requirements of RCRA. 40 C.F.R. § 271.22(a)(2). New Union has continued to exercise control over activities regulated by RCRA, issue permits conforming to RCRA requirements, and comply with RCRA's public participation requirements.

New Union has continued to exercise control over activities regulated by RCRA. RCRA regulates the generation, transportation, and treatment, storage and disposal of hazardous wastes; all areas in which New Union is currently functioning. (R. at 11.) Admittedly, the state's shortage of resources has resulted in slightly less enforcement of RCRA in the state. New Union, however, is still more than capable of issuing permits for transportation, generation, and storage,

treatment and disposal of hazardous wastes. (R. at 11.) The state does not anticipate a decrease in the number of permits issued or the number of facilities inspected in the next year. (R. at 11.) This illustrates the state's ability to act efficiently and to handle the situation effectively, in spite of the resource cuts. Furthermore, New Union continuously acts at the same level as EPA. Both EPA and New Union handled six enforcement actions in 2008. (R. at 11.)

New Union has repeatedly issued permits that conform to RCRA requirements. Out of the 1500 TSDs that have permits, only twenty-two were found to be in significant violation of RCRA standards in 2009. (R. at 11.) This is less than 2%. Given the decrease in resources available to New Union, this is an impressive accomplishment. While there is a backlog of permits, New Union has not decreased its standards; instead it has handled the situation by prioritizing permit issuance. (R. at 11.)

New Union complied with RCRA's public participation requirements. New Union is committed to public involvement in the enforcement of hazardous waste regulations, as illustrated in the number of enforcement actions taken. New Union took the same number of corrective actions as EPA, and demonstrated an intent to continue to comply with RCRA's public participation requirements. (R. at 11.) Furthermore, environmental groups were able to exercise their public participation right by filing citizen suits in the state. (R. at 11.)

### 2. New Union's Enforcement Program Was In Compliance With The Requirements For Final Authorization.

New Union's enforcement program complied with RCRA's final authorization requirements. A state's enforcement program is in compliance with the requirements for final authorization, unless the program: fails to act on permit violations; fails to seek adequate enforcement penalties or to collect administrative fines when imposed; or fails to inspect and

monitor activities subject to regulation. 40 C.F.R. § 271.22(a)(3). New Union has acted on permit violations, sought adequate enforcement penalties, and inspected TSDs.

New Union has acted on permit violations. Out of the twenty-two significant violations, New Union and EPA have each acted on six. (R. at 11.) While some TSDs are operating with expired permits, this is not a violation since their permits have continued by operation of law. (R. at 11.) As long as these TSDs have submitted a timely and complete application, the terms and conditions of a permit continue in force beyond the permit's expiration date. *See* 40 C.F.R. § 270.51. There is no quota to determine whether a state has acted in compliance. New Union's efforts to act on permit violations illustrate an intent to comply with RCRA requirements.

Upon recognizing permit violations, New Union has required compliance with administrative orders and imposed injunctions in civil actions. (R. at 11.) In the six violations enforced, New Union imposed penalties that were in amounts derived from EPA's penalty policy. (R. at 11.) Therefore, the state's program has sought adequate enforcement penalties.

New Union inspected 150 TSDs in 2008 and expected to operate at that level in 2009. (R. at 11.) Recognizing that it could not inspect more facilities, New Union sought EPA's help and established a policy to prioritize inspections based on the volume or toxicity of hazardous waste. (R. at 11.) EPA cannot expect a state to inspect every facility, every year. New Union has established a system that is effective and complies with RCRA requirements. EPA cannot evaluate the success of a state program based on the number of inspections conducted and enforcement actions taken because each state has unique circumstances.

### B. Even If New Union's Resources And Performance Were Insufficient, EPA Has Discretion To Take Action Other Than Withdrawing Approval.

