TEAM 57

Civ. App. No. 18-2010
Civ. App. No. 400-2010

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.,

Petitioner-Appellant-Cross-Appellee,

v.

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

Respondent-Appellee-Cross-Appellant,

and

STATE OF NEW UNION,

Intervenor-Appellee-Cross-Appellant.

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

BRIEF FOR PETITIONER-APPELLANT
CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

Statutes

Constitutional Provisions

Rules

Regulations

Journal Articles

Other Authority

JURISDICTIONAL STATEMENT

This consolidated case includes an appeal and a petition for lift of a stay. The appeal is from a final judgment of the United States District Court of the District of New Union, which sat in federal statutory jurisdiction. U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 1331, 42 U.S.C. § 6972; 5 U.S.C. § 553(e) (2010). The United States Court of Appeals for the Twelfth Circuit has appellate jurisdiction over all final decisions of the United States District Court for the District of New Union. 28 U.S.C. § 1291. This Court also has original jurisdiction to hear appellant's petition for review under federal law. 42 U.S.C. § 6926 (2010). This Court has jurisdiction to review EPA decisions authorizing state hazardous waste programs. 42 U.S.C. § 6976(b)(2).

STATEMENT OF THE ISSUES

I. Whether the EPA's approval of New Union's hazardous waste program constituted a rule under section 3006(b) of RCRA.

II. Whether the EPA's year-long failure to act on CARE's petition violated CARE's right to petition for repeal of a rule.

III. Whether the EPA's failure to respond to CARE's petition constituted a constructive denial of the petition and constructive re-approval of New Union's program.

IV. Whether this Court should lift the stay of CARE's action and review CARE's claims.

V. Whether New Union's diminished program fails to meet RCRA approval criteria.

VI. Whether the ERAA renders regulation of New Union railroad hazardous waste sites inconsistent with federal standards.

VII. Whether the ERAA violates the Commerce Clause and renders the state program inconsistent with the federal program or other state RCRA programs.

STATEMENT OF THE CASE

On January 5, 2009, Citizen Advocates for Regulation and the Environment, Inc. (CARE), a non-profit corporation, served a petition on the Administrator of the Environmental Protection Agency (EPA), requesting that she commence proceedings to withdraw approval of

New Union's state hazardous waste program. (R. at 4.) CARE's petition asserted that a 2000 New Union statute withdrew a class of hazardous waste sites from the program and prohibited disposal of a hazardous waste inside the state, rendering the program ineligible for continued authorization and in violation of the Commerce Clause. (R. at 5.) CARE's petition further asserted that State resources allocated to the program had dwindled to the point that the program had not met minimum federal standards for state authorization since at least 2009. (R. at 5-6.) CARE filed a petition under section 7004 of the Resource, Conservation and Recovery Act (RCRA) and section 553(e) of the Administrative Procedure Act (APA), requesting that the Administrator withdraw authorization of the program. (R. at 4.)

After waiting one year for a response from the Administrator, CARE filed a complaint against her in the United States District Court for the District of New Union under section 7002 of RCRA. (R. at 4.) CARE asserted that the EPA constructively denied CARE's petition and constructively determined that New Union's program continued to meet federal criteria. (R. at 4.) CARE's complaint requested an injunction ordering the EPA to act on CARE's petition. (R. at 4.) In the alternative, CARE requested review of both of the EPA's constructive actions. (R. at 4.) The district court granted New Union's motion to intervene. (R. at 4.)

CARE also filed a petition with this Court under section 7006 of RCRA for review of the Administrator's constructive actions. (R. at 5, 8.) This Court granted New Union's motion to intervene and stayed the proceeding pending the district court's order. (R. at 5.)

On June 2, 2010, the District Court granted New Union's motion for summary judgment and denied CARE's motion. (R. at 9.) The District Court held that: (1) the Administrator's original authorization of New Union's program was an order, not a rule, precluding district court jurisdiction (R. at 7); (2) because the Administrator issued an order, the District Court lacked

subject matter jurisdiction under section 553(e) of the APA (R. at 8); and (3) the Court of Appeals may have statutory jurisdiction under section 7006(b) of RCRA (R. at 8.). Finding that it did not have jurisdiction, the District Court did not reach the merits of CARE's claims.

CARE timely appeals the district court's order dismissing CARE for lack of statutory and federal subject matter jurisdiction. (R. at 1.) CARE requests that this Court reverse the district court's decision denying jurisdiction and remand to the district court for further proceedings. CARE requests alternatively that this Court lift the stay on CARE's petition and proceed to review the EPA's constructive actions. (R. at 1.) This Court consolidated the appeal and the stayed action, granting review by order of September 29, 2010. (R. at 1-3.)

STATEMENT OF THE FACTS

The EPA approved New Union's hazardous waste program in 1986 after finding New Union had "adequate" resources at that time and that "with less [sic] resources, the program might not be adequate." (Rec. doc. 4, p.16.) In 1986 the EPA found that the State administered the program with fifty full-time DEP employees, including fifteen permit writers, fifteen inspectors and two lawyers, who issued permits "in a timely fashion," inspected treatment, storage and disposal facilities (TSDFs) at least once every other year, and took enforcement action "against all significant violations." (Rec. doc. 1, p. 73; rec. doc. 2, p.1.) In 1986, 1200 TSDFs required such permits. (Rec. doc. 1, p. 17.)

Since 1986, New Union has allocated diminishing resources to the program while the number of TSDFs requiring permits has risen. In 2009, 1500 TSDFs required regulation while the state dedicated only thirty full-time employees to the DEP, including seven permit writers, seven inspectors and one lawyer. (Rec. doc. 5 for 2009, p. 52.) Of the 1500 TSDFs, 900 operated under permits that had expired as long ago as 1989, continued only by law. (Rec. doc.

5 for 2009, p. 20.) New Union receives an average of fifty permit applications per year from new facilities or existing TSDFs wishing to expand operations, leading to a "growing backlog of permit applications" despite the DEP's issuance of 125 permits in 2008. (Rec. doc. 5 for 2009, pp. 19, 20.) New Union's 2009 annual report stated that the DEP inspected no more than ten percent of its TSDFs and that the EPA inspected a comparable number. (Rec. doc. 5 for 2009, pp. 22, 23.) The same year, New Union reported twenty-two significant permit violations and hundreds of minor violations, and took only six enforcement actions, while the EPA and citizen groups each also filed six suits under RCRA. (Rec. doc. 5 for 2009, pp. 24-26.) The State has cut the DEP's resources by up to twenty percent more than other state health programs. (Rec. doc. 5 for 2009, p. 51.) The State Director of Budget publicized that the Governor will likely order a two-year freeze on hiring most state employees, including DEP staff, with more layoffs of up to ten percent imminent for "programs in which state employees perform[] functions that federal employees [otherwise would]." (Rec. doc. 5 for 2009, p. 53; rec. doc. 6, June 6, 2009.)

In 2000, New Union's legislature changed the structure of the State hazardous waste program by enacting the Environmental Regulatory Adjustment Act (ERAA). (Rec. doc. 5 for 2000.) The ERAA amended the Railroad Regulation Act (RRA), which established a Railroad Commission (Commission) to regulate intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards. (Rec. doc. 5 for 2000.) The Commission is staffed by three employees, one of whom is appointed by the State Senate. (Rec. doc. 5 for 2000.) The ERAA amended the RRA by transferring "all...permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the Commission" and removing criminal penalties for violations of environmental statutes committed by facilities overseen by the Commission. (Rec. doc. 5 for 2000, pp. 103-05.) In 2000, Nat Greenleaf, the twin brother of the

Majority Leader of the State Senate, Luther Greenleaf, was the president of New Union's only intrastate railroad, the New Union RR Company (NURC). (Rec. doc. 6, Aug. 14, 2000.)

