Team No. 45

C.A. No. 18-2010

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-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 **THE STATE OF NEW UNION,**
Intervenor-Appellee-Cross Appellant

Oral Argument Requested

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JURISDICTIONAL STATEMENT

Federal district courts have original jurisdiction over civil action arising under the laws of the United States, including the Administrative Procedure Act ("APA") 5 U.S.C. § 553 and the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. § 6901 *et seq.* 28 U.S.C. § 1331(2006). The Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from final decisions of the District Court of New Union. 28 U.S.C. § 1291, 1294(1)(2006).

STATEMENT OF ISSUES

I. Whether the EPA took discretionary action when deciding not to revoke New Union's hazardous waste program by issuing an order which gave rise to the application of the APA in granting judicial review to the courts of appeals and would preclude jurisdiction of the district courts.

ANSWER: Yes.

II. Whether the district court properly granted New Union's motion for summary judgment where the court determined that judicial review of EPA's RCRA § 3006 state authorization is granted to the court of appeals by RCRA § 7006, not to the district court under 28 U.S.C. § 1331.

ANSWER: Yes.

III. Whether the EPA's failure to respond to CARE's petition was a "constructive action" where the EPA was not required to respond to a petition to withdraw state authorization.

ANSWER: Yes.

IV. Whether the district court would have proper jurisdiction to determine a federal question of whether the EPA was required to act, and if so, to issue an order for the EPA to act.

ANSWER: Yes.

V. Whether the EPA, if compelled to act, must proceed under statutory guidelines set forth under RCRA § 3006 before withdrawing authorization where EPA has authorization to enforce federal standards in the interim period.

ANSWER: Yes.

VI. Whether the EPA is compelled to withdraw approval of a state program that does not regulate railroad hazardous waste where 49 U.S.C. §§ 5101-5128 grants the Secretary of Transportation sole authority to regulate transportation of hazardous waste.

ANSWER: Yes.

VII. Whether New Union's 2000 Environmental Regulatory Adjustment Act should retain EPA approval where the program did not adversely affect the equivalency of the state's authorized program to the federal program, was consistent with the federal and other state programs, and was consistent with the Commerce Clause.

ANSWER: Yes.

STATEMENT OF THE CASE

On January 5, 2009, the Citizen Advocates for Regulation and the Environment, Inc., ("CARE") petitioned the Administrator of the Environmental Protection Agency ("EPA") to withdraw its approval of New Unions hazardous waste recovery regulatory program. (Record at 4). On January 4, 2010, CARE filed suit in the United States District Court for the District of New Union seeking an injunction to require the EPA to act on the petition or judicial review of the constructive denial. (R. at 4). New Union was granted the right to intervene. (R. at 4). CARE simultaneously filed a complaint with the court of appeals seeking judicial review of EPA's constructive denial. (R. at 5). Again, New Union was granted the right to intervene. (R. at 5).

On June 2, 2010, the district court issued an order denying CARE's motion for summary judgment and granting New Union's motion for summary judgment. (R. at 9). The district court held that: (1) EPA's approval or disapproval of New Union's program was an order and is not subject to petition under § 7004 of RCRA (R. at 7); (2) the petition is time barred by the statute of limitations (R. at 7); (3) the court did not have federal question jurisdiction under 28 U.S.C. § 1331 (R. at 8); and (4) jurisdiction for review of EPA action lies in the court of appeals. (R. at 8).

CARE filed an appeal from the district court's decision. (R. at 1). CARE appeals the district court's dismissal for lack of jurisdiction under 42 U.S.C. § 6976(b) or 28 U.S.C. § 1331. (R. at 1). CARE also seeks to consolidate the district court case with the action it filed with the court of appeals on January 4, 2010, C.A. No. 18-2010. (R. at 1). The EPA appeals the district court's decision regarding lack of jurisdiction under 42 U.S.C. § 6976(b) (R. at 1). EPA and New Union also challenge the request to consolidate the two cases. (R. at 2). New Union requests that this court affirm the district courts decision to dismiss CARE's claim for lack of jurisdiction. (R. at 2). This Court granted review on September 29, 2010. (R. at 3).

STATEMENT OF THE FACTS

In 1986, the EPA approved the state of New Union's hazardous waste program, finding that the state's Department of Environmental Protection ("DEP") had sufficient resources for the program. (R. at 10). Administration and enforcement included issuing permits in a "timely fashion, biannual inspections of RCRA regulated facilities, and acting on any significant violation." (R. at 10). On January 5, 2009, the Citizen Advocates for Regulation and the Environment (CARE) petitioned the Administer of the EPA to withdrawal its 1986 approval of New Union's hazardous waste recovery regulatory program, claiming that the state's program no longer met the requirements for EPA approval. (R. at 4).

Since 1986, full-time employees devoted to the program have decreased, while the number of Treatment, Storage and Disposal facilities ("TSDs") in the state have increased. (R. at 10). While the increase in TSDs has occurred gradually since 1986, the decrease in jobs devoted to the program has mostly only occurred since 2000. (R. at 10). New Union has stated that the decrease since 2000 corresponded with several other decreases in resources that the state commits to other public health regulatory programs due to a decline in the finances available to the state. (R. at 10). Further, in its 2009 Annual Review, New Union reported that the Governor instituted a freeze on hiring state employees, which precluded DEP from filling any of its vacancies and, according to the Governor's Director of Budget, is likely to remain in force for the next two years. (R. at 10).

New Union has prioritized the issuance of permits in order to increase the program's efficiency. (R. at 11). The state has also prioritized its inspection program where reduction in resources has required giving precedence to "inspecting facilities that have reported unpermitted releases of hazardous waste into the environment and to facilities reporting other violations

posing the greatest potential for harm to the public health or the environment because of the volume or toxicity of the hazardous waste they are permitted to handle." (R. at 11). Additionally, the EPA has been recruited to help expedite the inspection and enforcement processes. (R. at 11).

