Team No. 51

CA-18-2010

CA-400-2010

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

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

v.

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

v.

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

ON APPEAL FROM THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW UNION

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

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JURISDICTIONAL STATEMENT

This is an appeal from the final order of the United States District Court for the District of New Union. Jurisdiction in the District Court was based on federal question jurisdiction, the Resource Conservation and Recovery Act, and the Administrative Procedure Act. 28 U.S.C. § 1331 (2006); 42 U.S.C. § 6972(a)(2) (2006); 5 U.S.C. § 553(e) (2006). Citizen Advocates for Regulation and the Environment (CARE) timely filed a notice of appeal from the District Court's final order granting the State of New Union's motion for summary judgment and denying CARE's motion for summary judgment. This court has jurisdiction under 28 U.S.C. § 1291, which grants jurisdiction over all final decisions of the district court. 28 U.S.C. § 1291 (2006). Grant of a motion for summary judgment constitutes a final order that disposes all of the parties' claims and from which appeal may be taken. *FirsTier Mortgage Company v. Investors Mortgage Insurance Company*, 498 U.S. 269, 111 S.Ct. 648 (1991).

STATEMENT OF THE ISSUES ON REVIEW

1. Whether RCRA § 7002(a)(2) provides jurisdiction for district courts to order the 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.

2. Whether 28 U.S.C. § 1331 provides jurisdiction for district courts to order the EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed under 5 U.S.C. § 553(e).

3. Whether EPA's failure to act on CARE's petition that the EPA initiate proceedings to consider withdrawing approval of New Union's hazardous waste program under RCRA § 3006(e) 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), both subject to judicial review under RCRA §§ 7002(a)(2) and 7006(b).

4. If the answer to issue 3 is positive and the answer to either or both of issues 1 and 2 is positive: Should this Court lift the stay in C.A. No. 18-2010 and proceed with judicial review of the EPA's constructive actions or should the Court remand the case to the lower court to order the EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program?

5. If this Court proceeds to the merits of CARE's challenge: Must the EPA withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria?

6. If this Court proceeds to the merits of CARE's challenge: Must the EPA 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?

7. If this Court proceeds to the merits of CARE's challenge: must the EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause?

STATEMENT OF THE CASE

On January 4, 2010, CARE filed simultaneous actions in the District Court (Civ. Case No. 000138-2010) and the Court of Appeals (C.A. Case No. 18-2010) seeking an injunction requiring EPA to act on its petition to commence withdrawal of New Union's state hazardous waste program. In the alternative, CARE also sought judicial review of the EPA's constructive denial of the petition and constructive determination that New Union's hazardous waste program continues to meet the criteria for approval. The Court of Appeals stayed action pending the outcome in the District Court. New Union moved to intervene and was made a party to the action. The parties filed cross-motions for summary judgment, stipulating to the facts alleged by CARE and agreeing that no additional facts were necessary to decide the matter.

On June 2, 2010, the District Court issued an Order in which it held that it lacked jurisdiction to order the EPA to make a determination on CARE's petition. Both CARE and the EPA appealed the District Court's Order. CARE also requested that this Court lift the stay in Case No. 18-2010 and proceed with review of the EPA's constructive denial of CARE's petition.

STATEMENT OF THE FACTS

The EPA approved New Union's hazardous waste program in 1986 after finding that the New Union Department of Environmental Protection ("DEP") had adequate resources to issue permits in a timely fashion, inspect RCRA regulated facilities at least every other year, and take enforcement actions against all significant violations (Rec. doc. 2, p.1). The EPA noted at the

time that if the DEP had fewer resources New Union's program might not be adequate to comply with RCRA provisions. (Rec. doc. 3, p. 16).

In 2000, the New Union legislature enacted the Environmental Regulatory Adjustment Act ("ERAA"), which amended New Union environmental statutes. (Rec. doc. 4 for 2000, pp. 103-105). The first amendment was to the New Union Railroad Regulation Act ("RRA"), which established the New Union Railroad Commission charged with regulating intrastate railroads. (Rec. doc. 4 for 2000, pp. 103-105). The amendment transferred all DEP enforcement authority of state environmental laws to the Commission. (Rec. doc. 4 for 2000, pp. 103-105). The amendment also removed criminal sanctions for violations of environmental statutes committed by facilities falling under the jurisdiction of the Commission. (Rec. doc. 4 for 2000, pp. 103-105).

The ERAA addressed New Union's problem with Pollutant X, a highly toxic hazardous waste. (Rec. doc. 4 for 2000, pp. 105-107). Based on the legislature's determination that Pollutant X is among "the most potent and toxic chemicals to public health and the environment," New Union's Hazardous Waste Regulation Act was amended as follows:

> 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 [d]isposal 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).

In the years since the EPA originally approved New Union's hazardous waste program, the number of TSDs in the state has increased from 1,200 to 1,500. (Rec. doc. 4 for 2009, p. 23). Meanwhile, the resources and staff devoted to New Union's program have been reduced dramatically, falling by 40%, mostly since the year 2000. (Rec. doc. 1, p. 73). Though all of New Union's state programs have experienced funding cuts, resources allocated to the DEP were reduced more drastically than resources allocated to other programs. (Rec. doc. 4 for 2009, p. 51). In 2009, New Union's Governor enacted a general freeze on hiring new DEP employees for at least two years. (Rec. doc. 4 for 2009, p. 53). Additional lay-offs of 5 to 10% of DEP's staff are also likely in that time. (Rec. doc. 4 for 2009, p. 53; Rec. doc. 6, June 6, 2009).

As a result of reduced resources, the DEP has failed to keep-up with issuing and renewing hazardous waste permits in the state. (Rec. doc. 4 for 2009, p. 19). Of the 1,500 TSDs known to exist in New Union, 900 are currently operating on expired permits, some of which expired as long as 20 years ago. (Rec. doc. 4 for 2009, p. 20). Each year, New Union receives 50 applications for hazardous waste permits from new facilities seeking to start operations and from existing facilities seeking to expand operations. (Rec. doc. 4 for 2009, p. 20). The DEP focuses its resources on issuing new permits before renewing expired permits, even where facilites have operated on an expired permit for 15 or more years or the wastes handled pose great potential harm to the public health or the environment. (Rec. doc. 4 for 2009, p. 20). The New Union DEP indicated that it issued 125 RCRA permits in 2009 and anticipated issuing 125 in 2010. (Rec. doc. 4 for 2009, p. 19)

In 2009 the DEP performed inspections of 150 TSD facilities and projected it would complete the same number of inspections in 2010. (Rec. doc. 4 for 2009, p. 22). The DEP recruited the EPA to inspect a comparable number of New Union facilities in 2009 and 2010.

(Rec. doc. 4 for 2009, p. 23). In 2009, 22 significant permit violations were reported along with hundreds of minor violations; the DEP and EPA each took 6 enforcement actions. (Rec. doc. 4 for 2009, p. 24-26).

SUMMARY OF THE ARGUMENT

The District Court erred in granting New Union's Motion for Summary Judgment because the EPA's action was rulemaking and subject to review under RCRA § 7002. The EPA's failure to act on a RCRA § 7004 petition caused it to fail to perform a mandatory duty and provides a cause of action for a RCRA § 7002 suit in District Court. Furthermore, the District Court also erred in determining that CARE could not challenge the EPA's failure to act on its petition under the APA. If no adequate remedy is available under the controlling statute, the APA provides for adjudication of a challenge to agency promulgation of a rule in the District Court. Since EPA action approving, denying or modifying a state program is rulemaking, and the EPA unreasonably or unlawfully delayed acting on CARE's petition, the APA provides alternative grounds for review.

In the alternative, the Court of Appeals has jurisdiction under 42 U.S.C. § 6976(b). The EPA's failure to act on CARE's petition constituted constructive denial of that petition and a constructive determination that New Union's program continues to meet RCRA criteria for program approval. RCRA provides for judicial review of both constructive denial of a petition for a rule and constructive approval of a state program in the Court of Appeals. This Court should lift the stay in the Court of Appeals case previously filed by CARE and proceed with judicial review of the EPA's actions rather than remand to the District Court because this Court has statutory jurisdiction to hear the matter and doing so would promote judicial economy.

New Union's program no longer meets RCRA criteria for approval and the EPA has a mandatory duty to being withdrawal proceedings. New Union's performance evidences that it cannot adequately comply with RCRA permitting and enforcement provisions. New Union has also passed legislation that prevents the DEP from acting in a manner equivalent to the Federal program or other state programs, and New Union's treatment of Pollutant X fails to regulate waste in accordance with federal minimum standards, causes the program to be inconsistent with the federal and other state programs, and violates the Commerce Clause. Accordingly, this Court should order the EPA to comply with its mandatory duty to withdrawal New Union's program as no longer compliant with the requirements of the statute.

ARGUMENT

Standard of Review

The District Court determined that it lacked jurisdiction to hear CARE's challenge and granted summary judgment in favor of New Union. Where the parties stipulate to the facts and the District Court's judgment is based solely on questions of law, the Court of Appeals reviews a District Court's grant of summary judgment *de novo*. *Bjustrom v. Trust One Mortgage Corp.*, 322 F.3d 1201, 1205 (9th Cir. 2003). Issues of law are reviewed without deference to the district court. *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 811-812 (9th Cir. 1997).