Another portion of the ERAA amended New Union's hazardous waste program. (Rec. doc. 5 for 2000.) The amendment categorically prohibited the treatment and disposal within New Union of the hazardous waste Pollutant X. (Rec. doc. 5 for 2000, pp. 105-07.) The amendment allowed the DEP to issue permits to store Pollutant X for up to 120 days if the permittee transports the waste to an authorized TSDF outside New Union. (Rec. doc. 5 for 2000, pp. 105-07.) However, the amendment provided that "any person" may transport Pollutant X through New Union if such transport is as direct as possible, "with no stops within the state except for emergencies and necessary refueling." (Rec. doc. 5 for 2000, pp. 105-107.) The amendment also required facilities that generate Pollutant X to minimize its generation until it is no longer produced in the State. (Rec. doc. 5 for 2000, pp. 105-07.)

SUMMARY OF THE ARGUMENT

The district court erred in holding that it did not have jurisdiction to review CARE's petition to withdraw EPA approval of New Union's state hazardous waste program. The Administrator's authorization of the program is a rule promulgated under the EPA's rulemaking process, binding all tribunals that will review the DEP's permitting, inspection and enforcement decisions. The EPA fulfilled a non-discretionary duty to approve or deny applications for state hazardous waste programs by authorizing the DEP's program. The EPA's authorization is thus reviewable in district courts. CARE filed its January 2009 petition with the EPA under section 7004 of RCRA, which authorizes petitions by any person to repeal rules and requires the Administrator to act on the petition within a reasonable time. 42 U.S.C. § 6974(b).

The district court also erred in refusing to exercise jurisdiction under section 553(e) of the APA. Because the EPA's original authorization of New Union's problem was a rule, CARE properly filed a petition for withdrawal under section 553(e). This Court should require the district court to order the EPA to act on CARE's petition for withdrawal.

This Court has jurisdiction to adjudicate CARE's petition for review because the EPA has taken a final action by constructively re-authorizing New Union's program. By failing to respond for a year, the EPA's non-discretionary duty to respond to CARE's petition has ripened into an action reviewable by this Court. This Court should lift the stay on CARE's appellate petition and review CARE's claims because appellate courts have more agency-related expertise than district courts and are better suited to settle policy issues. Alternative claims are allowed under procedural rules. Fed. R. Civ. Pro. § 8(d)(2).

This Court should review the EPA's constructive re-authorization of the State program because the DEP failed to meet federal permitting, inspection and enforcement standards. The ERAA renders the State program inconsistent with federal criteria by effectively excluding railroad hazardous waste sites from regulation. Finally, the ERAA renders the State program inconsistent with other states, not equivalent to the federal program and in violation of the Commerce Clause by removing criminal sanctions from all entities regulated by state environmental programs, suspending manifesting requirements for transporters of hazardous waste, and prohibiting treatment and disposal of Pollutant X inside New Union.

STANDARD OF REVIEW

An appellate court reviews a lower court's grant of summary judgment *de novo*. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). Summary judgment is appropriate if "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). "When applying this standard,

[appellate courts] examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Thus, this Court must review *de novo* the district court's denial of jurisdiction over CARE's claims in the light most favorable to CARE. *De novo* reconsideration is also appropriate when deciding whether to lift a stay of an action. *Pescosolido v. Block,* 765 F.2d 827, 831 (9th Cir. 1985). When determining whether to review CARE's claims, this Court should not defer to the EPA's construction of the judicial review provisions of environmental statutes. *Love v. Thomas*, 858 F.2d 1347, 1352 n.9 (9th Cir. 1988).

ARGUMENT

I. THE DISTRICT COURT HAS JURISDICTION TO ORDER THE EPA TO ACT ON CARE'S PETITION BECAUSE THE EPA'S APPROVAL OF NEW UNION'S HAZARDOUS WASTE PROGRAM CONSTITUTED A RULE UNDER RCRA.

RCRA section 7002(a)(2) allows CARE to force the EPA to amend or repeal New Union's hazardous waste program. 42 U.S.C. § 6972. Any person may commence a civil action against the Administrator of the EPA alleging that the Administrator failed to perform "any act or duty under [RCRA] which is not discretionary with the Administrator." 42 U.S.C. § 6972(a)(2). CARE petitioned the EPA under RCRA section 7004 to force the EPA to repeal a rule. R. at 1; 42 U.S.C. § 6974. Although RCRA does not define a rule, the APA states that a rule is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law includ[ing] the approval or prescription for the future of ... corporate … structures ... or practices." 5 U.S.C. 551(4).

A. The EPA's approval of New Union's hazardous waste program is of general or particular applicability and future effect.

A court has jurisdiction under section 502 of the APA to review the merits of a petition for review filed under the same section. *Coalition for Common Sense in Gov. Procurement v.*

Sec'y of Veterans Affairs, 464 F.3d 1306, 1314 (D.C. Cir. 2006). The *Coalition* court held that a "Dear Manufacturer Letter" written by the Veterans Affairs Administration (VAA) regarding manufacturer purchases "prospectively [required] action on behalf of all drug manufacturers." *Id*. at 1317. Holding that the letter was a substantive rule under the APA, the court found that the letter changed existing law and affected the manufacturers' obligations by creating a new refund system, requiring manufacturers to pay double the amount for drugs. *Id*. As evidence of a substantive rule, the court relied on the fact that the letter bound tribunals outside the VAA. *Id*.

Here, like the letter in *Coalition*, the EPA's continuing approval of New Union's program affects all New Union tribunals that will hear cases brought pursuant to the state program, as well as any court hearing a challenge to the program. The EPA's approval of the program did not affect only a "single and particular party"; rather, in addition to tribunals, the program binds over a thousand TSDFs through continued permitting. (R. at 7; Rec. doc. 5 for 2009, pp. 19, 20.)

The EPA's approval of New Union's program was also forward-looking. *See* 5 U.S.C. 551(4). The program prospectively requires action by all TSDFs in New Union because they must apply for and comply with permits issued under New Union's delegated authority. 42 U.S.C. § 6926; (R. at 7.) Additionally, New Union's re-delegation of permitting authority to the Commission for railroad facilities requires owners and operators of railroad sites to prospectively comply with specific hazardous waste management laws. (Rec. doc. 5 for 2000, pp. 103-05.)

Delayed agency action can be sufficiently final to constitute a rule under the APA. In 1984, the EPA delayed issuing ocean burning permits until specific ocean incineration regulations were promulgated. *Waste Management, Inc. v. U.S. EPA*, 669 F.Supp. 536, 538 (D. D.C. 1987). The court held that the agency's decision to delay the issuance of permits was a statement of future effect designed to prescribe law, policy or procedure and was a rule under the

APA. *Id*. at 539. The court clarified that the EPA's delay was not an interpretive rule or a general statement of policy without force of law; rather, the agency's refusal to engage in the permitting process was agency procedure of practice that amounted to a procedural rule exempt from notice and comment requirements of the APA. *Id*. (citing 5 U.S.C. § 553(b)(A)). Although the deferral affected agency supplicants and could cause the plaintiff fishermen some difficulty, because the plaintiff would be able to submit applications once new rules were in place, the court held that the effect and difficulty were sufficiently temporary to gain the exemption from notice and comment procedures. *Id*. at 540. Refusal to engage in a mandatory permitting process is equivalent to delegating permitting authority to an agency that does not meet the state equivalency requirements under RCRA. TSDFs operating without permits subject to RCRA's provisions are subject to federal enforcement under RCRA sections 3008(a)-(h). 42 U.S.C. § 6928. The effect in *Waste Management* was temporary, while the effect here is not. *See Id*. Even if the refusal to permit is an interpretive rule, it is still a rule under the APA.