Even if EPA decided that New Union's program was insufficient, the statute affords EPA discretion, there are more viable alternatives, and public policy considerations dictate that

withdrawal be used as a last resort. The statute states that EPA "shall notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program." RCRA § 3006(e). The plain language of RCRA only triggers a nondiscretionary duty to withdraw approval once EPA has determined that the state's program fails to comply with RCRA, notifies the state, and gives the state a reasonable amount of time to take corrective action. *See Nat'l Wildlife Fed'n v. Adamkus*, 936 F. Supp. 435, 440 (W.D. Mich. 1996). The Code of Federal Regulations, however, states that "the Administrator *may* withdraw program approval when a State program no longer complies with the requirements . . . and the state fails to take corrective action." 40 C.F.R. § 271.22 (emphasis added). The plain language of the regulation indicates that it is within the Administrator's discretion to order the commencement of withdrawal proceedings. *Id.* at 440; *see also Rose v. Rose,* 481 U.S. 619, 626–27 (1987) (holding that "may" is a permissive term expressing discretionary power). Thus, EPA is not required to commence withdrawal proceedings. Furthermore, had EPA decided to initiate withdrawal proceedings, it was required to give New Union an opportunity to take corrective action.

A state's capability can change after delegation because of factors such as staff turnover, changes in state legislation or financial support. The biggest sanction EPA could inflict on an authorized state that is no longer in compliance with RCRA is withdrawal of the state's program. Zahren, *supra*, at 381. Revocation is impractical and strains EPA's already limited resources because it requires EPA to take over all aspects of enforcement and reallocate resources. *See* Lisa Dittman, Comment, *Overfiling: Policy Arguments in Support of the Gorilla in the Closet*, 48 UCLA L. Rev. 375, 391 (2000). If EPA was forced to withdraw approval every time a state's capabilities changed, EPA could face the daunting responsibility of enforcing RCRA in all fifty

states. *Id.* at 391 (stating that limited EPA enforcement officials could not regulate such an influx). EPA lacks the resources to fill the gap left by the states. David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 Harv. Envtl. L. Rev. 1, 91 (2000). Since it is Congress's goal that states serve as primary enforcers, EPA should withdraw approval only where states have clearly failed and are unlikely to improve in the future. *Id.* at 92. EPA resource constraints and a strong presumption of state primacy mandate that program withdrawal should be a last resort.

Withdrawal of an authorized state's approval is rare; instead, EPA resorts to sanctions, negotiations of new deadlines, or overfilings. Zahren, *supra*, at 382. These intermediate enforcement mechanisms allow the EPA to ensure that states comply with RCRA while avoiding the costs of withdrawing state approval every time there is a departure from federal policy. Dittman, *supra*, at 391. When a state's performance fails to meet RCRA requirements, EPA may: suggest changes in the state's procedures or use of resources; provide technical assistance; increase the number of oversight inspections or require submittal of information on remedial measures; or provide other workable state models to states with problems in specific areas. Memorandum from Alvin L. Alm, Deputy Administrator, to Assistant Administrators, Regional Administrators, Regional Enforcement Contacts, *et. al.*, Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement "Agreements" (June 7, 2002). Thus, EPA could suggest more practical alternatives instead of withdrawing New Union's program.

## VI. NEW UNION IS STILL REGULATING RAILROAD HAZARDOUS WASTE FACILITIES AND, EVEN IF THIS COURT FOUND THAT NEW UNION WAS FAILING TO REGULATE THESE FACILITIES, THE EPA IS NOT REQUIRED TO WITHDRAW ITS APPROVAL OF THE ENTIRE PROGRAM.

New Union continues to regulate hazardous waste facilities when it established the Commission. EPA regulations allow authorized states to divide RCRA program responsibilities

between two or more state agencies. David Schnapf, *State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act*, 12 Envtl. L. 679, 719–20 (1982) (stating that in California, land disposal of waste is governed by the state water quality agency, while the health department administers most other hazardous waste program requirements). To obtain authorization from EPA, the combined programs of the state agencies must meet all Part 271 requirements. *See id.* at 720. Assuming that DEP met authorization requirements when New Union's program was authorized, DEP's delegation of its setting, permitting, inspection, and enforcement authorities to the Commission would not change the program's overall ability to meet Part 271 requirements.

