Team No. 39

C.A. No. 18-2010

C.A. No. 400-2010

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

v.

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

v.

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

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

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

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JURISDICTIONAL STATEMENT

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 *et seq*. 28 U.S.C. § 1331 (2006); 42 U.S.C. § 6974(a) (2006). The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

1. Whether RCRA, § 7002(a)(2), 42 U.S.C. § 6972(a)(2) (2006), provides jurisdiction for the district court to order EPA to act on Citizen's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004, 42 U.S.C. § 6974(a) (2010).
2. Whether there is federal question jurisdiction for the district court to order EPA to act on Citizen's petition for revocation of EPA's approval of New Union's hazardous waste program, filed under 5 U.S.C. § 553(e).
3. Whether EPA's failure to act on Citizen's petition to initiate proceedings to consider withdrawing approval of New Union's hazardous waste program under RCRA § 3006(e), 42 U.S.C. § 6926(e) (2006), 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 RCRA § 3006(b), 42 U.S.C. § 6926(b) (2006), both subject to judicial review under RCRA § 7006(b), 42 U.S.C. § 6976(b) (2006).
4. Assuming the answer to issue 3 is positive, and the answer to either or both of issues 1 and 2 is positive, whether this Court should lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions or should the Court remand the case to the

lower court to order EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program.

5. Assuming this Court proceeds to the merits of Citizen's challenge, whether EPA must withdraw its approval of New Union's program because its resources and performance satisfy RCRA's withdrawal criteria.
6. Assuming this Court proceeds to the merits of Citizen's challenge, must EPA withdraw approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act effectively withdraws railroad hazardous waste facilities from regulation.
7. Assuming this Court proceeds to the merits of Citizen's challenge, 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

On January 5, 2009, Citizen Advocates for Regulation and the Environment, Inc. ("Citizen"), served a petition on the Administrator of the Environmental Protection Agency ("EPA") under 42 U.S.C. § 6974(a). (R. at 4.) The petition requested that EPA commence proceedings to withdraw EPA's approval of New Union's hazardous waste program ("the Program"), granted by EPA pursuant to § 6926(b) in 1986. (R. at 4.) On January 4, 2010, Citizen filed suit (Civ. 000138-2010) in United States District Court for the District of New Union under 42 U.S.C. § 6972(a)(2), seeking either an injunction requiring EPA to act on that petition or, in the alternative, judicial review of EPA's inaction, on the theory that such inaction constituted a constructive denial of the petition. (R. at 4.) Citizen simultaneously filed an action

with the Twelfth Circuit (No. 18-2010) seeking judicial review of EPA's inaction on the same theory. (R. at 5.) The Twelfth Circuit stayed its ruling pending the district court outcome. (R. at 1.) New Union filed unopposed motions to intervene in both actions, which both courts granted. (R. at 4.)

On June 2, 2010, the district court issued an order dismissing Citizen's motion for summary judgment and granting New Union's. (R. at 9.) The district court held that: (1) Citizen's petition was not filed under § 6974(a) because § 6974(a) only governs petitions to repeal rules, and EPA's approval of New Union's program was an adjudication; (2) Citizen's petition was time-barred by § 6926(a) and (b); (3) Citizen's petition was not filed under § 553(e) of the Administrative Procedures Act ("APA") because RCRA displaces the APA; and (4) jurisdiction for review of all EPA actions regarding whether state programs meet RCRA's criteria lies in the court of appeals. The district court did not reach the merits of Citizen's petition. (R. at 6-8.)

EPA and Citizen filed a timely appeal from the district court's decision. (R. at 1.) EPA takes issue with the district court's denial of jurisdiction under § 6972(a)(2) to order action under § 6974(a). (R. at 1.) Citizen takes issue with the district court's denial of jurisdiction under RCRA as well as under 5 U.S.C. § 1331 to order action on its petition pursuant to 5 U.S.C. § 553(e). (R. at 1.) Citizen also requests that the Twelfth Circuit lift its stay of No. 18-2010 and review the EPA's alleged constructive denial. (R. at 1.) EPA and New Union take issue with lifting the stay and contend that the EPA's failure to act is not equivalent to a determination, and therefore not a "constructive" decision. (R. at 2.) On the merits, New Union and EPA take issue with all but one of Citizen's contentions that New Union's program no longer meets RCRA standards. (R. at 2.) This Court granted review on September 29, 2010. (R. at 3.)

STATEMENT OF THE FACTS

In 1986, EPA approved New Union's hazardous waste program under RCRA's cooperative federalism provision. (R. at 10.) The New Union's Department of Environmental Protection ("DEP") was in complete compliance with RCRA's statutory and EPA's regulatory approval criteria in the DEP's issuance of permits, inspection of RCRA regulated facilities, and enforcement actions. (R. at 10.)

For the last twenty-four years the DEP has administered New Union's program. (R. at 10.) In 2009, New Union put a hiring freeze on all state employees because of ongoing financial difficulties. (R. at 10.) Because of the current budgetary constraints, New Union has fewer employees administering the Program as compared to 1986. (R. at 10.) New Union has also decreased the amount of resources allocated to the DEP, as well as other public health regulatory programs. (R. at 10.)

However, in a collaborative effort with the EPA, the DEP's 2009 Annual Report indicates that both the DEP and the EPA inspected 10% of the State's treatment storage and disposal facilities ("TSDs") last year, and intended to inspect a comparable amount this year. (R. at 11.) The DEP's inspections led to it commencing six enforcement actions for violations. (R. at 11.) The EPA's inspection of the same number of TSDs also yielded six enforcement actions. (R. at 11.)

In 2009, the DEP issued 125 RCRA permits in New Union and anticipated replicating this accomplishment, and issuing a comparable number in 2010. (R. at 11.) While there is currently some backlog in permit applications because of the rising number of applications, the DEP has instituted a policy that prioritizes permit issuance to deal with this problem. (R. at 11.)

In 2000, the New Union legislature enacted the Environmental Regulatory Adjustment Act ("ERAA"). (R. at 11.) The ERAA amended the Railroad Regulation Act ("RRA") by

transferring the regulation of all railroad facilities under the DEP to the New Union Railroad Commission ("Commission"). (R. at 12.)

The ERAA also amended how New Union treats and disposes of Pollutant X, a potent and toxic chemical that is dangerous to public health and the environment. (R. at 12.) There are only nine treatment and disposal facilities in the country presently authorized to treat or dispose of Pollutant X, none of which are located in New Union. (R. at 12.) For these reasons, every facility that generates Pollutant X must submit a plan to minimize the generation of Pollutant X until generation entirely ceases. (R. at 12.) Further, the DEP will not issue permits allowing Pollutant X to be stored for more than 120 days in New Union while awaiting transportation to a facility outside of the state designed to treat or dispose of Pollutant X. (R. at 12.) Any person may transport Pollutant X "through or out of the state" but it must be as "direct and fast as is reasonably possible." (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). This Court reviews questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Thus, this Court's jurisdiction to decide jurisdictional issues under RCRA and the APA, and interpret RCRA's relevant substantive provisions pertaining to the standard for resources and performance of New Union's program, railroad hazardous waste facilities, and pollutant X, must be reviewed *de novo*.