B. The EPA's approval of New Union's hazardous waste program is designed to implement, interpret, and prescribe RCRA.

Prescribing duties that affect financial interests of regulated entities constitutes a rule, even where the agency fails to follow notice and comment procedures. *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 441 (9th Cir. 1993). The court clarified that a regulation effectuating a statutory requirement was a "procedural" rule under the APA because it affected the price of a particular commodity by prescribing specific marketing procedures. *Id*. at 447. Finally, the court held that the agency's prohibition of the early sale of underpriced almonds was an "interpretive" rule since it explained or clarified existing laws and regulations. *Id*.

The EPA's approval of New Union's hazardous waste program was a procedural, substantive, and interpretive rule. Unlike the Department of Agriculture's failure to follow

proper procedures in *Cal-Almond*, the EPA here approved New Union's state program for hazardous waste removal in 1986 by following the required notice and comment provisions. (R. at 5, Rec. doc. 2, p. 1.) The EPA's continued approval is a procedural rule since it structures the EPA's delegation of non-discretionary duties under RCRA to state authorities, governing future decisions of the EPA and New Union's hazardous waste program. *See* 42 U.S.C. § 6926. The EPA's continued approval of New Union's hazardous waste program is a substantive rule because the program directly affects the financial interests of persons and corporations performing TSD activities in New Union. (Rec. doc. 5 for 2000.) Finally, the EPA's continued approval of New Union's hazardous waste program is an interpretive rule because it shifts the regulating authority from the EPA to New Union, clarifying the State's obligations under RCRA to implement a hazardous waste program. (Rec. doc. 5 for 2000.); 42 U.S.C. § 6926.

The EPA's re-authorization of New Union's hazardous waste program is final agency action because it unambiguously subjects TSDFs to state regulation. An agency's interpretation of its enabling statute that is not an abstract question of administrative policy is fit for judicial consideration. *Rocky Mountain Oil and Gas Assoc. v. Watt*, 696 F.2d 734, 741 (10th Cir. 1982). The Department of Interior's (DOI) adoption of the Solicitor's statutory interpretation in a handbook constituted final agency action for purposes of judicial appeal under the APA. *Id.* (citing 5 U.S.C. § 704 (1986)). As evidence, the court noted that applications for permits had been denied based upon DOI's adopted interpretation. *Id*. DOI's administration of the policy was final agency action because it was "anything but 'a matter of speculation.'" *Id*.

Here, the EPA's continued approval of New Union's hazardous waste permitting is final agency action fit for judicial consideration because there is no "matter of speculation": the ERAA governs "all standard setting, permitting, inspection, and enforcement authorities of the

DEP under any and all state environmental statutes." (Rec. doc. 5 for 2000.) The EPA's non-discretionary duty to approve or deny state hazardous waste programs within 90 days of a state submitting a plan for approval is significantly less speculative than DOI's discretionary issuance of the handbook in *Rocky Mountain*. 42 U.S.C. § 6926(b). The duty to approve or deny a state hazardous waste program is non-discretionary, therefore its fulfillment (or lack thereof) is final agency action under *Rocky Mountain* because the state must rely on the EPA's approval or disapproval whereas regulated entities were under no obligation to follow the DOI's handbook until the court so decided. 42 U.S.C. § 6926(b).

C. The EPA's approval of New Union's program was not an order under the APA.

The APA defines an "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory... of an agency in a matter other than rule making but including [all licensing decisions]." 5 U.S.C. § 551(6, 9). This definition does not describe the EPA's action in this case. A final disposition resolves a dispute between parties to administrative proceedings. *Levy v. U.S. Securities and Exchange Comm'n*, 462 F.Supp.2d 64, 67 (D. D.C. 2006). Because the Securities and Exchange Commission (SEC) did not promulgate amendments to their rules to resolve any dispute by the parties to the case, the court held that those amendments were not orders under the APA. *Id*. Rather, the amendments were rules since they generally applied to entities under the SEC's authority and because they had future effect and were designed to implement, interpret, or prescribe law or policy. *Id*.

The EPA's continued approval of New Union's hazardous waste program generally applies to the immediate future because it affects many regulated entities through one adjudicatory process; particularly under the re-delegation of some of the DEP's enforcement authority under the ERAA. (Rec. doc. 5 for 2000.) CARE did not dispute any particular permit,

only New Union's continued permitting authority, so there is no "dispute between parties" subject to RCRA's substantive requirements sufficient to trigger "final disposition" analysis.

In contrast, a classification determination by the Department of Defense under RCRA regarding its own real property was not an "agency action" under the APA because it was not sufficiently of future effect designed to implement, interpret, or prescribe law or policy. *Frost v. Perry*, 919 F. Supp. 1459, 1469-70 (D. Nev. 1996). Similarly, an agency's failure to conform to National Environmental Policy Act (NEPA) requirements for its licensing procedures was not final agency action under the APA because the agency had no clear legal duty under NEPA to perform an environmental analysis until the licensee acquired the land applied for as a proposed site. *Gage v. Commonwealth Edison Co.*, 356 F. Supp. 80, 86 (N.D. Ill. 1972). In ruling that the agency's failure to perform NEPA analysis was not final agency action, the court relied upon the fact that the Atomic Energy Commission had not yet received an application for a permit and the prospective permittee had not yet acquired the land in question. *Id*. Unlike the duty-free agency in *Gage*, the EPA has a clear legal obligation under RCRA to allow or deny New Union to continue RCRA permitting under section 3006. 42 U.S.C. § 6926. Approximately 1500 entities are already permitted under New Union's program, in contrast with the single prospective regulated licensee in *Gage*. (Rec. doc. 5 for 2009, p. 23.)

A narrow exception to the rule that the word "shall" imposes non-discretionary duties on an agency was discussed in *Martinez v. Lamagno*, where, in a footnote, the Supreme Court explained that the use of "shall" in the Federal Civil Rules of Procedure "authorizes" a court to apply those rules instead of mandating action. 515 U.S. 417, 432-33, n.9 (1995); *contra Bennett v. Spear*, 520 U.S. 154, 175 (1997) (holding that "any contention that the relevant provision of [the Endangered Species Act] is discretionary would fly in the face of its text, which uses the

imperative 'shall'"). The proposition that "shall" does not require the addressed governmental unit to act is unique to this footnoted dictum; it does not apply to substantive statutes. In the instant case, RCRA requires the EPA to approve or deny state hazardous waste permitting programs under section 3006, contrary to the district court's discretionary application of procedural rules. 42 U.S.C. § 6926. Finally, the ninety day statute of limitations does not apply to CARE's petition, since the conceded facts that make New Union's program insufficient under RCRA were not known until the DEP's 2009 Annual Report 2009 was issued, within ninety days of CARE's service of the petition on the EPA. (Rec. doc. 5 for 2009; R. at 4.)

II. THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. 1331 TO ORDER THE EPA TO ACT ON CARE'S DISTRICT COURT PETITION.

The EPA's failure to act on CARE's petition violates the requirement that the EPA "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). New Union's continued operation of its hazardous waste program sufficiently affects TSDFs' and CARE's interests to constitute a program approvable only through an agency rule. The EPA must respond to CARE's petition for program withdrawal, especially since New Union has devoted fewer resources to a growing number of hazardous waste facilities.

A. CARE has the right to petition for repeal of EPA approval of New Union's hazardous waste program.

An agency decision that effectively suspends the implementation of regulations for classes of TSDFs constitutes rulemaking subject to the requirements of the APA. *Envtl. Def. Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983). In *EDF,* after belatedly promulgating regulations for two classes of hazardous waste facilities under court order, the EPA decided not to revoke the permits that would be affected by these new regulations. *Id*. at 817. Because the effect of this decision was to postpone compliance mechanisms for an entire class of facilities,

the court held that the EPA's action substantively promulgated a regulation reviewable under section 553 of the APA. *Id*. at 818. Moreover, the court held that the EPA's decision not to revoke permits was a rule subject to notice and comment requirements because of its substantive effect on the obligations of the regulated entities and on the rights of the public. *Id*.

