IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

C.A. No. 18-2010
C.A. No. 400-2010

CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.,

Petitioner-Appellant-Cross-Appellee,

v.

LISA JACKSON, ADMINISTRATOR, U.S. Environment Protection Agency,

Respondent-Appellee-Cross-Appellant,

v.

STATE OF NEW UNION,

Intervenor-Appellee-Cross-Appellant.

BRIEF FOR LISA JACKSON AS RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

JURISDICTIONAL STATEMENT

The appellants, Citizen Advocates for Regulation and the Environment, Inc. (CARE), appeal the district court's order granting New Union's motion for summary judgment based on a lack of jurisdiction. The district court denied jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 6976(b) and entered judgment on June 2, 2010. The cross-appellants, EPA, appeal the district court's finding of a lack of jurisdiction under 42 U.S.C. § 6976(b). Notice of appeal was filed by CARE and EPA within the ten-day period as required by Fed. R. App. P. Rule 4(b). This Court has jurisdiction to review the appellants' and cross-appellants' motions pursuant to 28 U.S.C. § 1291 (2006).

QUESTIONS PRESENTED

I. Whether the district court has jurisdiction under RCRA § 7002(a)(2) to order EPA to act on CARE's petition, filed pursuant to RCRA § 7004, for revocation of approval of New Union's hazardous waste program.

II. Whether 26 U.S.C. § 1331 provides jurisdiction for the district court to order EPA to act on CARE's petition, filed under 5 U.S.C. 553(e), for revocation of EPA's approval of New Union's hazardous waster program.

III. Whether EPA's failure to act on CARE's petition that EPA withdraw its approval of New Union's hazardous waste program constituted a constructive denial of that petition and a constructive determination that New Union's program continued to meet RCRA's criteria for program approval under RCRA § 3006(b), subject to judicial review under RCRA §§ 7002(a)(2) and 7006(b).

IV. Whether, if EPA's failure to act on CARE's petition was a constructive denial of that petition and a constructive approval of New Union's hazardous waste program and the district court

has jurisdiction to order EPA to act on CARE's petition, the Court of Appeals should lift the stay and proceed with judicial review of EPA's constructive actions or whether the Court should remand the case to the lower court to order EPA to act on CARE's petition.

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

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

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

STANDARD OF REVIEW

The Court of Appeals reviews factual findings for clear error and legal conclusions *de novo.*" *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citing *Close v. N.Y.*, 125 F.3d 31, 35 (2d Cir. 1997)). Subject matter jurisdiction is a question of law and the standard of review is *de novo*. *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994). The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error." *Id.; see also Syms v. Castleton Indus., Inc.*, 470 F.2d 1078, 1085 (5th Cir. 1972).

STATEMENT OF THE CASE

In 1986, the state of New Union developed a hazardous waste program. New Union submitted its program to the Environmental Protection Agency ("EPA") for approval to operate

in lieu of the federal program under the Resources Conservation and Recovery Act ("RCRA"), pursuant to § 3006(b), 42 U.S.C. § 6926(b). EPA approved New Union's hazardous waste program in 1986. On January 5, 2009, Citizen Advocates for Regulation and the Environment ("CARE") served a petition on EPA under RCRA § 7004, 42 U.S.C. § 6974, and §553(e) of the Administrative Procedure Act ("APA"). In the petition, CARE requested that EPA commence proceedings to withdraw EPA approval of New Union's hazardous waste program, basing its request on changes that had occurred in New Union's administration of the program in the years since EPA approval. EPA took no action on CARE's petition. On January 4, 2010, CARE filed an action in district court seeking an injunction requiring EPA to act on the petition or requesting the court to find that EPA's denial of the petition was a constructive denial of the petition and a constructive determination by EPA that New Union's program met the criteria for approval under RCRA § 3006(b). New Union filed an unopposed motion to intervene in the case under Fed. R. Civ. P. Rule 24, which the district court granted. The parties filed cross-motions for summary judgment. CARE simultaneously filed an action in the Court of Appeals seeking judicial review of EPA's constructive denial of CARE's petition on the same grounds. New Union requested and was granted the right to intervene in that action as well. The Court of Appeals stayed its proceeding, pending the outcome of the district court action. On June 2, 2010, the district court issues an order holding that it lacked subject matter jurisdiction. CARE is requesting the Court of Appeals to lift its stay and to consolidate the original appellate action with the appeal from the district court judgment. New Union and EPA are appealing the decision by the district court that it lacked subject matter jurisdiction.

STATEMENT OF THE FACTS

When EPA approved New Union's hazardous waste program, EPA made a finding that the New Union Department of Environmental Protection ("DEP") had adequate resources to fully administer and enforce the program, including issuance of permits in a timely fashion, inspecting RCRA regulated facilities at least every other year, and taking enforcement action against all significant violations. (Rec. doc. 2, p.1). In 1986, at the time of the application for approval, the New Union DEP reported that there were 1200 hazardous waste treatment, storage and disposal facilities ("TSDs"), requiring permits under RCRA, (Rec. doc. 1, p.17), and the New Union DEP reported that it had 50 full-time employees. (Rec. doc. 1, p.73). In its 2009 Annual Report to EPA, the New Union DEP reported 1500 TSDs and 30 full time employees. (Rec. doc. 5 for 2009, p.52). The increase in TSDs has been gradual since 1986 and the decrease in employees has occurred primarily since 2000. New Union's 2009 Annual Report to EPA attributed that decrease to the deterioration of the State's finances. (Rec. doc 5 for 2009, p. 50).

In the 2009 Annual Report to EPA, the DEP indicated that it has issued 125 RCRA permits during the previous year and anticipates issuing 125 in the present year. (Rec. doc. 5 for 2009, p.19). The Annual Report indicated that some 900 TSDs had expired permits, but were continuing to operate by law. DEP also reported that it had about 50 applications a year from new facilities or permitted facilities that need an amended permit to expand their operations. (Rec. doc. 5 for 2009, p. 20). In 2009, the DEP performed inspections of 150 TSDs, 10% of the TSD's, and expected to perform at the same level during 2010. (Rec. doc. 5 for 2009, p. 22). At the request of the DEP, EPA inspected a comparable number of facilities in 2009 and EPA agreed to do so again in 2010. (Rec. doc. 5 for 2009, p. 20, 23).