SUMMARY OF THE ARGUMENT

The district court erred in holding that it did not have jurisdiction under 42 U.S.C. § 6972(a)(2) to address EPA's failure to perform a non-discretionary duty. The EPA has a

mandatory duty to respond to Citizen's petition in writing, but nothing more. The district court correctly held that there is no federal question jurisdiction under the APA because RCRA—being more specific and not inconsistent with the APA—displaces it.

The district court correctly concluded that EPA's delayed response is in no way a constructive denial of Citizen's petition, nor a constructive determination that New Union's program continues to meet RCRA approval. First, EPA's delayed response to the petition is not unreasonable, nor does it meet the even higher burden required to constitute a constructive denial. Many factors influence delay, and it is the EPA that is best suited to consider those factors and prioritize its duties. Second, EPA's delay does not amount to a constructive determination that the Program continues to meet RCRA approval criteria. The approval criteria merely govern the one-time approval of a program, and the EPA is aware of the state of New Union's program via its ongoing monitoring protocol. Consequently, EPA's delay is nothing more than delay, and not a constructive decision of any kind.

If this Court believes EPA's delay constitutes a constructive denial and determination, the Court must nonetheless remand the case to the district court because this claim does not meet the narrow substantive and procedural requirements for judicial review. Even if Citizen's claim was properly before this Court, the EPA produced no administrative record. Therefore, should the Court find EPA's delay to constitute a constructive decision, it should remand the case to the lower court to order the EPA to respond to the petition.

The EPA is not required to withdraw the Program merely because New Union currently devotes fewer resources and staff than when EPA initially approved its Program. EPA's decision whether to withdraw the Program is discretionary, and deserves great judicial deference.

Further, withdrawal is a drastic measure, and Citizen has not alleged even one specific RCRA violation to justify this measure.

The Code of Federal Regulations ("CFR") gives New Union the authority to transfer the responsibility of regulating railroad waste from the DEP to the Commission. While substantively New Union has this authority, the State did fail to comply with the procedural requirements of modifying its program. However, these procedural violations are not sufficient justification to require the drastic measure of withdrawing New Union's program.

New Union's treatment of Pollutant X is equivalent to and consistent with RCRA standards, and in compliance with the Commerce Clause. New Union's program, when authorized, must have been equivalent to RCRA standards. Therefore, because the ERAA has made the treatment of Pollutant X more stringent, the Program is currently at least "equivalent" to RCRA standards. New Union's treatment of Pollutant X does not discriminate against interstate commerce in violation of the Commerce Clause. Because the Program does not violate the Commerce Clause, it is also "consistent" with RCRA, which sets a more permissive standard.

ARGUMENT

I. THE DISTRICT COURT HAS JURISDICTION UNDER 42 U.S.C. § 6972(a)(2) AND EPA's ONLY DUTY IS TO RESPOND TO CITIZEN IN WRITING.

RCRA and its implementing regulations require EPA to respond to petitions for repeal of a rule in writing. Because EPA's approval of New Union's RCRA program was a valid rulemaking, EPA must respond to it in writing. EPA does not need to initiate rulemaking in response to every petition it receives.

A. The District Court Has Jurisdiction Under 42 U.S.C. § 6972(a)(2) because EPA's Approval of New Union's Program Was Rulemaking.

Any person can commence a civil action to force the EPA to perform any non-discretionary act or duty. 42 U.S.C. § 6972(a)(2). The EPA "shall take action" on petitions filed to promulgate, amend, or repeal any regulation. § 6974(a). Taken together, these two RCRA provisions indisputably provide jurisdiction for Citizen's lawsuit, but *only* if EPA's approval of New Union's program was a regulation, or rule. Because RCRA does not specify whether the EPA is to use rulemaking or adjudication to approve state RCRA programs, that choice is up to the agency. *See Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984). EPA employed valid notice-and-comment rulemaking procedures, therefore the district court has jurisdiction to force it to act under § 6972(a)(2).

1. RCRA Never Specified Rulemaking or Adjudication.

Whether EPA's choice of rulemaking to approve state programs is acceptable is governed by the Court's two-part *Chevron* test. In the first step, the reviewing court must address whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter," and the court must give effect to the "unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Congress is deemed only to have spoken directly to the precise issue when it has addressed it "directly and plainly." *ABA v. FTC*, 430 F.3d 457, 467 (D.C. Cir. 2005). Only when the statute is "silent or ambiguous with respect to the specific issue," *Barnhart v. Walton*, 535 U.S. 212, 218 (2002), or when "two or more reasonable" interpretations exist, Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 520 (1989), does the reviewing court then turn to step two of the *Chevron* analysis. *Chevron* applies to agency decisions regarding procedures as well as substance. *Dominion Energy Brayton Point v. Johnson*, 443 F.3d 12, 15-17 (1st Cir. 2006).

Following the first prong of the *Chevron* test, Congress never specifically instructed the EPA to use rulemaking or adjudication to approve state RCRA programs. RCRA's approval provision simply requires "notice and opportunity for public hearing," an application "in such form as [the Administrator] shall require," and time parameters for the EPA to issue further notice and publishing findings. 42 U.S.C. § 6926(b). In no part of § 6926(b)—the only section that speaks to the procedures the EPA should use to approve state programs—did Congress use the terms "rulemaking," "adjudication," "rule," or "order." *Id*. Therefore, Congress has not spoken directly to this precise issue, and the Court should move to the second prong of the *Chevron* test.

2. Using Rulemaking Was an Acceptable Interpretation of RCRA.

Chevron's second step dictates that, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. An agency's construction need not be the only one it conceivably could have adopted, or even the reading the court prefers. *Id*. Rather, the court can only reject the agency's interpretation if it is "compelled to," *McLean v. Crabtree*, 173 F.3d 1176, 1181 (9th Cir. 1999), or if the interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

EPA's choice to approve state programs through rulemaking was a permissible interpretation of RCRA. All aspects of RCRA's approval provision—notice, public hearing, and publishing findings—are captured by rulemaking. *See* 42 U.S.C. § 6926(b). Congress expressly contemplated that agencies would use rulemaking to approve specific programs like these by defining a rule in the APA as a "statement of general *or particular* applicability." 5 U.S.C. § 551 (2006) (emphasis added). Rulemaking is well within the EPA's authority, and agencies are

generally free to design their own procedures. *See Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 543-545 (1978).

Other courts have validated the EPA's use of rulemaking in approving state programs. The court in *Southern Union* never questioned the legitimacy of the EPA's rulemaking in approving Rhode Island's RCRA program. *See United States v. S. Union Co.*, 643 F. Supp. 2d 201, 211-213 (D.R.I. 2009) (holding that approving the Rhode Island program, *inter alia*, was an exercise of the EPA's legislative authority). Other courts have recognized the EPA's use of rulemaking to approve state programs in the context of other statutes that call for similar cooperative federalism. *See, e.g.*, *Maryland v. EPA*, 530 F.2d 215, 221 (4th Cir. 1975) (holding that the EPA's approval of Maryland's Clean Air Act implementation plan was "clearly" rulemaking).