If failing to revoke permits effectively promulgates a regulation, failing to approve or deny a state permitting program is certainly promulgating a rule under the APA. The EPA does not deny that TSDFs in New Union continue to operate without federal review of the state's permitting ability. In fact, the EPA inspects facilities under New Union's hazardous waste management program because the state is unable to fulfill minimum inspection requirements using its own resources. (Rec. doc. 5 for 2009, p.23.)

The APA provides remedies applicable to CARE's petitions. The maxim that specific remedies trump general ones is not. The district Court's cited authority for preferring RCRA remedies over those of the APA, the cited authority applies to interpreting different parts of the same statute, not comparing two different statutes. *See* (R. at 8) (citing *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-25 (1989)). While the APA does not require timely action by an agency under its requirement to give interested "person[s] the right to petition," this does not affect whether the CARE's petition is a rule under the APA. 5 U.S.C. § 553(e). The EPA's continued approval of New Union's hazardous waste program substantively affects all 1500 TSDFs operating in New Union, and is thus a rule under the APA. (Rec. doc. 5 for 2009, p. 52.)

B. The EPA must respond to CARE's petition for the EPA to withdraw authorization of New Union's hazardous waste program.

The APA requires an agency to respond to a petition under Section 553(e) and set forth its reasons for denying the action requested in that petition. *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 328 (7th Cir. 1983). The Seventh Circuit recognized that an agency could

be constantly engaged in considering endless 553(e) petitions if the EPA followed the required new procedures under the APA. *Id*. at 329. Instead, the court noted that the EPA had dealt with the substance of the petition by sending letters to the petitioners explaining the EPA's basis for denying petitioners' requests, consistent with the substantive law under which the petition was regulated. *Id*. (citing 42 U.S.C. § 7407(d)(2)). Moreover, the state agency with delegated authority to administer the substance of the EPA's responsibilities sent multiple letters to the petitioners detailing their own correspondence with the EPA. *Id*.

The EPA has not responded to CARE's petition. (R. at 4.) The facts underlying the EPA's original approval of New Union's permitting program have clearly changed since its initial approval, when even the EPA noted that "with less [sic] resources the program might not be adequate." (Rec. doc. 4, p.16.) (TSDFs requiring permits have risen from 1200 to 1500; program staff dedicated to hazardous waste management has shrunk from fifty full-time employees to thirty). Thus, the EPA had a duty to respond to CARE's petition and its failure to do so is reviewable by district courts under section 553(e) of the APA.

III. THIS COURT HAS JURISDICTION TO REVIEW THE EPA'S CONSTRUCTIVE DENIAL OF CARE'S PETITION AND CONSTRUCTIVE DETERMINATION TO RE-APPROVE NEW UNION'S PROGRAM.

The EPA's inaction on CARE's petition has ripened into a constructive denial of the petition. Constructive denial of CARE's petition has produced the same results as actual denial would have. The denial thus amounts to a constructive determination that New Union's hazardous waste program still meets RCRA criteria, and is final action reviewable by this Court.

A. By failing to respond to CARE's petition, the EPA constructively denied it and constructively determined that the State program still meets RCRA criteria.

The EPA's inaction is tantamount to approval of a state decision. *Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984). In *Scott*, Indiana failed for over five years to

submit proposed Total Maximum Daily Loads (TMDLs) under the Clean Water Act (CWA). The Seventh Circuit held that this failure amounted to a "constructive submission" of no TMDLs and that the EPA was under a duty to either approve or disapprove the "submission." *Id.* at 996. The state's inaction ripened into a refusal to act, which was equivalent to a determination that no TMDLs were necessary. *Id.* at 997-98. (ordering the EPA to perform the non-discretionary duty of imposing federal TMDLs on the state). As in *Scott*, the EPA has failed to fulfill a non-discretionary duty for a long period of time by failing to act on CARE's petition. The EPA's failure to act constitutes a constructive denial of CARE's petition. (R. at 4.) This constructive denial of CARE's petition is the functional equivalent of a determination that New Union's program continues to meet RCRA criteria, therefore the constructive denial of the petition constitutes a constructive determination that the program continues to meet RCRA's standards.

B. The EPA's constructive determination that New Union's hazardous waste program continues to meet RCRA criteria is a final action reviewable by this Court.

The EPA's constructive determination that New Union's program continues to meet RCRA criteria is a final action because the duration of time that has passed since CARE submitted the petition, and the EPA's lack of intent to act in future, indicate final action. In *Western Oil & Gas Association v. U.S. EPA*, where the EPA promulgated area designations a month after the statutory deadline, the court found that the EPA had violated the APA and provided a remedial opportunity for comment on the designations, suggesting that even one month is an unreasonable amount of time to leave a public welfare regime in an inadequate state. 633 F.2d 803, 812 (9th Cir. 1980). Similarly, non-action is constructive final action when the Administrator mutely allows a statutorily required rulemaking cycle to pass with no change in relevant standards. *Natural Res. Def. Council, Inc. v. Adm'r, U.S. E.P.A. (NRDC I)*, 902 F.2d

962, 983 (D.C. Cir. 1990) (*vacated on other grounds*, 921 F.2d 326 (D.C. Ct. App. 1991)). The result is the same as a statement from the EPA that a revision is unnecessary, making the EPA's silence a proxy for a determination. *Id*.; *see also Sierra Club v. Thomas,* 828 F.2d 783, 793 (D.C. Cir. 1987) (inaction as "[e]ffective[] final action not acknowledged" may constitute final action for jurisdictional purposes). Though the absence of a mandatory deadline is a "factor counseling against judicial intervention," it does not dispose of claims of unreasonable delay. *Id.* at n. 99. Agency intent to act in future, however, is a factor indicating that an unusual delay may be more reasonable than otherwise. *Saccacio v. Bureau of Alcohol, Tobacco & Firearms*, 211 F.3d 102, 103-04 (4th Cir. 2000). Here, the EPA has failed to act on CARE's petition for a full year, and by arguing that section 7004 does not mandate action, the EPA implies that it has no intention to act. (R. at 6.) The EPA's non-action is reviewable by this Court.

If the EPA was immune from judicial review whenever it declined to decide whether revision of standards was proper, the EPA could evade review of even the most egregious footdragging, contrary to Congress' goal of carefully monitoring pollution emissions. *Thomas*, 828 F.2d at 793. RCRA, like the CAA, "provides for a route to judicial intervention whenever EPA fails to perform a nondiscretionary statutory duty." *NRDC I*, 902 F.2d at 985; *see* 42 U.S.C. 6976(2)(a). In *NRDC I*, the EPA's silence regarding a particulate matter standard regulating acid deposition constituted indefinite deferral, amounting to a final decision not to revise. *Id.* at 987. The EPA's inaction in the present case mirrors the inaction in *NRDC I* and amounts to a final decision that New Union's program continues to meet RCRA criteria.

IV. THIS COURT SHOULD LIFT THE STAY AND PROCEED WITH JUDICIAL REVIEW OF THE EPA'S CONSTRUCTIVE ACTIONS.

Where other environmental statutes provide for review only of final agency action, RCRA provides for appeals court review of *any* Administrator action pertaining to approval of

state programs. Because appellate courts are more competent to review agency actions and can promote judicial efficiency by reviewing agency actions, this Court is the proper forum for reviewing CARE's petition.