The District Court did not reach the merits of this case. Neither 42 U.S.C. § 6972 nor 42 U.S.C. § 6976 provide for statutory burdens of proof in actions arising under those sections. "In administrative proceedings, the APA provides a default rule for allocating proof burdens when regulatory statutes do not set forth separate rules." *Hazardous Waste Treatment Council v. U.S. E.P.A.*, 886 F.2d. 355, 366 (D.C. Cir. 1989). Under the APA, "the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The burden of persuasion in such cases requires the

proponent of a rule or order to establish their claim by preponderance of the evidence. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 270, 114 S.Ct. 2251, 2254 (1994). Thus, to prevail on the merits, CARE must establish that "the greater and superior weight of evidence" is in favor of its conclusions. *See People v. Miller*, 171 Cal. 649, 154 P. 468 (1916); *Lowry v. Lowry*, 170 Ga. 349, 153 S.E. 11 (1930) (defining "preponderance of the evidence").

Discussion of the Issues

1. RCRA § 7002(a)(2) PROVIDES JURISDICTION FOR THE DISTRICT COURT TO ORDER THE EPA TO ACT ON CARE'S PETITION FOR REVOCATION OF NEW UNION'S HAZARDOUS WASTE PROGRAM BECAUSE THE EPA'S APPROVAL OF NEW UNION'S PROGRAM WAS RULE.

Under the RCRA citizen suit provision, any person may file a suit against the Administrator where there is an alleged failure of the Administrator to perform a nondiscretionary duty under RCRA. 42 U.S.C. § 6972(a)(2) (2006). CARE served a petition on the EPA under RCRA § 7004 seeking to compel the EPA to repeal a regulation promulgated under RCRA § 3006 approving New Union's state hazardous waste program. 42 U.S.C. §§ 6929, 6974(a). The EPA has a mandatory duty to respond to § 7004 petitions within a reasonable amount time following receipt of the petition. 42 U.S.C. § 6974(a). Pursuant to this duty, the EPA must make a determination on the petition and publish the determination in the Federal Register with the reasons for its determination. 42 U.S.C. § 6974(a); *see* 40 C.F.R. § 260.20(c) (2009). The EPA has not taken action on CARE's petition. (R.4).

In response to the EPA's refusal to take action, CARE sought judicial intervention to compel EPA compliance with its duty to respond to CARE's rulemaking petition. (R.4.) The District Court erred in granting New Union's motion for summary judgment because: (1) RCRA § 7004 imposes a mandatory duty on the EPA to respond to such petitions, and (2) the District

Court has jurisdiction to hear this case under RCRA § 7002(a)(2) because an EPA determination on CARE's petition would result in a rule.

A. The Administrator has a mandatory duty to respond to RCRA § 7004 petitions.

CARE filed a complaint to compel the Administrator to act under RCRA § 7004 because the EPA determined it had a duty to respond to CARE's petition, which New Union agrees with. (R.6). The District Court cited EPA's argument that "shall does not necessarily indicate a mandatory action." (R.6) (citing *Guiterrez de Martinez v. Lamagno*, 515 U.S. 417, 432-433 n. 9, 115 S. Ct. 2227, 2235 (1995)). The District Court's reliance on EPA's citation is flawed because in *Guiterrez*, the Supreme Court explicitly stated that "shall generally means must" and that "shall" is often misused to mean should or may. *Guiterrez*, 515 U.S. at 432 n.9, 115 S. Ct. at 2235 (*emphasis added*).

The *Guiterrez* court provided two examples of when "shall" does not mean "must," both of which were from the Federal Rules of Civil and Criminal Procedure, and were limited by the word "only." *Id.* RCRA's provision regarding rulemaking petitions does not contain similar language limiting the mandatory nature of the Administrator's duty only to certain circumstances. 42 U.S.C. § 6974(a). The statute states that the Administrator shall take action within a reasonable amount of time after receipt of a petition, leaving the mandatory nature of the Administrator's duty unchanged. 42 U.S.C. § 6974(a) ("Within a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition and shall publish notice of such action in the Federal register, together with the reasons therefore.") (*emphasis added*). The plain language of the statute and the plain meaning of the term prove that the Administrator has a duty to respond to § 7004 petitions within a reasonable amount of time.

Therefore, the District Court erred in its determination that the Administrator was not required to respond.

B. The District Court erred in holding that the Administrator's determination to approve or disapprove of NU's hazardous waste program is not a rule.

The District Court erroneously determined that the EPA did not have a duty to respond to CARE's petition because the EPA's action in response would involve issuing an order rather than creating a rule even though the EPA determined that its action would be a rulemaking. (R.7). The choice the EPA makes between proceeding by general rule or by individual adjudication and order lies in the informed discretion of the administrative agency. *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 203, 67 S. Ct. 1575, 1580 (1947). The Administrator's determination that its initial approval of New Union's program is a rule falls within the Administrator's discretion, not the District Court's. (R.6).

1. Chevron deference applies because the EPA's determination that its action was a rulemaking is an interpretation of the EPA's authority under RCRA §§ 2002(a) and 3006.

According to *Chevron*, when a court reviews an agency's construction of the statute which it administers, the court must address whether Congress has directly spoken to the question at issue. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984). When the District Court determined that *Chevron* deference did not apply, it mistakenly focused on the definition of rulemaking under the APA, instead of looking to the Administrator's construction of RCRA, the statute which the EPA administers. (R.6); *see* 42 U.S.C. § 6926.

When analyzing RCRA, if the intent of Congress is clear the court must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842-43. The EPA's initial approval and authorization of New Union's hazardous waste program derives authority under

RCRA §§ 2002(a) and 3006. 42 U.S.C. §§ 6912(a), 6926. Congress expressly delegated broad rulemaking authority to the EPA under RCRA by requiring the Administrator to: (1) prescribe necessary regulations; (2) review and, where necessary, revise each regulation promulgated at least every three years; and (3) prescribe regulations to assist States in the Development of State hazardous waste programs. 42 U.S.C. §§ 6912(a),(b), 6926(a). Congress clearly intended to delegate broad authority to the EPA for the promulgation and revision of regulations under RCRA, and as such, the Administrator's determination of proceeding by rulemaking conforms with Congressional intent.

2. *Even if the EPA's determination is not entitled to deference, Congress intended to include EPA decisions to approve state hazardous waste programs with other rulemaking actions subject to petition under 42 U.S.C. § 6974.*

RCRA's mechanism for petitioning the EPA for the promulgation, amendment or repeal of regulations evidences implicit Congressional intent to provide for review of an authorized state hazardous waste programs. As such, a petition challenging the continued validity of a state program is properly made under 42 U.S.C. § 6974, and the failure of the EPA to respond to that petition is reviewable in the District Court under 42 U.S.C. § 6972.

To determine Congressional intent, the court must apply the "traditional tools of statutory construction." *Id.* at 843, 104 S.Ct. at 2781. These tools include looking to the language of the statute itself, as well as "the specific context in which that language is used, and the broader context of the statute as a whole[.]" *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 454-55, 113 S.Ct. 2173 (1993) (*internal citations and quotations omitted; emphasis added*).

In *Ki Se Lee v. Ashcroft*, the Third Circuit read two subsections of the Immigration and Nationality Act (8 U.S.C. § 1101) together to create ambiguity about the plain meaning of one of

the subsections. *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 222 (3rd Cir. 2004). The court determined that "if at all possible, we should adopt a construction which recognizes each element of the statute." *Id.* at 223. Applying this principle, the court determined that the second subsection modified the first, even though language to this effect was not expressly included in the statute. *Id.* at 223.

This case presents an similar situation. Although 42 U.S.C. § 6972(a) does not provide explicitly for petitions challenging the validity of state hazardous waste programs, or specifically denote such actions as rules, the public participation provisions of 42 U.S.C. § 6972(b) include a requirement of "public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter." 42 U.S.C. § 6972. This Court should read these provision together to comprehend the full intention of Congress in enacting 42 U.S.C. § 6972(a) and (b) under the same section. When read together, 42 U.S.C. § 6972(b)'s specific inclusion of "program" as an entity similar to regulations implies Congressional intent to provide for revision, implementation, and enforcement of such programs pursuant to the mandates of 42 U.S.C. § 6972(a).

II. THE DISTRICT COURT HAS JURISDICTION UNDER 28 U.S.C. § 1331 TO ORDER THE EPA TO ACT ON CARE'S PETITION FOR THE REVOCATION OF NEW UNION'S HAZARDOUS WASTE PROGRAM.

Federal courts have jurisdiction over all civil actions arising under the laws of the United States, including those brought under the APA. *Road Sprinkler Fitters Local Union 669 v. Herman*, 234 F.3d 1316, 1319 (D. C. Cir. 2000) (*citing* 28 U.S.C. § 1331). The APA waives the government's sovereign immunity, and thus permits the exercise of jurisdiction in actions seeking non-monetary relief with respect to agency action. 5 U.S.C. § 702. This waiver applies

as long as another statute does not limit judicial review or forbid the type of relief sought. 5 U.S.C. § 702.

The APA affords judicial review to parties adversely affected by agency action. *Cohen v. U.S.*, 578 F.3d 1, 6 (2009) (*citing* 5 U.S.C. §§ 702, 704; *rehearing en banc granted in part Cohen v. U.S.*, 599 F.3d 652 (D.C. Cir. Mar 11, 2010)). Judicial review is limited to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. A substantive rule constitutes a binding final agency action and is reviewable. 5 U.S.C. § 704.

The APA further provides that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." U.S.C. § 553(e) (2006). Furthermore, the APA provides a remedy for compulsion of agency action unlawfully held or unreasonably delayed. 5 U.S.C. § 706(1). As discussed *supra*, EPA's action in determining whether to withdraw approval of New Union's hazardous waste program was a rulemaking, and as such, CARE's may challenge EPA's denial of its petition under 5 U.S.C. § 702 and seek compulsion of EPA action on the petition.

A. CARE's petition is subject to review under 28 U.S.C. § 1331 and 5 U.S.C. § 702 because it was for the issuance, amendment, or repeal of a rule and was unlawfully or unreasonably delayed by the EPA.