In 2009, DEP took six enforcement actions; four were administrative orders requiring both compliance and the payment of penalties and two were civil actions requesting injunction and the

judicial assessment of penalties. (Rec. doc. 5 for 2009, p. 25). EPA took the same number of comparable actions within New Union and environmental groups filed six citizen suits in the State in 2009. (Rec. doc. 5 for 2009 p. 26). DEP reported that there were twenty-two significant permit violations in 2009. (Rec. doc. 5 for 2009, p. 24).

In 2000, the New Union legislature enacted the 2000 Environmental Regulatory Adjustment Act ("ERAA"), containing a number of amendments to the State's existing environmental legislation, two of which are pertinent to this case. First, the ERAA established a New Union Railroad Commission charged with regulating intrastate railroads to the extent allowed by the Commerce Clause in the federal Constitution. The Railroad Commission is a state agency. The ERAA transferred "all standard setting, permitting, inspection, and enforcement authorities of the DEP [regarding railroads] under any and all state environmental statutes to the Commission." (Rec. doc. 5 for 2000, pp. 103–105). In addition, New Union amended the state hazardous waste program to provide for treatment and disposal of Pollutant X. *See* Appendix.

SUMMARY OF THE ARGUMENT

The district court erred in finding that it did not have jurisdiction. RCRA § 7002(a)(2) provides jurisdiction for the district court to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program filed pursuant to RCRA § 7004.

Under the Resource Conservation and Recovery Act ("RCRA") § 7004, "any person may petition the Administrator for the promulgation, amendment, or repeal of any regulation. EPA must act on the petition in a reasonable time. If EPA fails to act on the petition, a citizen may file a civil action the citizens suit provision of RCRA, § 7002(a)(2), over which the district court would have jurisdiction.

CARE properly filed is petition under RCRA § 7004 because EPA's authorization of New Union's hazardous waste program was a rulemaking. EPA's determination that its action

was a rule is entitled to Chevron deference as EPA is interpreting a statute that it is charged with administering. In addition, EPA's approval of New Union's hazardous waste program has the characteristics of a rulemaking, as it is forward looking and of general applicability. Because EPA's action was a rule, it is subject to petition under RCRA § 7004, giving CARE a cause of action under the citizens suit provision of RCRA, § 7002(a)(2).

In the event that the district court required EPA to act on CARE's petition and EPA denied the petition, CARE would have the right to judicial review in the district court within ninety days of the denial of their petition under RCRA § 7006(a). Alternatively, under RCRA § 7006(b), CARE could apply for judicial review by the Court of Appeals of EPA's authorization of New Union's hazardous waste program, basing their complaint solely on events occurring more than ninety days after the authorization was granted.

EPA's failure to act on CARE's § 553 petition is not subject to judicial review under 28 U.S.C. § 1331. RCRA provides specific procedures for petition and judicial review of certain agency actions. Where Congress has already provided special and adequate review procedures, review under the APA does not provide additional judicial remedies. Since adequate review procedures exist under RCRA, CARE cannot avail itself of remedies provided by the APA.

EPA's failure to withdraw approval of New Union's hazardous waste program under RCRA § 3006 was not a constructive determination that New Union's program continued to meet RCRA criteria. For a constructive action to occur, there must be the failure to perform a non-discretionary duty. The EPA had discretion to decide whether to initiate withdrawal proceedings; therefore, failure to commence withdrawal proceedings was not a constructive action. Nor was EPA's failure to respond to CARE's petition a constructive denial of that petition. Although EPA was required to respond to CARE's petition within a reasonable time,

failure to respond within a year was not a constructive denial. The alleged failure of an Administrator to perform a nondiscretionary duty or act is to be brought in the district court of the alleged violation. EPA has a nondiscretionary duty to respond to CARE's petition. Therefore, CARE can bring an action in district court to compel the Administrator to act on its petition. However, the EPA had discretion to choose whether to withdraw approval of New Union's hazardous waste program. An agency's discretionary action is not judicially reviewable. Therefore, EPA's failure to withdraw approval of New Union's hazardous waste program is not reviewable by the Court of Appeals.

If this Court does review EPA's decision not to withdraw approval of New Union's program, this Court should find that EPA has discretion to make such a decision under RCRA § 3006(e) and that New Union's resources and performance are sufficient for EPA's continued approval of New Union's program under RCRA § 3006(b). While the record shows that New Union has decreased its resources devoted to RCRA, New Union has asked for and has received support from EPA for inspections and enforcement, and will continue to receive this and potentially more support in the future. Using its statutory discretion under RCRA § 3006(e), EPA believes New Union is adequately implementing and enforcing RCRA. When an agency is granted such discretion, the Supreme Court has held in *Norton v. S. Utah Wilderness Alliance* that a court has no power to specify what action an agency must take. The EPA has decided that other options are available besides withdrawing approval of New Union's hazardous waste program. Withdrawal would be a drastic step requiring extreme measures and RCRA statutorily encourages the federal and state governments to work together to support a state plan.

EPA has similarly decided, using its statutorily designated discretion, that New Union's 2000 Environmental Regulatory Adjustment Act ("ERAA"), which transfers responsibility of

railroad hazardous waste to the New Union Railroad Commission, does not affect New Union's state hazardous waste plan such that withdrawal of the entire plan is necessary. New Union is allowed to transfer RCRA responsibilities to different state, regional, and local authorities pursuant to RCRA 4006(b)(1) and this is precisely what New Union has done. If the program is insufficient, EPA has discretion to exercise other options besides withdrawing an entire state program, which is an extreme measure. EPA is best positioned to decide how to marshal its limited resources to support New Union's hazardous waste program and this is why Congress has delegated this discretion to EPA.