A. This Court has jurisdiction over constructive agency actions.

Under RCRA, courts of appeal have original jurisdiction to review all Administrator action "in granting...authorization" of a state program. 42 U.S.C. § 6976(b)(2). By contrast, section 307(b)(1) of the CAA provides that final action by the EPA is reviewable only by the Court of Appeals for the District of Columbia. 42 U.S.C. § 7607. The provision in RCRA notably does not require a "final" agency action as required by the CAA, creating a lower threshold for jurisdiction. Further, courts of appeal may adjudicate "indefinite deferral[s,] analogous to pure agency muteness." *NRDC I,* 902 F.2d at 962, 987. In *NRDC I*, the court found that the EPA acted with finality by not issuing a fine particle standard under the CAA, so that NRDC's petition pertaining to the standard was within the court's jurisdiction. *Id.* at 980. Here, the EPA has ignored CARE's petition for over a year and provided no indication of intent to review it at any future date. (R. at 6.) This amounts to a constructive determination that New Union's hazardous waste program continues to meet RCRA standards, and a final action for purposes of a rulemaking, exceeding the threshold requirement of mere Administrator action.

Similarly, a court of appeals has jurisdiction to review an agency action that has the same effect as a final action under RCRA. *Vineland Chem. Co., Inc. v. U.S. E.P.A*, 810 F.2d 402, 403-04 (3rd Cir. 1987). The Third Circuit found that section 7006(b) establishes jurisdiction in the Court of Appeals in order "[t]o avoid unintended and anomalous results," stating further that "statutes authorizing review of specified agency actions should be construed to allow review of agency actions which are 'functionally similar' or 'tantamount to' those specified actions." *Id.* at

405. The EPA's constructive denial of CARE's petition has the same result as an actual denial: the program will continue to operate while failing to meet RCRA standards.

B. Appellate courts are institutionally more competent than district courts to review agency actions.

This Court should find that original appellate review is proper for CARE's petition. RCRA and other environmental statutes create a complex scheme for judicial review of the EPA's performance that has given rise to confusion as to which court has jurisdiction over claims that the EPA has not fulfilled its obligations. *NRDC I*, 902 F.2d at 981. Because courts of appeal have greater expertise than district courts in adjudicating agency-related matters, claims are better reviewed by appeals courts where the complaint "[r]equests [] affirmance of standards or the vacation of EPA decisions, based on a well-developed administrative record." *Id.*at 985.

In *Thomas*, the court found that jurisdiction lay with the court of appeals rather than the district court because the CAA did not exclude rulemakings from the coverage of the APA, and exempting the rulemaking in controversy from coverage of the APA would be contrary to Congressional intent. 828 F.2d at 796. The Sierra Club had filed complaints in both courts seeking declaratory and injunctive relief to compel the EPA to conclude a rulemaking. *Id.* at 787. The court of appeals had jurisdiction to review final rulemakings, and found that while district courts are better suited to making factual determinations, courts of appeal are "more suited" to settle issues that, like those here, arise from inferable deadlines, "because [circuit courts] 'develop an expertise concerning the agencies assigned [to them] for review.'" *Id.* at 787, 791 (citing *Telecomm. Research & Action Ctr. v. F.C.C. (TRAC)*, 750 F.2d 70, 78 (D.C. Ct. App. 1984)). Exclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise. *TRAC*, 750 F.2d at 78. In addition, exclusive jurisdiction eliminates duplicative and potentially conflicting review, increasing delay and expense. *Id.* The

Thomas court dismissed Sierra Club's petition for review because the period of time that had passed was not unreasonable, and the EPA was still deliberating. *Id.* at 798-99.

The EPA showed no sign that it was deliberating on CARE's petition at any time during the year between CARE's filing of petitions to the EPA and to this Court; to the contrary, the EPA now asserts that it has no duty to do so. (R. at 6.) The EPA's failure to respond amounts to constructive denial of CARE's petition and a constructive determination that New Union's program continues to meet RCRA criteria. Even if these are not "final" actions for the purpose of other statutes, they are certainly Administrator actions, bringing this case within the jurisdiction of this Court. Further, because the parties have developed a substantial administrative record and CARE seeks vacation of the EPA's re-approval of New Union's program, this Court is the appropriate forum for review of CARE's claims. (R. at 4.)

First-instance judicial review in a court of appeals is more appropriate for broad, policy-oriented rules than for specific, technology-based rules. *Natural Res. Def. Council, Inc. v. U.S. E.P.A. (NRDC II)*, 673 F.2d 400, 405 (D.C. Cir. 1982). Remanding this case to the district court will likely result in a duplication of effort and a waste of judicial resources. The EPA's position in this case indicates that if the district court orders the EPA to act on CARE's petition, the EPA will deny CARE's petition and require CARE to seek review of this matter before this Court again. (R. at 4.) This Court should lift the stay to avoid wasting valuable judicial resources.

C. CARE's petition was not filed out of time because of the discovery rule.

CARE's petition is not precluded by RCRA's ninety-day statute of limitations because new information from the DEP's 2009 Annual Report was not available within the limitation period. The limitation in section 7006(b) does not preclude any suit that "is based solely on grounds which arose after [the] ninetieth day" after the action. 42 U.S.C. § 6976(b)(2). The

district court erred in its interpretation of section 7006(b) because the grounds for CARE's petition for repeal of New Union's hazardous waste program arose after the ninetieth day after the state program was approved in 1986. (R. at 5.) According to the discovery rule, statutes of limitation must be tolled until the plaintiff discovers or should have discovered through reasonable diligence that she has suffered injury. *U. S. v. Kubrick*, 444 U.S. 111, 129 (1979). For these reasons, this Court should lift the stay and proceed with review of CARE's claims.

V. THE EPA HAS ABUSED ITS DISCRETION IN CONSTRUCTIVELY REAPPROVING NEW UNION'S HAZARDOUS WASTE PROGRAM BECAUSE THE PROGRAM NO LONGER MEETS FEDERAL CRITERIA.

New Union's dwindling allocation of resources to the state program "has translated directly into less than robust" protection of the State's citizens and environment from hazardous waste pollution. (R. at 11.) When empowering states to provide programs in lieu of federal regulations, Congress' aim was to enable states to enforce rules that are "as strict or stricter" than the federal program. *Penn. Coal Ass'n v. Babbitt*, 63 F.3d 231, 237-38 (3rd Cir. 1995). New Union lacks sufficient funding to run its program even as strictly as federal standards demand. Courts interpret agency duties strictly where public welfare statutes like RCRA operate on a precautionary basis to protect human and environmental health. The EPA's failure to withdraw the faltering program, leaving it intact, constitutes a constructive re-approval of the program that this Court should review as an abuse of discretion. This Court should order withdrawal of New Union's program because Congress has specifically provided this measure to remedy systemic problems such as those demonstrated by New Union's program.

A. New Union's permitting, inspection and enforcement of the state program fall below federal minimum criteria.

The Administrator may rely on three independent bases to withdraw approval of New Union's program. 40 C.F.R. § 271.22. These include "failure to issue permits," "failure to

inspect and monitor activities subject to regulation," and failure to "act on violations of permits or other program requirements." 40 C.F.R. § 271.22 (a)(2)(i), (3)(i), (3)(iii). Even at the inception of New Union's program in 1986, EPA approved it with the caveat that "with less resources[,] the program might not be adequate." (Rec. doc. 4, p. 16.) Since that time, hazardous waste facilities have mushroomed across New Union while the state government has allocated progressively fewer resources and personnel to DEP. (R. at 9.) Between 1986 and 2009, the DEP budget was slashed by almost twenty percent more than other state programs, and DEP's staff was reduced nearly by half, from fifty to just thirty members, with more deep cuts of up to ten percent imminent. (Rec. doc. 1, p. 73; rec. doc. 5 for 2009, pp. 52, 53.) The resulting level of oversight fails to attain the basic standards required by the EPA under 40 C.F.R. § 271.

