Team No. 52

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

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

v.

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

v.

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

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

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

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JURISDICTIONAL STATEMENT

Federal district courts have subject matter jurisdiction to hear claims arising under federal law, including the Resource Conservation and Recovery Act ("RCRA") and the Administrative Procedure Act ("APA"). 28 U.S.C. § 1331 (2006). The District Court for New Union had jurisdiction to hear claims arising from allegations of a failure of the Administrator to perform a mandatory duty under RCRA. 42 U.S.C. § 6972(a) (2006). This is an appeal from a final order of the District Court of New Union, dated June 2, 2010, granting summary judgment to New Union. The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from final decisions of the District Court for New Union. 28 U.S.C. §§ 1291, 1294(1) (2006).

STATEMENT OF THE ISSUES

I. Whether the District Court acted improperly in dismissing CARE's citizen suit filed under RCRA § 7002(a), alleging that the Administrator failed to perform the mandatory duty of acting on a rulemaking petition filed pursuant to RCRA § 7004(a).

II. Whether federal question jurisdiction alleging that the EPA violated the APA is proper in this case, given that RCRA provides a specific grant of jurisdiction.

III. Whether the EPA's failure to act is subject to review under RCRA § 7006(b) even though inaction is not the same as an affirmative or constructive action.

IV. Whether this Court should lift the stay in C.A. No. 18-2010 and proceed with review despite judicial efficiency and agency deference doctrines supporting remand.

V. Whether the EPA must immediately withdraw its approval of New Union's RCRA program because after recent budget cuts the program's resources and performance are not sufficient to meet RCRA's criteria for state program approval.

VI. Whether the EPA must withdraw its approval of the entire New Union RCRA program because the New Union 2000 Environmental Regulatory Adjustment Act withdraws railroad hazardous waste facilities from regulation by the specific EPA approved state agency.

VII. Whether the EPA must withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act renders the State's program not equivalent with the federal program, inconsistent with the federal or other state programs, or in violation of dormant Commerce Clause principles.

STATEMENT OF THE CASE

On January 5, 2009, The Citizen Advocates for Regulation and the Environment, Inc. ("CARE") requested that the EPA commence withdrawal proceedings of its 1986 approval of New Union's hazardous waste program. (R. at 4.) After a year of EPA inaction, CARE filed suit against the EPA in the United States District Court for the District of New Union on January 4, 2010. (R. at 4.) CARE alleged that the EPA had failed to act on CARE's petition and sought (1) an injunction ordering EPA to act on the petition, or (2) judicial review of the EPA's constructive denial of the petition. (R. at 4.) CARE simultaneously filed a complaint for review by this court, C.A. No. 18-2010, the proceedings of which were stayed on EPA's motion. (R. at 5.) New Union intervened as a matter of right in both cases. (R. at 4-5.)

On June 2, 2010, the District Court held that: (1) the EPA's approval or disapproval of New Union's program was an order, (2) the court did not have jurisdiction under RCRA to order the EPA's action, (3) the court did not have federal question jurisdiction to review the EPA's action, and (4) RCRA grants exclusive jurisdiction for review to this court. (R. at 6-8.)

Both the EPA and CARE filed timely appeals from the District Court's decision. (R. at 1.) The EPA appeals the District Court's decision that it lacked jurisdiction under RCRA § 7006(b). (R. at 1.) The EPA also takes issue with CARE's motion to lift the stay on C.A. No. 18-2010 and consolidate with its appeal of the District Court's decision. (R. at 1-2). This court granted review September 29, 2010. (R. at 3.)

STATEMENT OF THE FACTS

The EPA approved New Union's RCRA program in 1986. (Rec. doc. 2, p. 1.) Since then, the New Union Department of Environmental Protection ("DEP") has issued approximately 900

permits to hazardous waste treatment, storage and disposal facilities ("TSDs") under RCRA. (Rec. doc. 4 for 2009, p. 20.) The number of TSDs in New Union has gradually increased, from 1,200 in 1986 to 1,500 in 2009. (Rec. doc. 1, p. 17, Rec. doc. 4 for 2009, p. 23.) Despite recent cuts in the resources for the state program, New Union issued 125 permits to TSDs in 2009, and plans to issue as many in 2010. (Rec. doc. 4 for 2009, p. 19.) By comparison, New Union receives roughly 50 applications for new or amended permits each year. In making permitting decisions, the DEP prioritizes the reduction of the permit backlog. (Rec. doc. 4 for 2009, p. 20.) In 2009, the DEP conducted 150 inspections of TSDs, and expected to inspect the same amount in 2010. The EPA inspected 150 TSDs on behalf of New Union in 2009, and has promised to inspect the same number in 2010. (Rec. doc. 4 for 2009, p. 22-23.) The DEP prioritizes inspecting the TSDs that have reported unpermitted waste releases and those that pose the greatest potential harm to the public or the environment. (Rec. doc. 4 for 2009, p. 20.) In total, 18 enforcement actions were taken last year under the state RCRA program: 6 by the DEP, 6 by the EPA, and 6 by environmental groups. (Rec. doc. 4 for 2009, p. 24-26.)

The 2000 New Union Environmental Regulatory Adjustment Act ("ERAA") establishes a new state agency, the New Union Railroad Commission, and transfers to it "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes" for the only railroad in New Union. (Rec. doc. 4 for 2000, pp. 103-105, Rec. doc. 6, Aug. 14, 2000.) The ERAA also amends the New Union hazardous waste program with respect to Pollutant X, which is considered by the EPA and the World Health Organization to be, from both a public health and environmental standpoint, one of the most potent and toxic chemical hazardous wastes. (Rec. doc. 4 for 2000, pp. 105-107.) With this provision, the ERAA attempts to prevent the public and the environment from being exposed to this dangerous

chemical by supplementing its RCRA program with the additional demands outlined in the ERAA provision, which include minimizing the creation of Pollutant X and reporting on the yearly reductions achieved. (Rec. doc. 4 for 2000, pp. 105-107.) The ERAA allows for transportation of Pollutant X through New Union to a facility designed and permitted to treat or dispose of Pollutant X, assuming that transportation be direct and not make unnecessary stops. (Rec. doc. 4 for 2000, pp. 105-107.) Pollutant X is barred from remaining in New Union indefinitely because New Union has no treatment facilities for Pollutant X. (Rec. doc. 4 for 2000, pp. 105-107.) However, temporary storage of Pollutant X is allowed in New Union for up to 120 days. (Rec. doc. 4 for 2000, pp. 105-107.)

STANDARD OF REVIEW

Summary judgment is proper when the record shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Circuit courts review questions of law *de novo. Pierce v. Underwood,* 487 U.S. 552, 558 (1988). In this case, the court reviews *de novo* all questions of law arising from the District Court's interpretation of RCRA and the APA, including the question of whether the EPA can be compelled to act upon CARE's petition.

SUMMARY OF ARGUMENT

The District Court erred in granting summary judgment to New Union on the issue of citizen suit jurisdiction under RCRA § 7002(a). CARE submitted a petition for rulemaking and has alleged that the Administrator failed to act on that petition in a timely manner. The District Court had jurisdiction to review that allegation. The District Court was correct, however, in granting summary judgment to New Union on the issue of federal question jurisdiction. RCRA

provides jurisdiction to the District Court, and a broader grant of jurisdiction would be unnecessary, redundant, and detrimental to Congress' allocation of jurisdiction under RCRA.