In 2000, New Union passed the 2000 Environmental Regulatory Adjustment Act (the "ERAA"). (R. at 11). The act contained a series of amendments to environmental and other legislation including the Railroad Regulation Act (the "RRA") and the state hazardous waste program. (R. at 11). The ERAA transferred "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the [Union Railroad] Commission." (R. at 12). Further, the state could no longer impose criminal sanctions for violation of environmental regulations on "facilities falling under the jurisdiction of the commission. (R. at 12).

The amendment to New Union's hazardous waste program contained several provisions relating to the regulation of Pollutant X because the EPA and the World Health Organization recognized Pollutant X "to be among the most potent and toxic chemicals to public health and the environment." (R. at 12). The amendment, first, requires every facility within the state that generates the pollutant to submit a plan for reduction within the next ninety days, and to submit an annual report subsequently to show the progress of the plan until Pollutant X is no longer generated. (R. at 12). Second, the amendment limits the number of days the pollutant may remain within the state to 120 days, after which it should be transported to a facility outside of the state that is authorized and designed for the treatment and disposal of Pollutant X. (R. at 12). Finally, the Amendment requires that transportation of Pollutant X through or out of the state must be "as direct and fast as is reasonably possible, with no stops within the state except for

emergencies and necessary refueling." (R. at 12). On January 4, 2009, less than a year after CARE filed its petition, CARE brought this action seeking an injunction compelling the EPA to respond to the petition, or for judicial review of EPA's constructive denial of the petition. (R. at 4). CARE also brought a simultaneous claim in the court of appeals, C.A. no. 18-2010, for judicial review of the same matter, which was stayed pending the decision in this action. (R. at 4-5). New union filed motions to intervene, which were granted in both cases. (R. at 5).

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 Appellants' claims under RCRA and APA must be reviewed *de novo*.

SUMMARY OF THE ARGUMENT

The district court was correct in its determination that it did not have jurisdiction under RCRA § 7002 to order the EPA to act on CARE's petition to withdraw New Union's hazardous waste program. The issuance of New Union's permit is an order by EPA and not a regulation; therefore it does not fall under RCRA's petition provision. The petition falls under the APA and is reviewable only in the court of appeals. Additionally, the issuance of New Union's permit occurred in 1986, and the petition exceeds the ninety-day statute of limitations.

The district court was correct in determining that it did not have federal question jurisdiction under § 1331 to compel the EPA to act on CARE's petition. Because the petition is on an order, and not a regulation, the APA controls. The APA gives interested parties a right to petition, but does not require that the EPA act on such a petition.

EPA's failure to respond to CARE's petition was not a "constructive denial" of the petition or a constructive determination that New Union's program remained in compliance with RCRA's standards because EPA had no duty to respond to the petition under the APA. Were this a determination that New Union's programs continued to meet the guidelines, it would only be a determination *not* to withdraw authorization, which is not the "amendment" or "denial" of a permit required by RCRA for judicial review. Further, even if the EPA were required to respond, RCRA provides that they must be allowed a reasonable time. This action was brought in under a year, which is not sufficient time for any meaningful response from an overburdened agency.

If the EPA was required to respond to CARE's petition, review of EPA's "constructive denial" of the petition would be properly remanded to the district court to order the EPA to initiate withdrawal procedures. The EPA is obligated to follow certain procedures when withdrawing state authorizations. These procedures require publication and opportunity for

public comments, as well as notice under RCRA and the APA. Judicial review in this court would prevent any opportunity for New Union to take corrective measures and would defy the intent of RCRA.

The EPA is not required to withdraw its approval of New Union's hazardous waste program. Not only is the EPA required to give New Union an opportunity to take corrective measures, if it finds that that New Union is not in compliance with RCRA standards, the EPA may overfile in order to enforce those standards. Withdrawal is an avenue of last-resort, after the agency has exhausted all other options.

The EPA need not withdraw authorization of New Union's program simply because the ERAA does not regulate railroad hazardous waste. In 1994, the Hazardous Materials Transportation Act gave exclusive power to the Secretary of Transportation to regulate railroad facilities. Therefore, the ERAA does not have a substantial impact on New Union's ability to regulate such facilities.

Finally, EPA is not required to withdraw authorization of New Union's program due to the amendments in the ERAA regarding Pollutant X because the amendments do not violate the Commerce Clause. States are permitted to have stricter standards than EPA and these provisions are consistent with the federal program. The state had legitimate concern to enact an amendment providing for reporting and reducing the generation of Pollutant X, as well as providing restrictions on storage and proper transportation since Pollutant X has been found to be among "the most potent and toxic chemicals to public health and the environment." (R. at 12).

ARGUMENT

I. THE DISTRICT COURT DOES NOT HAVE JURISDICTION UNDER RCRA TO ORDER THE EPA TO REVOKE NEW UNION'S HAZARDOUS WASTE PROGRAM WHEN SUCH DETERMINATION FITS WITHIN THE DEFINITION OF AN ORDER UNDER THE APA AND THEREBY IMPOSES NO DUTY ON THE EPA TO ACT.

The district court does not have jurisdiction to procced with CARE's citizen suit to compel the EPA to take action. To give rise to district court jurisdiction under RCRA § 7002(a)(2) there must be a failure of the Administrator to take non-discretionary action. 42 U.S.C. § 6972. Under RCRA § 7004 there is a right to petition for rules, "[a]ny person may petition the Administrator for promulgation, amendment, or repeal of *any regulation* under this chapter [42 U.S.C. §§6901 *et seq.*]." 42 U.S.C. §6974(a) (emphasis added). Only when such a petition is brought to the Administrator of the EPA is a duty to respond imposed on the Administrator. "[W]ithin a reasoanble time following reciept of such petition, the Administrat*or shall take action* with respect to such petition." 42 U.S.C. § 6974(a) (emphasis added). Thus, there is a right to petition the EPA for rules and subsequently a right to compel the Administrator to act pursuant to such petitions via § 7002.