A change in penalties could affect the authorization requirements. A state program's approval can be withdrawn when the state fails to seek adequate enforcement penalties. 40 C.F.R. § 271.22(a)(3)(ii). RCRA provides for civil penalties as part of its enforcement scheme and EPA regulations authorize states to impose civil penalties against violators of RCRA. 40 C.F.R. § 270.16. While states are also able to enforce criminal penalties, they are not required to as long as the civil penalty imposed reflects the gravity of the violation. *See* RCRA § 3008(d) (stating that a violator "shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed . . . five years . . . or both"). When DEP delegated authority to the Commission, it permissibly removed criminal penalties for violations of environmental statutes. (R. at 12.) DEP's delegation of its authority to the Commission did not result in a present failure by New Union to regulate railroad hazardous waste facilities.

Even if New Union failed to regulate hazardous waste facilities, EPA is not required to withdraw its approval of the entire program. EPA has stated that it has no duty to review a state's entire environmental program whenever the state decides to revise a portion of the program. *See*

*Nat'l Wildlife Fed'n*, 936 F. Supp. at 441 (stating that EPA had discretion to abolish some state agencies and reorganize others after state wetlands program was approved under CWA). The "full and complete" review occurs prior to EPA transferring authority to the state to run a hazardous waste disposal program, not when the state revises an already existing program. *Id.* "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)(2) (emphasis added). The plain language of subsection (2) illustrates that an administrator can disapprove a program revision without withdrawing approval of the entire program.

This Court should afford deference to EPA's decision not to withdraw approval of the entire program. The revision delegating authority to the Commission occurred in 2000, nine years prior to CARE's challenge. (R. at 12). The Supreme Court has long recognized that an agency's reasonable construction of its own regulations is entitled to deference. *E.g.*, *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."). EPA has not withdrawn New Union's entire program, even though the delegation to the Commission occurred nine years ago. (R. at 12). This decision should be given deference since it is a permissible interpretation of § 271.21 and EPA has greater familiarity with its own regulatory text.

Even if EPA was required to withdraw the entire program because of a revision, EPA must notify New Union and give the state ninety days to take appropriate corrective action. RCRA § 3006(e). New Union has yet to receive such notice. In the event that the court required

EPA to withdraw New Union's entire program, New Union still has the ability to prevent withdrawal by regaining regulatory authority over railroad hazardous waste facilities.

## VII. EPA SHOULD NOT WITHDRAW NEW UNION'S PROGRAM APPROVAL BECAUSE ERAA'S TREATMENT OF POLLUTANT X SATISFIES RCRA.

Authorized state programs must be: (A) equivalent to the federal program, (C) consistent with the federal or state programs applicable in other states, and (C) in conformity with the Commerce Clause. *See* RCRA § 3006. ERAA's treatment of Pollutant X does not adversely affect the equivalency of the state program with the federal program, is not inconsistent with the federal or other approved state programs, and does not violate the Commerce Clause.

### A. ERAA Does Not Affect The Equivalency Of New Union's Program With The Federal RCRA Program.

While EPA rules do not define the term "equivalent," equivalent implies that the state must regulate at least the same universe of waste and handlers as the federal program. Susan M. McMichael, *RCRA's Statutory and Regulatory Framework*, 40 Envtl. L. Rep. News & Analysis 10432, 10446 (2010). EPA's authorization process sets a floor, not a ceiling, for federal requirements. *Old Bridge Chem., Inc. v. New Jersey Dep't of Envtl. Protection*, 965 F.2d 1287, 1296 (1992). States may implement hazardous waste rules that are more stringent than EPA rules. McMichael, *supra*, at 10445. When EPA authorizes state program revisions that are more stringent than EPA's rules, they are federally enforceable. *Id.* at 10446 (requiring an annual report rather than a biennial one for generators is an example of more stringent state rule). To determine whether a state revision is at least as stringent as the EPA rules, the state rule must not create or increase an environmental or health risk, or a legal enforceability problem. *Id.*

ERAA's provision regarding Pollutant X is equivalent to the federal RCRA program and is federally enforceable because it is more stringent than the federal program. First, the federal

program requires generators of hazardous waste to submit reports to the administrator or state agency at least once every two years, setting out efforts undertaken to reduce the volume and toxicity of waste generated and the changes actually achieved during the year. RCRA § 3002(a)(6). Here, the amendment requires similar reporting requirements, but instead of every two years, the hazardous waste generator must submit a report every year. (R. at 12.) The use of "at least" in the statute illustrates that states can implement more stringent requirements.