The District Court properly held that it did not have jurisdiction for review of the EPA's determination under RCRA § 7006(b). The EPA's failure to act is not the same as the affirmative actions reviewable under the statute and was furthermore not so delayed or harmful as to be considered a "constructive" determination. If the EPA's inaction *is* found to be reviewable under § 7006(b), it would only be under the expanded exception for review of "constructive" determination. As a discretionary action, this court's review is limited to whether the EPA's inaction was an "abuse of discretion." With no record, this court's optimal decision will be to maintain the stay and remand to the District Court for further factual proceedings.

New Union has allocated adequate resources for the full administration and enforcement of its RCRA program. Railroad hazardous waste facilities are still capable of being regulated by New Union because states may divide and delegate RCRA responsibilities amongst state agencies, and thus the enactment of the ERAA does not require the Administrator withdraw authorization of New Union's RCRA program. The ERAA does not render New Union's program not equivalent to the federal program or inconsistent with the federal or other state programs, rather it makes the New Union program more stringent. Last, the ERAA does not violate the Commerce Clause because it does not substantially affect interstate commerce. Even if New Union's RCRA program were to be deemed subject to withdrawal by the Administrator for one of the alleged reasons, the Administrator must take certain steps before the program could be withdrawn, and has alternative steps to withdrawal at his disposal.

ARGUMENT

I. THE CITIZEN SUIT PROVISION OF RCRA PROVIDES JURISDICTION FOR THE DISTRICT COURT TO HEAR CARE'S CLAIM.

Citizen suit jurisdiction under RCRA is proper when there is "alleged a failure of the Administrator to perform any act or duty that is not discretionary with the Administrator." 42 U.S.C. § 6972(a)(2) (2006). Such non-discretionary duties include acting within a reasonable time on petitions "for the promulgation, amendment, or repeal of any regulation." 42 U.S.C. § 6974(a) (2006). Citizen suit jurisdiction is proper in this case because (1) CARE petitioned for a rulemaking under 42 U.S.C. § 6974(a), and (2) there is a factual question as to whether the Administrator acted on that petition in a timely manner as required by 42 U.S.C. § 6972(a)(2). CARE petitioned for repeal of the EPA's authorization of New Union's hazardous waste program, which the EPA has treated as a rulemaking and which was enacted pursuant to the rulemaking procedures in the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* (2006). We request that this court overrule the District Court's ruling with respect to jurisdiction under 42 U.S.C. § 6972(a)(2) and find that the District Court has jurisdiction to hear this case.

A. EPA's Authorization of New Union's Hazardous Waste Program Was a Rulemaking and Was Thus Subject to Petition Under RCRA § 7004(a).

Congress and the Supreme Court have granted significant latitude to administrative agencies to develop and promulgate policies. Generally, administrative agencies can act either by the quasi-legislative process of rulemaking or the quasi-judicial process of adjudication, and they have broad discretion to choose between the two. *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947); *American Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606 (1991). Courts accord broad deference to such determinations. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Bowles v. Seminole Rock and Sand Company*, 325 U.S. 410 (1940). Even if the court finds that no administrative deference applies here, the EPA's procedure for approving New Union's program constituted a rulemaking as described by the APA. Because the EPA engaged in

rulemaking when it approved New Union's program, the action is subject to petition under 42 U.S.C. § 6974(a).

1. The EPA's classification of its authorization of New Union's program as a rulemaking is entitled to judicial deference.

The Supreme Court has established the principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" *Chevron*, 467 U.S. at 844; *see also Barnhart v. Walton*, 535 U.S. 212 (2002); *U.S. v. Mead Corp.*, 533 U.S. 218 (2001). When an agency's action instead involves interpreting its own regulations, courts generally adopt an even more generous standard of deference. *Seminole Rock*, 325 U.S. 410. The EPA's authorization of New Union's hazardous waste program involved interpreting either the RCRA statute or its own regulations on the subject. Either way, its decision to proceed by rulemaking is entitled to judicial deference.

a. *Because the EPA was interpreting RCRA, a statute it is responsible for administering, its actions are entitled to* Chevron *deference.*

Chevron sets out a two-pronged test for determining whether a court can review an agency determination. The first question is whether Congress "has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. In this case, the issue is whether the EPA may choose to proceed via rulemaking when authorizing state programs. 42 U.S.C. § 6926 (2006). The District Court erred in holding that the EPA was not interpreting RCRA in making this decision. In authorizing New Union's program, the EPA was *applying* procedures found in the APA, 5 U.S.C. § 551, and *interpreting* a statute that it administers, namely RCRA § 3006 (42 U.S.C. § 6926), which deals with the process by which the Administrator authorizes state programs. *See infra,* Part I.B. 42 U.S.C. § 6926(a) specifically instructs the Administrator to "promulgate guidelines to assist States in the Development of State hazardous waste programs."

42 U.S.C. § 6926(b) deals with the "authorization" of state programs, and the language of the statute offers no guidance as to whether such authorization should be accomplished by rulemaking or adjudication. Elsewhere in RCRA, Congress specifies the procedure to be used. *See*, *e.g.*, 42 U.S.C. § 6928 (2006) ("The Administrator may issue an order assessing a civil penalty…or the Administrator may commence a civil action"). The lack of direction with respect to enforcement procedures in the statute demonstrates that Congress has not "directly spoken to the precise question at issue" and the choice of how to proceed is at the Administrator's discretion. The first prong of the *Chevron* test is therefore met.

The second question for a court applying *Chevron* deference is whether the "agency's action is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843. This is a highly deferential standard, requiring not that the agency's construction be the best available but merely that it not violate congressional instructions. "[W]e must decide…whether the interpretation…exceeds the bounds of the permissible." *Barnhart*, 535 U.S. at 218. The EPA had good reasons for authorizing state programs via the rulemaking procedure. Rulemaking allows public participation, permits entities subject to the rule to rely on its prospective and uniform application, and ensures that the Agency itself can devote necessary resources to developing sound policy. David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 931-42. The Supreme Court has held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Chenery*, 332 U.S. at 203. The EPA made the permissible decision to authorize New Union's program by rulemaking, and the *Chevron* standard insulates that decision from judicial review.

b. *If* Chevron *is inapplicable here, then* Seminole Rock *deference applies because the EPA was interpreting its own regulations in approving New Union's program.*

Seminole Rock establishes the standard of deference that courts apply when agencies interpret their own regulations. "[A] court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Seminole Rock*, 325 U.S. at 414. Pursuant to 42 U.S.C. § 6926, the EPA has promulgated regulations entitled "Requirements for final authorization." 40 C.F.R. § 271 *et seq*. The EPA interpreted those regulations in deciding to authorize New Union's program. When an agency construes a regulation, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414. No evidence has been presented that the EPA's procedure for authorizing New Union's program was inconsistent with the regulations for such authorization. The regulations require "permitting, compliance evaluation, enforcement, public participation, and sharing of information." 40 C.F.R. § 271.24(c). Those requirements, especially the "public participation" mandate, are best achieved via the rulemaking process. Shapiro, *The Choice of Rulemaking*, at 930. The EPA determined, by interpreting its own regulations, that a rulemaking is the best way to proceed with authorization of state programs. The *Seminole Rock* standard requires that this court accept the EPA's interpretation and treat the EPA's authorization of New Union's program as a rulemaking.

2. Even in the absence of judicial deference, the EPA's authorization procedure is consistent with the APA's description of rulemaking.