Further, rulemaking is preferable to adjudication in this context. Notice-and-comment rulemaking allows for general participation in the deliberative process. *See* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 930 (1965). Such broad participation is especially appropriate in the consideration of a RCRA state program, which affects not just the EPA and the state, but potentially hundreds of regulated entities and millions of state citizens. Rulemaking also ensures that the agency produces a substantial record to allow for meaningful judicial review. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1982). Informal adjudication does not necessarily produce such a record. *See* 5 U.S.C. § 555 (2006) (detailing the minimal procedures required of informal adjudication).

B. EPA's Only Duty to Act on Citizen's 42 U.S.C. § 6974(a) Petition is to Respond to Citizen in Writing.

Because EPA used rulemaking to authorize New Union's program, Citizen's petition was properly filed under § 6974(a), which allows "[a]ny person" to petition the EPA for the repeal of "any regulation." § 6974(a). But the only non-discretionary duty that EPA failed to undertake was that which the EPA mandated for itself in 40 C.F.R. § 271.23 (2010). The EPA's regulations interpreting RCRA—a statute it administers—only require that it respond to petitions for repeal in writing. 40 C.F.R § 271.23. This interpretation of the statute deserves *Chevron* deference because RCRA does not specify, in § 6974 or elsewhere, what "action" the EPA must take on petitions to repeal a rule. Responding in writing is thus a permissible interpretation of the statute.

1. Congress Did Not Mandate EPA to Initiate Rulemaking in Response to Each Petition to Initiate Rulemaking.

Chevron's two steps, again, govern the analysis. The first requires that the EPA give effect to the intent of Congress when such intent is unambiguous and Congress has "directly spoken to the precise question." *Chevron*, 437 U.S. at 842. Here, Congress mandated that the EPA must "take action with respect to such petition[s]." § 6974(a). But Congress did not define exactly what "action" the EPA must take.

"Action" is a broad term. Black's Law Dictionary defines "action" as "the process of doing something." Black's Law Dictionary, 26 (9th ed. 2009). The APA defines "agency action" as "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (2006). Thus, the APA specifically permits doing nothing as an acceptable interpretation of an instruction to take action. *Id.* No reading of "take action" in §

6974 mandates that the agency *must* initiate withdrawal proceedings. Congress, conscious of the dictionary and APA definitions of action, left this to the EPA.

Congress did specify that the EPA "shall publish notice of such action in the Federal Register," § 6974(a), but against the vague and expansive definition of "action," Congress could not have intended mandatory publication for each petition. Although "shall" generally means "must," the term is often misused to mean "should" or "may." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432-33 n. 9 (1995). "A phrase gathers meaning from the words around it." *Jones v. United States*, 527 U.S. 373, 389 (1999). Integral to the sentence is the requirement that the agency take action: simply publishing something in the Federal Register only fulfills the goal of notice, and in the context of a specific petition, it fulfills this goal poorly. It does not fulfill other goals Congress contemplates when it invites agency action, including application of reasoned analysis, expertise and integration of competing political forces to achieve policy outcomes.

Hence, because Congress did not unambiguously dictate how the EPA is to act on petitions to repeal a rule, the Court should move to step two of the *Chevron* analysis.

2. EPA Only Owes Citizen a Response in Writing.

In *Chevron*'s second step, courts must defer to the agency's interpretation of the statute, provided it is a permissible interpretation. *Chevron*, 467 U.S. at 843. Nothing in RCRA or the APA requires the EPA to initiate rulemaking proceedings in response to every petition. While refusals to promulgate rules are subject to judicial review, such review is "extremely limited and highly deferential." *Massachusetts v. EPA*, 549 U.S. 497, 529-29 (2007) (internal quotations omitted). Petitions to initiate rulemaking do "not ordinarily comprehend any rights in private

parties to compel an agency to institute such proceedings or promulgate rules." *R.I. Television Corp. v. FCC*, 320 F.2d 762, 766 (D.C. Cir. 1963).

The EPA interpreted "action" to mean that the "Administrator may order the commencement of withdrawal proceedings . . . in response to a petition [and] shall respond in writing to any petition to commence withdrawal proceedings." 40 C.F.R. § 271.23(b)(1) (2010). Responding in writing is a permissible construction of RCRA's requirements. It notifies the party who submitted the petition of the Administrator's decision, and does not require expenditure of scarce resources. Forcing the EPA to initiate rulemaking in response to every petition would result in a severe strain on EPA resources, as EPA gets thousands of petitions each year. Responding to petitions to repeal a rule in writing—and nothing more—is the hallmark of the procedures set out in the APA. *See* 5 U.S.C. § 555(e) (2006) (responding in writing to a petition is a minimum requirement). Recognizing this, the EPA provided for exactly that same procedure in responding to RCRA petitions. 40 C.F.R. § 271.23(b)(1). Its construction of "action" in § 6974, is thus permissible, and the only duty EPA owes is to respond to Citizen in writing.

II. THERE IS NO FEDERAL QUESTION JURISDICTION UNDER THE APA BECAUSE RCRA DISPLACES THE APA.

Jurisdiction exists for this Court to order EPA to take action on Citizen's petition under RCRA, but not the APA, because the specific statute, RCRA, displaces the more general APA in areas that RCRA covers. This conclusively established method of statutory interpretation controls, so long as the specific statute meets the minimum requirements of the APA. As RCRA meets APA's minimum requirement, there is no cause of action for violation of the APA.

A. RCRA Displaces the APA because the More Specific Displaces the General.

"[I]t is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 384 (1992); *see also, Edmond v. United States*, 520 U.S. 651, 658 (1997); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). This is true regardless of whether the more specific rule is in the same or another statute. *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932).

The APA sets the background minimum requirements for agency actions in a broad range of circumstances, including petitions for rulemaking in § 553(e). *See generally Won Yang Sung v. McGrath*, 339 U.S. 33 (1950); 5 U.S.C. § 553(e) (2006). It allows "interested" persons the right to petition for repeal of a rule. *Id.* RCRA's petition provision is more specific than that of the APA. It allows "any" person to file a petition to repeal a regulation promulgated pursuant to RCRA. *See* 42 U.S.C. § 6974(a). Because this provision is specific to RCRA and expands the class of persons who may file a petition from "interested" to "any," it displaces APA § 553(e).

B. RCRA's Displacement of the APA Is Acceptable because RCRA Procedures Do Not Violate the Minimum Procedural Requirements to Respond to a Petition.

Agencies are free to fashion their own procedures provided they conform to the minimum requirements of the APA. *Vt. Yankee*, 435 U.S. at 521. Rulemaking-related procedures that do not comply with the procedures set out in APA § 553 are void. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764-65 (1969) (plurality opinion); *see also Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972); *Hotch v. United States*, 212 F.2d 280, 283 (9th Cir. 1954). Because RCRA's provisions regarding allowing for and responding to petitions meet and exceed the APA's statutory minimum, RCRA controls.

APA § 553(e), which sets the minimum background requirements for rulemaking petitions, states simply that agencies must give an interested person the right to file a petition. 5 U.S.C. § 553(e). It says nothing about how an agency must respond. That is laid out in APA § 555(e), which requires that denial of a petition be made in writing, including a "brief" statement of grounds for denial. 5 U.S.C. § 555(e). This writing can take the form of a responsive correspondence. *See Am. Horse Protections Ass'n, Inc. v. Lyng*, 812 F. 2d 1, 5 (D.C. Cir. 1987).

