C.A. No. 18-200; 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, U.S. Environmental Protection Agency, *Respondent-Appellee-Cross-Appellee*	§
v.	§
STATE OF NEW UNION. *Intervenor-Appellee-Cross-Appellant*	§

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JURISDICTIONAL STATEMENT

This is an appeal from a final decision of the United States District Court for the District of New Union ("District Court") rendered on June 2, 1010, granting the State of New Union's motion for summary judgment, and denying a motion for summary judgment filed by Citizen Advocates for Regulation and the Environment, Inc. ("CARE"). The District Court dismissed the claims filed by CARE because it did not have subject matter jurisdiction under § 6972(a)(2) of the Resource Conservation and Recovery Act ("RCRA") or 28 U.S.C. § 1331 to order New Union to act on CARE's petition. 42 U.S.C. § 6972(a)(2) (2006), 28 U.S.C. § 1331 (2006). This Court has jurisdiction to review whether the District Court had subject matter jurisdiction under either statute, pursuant to 28 U.S.C. § 1291. 28 U.S.C. § 1291 (2006). The granting of summary judgment due to lack of subject matter jurisdiction is a decision that this Court will review *de novo. Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). In addition, this Court has jurisdiction pursuant to RCRA § 6976(b) to determine whether it has jurisdiction to consider the merits of the Environmental Protection Agency's ("EPA") failure to act on CARE's petition. 42 U.S.C. § 6976 (2006).

QUESTIONS PRESENTED

1. Under section 6972 of the RCRA, does a district court have jurisdiction to order the EPA to act on a petition filed under section 6974 of the RCRA when the petition pertains to an order rather than a rule?
2. Under 28 U.S.C. 1331, does a district court have jurisdiction to order the EPA to act on a petition filed under section 553(e) of the Administrative Procedure Act when the petition pertains to an order rather than a rule?
3. Under the RCRA, does the EPA's failure to act on a petition constitute a "constructive denial" of the petition and/or a "constructive determination" that the status quo does not require EPA intervention and if so, are these decisions subject to judicial review under section 6976 of the RCRA?
4. Under the RCRA, should this Court lift its stay in the previously filed action and proceed with judicial review of EPA's constructive actions or should the Court remand the case so that the District Court can order the EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program?
5. Under the RCRA, does the EPA have a mandatory duty to withdraw its approval of New Union's hazardous waste program when its resources and performance fail to meet RCRA approval criteria?
6. Under the RCRA, does the EPA have a mandatory duty to withdraw its approval of New Union's hazardous waste program when New Union's recent legislation transfers some environmental regulatory power to a different in-state agency?

7. Under the RCRA, does the EPA have a mandatory duty to withdraw its approval of New Union's hazardous waste program when New Union's recent legislation affects some variation between the federal program and New Union's program?

STATEMENT OF THE CASE

On January 5, 2009, CARE petitioned the EPA, under section 6974 of the RCRA and section 553(e) of the Administrative Procedure Act ("APA"). 42 U.S.C. § 6974 (2006); 5 U.S.C. 553(e) (2006). In its petition, CARE requested that the EPA commence proceedings to withdraw its 1986 approval of New Union's hazardous waste regulatory program pursuant to section 6926(b) of the RCRA. 42 U.S.C. § 6926(b) (2006). The EPA has yet to act on CARE's petition. On January 4, 2010, CARE filed an action in the United State District Court for the District of New Union under section 6972 of the RCRA, seeking an injunction requiring EPA to act on that petition. In the alternative, CARE sought judicial review of EPA's "constructive denial" of the petition and EPA's "constructive determination" that New Union's hazardous waste program continues to meet the criteria for approval despite CARE's allegations. New Union filed an unopposed motion to intervene pursuant to Federal Rule of Civil Procedure Rule 24, which the district court granted. The parties filed cross-motions for summary judgment, agreeing that the facts alleged by CARE were uncontested and no further facts were necessary to decide the matter. Also on January 4, 2010, CARE filed a petition for review with this Court seeking judicial review of EPA's "constructive denial" and "constructive determination" on the same grounds. New Union also filed an unopposed motion to intervene in that case, which this Court granted. On EPA's motion, the Court of Appeals stayed that proceeding, pending the outcome of this action.

STATEMENT OF THE FACTS

The EPA approved New Union's solid waste disposal program run by the New Union DEP in 1986. Rec. doc. 2, p. 1. When the EPA approved New Union's program, the EPA made a finding that the New Union DEP had adequate resources to administer and enforce a solid waste

disposal program that included issuing permits, inspecting facilities regulated by RCRA and taking enforcement actions. Rec. doc. 2, p.1. However, the EPA noted that with fewer resources, the program might not be adequate. Rec. doc. 4, p. 16. New Union has continually apprised the EPA of the status of the program, but in the 2009 Annual Report, New Union noted that there had been and deterioration in the state's finances causing a freeze on hiring new employees, less money for the DEP's hazardous waste program, and lay-offs of state employees. Rec. doc. 5 for 2009, pp. 51, 53. The lack of funds has resulted in the DEP issuing fewer citations than in previous years. Rec. doc. 5 for 2009, p. 20. New Union's DEP instituted a policy prioritizing the issuance of permits to ensure that the most important permits were examined first. Rec. doc. 5 for 2009, p. 20. The EPA has stepped in to help inspect facilities as well as implement enforcement actions. Rec. doc. 5 for 2009, pp. 25, 26. In 2000, the New Union legislations enacted the 2000 Environmental Regulatory Adjustment act (the "ERAA"), which changed the Railroad Regulation Act (the "RRA"), and allowed a new state agency to regulate permitting, inspections and enforcement of environmental statutes and removed criminal enforcement actions for violations. Rec. doc. 5 for 2000, pp. 103-105. Also, the ERAA made note of the highly dangerous nature of Pollutant X and the lack of treatment and disposal facilities in New Union. Rec. doc. 5 for 2000, pp. 105-107. In doing so, the New Union legislature limited storage of Pollutant X to less than 120 days while awaiting transportation, and required transportation of Pollutant X to be made as fast as reasonably possible, allowing stops only in cases of emergency. *Id.*