The EPA followed the provisions of the APA's rulemaking section, 5 U.S.C. § 553 (2006), when it initially authorized New Union's hazardous waste program. Under the APA, administrative actions are either rules or orders. 5 U.S.C. § 551. The word "authorization," used

in RCRA, 42 U.S.C. § 6926, does not fall directly under either the description of a rule in § 551(4) or the description of an order in § 551(6). Because § 551(6) defines orders in opposition to rules ("'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing"), the operative question is whether or not the EPA's approval of New Union's program was a rule. In general, rulemaking is preferable to case-by-case adjudication: "the function of filling in the interstices of regulatory statutes should be performed, as much as possible, through… promulgation of rules to be applied in the future." *N.L.R.B. v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (internal quotes omitted). Rules are "agency statement[s] of…particular applicability and future effect designed to implement…policy." 5 U.S.C. § 551(4). The EPA's authorization of New Union's program fits that description.

The EPA procedure used to decide whether to authorize state programs provides further support for the proposition that the authorization was a rulemaking and not an order. The APA, 5 U.S.C. § 553 sets forth the procedure for rulemaking, which requires notice of proposed rulemaking, public comment, and publication in the Federal Register. As the District Court correctly acknowledged, "EPA…us[ed] a notice and comment procedure and incorporat[ed] the result in 40 CFR Part 272." (R. at 6.) The EPA did not follow the requirements of 5 U.S.C. §§ 554, 556, & 557, which lay out the procedure for adjudication. Most notably, it did not limit the "submission and consideration of facts" to "interested parties," opting instead for a public notice and comment procedure. 5 U.S.C. § 554(c). Therefore, even in the absence of administrative deference to the EPA's classification of its own procedures, the procedure the EPA used to authorize New Union's program meets the APA description of rulemaking, and it is therefore subject to petition under 42 U.S.C. § 6974(a).

B. RCRA 7004(a) Requires the EPA Administrator To Take on a Petition for Rulemaking Filed Pursuant To RCRA 7002(a)(2).

RCRA 7004(a) reads, in relevant part, "[w]ithin a reasonable time…the Administrator shall take action with respect to such a petition and shall publish notice of such action in the Federal Register." The word "shall" almost always carries a "mandatory sense." Black's Law Dictionary (9th ed., 2009). The Supreme Court and circuit courts have almost always understood "shall" as imposing a requirement, except when doing so would undermine the plain meaning of other sections of the statute or rule. *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935), describing "shall" as "the language of command." The word "shall" should be read in the imperative sense unless "the text of [the statute] puts a reader on notice that the regulation is using 'shall' in an unorthodox manner." *Exportal Ltda v. U.S.*, 902 F.2d 45, 50 (D.C. Cir. 1990).

The District Court erred in holding that the word "shall" in RCRA § 7004(a) can be read in the optional sense. Reading "shall" as "may" essentially nullifies the phrase "within a reasonable time following receipt of such petition." 42 U.S.C § 6974(a). If taking any action at all on a petition is voluntary, then language imposing a "reasonable time" requirement is superfluous. The District Court's holding leads to the strange and avoidable conclusion that the EPA has a reasonable amount of time to either act or do nothing. This construction violates the canon of interpretation that admonishes courts to avoid construing statutory language in a way that nullifies other statutory commands. *Duncan v. Walker,* 553 U.S. 167, 174 (2008).

The District Court cites *Guiterrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), in support of its reading. That case holds that "'shall' generally means 'must,'" and finds a narrow exception for the statute at issue because "both sides have tendered plausible constructions of a text most interpreters have found far from clear," as evidenced by rather extensive litigation regarding the meaning of the statute. *Id*. at 418. Neither litigants nor commentators have alleged

a lack of clarity in RCRA § 7004(a), and the statute contains none of the language that causes courts to deviate from the typical understanding of the word "shall." *Cf. Guiterrez de Martinez*, 515 U.S. 417, at n.9 (discussing the interpretation of Fed. R. Civ. P. 16(e): "The order…shall be modified *only* to prevent manifest injustice." [emphasis added]). In the absence of such factors, *Guiterrez* mandates that courts read "shall" in its traditional sense as a command, requiring that the EPA "take action" in a reasonable amount of time. An allegation that the Administrator has failed to do so may be brought in "the district court for the district in which the alleged violation occurred." 42 U.S.C. § 6972(a). Whether the EPA's delay in acting on CARE's petition was unreasonable, and therefore whether the EPA can be ordered to act on that petition, is a factual question for the District Court. Therefore, we respectfully request that this court reverse the District Court's finding that it lacks jurisdiction to hear this case under RCRA § 7002.

II. FEDERAL SUBJECT MATTER JURISDICTION IS IMPROPER BECAUSE RCRA ITSELF PROVIDES JURISDICTION AND BECAUSE FINDING JURISDICTION UNDER THE APA WOULD UNDERMINE CONGRESSIONAL INTENT.

CARE argues that the EPA violated the APA provision requiring that every federal agency "give an interested person the right to petition for the issuance, amendment or repeal of a rule." 5 U.S.C. § 553(e). RCRA gives the District Court jurisdiction to order the EPA to act on CARE's petition, so finding jurisdiction under the APA would be redundant. Moreover, finding jurisdiction under the APA would undermine specific procedures of RCRA that carefully allocate jurisdiction among the various courts. Because APA jurisdiction is unnecessary and would violate Congress' explicit instructions vis-à-vis jurisdiction under RCRA, we respectfully request that the Circuit Court affirm the District Court's holding that it cannot assert federal question jurisdiction under 28 U.S.C. § 1331 (2006) in this case.

A. RCRA §7004(a) Contains a Specific Jurisdictional Provision that Supercedes the General Provisions of the APA and 28 U.S.C. § 1331.

In statutory interpretation, "[a] general statutory rule usually does not govern unless there is no more specific rule." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524 (1989). The APA, which applies to administrative agencies generally, does not apply when Congress has developed a specific statutory scheme in a piece of legislation governing one agency. The textual similarity between the jurisdictional sections of the APA and RCRA leaves little doubt that each has the same purpose. The APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). RCRA reads: "[w]ithin a reasonable time following receipt of such petition [for promulgation, amendment, or repeal of any regulation], 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 therefor." 42 U.S.C. § 6974(a). RCRA § 7002(a)(2) adds jurisdictional bite to RCRA § 7004, allowing suits against the Administrator for failure to perform a mandatory duty, much as 28 U.S.C. § 1331 grants general jurisdiction for district courts to hear cases involving violations of federal law. Finding federal question jurisdiction for an alleged violation of the APA would therefore congressional intent in enacting a jurisdictional provision within RCRA. Because RCRA § 7002(a) provides jurisdiction for the District Court to hear this case, a finding of jurisdiction under the APA is unnecessary and disruptive of congressional intent.

B. A Finding of Jurisdiction Under the APA Would Disrupt Congress' Statutory Scheme that Allocates Jurisdiction Among Several Courts.

In RCRA § 7006, Congress developed a scheme that allocates jurisdiction among the D.C. Circuit Court, the other circuit courts, and the district courts, depending on the nature of the action. A petition for review of an Administrator's final rulemaking action must be filed in the D.C. Circuit Court. 42 U.S.C. § 6976(a). Appeals of grants or denials of authorization under

RCRA § 3006 must be filed in the circuit court that covers the district in which the petitioner resides. *Id*. Petitions like the one at issue here, dealing with failure to perform a mandatory duty, must be filed in the district court for the district where the alleged violation occurred. 42 U.S.C. § 6972(a); *Sierra Club v. Thomas*, 828 F.2d 783, 789-90 (D.C. Cir. 1987) (holding that district courts generally have jurisdiction over "delay claims," though the question is "difficult.")