RCRA's petition provision exceeds the minimum standards of the APA. In addition to allowing a broader base of people to file petitions, it has been interpreted by the EPA to provide for responsive correspondence. 40 C.F.R. § 271.23. The CFR states that the while the EPA does not need to initiate withdrawal proceedings in response to a petition, "[t]he Administrator shall respond in writing to any petition to commence withdrawal proceedings." *Id*. This provision makes clear that while the EPA may not initiate rulemaking, it will respond to each petition in writing. As RCRA meets the APA's minimum standards in APA § 555(e), the more specific RCRA displaces the APA.

III. EPA'S FAILURE TO RESPOND TO CITIZEN'S PETITION IS NOT A CONSTRUCTIVE DENIAL OF THE PETITION, NOR A CONSTRUCTIVE DETERMINATION THAT NEW UNION'S HAZARDOUS WASTE PROGRAM IS ADEQUATE UNDER RCRA.

EPA's delayed response to Citizen's petition is not a constructive denial because it is not unreasonable, and is not equivalent to a denial of relief, especially considering the numerous considerations EPA must make in reviewing a petition. Further, EPA's delayed response to the petition cannot amount to a conclusion that the Program continues to meet § 6926(b) authorization criteria, because § 6926(b) applies only to the one-time authorization of state programs. Rather, EPA's actions in monitoring the Program show that delay does not indicate any determination by the EPA.

A. EPA Has Not Constructively Denied Citizen's Petition.

Courts may find constructive denial when agency inaction is equivalent to a denial of relief. *Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984). Courts may find extreme or unreasonable delay to be equivalent to a denial of relief. *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970). According to the APA, a court may order the agency to act when it finds the agency's delay to be unreasonable. 5 U.S.C. § 706(1) (2006); *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). Inaction amounting to a constructive denial , however, would be directly reviewable by the court. *Scott*, 741 F.2d at 996. For the delay to be unreasonably, however, it must last much longer than one year. As EPA's delay does not come close to the length necessary to be construed as unreasonable, inaction is not equivalent to constructive denial.

1. EPA's Delayed Response Is Not Unreasonable.

The APA governs judicial review of agency inaction. 5 U.S.C. § 706(1). Under this standard, courts ask (1) if the agency has violated its statutory mandate by failing to act, or (2) if the agency's delay is unreasonable. *Id*. Section 6974(a) provides that, "[a]ny person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under this chapter. Within a *reasonable time* following receipt of such petition, the Administrator shall take action with respect to such petition." 42 U.S.C § 6974(a) (emphasis added). Therefore, the APA and RCRA both set forward a highly deferential "reasonableness" standard, by which the Court should review EPA's delayed response to Citizen's petition.

Courts have generally found delay unreasonable after years of agency inaction. In *Nader*, the court held that the Federal Communications Commission's ten-year delay was unreasonable. *Nader v. Fed. Commc'ns Comm'n*, 520 F.2d 182, 205 (D.C. Cir. 1975). The court stated that

"nine years should be enough time for any agency to decide almost any issue" and that such delay verged on "losing its ability to effectively regulate at all." *Id.* at 206-07. The court thus ordered the Commission to quickly make its determination. *Id.* at 207. This extremely long standard is shared by other courts. *See, e.g.*, *Estate of French v. Fed. Energy Regulatory Comm'n*, 603 F.2d 1158, 1167 (5th Cir. 1979) (holding nineteen-year delay unreasonable).

EPA's inaction is not unreasonable or equivalent to a denial of the petition. One year passed between when Citizen filed its § 6974(a) petition and this action. (R. at 4.) EPA's delay in this instance is a mere fraction of the nearly ten-year delay in Nader. *See Nader*, 520 F.2d at 205. Hence, this year-long delay cannot be construed to be a constructive denial.

2. As EPA's Delay Is Not Unreasonable, It Does Not Meet the High Standard Required of Constructive Determinations.

Similarly, when agency delay has "precisely the same impact" as a denial of relief, such inaction may constitute a constructive denial. *Hardin*, 428 F.2d at 1099. However, "relief delayed is not always equivalent to relief denied." *Id.* Because EPA's delay is not unreasonable, it has not ripened into the equivalent of a denial. This delay thus does not amount to constructive denial.

The court in *Scott* stated that a state's failure to submit pollutant discharge limits to the EPA after nearly three years *may* amount to a constructive submission that pollutant discharge limits are unnecessary. *Scott*, 741 F.2d at 996. However, that case dealt with § 303(d) of the Clean Water Act, which requires a state to submit pollutant discharge limits within 180 days. 33 U.S.C. § 1314(a)(2)(D) (2006); *Scott*, 741 F.2d at 996. The *Scott* court thus had a specific time frame to reference in determining the reasonableness of the state's delay. 33 U.S.C. § 1314(a)(2)(D); *Scott*, 741 F.2d at 996.

Unlike *Scott*, this case presents no clear timeframe from which to judge what constitutes

a constructive denial of the petition. *See* 42 U.S.C. § 6974(a); *Scott*, 741 F.2d at 996. Without a statutory timeframe, the Court must rely only on the highly deferential "reasonableness" test outlined above. *See* 5 U.S.C. § 706(1); § 6974(a). However, even by the *Scott* standard, where inaction nearly three years after the clear statutory time frame *may* have been a constructive determination, EPA's year-long delay does not amount to a constructive denial. (R. at 4.) *See Scott*, 741 F.2d at 996.

3. EPA, and Not this Court, Is Best Suited to Balance and Prioritize Its Responsibilities.

To adequately respond to Citizen's petition, EPA "must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Because many factors influence delay, courts are generally ill-suited to review an agency's priorities. *Hardin*, 428 F.2d at 1099; *see also Heckler*, 470 U.S. at 831.

Given the many duties entrusted to EPA and the multiple constraints under which it operates, the Court should not fault EPA for any reasonable delay in this decision-laden process. *See Heckler*, 470 U.S. at 831. EPA, not this Court, is best suited to evaluate the petition, balance various interests, and prioritize its duties. *See Hardin*, 428 F.2d at 1099. EPA's need to balance its limited resources against a high volume of petitions makes a one-year delay in responding not unreasonable.

EPA inaction does not amount to a constructive denial. Its one-year delay does not come close to the unreasonable delay both the APA and courts require before ordering agency action, and EPA has not missed any specific statutory deadline. While EPA might like to be able to

respond to all the petitions it receives immediately, it does not have the resources to do so. Thus, EPA's delay has not met the standard for constructive denial and the Court should reject Citizen's claim.

B. EPA's Inaction on Citizen's Petition Cannot Be Construed as Either Approving or Disapproving New Union's Program Under 42 U.S.C. § 6926(b).

Section 6926(b) only provides for the one-time approval of state programs, which does not apply to EPA's inaction in this instance. The relevant procedures for ongoing monitoring are outlined in the CFR. 40 C.F.R. § 271.8 (2010); 40 C.F.R. § 271.15 (2010). Given these procedures, EPA's inaction on Citizen's petition does not mean that EPA is ignoring New Union's program. Rather, its inaction on Citizen's petition is simply that, inaction, and not an approval or disapproval of the Program.