SUMMARY OF THE ARGUMENT

Prior to evaluating the merits of this case, this Court must consider several jurisdictional issues. This Court must determine whether the District Court had jurisdiction to order the EPA to

take action regarding CARE's petition, and also whether the EPA's actions are subject to the judicial review of this Court. First, the District Court did not have jurisdiction to order the EPA to act on CARE's petition under either RCRA § 6972(a)(2) or 28 U.S.C. § 1331. Jurisdiction under both statutes pertains only to agency rules, and the EPA's initial approval of New Union's hazardous waste program was an order. In addition, the EPA's failure to act on CARE's petition is not subject to judicial review in this Court because such inaction was not a constructive determination of any kind. Nonetheless, even if the EPA's failure to act is considered a constructive denial of CARE's petition and/or a constructive determination of the compliance of New Union's program, such "determinations" are still not subject to judicial review in this Court because they fall outside the scope of RCRA § 6976(b).

If it is determined that this Court has jurisdiction, withdrawal of approval of New Union's state program is not appropriate because the EPA has not seen fit to initiate withdrawal proceedings. Also, New Union's changes within its authorized state program, such as transferring regulatory authority to the Railroad Commission and waiving criminal sanctions, do not render the program insufficient under the RCRA and do not mandate EPA withdrawal of approval. Moreover, if a defect exists in the authorized state program, New Union is entitled by statute to both notice and an opportunity to cure. Finally, New Union's Environmental Regulatory Adjustment Act (ERAA) does not unreasonably restrict, impede or operate as a ban on the free movement of hazardous wastes across the state border in violation of the commerce clause, and is therefore, not unconstitutional.

ARGUMENT

1. Jurisdictional Issues

I. The District Court Did Not Have Jurisdiction Under Section 6972(a)(2) of the RCRA to Order the EPA to Act on CARE's Petition for Revocation of Approval.

One issue on appeal is whether the District Court had jurisdiction under § 6972 of the RCRA to order the EPA to act on CARE's petition requesting the EPA to begin proceedings to withdraw its approval of New Union's Program. The District Court was correct in its determination that it lacked subject matter jurisdiction because the EPA's actions constituted an order, which is not reviewable by the District Court.

A. With Respect to a Citizen Suit, Section 6972(a)(2) of the RCRA Grants Jurisdiction to a District Court Only When the EPA Fails to Consider a Petition that Pertains to a "Rule."

Section 6974 of the RCRA allows any person or group to petition the EPA Administrator for "promulgation, amendment, or repeal of any regulation" issued under RCRA. 42 U.S.C. § 6974 (2006). Within a reasonable time following receipt of such petition, the Administrator "shall take action with respect to such petition." *Id.* The language of this provision, through the usage of the word "shall," demonstrates that the Administrator's duty to respond to a petition related to a regulation is nondiscretionary and mandatory. *Alabama v. Bozeman,* 533 U.S. 146, 153 (2001). Accordingly, when an Administrator of the EPA fails to fulfill such a mandatory duty, section 6972(a)(2) gives a person or group the right to sue the Administrator in the district court of the district where the alleged violation occurred. 42 U.S.C. § 6972(a)(2) (2006). However, pursuant to the language of the statute, this citizen suit remedy is only applicable when the Administrator fails to consider a petition that pertains to a regulation or rule. Therefore, the District Court only has jurisdiction if the initial approval of New Union's Program was a rule. If

the approval was anything other than a rule, such as an order, the District Court does not have jurisdiction.

The RCRA does not define "rule", so in interpreting the language of this statute courts have turned to the definitions of rules and orders in the APA. Under the APA, a rule is defined as "the whole or a 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). An order, on the other hand, is defined as "the whole or a part of a final disposition [. . .] of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6) (2006). The APA defines a license as "an agency permit, certificate, approval, [. . .] or other form of permission." 5 U.S.C. § 551(8) (2006).

B. The District Court Did Not Have Jurisdiction to Hear CARE's Citizen Suit Under Section 6972(a)(2) Because the Suit Pertained to the Revocation of Approval by the EPA of an Authorized State Hazardous Waste Program, which is an "Order," not a "Rule."

Based on the plain language of the APA, it is apparent that the EPA's approval of New Union's Program in 1986 is an order, rather than a rule. The approval is not a statement of general applicability and future effect designed to implement or interpret law. It likewise does not set forth a general far-reaching standard that applies to multiple organizations. Instead, the EPA's determination is an "approval, [. . .] or other form of permission" that grants the State of New Union the right to regulate solid waste within its borders. It is a license/permit that only applies to one entity, New Union, showing that it is an order rather than a rule.

This argument is supported by past court decisions that further clarify the distinction between an agency rule and order. For example, in *McLouth Steel Products*, the EPA developed a model to estimate the ability of an aquifer to dilute the toxicants from a specific amount of waste, and predict the level of toxicants at a receptor well. *McLough Steel Products Corp. v.*

Thomas, 838 F.2d 1317, 1319 (D.C. Cir. 1988). The court held that the model was a rule because it was a binding quantitative approach used by the EPA in widespread application to predict the level of various toxicants that could potentially migrate to environmental receptors. *Id.* at 1320. In contrast, in *Hazardous Waste Treatment Council*, the EPA approved a petition by an individual seeking to build a hazardous waste injection well. *Hazardous Waste Treatment Council v. E.P.A.*, 910 F.2d 974, 975 (D.C. Cir. 1990). The court held that the approval of the petition was not a rule because the decision concerned a single well in a single town, and only applied to the individual's application. *Id.* at 976.