CARE's petition for withdrawal of New Union's state hazardous waste program was a petition for a rule pursuant to the statutory intent of RCRA and the EPA's own interpretation of the statute. *Supra*. A claim to compel agency action unlawfully withheld or unreasonably delayed can proceed only where a plaintiff asserts that an agency failed to take action that it is required to take. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64, 124 S. Ct. 2373, 2379 (2004). When the Administrator failed to comply with its mandatory duty to respond to CARE's

rulemaking petition under § 553(e), it trigged the judicial review provision of the APA. 5 U.S.C. §§ 553(e), 706(1). While the EPA has discretion over its response to CARE's rulemaking petition, "[i]t is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decision-making." *Bennett v. Spear*, 520 U.S. 154, 172, 117 S. Ct. 1154, 1166 (1997). Judicial review to compel the Administrator to act is proper because the Administrator was derelict of an express, mandatory statutory duty.

Although there is no per se rule as to what constitutes unreasonable delay when waiting for agency action, "a reasonable time is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (*internal quotations omitted*). Here, EPA has failed to act on CARE's petition for nearly a year. (R.5). The primary purpose of mandating EPA action "is to ensure that an agency does not thwart jurisdiction by withholding a reviewable decision." *In re Am. Rivers*, 372 F.2d at 418-19. Allowing the agency to inordinately delay action frustrates congressional intent "by forcing a breakdown of regulatory processes." *Cutler v. Hayes*, 818 F.2d 879, 897 n.156 (D.C. Cir. 1987).

28 U.S.C. § 1331 and 5 U.S.C. § 702 provide for judicial review of EPA's constructive denial of CARE's petition because the APA expressly provides a mechanism for review of agency action not otherwise provided for or foreclosed by statute. The APA provides for relief to compel agency action unlawfully withheld or unreasonably delayed, and in this case the EPA failed to act on CARE's petition for the amendment or repeal of a rule in a reasonable time. If RCRA does not provide for other "adequate remedy," 5 U.S.C. § 702 provides an alternative process for review. *See Natural Resources Defense Council v. Johnson*, 461 F.3d 164 (2nd Cir. 2006).

B. Review of CARE's petition under the APA is only appropriate if another statute does not limit judicial review or forbid the type of relief sought, and for which there is no other adequate remedy in a court.

The District Court determined that CARE could not maintain an action under the APA because RCRA provides specific authority for review and there is an old rule of statutory interpretation that states "the specific governs over the general." (R.8). CARE concedes that if another statute provides for jurisdiction over this claim then the APA will not provide a mechanism for review. Indeed, CARE has raised APA jurisdiction for the exact purpose of providing an alternative avenue for remedy if the District Court determines that no remedy exists under RCRA.

The Circuit Court for the District of Columbia has held that an alternative remedy will not be adequate for purposes of determining whether final agency action is reviewable under the APA if the remedy offers only doubtful and limited relief. *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009). Here, the District Court determined that the adequate remedy for CARE's cause of action lies in RCRA provisions vesting jurisdiction in the Court of Appeals. If this Court determines that it has jurisdiction under RCRA to adjudicate CARE's claims, CARE concedes that the APA does not provide an alternative avenue for review. If, however, this court determines that RCRA does not provide for review of the EPA's constructive denial of CARE's petition either in the Court of Appeals the APA provides for review.

III. THE EPA'S FAILURE TO ACT ON CARE'S PETITION CONSTITUTED CONSTRUCTIVE DENIAL OF THAT PETITION AND A CONSTRUCTIVE DETERMINATION THAT NEW UNION'S PROGRAM CONTINUES TO MEET RCRA CRITERIA FOR PROGRAM APPROVAL AND BOTH ACTIONS ARE SUBJECT TO JUDICIAL REVIEW UNDER RCRA § 7006(b).

The EPA's failure to act on CARE's petition was a constructive denial of that petition because the EPA unreasonably delayed nondiscretionary action. The EPA's inaction amounted

to a constructive determination that New Union's program continues to meet approval criteria because the EPA's refusal to perform a mandatory duty constitutes a determination that no EPA action was necessary. Both actions are subject to exclusive review in the court of appeals under RCRA § 7006(b) because approval of New Union's hazardous waste program was a rule and the EPA's failure to revise the rule in the face of new information is an action in granting authorization.

A. The EPA's failure to act on CARE's petition in a reasonable amount of time constituted a constructive denial of CARE's petition.

The EPA's failure to act on CARE's petition for 364 days constitutes a constructive denial of that petition because the EPA failed to perform a mandatory duty to respond to a petition to commence withdrawal proceedings within a reasonable amount of time. 40 C.F.R. 271.23(b)(1). Under the TRAC factor test for determining whether agency action has been unreasonably delayed, the court should (1) apply a rule of reason, (2) look to statutory guidance if available, (3) be especially vigilant when human health and welfare are at stake, (4) consider competing priorities of the agency, (5) consider the interests prejudiced by delay, and (6) not require a showing of agency impropriety. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d, 70, 80 (D.C. Cir. 1984). *See also In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (holding that the Federal Regulatory Commission's failure to answer a petition for formal consultation under the Endangered Species Act for six years was plainly unreasonable);

This court should apply the TRAC test to determine whether the EPA unreasonably delayed action on CARE's petition. First, the rule of reason demands a finding that the EPA unreasonably delayed action on CARE's petition by failing to act for a year. Second, there is no statutory guidance in RCRA that defines a "reasonable amount of time" for EPA action in

response to § 7004 petitions. Third, due to the severe toxicity of Pollutant X, (Rec. doc. 4 for 2000, pp. 105-107), this Court should be especially vigilant of the welfare of the citizens and environment of New Union. Fourth, the competing priorities of the agency are the proper implementation of a hazardous waste program and budgetary concerns, whereas the interests prejudiced by delay of action are not only the interests of CARE in achieving withdrawal of New Union's program approval, but the interests of the citizens of New Union in living in a safe environment untainted by hazardous waste. Under the TRAC criterion, this Court should find that the EPA's inaction constitutes an unreasonable delay.

B. Failure to act on CARE's petition constituted a constructive determination by the EPA that New Union's program continues to be sufficient to meet RCRA approval criteria.

The EPA's failure to act on CARE's petition constituted a constructive determination that New Union's program continues to meet RCRA approval criteria because the EPA's refusal to perform a nondiscretionary duty amounts to a determination that no EPA action was necessary.

The present case is analogous to *Scott v. City of Hammond, Ind.*, 741 F.2d 992 (7th Cir. 1984), where the plaintiff brought suit under the Clean Water Act against the EPA for failure to perform a nondiscretionary duty of promulgating total maximum daily loads ("TMDLs"), alleging that the state's failure to promulgate TMDLs was a constructive submission of no TMDLs. The Seventh Circuit stated that if the state constructively submitted no TMDLs, the EPA's failure to perform a nondiscretionary duty of promulgating TMDLs for the state would be tantamount to a determination that no TMDLs were needed and EPA action was unnecessary. *Id.* at 998.

As explained by the court in *Scott*, where the EPA fails to perform a nondiscretionary duty, that failure is equivalent to a determination that no EPA action is necessary. At issue in

Scott was whether the EPA's inaction, when faced with a mandatory duty to act, amounted to a decision that no action was necessary because the EPA agreed with the state's determination that no TMDLs were necessary. Like *Scott*, here the EPA had a nondiscretionary duty to respond to CARE's petition and failure to respond constitutes a determination that no EPA action was necessary because New Union's program continues to meet approval criteria.

The EPA and New Union may argue that the EPA's inaction on CARE's petition is not a constructive action denial because the EPA did not have a mandatory duty to act. However, RCRA § 7004 states that the EPA "shall take action" on a petition to repeal a rule and 40 CFR 271.23(b)(1) states that the EPA "shall respond in writing to any petition to commence withdrawal proceedings." The term "shall" means "must." *Alabama v. Bozeman*, 533 U.S. 146, 153, 121 S. Ct. 2079, 2085 (2001); *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S.Ct. 428 (1947).

C. The EPA's constructive determinations are rules and subject to review in the Court of Appeals under RCRA § 7006(b).

Both constructive actions are subject to review under RCRA § 7006(b) because approval of a state's hazardous waste program is a rule and the EPA's failure to revise the rule in the face of new information is an action in granting authorization. RCRA § 7006(b) provides for Court of Appeals review of the EPA's action in granting, denying, or withdrawing a state's authorized hazardous waste program.

In *Maier v. U.S. E.P.A.*, 114 F.3d 1032, 1037-38 (10th Cir. 1997), the Tenth Circuit held that the EPA's denial of a petition to institute rulemaking constituted an action in approving or promulgating a rule under the Clean Water Act and the court of appeals had exclusive jurisdiction. The court stated that "Congress plainly intended that the Administrator's refusal to institute rulemaking in the face of new information could be reviewed directly in a circuit court.

Id. at 1037. Moreover, the court stated that "a challenge to the refusal to revise a rule in the face of new information is more akin to a challenge to the existing rule than a challenge to the refusal to promulgate a new rule." *Id.* at 1038. The court firmly stated that where a petitioner challenges the substance of an existing regulation the court of appeals has exclusive jurisdiction, which may not be evaded by styling the claim as a failure to revise an existing regulation. *Id.*

Just as the court in *Maier* held that the EPA's denial of a petition to revise a rule was exclusively reviewable in the court of appeals, this court should find that the EPA's constructive denial of CARE's petition is reviewable only in this court. Both the petitioner in *Maier* and CARE sought revision of an existing rule in light of new information, rather than the EPA's refusal to promulgate a new rule. New information indicating numerous failings of New Union to carry out its hazardous waste program in accordance with RCRA guidelines requires the EPA to revoke or revise New Union's hazardous waste program.