CARE petitioned the EPA on January 5, 2009 to withdraw its approval of New Union's hazardous waste program, CARE did not petition the EPA to promulgate, amend, or repeal of *any regulation.* (R. at 4). 42 U.S.C. § 6974(a). The approval of New Union's hazardous waste program was an order, not a rulemaking, thus it does not fall under RCRA § 7002. As defined by the APA an order is an action other than a rule, but *includes a permit*. *See* 5 U.S.C. §551(6) & (8) (emphasis added). The EPA's approval of New Unions permit was adjudicatory in nature applying to a specific circumstance falling under the definition of an order, not a general statement of policy of the agency which would be considered a rulemaking subject to RCRA §

7004. *See* 5 U.S.C. § 551(4). The district court was correct in recognizing that the EPA's approval of New Union's hazardous waste program was an order, rather than a rulemaking, thereby falling outside the meaning of a RCRA § 7004 petition.

Proper jurisdiction arises in the court of appeals. "Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any permit..., or (2) in granting, denying, or withdrawing authorization ... under section 6926 of this title ["State Authorization"], may be had by any interested person in the Circuit Court of Appeals ..." 42 U.S.C. § 6976(b). The district court does not have jurisidction to compel the EPA to act on CARE's petition.

A. The EPA's Approval Of New Union's Hazardous Waste Program Was An Order, Not A Rule, And Does Not Give Rise To District Court Jurisdiction Under RCRA § 7002.

The district court does not have jurisdiction under RCRA § 7002 because it requires agency action in relation to a rule, not an order. 42 U.S.C. § 6972. RCRA does not define the difference between a rule and an order. The terms order and rule are defined by the APA.

An order is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). Licensing is defined as "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." 5 U.S.C. § 551(8). And license "includes the whole or a part of an agency *permit*." 5 U.S.C. § 551(8) (emphasis added). Therefore, the EPA's granting of a permit to New Union to implement its own hazardous waste program was an order as defined by 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).

The distinction between the two statutory definitions is the effect on the parties involved. Adjudication, which precedes an order, involves specific individuals under specific circumstances with an immediate effect on the party subject to the adjudication. *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994). Rulemaking applies to a much broader class of people and is only applicable prospectively after the rule is applied. *See id.*; s*ee also Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) (the "central distinction" between rulemaking and adjudication is that rules have legal consequences "only for the future"). In addition, courts have looked at the "character of a proceeding, to determine whether it is a rule or an order." *New Mexico Envtl. Improvement Div. v. Thomas*, 789 F.2d 825, 829 (10th Cir. 1986).

There is not always a clear distinction between orders and rules in agency action. *See Trans Shuttle, Inc. v. Public Utilities Com'n of State*, 89 P.3d 398 (Colo. 2004). The APA definitions of rule and order are mutually exclusive, or in other words agency action must be an order, or it must be a rule, it cannot be both. *See* 5 U.S.C. § 551. In absence of clear distinctions between rules and orders courts look to: the conduct and effect of a proceeding, the purpose for which it was brought, and the product of agency action. *See Trans Shuttle*, 89 P.3d 398; *see American Airlines, Inc. v. Dept' of Transp.,* 202 F.3d 788 (5th Cir. 2000).

The EPA's action to approve New Union's hazardous waste program was an order, not a rule. The process to approve New Union's permit involved a specific party, New Union, and there was immediate effect, in 1986 after New Union met the statutory and regulatory

requirements. (R. at 5). The EPA was applying facts to law to determine if New Union met the criteria, it determined that New Union was in compliance and issued the permit. (R. at 5). The permit was not issued to a broad range of people with future effect. *See* 5 U.S.C. § 551(4).

The Fifth Circuit Court of Appeals distinguished between approval of a state implementation plan ("SIP") and the "rules" which were part of the state statutory plan. *Texas BCCA Appeal Group v. EPA*, 348 F.3d 93 (5th Cir. 2003). The court was reviewing EPA's approval of the state of Texas' SIP under the Clean Air Act, 42 U.S.C. §§ 7401-7671q, to reduce ozone levels. *Id.* The Fifth Circuit applied the § 551(4) definition of "rule" to the state's "enforceable commitments" and found that these were rules which "created specific rights, imposed specific obligations on, and was enforceable against" the state. *Id.* at 116. Thus, the statutory rules that outlined the authority for a state program were a separate question from the judicial review of the approval of the SIP, which was found to be an order. *Id.*

B. The Statute Of Limitations Has Expired.

Jurisdiction by the district courts is precluded in CARE's action because the action was brought after the statute of limitations expired. (R. at 7). As discussed above, judicial review of state hazardous waste program authorization is governed by RCRA §7006(b). 42 U.S.C. § 6976(b). Under the express terms of this statue, citizens are required to bring actions within ninety days of the "issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day." *Id.* CARE should have brought their action on the state's authorization within ninety days of the issuance which occurred in 1986, or within ninety days of the occurrence which caused them concern. Therefore, CARE's action is futile.

II. THE DISTRICT COURT DOES NOT HAVE INITIAL JURISDICTION ON CARE'S ACTION WHERE THE COURT OF APPEALS HAS INITIAL JURISDICTION TO REVIEW EPA'S AUTHORIZATION OF NEW UNION'S HAZARDOUS WASTE PROGRAM.

The district court does not have federal question jurisdiction under 28 U.S.C. §1331 to compel the EPA to act on CARE's petition for revocation of the approval of New Unions hazardous waste program. The APA requires that "[e]ach 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). However, there is no authority under the APA for the court to compel the EPA to act upon the petitions.

Generally, the rule is that the specific governs over the general. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-25 (1989). The general rule on petitions for rulemaking is found in the APA. 5 U.S.C. § 553(a). The more specific rule, and the one that CARE asserted its petition under, is RCRA § 7004. The APA does not require the agency to respond because § 553(e) only allows CARE to petition to the EPA in their rulemaking process. RCRA § 7004, on the other hand, has the additional requirement on the EPA to respond in a timely manner to the petition. The specific statute in question doesn't grant jurisdiction to the district court, but the court of appeals.