Section 6926(b) outlines the procedure for authorization of state programs. § 6926(b). When the EPA receives a state's application for authorization, it has ninety days to give notice of whether it expects to authorize the program, and then another ninety days to determine whether the program meets RCRA criteria. *Id*. Section 6926(b) does not grant EPA the power to determine whether the program *continues* to meet RCRA criteria. *Id*.

Authorization is therefore wholly distinct from continued monitoring of a program, which is provided for in the CFR. 40 C.F.R. § 271.8; 40 C.F.R. § 271.15. EPA requires, *inter alia*, periodic inspections, coordination of compliance monitoring with the EPA, and allowance for joint processing of permits. 40 C.F.R. § 271.8(b) (2010). EPA's utilization of these procedures affirmatively indicates that EPA is involved in New Union's program. (R. at 10-11.) Hence, EPA's affirmative monitoring actions confirm that its inaction on Citizen's petition does not

constitute constructive determination that the Program continues to meet RCRA criteria. (R. at 10-11.)

EPA's delay on Citizen's petiton is not a determination that the Program continues to meet RCRA requirements. Therefore, the Court should hold that EPA's inaction is just that—inaction—and not constructive decision of any kind.

IV. IF THIS COURT FINDS EPA'S DELAY TO CONSTITUTE A CONSTRUCTIVE DECISION, THE COURT SHOULD NONETHELESS REMAND THE CASE TO THE DISTRICT COURT BECAUSE THIS COURT HAS NO STATUTORY BASIS, NOR ADMINISTRATIVE RECORD, FOR JUDICIAL REVIEW.

The court of appeals can review an agency's action in a limited number of instances, including actions denying, granting, or withdrawing authorization. 42 U.S.C. § 6976(b). If EPA's action does not fall within this category, original jurisdiction lies in the district court. 42 U.S.C. § 6972(a)(2). Section 6976(b) does not give this Court the power to review EPA's alleged constructive decision because EPA did not grant, deny, or withdrawal authorization, but rather simply *failed* to withdraw authorization. Further, this Court has no way to review EPA's inaction, as EPA's alleged constructive decision is wholly without an administrative record. Therefore, this Court should not lift the stay in No. 18-2010, but rather remand this case to the district court to order EPA to begin proceedings under § 6974(a).

A. <u>Because EPA Did Not Grant, Deny, or Withdraw Authorization, this Court Cannot Review EPA's Constructive Actions Under 42 U.S.C. § 6976(b).</u>

When a jurisdictional statute is unambiguous, courts are "not at liberty to displace, or to improve upon, the jurisdictional choices of Congress." *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1441 (D.C. Cir. 1988). According to § 6976(b), the court of appeals has the power to review EPA's action "in granting, denying, or withdrawing authorization . . . under section 6926." § 6976(b). Citizen challenges EPA's failure to withdraw, not EPA's actions in

granting, denying, or withdrawing authorization. *Id*. According to the plain meaning of the statute, this Court is thus unable to review EPA's alleged constructive actions.

The court of appeals in *United Technologies Corp. v. EPA*, 821 F.2d 714, 721 (D.C. Cir. 1987), held that it was not able to review a petition regarding the EPA's failure to promulgate a rule under RCRA § 7006(a)(1), 42 U.S.C. § 6976(a)(1) (2006). Section 6976(a)(1) governs "petition[s] for review of action of the Administrator in promulgating any regulation" and the denial of petitions for "the promulgation, amendment or repeal of a regulation." *Id*. Because § 6976(a)(1) gave that court the power to review a very narrow category of petitions—those regarding promulgation, amendment, and repeal of rules—the court correctly refused to expand upon the plain language of the statute to include review of the EPA's *failure* to promulgate a rule. *Id.*; *United Tech. Corp.*, 821 F.2d at 721.

Similarly, Congress set out a narrow category of actions that are reviewable in the court of appeals in the first instance—namely granting, denying, and withdrawing authorization. § 6976(b). EPA's *failure* to withdraw authorization does not fall under § 6976(b)'s power to review instances where EPA has granted, denied, or withdrawn authorization. *Id.*; *c.f. United Tech.*, 821 F.2d at 721. Citizen's claim that EPA unlawfully failed to withdraw authorization cannot sensibly be construed to fall under the unambiguous language of § 6976(b). *See* § 6976(b); *United Tech.*, 821 F.2d at 721; (R. at 5.) Rather, this Court can only review EPA's actions in granting, denying, or withdrawing authorization, and not EPA's *failure* to withdraw. § 6976(b); *see United Tech.*, 821 F.2d at 721. Consequently, this Court does not have the requisite statutory power to review EPA's constructive actions, the stay should not be lifted, and the case should be remanded to the district court.

B. Even if 42 U.S.C. § 6976(b) Did Include Failure to Withdraw Authorization, That Section Time-Bars Judicial Review of Citizen's Petition.

Filing periods "may not be enlarged or altered by the courts." *Nat'l Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981) (referring to the ninety-day window in RCRA § 6976(a)(1)). For this Court to have jurisdiction, Citizen must have filed an application for review "within ninety days from the date of [the agency action], or after such date only if such application is based solely on grounds which arose after such ninetieth day." § 6976(b). Citizen's petition does not fall within § 6976(b)'s ninety-day window, nor does it arise out of changed circumstances, therefore its claim is time-barred.

Citizen alleges that the Program fell out of compliance years ago, at the very latest, in 2000 with the passage of the ERAA. *See Nuclear Regulatory Comm'n*, 666 F.2d at 602; (R. at 4, 11.) Therefore, Citizen's petition falls far outside of the ninety-day window provided for by § 6976(b). *See* § 6976(b). Further, Citizen does not allege that changed circumstances "arose" after EPA initially failed to comply. *See* § 6976(b); (R. at 11.) Rather, Citizen claims the Program compliance continued to worsen, and EPA continued to fail to withdraw. (R. at 4.) RCRA is clear: if the application is made after the ninety-day window, it must arise "*solely* on grounds that arose after such ninetieth day." § 6976(b). As Citizen does not specifically allege this, this exception to the ninety-day period is inapplicable. Therefore, any changed circumstance alleged after that date is merely cumulative. *See* § 6976(b).

Even if this Court broadens § 6976(b) to include failure to withdraw, judicial review under § 6976(b) is nevertheless time-barred. Therefore, the Court should not lift the stay, but remand to the district court.

C. There Is Currently No Record Available to Review, Therefore the Court Should Remand the Case to the Court Below.

"Meaningful appellate review . . . is impossible in the absence of any record of administrative action." *Hardin*, 428 F.2d at 1099. However, "the focal point for judicial review should be the administrative record already in existence, not some new record completed initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). When this record is unavailable, the court should order the agency to either make the determination anew, or compile the appropriate record of the previous decision. *Hardin*, 428 F.2d at 1100. This Court only has the power to *review* grants, denials, and withdrawals; it cannot create a record where none already exists. § 6976(b). Because RCRA does not allow this Court to order EPA to act, it should remand the case to the district court.