The facts here are more analogous to the case in *Hazardous Waste*. Similar to the situation in *Hazardous Waste,* the EPA's approval of New Union's Program only applied to New Union's Program to regulate hazardous waste within its borders. It had no effect on the programs in other states, nor did it outline guidelines to be followed for future hazardous waste program applications. The EPA's approval of New Union's Program was not a rule under RCRA, but was rather an order. Therefore, in light of the plain language of the APA and past court decisions, it is evident that the EPA's approval of New Union's hazardous waste program is an order under the RCRA. Accordingly, the district court does not have jurisdiction under section 6972(a)(2) of the RCRA to order the EPA to act on CARE's petition for revocation of EPA approval of New Union's Program.

II. The District Court Does Not have Federal Question Jurisdiction to Order the EPA to Act on CARE's Petition Because the EPA's Permit to New Union Was an Order Under the Administrative Procedure Act.

CARE also argues that the District Court can order the EPA to act on CARE's petition based on federal question jurisdiction because the EPA's inaction was a violation of section 553 of the APA. Section 553 of the APA states that "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) (2006). Because this cause of action is created by the APA, a federal law, it appears the District Court has federal question jurisdiction. 28 U.S.C. § 1331 (2006). In addition, similar to the language of the RCRA, the use of the word "shall" indicates that the EPA is required to allow rule-related petitions. *Bozeman,* 533 U.S. at 153 (2001). However, the District Court does not have jurisdiction because like the above citizen suits under RCRA, a person only has the right to petition an agency for the issuance, amendment, or repeal of a *rule*. Based on the same reasoning as above, the EPA's approval of New Union's Program is not a rule of general applicability as set forth in the APA. Rather, it is an order that applies only to New Union. Thus, the District Court also does not have federal question jurisdiction to order the EPA to act under section 553 of the APA.

III. The EPA's Failure to Act on CARE's Petition Is Not Subject to Judicial Review Because it Was Not a Constructive Denial of the Petition or a Constructive Determination that New Union's Program Remains in Compliance.

CARE asserts that because the EPA did not respond to its petition for over a year, that such inaction was a constructive denial of the petition and a constructive determination that New Union's Program still met federal standards. Therefore, CARE argues that this Court should have jurisdiction based on section 6976(b)(2) of RCRA. However, CARE's arguments fail because the EPA's inactions do not amount to any sort of constructive determination.

A. Because the EPA Can Choose to Respond to a Petition Pertaining to an Order at Its Own Discretion, the EPA's Failure to Respond to the Petition Is Not a Constructive Denial of the Petition.

CARE contends that the EPA's failure to respond to its petition was a constructive denial of the petition. This argument is based on the reasoning of the 7th Circuit Court of Appeals in *Scott v. City of Hammond.* In *Scott*, the plaintiff William Scott brought a claim against the EPA

under the Clean Water Act because of pollution of Lake Michigan that forced Chicago to close its beaches during the summer of 1980. *Scott v. City of Hammond*, 741 F.2d 992, 993 (7th Cir. 1984). Scott alleged that the EPA failed in its mandatory duty set forth in the Clean Water Act to regulate the amount of daily discharges of pollutants into Lake Michigan. *Id.* at 996. The relevant section of the Clean Water Act requires each state to submit a proposal for an acceptable amount of daily discharges, which the EPA must either approve or disapprove of within 30 days of the submission. *Id.* However, in this case, the state of Illinois repeatedly failed to submit a proposal, so the court stated that this prolonged failure could amount to a "constructive submission" by Illinois that no limitations were needed. *Id.* The court went on to say that the EPA's inaction appeared to be "tantamount to approval" of this state's constructive submission. *Id*. at 998.

The case here is distinguishable from *Scott* for many reasons. First, in *Scott,* the EPA had a mandatory duty to respond to state submissions under the Clean Water Act. Here, as established, there is not a mandatory duty imposed on the EPA to respond to CARE's petition because the petition pertains to an order. Accordingly, the EPA can respond to the petition at its own discretion. Therefore, the EPA's failure to respond to the petition, an act that is entirely at its discretion, cannot be construed as a constructive denial of the petition.

B. The EPA'S Failure to Respond to CARE's Petition is Not a "Constructive Determination" of Compliance Because the EPA Has No Duty to Respond to Such a Petition.

Similarly, the failure of the EPA to respond to CARE's petition is not a constructive determination that New Union's Program continues to meet federal criteria. If the EPA had a mandatory duty to respond to CARE's petition, perhaps it could be argued that its failure to respond could be a constructive determination that New Union's Program still met federal standards. However, because there is no such mandatory duty, that argument cannot be made. It

cannot logically be argued that the EPA's failure to respond to an optional petition is somehow an evaluation of New Union's hazardous waste program. New Union's Program may be found to still be in compliance with federal guidelines, but such determination would not be indicated by its failure to respond to CARE's petition. Rather, once a state program has been approved by the EPA to operate in lieu of the federal program, it is deemed to be in compliance unless the Administrator takes corrective action such as withdraw authorization or issue a compliance order on the state. 42 U.S.C. §§ 6926(e), 6928(a)(2) (2006). Regardless, a constructive determination by the EPA is not shown through its failure to act on a non-obligatory petition.

Furthermore, the "constructive submission" argument set forth in *Scott* has been applied only in limited circumstances. It typically only applies to cases involving the Clean Water Act, and in particular the provision controlling individual states' submissions of proposals outlining acceptable amounts of daily pollutant discharges into bodies of water. Also, for the theory to apply, there must be concrete evidence that shows a state's inaction amounts to a constructive submission. As the court in *Hayes v. Whitman* stated, it is a narrow theory that only applies when a state's actions "clearly and unambiguously" express a decision by a state that no such regulations are necessary. *Hayes v. Whitman*, 264 F.3d 1017 (10th Cir. 2001). Even if this Court does extend the "constructive submission" argument to the case at hand, the evidence is simply not conclusive enough to show that the EPA's inaction is either a constructive denial of CARE's petition, or a constructive approval of New Union's Program.