The EPA and New Union may argue that CARE cannot seek review under 7006(b) because more than 90 days have passed since the EPA granted New Union's program authority. However, in *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 907 F.2d 1146, 1165 (D.C. Cir. 1990) the court dismissed the EPA's argument that the 90-day statute of limitations provision of RCRA 7006(b) had passed because all of the claims were based on actions occuring after the 90-day period had run. Like the petitioner in *NRDC*, CARE's petition is based solely on grounds arising after 90 days from when the EPA approved New Union's program, therefore review is proper in this Court.

IV. THE COURT OF APPEALS SHOULD LIFT THE STAY AND PROCEED WITH JUDICIAL REVIEW OF THE EPA'S CONSTRUCTIVE ACTIONS RATHER THAN REMAND TO THE DISTRICT COURT TO ORDER THE EPA TO INITIATE WITHDRAWAL PROCEEDINGS.

This court should lift the stay and proceed with judicial review because jurisdiction is proper in the Court of Appeals under 42 U.S.C. §. 6976(b) and remaining in the Court of Appeals promotes judicial economy.

A. The Court of Appeals has jurisdiction over this matter pursuant 42 U.S.C. § 6976(b).

This Court should lift the stay and proceed with judicial review because jurisdiction is proper in the Court of Appeals under 42 U.S.C. § 6976(b). Where a petition to compel unreasonably delayed agency action is proper before the court of appeals, a district court, or both: "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." *Sierra Club v. Thomas*, 828 F.2d 783, 787 (D.C. Cir. 1987) (*emphasis in original*). In *Sierra Club*, the court analyzed the Clean Air Act ("CAA"), which provides for review of agency action in a district court for citizen suits and the court of appeals for appeal of a rulemaking. The court held that considerations of efficiency and fairness suggest that when no readily-ascertainable deadline exists in the statute, a claim alleging unreasonable delay should be brought in the Court of Appeals. *Id.* at 792.

The provisions for judicial review in the CAA and RCRA are practically identical, therefore this Court should proceed with judicial review because just like the CAA, the RCRA does not provide a readily-ascertainable deadline for EPA action. Moreover, jurisdiction is exclusive in this Court because RCRA § 7006(b) vests jurisdiction in the Court of Appeals, thereby cutting of original jurisdiction in other courts in cases covered by the statute. *TRAC*, 750 F.2d at 77.

B. Remaining in the Court of Appeals promotes judicial economy.

This court should proceed with review for reasons of judicial economy. In *Indiana & Michigan Elec. Co. v. U.S. E.P.A.*, 733 F.2d 489, 490 (7th Cir. 1984), the court found that notwithstanding the fact that the district court had general jurisdiction under the CAA over claims for agency inaction, the Court of Appeals had jurisdiction to challenge the EPA's determination to take no action in a challenge to the validity of an implementation plan and judicial economy was fostered by direct review in the Court of Appeals.

Like the court in *Indiana*, this court has jurisdiction to hear CARE's challenge to the EPA's action in approving New Union's program. It would be a waste of time and resources to remand this case to the District Court to order EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's program because the EPA already denied CARE's petition and determined that New Union's program continues to meet approval criteria. Thus, this Court has proper jurisdiction under RCRA § 7006(b) to review the EPA's actions and remanding to the District Court to commence withdrawal proceedings is unnecessary.

V. THE EPA MUST WITHDRAW ITS APPROVAL OF NEW UNION'S PROGRAM BECAUSE NEW UNION'S RESOURCES AND PERFORMANCE FAIL TO MEET RCRA APPROVAL CRITERIA.

New Union's program fails to meet the minimum approval criteria set out in 42 USC § 6926(b) by failing to provide adequate administration and enforcement of RCRA hazardous waste provisions, and by failing to provide services equivalent to the federal program. Since 42 USC § 6926(e) requires the EPA to withdraw authorization for any state program that fails to meet the administration and enforcement provisions of 42 USC§ 6926(b), the EPA must withdraw approval of New Union's program and proceed to establish a federal program in its place.

The United States Supreme Court has long held that the courts have a simple function in determining the proper interpretation of a statutory mandate: "to construe the language so as to give effect to the intent of Congress." *U.S. v. American Trucking Association*, 310 U.S. 534, 532, 60 S.Ct. 1059, 1063 (1940). The starting point in discerning Congressional intent is the existing statutory text and where the statute's language is plain, the sole function of the courts is to enforce the statute according to its terms. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004).

Any state seeking to administer and enforce a hazardous waste program must submit an application to the EPA. RCRA directs the EPA Administrator to authorize such a program unless (1) the State program is not equivalent to the federal program, (2) the program is not consistent with federal or state programs applicable in other States, or (3) the program does not provide adequate enforcement of RCRA Hazardous Waste Management provisions. 42 USC § 6926(b). If a state is not administering and enforcing a program in accordance with the requirements of 42 USC § 6926 the EPA must notify the state, and if appropriate corrective action is not taken, within a reasonable time the EPA must withdraw authorization of the program and establish a federal program in lieu thereof. 42 USC § 6926(e).

A. The EPA must withdraw approval of New Union's program because the program lacks sufficient resources to satisfy the permitting and enforcement requirements of RCRA.

A state program cannot be approved if it does not at minimum provide for adequate enforcement of RCRA hazardous waste provisions. 42 U.S.C. § 6926(b). One of the requirements for approval of New Union's program is that New Union's state law must require permits for hazardous waste management facilities and prohibit the un-permitted operation of such facilities. 42 U.S.C. § 6925(a); 40 C.F.R. § 271.13(a). RCRA also demands that hazardous

waste permits be of a limited duration subject to periodic renewal. 42 U.S.C. § 6925(c)(3). RCRA is not satisfied by a state program that merely requires facilities to obtain a permit when they begin operation; a state-issued permit must be current and renewed from time to time.

First, New Union's program is not capable of ensuring that all hazardous waste facilities possess a valid permit. The record shows that over half (60%) of the TSD facilities located in New Union are presently operating on an expired permit; some have been operating without a current permit for as long as 20 years. (Rec. doc. 4 for 2009, p. 20). New Union has demonstrated a capacity to issue 125 permits annually, with approximately 50 permits going to new applications each year. (Rec. doc. 4 for 2009, p. 19). This means that at a rate of 75 renewals per year New Union will not be able to bring all of its TSD facilities into permit compliance for at least 12 years.[1] New Union law operates to allow continued use of hazardous waste facilities despite the fact that their TSD permit has expired. (Rec. doc. 4 for 2009, p. 20).

The criteria enacted by Congress for approval of a state hazardous waste program also require that the program be capable of "adequate enforcement" of RCRA provisions. 42 USC § 6926(b). RCRA requires that all permitted hazardous waste facilities be inspected at least every two years. 42 USC § 6926(e)(1). RCRA also imposes a mandatory enforcement duty requiring the State program to take action to revoke any issued TSD permit upon evidence that the permitted facility has failed to comply with the standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. § 6925(c)(3).

New Union's program is unable to adequately monitor facilities within the state and take RCRA-mandated action against noncompliant facilities. The DEP has demonstrated that it can only perform approximately 150 facility inspections per year- a number that amounts to less than

[1] Furthermore, the record shows that New Union's program will probably see additional resource cuts in the coming years, and New Union has demonstrated a propensity to cut the DEP more deeply than other programs, making it far less likely that all facilities will possess valid permits at any time in the near future.

10% of the total TSD facilities in the state. (Rec. doc. 4 for 2009, p. 22). This rate of inspection makes it impossible to inspect each permitted facility at least every two years, as required by statute. Furthermore, the DEP is admittedly incapable of responding to serious permit violations in a manner consistent with RCRA provisions: the DEP took only 6 enforcement actions in 2009 despite being aware of "22 significant permit violations" and "hundreds of minor violations." (Rec. doc. 4 for 2009, p. 24). Even counting the 6 actions taken by EPA enforcement agents and the 6 actions by private citizens, New Union's program could not enforce RCRA provisions even on just the serious permit violations in the State. (Rec. doc. 4 for 2009, p. 24). As a consequence of the DEP's failure to enforce RCRA, at least 4 known, significant permit violations in 2009 went completely unaddressed. (Rec. doc. 4 for 2009, p. 24).

B. The EPA's determination that New Union's program meets RCRA criteria for approval is not entitled to deference.

Inherent in the concept of *Chevron* deference is the rule that deference should only be given to an agency action where Congress intended to provide the agency with authority to enact a particular regulation or make a particular rule. *See Christensen v. Harris County*, 529 U.S. 576, 596-597, 120 S.Ct. 1655 (2000) (BREYER, J., dissenting) (where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable"). Pursuant to this understanding, "a regulation cannot stand if it is arbitrary, capricious, or manifestly contrary to the statute." *U.S. v. O'Hagan*, 521 U.S. 642, 673 117 S.Ct. 2199, 2217 (1997).

In *Ragsdale v. Wolverine World Wide, Inc.*, the Supreme Court held that a Labor Department regulation[2] was contrary to FMLA and beyond authority of Secretary of Labor. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S.Ct. 1155 (2002). The regulation

[2] Providing that leave taken by an employee does not count against the employee's Family and Medical Leave Act (FMLA) entitlement if the employer does not designate the leave as "FMLA leave."

effectively penalized employers for failing to provide prompt FMLA notice by entitling an employee to additional FMLA leave regardless of any prejudice the employee might have suffered from the employer's lapse. *Ragsdale* at 88. Acknowledging *Chevron* deference, the Supreme Court nonetheless determined that the Labor Department regulation was invalid because it altered the statute in a fundamental way by relieving employees of the burden to prove real impairment of their rights and resulting prejudice as required by the statute. *Ragsdale* at 91. The Supreme Court held that the Labor Department's regulation effected "an impermissible alteration of the statutory framework" which exceeded its power to issue regulations "necessary to carry out the Act." *Ragsdale* at 96.