In *Hardin*, the court remanded the case to the agency, where the agency refused to act but the record did not indicate why. *Hardin*, 428 F.2d at 1100. Meaningful review is impossible without any record of the administrative action, thus the court ordered the agency to make either "a fresh determination" or state the "reasons for [its] silent . . . refusal to [act]." *Id.*

Likewise, EPA, in making its alleged "constructive determination" has not developed any administrative record by which this Court could review EPA's alleged constructive actions. *See id.*; (R. at 9-11.) This Court would be forced to base its review merely on the original Program application and New Union's 2009 Annual Report to EPA. (R. at 10.) Moreover, this Court only has the ability to *review* agency actions under § 6976(b). It should thus should not lift the stay on No. 18-2010, but rather remand this case to the lower court, so that the lower court may order EPA to begin proceedings under § 6974(a).

V. EPA IS NOT REQUIRED TO WITHDRAW APPROVAL OF NEW UNION'S PROGRAM MERELY BECAUSE NEW UNION HAS DIRECTED FEWER RESOURCES AND STAFF TO THE PROGRAM.

The EPA's decision to withdraw a state's hazardous waste program is discretionary under both RCRA and the CFR. 42 U.S.C. § 6926(e); 40 C.F.R. § 271.22(a) (2010). Courts must give broad deference to an agency's decision whether to enforce statutory violations, because their expertise makes them uniquely situated to make individualized and informed decisions. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Nonetheless, Citizen urges the Court to require that EPA withdraw approval of New Union's program. (R. at 1.) Wholesale withdrawal of a state program is a "drastic" and "extreme" response to RCRA violations. *See United States v. Power Eng'g Co.*, 303 F.3d 1232, 1238-39 (5th Cir. 2002). Yet, Citizen has not specifically alleged that New Union has violated even one single RCRA provision. (R. at 10-12.) Therefore, because EPA's decision to withdraw a state program is discretionary, and this decision must be given broad deference, this Court should not require that EPA take a "drastic" measure without evidence of a single RCRA violation.

A. EPA's Decision to Withdraw a State's Program is Discretionary Under Both RCRA and the CFR.

The plain language of RCRA makes EPA's decision whether to commence withdrawal proceedings discretionary. § 6926(e). The statute provides that, "[w]henever the Administrator determines . . . that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall notify the State and . . . the Administrator shall withdraw authorization of such program." *Id.*

Courts have held that the phrase "[w]henever the Administrator determines" grants the EPA discretion. *See Ohio Pub. Interest Research Grp., Inc. v. Whitman*, 386 F.3d 792, 796 (6th Cir. 2004); *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 330 (2d Cir. 2003); *Her*

Majesty the Queen v. EPA, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (statutory phrase "[w]henever the Administrator" implies "a degree of discretion"). Because the determination of whether to withdraw a state's program is to occur "whenever" the EPA makes it, the determination is necessarily discretionary. *See Ohio Pub. Interest Research Grp.*, 386 F.3d at 796.

In line with the statute, the EPA has interpreted § 6926(e) to mean that the decision to commence withdrawal proceedings is discretionary. 40 C.F.R. § 271.22(a). This section, which governs the "criteria for withdrawing approval of State programs," provides that EPA "*may* withdraw program approval when a State program no longer complies with the requirements of this subpart, and the State fails to take corrective action." *Id.* (emphasis added). EPA is charged with the administration of RCRA, and thus courts must defer to its interpretation whenever the statute is silent or ambiguous with respect to a specific issue. *Chevron*, 467 U.S. at 844-45. If the agency's interpretation is reasonable and consistent with the statutory purpose, the courts must uphold it. *Id.*

EPA's interpretation that its decision is discretionary is consistent with policy considerations received in comments during rule making process. *See* 45 Fed. Reg. at 33,385 (May 19, 1980). States were encouraged to develop their own programs by avoiding the establishment of "very tight standards," *and* are thus meant to have great latitude in regulating their programs. *Id.* Commentators rejected the contention that "withdrawal should be mandatory" for any state violation, because such a requirement would be "draconian," and a "drastic and often impractical step." *Id.* Because the EPA's decision whether to withdrawal a state program is discretionary, it is never *required* to withdraw. 40 C.F.R. § 271.22(a).

B. Courts Must Give Broad Deference to EPA's Decision to Not Commence Withdrawal Proceedings.

An agency's decision not to enforce a statute is the "agency's absolute discretion." *Heckler*, 470 U.S. at 831. It is generally unsuitable for judicial review because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* An agency might not enforce a violation because it does not fit the agency's overall policies, it has insufficient resources to undertake the enforcement action, or simply because it cannot act against each technical violation. *Id.* at 831-32.

This Court must give broad deference to EPA's decision whether or not to commence withdrawal proceedings. *See id.* Regardless of the severity of the alleged violations, EPA has the discretion to determine whether, and how, to enforce the alleged violations. *See id.*; § 6926(e). By overruling EPA's decision not to act, the Court would be defying the explicit language of the Supreme Court, and overstepping its power of judicial review. *See Heckler*, 470 U.S. at 831.

C. Wholesale Withdrawal of State Enforcement Is an "Extreme" and "Drastic" Measure.

Withdrawing a state's program is an "extreme and drastic step." *Power Eng'g Co.*, 303 F.3d at 1238-39; *Waste Mgmt., Inc. v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill. 1989); 45 Fed. Reg. at 33,385. One court rejected the complete withdrawal of a state program because the "remedy is so drastic that EPA cannot be expected to use it except in egregious cases." *Nat'l Res. Def. Council v. EPA*, 859 F.2d 156, 181 (D.C. Cir. 1988) (concerning potential withdrawal of a state program under the Clean Water Act). Withdrawal means an increased administrative burden on the EPA and "increased state-federal friction." *Id.* Therefore, it is not surprising that while forty-eight states currently run their own hazardous waste programs in lieu of the federal

program, there is no record that the EPA has ever withdrawn its approval of a state's RCRA program. *See* EPA, 25 Years of RCRA: Building on Our Past To Protect Our Future (2001) *available at*, http://www.epa.gov/osw/inforesources/pubs/k02027.pdf; *see also, Friends of the Earth v. Reilly*, 966 F.2d 690 (D.C. Cir. 1992) (where the court examined whether the EPA's decision to commence withdrawing proceedings was proper, and found that the state's program was consistent with RCRA, and that EPA should not withdraw its authorization).

Withdrawal is seen as a last resort, and thus the CFR has set forth comprehensive withdrawal procedures that EPA and the state must go through before a program is withdrawn. *See* 40 C.F.R. § 271.23. There is simply no authority or precedent to suggest that a court can supersede RCRA and simply mandate that EPA *must* withdraw New Union's program without first engaging in withdrawal procedures. For this Court to require EPA to withdraw approval, it would necessarily ignore the plain language of RCRA, fail to defer to EPA's interpretation of the statute, and mandate drastic enforcement measures best decided by EPA.

D. Citizen Has Made Only Vague Allegations, and Has Not Provided Evidence of One Specific RCRA Violation as a Result of the Decreased Funding and Staffing of Its Program.

Citizen has not specifically explained how its vague allegations of New Union's decreased funding and staffing establishes that the Program no longer meets the requirements of 40 C.F.R. § 271.22(a). EPA cannot easily evaluate these general factual assertions without any discussion of the specific causes for withdrawal, such as those listed in 40 C.F.R. §§ 271.22(a)(I)-(a)(4). Citizen has merely alleged that compared to 1986, when the Program was approved, the state has fewer employees and less funding to monitor an increased number of waste facilities. (R. at 10.) However, Citizen has failed to correlate the decreased funding and staffing with RCRA violations. (R. at 10-12.)