Lastly, this Court should recognize EPA's discretion in deciding that New Union's treatment of pollutant X in its ERAA is equivalent to and consistent with the federal program and not in violation of the Commerce Clause. New Union has articulated standards for the treatment, storage, disposal, and transportation of pollutant X and these standards are based on protecting the health of New Union's people and environment. The standards are in line with RCRA § 3002 and other regulations that require states to use methods practically available to protect human health and the environment. New Union's standards for addressing pollutant X do not unduly burden another state and it is within the jurisdiction of New Union to completely regulate its own hazardous waste. Thus, there is no Commerce Clause violation.

ARGUMENT

I. RCRA § 7002(a)(2) Provides Jurisdiction for the District Court to Order EPA to Act on CARE's Petition for Revocation of EPA's Approval of New Union's Hazardous Waste Program Filed Pursuant to RCRA § 7004.

The district court erred in finding that it did not have jurisdiction. The Resource Conservation and Recovery Act ("RCRA") § 7004 states that "any person may petition the Administrator for the promulgation, amendment, or repeal of any regulation" under RCRA. 42

U.S.C. § 6974 (2010). If EPA fails to act in a reasonable time, the citizen may file a civil action over which the district court will have jurisdiction. 42 U.S.C. § 6972.

EPA's has characterized its authorization of New Union's hazardous waste program as a rulemaking, subject to petition under RCRA § 7004. EPA's interpretation that its authorization of New Union's hazardous waste program is a rulemaking is subject to *Chevron* deference as RCRA is a statute that EPA is charged with implementing. In addition, EPA's approval of New Union's hazardous waste program has the characteristics of a rulemaking, as it is forward looking and of general applicability. Because EPA's action was a rule, it is subject to petition under RCRA § 7004, giving CARE a cause of action under the citizens suit provision of RCRA, § 7002(a)(2).

In the event that the district court required EPA to act on CARE's petition and EPA denied the petition, RCRA § 7006(a) provides that CARE would have the right to judicial review in the district court within ninety days of the denial of their petition. 42 U.S.C. § 6976(a). Alternatively, under RCRA § 7006(b), CARE could apply for judicial review by the Court of Appeals of EPA's authorization of New Union's hazardous waste program, basing their complaint solely on events occurring more than ninety days after the authorization was granted. 42 U.S.C. § 6976(b).

RCRA § 7002(a)(2) provides jurisdiction for the district court to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program filed pursuant to RCRA § 7004.

A. **EPA's Determination that Its Action Was a Rulemaking Is Entitled to *Chevron* Deference.**

EPA is entitled to *Chevron* deference in its determination that its authorization of New Union's hazardous waste program was a rulemaking. In *Chevron*, the Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842–843 (1984). The Court went on to add, "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Id.* at 844.

RCRA is a statute that EPA is specifically charged with implementing, therefore EPA's interpretation of RCRA's provisions are entitled to *Chevron* deference:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.

United States v. Mead Corp., 533 U.S. 218, 226–227 (2001). *Compare Metro. Stevedore Co. v. Rambo,* 521 U.S. 121, 137 (1997) (no deference to agency interpretation of the APA because not a statute that agency is charged with administering.); *Ardestani v. INS*, 502 U.S. 129 (1991) (Blackmun, J., dissenting) (finding that "reviewing courts do not owe deference to an agency's interpretation of statutes outside its particular expertise and special charge to administer."); *Prof'l Reactor Operator Soc'y. v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991)) (no deference to agency interpretation of APA, because agency not assigned special role by Congress in

construing that statute). EPA has the authority to "make rules carrying the force of law" regarding the authorization of State hazardous waste programs under RCRA.

Agencies have discretion to choose between adjudication and rule making as a means of setting policy. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974); *Mobil Explor'n & Prod. N. Am., Inc. v. FERC*, 881 F.2d 193, 198 (5th Cir. 1989); *State, Dept. of Envt'l Prot. v. Stavola*, 103 N.J. 425, 443–44 (1986) (stating that the "procedural choices as between adjudication and rule-making is an aspect of [their] delegated authority and lies within the discretion of administrative agencies"). Courts accords significant deference to an agency's characterization of its own action. *Am. Airlines, Inc. v. Dep't of Transp.,* 202 F.3d 788, 797 (5th Cir. 2000).

While RCRA 3006(b) provides guidelines for authorization of a state hazardous waste program by EPA, it fails to specify whether EPA's authorization of a state hazardous waste control program is an adjudication or a rule making. 42 U.S.C. § 6926. The Administrative Procedure Act ("APA") defines "rule," "rulemaking," "order," and "adjudication," 5 U.S.C. § 551 (4–7) (2010) and specifies procedures for agency actions. 5 U.S.C. §§ 553 & 554. Using the definition of "rulemaking" provided by the APA, EPA has interpreted its actions in authorizing a State hazardous waste program to be a rulemaking. In making this determination, EPA was interpreting RCRA, not the APA.

Because Congress has not directly addressed the issue and RCRA is silent as to whether the authorization process under RCRA is an adjudication or a rule making, EPA is entitled to *Chevron* deference in its judgment that the authorization process is a rulemaking.

B. **EPA's Approval of New Union's Hazardous Waste Program Was a Rule.**

EPA's approval of New Union's hazardous waste program meets the criteria of a rulemaking. As stated in the Administrative Procedures Act, a "'rule' means the whole or a part

of an agency statement of *general or particular* applicability and *future* effect . . . ." 5 U.S.C. § 551(4) (emphasis added). An order, however, is defined as a "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 . . . ." 5 U.S.C. 551(6). EPA's authorization of New Union's hazardous waste program is a statement of general applicability and future effect.

1. *EPA's authorization of New Union's hazardous waste program is a rule because it has a future effect.*

EPA's authorization of New Union's hazardous waste program was forwarding looking. The distinction between a rule and an order lies partly in the temporal focus: a rule "looks to the future and changes existing conditions, " whereas an order is a judicial proceeding that "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908). EPA's approval of New Union's hazardous waste facility was the approval of future State action and granted the State the ability to issue permits for hazardous waste facilities into the future. By authorizing New Union's hazardous waste program in lieu of the federal program, EPA did not issue a permit or a license to New Union, rather EPA granted authorization for the state to grant permits as required under their hazardous waste program. EPA's action was forward looking and addressed future action by the state of New Union, thus meeting the temporal criterion of a rule.