A similar impermissible rule was promulgated in this case when the EPA determined that New Union's program meets the RCRA criteria for approval. The record shows that New Union's program is deficient in multiple key respects under 42 USC § 6926. *See supra.* EPA approval of New Union's program effectively alters the statutory framework for approval of state programs by allowing a program to operate despite its clear inability to meet the minimum requirements of a RCRA complaint program. The EPA's determination is not entitled to *Chevron* deference because it is manifestly contrary to the provisions of 42 USC § 6926 and there is no evidence suggesting congressional intent to provide the EPA with authority to alter RCRA state program approval criteria. Therefore, no deference is due to the EPA's interpretation that is at odds with the plain language of the statute. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863 (1989).

C. If New Union's program no longer meets RCRA criteria for approval, the EPA must withdraw the program.

The EPA and New Union argue that even if the DEP's resources and performance are insufficient to meet RCRA approval criteria, the EPA has the discretion to take action other than

withdrawing approval. Specifically, the EPA contends that under 42 U.S.C. § 6928(a) it is free to either bring an enforcement action in New Union when that state fails to act or withdraw authorization to that state. EPA and New Union rely on a series of federal cases for this proposition. *Wyckoff Co. v. EPA*, 796 F.2d 1197 (9th Cir. 1986) (Arguing that the EPA is free to either bring an action in an RCRA authorized state when that state fails to act after the EPA gives notice to the state or withdraw authorization to that state).

The EPA and New Union's position that the EPA may take other action instead of withdrawing an insufficient program misses the point of 42 U.S.C. § 6928(a)(2). The plain terms of RCRA require the EPA to withdraw approval of a state's program if the state does not administer and enforce the program in accordance with requirements of 42 USC § 6926. 42 USC § 6926(e). The legislative history of the act reveals Congress' intent that withdrawal of a state program be the primary means of controlling deficient state programs:

> "It is the Committee's intention that the States are to have primary enforcement authority and if at any time a State wishes to take over the hazardous waste program it is permitted to do so, provided that the State laws meet the Federal minimum requirements for both administering and enforcing the law.
>
> . . .
>
> Therefore, a state retains the primary authority to implement its hazardous waste program so long as such program remains equivalent to the federal minimum standards. If the state program does not remain equivalent to the federal minimum standards then the Administrator is authorized to implement the hazardous waste provisions of this Act in such state."

H. Rep. 1491, 94th Cong., 2nd Sess. 24-32; *reprinted in* 1976 U.S.C.C.A.N. 6262-6267.

Thus, Congressional intent in enacting 42 U.S.C. § 6928(a)(2) was not to provide a mechanism for permitting insufficient state programs to continue indefinitely with EPA support, but rather to allow EPA to take action against noncompliant persons in the state despite the fact that the state program was still in force. 42 U.S.C. § 6928(a)(2) was not intended to permit the

EPA to ignore its mandatory duties under RCRA. Congress clearly intended the EPA to withdraw approval of state programs that fail to meet approval criteria under 42 USC § 6926: provisions allowing for EPA action where the state has failed to act was included to ensure that the EPA would have statutory authority to take action even where a state program was operating 'in lieu of' the federal program. Congress still intended the EPA to withdraw approval of noncompliant programs.

VI. THE EPA MUST WITHDRAW ITS APPROVAL OF NEW UNION'S PROGRAM BECAUSE THE ERAA EFFECTIVELY WITHDRAWS RAILROAD HAZARDOUS WASTE FACILITIES FROM REGULATION.

RCRA requires the EPA to develop permitting requirements for hazardous waste facilities, including all structures "used for treating, storing, or disposing of hazardous waste." 42 U.S.C. § 6924(a)(6); 40 C.F.R. § 260.10. Railroad facilities that handle, store, treat, transport, or dispose of hazardous wastes have been held to be among the facilities regulated by RCRA. *Consolidated Companies Inc. v. Union Pacific Railroad Company*, 449 F.3d. 382, 386 (5th Cir. 2007). Such railroad facilities require a RCRA permit issued by the EPA or a state program operating in lieu of the federal program.

New Union's Environmental Regulation Adjustment Act ("ERAA") effectively prevents the state's program from regulating railroad hazardous waste facilities by transferring regulatory authority to a third-party commission. This transfer of authority causes New Union's program to be less than equivalent to the federal program by (1) withdrawing instate railroad facilities from DEP authorities, and (2) prohibiting criminal sanctions for violations that would be authorized under RCRA. As a result of these deficiencies, New Union's program is less than equal to the federal program, and this Court should order the EPA to withdraw approval of the state program and establish a federal program in its place.

A. The ERAA causes New Union's program to be less than equivalent to the federal program by withdrawing hazardous waste facilities from approved standard setting, permitting, inspection, and enforcement authorities.

Federal regulations "establish minimum national standards which define the acceptable management of hazardous waste," except in states which are operating an authorized hazardous waste program. 40 C.F.R. § 264.1(a), (f). However, even states operating their own programs must have standards for hazardous waste management facilities equivalent to 40 CFR 264. 40 C.F.R. § 271.12, (h).

In *Hazardous Waste Treatment Council v. Reilly* the EPA commenced withdrawal proceedings against North Carolina's Hazardous Waste Program partly on the grounds that North Carolina's state law inhibited existing authorities to be consistent with the federal program. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1394 (D.C. Cir. 1991). In that case, the EPA explained that a North Carolina law prohibiting certain facilities from obtaining permits was grounds for withdrawal of the state program: "The State's diminished authority to issue such permits renders the North Carolina hazardous waste management program not equivalent to the Federal program and provides grounds for withdrawal of authorization." Order to Commence Proceedings, 52 Fed.Reg. 43,903, 43,905 (1987) (*See Appendix for complete text*).

New Union's ERAA delegates "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the [Railroad] Commission." (Rec. doc. 4 for 2000, pp. 103-105). This provision limits the ability of the DEP to be consistent with the federal program by prohibiting the DEP from issuing permits to railroad facilities that would otherwise be regulated under the federal program. "Action by a State legislature or court striking down or limiting State authorities," especially those that limit the State's ability to "exercise control over activities required to be regulated... including failure

to issue permits," subjects New Union's program to withdrawal under RCRA regulations and 42 U.S.C. § 6926. 40 C.F.R. § 271.22(a)(1)(ii), 271.22(a)(2)(i).

B. The ERAA causes New Union's program to be less than equivalent to the federal program by prohibiting enforcement of criminal sanctions against RCRA violators.

RCRA imposes criminal penalties for certain violations of its provisions, and the EPA regulations denote failure of a state program "to seek adequate enforcement penalties" as grounds for withdrawal of the state program. 42 U.S.C. § 6928(d) and 40 C.F.R. § 271.22(a)(3)(ii). In this case, New Union's ERAA "removed criminal sanctions for violations of environmental statutes by facilities falling under the jurisdiction of the [Railroad] Commission." (Rec. doc. 4 for 2000, pp. 103-105). Since New Union's state hazardous waste program is unable to seek criminal penalties against RCRA violators, the program fails to meet the standards set by the federal program and must be withdrawn.

The Tenth Circuit has emphasized the importance of enforcing criminal sanctions against RCRA violators, as well as the requirement that an authorized state program be capable of such enforcement:

> The EPA enforces RCRA standards by requiring owners and operators of facilities to obtain permits, and by issuing administrative compliance orders and seeking civil and criminal penalties for violations. The EPA may authorize states to carry out their own hazardous waste programs in lieu of RCRA and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste so long as the state program meets the minimum federal standards.

U.S. v. Colorado, 990 F.2d 1565, 1569 (10th Cir. 1993) (*internal citations and quotations omitted*). Though some jurisdictions have held that State enforcement of RCRA penalties need not be as severe as EPA penalties, *see Titan Wheel Corp. of Iowa v. U.S. E.P.A.*, 291 F.Supp.2d. 899, 912-913 (S.D. Iowa 2003), the issue here is not whether the EPA may correct an inadequate state penalty but whether New Union may entirely prohibit its state program from enforcing RCRA criminal sanctions. Where, as here, the state program is prohibited by statute from

enforcing RCRA mandated criminal penalties against RCRA violators, the state program has failed to provide enforcement equivalent to the minimum federal standards.

C. New Union's present failure to regulate railroad hazardous waste facilities requires the EPA to withdraw approval of the entire program.

The EPA and New Union acknowledge the DEP's present failure to regulate railroad hazardous waste facilities but contend that the failure does not require withdrawal of the entire state program. This determination by EPA and New Union is not entitled to *Chevron* or *Skidmore* deference because it is plainly at odds with the provisions of RCRA. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863 (1989).

RCRA requires that a state program be "equivalent to the Federal program" in order to obtain EPA authorization. 42 U.S.C. § 6928(b). "Partial State programs are not allowed for programs operating under RCRA final authorization." 40 C.F.R. § 271.1(h). The EPA regulations have defined a whole program as "any combination of partial programs that meet all the requirements of these regulations." *Public Citizen, Inc. v. U.S. E.P.A.*, 343 F.3d. 449, 458 (5th Cir. 2003). Due to the ERAA's removal of railroad hazardous waste facilities from DEP jurisdiction, New Union's program "fails to exercise control over activities required to be regulated" under the statute, and thus fails to meet all the requirements of RCRA regulations. 40 C.F.R. § 271.22(a)(2)(i).