1. New Union's program has failed to comply with minimum federal criteria for permitting, inspection and enforcement.

New Union has demonstrated that its budget is not capable of providing the resources or the personnel necessary to "protect human health and the environment." 42 U.S.C. § 6902(a). In fact, New Union's 2009 Report indicates that New Union failed to perform the least of the EPA's federal requirements, including permitting facilities, inspecting regulated sites, and enforcing violations. *See* (Rec. doc. 5 for 2009, pp. 20, 23, 25.) This failure constitutes New Union's ongoing inability to comply with applicable regulations. 40 C.F.R. § 271. Although New Union was not forced, but chose to take management of its hazardous waste from the EPA, the State now relies on the discretionary nature of the program to justify "concentrat[ing] [future] resource cuts" for programs "in which employees perform[] functions that federal employees would otherwise perform." (Rec. doc. 6, June 6, 2009.) With plans to cut up to ten percent more of the program following a slash by up to twenty percent more than cuts in other

State public health programs, New Union thinks it can have its program and underfund it too. (Rec. doc. 5 for 2009, pp. 51, 53.)

The DEP's budget prevents it from providing current permits "for owner/operators of *all* hazardous waste management facilities" and from reviewing permits "five years after the date of permit issuance" for modifications. 40 C.F.R. §§ 271.13(a), 270.5. New Union widely misses these goals due to decreased funding and staffing, including a dive from fifteen to just seven permit writers. *Compare* (Rec. doc. 1, p.73.) *with* (Rec. doc. 5 for 2009, p. 52.) In 2009, a "growing backlog of permit applications" went unaddressed, including those of about 900 TSDFs whose permits were "continued by operation of law, some of them expired as long as 20 years ago." (Rec. doc. 5 for 2009, p. 20.) The DEP's shrinking staff is simply unable to keep up with permitting demands of the State hazardous waste industry, which grows at the rate of about 50 new or expanded facilities per year. (Rec. doc. 5 for 2009, p. 20.)

Nor has the DEP met the requirements that it must "have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance," and must "maintain [a] program capable of making comprehensive surveys of all facilities and activities," including "periodic inspections of the facilities and activities subject to regulation." 40 C.F.R. §§ 271.15(a), (b). The DEP has fired eight of its fifteen inspectors despite continuing growth in the industry, and has leaned on EPA officials for help with inspections, together managing to inspect only twenty percent of the State's TSDFs annually. (Rec. doc. 5 for 2009, pp. 22, 23.) Inspecting each facility once every five years, less than half as often as the DEP did alone at the time the program was approved, the DEP could not possibly "determine [facility compliance] independent of information supplied by the [facility itself]." (Rec. doc. 5 for 2009, p. 22); 40 C.F.R. § 271.15(a).

New Union has likely failed to "restrain immediately and effectively" all unauthorized activity that endangers or damages public health or the environment, and to "sue…to enjoin...violation of any program requirement, including permit conditions." 40 C.F.R. § 271.16(a). Criminal sanctions have likely not "[obtained] against any person who knowingly transports...treats, stores, or disposes of hazardous waste without a permit." *Id.* In 2009, the DEP prosecuted only six violations of the state program, relying on citizens and the EPA to bring twelve additional enforcement suits. (Rec. doc 5 for 2009, pp. 25, 26.) Meanwhile, the DEP reported twenty-two "significant" permit violations and "hundreds of minor violations." (Rec. doc. 5 for 2009, p. 24.) The DEP's failure to enforce all significant violations is a failure to attain the requirements of Part 271.16. Further, the DEP's "growing backlog" of permit applications and failure to conduct regular inspections demonstrate that DEP neglects enforcement duties because the State simply does not learn of accruing violations. As discussed below, New Union has suspended criminal sanctions from all railroad TSDFs, in direct contravention of Part 271.16(a)(3)(ii). (Rec. doc. 5 for 2000, pp. 103-05.)

2. New Union's ongoing failure to maintain its program in compliance with federal requirements demonstrates that EPA's re-approval of the program was inconsistent with RCRA's purpose and an abuse of discretion.

Because the EPA's constructive re-approval of New Union's program is a rule under section 7002(a)(2) of RCRA, this Court should review the rule and find that it was "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). The EPA's discretion in rulemaking is "far from unbounded" because it "must comport with the broader 'statutory purpose' of [] RCRA." *Am. Petrol. Inst. v. U.S. E.P.A.*, 906 F.2d 729, 742 (D. D.C. 1990) (ordering EPA to regulate a certain type of slag). RCRA also provides for the Administrator to disapprove a proposed state program if "such program does not provide adequate enforcement of

compliance" with the federal RCRA program, and requires the Administrator to withdraw authorization of the state program whenever she "determines after public hearing that a State is not administering and enforcing" the state program in accordance with the federal requirements. 42 U.S.C. §§ 6926(a),(e). This Court should find that by allowing continued operation of New Union's state program in the face of CARE's petition and the State's demonstrated failure to attain federal standards, the EPA has constructively determined to the contrary, in abdication of its duty to comport with RCRA's statutory purpose, discussed further below. This constructive re-approval was an abuse of discretion that this Court should review and remedy.

B. The Administrator must withdraw New Union's program because anything less would subvert RCRA's precautionary purpose.

Environmental statutes authorizing withdrawal of state programs provide an "all or nothing" choice to the Administrator. Moreover, RCRA calls for precautionary action to effectuate its pollution-prevention purpose. Because the EPA's position in this suit is a litigation stance, this Court should not defer to the EPA's view that it has discretion to take lesser action.

1. When a state program fails to meet federal standards, the EPA has no discretion to act other than to withdraw the program.

Where a state program is inconsistent with federal standards, neither Congress nor the EPA has provided the Administrator with authority to withdraw a state's power over anything less than the state's entire hazardous waste program. 42 U.S.C. § 6926(e); 40 C.F.R. § 271. Congress intended to maximize local control over state territory only to the extent that states demonstrate the ability to maintain the EPA's minimum guidelines. In language almost identical to § 6926(e), the CAA and CWA require the Administrator to "withdraw approval of [a state] program" if she determines that the state is not meeting federal requirements, and if the state fails to remedy the problem within 90 days. 33 U.S.C. § 402(c)(3) (CWA); 42 U.S.C. § 7412(l)(6)

(CAA). CWA's provision is an "all-or-nothing [grant of] authority to withdraw approval of a state NPDES program." *EPA v. California ex rel. State Water Res. Control Bd.* 426 U.S. 200, n. 39 (1976). The Court noted that a state can limit its own authority by "submitting a plan covering only some of its navigable waters," but that the "EPA's authority to withdraw approval of a state program [is limited] to withdrawing approval as to the entire program." *Id.* The Court viewed this limitation as a Congressional concern that EPA's review authority should be restricted only "as much as [is] consistent with [the EPA's] overall responsibility for assuring attainment of national goals." *Id.* (citing H.R. Rep. No. 92-911, 1 Leg.Hist. 814). Section 3006(e) "gives the EPA only the option of withdrawing authorization of a state program [that] fails to administer or enforce the program; not the option to reject part of a program or course of action on an incident-by-incident basis." *Harmon Ind., Inc. v. Browner*, 19 F.Supp.2d 988, 996 (W.D. Mo. 1998). Though the 10th Circuit disagreed narrowly with *Harmon*, finding that EPA may enforce RCRA against individual entities even where a state program is authorized to do so, the Record shows that a case-by-case approach has not worked for New Union: though the EPA has already assumed one-third to one-half of the State's inspecting and enforcement duties, the State is still unable to attain minimum RCRA standards. *U.S. v. Power Eng'g Co.*, 191 F.3d 1224, 1229 (10th Cir. 1999); (Rec. doc. 5 for 2009, pp. 23, 26.)

2. RCRA's incorporation of the precautionary approach demonstrates that Congress intended for the EPA to take comprehensive, preventive action.