2. *EPA's authorization of New Union's hazardous waste program was a rule because it had general applicability.*

In authorizing New Union's hazardous waste program, EPA created a rule of general applicability. When agency action implicates matters of general administrative policy, rulemaking is appropriate. *Stavola*, 103 N.J. at 442. "[I]f the impact of a ruling or decision of the Board affects an entire class, rather than particular members of a group, an adjudicatory

proceeding is unnecessary and the rule-making process may be properly invoked." *Flying Tiger Line, Inc. v. Boyd*, 244 F. Supp. 889, 892 (D.D.C. 1965) (citing *Capitol Airways, Inc. v. CAB*, 292 F.2d 755, 758 (D.C. Cir. 1961)). "When courts have construed EPA action to constitute the promulgation of regulations . . . the ruling has constituted a decision of uniform or widespread application." *Hazardous Waste Treatment Council v. EPA*, 910 F.2d 974, 976 (D.C. Cir. 1990) (finding an action by EPA concerning a single well in a single town not to be a rulemaking).

In approving New Union's hazardous program, EPA was ruling on a matter of general policy governing the entire range of hazardous waste disposal activities in New Union. The ruling was not directed at a specific storage and disposal facility ("TSD"), or even a specific industry. The ruling was meant to be wide ranging and encompass the breadth of New Union's hazardous waste control programs. An action such as this when taken by EPA is properly a rulemaking rather than an adjudication as it is intended to have wide coverage and encompasses a large segment of the regulated activity.

3. *If EPA's authorization has a particular rather than a general effect it is still a rule.*

Even if the district court were correct in finding that EPA's authorization of New Union's hazardous waste program was an action of particular applicability as it applies to a single state, the action is still a rulemaking. The APA states that a rule can have "general *or* particular applicability." 5 U.S.C. § 551(4) (emphasis added). *See also Short Haul Survival Comm. v. United States*, 572 F.2d 240, 244 (9th Cir. 1978) (finding a good-faith exercise of administrative rule-making authority where action affected carriers individually). EPA's authorization of New Union's hazardous waste program is a rulemaking even if the scope of the regulation is particular and applies to the state of New Union rather than the hazardous waste facilities as a class.

C. EPA's Approval of New Union's Hazardous Waste Program Was Subject to Petition Under RCRA § 7004.

CARE properly petitioned EPA under RCRA § 7004 for repeal of EPA's authorization of New Union's hazardous waste program. RCRA § 7004 states that "any person may petition the Administrator for the promulgation, amendment, or repeal of any regulation" under RCRA. 42 U.S.C. § 6974(a). As discussed above, EPA's authorization of New Union's hazardous waste program was a rule and was, therefore, petitionable under RCRA § 7004.

"Within a reasonable time following receipt of such petition, the Administrator *shall* take action with respect to such petition . . . ." *Id.* (emphasis added); *see also* 40 C.F.R. § 271.23 (2010). The use of the word "shall," sets forth a mandatory duty." *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 549 (D.D.C. 2005). EPA had a nondiscretionary duty to respond to CARE's petition within a reasonable period of time. The citizens suit provision of RCRA, RCRA § 7002(a)(2), provides that a person can commence an action against the Administrator when the Administrator fails to perform a nondiscretionary duty. 42 U.S.C. § 6972(a)(2). CARE has stated a claim upon which the district court has jurisdiction to act.

D. CARE's Claim Is Not Time Barred by RCRA § 7006.

CARE's claim for judicial review would not be time barred under RCRA § 7006. RCRA § 7006(a) states that a petition for review of action of the Administrator in denying any petition should be filed within ninety days of the denial. 42 U.S.C. § 6976(a). If EPA denies CARE's petition for withdrawal of authorization of New Union's hazardous waste disposal program, CARE has ninety days from that denial to ask for judicial review of the denial of the petition under RCRA § 7006(a). *Id.*

Alternatively, CARE could file an application with the Court of Appeals under § 7006(b) for review of EPA's original grant of authorization to New Union's hazardous waste program.

Id. § 6976(b). Under RCRA § 7006(b), an application for review of the Administrator's action in granting, denying or withdrawing authorization of a state hazardous waste program shall be made within ninety days of the issuance, denial, or withdrawal or "after such date . . . based solely on grounds which arose after such ninetieth day." *Id.* EPA approved New Union's hazardous waste control program in 1986. CARE's allegations are based on events that have occurred since 1986, including the New Union Environmental Regulatory Adjustment Act ("ERAA") enacted in 2000 and the decrease in number of New Union Department of Environmental Protection ("DEP") employees since 2000. CARE bases its allegations on facts found in New Union DEP's Annual Report of 2009. CARE's allegations are based solely on grounds that arose more than ninety days after EPA approved New Union's hazardous waste program in 1986. If CARE filed an application for review of EPA's grant of authorization to New Union under RCRA § 7006(b), it would not be time barred.

CARE's claims against EPA are not time barred by RCRA § 7006; therefore, it would not be futile for the district court to assert jurisdiction or to act upon those claims.

II. 28 U.S.C. § 1331 Does Not Provide Jurisdiction for the District Courts to Order EPA to Act on CARE's Petition Filed under 5 U.S.C. § 553(e).

The district court does not have jurisdiction under 28 U.S.C. § 1331 to order EPA to act on CARE's petition filed under 5 U.S.C. § 553(e). Only agency actions "made reviewable by statute and *final agency action for which there is no other adequate remedy in a court* are subject to judicial review." 5 U.S.C. § 704 (emphasis added). Although the APA provides a general authorization for review of agency action in the district courts, it was not intended to duplicate the special statutory procedures relating to specific agencies. *Bowen v. Mass.*, 487 U.S. 879, 902 (1988). Review under the "APA does not provide additional judicial remedies in situations in which Congress has already provided special and adequate review procedures." *Id.*

Since Congress has provided an adequate remedy in RCRA over this action, the general grant of review in § 702 of the APA does not give the court jurisdiction pursuant to 28 U.S.C. § 1331. *See Fire-Trol Holdings LLC v. USDA Forest Serv.,* 2004 WL 5066232, 5 (D. Ariz. 2004). The statutory scheme established under RCRA provides procedures for petition and for citizen suits. 42 U.S.C § 6972& 6974. Adequate remedies exist under RCRA, CARE cannot also avail itself of suit under the APA.