It also should be noted that the court in *Scott* did not conclusively determine whether the actions by the state and the EPA were in fact constructive determinations. The court only stated that the actions by Illinois *could* be a constructive submission. Likewise, it stated that the actions by the EPA *appeared* to be tantamount to approval, but did not definitively state that its actions

actually did constitute an approval. The reason was because the court felt that such determinations were questions of fact, so it remanded the case to the district court to determine if there was sufficient evidence to demonstrate a constructive determination by either party. *Scott*, 741 F.2d at 998.

C. Even If the EPA's Failure to Act on Care's Petition Does Constitute a "Constructive Determination" of Compliance, It Does Not Fall Under the Purview of Jurisdiction Granted by Section 6976(b)(2) of the RCRA.

RCRA § 6976 allows for judicial review of an EPA Administrator's actions in "granting, denying, or withdrawing" authorization of an approved state hazardous waste program. 42 U.S.C. § 6976(b)(2) (2006). Even if the EPA's inaction regarding CARE's petition is found to be a constructive determination that New Union's program remains in compliance, such determination does not fall under any of the classifications set out in section 6976 of the RCRA. The EPA certainly would not be "withdrawing" or "denying" New Union's authorization through its inaction. Further, by "constructively determining" that the Program remains in compliance, the EPA would not be "granting" authorization to New Union's Program. This was done in 1986 when the EPA initially approved New Union's Program. Rec. doc. 2, p. 1. Therefore, because the "actions" taken by the EPA do not fall under any of the categories set out in RCRA § 7006(b)(2), this Court does not have jurisdiction for judicial review.

IV. Assuming Jurisdiction Exists and the EPA's Failure to Act Was a "Constructive Denial" of the Petition and "Constructive Determination" of Compliance, This Court Should Remand and Allow the EPA to Conduct a Proper Withdrawal Proceeding Pursuant to the RCRA in Accordance with the Will of Congress.

Even if it is determined that the inaction by the EPA was a constructive denial of CARE's petition/constructive determination that New Union's Program remains in compliance, and that either the District Court or this Court has jurisdiction, the case should still be remanded to the

District Court so that it can order the EPA to conduct the appropriate proceedings to consider withdrawal of its approval of New Union's program.

The RCRA sets out a very specific procedure that must be followed when considering the withdrawal of EPA approval of a state hazardous waste program. Before withdrawing EPA approval of a state program, the Administrator must first conduct a public hearing to determine if the state program is meeting the federally mandated requirements. 42 U.S.C. § 6926(e) (2006). If after the hearing the Administrator finds that the state is not conducting its program in accordance with the requirements set forth in the RCRA, the Administrator will notify the state. *Id.* The state in violation must then take corrective action within a reasonable time, not to exceed 90 days. *Id.* If such action is not taken, the Administrator is required to withdraw authorization of the program and establish a federal program in accordance with the RCRA. *Id.* The statute makes it clear that such withdrawal is not appropriate unless the Administrator first notifies the state, and makes public in writing the reasons for such withdrawal. *Id.* However, such withdrawal of approval shall cease to be effective once it is determined that the state program once again meets the minimum requirements. 42 U.S.C. § 6947(c) (2006).

The statute undoubtedly sets out Congress' desire that a very particular procedure be followed before authorization of an approved hazardous waste program can be revoked. The withdrawal procedure in the RCRA shows the preference of Congress for individual states to regulate their own hazardous waste programs in lieu of the federal program. Furthermore, even when a state is in violation, the notice and opportunity to cure conditions give the state an opportunity to bring its program up to compliance prior to the EPA taking over.

The precise steps that must be taken to revoke an approved state program's authorization show that it would be an inappropriate remedy for this Court to conduct a judicial review of the

EPA's constructive actions to determine the validity of New Union's program. The proper remedy is to follow the above procedure set out in the RCRA, insuring that congressional intent is carried out. Consequently, this Court must remand the case, rather than lift its stay and proceed with judicial review, so that New Union's program can be examined in the appropriate manner.

2. Substantive Issues

I. Withdrawal of EPA Approval of New Union's Program Is Not Appropriate Because the EPA Has Not Seen Fit to Initiate Withdrawal Proceeding and the Court Should Give Deference to EPA's Discretionary Functions

Under section 6926(a) of the RCRA, Congress gave the EPA authority to regulate landfills for solid waste. 42 U.S.C. § 6926(a) (2006). States are permitted to operate their own hazardous waste disposal programs and issue permits to dispose of waste "in lieu of the Federal program" under subsection III of RCRA upon the following conditions: (1) EPA approval of the program; and (2) a finding that it is equivalent to and consistent with the federal program. 42 U.S.C. § 6926(b) (2006). Furthermore, under the statute, the EPA is required to revise guidelines for state plans after consulting with federal, states, and local authorities every three years. *Id.* When a state program fails to comply with RCRA requirements, the EPA is authorized to withdraw state program approval as well as enforce against permit violations. 42 U.S.C. §§ 6926(e)-6928(a)(1) (2006). The EPA has complete oversight of the states with authorized programs, even though the program is said to operate in lieu of the federal program. *United States v. Elias*, 269 F.3d 1003, 1009 (9th Cir. 2001); *United States v. Power Eng'g Co.,* 191 F.3d 1224, 1229 (10th Cir. 2002); *Ashoff v. City of Ukiah*, 130 F.3d 409, 411 (9th Cir.1997). Therefore, the EPA retains some regulatory power over both violations of permit holders within an authorized state program as well as the state's implementation of the program itself.