A grant of jurisdiction under the APA would, because of the language of 5 U.S.C. § 553(e), override Congress' specific jurisdictional allocation. 5 U.S.C. § 553(e) allows petitions for the "issuance, amendment, or repeal of a rule." 28 U.S.C. § 1331 grants jurisdiction to the district courts for all cases arising under federal law. Finding jurisdiction under § 1331 would allow the district court to hear petitions about final rules and authorizations in violation of 42 U.S.C. § 6976(a), in addition to petitions alleging dereliction of mandatory duties covered under § 6972(a)(2). In short, a finding of broad federal question jurisdiction would allow the district court to replace Congress' judgment about the allocation of judicial resources with its own, and would allow the district courts to make rulings that Congress has specifically delegated to circuit courts or vice versa. *Cf. Sierra Club v. U.S. E.P.A.*, 992 F.2d 337, 346-47 (D.C. Cir. 1993). RCRA's jurisdictional allocation ensures that all EPA actions are subject to some form of judicial review, so CARE has not been denied the opportunity to seek judicial review of agency action.

C. Even If This Court Finds Federal Question Jurisdiction, the EPA's Actions Are Not Reviewable Under the APA Because the EPA's Failure to Act on CARE's Petition Is Not a "Final Agency Action."

The APA broadly requires that an agency decision be a "final agency action" before it can be subjected to judicial review. *Sierra Club v. Gorsuch*, 715 F.2d 653, 657 (D.C. Cir. 1982). The intent behind such limitation of judicial review is to "prevent the courts, through avoidance

of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). The ripeness factors require courts to consider the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," and where these attributes are not found, courts are to defer review until the agency has made such action final.[1] *Id.*

EPA's delay of one year does not create any of the problems that cause courts to intervene before agency action has become final. Harm to the parties from withholding judicial review must generally reach the level of "an immediate and significant change in a plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Abbott*, 387 U.S. at 153. Here, EPA's inaction is not an "exercise [of] its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Generally, administrative delays of a year are acceptable to courts. *MCI Telecommunications Corp. v. F.C.C.*, 627 F.2d 322, 340 (D.C. Cir. 1980). Holding otherwise would threaten the EPA's power to allocate its limited resources; granting courts the power to compel agency action in non-emergency circumstances when the agency itself is not prepared to act would violate the principle of separation of powers and undermine the judicial branch's traditional deference to agency decisionmaking. *Nor-Am Agricultural Products, Inc. v. Hardin*, 435 F.2d 1151, 1158-59 (7th Cir. 1970). Because court review under RCRA allows courts to compel incremental agency action, there is no reason for a

[1] Exceptions to this rule exist, but are left for discussion in the following section Part III.A.

holding that would empower courts to displace agency discretion. The grant of jurisdiction in RCRA renders federal question jurisdiction under the APA unnecessary and redundant.

III. THE EPA'S FAILURE TO ACT IS NOT REVIEWABLE UNDER RCRA § 7006(b) BECAUSE THE STATUTE DOES NOT EXPLICITLY OR EXPANSIVELY PROVIDE FOR ITS REVIEW.

The EPA's failure to act on CARE's petition is not subject to review under RCRA § 7006(b) as it does not satisfy the statute's enumerated or expanded terms of "agency action." RCRA § 7006(b) provides judicial review of agency "issuance, denial, modification, revocation, grant, or withdrawal" of permits granted under 42 U.S.C. §§ 6925, 6926, & 6935. 42 U.S.C. § 6976(b) (2006). The Supreme Court has expanded this group of reviewable actions to include the rare instances of delay in which agency *in*action is so prolonged as to effectively be a "constructive determination" of the issue. *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 76 (D.C. Cir. 1984); *Envtl. Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970); *Scott v. Hammond*, 741 F.2d 992 (7th Cir. 1984) (applying the standard to state decisions). Here, CARE filed a petition for review of New Union's hazardous waste program on January 5, 2009 and filed suit on January 4, 2010 when EPA had not acted. (R. at 4.) The short term and minimal consequences of this inaction do not meet the standards demonstrating unreasonable delay and categorizing it as a "constructive denial" of the petition or a "constructive determination" on the sufficiency of New Union's program. As inaction is not explicitly included as a reviewable agency decision and the delay is not serious enough to be recharacterized as a "constructive action," EPA's failure to act is not reviewable under § 7006(b).

A. <u>The EPA's Failure to Act Is Not an Enumerated Agency Action and Is Not Reviewable Under § 7006(b).</u>

EPA's failure to act on CARE's petition is not the same as a literal agency action against the petition or the program. RCRA § 7006(b) allows the judicial review of agency "issuance, denial, modification, revocation, grant, or withdrawal" of permits under 42 U.S.C. §§ 6925, 6926, & 6935. The Supreme Court has indicated that review under this statute should be limited to the enumerated terms, which thus do not automatically include agency *in*action. *U.S. v. Bean*, 537 U.S. 71, 76 n.4 (2002) (applying the canon of construction that "[t]he use of different terms within related statutes generally implies that different meanings were intended."). Here, APA's separation of action and inaction is indicative of the narrow range of agency decisions reviewable under § 7006(b), specifically that they are strictly construed as affirmative actions listed and not agency *in*action. In this respect, the District Court was mistaken to make no delineation between withdrawing authorization and *not* withdrawing authorization. The latter decision is not reviewable under § 7006(b).

B. The EPA's Failure to Act Is Not a Constructive Denial or Determination and Is Thus Not Reviewable Under § 7006(b).

Courts have consistently held that judicial review is not permissible in instances where agency action is subject to agency discretion. *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution*, 498 U.S. 211 (1991). However, courts and Congress also recognize the resulting perverse incentive for agencies to defer action indefinitely in order to avoid judicial review. *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987); *Envtl. Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 593 (D.C. Cir. 1971). As such, the purview of judicial review has been expanded to permit review in those rare instances where inaction is so prolonged that it becomes a "constructive" determination or denial. *TRAC*, 750 F.2d at 76.

As the decision to delay action is subject to agency discretion, courts are hesitant to set a bright-line temporal rule. *In re Barr Laboratories*, 930 F.2d 72, 74 (D.C. Cir. 1991). Courts have

compared agency delay to two standards: explicit statutory deadlines where they exist or, by default, APA instruction to act "within a reasonable time."[2] *In re Barr*, 930 F.2d 72; *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1229 (10th Cir. 2002); *Hayes v. Whitman*, 264 F.2d 1017, 1024 (10th Cir. 2001). This standard draws from and reflects the APA-granted authority that courts "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (2006); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999).

Here, RCRA provides no statutory deadline for EPA response to petitions or program review, and the one-year delay in EPA's action is not unreasonable in its duration or consequences. EPA's failure to act is therefore not a "constructive denial" or "constructive determination" and is not subject for judicial review under § 7006(b).

1. There is no statutory language requiring EPA's response to a petition within a certain timeframe.

Courts have used statutory requirements as markers of when prolonged agency inaction effectively becomes agency action. The failure to take action by this prescribed date is the point at which it the EPA's failure to act becomes a "final agency action." *Southern Utah Wilderness Alliance*, 301 F.3d at 1229. Here, RCRA serves only to mandate EPA action "within a reasonable time" and describes the processes by which such action must be conducted. 42 U.S.C. §§ 6974(a), 6926(e), & 6976(b). There is no specified date by which the EPA must act and EPA review of the state's program is required only after public hearing and determination by the Administrator of program noncompliance. *Infra* Part V. Due to the lack of statutory language requiring action, the EPA's inaction was not so prolonged as to disobey a statutory requirement and is thus not a constructive action permissible for judicial review.