III. EPA's Failure to Act on CARE's Petition Was Not a Constructive Action and Is Therefore Not Subject to Judicial Review.

EPA's failure to withdraw approval of New Union's hazardous waste program under RCRA § 3006 was not a constructive determination that New Union's program continued to meet RCRA criteria. No constructive action can occur when the duty to act is purely discretionary. The EPA had discretion whether to initiate withdrawal proceedings. Neither was EPA's failure to respond to CARE's petition a constructive denial of that petition. Although EPA was required to respond to CARE's petition within a reasonable time, failure to respond within a year was not a constructive denial.

A. EPA's Failure to Withdraw Approval of New Union's Hazardous Waste Program Was Not a Constructive Determination that the Program Continued to Meet RCRA's Criteria for Program Approval.

EPA's failure to withdraw approval of New Union's hazardous waste program is not a constructive approval of that program. EPA has discretion to determine when a State program no longer meets the criteria of RCRA, and EPA's failure to withdrawal approval is not a constructive action. Under RCRA § 3006(e), "whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized by [RCRA § 3006] in accordance with the requirements of [RCRA § 3006], he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time . . . shall withdraw

authorization of such program and establish a Federal program . . . ." 42 U.S.C § 6926. EPA is required to withdraw approval of a State hazardous waste program once it has determined that the program does not meet RCRA criteria and the State has refused to take corrective action; however, RCRA § 3006(e) does *not* explicitly require EPA to hold public hearings from time to time in the first instance to determine whether a State is administering a program in accordance with § 3006(e). *See Nat'l Wildlife Fed'n v. Adamkus,* 936 F. Supp. 435, 440 (W.D. Mich. 1996) (interpreting identical language in § 404 of the Clean Water Act). The statutory language "only triggers a nondiscretionary duty to withdraw approval once EPA has determined after public hearing that the state's administration of the program fails to comply with the [the statute], notifies the state, and has given the state a reasonable amount of time to take corrective action." *Id.*

Since a decision by the Administrator to withdraw approval of a State hazardous waste program is discretionary, failure to withdraw approval is not a constructive action. *Compare Scott v. City of Hammond, Ind.*, 741 F.2d 992, 996 (7th Cir. 1984) (failure to perform nondiscretionary action is constructive action). EPA was under no mandatory duty to make a determination to commence proceedings or to actually commence proceedings to disapprove New Union's hazardous waste program; therefore, EPA's failure to withdraw approval is not a constructive determination that New Union's hazardous waste program continues to meet RCRA criteria.

B. EPA's Failure to Act on CARE's Petition Was Not a Constructive Denial of that Petition.

EPA's failure to act on CARE's petition within a year was not a constructive denial of that petition. Although the determination to withdraw approval of a State hazardous waste program is discretionary with the Administrator, the decision to respond to a petition is not: the

"Administrator *shall* respond in writing to any petition to commence withdrawal proceedings." 40 C.F.R. § 271.23 (emphasis added).

Where there is no explicit timetable given for the Administrator to respond to the petition of an interested party, failure to respond to that petition is not a constructive denial. *Nat'l Wildlife Fed'n*, 936 F. Supp. at 443 (EPA's failure to respond to public comment is not a final agency action under the APA). Under the APA a federal agency is obligated to "conclude a matter" presented to it "within a reasonable time," 5 U.S.C. § 555(b), and a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1); *In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (finding six year delay unreasonable); *see In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992). While the APA does not set clear temporal boundaries defining "unreasonable delay," "a reasonable time for an agency decision could encompass months, occasionally a year or two." *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003) (citing *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) (internal citation omitted)). CARE filed an action in federal court seeking action on its petition less than one year after serving its initial petition on EPA. EPA has not unreasonably delayed its action on CARE's petition nor can its silence be construed as a constructive approval of New Union's hazardous waste program.

IV. If This Court Finds EPA's Failure to Act to Be a Constructive Action, the Court Should Remand the Case to the Lower Court.

The district court has jurisdiction to require EPA to act on CARE's petition. The alleged failure of an Administrator to perform a nondiscretionary duty or act is to be brought in the district court of the alleged violation. EPA has a nondiscretionary duty to respond to CARE's petition. Therefore, CARE can bring an action in district court to compel the Administrator to act on its petition.

However, the EPA had discretion to choose whether to withdraw approval of New Union's hazardous waste program. A discretionary action is not judicially reviewable. Therefore, EPA's failure to withdraw approval of New Union's hazardous waste program is not reviewable by the Court of Appeals.

A. The District Court Has Jurisdiction to Order EPA to Respond to CARE's Petition.

The district court has jurisdiction to order EPA to act on CARE's petition. RCRA § 7002(a)(2) provides that an alleged failure of an Administrator to perform a non-discretionary act or duty is to "be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia." 42 U.S.C. § 6972(a)(2). EPA had a non-discretionary duty to act on CARE's petition. RCRA § 7004 states that, within a reasonable time following receipt of a petition to promulgate, amend or repeal a regulation, the Administrator *shall* take action with respect to such petition." 42 U.S.C. § 6974(a) (emphasis added). The "Administrator *shall* respond in writing to any petition to commence withdrawal proceedings." 40 C.F.R. § 271.23 (emphasis added). The use of the word "shall," sets forth a mandatory duty." *Sierra Club*, 355 F. Supp. 2d at 549. The plain language of the statute indicates that EPA's duty to act on CARE's petition was a non-discretionary duty. The district court has jurisdiction to order the Administrator to respond to CARE's petition.