A. The Court Should Uphold EPA's Interpretation of the Word "Program" Because the EPA's Interpretation Is Reasonable.

The word "program" in the statute has been held ambiguous because it can mean the entire enforcement procedures of a program or only the permit approval process. *United States v. Power Eng'g Co.*, 191 F.3d at 1229 (10th Cir. 2002). The EPA reasons that the word "program" in the statute "refers only to the administration of the regulatory program, and not to enforcement." *Id*. When there is an ambiguity in a statute, the court must first look to see if Congress has directly spoken on the issue, and if not, the court defers to the agency's determination. *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). If the EPA's interpretation is reasonable, the court will uphold it. *Id*. This rationale is supported by the wording of the statute which placed "administration of authorized state programs and the enforcement of state regulations [. . .] in separate clauses of the relevant sentence: [An authorized] State is authorized to carry out [its] program in lieu of the Federal program under this subchapter in such State *and* to issue and enforce permits for the storage, treatment, or disposal of hazardous waste." *Power Eng'g Co*., 191 F.3d 1224, 1228 (10th Cir. 2002) (citing 42 U.S.C. § 6926(b)). Because "in lieu of" is in the first clause and not the second, the language of the statute can reasonably mean, "the state is authorized to carry out its program in lieu of the federal program, and that the state is authorized to issue and enforce permits." *Id*. Therefore, if "enforcement were considered part of carrying out a program, the second clause would be superfluous, and [the court] cannot 'construe a statute in a way that renders 'words or phrases meaningless, redundant, or superfluous.'" *Id*. (quoting *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262, 1272 (10th Cir. 2000)). Because the court found that there was a reasonable basis for the EPA's interpretation, the court should uphold the EPA's interpretation of the word "program." Therefore, when the EPA steps in to bring enforcement actions in New Union, New

Union still has a program that operates "in lieu of" the federal program, but the EPA is merely enforcing New Union's program.

B. It Is the Province of the EPA to Determine the Sufficiency of New Union's Authorized State Program.

In 1986, the EPA approved New Union's proposed program for hazardous waste disposal and found that the New Union DEP had adequate resources to fully administer and enforce New Union's hazardous waste program. Rec. doc. 2, p. 1. The EPA is in the best position to determine if New Union's program continues to meet the EPA's criteria. The EPA has been apprised of information from New Union detailing the implementation of the plan, and the EPA also has access to information involving plans in other states. The statute requires that any state's authorized program be "equivalent" and "consistent with" the federal plan, but the federal government retains enforcement authority both civilly and criminally. *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 43–46 (1st Cir. 1991); *Elias*, 269 F.3d at 1009 (9th Cir. 2001). New Union has taken fewer enforcement actions in the previous few years and CARE asserts that this is a sign that New Union's diminished funding has caused the program to be poorly operated and ineffective. Rec. at 5. However, while New Union has taken fewer enforcement actions as funds have decreased, the EPA has authority to intervene, and in fact has intervened, to help New Union enforce the state's plan. Rec. doc. 5 for 2009, p. 26. The statute contemplates that a state authorized program ceases to be equivalent and consistent with the federal plan when a state that is not enforcing or administering a program authorized as under the statute.

In contrast, here, New Union is attempting to both administer and enforce an authorized program while the EPA is merely helping to enforce a valid program. The plan's goals and methods are equivalent to and consistent with the federal plan and New Union is actively trying

to enforce its valid plan, even though they lack funding to enforce the plan fully. The record shows that New Union has taken numerous enforcement actions in the previous years. Rec. doc. 5 for 2009, p. 25. While the EPA has taken some enforcement actions within the state, the number taken by the EPA has not so exceeded the number taken by New Union such as to render New Union's action ineffective. Finally, because it is appropriate for the EPA to take enforcement actions in New Union, if the EPA were to take more enforcement actions and allow New Union's DEP to perform all inspections, New Union's approved program could be more adequately administered.

Certainly, New Union has issued fewer permits as its funds have diminished. However, New Union has prioritized the most dangerous and important types of facilities and hazardous waste and addressed those permits first. Rec. doc. 5 for 2009, p. 20. This might not be the most ideal situation, but by not initiating proceedings to withdraw approval of New Union's program, the EPA is acknowledging that this solution is in compliance with the statutory requirements of a state program's authorization. Further, the EPA's failure to withdraw approval of New Union's program indicates that the program remains in compliance despite diminished funds. While the EPA noted that the plan might not be able to be implemented if New Union's resources diminished, New Union has continually fulfilled its obligation to present detailed reports to the EPA to prove that the plan/ implementation of the plan is in compliance with the EPA's criteria. Rec. doc. 5. The EPA has not pointed out that New Union's diminished resources have failed to comply. Therefore, New Union is under no notice that the plan's implementation might be inadequate. As aforementioned, notice of any noncompliance and time to remedy if the EPA finds a problem with the plan is imperative under the statute if withdrawal of approval is imminent.

Furthermore, under section 6926(e) of the RCRA, the EPA does not have to continually re-authorize a state's program. Rather, the state is required to continually inform the EPA of the status of the program, and if the EPA Administrator finds that the state's program is no longer in compliance, he is then required to give the state notice and time to correct before withdrawing approval. 42 U.S.C. § 6926(e) (2006). This action is entirely up to the EPA's discretion.