[2] There is a third method of comparing delay to the agency's own voiced standards, but as the EPA has not made any on record, this standard does not apply. *Public Citizen Health Research v. Chao*, 314 F.3d 143 (3d Cir. 2002).

2. The EPA's delay in action is not unreasonable.

When evaluating the delay under the APA, "[s]howing of unjustifiable delay coupled with irreparable injury if an immediate appeal is not allowed is enough to make constructive denial of relief sought appealable, if formal denial would be." *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 526 (7th Cir. 1996). Courts have generally found delay of a year acceptable, "but not several years or a decade."[3] *MCI*, 627 F.2d at 340. *See also Scott v. Hammond*, 741 F.2d at 998; *Air Line Pilots Ass'n, Intern. v. C.A.B.*, 750 F.2d 81, 86 (D.C. Cir 1984); *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 151-59 (3d Cir. 2002).

In this instance, the EPA has delayed action for only one year. (R. at 4.) Furthermore, CARE has failed to demonstrate that there will be irreparable harm should the immediate appeal not be allowed. Neither the duration nor the consequences of the delay in EPA's action rise to the standard courts have previously applied in considering agency inaction to be a "constructive" decision. *See, e.g.*, *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983). As the duration and consequences of EPA's delay are within reason, EPA's inaction does not constitute a constructive action and is thereby not subject for judicial review.

IV. EVEN IF THE EPA'S INACTION IS FOUND TO BE A CONSTRUCTIVE ACTION REVIEWABLE UNDER RCRA § 7006(b), THIS COURT SHOULD REMAND THIS CASE TO THE DISTRICT COURT.

This court should not lift the stay and should remand the suit to the lower court even if the EPA's inaction is found to be reviewable under § 7006(b). Even if considered an action, the EPA's decision was within its discretion. Here, meaningful review is precluded because judicial review is limited to compelling that which is "unlawfully withheld or unreasonably delayed" and

[3] With respect to harm, courts have shown lower tolerance for delay when "human health and welfare are at stake." *Forest Guardians v. Babbitt*, 174 F.3d at 1191; *Nor-Am Agricultural Products, Inc. v. Hardin*, 435 F.2d 1151, 1160-61 (7th Cir. 1970).

deeming unlawful agency action that which is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(1); 5 U.S.C. § 706(2)(A). Judicial review is furthermore restricted to the court's area of expertise: statutory interpretation. *Gorsuch*, 715 F.2d at 659. Maintaining the stay would follow the "primary jurisdiction doctrine" that promotes "proper relationships between the courts and administrative agencies" by keeping separate their "particular regulatory duties." *U.S. v. Rice*, 605 F.3d 473, 475 (8th Cir. 2010).

The absence of an evidentiary record confines review by this court to forcing agency action, an action usually reserved to District Courts. Accordingly, this court should remand to the District Court to order EPA to initiate proceedings under RCRA §§ 3006(e) and 7004.

A. The Court's Order Is Limited to Compelling Agency Action.

The scope of review allowed to this Court is so narrow as to functionally limit the Court's determination to compelling agency action. The APA limitations on judicial review are structured so as to best "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). Accordingly, "[t]he formulation of standards for suspension is entrusted to the [agency]" and the court has the "obligation to ensure that the administrative standards conform to the legislative purpose." *Ruckelshaus*, 439 F.2d at 596.

In order to keep these responsibilities separate, courts confronted with review of agency action proceed by first reviewing the agency's statutory responsibilities "and [then] determining whether [the] delay is inconsistent with the agency's discretion under the applicable statutory scheme." *Gorsuch*, 715 F.2d at 659. Where "the statute relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable

effect," the reviewing court cannot "substitute its judgment for the decision of the [agency] not to bring suit." *Dunlop v. Bachowski*, 421 U.S. 560, 571 (1975). To review the agency's determination, the court requires "copies of a statement of reasons supporting his determination." *Id.* Where no records exist for the court to review such reasoning, as is common when an agency fails to act, courts have remanded to lower courts in order to compel creation of such a record or else a timetable describing future action. *MCI*, 627 F.2d at 345-46.

Here, there is potential review of (1) the EPA's construction of its obligation to respond to petitions under RCRA § 3006(e), and (2) EPA's understanding of "within a reasonable time." RCRA § 7004(a). RCRA § 3006(e) requires the EPA to commence the withdrawal of a state program's approval only after the Administrator has determined it to be inadequate, meaning CARE's provided information insufficient to compel such action. Though the Court may review the EPA's reasoning, "meaningful appellate review…is impossible in the absence of any record of administrative action." *EDF*, 428 F.2d at 1099. Accordingly, even if EPA inaction is determined to be a "constructive" decision final enough for review, the Court must "remand the case to the [Administrator] either for a fresh determination on the question of suspension, or for a statement of reasons for his silent but effective refusal." *Id.* at 1100.

With respect to the EPA's interpretation of "within a reasonable time," that the Court has characterized the EPA's inaction as a constructive action means that the Court has decided that the EPA's delay is too long and thus its understanding of "within a reasonable time" too broad. RCRA § 7004(a); *Supra* Part III.B.2. As such, the Court's determinations, as permitted to it under the APA, 5 U.S.C. § 706(1) would again be limited to compelling agency action in order to generate a reviewable, evidentiary record. *Chao*, 314 F.3d 143; *In re Chemical Workers Union*, 958 F.2d 1144, 1144 (D.C. Cir. 1992).

B. Maintaining the Stay Is in Accordance with the Primary Jurisdiction Doctrine.

Maintaining the stay accords with the primary jurisdiction doctrine. The primary jurisdiction doctrine "seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime." *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 673 (2003). Courts can and should raise this doctrine on their own when (1) "a case raises issues of fact not within the conventional experience of judges, but within the purview of an agency's responsibilities," (2) the limited judicial review should defer "to an agency better equipped…to resolve an issue in the first instance," or (3) allowing the agency primary review "will promote that proper working relationship between court and agency." *Id.* Where appropriate, the primary jurisdiction doctrine "requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Rice*, 605 F.3d at 475.

Here, the EPA's inaction and subsequent relief sought by CARE – that approval of the New Union's hazardous waste program be revoked – are determinations strictly within the expertise of the EPA. Even if the EPA's inaction is considered to be a "constructive" decision, in the interest of judicial efficiency and accuracy of the review of the final action, this court should not lift the stay and should instead remand this case to the lower court for further factual proceedings. *Nor-Am*, 435 F.2d at 1158-59.

V. NEW UNION'S RESOURCES AND PERFORMANCE ARE SUFFICIENT TO MEET RCRA'S APPROVAL CRITERIA.

The criteria for authorizing, or refusing to authorize, a state program are given by 42 U.S.C. § 6926(b). The EPA Administrator shall approve the state program unless (1) the state program is not equivalent to the federal program, (2) the program is not consistent with the

federal or other state programs, or (3) such program does not provide adequate enforcement of compliance with the requirements of the statute. 42 U.S.C. § 6926(b). Relevant here is the third possible exception to approval, which implicitly addresses the resources and performance of the state program with respect to enforcement. *Id.* 42 U.S.C. § 6926(e) lays out the circumstances under which the EPA shall withdraw approval of the state program. Here, Congress has explicitly left it to the Administrator to determine, after a public hearing, if a state is not administering and enforcing a program in accordance with the requirements of the statute. 42 U.S.C. § 6926(b). If he finds enforcement lacking, he shall notify the state and, if the state fails to take appropriate corrective action within a reasonable time, he shall withdraw authorization of such program and reestablish a federal program. 42 U.S.C. § 6926; 40 C.F.R. § 271.22.