Congress has stated clearly its intent that RCRA will act as a preventative measure, decreeing that RCRA's national policy is to "minimize the present and future threat [of land pollution] to human health and the environment." 42 U.S.C. § 6902(b). Here, withdrawal of federal authorization may be an extreme step, as discussed below, but it is warranted and necessary to carry out Congressional intent. *Maine People's Alliance v. Mallinckrodt, Inc.,* 471

F.3d 277, 294 (1st Cir. 2006) (the 1980 amendment of section 7003, substituting 'may present' for 'is presenting' an endangerment, confirmed RCRA's status as a precautionary law). Precaution is especially critical in the execution of public welfare statutes because "waiting for certainty will often allow for only reactive, not preventive, regulatory action," and this type of legislation "would seem to demand that regulatory action..., optimally, prevent, the perceived threat." *Ethyl Corp. v. EPA*, 541 F.2d 1, 13, 25 (D.C. Cir. 1976).

Unless this Court proceeds with review of the EPA's re-approval of New Union's program, RCRA's precautionary intent will be foiled. New Union's hazardous waste program leaves hundreds of facilities without current permits, and the Record shows that the State's "less than robust" inspection and enforcement ability, even with equivalent efforts from the EPA, is probably failing to enforce numerous violations. (Rec. doc. 5 for 2009, pp. 22-26.) While the EPA may enforce federal standards in individual cases to support state programs, a small number of violators are not at issue here. *Waste Management of Ill., Inc. v. U.S. EPA (WMI)*, 714 F.Supp. 340, 341 (N.D. Ill. 1989). This Court should be concerned with the systemic underfunding and understaffing that likely allow TSDFs to escape penalty for violations, and how easily other states may follow New Union's example if the EPA is not held to the precautionary standards set out by Congress. New Union's program endangers the welfare of its citizens on such a widespread basis that "to promote the protection of health and the environment," the EPA must withdraw approval of the program entirely. 42 U.S.C. § 6902(a).

3. <u>This Court should not defer to the EPA's stance that a partial remedy would fulfill the EPA's duty to enforce state compliance with RCRA.</u>

The EPA's position that it may remedy the underperforming state program by taking action other than withdrawing approval is not an "agency position"; it is purely a litigation stance. Where an agency opines as a litigant, having never previously staked a position on the

issue that would bind the agency in later actions, *Chevron* deference is inappropriate. *Bowen v. Georgetown Univ. Hosp.*, 488 US 204, 212-13 (1988) (agency's counsel merits no deference where the agency has articulated no position on the issue). Where courts view a litigation stance as self-interested, they withhold deference from agency interpretation. *See Connecticut Gen'l Life Ins. Co. v. Comm'r of Int'l Rev.*, 177 F.3d 136, 143 (3rd Cir. 1999) (courts have a duty to independently insure that an agency's interpretation comports with the language it has adopted.)

This Court should not defer to the EPA's position on this issue because the EPA has not publicized a position on the Administrator's duty to review petitions for withdrawal of state programs. The EPA has strong incentives to maintain the status quo and has never withdrawn a state program "[because] [i]t is politically difficult and legally complex for EPA to rescind these privileges." Hilary Sigman, *Letting States Do the Dirty Work: State Responsibility for Federal Environmental Regulation*, 56 NATIONAL TAX JOURNAL 1, 4 (2003). Recognizing these incentives, this Court should find that the EPA's lack of a position on this issue until now does not permit agency deference.

VI. THE EPA MUST WITHDRAW NEW UNION'S HAZARDOUS WASTE PROGRAM BECAUSE STATE LAW EXEMPTS RAILROAD HAZARDOUS WASTE FACILITIES FROM REGULATION, MAKING THE PROGRAM INCONSISTENT WITH RCRA.

Since 2000, New Union's citizens and environment have been exposed to the health risks posed by a class of unregulated hazardous waste sites. That year, the ERAA "transferr[ed] 'all standard setting, permitting, inspection, and enforcement authorities' of the DEP" over all railroad facilities to the Commission. (Rec. doc. 5 for 2000, pp. 103-05.) (quoting the ERAA). The ERAA effectively excluded railroad hazardous waste sites from RCRA regulation by suspending criminal sanctions for railroad owners and operators, and by shifting oversight to the Commission, which lacks the expertise and incentive necessary to execute the State program.

A. The ERAA's suspension of criminal sanctions for railroad sites renders New Union's program inconsistent with federal standards.

New Union's removal of criminal penalties for railroad hazardous waste sites struck down a crucial aspect of the State's enforcement capacity. (Rec. doc. 5 for 2000, pp. 103-05.) Federal regulation provides that "[a]ny State agency administering a program shall have available...criminal remedies." 40 C.F.R. § 271.16(a)(3). Criminal sanctions are critical to enforcing environmental laws, especially where large corporate entities are involved – for example, the State's only railroad, NURRC. (Rec. doc. 6, Aug. 14, 2000.) Congress included criminal sanctions in RCRA to "send a wake-up call" that corporations could not simply "pay to pollute" by violating laws now and paying civil fines later, as NURC would be able to do under the ERAA. Sean J. Bellew & Daniel T. Surtz, *Criminal Enforcement of Environmental Laws: A Corporate Guide to Avoiding Liability*, 8 VILLANOVA ENVTL. L. J. 205, 205 (1997).

Enforcing criminal penalties against unpermitted hazardous waste polluters is especially important "in the interest of public safety." *U.S. v. Freed*, 401 U.S. 601, 607-08 (1971) (upholding strict liability prosecution for unregistered hand grenade possession). Courts have labeled exceptionally dangerous illegal activity as "public welfare crimes," allowing strict liability prosecution under most of the public welfare environmental statutes, including RCRA. *U.S. v. Laughlin*, 10 F.3d 961, 965-66 (2nd Cir. 1993) (knowledge of a lack of permit was not required for criminal prosecution under RCRA). *Accord*, *U.S. v. Hopkins*, 53 F.3d 533, 538 (2nd Cir. 1993) (prosecution for "knowingly" treating, storing or disposing of hazardous waste "did not require the government to prove...[knowledge] that the waste...was identified or listed under RCRA or that he lacked a disposal permit[, but only] the nature of the hazardous waste matter") (collecting cases).

The ERAA's suspension of criminal sanctions against NURC would allow this railroad, and any others that incorporate in New Union, to "pay to pollute," making unpermitted hazardous waste disposal simply a cost of doing business. This is directly contrary to the letter and the spirit of RCRA. This Court should find that reauthorization of the state program after enactment of the ERAA was an abuse of the EPA's discretion, and order withdrawal.

B. The Commission's lack of institutional competence and conflicting interests impermissibly limit New Union's authority to enforce the state program under federal law.

The "Administrator may withdraw program approval when...[a]ction by a State legislature...strik[es] down or limit[s] State authorities." 40 C.F.R. § 270.22(a)(1)(ii). The ERAA has limited the State's authority to regulate railroad hazardous waste sites by shifting oversight from DEP to the Commission, which is practically incapable of performing the task. Having previously regulated only commercial and property aspects of railroads, the Commission totally lacks institutional competence to administer environmental programs. (R. at 12.) Prior to the ERAA, the Commission regulated only "railroad freight rates, railroad tracks and rights of way, and railroad yards." (R. at 12.) Even the DEP's specialized permit writers, inspectors and lawyers cannot keep up with the increasing demands of the hazardous waste industry. (Rec. doc. 1, p. 73; rec. doc. 5 for 2009, pp. 20, 50.) Operating without the technical regulatory expertise of the DEP, the Commission is even less able to execute the hazardous waste program.

The Commission's oversight is problematic also because of the Commission's conflicts of interest. During the ERAA's passage, Luther Greenleaf was Majority Leader of New Union's state senate. (Rec. doc. 6, Aug. 14, 2000.) At that time, the only railroad in the state was owned by the NURC, whose president, Nat Greenleaf, was Luther's twin brother. (Rec. doc. 6, Aug. 14, 2000.) The doctrine of honest services fraud provides that "undisclosed, biased decision

making [by a public official] for personal gain...constitutes a deprivation of honest services." *U.S. v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996) (citing 18 U.S.C. § 1346). The Greenleafs are likely liable for honest services fraud because Luther affected legislative proceedings to enrich NURC and may even have appointed one of the three Commissioners who oversee railroad regulation, likely resulting in a kickback from his brother that would satisfy the recent narrowing of the doctrine. *See Skilling v. U.S.* 130 S. Ct. 2896, 2931 (2010) ("there is no doubt that Congress intended [the law] to reach at least...kickbacks"). This conflict makes the Commission especially unlikely to perform even to the level that its expertise would allow under disinterested oversight. This Court should find that by shifting regulation of railroad hazardous waste sites from the DEP to the Commission, New Union has impermissibly limited its own authority in violation of 40 C.F.R. 270.22(a)(1)(ii), and that the EPA's constructive re-approval despite this limitation further demonstrates the EPA's abuse of discretion.