Under 28 U.S.C. § 1331, original jurisdiction is found in the district courts for "all civil actions arising under the Constitution, laws, or treaties of the United States." Determining jurisdiction begins with interpreting the applicable statute. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 735 (1985). In *Waste Management of Illinois, Inc. v. United States EPA*, 714 F. Supp. 340 (N.D. Ill. 1989), the court addressed the issue of whether § 1331 jurisdiction applies in cases where a more specific rule applies. The court determined that jurisdiction of the district court could be eliminated by a statute that applies more specifically than § 1331. *Waste*

Management, 714 F. Supp. at 345. The court found that RCRA § 7006 provided jurisdiction to the court of appeals in hearing citizen's actions challenging EPA regulations. *Id.* at 351. The district court determined that the statutory prescription for the action governed and transferred the matter to the court of appeals. *Id.* at 350-51.

The courts have dealt with jurisdictional issues of EPA authorization of state plans. "Judicial review of Administrator action in approving or disapproving a state plan is authorized before the Circuit Court of Appeals for the Circuit in which the state submitting the plan is located." *Appalachian Power Co. v. EPA*, 477 F.2d 495, 499 (4th Cir. 1973). The *Appalachian Power* court decided not to make a determination as to whether EPA's approval of a state program under the Clean Air Act was a judicial order or rulemaking (regulatory) function, but determined that jurisdiction belonged to the court of appeals. *Id.*. The language of RCRA § 7006 clearly grants jurisdiction to the court of appeals to hear CARE's action where the action is to review "the Administrator's action .... (2) in granting, denying or withdrawing authorization..." of a state's program. 42 U.S.C. § 6976(b). The *Appalachian Power* ruling fully supports the literal reading of this statute. *See Appalachian Power, supra*.

The Court has also applied such logic to reviewing petitions brought before the Nuclear Regulatory Commission. *Florida Power & Electric Co. v. Lorian*, 470 U.S. 729; 105 S. Ct. 1598 (1985). The *Florida Power & Electric Co.* Court found that granting jurisdiction to the courts of appeals, and not the district courts, would prevent two issues from arising: "duplication of judicial review" and "bifurcation of review of orders." *Id.* at 742-43.

CARE is seeking judicial review of EPA's authorization of New Union's hazardous waste program. Under RCRA § 7006, judicial review of such causes of action are to be brought before the courts of appeals. 42 U.S.C. § 6976. Although the court in *Appalachian Power* made

their determination without deciding whether the EPA's action was an order or a regulation, it found that proper jurisdiction rests with the courts of appeals. *See Appalachian Power, supra*.

RCRA § 7006(a) provides a distinct judicial review process for regulations and certain petitions in the Court of Appeals of the District of Columbia. 42 U.S.C. § 6976(a). While RCRA § 7002 provides jurisdiction in the district court for citizen suits relating to regulations issued by the Administrator. 42 U.S.C. § 6972. However, RCRA § 7006(b) provides that review of EPA orders of state authorization is granted to the court of appeals in the state which review is sought. 42 U.S.C. § 6976.

The court should find that the EPA was not acting within a rulemaking function, but issuing an order following adjudication, when it authorized new union's plan and therefore the district court does not have jurisdiction.

III. SINCE JUDICIAL REVIEW IS THE PROPER VEHICLE FOR DETERMINING WHETHER EPA'S AUTHORIZATION OF A STATE PROGRAM WAS PROPERLY GRANTED, THE EPA WAS NOT REQUIRED TO ACT UPON CARE'S PETITION, THUS THE EPA'S INACTION DOES NOT CONSTITTUTE "CONSTRUCTIVE ACTION."

The EPA was not required to respond to CARE's petition. RCRA § 7006 specifically provides the proper forum for a citizen to bring an action for review of state authorized programs is in the courts of appeals. 42 U.S.C. § 6976. RCRA § 7004 generally allows for citizens to petition the Administrator to act in promulgating, amending, or repealing "any *regulation* under [RCRA]." 42 U.S.C. § 6974 (emphasis added). Both of these statutes require judicial review in the courts of appeals.

The word "constructive" as imputed in law can be defined as "denoting an act or condition not directly expressed but inferred from other acts or conditions." Dictionary.com, http://dictionary.reference.com/browse/constructive (last visited Nov. 22, 2010). The Seventh

Circuit Court of Appeals ruled that a state's failure to act within a reasonable amount of time was a "constructive" action where the state had an obligation to act. *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984); *see also Hayes v. Browner*, 117 F. Supp. 2d 1182 (N.D. Okla. 2000). The court in *Hayes* found that the EPA previously approved a state's Total Maximum Daily Limits ("TMDLs") guidelines and pointed out that where the EPA has a duty to approve or disapprove a state's regulatory action under the Clean Water Act, review of the EPA's approval or disapproval is properly brought in the court of appeals under the arbitrary and capricious standard. *Id*; *see also Scott, supra*.

CARE's allegation of EPA's "constructive action" is premised on the notion that EPA did not act within a reasonable time on CARE's petition. However, this would only amount to a "constructive action" if the EPA were required to act. The EPA only had a duty to approve or disapprove New Union's hazardous waste program under RCRA § 3006. 42 U.S.C. § 6926. Unlike in *Scott*, where the state failed to enact any regulations, New Union has enacted regulations, which were authorized by the EPA in 1996. (R. at 10). CARE could only seek review of EPA's approval in the court of appeals under the arbitrary and capricious standard, not by petition. *See Hayes, supra*. Therefore, CARE's petition was an improper application of RCRA. Specifically, RCRA § 7004 provides that citizens may appeal the EPA's state authorizations "in the *Circuit Court of Appeals* of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person." 42 U.S.C. § 6974 (emphasis added). Since CARE's petition was improper, the EPA was not required to act. The EPA could only be compelled to act if it had a duty to do so, but in this case, the EPA was under no such duty. Therefore, the EPA's inaction did not constitute a

"constructive action." Furthermore, the EPA's inaction did not amount to "constructive" denial of their petition. *See Scott, supra*.