VII. THE EPA MUST WITHDRAW ITS APPROVAL OF NEW UNION'S PROGRAM BECAUSE TREATMENT OF POLLUTANT X UNDER THE ERAA MAKES NEW UNION'S PROGRAM: (1) NOT EQUIVALENT TO THE FEDERAL PROGRAM, (2) INCONSISTENT WITH THE FEDERAL PROGRAM AND OTHER APPROVED STATE PROGRAMS, AND (3) INCONSISTENT WITH, AND IN VIOLATION OF, THE COMMERCE CLAUSE.

RCRA allows a state to implement its own program in lieu of the federal program if the state's program is "equivalent to" and "consistent with" the federal or state programs applicable

in other states. *Environmental Technological Council v. Sierra Club*, 98 F.3d. 774, 779 (4th Cir. 1996) (*citing* 42 U.S.C. § 6926(b)). Furthermore, Congress did not intend to permit states operating their own hazardous waste programs to thereby burden interstate commerce. *Hazardous Waste Treatment Council v. South Carolina,* 945 F.2d 781, 792 (4th Cir. 1991). "In fact, the RCRA could be read to *prohibit* state hazardous-waste legislation that burdens interstate commerce." *Chemical Waste Management, Inc. v. Templet*, 967 F.2d. 1058, 1059 (5th Cir. 1992) (*citing* 42 U.S.C. § 6926(b)).

A. The ERAA causes New Union's program to be less than equivalent to the Federal program and by unreasonably altering the statutory requirements for transporters of Pollutant X – a listed hazardous waste.

RCRA hazardous waste provisions require the EPA or a State program to establish standards applicable to transporters of hazardous waste as are necessary to protect human health and the environment. 42 U.S.C. § 6923(a). Federal regulations require transporters to possess EPA identification numbers and comply with manifest and reporting requirements. 42 U.S.C. 6906, 6912, 6922-6925, 6937, and 6938; 40 C.F.R. § 263.11, 263.20. The ERAA, by contrast, permits "any person" to transport Pollutant X out of New Union, so long as they do so "as fast as is reasonably possible." (Rec. doc. 4 for 2000, pp. 105-107). The ERAA causes New Union's program to be less than equivalent to the Federal program by failing to require transporters of Pollutant X to possess transporter identification numbers and to comply with manifest and reporting requirements.

"The EPA will authorize a state to administer its own program if the state program is the 'equivalent' of RCRA and its accompanying regulations." *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 863 (4th Cir. 2001). "RCRA sets a floor, not a ceiling, for state regulation of hazardous wastes." *Old Bridge Chems., Inc. v. N.J. Dep't of Envtl. Prot.*, 965 F.2d 1287, 1296

(3rd Cir.1992). In this case, New Union's program fails to require transporter identification and reporting requirements equivalent to those of the federal program. When a state program fails to meet the requirements of RCRA, including inspection and monitoring of activities subject to regulation, the state program becomes subject to mandatory withdrawal. 42 U.S.C. § 6926(b); 40 C.F.R § 271.22(a)(3)(iii).

B. The ERAA causes New Union's program to be inconsistent with the Federal program and other approved state programs by prohibiting in-state treatment, storage and disposal of Pollutant X, and by unreasonably restricting, impeding and banning the free movement of Pollutant X across New Union's boarder.

The EPA may not approve a state program if "such program is not consistent with the Federal or State programs applicable in other States." 42 U.S.C. § 6926(b). If a state program falls into this category, the EPA must notify the State of the deficiency; if the deficiency is not corrected within 90 days, the EPA "shall withdraw authorization of such program." 42 U.S.C. § 6929. Though RCRA itself does not elaborate on the meaning of "consistent," the requirement is addressed in the federal regulations:

> To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below....
>
> (b) Any aspect of State law or of the State program which 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 may be deemed inconsistent.

40 C.F.R. § 271.4.

In *Hazardous Waste Treatment Council v. Reilly*, the Circuit Court for the District of Columbia held that a State law implicates 40 C.F.R. § 271.4(b) and impermissibly acts as a prohibition on the treatment of hazardous wastes only "when it effects a total ban on a particular waste treatment technology within a State." *Hazardous Waste Treatment Council v. Reilly*, 938

F.2d 1390, 1395 (D.C. Cir. 1991). The D.C. Circuit further held that "such a construction is reasonable and merits deference," given the language of 40 C.F.R. § 271.4(b), "which uses the word 'prohibit.'" *Reilly* at 1396. The Court concluded that "because it did not effect a statewide ban." the state law did not violate RCRA or 40 C.F.R. § 271.4(b).

In this case, however, New Union's state law completely bans the treatment, storage and disposal of Pollutant X within the State of New Union. The EPA successfully argued in *Reilly* that such a total ban would cause a State program to violate the consistency provision of 40 C.F.R. § 271.4(b). *Reilly* at 1396. The EPA should not be allow to reverse this view now and claim that New Union's outright ban on the treatment of Pollutant X is, in fact, consistent with Federal and other authorized state programs. *See Montana v. Independent Petrochemical Corporation*, 104 F.3d. 159, 162 (8th Cir. 1997).

C. The ERAA causes New Union's program to violate the Commerce Clause by unreasonably restricting, impeding and banning the free movement of hazardous wastes from other States for New Union.

The Commerce Clause provides that Congress with power to regulate commerce. U.S. Const. art. I, § 8, cl. 3. The Commerce Clause has a negative aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345, 1349 (1994). Thus, the negative or dormant Commerce Clause prohibits states from discriminating against the free flow of interstate commerce. *Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 782 (4th Cir. 1996).

RCRA has been interpreted to prohibit state hazardous waste legislation that burdens interstate commerce. *Chemical Waste Management, Inc. v. Templet*, 967 F.2d 1058, 1059 (5th Cir. 1992). If a restriction on commerce is discriminatory – it applies 'differential treatment of

in-state and out-of-state economic interests that benefits the former and burdens the latter" – it is virtually *per se* invalid. *Oregon Waste Systems*, 511 U.S. 93, 99, 114 S.Ct. 1345, 1350 (1994).

In *Environmental Technology Council v. Sierra Club*, the Fourth Circuit evaluated the legality of a South Carolina law which "prohibited entry into the state of certain out-of-state wastes," and prohibited South Carolina facilities "from accepting any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste," under the dormant Commerce Clause. *Environmental Technology Council*, 98 F.3d at 780 (4th Cir. 1996). The Fourth Circuit determined that the Congress did not intend RCRA to specifically authorize the South Carolina law. *Id.* at 785. Noting that there is no clear rule for determining whether a state law should be deemed so discriminatory as to be per se invalid, the court nonetheless held that "the provisions at issue here are not close calls-they clearly discriminate against out-of-state waste either facially, in effect, or in purpose." *Id.* The Court went on to hold that "the blacklisting provision, floor for in-state wastes, ceiling for out-of-state wastes, and quotas for out-of state and in-state wastes facially discriminate against out-of-state wastes by refusing admittance into South Carolina of certain wastes and giving express preference over South Carolina capacity to in-state wastes." *Id.*

The Fourth Circuit added that "a state cannot achieve a legitimate economic goal through the illegitimate means of isolating the State from the national economy." *Id.* at 786. Although South Carolina attempted to justify the regulation by alluding to "the state's concern for the health, safety, and welfare of its citizens," the Fourth Circuit nonetheless held that there is "no basis to distinguish out-of-state waste from domestic waste" over concern for citizens' health, safety, and welfare. *Id.* The Fourth Circuit concluded by affirming the District Court's order striking down the South Carolina laws as inconsistent with the dormant Commerce Clause.

The present case is identical to *Environmental Technology Council v. Sierra Club*. Here, New Union attempts to burden out-of-state hazardous waste facilities with a law that prohibits New Union facilities from handling Pollutant X and requires transporters to rush Pollutant X out of the state as fast as possible. (Rec. doc. 4 for 2000, pp. 105-107). The ERAA thus affects the facially discriminatory purpose of imposing the burden of Pollutant X on other states by refusing to allow facilities in-state to dispose of the waste. This is precisely the issue which the Fourth Circuit found dispositive in *Environmental Technology Council v. Sierra Club*. Accordingly, this Court should strike down the provisions of the ERAA which provide for the discriminatory handling of Pollutant X as violative of the dormant Commerce Clause. *Oregon Waste*, 511 U.S. at 99.

CONCLUSION

The District Court erred in granting New Union's Motion for Summary Judgment because an EPA action approving, denying or modifying a state program is a rulemaking function, and the EPA's failure to act on that petition caused it to fail to perform a mandatory duty amounting to a constructive determination that New Union's program continues to meet approval criteria. Furthermore, the District Court also erred in determining that CARE could not challenge the EPA's failure to act on its petition under the APA. If no other remedy is available, the APA provides jurisdiction for the District Court to adjudicate a challenge to agency promulgation of a rule. Since EPA action approving, denying or modifying a state program is rulemaking, and the EPA unreasonably or unlawfully delayed acting on CARE's petition, the APA provides alternative grounds for review.

In the alternative, the Court of Appeals has jurisdiction under 42 U.S.C. § 6976(b). The EPA's failure to act on CARE's petition constituted constructive denial of that petition and a

constructive determination that New Union's program continues to meet RCRA criteria for program approval. Constructive denial of CARE's petition and constructive approval of New Union's program are subject to judicial review under RCRA. This Court should proceed with judicial review of the EPA's constructive actions rather than remand because this Court has statutory jurisdiction to hear the matter and doing so would promote judicial economy.

The EPA's determination that New Union's program meets RCRA criteria for approval is plainly at odds with the requirements of the statute. New Union no longer has resources capable of adequately complying with RCRA permitting and enforcement provisions. Furthermore, New Union passed legislation that prevents the DEP from acting in a manner equivalent to the Federal program or other state programs. Finally, New Union's treatment of Pollutant X fails to regulate waste in accordance with federal minimum standards, causes the program to be inconsistent with the federal and other state programs, and violates the Commerce Clause.