VII. THE EPA MUST WITHDRAW NEW UNION'S PROGRAM BECAUSE THE ERAA RENDERS NEW UNION'S PROGRAM INCONSISTENT WITH OTHER STATE PROGRAMS, NOT EQUIVALENT TO RCRA, AND IN VIOLATION OF THE COMMERCE CLAUSE.

The EPA may not approve a state program if it is not equivalent to the federal RCRA program or if it is inconsistent with other state programs. *Haz. Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1392 (D.C. Cir. 1991). New Union's hazardous waste program fails to require manifesting for transported wastes, removes necessary penalties for criminal activities, limits state authority, and violates the Commerce Clause. If a state program is determined to be not equivalent or inconsistent, the EPA must notify the state of the deficiency, and if it is not corrected within ninety days, the EPA must withdraw authorization. 42 U.S.C. § 6926(e).

A. New Union's hazardous waste program is inconsistent with other state programs.

A RCRA program is inconsistent with RCRA and other state programs if "the State manifest system does not meet the requirements of [Part 271]." 40 C.F.R. § 271.4. The ERAA's provision allowing "[a]ny person [to] transport Pollutant X through or out of the state" makes New Union's hazardous waste program inconsistent with other state programs. (Rec. doc. 5 for 2000, pp. 105-07.) Although such transport is mandated to "be as direct and fast as is reasonably possible," allowing the transport of one of "the most potent and toxic chemicals" without proper manifesting is inconsistent with every other approved state hazardous waste program. (Rec. doc. 5 for 2000, pp. 105-07.); 40 C.F.R. § 271.4(c). One such state, Arkansas, requires "[a]ny person who transports hazardous waste in, from, or through [Arkansas to] comply with the permitting and other requirements of the Arkansas Highway and Transportation Department and Arkansas Motor Carrier Act." Ark. Reg. 23 § 263.13(a). Furthermore, Arkansas requires that "[p]ersons transporting hazardous waste shall carry a copy of a valid transporter permit in their vehicle." *Id*. New Union fails to require proper manifesting or compliance with state transportation laws and thus the ERAA makes New Union's hazardous waste program inconsistent with other state programs.

B. New Union's hazardous waste program is not equivalent to the federal RCRA program.

Although withdrawing state authorization for hazardous waste programs is an extreme step, the EPA retains authority to object to a particular facility's permit if the Regional Administrator believes the permit is inconsistent with the federal program. *WMI*, 714 F.Supp. at 341-42. In *WMI*, the court found that the EPA could take action against a permittee for conditions required by federal regulation, for the sole reason that the conditions were absent

from the permit. *Id*. at 343. Following the ERAA's passage, New Union's program contravenes the federal regulation that requires criminal sanctions for knowing transportation of hazardous wastes to unpermitted TSDFs, and unpermitted treatment, storage and disposal of hazardous wastes. 40 C.F.R. § 271.16(a)(3)(ii). As above, this renders the State program inconsistent with the federal regime. (Rec. doc. 5 for 2000, pp. 103-05.)

C. The ERAA violates the dormant Commerce Clause by prohibiting treatment and disposal of Pollutant X inside New Union.

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power ... [t]o regulate Commerce…among the several States..." U.S. Const. art. I, § 8, cls. 1 & 3. The Supreme Court in *United States v. Lopez* delineated the boundaries of this power, finding that there are "three broad categories of activity that Congress may regulate under its commerce power," including (1) the use of channels of interstate commerce; (2) "instrumentalities," or persons or things in interstate commerce; and (3) those activities that substantially affect interstate commerce. 514 U.S. 549, 623-24 (1995). Courts view the Commerce Clause as acting in a "dormant" fashion where Congress has left channels of interstate commerce unregulated, because "[j]ust as Congress has power to regulate the interstate movement of [] wastes, States are not free from constitutional scrutiny when they restrict that movement." *City of Philadelphia v. New Jersey (Philadelphia)*, 437 U.S. 617, 622-23 (1978).

The ERAA violates the dormant Commerce Clause because it prohibits the treatment and disposal of Pollutant X inside New Union. The dormant Commerce Clause is concerned with economic protectionism by states through regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988). The crucial inquiry to determine the constitutionality of a statute under the dormant Commerce Clause is whether the statute is an economic protectionist measure

designed to isolate one state from a problem common to many by erecting a barrier against the movement of interstate trade. *Philadelphia*, 437 U.S. at 628. Such measures are virtually *per se* invalid. *Id.* at 617. Further, "a state law 'acts as a prohibition' on the treatment of hazardous wastes when it effects a total ban on a particular waste treatment technology within a State." *Reilly*, 938 F.2d at 1395.

As a potent, toxic chemical that threatens public health and the environment, Pollutant X is a waste, and therefore an article of commerce. (Rec. doc. 5 for 2000, pp. 105-07); *Philadelphia*, 437 U.S. at 622 (1978). Disposal of Pollutant X is a problem common to many states, evidenced by the nine TSDFs across the U.S. that the EPA has already authorized to do so. (Rec. doc. 5 for 2000, pp. 105-07.) The ERAA imposes a burden on other states to treat and dispose Pollutant X by imposing a total ban on the handling of Pollutant X within New Union. The ERAA's intrastate restrictions on Pollutant X violate the dormant Commerce Clause.

The ERAA's unconstitutionality is not mitigated by a legitimate purpose. If a state can show that a local purpose exists for an ostensibly unconstitutional barrier to interstate commerce, the question becomes whether alternative means could promote this local purpose without discriminating against interstate commerce. *Hughes v. State of Oklahoma*, 441 U.S. 322, 336 (1979). The extent of the burden tolerated will depend on the nature of the interest involved, and whether it could be promoted with a lesser impact on interstate activities. *Id.* at 331. New Union has not shown that the ERAA's regulation of Pollutant X will serve a compelling local state interest. The effect on interstate commerce is not incidental because the threat of Pollutant X to public health and the environment is high, given the waste's extreme toxicity and the implication, via the ERAA's restrictions on generating the waste, that a significant amount of it is generated in New Union. (Rec. doc. 5 for 2000, pp. 105-07.) Allowing one of the most potent

and toxic chemicals in existence to cross state lines without RCRA-compliant manifesting requirements is a significant burden on the states the waste is transported through and to because of the risk of spills and unauthorized disposal. Moreover, New Union could alternatively establish facilities within the state to handle Pollutant X. The ERAA violates the Commerce Clause because New Union's prohibition on treatment and disposal of Pollutant X inside the State will not achieve a legitimate local interest unique to New Union, and because it imposes an undue burden on other states while at least one alternative exists.

CONCLUSION

New Union's hazardous waste program fails to protect human health or the environment. This Court should order the district court to require the Administrator to respond to CARE's petition for withdrawal of the State program. Alternatively, this Court should retain jurisdiction due to this Court's greater expertise in agency and policy matters, and should order the EPA to withdraw approval of the State program because the State's resources and performance fail to meet federal standards. This Court should order the EPA to withdraw authorization of the State program also because the ERAA withdraws railroad TSDFs from regulation, and renders the State program not equivalent to the federal RCRA program, inconsistent with other states' RCRA programs, and in violation of the Commerce Clause.