A. New Union's Performance Does Not Fall Under Any of the Criteria for Program Withdrawal Given by 40 CFR § 271.22.

The Administrator may withdraw program approval only after he decides and notifies the state that its RCRA program no longer complies with EPA requirements, and the state fails to take corrective action. 40 C.F.R. § 271.22(a); *Texas Disposal Systems Landfill Inc. v. U.S. E.P.A.*, 377 Fed.Appx. 406, 408 (5th Cir. 2010) ("The EPA is only limited in that it must withdraw authorization after [the Administrator] has determined that the state is not in compliance."). The criteria for withdrawal due to resource and performance insufficiency include: "(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits," or, "(ii) Repeated issuance of permits which do not conform to the requirements of this part." 40 C.F.R. § 271.22(2).

In its 2009 Annual Report to the EPA, New Union reported that it had issued 125 permits in 2009, and planned to issue as many in 2010. (Rec. doc. 4 for 2009, p. 19.) Because New Union receives roughly 50 applications per year for new or amended permits, the Department of

Environmental Protection ("DEP") is cutting into the permitting backlog at a rate of 75 permits per year. (Rec. doc. 4 for 2009, p. 20.) Rather than constituting a failure to exercise control over hazardous waste activity, New Union's performance protects the health and safety of its citizens, as evidenced by the DEP's prioritization of reducing the permit backlog. (Rec. doc. 4 for 2009, p. 20.) Since the EPA approved the New Union RCRA program in 1986, the DEP has issued 900 permits to hazardous waste treatment, storage and disposal facilities ("TSDs"). (Rec. doc. 4 for 2009, p. 20.) Excluding 2009, the agency has issued 775 permits over 23 years, an average of 33.7 permits per year. Therefore, the 125 permits issued in 2009 was in fact a significant *increase* in DEP's average performance. This is confirmed by the fact that the number of TSDs in New Union has only gradually increased, from 1,200 in 1986 to 1,500 in 2009. (Rec. doc. 1, p.17.) (Rec. doc. 4 for 2009, p.23.)

Under the EPA regulations, a state program may also be insufficient due to: "(i) Failure to act on violations of permits or other program requirements; (ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or (iii) Failure to inspect and monitor activities subject to regulation." 40 C.F.R. § 271.22(3). In 2009, the DEP conducted a reported 150 inspections of TSDs, and expected to do the same amount in 2010. (Rec. doc. 4 for 2009, p. 22.) The EPA also inspected 150 TSDs on behalf of New Union in 2009, and has promised to do the same in 2010. (Rec. doc. 4 for 2009, p. 23.) This means that 300 of the 1,500 TSDs, or a total of 20%, will be inspected in 2010 alone, and, if necessary, every TSD in New Union could be inspected roughly every five years. (Rec. doc. 4 for 2009, p. 23.) Furthermore, the DEP has a prioritization plan whereby it first inspects the TSDs most likely to be violators or those that pose the greatest potential harm. (Rec. doc. 4 for 2009, p. 23.) Despite numerous minor violations of the State program, there were 18 total enforcement actions taken last year: 6

by the DEP, 6 by the EPA, and 6 by environmental groups. (Rec. doc. 4 for 2009, p. 25-26.) By comparison, during the fifteen-year period from 1984 to 1999, New York State completed fewer than 200 corrective actions, approximately 13 per year. During this same period, New York permitted 308 TSDs, an estimated 20 permits per year. Both figures fall significantly below those of the New Union RCRA program, and by comparison suggest that New Union's program is in fact sufficient. N.Y. Dep't of Envtl. Conservation, Div. of Solid & Hazardous Materials, *RCRA-C in New York State: Managing Hazardous Waste* (1999), *available at* http://www.dec.ny.gov/docs/materials_minerals_pdf/rcra.pdf. Though the EPA's list of compliance failures is non-exclusive, New Union's performance does not match any of the criteria. 40 C.F.R. 271.22(a).

B. Even If the Resources and Performance of the New Union Program Are Insufficient, the EPA Is Not Required to Withdraw Approval.

Even if a state program is deemed insufficient, there are several steps before, and many EPA alternatives to, outright withdrawal of approval. 42 U.S.C. § 6926(b); 40 C.F.R. § 271.22(a). The EPA must first give the state notice and the opportunity to correct the lack of compliance, and must hold a public hearing of adjudicative fact to determine if the state program should be withdrawn. 42 U.S.C. § 6926(b); *Friends of the Earth v. Reilly*, 966 F.2d 690, 693-94 (D.C. Cir. 1992) (stating that the EPA must hold a hearing, and the content of the hearing is at the EPA's discretion). The basic requirements for this public hearing are provided by regulation. 40 C.F.R. § 271.23(b). Only after a positive determination, would the EPA would notify the State that corrective action must be taken within ninety days. 42 U.S.C. § 6926(b). Only after a failure to do so would the EPA withdraw approval. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1392 (D.C. Cir. 1991) ("If a state program falls into one of [the 42 U.S.C. § 6926(b)] categories, the EPA *must* give notice of the deficiency and, if the state fails to correct

it after 90 days, then the EPA shall withdraw approval") (emphasis added). No such notice has been given, and thus withdrawal is impermissible.

The EPA has alternatives to initiating withdrawal proceedings, including its right to overfile. When the Administrator finds that state enforcement falls short of the EPA requirements, the EPA may commence separate actions for penalties. 40 C.F.R. § 271.16(c). Under 42 U.S.C. § 6928(a), the only condition of EPA enforcement is that it provide the state with notice of its violation prior to issuing an order or commencing a civil action. *U.S. v. Power Engineering Co*., 303 F.3d 1232, 1237 (10th Cir. 2002). In *Power Engineering*, the court held that *res judicata* bars EPA overfiling only when the federal government has actually aided the state in litigating the prior case. *Id.* The statutory language of RCRA authorization has been consistently interpreted to affirm that the EPA's enforcement right is not supplanted by the act of state authorization. *Id.*; *U.S. v. Elias*, 269 F.3d 1003, 1011 (9th Cir. 2001); *U.S. v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991); *Wyckoff Co. v. E.P.A.*, 796 F.2d 1197 (9th Cir. 1986). Even in the case of ambiguous language, deference is given to the Agency's interpretation. *Chevron*, 467 U.S. at 842-43.

Harmon Industries, Inc. v. Browner, the case frequently cited to show that overfiling may be impermissible, narrowly applies to permitting while making clear that RCRA "manifests a congressional intent to give the EPA a secondary enforcement right." 191 F.3d 894, 899 (8th Cir. 1999). Furthermore, the content of the authorized state programs themselves makes clear that the EPA has the reserved right to overfile. For example, the immediate final rule authorizing Idaho's program states that the EPA "retains the authority under sections 3008, 3013 and 7003 of RCRA [together, 42 U.S.C. § 6926] to undertake enforcement actions in authorized states." Hazardous Waste Management Program Codification of Approved State Hazardous Waste Program for Idaho, 55 Fed.Reg. 50,327, 50,327 (Dec. 6, 1990).

There are also strong and unambiguous policy reasons as to why the EPA should not be required to immediately withdraw authorization of any state program found to be insufficient in its resources and performance. The logical implications of adhering to a strict withdrawal rule – whereby EPA would be required to withdraw approval of a state program with every fluctuation in resources – are entirely unrealistic. This would be an entirely unrealistic burden for the EPA, which might make the entire national system of hazardous waste management ineffectual. This stark reality is illustrated by the factual record, which shows that the cut to New Union's program was part of a larger set of routine budget cuts. To wit, New Union's 2009 Annual Report to the EPA indicates that the decrease of resources was no greater than 20% more than cuts to other public health regulatory programs. (Rec. doc. 4 for 2009, pg. 51, 53.)