Second, RCRA prohibits storage of hazardous wastes that are prohibited from land disposal unless such storage is for the sole purpose of accumulating enough waste to recover, treat, or dispose of it properly. RCRA § 3004(j). ERAA places a 120 day storage limit, which, while more stringent than federal requirements, does not affect the equivalency of the programs.

Third, federal rules state that all hazardous waste is required to be transported to the permit-holding facility. RCRA § 3003(a)(4). Given the dangerous nature of Pollutant X, it is reasonable for New Union to place further requirements on its transportation. The three provisions of ERAA are equivalent to RCRA because they regulate the same universe of waste, just with more stringent guidelines. Thus, the amendments are federally enforceable.

### B. ERAA Does Not Render New Union's Program Inconsistent With The Federal Program And Other Approved State Programs.

ERAA maintains the program's consistency. A state program is consistent unless it: (1) unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes; or (2) 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. 40 C.F.R. § 271.4.

First, ERAA does not unreasonably restrict, impede, or operate as a ban on the free movement of hazardous wastes across the state's border. While Pollutant X is not freely movable

across New Union's borders, this restriction is reasonable. EPA and WHO have recognized Pollutant X as among the most potent and toxic chemicals to public health and the environment. (R. at 12.) If Pollutant X was freely movable, it would be impossible to regulate it and limit its detrimental effects. The restrictions placed on transportation are reasonable because they account for the possibility of unforeseen circumstances arising, such as emergencies and necessary refueling, which may require transporters to stop within the state's borders. (R. at 12.) It was reasonable to require transportation to be as direct and fast as possible.

Second, although Pollutant X cannot be treated, stored, or disposed of in New Union for more than 120 days, this prohibition was based in human health and environmental protection. (R. at 12.) There were no treatment or disposal facilities in New Union equipped to handle Pollutant X, or capable of protecting people or the environment from exposure to it. There are only nine facilities in the country authorized to treat Pollutant X. (R. at 12.) This illustrates the health and environmental risks of Pollutant X and the need for rigorous standards. (R. at 12.)

Even if this Court finds that New Union's program is no longer in conformity with RCRA's approval criteria and that EPA should withdraw approval, EPA has the discretion to determine the application of its guidelines and is not required to withdraw its approval. Courts are bound to accept "[a]n agency's interpretation of its own regulations . . . unless it is plainly wrong." *Gen. Carbon Co. v. Occupational Safety and Health Review Comm'n,* 860 F.2d 479, 483 (D.C.C. 1988). ERAA was passed in 2000, ten years ago, and EPA has not withdrawn approval of New Union's program. Even if this Court finds that EPA is plainly wrong, EPA must notify New Union of the deficiency and given the state ninety days to correct it.

### C. ERAA Does Not Violate The Commerce Clause.

The Commerce Clause is both a positive grant of power to Congress and an implied

restraint on the power of states to interfere with interstate commerce. Ethan R. Ware, *"No Hazardous Waste Allowed": A Review of the Constitutional Issues Raised by South Carolina's Restrictions on Out-of-State Hazardous Waste*, 1 S.C. Envtl. L. J. 1, 6–7 (1991) (stating that where Congress has not acted, the dormant powers of the Commerce Clause prohibit state regulation that unduly burdens the flow of interstate commerce). States, however, retain some authority to regulate local matters that affect interstate commerce through their general police powers. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

To determine whether a state has overstepped the boundaries of its police power and impermissibly burdened interstate commerce, courts apply strict scrutiny when state regulations are overtly discriminate against outside interests. *See* Ware, *supra*, at 9. However, the state may proffer some justification for the regulation. *Id.* New Union's refusal to permit TSDs of Pollutant X subjects the state regulation to strict scrutiny. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F. 2d 781, 793 (4th Cir. 1991) (stating that state requirements which forbid the construction of hazardous waste disposal facilities could be subject to strict scrutiny).