Even where the EPA would be compelled to act upon a petition, the EPA should be granted sufficient time to respond to such a petition. CARE brought its action against the EPA less than one year after their petition. (R. at 4). This was not sufficient time for the EPA to respond, especially because the EPA would be required to launch an investigation, hold hearings, notify the state, and allow the state time to cure. *See* 42 U.S.C. §6926. If the EPA would be compelled to respond to petitions such as these within one year, it would unduly overburden the agency to respond so quickly. In *Telecomm. Research & Action Ctr. v. Fed. Commc'n Comm'n*, 750 F.2d 70 (D.C. Cir. 1984), the court found that an agency's failure to respond to a citizen's petition after nearly five years was undue delay. However, in this situation, the EPA has had less than one year to respond, which was not a reasonably sufficient time to conduct a proper investigation, hold hearings, and give notice and time to cure to the state. Therefore, even if the EPA was required to respond to CARE's petition, judicial review for failure to respond would be premature as the EPA has not been granted sufficient time.

IV. REVIEW OF A "CONSTRUCTIVE" DENIAL OF CARE'S PETITION BY THE EPA WOULD BE PROPERLY HEARD UNDER 28 U.S.C. §1331 BY THE DISTRICT COURT.

The EPA is not required to act on CARE's petition because it was not a petiton for the "promulgation, amendment, or repeal of any regulation" under RCRA, but rather a petition for the EPA to withdraw an order. 42 U.S.C. § 6974. However, if the court should find a duty under RCRA § 7004, 42 U.S.C. § 6974, for the EPA to act on the petition, and if the district courts have jurisdiction, and if EPA's failure to act constituted a constructive denial of the petition, the proper procedure would be for this Honorable Court to remand the matter to the court below for

an order to be issued for EPA's compliance with withdrawal procedure. *See Carpenters Indus. Council v. Salazar*, 2010 WL 3447243 (D.D.C. 2010); and *National Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3 (D.D.C. 2009).

Under RCRA § 7002(a)(2), a citizen may file a suit in district court to compel the Administrator to act in accordance with his duties. 42 U.S.C. § 6972. The Seventh Circuit Court of Appeals heard a citizen's action pursuant to RCRA § 7002. *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). In *Scott*, a citizen's group brought an action against the EPA requesting that the EPA be compelled to take action where the state failed to act in accordance with statutory requirements. In that case, the Clean Water Act required that states impose water quality standards in the form of TMDLs that limited the amount of certain toxins that could be released into the waterways of the state. *Id.* at 994-95. The state of Indiana failed to set those standards. *Id.* The citizen's group contended that the EPA had a responsibility to impose sufficient water quality standards when the state "constructively" submitted no standards. *Id.* at 995. The *Scott* court agreed, finding that the EPA was under a duty to submit its own TMDLs where the state made a "constructive submission" of no TMDLs. *Id.* The court of appeals remanded the case to the district court to make a final determination as to whether the EPA failure upon a duty required a court order for action. *Id.* That court also determined that once the EPA acted, review of the action would be proper in the court of appeals after the proper procedures had been followed. *Id*. Similarly, this court should determine that it would be proper to remand to the district court to issue an order for the EPA to act upon any failure of duty. This will allow the EPA to follow the protocol set forth in RCRA for withdrawal of authorization of New Union's program.

To withdraw authorization of New Union's hazardous waste program, the EPA is required to follow the procedure set out under RCRA § 3006. 42 U.S.C. § 6926. This section states:

> Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirments of this section, he shall so notify the State and, if approprate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

42 U.S.C. § 6926(e). This provision asserts 5 procedural requirements before the EPA withdraws state authorization: (1) a public hearing must be held; (2) the Administrator determines, based on findings at the public hearing, that the State's program or enforcement is inadequate; (3) notification to the State of deficiencies; (4) allowance of up to ninety days for the State to correct the deficiencies; and (5) written, public notification to the State that authorization is being withdrawn with an explanation. *Id.*

In *National Parks*, the citizen's group was challenging a final rule of the EPA. The court found that the agency was required to follow APA procedures of "providing public notice and comment, before enacting or amending a rule." 660 F. Supp. 2d at 5. The court found that it was unable to rule on the merits of the case where the agency had not followed the APA procedures. *Id.*

Similarly, the court in *Carpenter's Industrial* was determining whether it could order the EPA to repeal a rule. 2010 WL 3447243 at 1. The court found that it did not have authority to vacate the EPA's rule without finding that the EPA's action was contrary to law and without following APA procedure of public notice and comment. *Id.* at 7. The court found that it would have authority to vacate with consent of the parties, but refused to do so because it did not have

consent of all the parties. *Id.* The court remanded to the agency to follow APA procedure in making a determination of whether the rule was proper, without vacating the rule. *Id.* at 8.

Congress set forth statutory procedures for withdrawing authorization of state programs under RCRA § 3006. 42 U.S.C. § 6926. Where those procedures have not yet been followed, there would be insufficient basis on which the court of appeals could make a determination that the EPA acted improperly "constructively approving" New Union's authorization. *See National Parks, supra*; and *Carpenters Industrial, supra.* Therefore, if EPA was under a duty to act on CARE's petition and if the district court has jurisdiction to order the EPA to act on the petition, this court should remand to the district court to issue an order for the EPA to act. Only after the EPA has followed the proper procedures may the court of appeals determine, based on the record, whether or not the ruling by the EPA was arbitrary and capricious. *See Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466 (6th Cir. 2006); *Defenders of Wildlife v. EPA*, 415 F.3d 1121 (10th Cir. 2005); and *Appalachian Power Co., supra*.