The EPA is not only alerted to New Union's program, but also other state's programs and the federal program. The best party to compare these various programs for consistency and equivalency to federal programs is the EPA. The EPA approval of state programs are given greater deference because, in granting approval for a state program, they are interpreting and administering their own statute with formality, care, consistency, and expertness. There is no indication that the EPA did not exercise the same formality, care, consistency and expertness when it approved New Union's program in 1986. At that time, the EPA approved the program after the statutory comment period and by input from agency experts. *United States v. Mead Corp.,* 533 U.S. 218, 228 (2001). Further, agency interpretations merit some deference, even when not rulemaking, because of the "specialized experience and broader investigations and information" that the agency has available to review. *Skidmore v. Swift & Co.,* 323 U.S. 134, 139 (5th Cir. 1944). Therefore, the EPA's determination that New Union's program is equivalent to and consistent with the federal program is binding on the court unless the court finds that it is an arbitrary, capricious and unreasonable decision. Here, the EPA has examined reports thoroughly and is keenly aware of the developments with respect to New Union's authorized state program. Therefore, the decision to uphold New Union's plan is neither arbitrary nor capricious and is based on reason. *Levesque v. Block*, 723 F.2d 175, 181-82 (1st Cir. 1983).

C. Notice of Insufficiency of a State Authorized Program is Mandatory Under the RCRA Before Procedures to Withdraw Authorization May Be Initiated.

While re-approval is not necessary, the EPA is required to give New Union notice that its program is no longer in compliance with federal guidelines and give time to cure deficiencies. 42 U.S.C. § 6926(e) (2006). When construing a statute, the Supreme Court has held that the "word 'shall' is ordinarily 'the language of command,'" and not of discretion. *Alabama v. Bozeman,* 533 U.S. 146, 153 (2001) (*quoting Anderson v. Yungkau*, 329 U.S. 482 (1947), 485; *see also Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)). Furthermore, section 6947(a) of the RCRA mandates that the EPA take certain actions by using the term "shall" as when the statute says that the "EPA Administrator shall, within six months after a State [solid waste management plan] has been submitted for approval, approve or disapprove the plan." 42 U.S.C. § 6947(a) (2006). This use of the word "shall" clearly shows that the EPA must take a specific action of approval or disapproval; using the word "may" in this situation would allow the EPA to take no action, thus leaving the state's plan with neither approval or disapproval. Here the use of the term "shall" clearly means that the EPA must take some action and words used throughout the statute are taken to have the same meaning throughout. *Merrill Lynch v. Dabit*, 547 U.S. 71 (2006); *IBP Inc. v. Alvarez*, 546 U.S. 21 (2005); *Cohen v. De La Cruz*, 523 U.S. 213 (1998). Therefore, "shall" is also a mandatory term here, requiring the EPA to give a notice to New Union before withdrawing authorization.

If the EPA determines that New Union's plan is no longer in compliance and gives notice, New Union is entitled to a hearing and time to cure the alleged defect in the authorized state program. 42 U.S.C. § 6926 (2006). In this case, should a hearing take place, New Union has the ability to remedy its lack of funds in that it can request grant money from the EPA and the EPA is authorized to deliver such a grant. The RCRA allows the EPA to give grants to states

when they implement programs to dispose of hazardous waste. 42 U.S.C. § 6916 (2006). A grant would allow New Union to remedy any problems that the EPA might find with the implementation of New Union's hazardous waste disposal plan without the burden of developing a new plan and seeking EPA approval again. Further, if New Union does not have the funds to adequately enforce the plan that it has already created, it is unlikely that New Union will have the funds to develop and implement a new plan that is in accordance within RCRA criteria. The EPA has grant programs for the Clean Water Act as well and provisions such as these have allowed for clean water programs to be carried out sufficiently. 33 U.S.C. § 1256 (2006). The EPA's approval of a state program only suspends the federal program in that state, but this does not mean that the EPA is not authorized to continue to give grants under RCRA. This helps the EPA achieve solid waste disposal goals when states cannot afford to carry out aspects of approved programs, without the EPA using extensive measures to implement plans in every state. When Congress developed the Clean Water Act, it provided billions of dollars to build treatment plants for sewage and to subsidize state pollution-control agencies. 33 U.S.C. §§ 1256, 1287, 1288(f) (2006). The state pollution-control agencies subsidized under the Clean Water Act also operate similarly to the state pollution-control agencies set out in RCRA. Therefore, subsidizing the RCRA agencies is equally useful. To execute a plan such as the RCRA, which is similarly as expansive, Congress should make the same or similar financial concessions. This way, the plans developed by the states could be implemented in a way that will meet the EPA requirements.

Therefore, even though New Union's funds have diminished, the EPA approved solid waste disposal plan can still be implemented because the EPA can aid New Union in the implementation and enforcement the plan. Furthermore, if the EPA finds that New Union's

diminished funds have made the plan less than equivalent to the Federal plan and gives New Union notice of noncompliance, New Union can ask the EPA for a grant to facilitate the plan. Therefore, removing the EPA's approval from New Union's plan is not the appropriate remedy under these circumstances and is certainly not required.

II. New Union's Changes Within It's Authorized State Program Do Not Render the Program Insufficient Under the RCRA and Do Not Mandate EPA Withdrawal of Approval.

The provisions of the RCRA, regulations passed down by the EPA with regard to authorized state programs and judicial interpretations of the RCRA contemplate certain variations among state authorized programs. Regulations contained in the Code of Federal Regulations contemplate a permissible transfer of agency authority to another in-state agency without rendering an authorized state program inconsistent or inequivalent with a federal program. Courts have held, with respect to authorized state programs, that the Federal government retains its civil and criminal enforcement powers. Thus, a state's decision to waive certain criminal sanction does not deprive the EPA from enforcing those criminal sanctions and thus, does not render an authorized state program insufficient under the RCRA.

A. New Union's Transfer of Regulatory Power to the New Union Railroad Commission Is a Permissible Transfer of Authority and Does Not Render New Union's Program Insufficient Under the RCRA.