VI. THE EPA NEED NOT WITHDRAW APPROVAL OF NEW UNION'S PROGRAM BASED ON THE DELEGATION OF RESPONSIBILITY TO THE RAILROAD COMMISSION.

The Agency may withdraw program approval when the State's legal authority no longer meets the requirements of RCRA due to "[f]ailure to exercise control over activities required to be regulated under this part." 40 C.F.R. § 271.22(a)(2)(i). In practice, states often divide regulatory responsibilities with those agencies best suited to handle those responsibilities to avoid duplicative enforcement regimes. 42 U.S.C.§ 6912(a)(6); *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004). Indeed, states may transfer all or part of the approved program to a new agency if authorized by the EPA. 40 C.F.R. § 271.21(c). Even if it is found that the New Union program is not regulating all facilities subject to RCRA due to the 2000 Environmental Regulatory Adjustment Act (the "ERAA"), the EPA need not immediately withdraw program approval. Instead, the EPA must first hold a public hearing and give the state notice before requesting that it alter its program. 42 U.S.C. § 6926(e); *supra* Part V. If the state makes an effort

to correct the RCRA insufficiencies, the Administrator has discretion whether to withdraw approval. 40 C.F.R. § 271.22.

A. States May Divide or Delegate RCRA Responsibilities Amongst State Agencies.

States may divide enforcement and oversight responsibilities amongst different state agencies. *Covington*, 358 F.3d at 640. Multiple agencies may pursue corrective action, and there need not be one lead agency to take control of all enforcement and correction. *Id.* at 640. In *Covington*, responsibility for the oversight of solid waste facilities and enforcement of violations in Idaho was divided between the State Department of Environmental Quality and the District Health Departments. *Id.* at 633. The court held that the Department of Environmental Quality's status as the lead agency did not preclude corrective actions by another state agency. *Id.* at 640. A state may also, with Agency approval, transfer part of the approved program to any other state agency. 40 C.F.R. § 271.21(c). Specifically, states shall notify the EPA whenever they propose to transfer all or part of any program from the approved state agency to another state agency, and the new agency is not authorized to administer RCRA until approved by the Administrator. *Id*. However, the authority to decide whether such a revision is acceptable is explicitly granted to the Administrator. 40 C.F.R. § 271.21.

Paralleling the New Union state program as amended by the ERAA, the Department of Transportation ("DOT"), not the EPA, has primary authority over railroad hazardous waste nationally. *New York Dep't of Envtl. Conservation v. U.S. D.O.T.*, 37 F.Supp.2d 152, 157-58 (N.D.N.Y. 1999). EPA must coordinate its RCRA regulations governing the transportation of hazardous waste with DOT regulations. *Id.* at 157; *see* 42 U.S.C. § 6923(b); *see* 40 C.F.R. § 263.10 (detailing the scope of EPA standards applicable to transportation of hazardous waste). Furthermore, the Administrator is authorized to "delegate to the Secretary of Transportation the

performance of any inspection or enforcement function under this chapter relating to the transportation of hazardous waste" in order to prevent duplicative activity. 42 U.S.C. § 6912(a)(6).

With the ERAA, New Union is delegating to the Railroad Commission the responsibility to regulate hazardous waste transported within the state. (Rec. doc. 4 for 2000, pp. 105-107.) It is within the consideration of the EPA that such a transfer of authority might take place, and the regulation requires only Administrator approval. 40 C.F.R. § 271.21(c). However, we are to assume that New Union failed to gain EPA approval. (Rec. doc. 4 for 2000, pp. 105-107.) Even so, the EPA is not statutorily compelled to withdraw the program for this reason. 42 U.S.C. § 6926(e). Furthermore, from a policy standpoint, New Union transfers this power to a body more knowledgeable about railroads and the potential danger of transporting hazardous waste, and one whose analogous federal body has primary jurisdiction over national regulation. *New York Dep't of Envtl. Conservation*, 37 F.Supp.2d at 157. Ultimately, this is a question under the Administrator's discretion, and this court must accept the Agency's construction of its own regulations unless that construction is "plainly wrong." 40 C.F.R. § 271.21(c); *Hazardous Waste Treatment Council*, 938 F.2d at 1395; *Seminole Rock*, 325 U.S. 410.

Furthermore, even if the New Union program is found to be in violation of one of the provisions given by 40 C.F.R. § 271.22(a), the Administrator is not required to withdraw approval because there are other processes by which the New Union RCRA program may be corrected. *Supra* Part V; 42 U.S.C. § 6926(e). The EPA could also supplement state enforcement and a lack of criminal sanctions by overfiling enforcement actions. *Power Engineering*, 303 F.3d 1232. It would be more efficient for the EPA to demand the state to correct its program or

commence its own enforcement of railroad activity in New Union than to take over enforcement of the entire program.

VII. THE ERAA DOES NOT MAKE NEW UNION'S STATE PROGRAM INCONSISTENT OR NOT EQUIVALENT, AND DOES NOT VIOLATE THE COMMERCE CLAUSE.

The New Union legislature's enactment of the ERAA does not warrant withdrawal of the New Union state RCRA program. A state program need not be approved if it is not equivalent to or not consistent with the federal regulatory scheme. 42 U.S.C. § 6926(e). Since the ERAA only makes the New Union program more stringent, and it does not fall within one of the exceptions to consistency given by EPA regulations, it thus remains equivalent to and consistent with the federal program. 42 U.S.C. § 6929; 40 C.F.R. § 271.4; *Old Bridge Chemicals, Inc. v. New Jersey Dep't of Envtl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992). Finally, the ERAA does not violate the Commerce Clause of the Constitution because it does not substantially affect interstate commerce. *U.S. v. Lopez*, 514 U.S. 549, 559 (1995).

A. The ERAA Does Not Make New Union's State Program No Longer Equivalent, But Rather More Stringent.

A state RCRA program will not be approved if it is not "equivalent" to the federal regulatory scheme. 42 U.S.C. § 6926(b). A statutory provision regarding the "retention of state authority," given by 42 U.S.C. § 6929 and adopted from the "Bumpers Amendment" of RCRA § 3009 provides: "Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." *Id.*; *see also* 40 C.F.R. § 271.1(i). Indeed, RCRA sets a floor, not a ceiling, for state regulation of hazardous waste. *Old Bridge*, 965 F.2d at 1292. 42 U.S.C. § 6929 is meant to show that there is "no particular federal importance requiring one uniform national system or plan of regulation," and thus the states have latitude to

create their own specific programs. *Old Bridge*, 965 F.2d at 1292. Rather than demanding uniformity or strict equivalence, the federal regulatory scheme establishes a "baseline standard" that state programs must not go below. *U.S. v. Southern Union*, 643 F.Supp.2d 201, 207 (D.R.I. 2009).

The ERAA provision regarding Pollutant X only makes New Union's RCRA program more stringent than the Federal program. (Rec. doc. 4 for 2000, pp. 105-107.) With this provision, the ERAA attempts to prevent the public and the environment from being exposed to a dangerous chemical by supplementing its RCRA program with the additional demands outlined in the ERAA provision, which include minimizing the creation of Pollutant X and reporting on the yearly reductions achieved. (Rec. doc. 4 for 2000, pp. 105-107.) Because these steps simply make the program more stringent that the federal program, it meets the requirements for equivalence set out by the statute. 42 U.S.C. § 6929; 40 C.F.R. § 271.1(i); *Old Bridge*, 965 F.2d at 1292. From a public policy standpoint, the fact that New Union has taken reasonable steps to stop a dangerous chemical from adversely affecting both public health and the environment should not subject it to a negative program assessment from the EPA.