ERAA satisfies strict scrutiny. Strict scrutiny requires the state to show the presence of a legitimate local purpose behind the restrictions; and the lack of available, less discriminatory alternatives. *E.g.*, *Hughes v. Oklahoma,* 441 U.S. 322, 336 (1979). Here, New Union has a legitimate local interest in not granting TSD permits for Pollutant X and in limiting the amount of time it can be stored in the state; and there are no less discriminatory alternatives.

### 1. New Union Has A legitimate Local Concern For Not Granting Permits.

New Union was motivated by the health, safety, and welfare of its citizens. The Supreme Court has upheld such discriminatory laws where there is a threat of death or disease. *E.g.*, *New Jersey v. Philadelphia*, 437 U.S. 617, 628–29 (1978) (stating that certain quarantine laws have

not been viewed as forbidden protectionist measures).

Here, ERAA is analogous to such health-protective measures since it reduces the exposure of New Union residents to the harmful effect of Pollutant X. ERAA is designed to reduce traffic in noxious articles, whatever their origin. Unlike the waste in *New Jersey*, which only became harmful after disposal in landfills, the movement of Pollutant X into or through New Union endangers health and must be disposed of as soon as, and as close to the point of origin as possible. 437 U.S. at 629.

Furthermore, unlike in prior cases, New Union does not distinguish out-of-state waste from domestic waste in an effort to protect citizens' health, safety and welfare. *See Chem. Waste Mgmt.v. Hunt,* 504 U.S. 334, 344–45 (1992) (holding that hazardous waste's danger to the health and safety of Alabama's citizens "does not vary with the point of origin of the waste" and that the dormant Commerce Clause allows a state to impose "an evenhanded cap on the total tonnage landfilled" with hazardous waste when it "curtail[s] volume from all sources."). New Union applies an even-handed rule to all Pollutant X waste. The state treats hazardous waste generated in New Union as equally dangerous to that generated out-of-state. Health concerns motivate New Union's treatment of Pollutant X, as illustrated by the fact that the state's laws distinguish among hazardous wastes based on their toxicity and not their place of origin.

**2. There Are No Less Discriminatory Alternatives Available To New Union.**

New Union has no less discriminatory alternatives available to fulfill the state's legitimate local purpose. New Union has already chosen the least discriminatory alternative by not creating an outright ban on all Pollutant X waste, and by treating in-state waste the same as out-of-state waste. *See Hughes*, 441 U.S. at 338 (stating that Oklahoma had less discriminatory alternatives available to conserve its minnows when the state placed no limits on how these minnows could

be disposed of within the state, but forbid the transportation of minnows out of the state for commercial sale). Unlike in *Hughes*, New Union did not discriminate against interstate commerce occurring across state lines; it did not prohibit the transportation and storage of out-of-state Pollutant X while simultaneously allowing that of in-state Pollutant X. *Id.*

Incidental burden on out-of-state generators and TSDs does not violate the Commerce Clause. New Union's regulations limit the expansion of local hazardous waste facilities and indirectly reduce the amount of outside hazardous waste permitted into the state. While this may place some burden on interstate commerce, it is not dispositive. *See Envtl. Tech. Council v. Sierra Club*, 98 F. 3d 774, 786 (1996) (stating that while other states may shoulder some burden, the Commerce Clause does not require fairness among the states, as long as hazardous waste is treated and disposed of somewhere). New Union has not impermissibly burdened interstate commerce and, thus, ERAA does not violate the Commerce Clause.

## CONCLUSION

For the foregoing reasons, New Union respectfully requests that this Court affirm the district court's grant of summary judgment on all claims.

Respectfully Submitted

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Counsel for the State of New Union