The Environmental Regulatory Adjustment Act (ERAA), passed by the New Union legislature in 200, transferred regulatory authority for any railroad operations in the state from New Union's DEP to the New Union Railroad Commission. Rec. doc. 5 for 2000, pp. 103-105. CARE contends that this essentially removed railroads in New Union from regulation under the state authorized program. Rec. at 5. However, the ERAA merely transfers railroad hazardous waste oversight to a different in-state agency. Rec. doc. 5 for 2000, pp. 103-105. According to 40

C.F.R. § 271.21(d), "[s]tates with approved programs shall notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and shall identify any new division of responsibilities among the agencies involved." 40 C.F.R. § 271.21(d) (2010). Thus, the EPA contemplates and permits the transfer of agency authority and regulation to another in-state agency. It follows that it is permissible for New Union's DEP to transfer regulations of hazardous waste disposal to the New Union Railroad Commission rather than leave the entire hazardous waste program under DEP administration. Thus, the 2000 Environmental Regulatory Adjustment Act (the "ERAA") amended the Railroad Regulation Act by "transferring 'all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statues to the Commission," was a valid transfer of authority if the EPA is notified as to the changes. Rec. doc. 5 for 2000, pp. 103-105. New Union was required to notify the EPA of the transfer of responsibility. If this transfer is approved by the EPA, it will be permissible. Approval of this transfer is within the scope of the EPA's discretion and, as such, should be upheld by the court, unless arbitrary. *Levesque v. Block*, 723 F.2d 175, 181-82 (1st Cir. 1983).

When Congress passed the RCRA and the provision allowing for states to submit their own hazardous waste plans for approval, it allowed the EPA to retain enforcement authority in approved states. *Wyckoff Co. v. Environmental Protection Agency*, 796 F.2d 1197 (9th Cir. 1986). Thus, the EPA will continue to oversee New Union Railroad Commission as the state agency enforcing the state approved plan. While New Union's ERAA shifts railroad environmental oversight to a different agency, it does not stop regulating the railroad's environmental issues. Rec. doc. 5 for 2000, pp. 103-105. New Union merely affected a shift in

regulatory authority while remaining within the oversight of the EPA. Therefore, the plan is in compliance with EPA requirements.

Furthermore, even if the court or the EPA find that the transfer of authority is not permissible, the EPA is still required to give notice to New Union so that New Union has a period to remedy any defect caused by the transfer of authority. 42 U.S.C § 6926(e) (2006); 40 C.F.R. § 271.21 (2010). The notice and time to cure requirement is consistent throughout, not only RCRA, but the Code of Federal Regulations as well. Therefore, even if the EPA decides that the transfer of authority is not approved, New Union has time to cure. For this reason, removing EPA authorization is not the appropriate remedy until New Union has had the opportunity to amend the decision so that it complies with RCRA and EPA requirements.

B. New Union's Waiver of Criminal Sanctions Within New Union's Authorized State Program Does Not Render the Program Insufficient Under the RCRA.

The waiver of criminal sanctions within New Union's approved program does not render the program inequivalent with the federal program. Courts have concluded that "under RCRA, the federal government retains both its criminal and its civil enforcement powers." *United States v. Elias*, 269 F.3d 1003 (2001). Therefore, while New Union might have waived its authority to seek criminal penalties under its EPA approved plan, the EPA still retains authority to criminally prosecute offenders. However, this does not render the "in lieu of" language in § 6926(b) in the RCRA meaningless, because when "the EPA authorizes a state program pursuant to § 6926(b): (1) the EPA ceases issuing permits pursuant to its permit program; (2) the EPA's regulations [. . .] are supplanted; and (3) the state assumes its position as the primary enforcement authority." *United States v. Flanagan*, 126 F. Supp. 2d 1284, 1292 (C.D. Cal. 2000). Therefore, while New Union's plan might not be equivalent to the federal plan in punishment, the requirements for permits are equivalent and the EPA retains power to impose criminal sanctions.

The EPA retains opportunities to enforce compliance in states with hazardous waste disposal programs authorized under section 6926(d) of the RCRA. 42 U.S.C. § 6926(d) (2006). Courts have held this to be true in cases where the court determined that, even though the state had a system in place to enforce violations, the EPA could enforce against violations where the state had failed to do so. *Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 901 (8th Cir. 1999). This ruling is consistent with the legislative history of RCRA reflected by a House report, which specifically states that even when "legislation permits the states to take the lead in the enforcement of the hazardous waste laws [. . .] the [EPA] Administrator is not prohibited from acting in those cases where the state fails to act." H.R. Rep. 94-1491 (1976) *reprinted at* 1976 U.S.C.C.A.N. 6269. Therefore, while New Union's ERAA might remove criminal disciplinary punishment from the purview of New Union's DEP, the EPA still retains authority to pursue a criminal action if it feels that a civil action might not be appropriate. When the state fails to take an enforcement action, the EPA will be able to do so. *Harmon Industries, Inc.*, F.3d at 901. The only limitation is the preclusion of EPA from duplicating a state enforcement action. Since New Union waived criminal penalties, the EPA will not be duplicating any enforcement action by pursuing criminal punishment in New Union. *Id*.

As previously stated, the word "program" in the statute is ambiguous it can be defined as the enforcement procedures and permit administration or merely the permit administration. *United States v. Power Eng'g Co.*, 191 F.3d 1224 (10th Cir. 2002). The EPA reasons that the word "program" in the statute means that the state permit requirements only replace federal permit requirements. *Id*. When there is an ambiguity in a statute, the court must first look to see if Congress has directly spoken on the issue, and if not, the court defers to the agency's determination. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-44

(1984). The court should uphold a reasonable agency interpretation. *Id*. This rationale is supported by the wording of the statute which placed "administration of authorized state programs and the enforcement of state regulations [. . .] in separate clauses of the relevant sentence." *Power Eng'g Co.,* 191 F.3d 1224, 1228 (10th Cir. 2002) (citing 42 U.S.C. § 6926(b)). The EPA's determination has been found reasonable on this basis by previous courts. *Id*. Because the court found that there was a reasonable basis for the EPA's interpretation, the court should uphold the EPA's interpretation of the word "program." According to the EPA then, the enforcement procedures and the lack of criminal sanctions do not make a state's program nonequivalent and removal of the EPA's approval for New Union's program is not appropriate. Withdrawing authorization "for a state program is an 'extreme' and 'drastic' step that requires the EPA to establish a federal program to replace the cancelled state program. *Id*. (*citing Waste Mgmt., Inc., v. E.P.A.*, 714 F. Supp. 340, 341 (N.D. Ill. 1989)).