WHERFORE, Petitioner-Appellant respectively requests Judgment in favor of CARE on the merits and an Order directing the EPA to commence withdrawal proceedings of New Union's hazardous waste program as the program is no longer permissible under RCRA. In the alternative, Petitioner-Appellant requests an order vacating the District Court's grant of summary judgment and remanding to that court with directions to commence judicial review of the EPA's constructive denial of CARE's petition, or to order the EPA to commence withdrawal proceedings. In addition to any other relief granted, Petitioner-Appellant prays for an order striking down relevant portions of the ERAA as inconsistent with federal law in violation of the Commerce Clause.

APPENDIX

North Carolina; Order to Commence Proceedings To Determine Whether To Withdraw Hazardous Waste Program Approval

[52 FR 43903-01, 1987 WL 130256 (F.R.)]

Tuesday, November 17, 1987

AGENCY: Environmental Protection Agency.

ACTION: North Carolina; order to commence proceedings to determine whether to withdraw hazardous waste program approval.

SUMMARY: On June 12, 1987, the North Carolina legislature enacted Senate Bill 114 (the "Act") which amended Article 9 of Chapter 130A of the North Carolina General Statutes, to add a new section 130A-295.01, the text of which is set forth below. The Act provides that new commercial hazardous waste treatment facilities will not be issued a hazardous waste permit to discharge any hazardous waste or toxic substance into any surface water that is located upstream of a public drinking water intake, unless a dilution factor of 1000 exists at the point of discharge into the surface water under certain low flow conditions. After review and investigation of the Act, the Regional Administrator has determined, for the reasons set forth below, that cause exists to commence withdrawal proceedings under 40 CFR 271.23, based upon the criteria in 40 CFR 271.22(a)(1)(ii) and (2)(i). In addition, GSX Chemical Services, Inc. (GSX) and the Hazardous Waste Treatment Council (Treatment Council) have petitioned EPA to withdraw authorization of the North Carolina hazardous waste program, alleging that the dilution and siting provisions of the Act are not in conformity with the provisions of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6901, et seq. This Order serves as the required response to the GSX and the Treatment Council petitions, granting the petitions to the extent of initiating withdrawal proceedings, and as a statement of allegations to which North Carolina must respond. See 40 CFR 271.23(b)(1).

DATES: Under 40 CFR 271.23(b)(1), the State must respond to the allegations in this Order by providing a written answer within December 17, 1987. The withdrawal proceeding hearing will be held on January 12-13, 1988 beginning at 9:00 a.m. each day.

Participation in Proceedings

The withdrawal proceeding hearing will be conducted by a Presiding Officer, in accordance with 40 CFR 271.23(b)(2) and 40 CFR 22.03 and 40 CFR 271.23. Leave to participate by persons not parties in the proceedings, pursuant to 40 CFR 271.23(b)(5), will be determined by the Presiding Officer. The Presiding Officer will also grant or deny motions to intervene and motions to file briefs as amicus curiae, pursuant to 40 CFR 271.23(b)(3) and 40 CFR 22.11 (c) and (d).

Pursuant to the provisions of 40 CFR 271.23(b)(2)(i), North Carolina, EPA, GSX Services, Inc., and the Hazardous Waste Treatment Council are parties to the proceedings initiated by this Order.

Pursuant to 40 CFR 271.23(b)(5), a person who is not a party as defined above may, at the discretion of and under conditions set forth by the Presiding Officer, be permitted to make a limited appearance through an oral or written statement of his/her position on the issues.

A person who seeks to formally intervene in the proceedings is subject to the requirements of 40 CFR 271.23(b)(3)(vii) and 40 CFR 22.11(a). Such a person must file a motion to intervene, setting forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding.

Pursuant to 40 CFR 22.11(d), a person who wishes to file a brief as amicus curiae shall file a written motion for leave. The motion shall identify the interests of the applicant and shall state the reasons why the proposed amicus brief is desirable.

The original and two copies of: all requests to participate by persons not defined as parties, pursuant to 40 CFR 271.23(b)(5); all motions to intervene, pursuant to 40 CFR 22.11(a); and all motions to file briefs as amicus curiae, pursuant to 40 CFR 22.11(d) shall be filed with the Regional Hearing Clerk, EPA Region IV, 345 Courtland Street, NE., Atlanta, Georgia 30365 by close of business December 2, 1987. Copies of such requests and motions shall also be served on the Presiding Officer and on each party of record.

ADDRESSES: Copies of the Act, the petitions, and information required by 40 CFR 271.23(b)(4)(ii) will be available for inspection and copying at the EPA, Region IV, Library, 345 Courtland Street, NE., Atlanta, Georgia 30365; the EPA, Library, Room M-2904, 401 M Street, SW., Washington, DC 20460; and the Solid and Hazardous Waste Management Branch, Environmental Health Section, North Carolina Department of Human Resources, P.O. Box 2091 Raleigh, NC 27602. The withdrawal proceeding hearing will be held in MacKimmon Center, North Carolina State University, Raleigh, North Carolina.

Copies of requests and motions shall be served on the Presiding Officer and on each party of record at the following addresses: Presiding Officer, EPA, A-110, 401 M Street, SW., Washington, DC 20460; Regional Administrator, EPA, Region IV, 345 Courtland Street, Atlanta, Georgia 30365; Secretary of State of North Carolina, 3rd Floor, Legislative Office Building, 220 West Jones Street, Raleigh, North Carolina 27611; GSX Chemical Services, Inc., P.O. Box 210799, Columbia, South Carolina 29221; Hazardous Waste Treatment Council, 1440 New York Avenue, NW., Suite 310, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Otis Johnson, Jr., Chief, Waste Planning Section, RCRA Branch, EPA, 345 Courtland Street, NE, Atlanta, Georgia 30365.

SUPPLEMENTARY INFORMATION:

I. Authority

Authority for issuance, by the Administrator, of an order to commence withdrawal proceedings regarding North Carolina's authorized hazardous waste program is provided for in section

3006(e) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6926(e). Pursuant to EPA Delegation Authority 8-7, dated March 6, 1986, such authority has been delegated to the Regional Administrator of EPA, Region IV. 42 U.S.C. 6926(e) requires the Regional Administrator to withdraw authorization from a State whenever he concludes after a withdrawal proceeding hearing that the State is not administering and enforcing an authorized program in accordance with 42 U.S.C. 6926. 42 U.S.C. 6926(b) requires that an authorized State program be equivalent to the Federal program and consistent with the Federal and State programs in other States, in particular the Solid Waste Disposal Act as amended, 42 U.S.C. 6901 et seq. Criteria for withdrawing approval of authorized State programs is codified at 40 CFR 271.22. Consistency is defined in 42 CFR 271.4.

II. Procedures Pursuant to 40 CFR 271.23(b)

Within 30 days of the date of this Order, the State shall admit or deny the allegations set forth herein by delivery of a written answer to the Regional Administrator. Proceedings shall be conducted by a Presiding Officer appointed by the Chief Administrative Law Judge of EPA, and records shall be kept in accordance with 40 CFR 271.23(b)(4). The hearing shall be conducted pursuant to 40 CFR 271.23(b)(2)-(6). The presiding Officer shall prepare a recommended decision and certify the record of proceedings to the Regional Administrator pursuant to 40 CFR 271.23(b)(7).

Within 60 days of the Presiding Officer's certification of the record and filing of the recommended decision, the Regional Administrator shall determine whether or not North Carolina has administered its authorized hazardous waste program in conformity with the Solid Waste Disposal Act, as amended, 42 U.S.C. 6901, et seq. The Regional Administrator shall then act pursuant to 40 CFR 271.23(b)(8).

III. Background

On June 12, 1987, the North Carolina General Assembly enacted a bill entitled, an Act To Specify an Additional Requirement Applicable to the Permitting of Any Commercial Hazardous Waste Treatment Facility for the Purpose of Protecting Public Health. N.C. General Stat. section 130A-195.01 (the "Act"). The State legislature ratified the bill on June 22, 1987. The provisions of the Act pertinent to the Order to commence withdrawal of the State program are as follows:

§ 130A-295.01. Additional requirement for commercial hazardous waste treatment facilities.
—(a) As used in this section:

(1) Commercial hazardous waste treatment facility means any hazardous waste treatment facility which accepts hazardous waste from the general public or from another person for a fee, but does not include any facility owned or operated by a generator of hazardous waste solely for his own use, and does not include any facility owned by the State or by any agency or subdivision thereof solely for the treatment of hazardous waste generated by agencies or subdivisions of the State;

(2) 'New', when used in connection with 'facility', refers to a planned or proposed facility, or a facility which has not been placed in operation, but does not include facilities which have

commenced operations as of the date this section became effective, including facilities operated under interim status;

(3) 'Modified', when used in connection with 'permit', means any change in any permit in force on or after the date this section becomes effective which would either expand the scope of permitted operations, or extend the expiration date of the permit, or otherwise constitute a major modification of the permit as defined in Title 40, Part 270.41 of the Code of Federal Regulations (1 July 1986); and

(4) '7Q10 conditions', when used in connection with 'surface water', refers to the minimum average flow for a period of seven consecutive days that has an average occurrence of once in 10 years as referenced in 15 NCAC 2B, 0206(a)(3) as adopted February 1, 1976.

(b) No permit for any new commercial hazardous waste treatment facility shall be issued or become effective, and no permit for a commercial hazardous waste treatment facility shall be modified, until the applicant has satisfied the Department that such facility meets, in addition to all other applicable requirements, the following requirements;

(1) The facility shall not discharge directly a hazardous or toxic substance into a surface water that is upstream from a public drinking water supply intake in North Carolina, unless there is a dilution factor of 1,000 or greater at the point of discharge into the surface water under 7Q10 conditions.