B. The ERAA Does Not Make New Union's State Program Inconsistent With Federal Regulations.

Consistency is also statutorily established as a consideration for state program approval. 42 U.S.C. § 6929(b). The statute gives no explicit guidance on what is determinative of consistency. *Id.* 40 C.F.R. §§ 271.4(a) *et seq.* lays out more precisely the circumstances in which a state program may be inconsistent. *Hazardous Waste Treatment Council*, 938 F.2d at 1392. The EPA regulations provide that in order to obtain approval a State program must generally be consistent with the Federal program and must also comply with three specific provisions, two of which are directly relevant here. 40 C.F.R. § 271.4. The first provisions states that "any aspect of

the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal…shall be deemed inconsistent." 40 C.F.R. § 271.4(a). The second provision states that a program warrants withdrawal if it, with "no basis in human health or environmental protection…act as a prohibition on the treatment, storage or disposal of hazardous waste in the State." 40 C.F.R. § 271.4(b).

The plain meaning of the first provision makes it inapplicable here. The requirement is that the program not "*unreasonably* restrict" the transport of hazardous waste through New Union. 40 C.F.R. § 271.4(a) (emphasis added). In fact, the opposite is true. The ERAA allows for movement through the state insofar as the ERAA states that "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." (Rec. doc. 4 for 2000, pp. 105-107.) (Emphasis added.) The only restriction is that transportation be direct and not make unnecessary stops, both reasonable requests given that Pollutant X is considered by the EPA and the World Health Organization to be, from a public health and environmental standpoint, one of the most potent and toxic chemical hazardous wastes. (Rec. doc. 4 for 2000, pp. 105-107.) Because there are no treatment facilities in New Union, to transport Pollutant X to the State or accumulate it there beyond the ERAA storage allowance of up to 120 days would itself be unreasonable. (Rec. doc. 4 for 2000, pp. 105-107.)

This section of the ERAA's basis in human health is indisputable, and thus New Union is exempt from inconsistency based on a ban of hazardous waste transport. (Rec. doc. 4 for 2000, pp. 105-107.) 40 C.F.R. § 271.4(b). Again, no treatment or disposal facilities capable of preventing exposure to persons and the environment of releases of Pollutant X exist in New Union. (Rec. doc. 4 for 2000, pp. 105-107.) In *Hazardous Waste Treatment Council*, the court

held that the state law "acts as a prohibition on treatment of hazardous wastes, for purposes of determining whether it is inconsistent with federal Resource Conservation and Recovery Act, when state law effects total ban on particular waste treatment technology within state." 938 F.2d at 1397. Similar to North Carolina's Senate Bill 114, which required thousand-fold dilution of hazardous discharges from waste treatment facilities above drinking water intakes, the ERAA does not ban the *technology* for treatment, storage or disposal. *Id.* at 1392. Thus, as in *Hazardous Waste Treatment Council*, this court should affirm the EPA's administrative decision not to withdraw authorization of the state program. *Id.* at 1397. Furthermore, as above, this provision of the ERAA makes New Union's program more stringent, and "state regulations that differ from federal regulations do not necessarily violate the federal act because RCRA expressly permits more stringent state regulations. Therefore, a mere inconsistency between the state and federal schemes does not constitute a violation of RCRA." *Old Bridge*, 965 F.2d at 1297.

40 C.F.R. § 271.4 grants only that the administrator "may" withdraw authorization if inconsistent with one of the specific provisions, and thus dictates agency discretion. Even if New Union had violated one of the two relevant regulations regarding consistency, the EPA would not necessarily have to withdraw program approval. This construction is confirmed by broad deference given to the EPA to interpret its own regulations. *Seminole Rock*, 325 U.S. 410.

C. The ERAA Does Not Violate the Commerce Clause of the Constitution Because It Does Not Substantially Affect Interstate Commerce.

Though ostensibly giving regulatory power to Congress, the Commerce Clause has long been understood to have a "negative" or "dormant" aspect that denies states the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce. U.S. Const. art. 1, § 8, cl. 3; *Oregon. Waste Systems, Inc. v. Dep't of Env't Quality of the State of Oregon*, 511 U.S. 93, 96 (1994). To be in violation of the so-called "dormant" Commerce Clause

principles, a law must "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 559. Hazardous waste is an article of commerce. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978) ("we reject the state court's suggestion that the banning of "valueless" out-of-state wastes by ch. 363 implicates no constitutional protection"); *Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334, 338 n.1 (1992). The "crucial inquiry" as to whether a law violates the Commerce Clause is whether it is a "protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia*, 437 U.S. at 624.

The ERAA passes both tiers of the two-tiered dormant Commerce Clause test. *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996). Because the ERAA is easily justified by "a valid factor unrelated to economic protectionism" it escapes the *per se* rule of invalidity. *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 274 (1988). Because the burdens on interstate commerce from the ERAA are only incidental and not excessive with respect to the local benefits, it passes the balancing test. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). The ERAA does not substantially affect interstate commerce because there are no treatment or disposal facilities for Pollutant X in the state of New Union. (Rec. doc. 4 for 2000, pp. 105-107.) To that end, a state would have no commercial purpose for sending any quantities of Pollutant X to a state that has no means for the treatment, storage or disposal of it. (Rec. doc. 4 for 2000, pp. 105-07.) Any effects upon interstate commerce stemming from the ERAA provision pertaining to Pollutant X would only be incidental to legislation meant to maintain the health and safety of New Union, and thus are not considered a violation of the Commerce Clause. *City of Philadelphia*, 437 U.S. at 623-24. Furthermore, this public health provision can in no way be thought of as protectionist, especially insofar as it is "devoid of economic animus toward out-of-state interests," and does not satisfy the "crucial inquiry" of Commerce Clause violations. *Id.* at

624; *Blue Circle Cement v. Bd. of County Com'rs of County of Rogers*, 27 F.3d 1499, 1510 (10th Cir. 1994). (Rec. doc. 4 for 2000, pp. 105-07.)

CONCLUSION

CARE properly petitioned the EPA for a rulemaking pursuant to the procedures laid out in RCRA. The District Court has the authority to hear CARE's claim under RCRA § 7002(a)(2) and order the EPA to act on the petition. This makes an additional grant of jurisdiction under the APA an unnecessary violation of Congress' allocation of jurisdiction amongst courts. Similarly, reclassification of the EPA's handling of these issues as a "constructive denial" or "final action" violates the Agency's decisionmaking authority and further contradicts the principle of deference to agency action. Should this court find jurisdiction to review, it must develop a factual record on the reasons for EPA inaction by remanding this decision to the lower court for further proceedings. Finally, New Union's program does not fall under the statutory and regulatory criteria for withdrawal for any of the alleged reasons. Even if New Union's RCRA program were to be deemed subject to withdrawal by the Administrator, the Administrator must take certain steps before the program could be withdrawn, and has alternative steps to withdrawal at his disposal. For the foregoing reasons, the EPA respectfully requests that this court REVERSE the District Court's ruling granting summary judgment to New Union, MAINTAIN the stay on C.A. No. 18-2010, and REMAND this case to the District Court for further factual proceedings.

Respectfully Submitted

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