B. EPA's Failure to Act on CARE's Petition is Not Reviewable by the Court of Appeals.

EPA's failure to act on CARE's petition is not reviewable by the Court of Appeals as it does not constitute a reviewable action. Agency inaction on a petition for rulemaking is not ripe for review where the inaction does not amount to a denial. *Consolidation Coal Co. v. Donovan*, 656 F.2d 910, 916 (3d Cir. 1981). Further, actions that are "committed to agency discretion by law" are precluded from judicial review. 5 U.S.C. § 701(a)(2). An agency's decision not to take

enforcement action is "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). This discretion is due to "the general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.*

While the Administrator is required to withdraw authorization if a State is not in compliance and fails to take corrective action, EPA has broad discretion in making that determination. The regulations state that the Administrator must take certain action once he determines that a State hazardous waste program is not in compliance with RCRA: the Administrator "*shall* notify the state," "the Administrator *shall* withdraw authorization," 42 U.S.C. § 6926(e). (emphasis added); the Administrator is given discretion in determining whether a State is in compliance: "the Administrator *may* order the commencement of withdrawal proceedings," "*may* conduct an informal investigation," "a state's authorization *may* be withdrawn," 40 C.F.R. §§ 271.22(a) & 271.23(b) . "May" is a permissive term indicating discretionary power. *Nat'l Wildlife Fed'n*, 936 F. Supp. at 440. The plain language of the regulation says that it is within the Administrator's discretion to order the commencement of withdrawal proceedings in response to a petition from the interested person. Therefore, although the Administrator is required to respond to a petition, he is not required to take any other action on the petition. EPA is only limited in that it must withdraw authorization *after* it has determined that the state is not in compliance. *Tex. Disposal Sys. Landfill, Inc. v. EPA*, 377 Fed. Appx. 406, 408 (5th Cir. 2010). (emphasis added). Where no such determination is made, the failure of action is not reviewable. *Id.* Since EPA has made no determination, the Court of Appeals cannot review EPA's actions.

V. New Union's Resources and Performance Are Sufficient For EPA's Continued Discretionary Approval of New Union's Program And Even If They Are Insufficient, EPA Has Discretion to Take Action Other Than Withdrawing Approval.

New Union's resources and performance are sufficient for EPA's discretionary approval of the State program, but even if its resources and performance were insufficient for continued approval, EPA may use its discretion to take action other than withdrawing approval of New Union's program. New Union has admittedly decreased its resources devoted to implementation and enforcement of RCRA within the State due to budget constraints, but the decrease is not sufficient to warrant withdrawing approval because New Union still meets its responsibilities under RCRA § 3006(b) as its program is equivalent to the Federal program, consistent with the Federal program, and provides adequate enforcement of requirements. 42 U.S.C. § 6926(b).

EPA may use its discretion to withdraw approval of a State program under RCRA § 3006(e) and pursuant to the Supreme Court's ruling in *Norton v. S. Utah Wilderness Alliance*. Additionally, other options are afforded New Union to meet its responsibilities, including revising its plan to solicit more monetary support from EPA in order to meet the State's financial constraints or soliciting permitting, inspection, and enforcement support from EPA during times of high need, which New Union did with success in 2009. These other options demonstrate support for EPA's discretionary decision not to withdraw approval of New Union's program, even if this Court finds the program insufficient for continued approval.

A. New Union's Most Recent Department of Environmental Protection Annual Report To the EPA, 2009 Shows Adequate Inspections and Enforcement and Therefore Sufficient Resources and Performance For Program Approval.

New Union has sufficient resources and performance for continued EPA approval. In title 40 C.F.R. § 271.8., the note at the end of the regulation explains that While states attempt to detail their program priorities and specific arrangements with the EPA, it is understood and expected that cooperative arrangements between states and the EPA will change over time as states' needs change. New Union has been faced with budget issues and thus has had to make

decisions and cuts based on those budget constraints. Fittingly, the cooperative arrangement between New Union and EPA has changed to accommodate New Union's needs. Under RCRA § 4002(c)(9), economic, financial, and political issues that effect comprehensive solid waste management are legitimate considerations that may guide a state plan and that may be used to revise a state plan. 42 U.S.C. § 6942. While a formal plan revision has yet to take place, New Union has solicited EPA's support for inspection of facilities and enforcement actions so that the New Union can meet its obligations under RCRA.

Regarding inspections of facilities, New Union is meeting its responsibilities pursuant to 40 C.F.R. § 271.15, that says states should have "programs for periodic inspections of the facilities." In 2009, when New Union first solicited EPA's help, 20% of TSDs were inspected, 10% by New Union and 10% by EPA. Since EPA has agreed to inspect a similar amount of facilities in 2010 and it is expected that New Union will do the same, another 20% of TSDs will be inspected in 2010. This means that during New Union's budget shortfall each TSD is inspected every five years. EPA is comfortable with this short-term periodic rate of inspection. Additionally, EPA may be able to inspect more than 10% of New Union's TSDs in the future if New Union asks for more support or revises its state plan.

Regarding enforcement actions, New Union is meeting its responsibilities pursuant to 40 C.F.R. § 271.16, which says that a State must have several specific available remedies for violations of state program requirements. In 2009, New Union reported twenty-two significant permit violations. New Union's Department of Environmental Protection ("DEP") took six enforcement actions, including four administrative orders requiring compliance and payment of penalties, and two civil actions requesting injunctions and judicial assessment of penalties. Additionally, EPA took six enforcement actions, and environmental groups took six enforcement

actions, for a total of eighteen enforcement actions. EPA approves New Union's enforcement abilities as the State has demonstrated it currently enforces using multiple remedies, and the number of actions taken in total is reasonable considering the total number of significant permit violations.

Because of the above facts and reasoning regarding New Union's inspection and enforcement in 2009, EPA, using its discretionary authority, has determined that New Union's resources and performance meet the requirements of RCRA § 3006. The State program is equivalent and consistent with the federal program and provides adequate enforcement of compliance with the federal program requirements. EPA will not withdraw approval of New Union's hazardous waste program. 42 U.S.C. § 6926.

B. EPA Has Exercised Its Discretion Not to Withdraw Approval of New Union's Program and May Exercise Options Other Than Withdrawal, As Withdrawal Is an Extreme Measure and EPA Is Statutorily Encouraged to Use Other Options.