(2) The facility shall not discharge indirectly through a publicly owned treatment works (POTW) a hazardous or toxic substance into surface water that is upstream from a public drinking water supply intake in North Carolina, unless there is a dilution factor of 1,000 or greater, irrespective of any dilution occurring in a wastewater treatment plant, at the point of discharge into the surface water under 7Q10 conditions.

Section 2. The provisions of this act are severable. If the Administrator of the United States Environmental Protection Agency concludes: pursuant to the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6926; and Title 40, Part 271, Code of Federal Regulations §§ 271.22 and .23, or in accordance with other applicable law and regulations; that any provision of this act will result in the withdrawal of approval of the North Carolina hazardous waste program, such provision is void. The Secretary, his designee, or other State official shall, upon receipt of notice of a decision by the Administrator that any provision of this act will result in withdrawal of program approval, certify to the Secretary of State that such provision is void. In the event that any provision of this act is voided pursuant to this section, it shall be revived only upon a subsequent reversal by the Administrator of his decision based on his determination that such provision is not in conflict with Environmental Protection Agency requirements for State program approval, or upon a reversal of the Administrator's initial decision by administrative or judicial review. The voiding of any provision of this act shall not affect other provisions of the act which can be given effect without the voided provision.

Section 3. This act is effective upon ratification.

On February 25, 1987 EPA received a request from the North Carolina Solid and Hazardous Waste Management Branch, Department of Human Resources, to review a proposed North Carolina Senate Bill. The bill would have suspended the State's acceptance of new permit applications as well as amendments to existing permits for the period running from the bill's ratification until August 1, 1987. EPA responded in writing to North Carolina stating that the bill, if enacted, would limit the State's legal authority to issue or modify certain RCRA permits. The bill was not passed. In a communication dated April 15, 1987 North Carolina asked EPA to review a second bill. The new bill imposed additional financial responsibility and siting requirements on commercial hazardous waste facilities. EPA responded in writing on April 23, 1987. The new bill was cited as being inconsistent with Federal program requirements. This bill also was not enacted.

On May 5, 1987, North Carolina asked EPA to review a third bill. This bill would prohibit commercial hazardous waste treatment facilities from discharging wastewater to a surface water that is upstream from a public drinking water supply intake unless there is a dilution factor of 1000 or greater at the point of discharge, regardless of dilution from a publicly owned treatment work (POTW).

In a letter dated May 13, 1987, EPA notified North Carolina that the bill (S114-CSRT-011), if enacted, would render the State program inconsistent with the Federal program, pursuant to 42 U.S.C. 6926(b) and 40 CFR 271.4, and would subject North Carolina's authorization to withdrawal under the criteria of 40 CFR 271.22. Notwithstanding this notification, the Act was enacted on June 12, 1987 and ratified on June 22, 1987.

IV. Allegations

A. EPA

1. 40 CFR 271.4(a) provides that any aspect of a State's hazardous waste program that unreasonably restricts, impedes or operates as a ban on the free movement across the State's border of hazardous wastes from or to other States for treatment, storage or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent. The Act discriminates against commercial hazardous waste treatment facilities, which normally accept both in-State and out-of-State wastes for treatment.

2. Only commercial hazardous waste facilities are regulated by the Act. State-owned and other non-commercial hazardous waste facilities are not subject to the dilution and siting requirements. The State has provided no evidence in response to EPA information requests to support the Act's distinction between the wastewater discharge of commercial and noncommercial hazardous waste facilities.

3. As a result of application of the dilution provision, the capacity of commercial hazardous waste treatment facilities is or will be substantially reduced.

4. The dilution provisions will apply to 85% of the potential sites for commercial hazardous waste treatment facilities within the State of North Carolina.

5. Compliance with the dilution requirements of the Act will make operation of some or all new commercial treatment facilities within the State of North Carolina economically unfeasible.

6. Only limited capacity for treatment of aqueous hazardous waste currently exists within the State of North Carolina.

7. A possible result of such discrimination is the reduction of the capacity of commercial facilities in North Carolina that can treat out-of-State wastes.

8. 40 CFR 271.4(b) provides that any aspect of a State law or program which 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 may be deemed inconsistent. The Act appears to be without basis in human health or environmental protection. The State has provided no evidence to support and no rationale for human health or environmental protection bases for the Act.

9. The dilution requirement appears to be arbitrary and does not take into account the concentration of chemicals in the wastewater and in the receiving water. The State has provided no supporting evidence for establishing this dilution factor on a health or environmental basis. The Act presents no apparent health or environmental basis for applying the dilution requirement only to commercial facilities. Moreover, despite the existence of statutory and regulatory controls over all wastewater discharges within the State, this provision is narrowly applied by the Act only to the wastewater discharges of commercial hazardous waste treatment facilities.

10. A facility which is unable to find a site where it could meet the dilution requirement, or is unable to modify its process to comply with the water discharge requirements of the Act, would be prohibited from receiving a permit or modifying an existing permit.

11. The Act will prohibit GSX from operating at Laurinburg, Scotland County, North Carolina, and will prohibit GSX and others from operating at numerous other locations within the State.

12. 40 CFR 271.22(a)(1)(ii) provides that the Regional Administrator may withdraw program approval when the State legislature strikes down or limits State authority. The Act provides grounds for withdrawal because the Act limits the ability of existing authorities of the State to be consistent with the federal program as set forth in 40 CFR 271.4.

13. The North Carolina program can no longer issue permits to some commercial treatment facilities which meet the previously authorized requirements. The State's diminished authority to issue such permits renders the North Carolina hazardous waste management program not equivalent to the Federal program and provides grounds for withdrawal of authorization under 40 CFR 271.22(a)(1)(ii).

14. 40 CFR 271.22(a)(2)(i) provides that the Regional Administrator may withdraw program approval when the State program fails to exercise control over required activities including failure to issue permits. The North Carolina program allegedly provides grounds for withdrawal by failing to exercise such control as stated in allegation 13.

B. Petitioners

On September 28, 1987, GSX Chemical Services, Inc. (GSX) petitioned EPA to withdraw authorization of the North Carolina Hazardous Waste Program. On October 1, 1987 the Hazardous Waste Treatment Council (Treatment Council) filed a petition to commence withdrawal proceedings regarding the authorized North Carolina hazardous waste program. The GSX and Treatment Council petitions contain allegations previously stated in Subsection IVA. of this Order. In addition:

15. The GSX petition alleges that in June 1985, GSX submitted an application to the Solid and Hazardous Waste Management Branch (SHWMB) of the North Carolina Department of Human Resources for a permit to operate an aqueous waste treatment facility in Scotland County, North Carolina. The GSX application proposed to serve a regional market, including several southeastern states.

16. In April 1987, SHWMB issued a draft permit to GSX which authorizes a daily discharge to Laurinburg-Maxton Airport Commission's POTW of 500,000 gallons per day of treated wastewater in accordance with RCRA and applicable regulations.

17. The drinking water supply intake of the City of Lumberton, North Carolina is 30 miles downstream of the POTW on the Lumber River.

18. The GSX facility permit was the subject of two public hearings and, on August 18, 1987, the period for public comment closed.

19. Application of the Act to GSX's facility would reduce the permitted wastewater discharge from the draft permit's maximum of 500,000 gallons to a maximum of 71,600 gallons per day.

20. GSX alleges that the Act restricts or impedes the free movement of hazardous waste across State borders for purposes of treatment, storage or disposal because a reduction in the treatment and disposal capacity of the proposed GSX facility (or any commercial facility) may prevent such facility from accepting out-of-State wastes for treatment or disposal.

21. The Treatment Council's petition contains allegations similar to those set forth in the GSX petition.

22. The Treatment Council also alleges that the Act's dilution requirement disregards the treatment and dilution which occurs in a POTW.

23. The purpose of the Treatment Council and the objectives of RCRA is to promote health and environmental protection by minimizing land disposal of hazardous wastes and by encouraging

the recycling, reuse and treatment of such wastes, 42 U.S.C. 6902(a)(6). The Act allegedly contravenes these objectives.

24. The Treatment Council alleges that Congress intended the free movement of hazardous wastes in interstate commerce to be the "fundamental basis" of the RCRA program, and that the equivalency and consistency requirements for State programs are Congress' intended means of protecting such free movement from States that might unreasonably withhold permits or otherwise obstruct disposal of wastes in interstate commerce. The arbitrary nature of the Act's dilution requirement and its discriminatory application to commercial waste treatment facilities allegedly created an unreasonable restriction, in violation of 40 CFR 271.4(a), of the movement of hazardous waste from other States into North Carolina for treatment and disposal.

25. Finally, the Treatment Council alleges that the Act discriminates against commercial treatment facilities in violation of the equal protection and due process clauses of the Constitution of the United States.

V. Conclusion

The Regional Administrator of EPA, Region IV, has determined that his concerns and petitioners' allegations raise substantial questions as to the consistency and equivalency of North Carolina's hazardous waste program with the Federal program, and that these questions provide cause to commence withdrawal proceedings, pursuant to 40 CFR 271.22 and 271.23. The Regional Administrator hereby schedules a hearing on January 12-13, 1988 to consider the concerns expressed by EPA and the allegations raised by the petitioners, and to assess North Carolina's responses thereto, which shall be served on the Regional Administrator of EPA, Region IV, by the State on or before December 17, 1987.

Pursuant to 40 CFR 271.23(b)(4)(v), copies of this Order have been served today upon:

Governor James G. Martin, State of North Carolina;
Thad Eure, Secretary of the State of North Carolina;
Lacy H. Thornburg, North Carolina Attorney General;
David T. Flaherty, Secretary, North Carolina Department of Human Resources.