As explained above, CARE's actions should be dismissed because the district court correctly decided that it did not have jurisdiction over CARE's claims. Furthermore, judicial review would be premature because the EPA has not taken procedural steps to determine whether New Union's hazardous waste program still meets federal standards. This process requires that New Union receive notice and have the opportunity to take corrective actions before complete withdrawal of authorization. 42 U.S.C. § 6926(e).

V. THE EPA NEED NOT WITHDRAW APPROVAL OF NEW UNION'S HAZARDOUS WASTE PROGRAM WHERE NEW UNION SHOULD HAVE THE OPPORTUNITY TO TAKE CORRECTIVE ACTIONS PRIOR TO WITHDRAWAL AND WHERE OVERFILING IS AVAILABLE TO ENFORCE RCRA STANDARDS.

The EPA may not withdraw authorization of New Union's hazardous waste program without following the procedures set forth in RCRA § 3006. 42 U.S.C. § 6926. This process has not taken place, yet; therefore, it would not be possible to determine whether New Union's resources and performance are insufficient. This statute also requires that the EPA hold a public hearing where its findings are presented, the state is notified of its deficiencies, and the State is afforded ninety days to take corrective action. *Id.* Further, even if there are deficiencies found in the interim, the EPA has authority to enforce federal RCRA standards within the state of New Union, even where the state has an enforceable authorized program. *See, e.g., U.S. v. Power Eng'g Co.*, 10 F. Supp. 2d 1145 (D. Colo. 1998); *U.S. v. Flanagan*, 126 F. Supp. 2d 1284 (C.D. Cal. 2000); *U.S. v. Murphy Oil, Inc.*, 143 F. Supp. 2d 1054 (W.D. Wis. 2001); and *U.S. v. Power Eng'g Co.*, 303 F.3d 1232 (10th Cir. 2002).

Under RCRA § 3008(a)(2), if a violation of RCRA occurs in a state where there is an authorized hazardous waste program, the Administrator is required to notify the state. 42 U.S.C. § 3008(a)(2). The EPA has authority to put a state on notice of a violation of a state-issued hazardous waste permit and to intervene. 40 C.F.R. § 271.19. Where a state has authorization to issue some permits, but not others, the EPA may be required to issue those that the state is not authorized to issue and enforce those permits. *See* U.S. EPA, Subpart CC and Miscellaneous Unit Permitting, Faxback 14347, RCRA/Superfund Hotline Monthly Reporting, EPA530-R-99-012e (May 1999). The EPA also has authority, under 42 U.S.C. §§ 6928 and 6973, to overfile. *See Wyckoff Co. v. EPA*, 796 F.2d 1197, 1200-1201 (9th Cir. 1986). Overfiling is when the EPA

brings an independent action to address a RCRA violation in an authorized state, after the state has already brought action. Although overfiling has been controversial, it has been permitted by most courts. *See, e.g., Power Eng'g Co., supra*; *Flanagan, supra*; *Murphy Oil, supra*; *but see Harmon Indust. Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1998). As an "extreme" and "drastic" last step, the EPA may withdraw its authorization of state approved program. *Power En'g, supra* at 1238-39, n. 116; *Waste Mgmt. v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill. 1989). Withdrawal of the authorization is under the discretion of the Administrator. *See* 40 C.F.R. § 271.22. However, it is important to reiterate that the State must first be compelled to act. *See Save the Valley, Inc. v. EPA*, 223 F. Supp. 2d 997, 1013 (S.D. Ind. 2002).

This Court should reject CARE's proposal that this court issue an order to compel EPA to withdraw its authorization of New Union's hazardous waste program. There are procedures set forth under RCRA that must be followed before judicial review of the EPA's authorization of New Union's program can occur. The EPA must launch an investigation to first determine if there are deficiencies. Then, New Union must be put on notice and given an opportunty to respond to and address any potential deficiencies. Because the EPA has authority to overfile, it would not be detrimental to remand this case to the court below to issue an order for the EPA to begin the investigation and notice process.

VI. REGULATION OF RAILROAD HAZARD WASTE FACILITIES FALLS UNDER AUTHORITY OF THE SECRETARY OF TRANSPORTATION, THUS THE EPA SHOULD NOT BE COMPELLED TO WITHDRAW APPROVAL OF NEW UNION'S ENTIRE PROGRAM SIMPLY BECAUSE THE STATE DOES NOT REGULATE RAILROAD HAZARDOUS WASTE FACILITIES.

The EPA should not be obliged to withdraw its entire program where New Union's program lacks certain provisions. Certain regulatory functions are granted to the federal government. Railroad hazardous waste facilities are regulated by the Secretary of Transportation.

See 49 U.S.C. § 5103 (2006). New Union withdrew state regulation of railroad hazardous waste facilities in the 2000 Environmental Regulatory Adjustment Act (the "ERAA"). (R. at 11-12). However, this would not be cause for EPA to withdraw its authorization of New Union's program, since such regulations fall under the authority of the federal government, not under the authority of the state.

Congress issued the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5128, in 1994 to create uniformity in the regulation of transportation of hazardous materials in commerce. *See Kappelmann v. Delta Air Lines, Inc.*, 539 F.2d 165; (D.C. Cir. 1976), *cert. denied* 429 U.S. 1061. The statutory language provides:

> The *Secretary shall prescribe regulations for the safe transportation*, including security, of hazardous material in intrastate, interstate, and foreign commerce. The regulations (A) apply to a person who (i) transports hazardous material in commerce; (ii) causes hazardous material to be transported in commerce; (iii) designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce; (iv) prepares or accepts hazardous material for transportation in commerce; (v) is responsible for the safety of transporting hazardous material in commerce; (vi) certifies compliance with any requirement under this chapter; or (vii) misrepresents whether such person is engaged in any activity under clause (i) through (vi); and (B) shall govern safety aspects, including security, of the transportation of hazardous material the Secretary considers appropriate.