III. New Union's ERAA Does Not Unreasonably Restrict, Impede or Operate As a Ban on the Free Movement of Hazardous Wastes Across the State Border in Violation of the Commerce Clause.

The EPA has set out certain circumstances in which an authorized state program becomes inconsistent with the federal program. 40 C.F.R. § 271.4(a) states that "[a]ny aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other states for treatment, storage or disposal at facilities authorized to operated under [. . .] an approved State program shall be deemed inconsistent." 40 C.F.R. § 271.4(a) (2010). The EPA has stated that it "intended 'unreasonable restrictions or impediments' to render State programs consistent.' 50 Fed. Reg. 46438 (Nov. 8, 1985). Furthermore, if a state impedes on interstate commerce to a significant degree, it could violate the commerce clause of the United States Constitution. U.S. Const., Art. I

§ 8, cl. 3. If a state's challenged statute 'clearly discriminate[s] against interstate commerce,' [. . .] the court must strike it down, 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Hazardous Waste Treatment Council v. South Carolina,* 945 F.2d 781, 790 (4th Cir. 1991) (citing *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988)).

In *Sprohase*, the Supreme Court reviewed a Nebraska statute that restricted intrastate transportation of ground water in order to preserve a water supply for Nebraska residents. *Sporhase v. Nebraska*, 458 U.S. 941, 941 (1982). The Nebraska statute also required that any state in which received ground water, must have a reciprocity agreement with Nebraska so as to have similar ground water requirements, transfers, and regulations. *Id*. 942. The Court found that the state had "legitimate reasons for the special treatment accorded requests to transport ground water across state lines." *Id*. at 955. Further, the Court opined that "a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the state." *Id*. However, the Court did find that Nebraska's reciprocity requirement for interstate water transfers was a burden on the flow of commerce that should be overturned. *Id*. The reciprocity requirement meant that some states were entirely incapable of receiving ground water from Nebraska. *Id*. The Court upheld the portion of the Nebraska law, which restricted use and transfers of water by Nebraska residents. Therefore, the Court held that the impact on interstate commerce was not substantial and was justified. *Id*. Conversely, the Court found that the reciprocity requirement for trading with other states did have a significant impact on interstate commerce that could not be justified, so the Court found that portion of the law in violation of the Commerce Clause, and, therefore, unconstitutional. *Id*.

New Union's regulation on transportation of Pollutant X is only unconstitutional if the requirements are not "demonstrably justified by a valid factor." *Hazardous Waste Treatment Council,* 945 F.2d at 790 (4th Cir. 1991). New Union's ERAA regulations on Pollutant X are much more analogous to the portion of the Nebraska ground water regulation restricting use and transfers by Nebraska residents (which the Court upheld) than the restrictions which completely precluded certain states from acquiring water from Nebraska (which the Court overturned). Furthermore, the Supreme Court has generally accepted some interstate commerce discrimination when the regulation is focused on the prevention of death or disease. *Id*. New Union's revision to its hazardous waste program has clear, justifiable reasons for limiting the transportation of Pollutant X. (Rec. doc. 5 for 2000, pp. 105-107). New Union seeks to protect its citizens due to the highly toxic nature of Pollutant X and recognizes the problems associated with disposing of Pollutant X, as there are very few disposal facilities. *Id*. CARE also has to prove that the restraints on the transportation of Pollutant X are overly burdensome and onerous such that they impede on interstate commerce. CARE cannot carry this burden. Pollutant X can be transferred across borders to safe disposal facilities, but this transportation is highly regulated and is required to be swift, with few stops. *Id*. Additionally, because of the Pollutant X's highly dangerous nature, it is likely that the Supreme Court would be even more likely to uphold New Union's decision to restrict transportation of Pollutant X. New Union's ERAA restrictions on transportation do not preclude interstate commerce or favor certain states in the manner of Nebraska's reciprocity requirement. Instead, the ERAA merely assures that transportation of Pollutant X is somewhat restricted so as to make the transfers safer and more efficient.

Similarly, the EPA's approval of New Union's program should not be removed because the EPA is the ultimate arbiter of the meaning of the term "equivalent" and whether or not New

Union's program is actually equivalent to the federal program. As previously discussed, the EPA's interpretation and application of the RCRA should be given deference and upheld by the court unless arbitrary. *Levesque v. Block*, 723 F.2d 175, 181-82 (1st Cir. 1983). The EPA has reviewed New Union's program and rendered it equivalent to and consistent with the federal program and that determination should be upheld. It is within the EPA's discretion to make this determination and that discretion should be given due deference by this Court.

CONCLUSION

In conclusion, the District Court does not have jurisdiction based on section 6972(a) of the RCRA or 28 U.S.C. § 1331 to order the EPA to act on CARE's petition because the initial approval granted by the EPA to New Union was an order and not a rule. In addition, the EPA's inaction regarding CARE's petition was not a constructive determination of any kind. But even if it was, this case still must be remanded so that the EPA can follow the proper withdrawal procedure set out RCRA.

Moreover, assuming that this Court has jurisdiction, removing the EPA's approval from New Union's program is not appropriate. It is ultimately the province of the EPA in its discretion to determine if an authorized state program no longer meets RCRA requirements. Even if the EPA finds that a defect exists, the state and the EPA have many avenues available to them to cure the problem. Therefore, removing the EPA's approval in this Court is not the correct remedy.