To the contrary, the record suggests that the *quality* of New Union's inspections is exemplary. (R. at 11.) Both New Union and EPA inspected 10% of the State's facilities and found an identical number of violations. (R. at 11.) Because EPA operates at a high level in monitoring hazardous waste facilities to ensure compliance with RCRA standards, New Union's findings of comparable violations suggests that the decreased resources has not affected the *quality* of New Union's monitoring. (R. at 11.)

The record is too thin for this Court to determine whether decreased funding and staffing requires withdrawal of the Program. New Union might have been overstaffed when the Program was originally authorized, New Union's previous monitoring policy may have been more stringent than what RCRA required, or technological advances may allow New Union to regulate its program more efficiently. There could be a variety of justifications for why New Union employs fewer people to run its waste program. A mere decrease in staff and available resources is insufficient to definitively support that New Union's program is not compliant with RCRA.

EPA is apprised of the Program's current staffing and funding levels, and thus should be allowed to do its job and determine the most constructive path to bettering the Program. (R. at 10); *Heckler*, 470 U.S. at 831. Complete withdrawal is a counterproductive solution to a claim of inadequate resources, because it is an extremely expensive endeavor. *See* Robert Worth, *Asleep on the Beat*, WASH. MONTHLY, November, 1999, *available at* http://www.washington monthly.com/features/1999/9911.worth.environment.html ("[t]aking over a state program is enormously expensive.") Because many states cannot allocate adequate funding to their hazardous waste programs, EPA "provides grants to states to assist them in developing or implementing authorized hazardous waste management programs." EPA, Authorizing States to Implement RCRA, *available at*, http://www.epa.gov/osw/inforesources/

pubs/orientat/rom311.pdf. Helping to fund New Union's program is a more productive alternative then commencing a costly withdrawal proceeding.

VI. EPA IS NOT REQUIRED TO WITHDRAW ITS APPROVAL OF NEW UNION'S PROGRAM SIMPLY BECAUSE THE STATE AGENCY CURRENTLY REGULATING RAILROAD WASTE WAS NOT THE STATE AGENCY THAT WAS INITIALLY APPROVED.

A state with an approved program explicitly has the power to "transfer all or part of any program from the approved State agency to any other State agency." 40 C.F.R. § 271.21(c) (2010). Therefore, substantively, New Union has not violated RCRA by transferring regulatory power of railroad waste from the DEP to the Commission. (R. at 11-12.) While the State did fail to comply with the procedures to revise a state program, (R. at 11-12), these procedural violations do not justify the drastic remedy of complete withdrawal of New Union's program.

A. <u>It Is Within New Union's Rights Under RCRA to Transfer Regulatory Responsibility for the Transport of Railroad Waste.</u>

Substantively, a state may change the agency responsible for regulating an aspect of its hazardous waste program. *See* 40 C.F.R § 271.21(c). A state has this power so it can best administer its program, and comply with evolving RCRA standards. *See United States v. Marine Shale Processors*, 81 F.3d 1361, 1367 (5th Cir. 1996); *United States v. S. Union Co.*, 643 F. Supp. 2d 201, 208 (D.R.I. 2009). Transferring regulatory power from one state agency to another does not make the state program a "partial" program, which is not allowed under RCRA. 40 C.F.R. § 271.1(h) (2010). This reading would render section 271.21(c) meaningless, and therefore is inappropriate.

When a state modifies its program, it must follow certain procedures pursuant to 40 C.F.R. § 271.21(b). For example, the state shall keep the EPA fully informed of any proposed modifications, submit a modified program description, the EPA shall approve or disapprove the

program revision, and public notice must be given. 40 C.F.R. § 271.21(b) (2010). In 2000, under the Environmental Regulatory Adjustment Act ("ERAA"), New Union transferred regulatory power of all transport of railroad waste from one state agency, the DEP, to another state agency, the New Union Railroad Commission ("Commission"). (R. at 11-12.) As the CFR specifically allows for this type of transfer, *see* 40 C.F.R. § 271.21(c), this is not an example of New Union having a partial program. A state agency, the Commission, is still regulating the transport of hazardous waste. (R. at 12.) The Commission has been regulating the transport of hazardous waste for the past ten years, and Citizen makes no allegations that they are not adhering to the regulations set forth in 40 C.F.R. § 271.11. (R. at 11.)

New Union did, however, fail to take the proper procedural steps when modifying its program. (R. at 11.) New Union never notified EPA about this modification, or complied with the procedures necessary to change regulatory power from the DEP to the Commission. (R. at 11.) Therefore, New Union has violated the procedural requirements of § 271.21(b). 40 C.F.R. § 271.21(b).

Complete withdrawal, however, is an inappropriate remedy for administrative violations. *Power Eng'g Co.*, 303 F.3d at 1238-39. Withdrawal is a drastic step, with severe financial consequences that can leave the state and federal program in chaos. *Id.* While EPA does not mean to diminish the importance of complying with RCRA procedures, a withdrawal in this instance would not serve its intended purpose.

VII. NEW UNION'S TREATMENT OF POLLUTANT X IS "EQUIVALENT" AND "CONSISTENT" WITH FEDERAL STANDARDS, AND DOES NOT VIOLATE THE COMMERCE CLAUSE.

New Union's current treatment of Pollutant X is "equivalent" to federal standards, because it only makes *more* stringent what had already been deemed an "equivalent" state

program. (R. at 10, 12.) To determine whether New Union's regulation of Pollutant X has violated the Commerce Clause, the Court should apply the *Pike* test, because New Union regulates the transportation of Pollutant X "evenhandedly." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under this test, Pollutant X does not violate the Commerce Clause. *See id.* New Union's program is also is "consistent" with RCRA, which is a more permissive standard in regulating the movement of waste across state borders. *See* 40 C.F.R. § 271.4(a) (2010).

A. New Union's Program Is "Equivalent" to the Federal RCRA Standards Because the ERAA Treats Pollutant X More Stringently than Before.

State programs may be "more stringent or more extensive" than what is required under RCRA. 40 C.F.R. § 271.1(i)(1) (2010). Courts have unanimously held that where a state's hazardous waste program is more stringent than RCRA, it is also "equivalent" to RCRA. *See, e.g.*, *State of Wash. Dept. of Ecology v. EPA*, 752 F.2d 1465, 1467 (9th Cir. 1985). A state program is not equivalent only if its program is *less* stringent than RCRA requirements. § 271.1(i)(1).

In 1986, EPA authorized New Union's program. (R. at 10.) To be "authorized," a state's program must be "equivalent" to federal RCRA standards. 42 U.S.C. § 6926(b). Therefore, at the time of approval, the Program was at least "equivalent" to RCRA standards. (R. at 10.)