Even if this Court decides that New Union has not met RCRA criteria for state program approval, EPA has discretion whether to withdraw approval or take action other than withdrawing approval. Withdrawing approval of a State plan is a discretionary action under RCRA § 3006: "Whenever the Administrator *determines* after public hearing that a State is not administering and enforcing a program . . . the Administrator shall withdraw authorization of such program . . ." 42 U.S.C. § 6926 (emphasis added). If the manner of any agency's action is left to the agency's discretion, a court has no power to specify what the action must be. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004).

EPA has determined that New Union is administering and enforcing its program so withdrawal is unnecessary and not mandatory, and EPA has and will exercise other options besides withdrawing approval. Case law allows full agency discretion regarding what actions EPA may take if New Unions program is not sufficient to meet RCRA criteria. In *Texas*

Disposal Systems Landfill, the Fifth Circuit further articulated the Supreme Court's holding in *Southern Utah Wilderness Alliance. Tex. Disposal Sys. Landfill Inc.*, 377 Fed. Appx. at 408. The Fifth Circuit held "neither the statute [42 U.S.C. § 6926] nor the regulations present standards by which we can review the EPA's decision not to commence withdrawal proceedings." *Id.*

Under RCRA § 3006, withdrawal is an extreme step that requires EPA to establish a full federal program to replace the cancelled state program and thus other options besides withdrawal are preferred as a first step when a state is inadequately enforcing RCRA. 42 U.S.C. § 6926. The Tenth Circuit noted in *Waste Management, Inc. v. EPA*, "nothing in the text of the statute suggests that [withdrawal] is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement." 714 F. Supp. 340, 341 (N.D. Ill. 1989). EPA may step in and enforce RCRA within a state's program without withdrawing approval of the state program. RCRA § 1003(a)(7) also favors administration and enforcement by states with approved programs in lieu of the federal program so EPA should work with New Union to support its existing program. 42 U.S.C. § 6902(a)(7).

EPA has promulgated regulations to allow for other options in order to avoid the drastic measure of withdrawing approval of a state program, and RCRA regulations provide the Regional Administrator of the U.S. EPA jurisdiction within state programs. 40 C.F.R. § 271.8. Under 40 C.F.R. § 271.19, EPA has jurisdiction to comment on state permit applications and draft permits, indicate when an issuance of a permit would be inconsistent with the approved state program, enforce permits in addition to the state, and terminate a state-issued permit or bring an enforcement action under RCRA § 3008(a)(3). 42 U.S.C. § 6928(a)(3). RCRA § 3008

also allows EPA to give an order to suspend or revoke a permit and may commence a civil action as long as EPA gives notice to the state. 42 U.S.C. § 6928.

States may reach out for support from EPA, as New Union has done, and the federal government is encouraged, by statute, to cooperate with states to authorize their programs. RCRA § 1003. 42 U.S.C. § 6902. EPA has been involved with inspecting New Union's TSDs and with enforcement actions of New Union's TSDs. Cooperation between states and EPA is encouraged because the Federal government can provide technical and financial assistance and states can provide local permitting, inspection, and enforcement authority that is tailored to the particular issues within a state. RCRA § 4001. 42 U.S.C. § 6941.

A state is also allowed to revise its program under 40 C.F.R. §271.21. A revision may take place when a state proposes to modify its basic priorities, forms, procedures, or statutory or regulatory authority. Additionally, "whenever the [EPA] Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as are necessary." 40 C.F.R. § 271.21(d). This would be an alternative to withdrawing approval and could initiate EPA asking New Union to revise its program.

The final option available to a state like New Union with an approved program is to transfer program responsibilities to EPA. 40 C.F.R. § 271.23(a). The transfer may be formal pursuant to the regulations, or the transfer may be in "such other manner as may be agreed upon with the Administrator." *Id.* Some responsibilities may have already been transferred to EPA as the record indicates EPA has been working in coordination with New Union's DEP to inspect TSDs and take enforcement actions. EPA has not withdrawn approval of New Union's

hazardous waste program because it is left to the discretion of EPA to decide whether to withdraw approval of a state program or assert other options and other options are available that are acceptable.

VI. New Union's Program Is Effective Even With Its 2000 ERAA Amendments and EPA Exercises Its Discretionary Approval Not To Withdraw New Union's Entire Program.

EPA does not have to withdraw approval of New Union's entire hazardous waste management program even though railroad hazardous waste facilities are now regulated by New Union's Railroad Commission. States are allowed to delegate responsibilities for hazardous waste management. EPA also has discretion over whether to withdraw approval of a plan and therefore has discretion over when to use other options besides withdrawing a state's entire plan.

Pursuant to RCRA § 4006(b)(1), states "may identify which solid waste management activities will, under such State Plan, be planned for and carried out by a regional or local authority or a combination of regional or local and State authorities." 42 U.S.C. § 6946(b)(1). In the 2000 Environmental Regulatory Adjustment Act (ERAA), New Union established that the New Union Railroad Commission would now have responsibility for "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes . . . ." This transfer of authority is permissible under the aforementioned section.

New Union has informed the EPA of all transfer of authority within its regulatory structure since the 2000 ERAA was passed, and therefore it has been left to the discretion of EPA to maintain New Union's hazardous waste program and not to withdraw approval of the program. The withdrawing of approval of a state plan is a discretionary action: "Whenever the Administrator *determines* . . . the Administrator shall withdraw authorization . . . ." 42 U.S.C. §

6926 (emphasis added). *See supra* Part V. The action or inaction is discretionary so that resources can be used in the most effective way. "[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Mass. v. EPA*, 549 U.S. 497, 527 (2007). EPA is not withdrawing New Union's program based on New Union's changes in its 2000 ERAA because the program is still effective. EPA wants to work cooperatively with New Union so that both New Union and the Federal government use resources effectively. If EPA withdrew approval of the program, EPA would need to plan and implement a complete federal program, which would expend large amounts of resources when a state program already exists, and the program, according to EPA, is enough in compliance with federal regulations to withstand approval.