49 U.S.C. § 5103(b)(1) (emphasis added). This Act granted the Secretary of Transportation the sole authority to regulate hazardous materials in commerce. *Kappelmann, supra.*

New Union enacted the ERAA in 2000 which amended the state's prior regulatory scheme. (R. at 11-12). Under the Act, amendments were made to the Railroad Regulation Act (the "RRA"). (R. at 11-12). The New Union Railroad Commission was originally established to regulate certain functions of the railroads to the extent provided by the Commerce Clause, including setting of freight rates, regulation of tracks and rights of way and of freight yards. (R.

at 11-12). Under the amendments to the RRA, criminal sanctions for violations of environmental statutes by the railroads were eliminated. (R. at 12). The amendments also transferred "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the commission." (See R. at 12). These amendments essentially withdrew railroad hazardous waste facilities from state regulation. (R. at 3).

CARE contends that the EPA should be compelled to withdraw authorization of New Union's program because New Union no longer regulates railroad hazardous waste facilities in the state. However, the enactment of Hazardous Materials Transportation Act granted the Secretary of Transportation exclusive regulatory control of such facilities. *See* 49 U.S.C. §§ 5101-5128. Intrastate, interstate and international railroads that transport hazardous waste fall within the description of those to which this statute applies. Railroads provide transportation, often inspect the shipments or provide packaging, accept the cargo, are responsible for safe delivery, and certify compliance with regulations. *See* Environmental Compliance Handbook for Short Line Railroads, Appendix B, at p. 1; *see also* 49 U.S.C. § 6103. The Hazardous Materials Transportation Act actually precluded New Union from regulating railroad hazardous waste facilities when enacted in 1994. The ERAA amendment was just a formal recognition of this shift of regulatory control. Since New Union does not have the power to regulate railroad hazardous waste facilities, the EPA should not be compelled to withdraw authorization of New Union's program for failing to regulate the railroad facilities.

VII. THE EPA SHOULD NOT WITHDRAW AUTHORIZATION OF NEW UNION'S HAZARDOUS WASTE PROGRAM BECAUSE THE ERAA DOES NOT AFFECT FEDERAL EQUIVALENCY OF THE PROGRAM, IS CONSISTENT WITH THE FEDERAL AND OTHER STATE PROGRAMS, AND DOES NOT VIOLATE THE COMMERCE CLAUSE.

The EPA should not be required to withdraw authorization of New Union's program. New Union's 2000 Act, the ERAA, provided an amendment to the state hazardous waste program which recognized a newly listed environmental hazardous waste, Pollutant X. (R. at 11-12). The EPA and World Health Organization recently found Pollutant X "to be among the most potent and toxic chemicals to public health and the environment." (R. at 12). This amendment does not affect the equivalency of New Union's program to the federal program, is consistent with the federal program and other state programs, and is within the limitations of the Commerce Clause.

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

Congress has permitted states to enforce RCRA requirements within their territories through authorization of a state program. 42 U.S.C. § 6926. However, "EPA's authorization sets a 'floor' not a ceiling for federal requirements." *Old Bridge Chem., Inc. v. New Jersey Dep't of Envtl. Prot.*, 965 F.2d 1287, 1296 (3d Cir. 1992), *cert denied*, 506 U.S. 1000; *see also* 42 U.S.C. § 6929. Because the EPA adds new regulations under RCRA every year, states are constantly applying for extensions of the base authorization. *See* 40 Envtl. L. Rep. News & Analysis 10432: *RCRA's Statutory and Regulatory Framework*, Susan M. McMichael (2010). The EPA rule changes are categorized in 3 ways: "(1) required rules (non-HSWA); (2) Hazardous and Solid Waste Amendments of 1994 ("HSWA") rules; and (3) optional rules." *Id.* States have the

discretion to adopt most of the new rules issued by the EPA because they are considered optional and enforceable by the EPA when not adopted by an authorized state. *Id.* at 10446.

Congress has set forth the criteria that must be met by states in adopting new EPA standards. 40 C.F.R. §271.21. When the EPA issues new standards that are broader in scope or more stringent than prior standards, states are required to make revisions in accordance with the new standards. 40 C.F.R. §§ 271.21(e)(1) and (2). States have up to one year to adopt the new standards, unless the adoption process requires statutory amendments by the state. *Id.* Mandatory adoption of HSWA standards is not required, however, because the EPA has power to administer HSWA standards in authorized states until those states receive final authorization of a hazardous and solid waste program within the state. *See* 42 U.S.C. § 6926(g), RCRA §3006(g); and 40 C.F.R. § 271.1(j).

Under the Code of Federal Regulations, hazardous waste generators may be allowed to store hazardous waste on site for up to ninety days without a permit in order for the facility to accumulate enough waste to transport off site to a storage and treatment facility. 40 C.F.R. § 262.34. Any storage beyond ninety days requires that the facility apply for a permit, unless an extension is granted. *Id.*

The court in *American Iron and Steel* addressed the issue of whether RCRA § 3006 extended to state regulation under HSWA. *American Iron and Steel Inst. v. EPA*, 886 F.2d 390, 403 (D.C. Cir. 1989). The court determined that the EPA was required to enforce the HSWA until authorized states were able to "demonstrate that they are prepared to undertake the specific tasks that the HSWA mandates." *Id.* The court cited the applicable statutory language:

> Any requirement or prohibition which is applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste and which is imposed under this subchapter pursuant to the amendments made by the Hazardous and Solid Waste Amendments of 1984 shall take effect in each State

> having an interim or finally authorized State program on the same date as such requirement takes effect in other States. The Administrator shall carry out such requirement [sic] directly in each such State unless the State program is finally authorized (or is granted interim authorization as provided in paragraph (2)) with respect to such requirement.

Id. citing RCRA § 3006(g)(1); 42 U.S.C. § 6926(g)(1) (Supp. IV 1986).