In 2000, New Union passed the ERAA, which made the treatment and disposal of Pollutant X more stringent in every respect. (R. at 11-12.) By adding the following requirements, the Program is now stricter under the ERAA than New Union's previously approved program. (R. at 12.) First, facilities generating Pollutant X must submit a plan to minimize its generation, and must annually submit reports regarding its reduction. (R. at 12.) Second, Pollutant X cannot be stored in New Union for more than 120 days before it must be transported to a facility outside the state. (R. at 12.) Third, transport of Pollutant X through and

out of the state shall be as direct and fast as reasonably possible. (R. at 12.) All three of these provisions make the Program stricter, tougher, and consequently more stringent than the previously authorized policy. (R. at 12.) Therefore, New Union's program is equivalent to RCRA, because it is regulating Pollutant X *more* stringently than the previously authorized, and thus "equivalent," program.

B. New Union's Regulation of the Transport of Pollutant X Does Not Violate the Commerce Clause.

Courts apply two different standards when determining whether a statute violates the Commerce Clause. *C&A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 390 (1994). If a statute clearly discriminates against interstate commerce, it is virtually a *per se* violation of the Commerce Clause. *Id.* However, a court must undergo a different analysis, known as the *Pike* test, if the statute "regulates evenhandedly" and "has only indirect effects on commerce." *Pike*, 397 U.S. at 142; *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007).

1. The ERAA's Regulation of the Transport of Pollutant X Does Not "Clearly Discriminate" Against Interstate Commerce, but Rather Regulates "Evenhandedly" and Thus Should Be Analyzed Under the *Pike* Test.

Courts have found a "virtually *per se*" violation of the Commerce Clause when statutes or ordinances "clearly discriminate" against interstate commerce or economically burden out of state interests. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Chemical Waste Mgmt. Inc. v. Hunt*, 504 U.S. 334, 337 (1992) (imposing an additional disposal fee on hazardous waste generated outside of Alabama and disposed of in Alabama violated the Commerce Clause); *C&A Carbone*, 511 U.S. at 383 (requiring all waste generated in a town to be processed in the town's waste facility violates the Commerce Clause by increasing cost of out-of-state

interests, and depriving out-of-state businesses an opportunity to access the local market).

However, a court must analyze a statute under the *Pike* test if it "regulates evenhandedly" and "has only indirect effects on commerce." *Pike*, 397 U.S. at 142. While the Supreme Court has recognized that there is no clear line between *per se* invalidation and the permissive *Pike* test, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986), courts should look at the *intent* of the legislature to burden out-of-state interests. *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 398-99 (3d Cir. 1987) (emphasis added). Statutes that discriminate against commerce merely because of its *origin*, almost always violate the Commerce Clause because they are clearly discriminatory to interstate commerce. *C&A Carbone*, 511 U.S. at 390; *see also Blue Circle Cement v. Bd. of Cnty. Comm'rs*, 27 F.3d 1499, 1511 (10th Cir. 1994).

The ERAA's regulation of the transport of Pollutant X does not "clearly discriminate" against out-of-state interests, but rather operates evenhandedly. (R. at 12.) The Act provides that the transport of Pollutant X "through or out of the state…be as direct and fast as reasonably possible." (R. at 12.) There is no *intent* by New Union to discriminate against other states because the ERAA does not distinguish between the transport of Pollutant X coming from within New Union, and the transport of Pollutant X through New Union from another state. (R. at 12.) Therefore, the *origin* of Pollutant X is inconsequential to the restrictions placed on its transport. (R. at 12.) Applying a strict *per se* test is inappropriate, and thus the Court should apply the balancing test set forth in *Pike*.

2. Applying the *Pike* Test, the ERAA's Regulation of the Transport of Pollutant X Does Not Violate the Commerce Clause.

Under *Pike*, the statute will be upheld unless the burdens are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. To determine whether the burdens outweigh the benefits, a court must scrutinize: (1) the local benefits advanced by the Ordinance;

(2) the burden the Ordinance imposes on interstate commerce; (3) whether the burden is "clearly excessive in relation to" the local benefits; and (4) whether the local interests can be promoted as well with a lesser impact on interstate commerce. *Id*. The challenging party bears the burden of showing that the incidental burden on interstate commerce is excessive compared to the local interest." *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir. 1992).

Applying the Pike factors, the benefits of the ERAA's amendments to New Union's local interests outweigh the incidental burden that it places on interstate commerce. First, because Pollutant X is a potent and toxic chemical that threatens public health and the environment, there is a phenomenal advantage to transporting it to a treatment facility as quickly as possible to mitigate its harmful effects. (R. at 12.) New Union does not have a facility to that can treat this pollutant. (R. at 12.) Therefore, there is a strong public interest in mandating that all persons transporting the pollutant out of, or through the state, do so "as direct and fast as reasonably possible." (R. at 12.) Second, this statute places minimal if any burden on interstate commerce. (R. at 12.) States only have to transport Pollutant X through New Union as "fast as is *reasonably* possible." (R. at 12) (emphasis added). This requirement is placed on all states regardless of the origin of Pollutant X. Third, given the strong public benefits of this Act, the minimal burden on interstate commerce is not excessive. Finally, there are no less discriminatory ways to protect the health and environment of New Union from Pollutant X. Citizen has not met its burden of showing that the incidental burden excessively outweighs the local interest. *See Dorrance,* 957 F.2d at 763. For these reasons, the ERAA's amendments do not violate the Commerce Clause.

C. New Union's Regulation of Pollutant X is "Consistent" with Federal RCRA Requirements.

If a regulation does not violate the Commerce Clause, it will not violate RCRA's more permissive consistency standard. *Hazardous Waste Treatment Council v. South Carolina*, 945

F.2d 781, 793-94 (4th Cir. 1991). To determine whether a state program is "consistent" with RCRA, is a two prong approach. First, it must have a basis in "human health or environmental protection," 40 C.F.R. § 271.4(b) (2010), and second, it must not "unreasonably restrict[], impede[], or operate[] as a ban on the free movement across the State border of hazardous wastes from or to other States." 40 C.F.R. § 271.4(a). This second prong is broader than the Commerce Clause because it only prohibits *unreasonable* restrictions on interstate commerce. *Id.* Therefore, if a statute does not violate the Commerce Clause, it must be consistent with RCRA.

The ERAA satisfies both prongs of RCRA's consistency test. First, the regulation of Pollutant X certainly has a "basis in human health or environmental protection." 40 C.F.R. § 271.4(b). All of its requirements ensure that toxic Pollutant X gets to a safe treatment and storage facility as quickly as reasonably possible. Second, because ERAA does not violate the Commerce Clause under the above *Pike* test, it is therefore consistent with RCRA. *Id.*

CONCLUSION

Because RCRA displaces the APA, the district court has jurisdiction to hear Citizen's petition under 42 U.S.C. § 6972(a)(2). It can potentially order the EPA to respond to Citizen in writing, but nothing more. EPA's inaction on Citizen's petition does not constitute a constructive denial or constructive determination of any kind. EPA actively monitors the Program. Thus, it is in the best position to determine whether and when to initiate withdrawal proceedings for violations of RCRA's minimum standards. For the foregoing reasons, EPA respectfully requests that this Court AFFIRM the decision of the district court rejecting federal question jurisdiction for violation of the APA, REVERSE the decision of the district court rejecting jurisdiction under RCRA, and REMAND the case to the district court for proceedings consistent with its opinion.