Even if the 2000 ERAA fails to regulate railroad hazardous waste facilities, EPA has discretion to withdraw or not withdraw approval of the program because EPA may utilize other options besides withdrawing approval of the program. If the matter is left to an agency's discretion, the court has no power to specify what the action must me. *S. Utah Wilderness Alliance*, 542 U.S. at 65. "[N]othing in the text of the statute suggests that [withdrawal] is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement." *Waste Mgmt., Inc.*, 714 F. Supp. at 341. Using its discretion, EPA has not withdrawn approval of New Union's program and instead would exercise other options. *See supra* Part V.

VII. New Union's Treatment of Pollutant X Is Sufficiently Equivalent and Consistent With the Federal Program and Does Not Violate the Commerce Clause.

New Union's treatment of pollutant X in its 2000 ERAA has no adverse effect its hazardous waste treatment program being equivalent to the federal program, consistent with other federal or state programs, and within the limits of the Commerce Clause of the U.S. Constitution. New Union treats pollutant X as required in the federal statute "Standards

applicable to generators of hazardous waste," within RCA § 3002 and pursuant to regulation 40 C.F.R. 271.4 (a),(b). 42 U.S.C. § 6922. New Union's 2000 ERAA Amendment does not violate the Commerce Clause because it does not impose a burden on other states and New Union's government has jurisdiction to regulate hazardous waste.

States must establish standards for generators of hazardous waste that include "recordkeeping practices that accurately identify the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environment, and the disposition of such wastes . . . ." 42 U.S.C. § 6922(a)(6)(C). The statute also prescribes, among several other things, that "efforts [should be] undertaken during the year to reduce the volume and toxicity of waste generated . . . ." *Id.* In compliance with the statute, New Union has asked facilities generating pollutant X to "submit . . . a plan to minimize the generation of pollutant X containing wastes and every year thereafter . . . submit to the DEP a report stating the reduction in generation of pollutant X during the previous year and a plan for additional reduction of such waste in the following year, until such generation entirely ceases." These requirements are equivalent to the federal program guidelines for generators of hazardous waste.

New Union also established guidelines for long-term disposal of pollutant X and these guidelines are equivalent to federal guidelines. RCRA § 3002(b)(2) requires that "the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment." 42 U.S.C. § 6922(b)(2). New Union currently has no treatment or disposal facilities within its State that are designed, permitted, or capable of "preventing exposure of persons or the environment to releases of pollutant X . . . ." *Id.* It is appropriate that in order to meet RCRA

provisions, including RCRA § 3002, New Union requires pollutant X to be transported out-of-state to a facility designed and permitted to treat or dispose of pollutant X.

Regulation 40 C.F.R. 271.4(b) says that a state program "*may* be deemed inconsistent" if a state law or program "has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State . . . ." 40 C.F.R. 271.4(b) (emphasis added). EPA has discretion whether to deem the program inconsistent or not as evidenced by the word "may." New Union specifically bases its program for pollutant X on "preventing exposure of persons in the environment to releases of pollutant X . . . ."). 42 U.S.C. § 6922(b)(2) A program is inconsistent only if it is not based on protecting human or environmental health *and* it acts as a prohibition on treatment, storage, or disposal of hazardous waste in the state. Because New Union's program is based on human health, it is consistent with the federal program or another approved state program.

New Union's hazardous waste program regarding pollutant X is within the constraints of the Commerce Clause of the U.S. Constitution. The Commerce Clause is violated when a state implements restrictions that unduly burden another state. *Phila. v. N. J.*, 437 U.S. 617, 623–624 (1978). A state may also unduly burden its own population if private competitors within a state are prevented from competing with a state sponsored program that is not regarded as an industry that should be solely under the jurisdiction of the state government. *United Haulers Ass'n, Inc. v. Onedia-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344–345 (2007). New Union has not unduly burdened another state with its actions. New Union's ERAA regarding pollutant X does not ban or require anything from any other state. Presently, EPA has authorized only nine facilities in the country to treat and dispose of pollutant X. This may be because treatment and disposal of pollutant X requires intensive and expensive processing and it makes economic sense

for a few processors to handle the majority of the waste. No state has come forth to state a claim under the Commerce Clause. Additionally, New Union is not unduly burdening its own population because it is protecting the health of its citizens and its environment. New Union, presumably along with many other states, has made a decision to process pollutant X out-of-state. New Union has jurisdiction to make this decision and jurisdiction to control all of the hazardous waste in its own state under RCRA § 1003. 42 U.S.C. § 6902. New Union citizens have the power to affect the state government decisions at the polls on Election Day if they do not like the way the State deals with its hazardous waste. There is no Commerce Clause violation.

CONCLUSION

The Court of Appeals should find that EPA has not unreasonably delayed in acting on CARE's petition and therefore no cause of action has accrued. If the Court of Appeals finds that EPA has unreasonably delayed in responding to CARE's petition, then the Court should remand the case to the district court for an order requiring EPA to act on CARE's petition.

Alternatively, if the Court of Appeals finds that it has jurisdiction to act on CARE's claims, then EPA was not required to withdraw approval from New Union's entire hazardous waste program, because EPA has discretion to take action other than withdrawing approval. Additionally, approval is not required to be withdrawn because New Union's program for regulation of Pollutant X is equivalent and consistent with the federal program and not in violation of the Commerce Clause.

APPENDIX

Recognizing that Pollutant X is said by EPA and the World Health Organization to be among the most potent and toxic chemicals to public health and the environment; and

Recognizing further that there are presently no treatment or disposal facilities in New Union designed and permitted to, or capable of, preventing exposure of persons or the environment to releases of Pollutant X; and

Recognizing further that there are only nine treatment and disposal facilities in the country presently authorized by EPA under RCRA to treat or dispose of Pollutant X;

NOW, THEREFORE, the Hazardous Regulation Act is amended to include the following:

1. Every facility generating wastes including Pollutant X shall submit to the DEP within the next ninety days a plan to minimize the generation of Pollutant X containing wastes and every year thereafter by December 31, shall submit to the DEP a report stating the reduction in generation of Pollutant X during the previous year and a plan for additional reduction of such waste in the following year, until such generation entirely ceases.

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

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

(Rec. doc. 4 for 2000, pp. 105–107).