New Union's 2000 ERAA sought to amend the state's hazardous waste program to add regulations regarding Pollutant X. (R. at 12). The amendments created requirements that producer of the Pollutant X draft and submit to the state DEP plans to minimize and eventually eliminate production of Pollutant X. (R. at 12). The amendments included a provision that allows the state to issue permits for temporary storage of Pollutant X to allow the facilities time to accumulate the waste until it may be transported to one of the nine facilities in the nation certified for the storage and treatment of Pollutant X. (R. at 12). The amendments also provided that transport of Pollutant X through or from the state be "as direct and fast as is reasonably possible, with no stops within the state except for emergencies and necessary refueling." (R. at 12).

As discussed above, the EPA allows temporary storage of hazardous material for ninety days without a permit. New Union will only grant permits for temporary storage up to 120 days. Although there is no mention of temporary storage without a permit in New Union's amendments, this 120-day provision does not contradict the EPA's provision. Furthermore, New Union is allowed to set forth a program that has stricter standards than the EPA.

At the time of New Union's 2000 ERAA, the EPA had not issued standards regarding the control of Pollutant X beyond those set forth in RCRA and HSWA. New Union had authorization under RCRA § 3009 to enforce standards that are broader in scope and stricter than

the EPA's standards. 42 U.S.C. § 6929. Therefore, New Union was able to implement its own regulations regarding Pollutant X.

The regulations concerning the transportation of Pollutant X through and from the state are similarly permissible under RCRA because the state's power to enforce stricter and broader standards. Furthermore, as will be set out below, New Union had legitimate concerns for implementing those regulations, and the regulations do not overburden commerce.

Although CARE fails to set forth facts illustrating where New Union's program fails to meet the state authorization standards set forth in RCRA § 3006(g)(1) provides that the EPA is authorized to implement federal RCRA policies, until New Union receives final authorization to extend its base program to cover hazardous and solid waste. *See American Iron, supra,* and 42 U.S.C. § 6926(g)(1). This umbrella coverage by the EPA clearly indicates that withdrawal of authorization of New Union's program would be unnecessary.

For the reasons set forth above, this Honorable Court should find that the ERAA did not affect the equivalency of the New Union's program to the federal program and is consistent with the federal program. However, even if it is found that New Union's program is deficient, the proper procedures affording New Union the opportunity to amend its program should be followed. *See* RCRA § 3006(e), 42 U.S.C. § 6926(e).

B. New Union's ERAA Is Consistent With The Federal Program And Other State Programs.

The court should find that New Union's 2000 ERAA is consistent with other state programs. Due to the EPA making over 300 changes to RCRA since 1980, the authorization status of states varies greatly. 40 ENVLRNA at 10450. (In an article titled, "*RCRA's Statutory and Regulatory Framework*," the author explains in great deal how RCRA has changed dynamically since it was implemented. 40 ENVLRNA 10432.) The EPA tracks state

authorization levels. *Id.* A review of the EPA's tracking records indicated, as of June 30, 2009, the EPA had granted authorization to 39 of the 50 states for more than 75% of EPA rules, but six states were authorized for less than 50% of EPA rules. *Id.* Even among those states that were granted authorization to implement the same rules, the state programs vary greatly due to the state's ability to impose stricter or broader standards. *Id.* The variance between the states may also be due to the fact that the EPA does not require all rules to be implemented by the states. *Id.* Therefore, it cannot be contended that simply because New Union's program is not exactly the same as the federal or other state programs that it is inconsistent with those programs. To conclude such a point would require that the EPA withdraw authorization of all state programs. This would be contrary to the purpose of RCRA § 3009 which permits states to impose their own levels of regulations, so long as they don't fall below the EPA standards. 42 U.S.C. § 6929. As stated above, there is no assertion that New Union's program standards fall below the RCRA standards. Therefore, the court should find that New Union's program is consistent with the federal program and other state programs.

C. New Union's ERAA Is Within The Limitations Of The Commerce Clause.

Although New Union ERAA sets guidelines for transportation of Pollutant X through the state, the regulation is within the limitations of the Commerce Clause. (R. at 12). The regulation is not discriminatory and strikes a reasonable balance between addressing valid local concerns with minor impacts on interstate commerce.

The Commerce Clause in the Constitution prohibits states from unreasonably burdening interstate commerce. U.S. Const. Art. 1, § 8, cl. 3. However, states are not completely restricted from regulating commerce. *Id.*; *see also Dennis v. Higgins*, 498 U.S. 439 (1991); *City of*

Philadelphia v. New Jersey, 437 U.S. 617(1978). States must have a legitimate purpose for regulating commerce within the state, but that purpose must not be outweighed by the burden imposed on commerce. *Id.*

When New Union issued the amendments of the ERAA in 2000, one of the concerns was Pollutant X and its impact on the environment and general health and welfare of the state's residents. (R. at 12). The third amendment provided to the HRA reads:

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

(R. at 12) (emphasis added). CARE contends that this amendment violates the Commerce Clause. The language "through or out of the state" clearly indicates that this amendment does not discriminate between in-state or out-of-state carriers. *See City of Philadelphia, supra*. Furthermore, because Pollutant X has been identified by the EPA and the World Health Organization as one of the "the most potent and toxic chemicals to public health and the environment," New Union has a legitimate concern to address where it is considering transportation of such a toxin through the state. (R. at 12). Furthermore, the regulation which requires that Pollutant X be transported efficiently without stops, but for refueling and emergencies, is not unduly burdensome on commerce. Therefore, the court should find that New Union's program does fall within the limitations of the Commerce Clause.

Since New Union's ERAA does not affect the equivalency of the state's program to the federal program, is consistent with the federal and other state programs and does not violate the Commerce Clause, the court should deny CARE's challenge to the EPA's authorization of New Union's hazardous waste program.

CONCLUSION

For the foregoing reasons, New Union respectfully requests that this court AFFIRM the District Court of New Union's dismissal of CARE's action for lack of jurisdiction and REMAND to the district court to order the EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program.

Respectfully Submitted,

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Counsel for New Union