IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 18-2010

&

C.A. No. 400-2010

CITIZEN ADVOCATES FOR REGULATION
AND THE ENVIRONMENT, INC.,

Petitioner-Appellant-Cross-Appellee

v.

LISA JACKSON, ADMINISTRATOR

Petitioner-Appellant-Cross-Appellee

v.

STATE OF NEW UNION

Intervenor-Appellee-Cross-Appellant

BRIEF IN SUPPORT OF INTERVENOR-APPELLEE-CROSS-APPELLANT

NEW UNION

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JURISDICTION AND VENUE

On January 5, 2009, the Citizen Advocates for Regulation and the Environment, Inc. ("CARE"), a non-profit corporation organized under the laws of the State of New Union, petitioned the Administrator of the Environmental Protection Agency ("EPA"), under §7004 of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, 6974 ("RCRA") and § 553(e) of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (APA). CARE petitioned the EPA to commence proceedings to withdraw its authorization of New Union's hazardous waste regulatory program which has operate in lieu of the federal program since 1986, pursuant to RCRA § 3006(b), 42 U.S.C. § 6926(b). CARE alleges New Union's program no longer met the criteria for EPA approval. To date, EPA has taken no action on that petition.

On January 4, 2010, CARE properly filed this action in this court, the Twelfth Federal Circuit, pursuant to RCRA §7002(a)(2), 42 U.S.C. § 6972, seeking either an injunction requiring EPA to act on that petition or judicial review of EPA's constructive denial of the petition and EPA's constructive determination that New Union's hazardous waste program still meets the criteria for approval. This Court granted New Union's unopposed motion to intervene under Federal Rule of Civil Procedure 24. Parties filed cross-motions for summary judgment, based on an uncontested factual record.

STANDARD OF REVIEW

As provided by the federal court rules,

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. Pro.* 56(c).

The "purpose of summary judgment is to pierce the pleadings and assess the proof in order to see if there is a genuine need for trial[.]" *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). A non-moving party is required by Rule 56(e) to demonstrate this need for trial only by going beyond the pleadings through affidavits, depositions, interrogatories answers, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 312, 323-24 (1986). Therefore, no issue for trial exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 249.

SUMMARY OF THE ARGUMENT

CARE's petition for review and revocation of New Unions hazardous waste management plan is unreviewable. EPA's decision to commence withdrawal is discretionary and therefore not subject to judicial review under RCRA's citizen suit provision. Jurisdiction is also not appropriate in the D.C. Circuit for rulemaking review, nor in the local Circuit Court of Appeals for revocation or withdrawal of permits or programs.

EPA approves each state program through a case-by-case adjudicatory analysis which, once approved is reviewable only at the discretion of the Administrator. Despite judicial deference to EPA's interpretation of RCRA's procedural requirements, neither initial approval, nor agency review, constitute rulemaking procedures that may be subject to judicial review. CARE is therefore barred from claiming a petition under section 7004 and jurisdiction under section 7006(a). Nor does the claim arise under federal law. RCRA provides the jurisdictional guidance on which claims can be brought in federal courts.

Judicial deference should be given to EPA's decision to monitor New Union's program and not take action on CARE's petition. Because neither RCRA, nor EPA regulation expressly provide a timeframe for review of an approved program, its inaction is not considered a constructive denial or determination. EPA allows New Union to implement its program, and use finite resources, as it see fit. CARE's reference to reduced staffing and slowed permit approvals provides insufficient cause to force EPA to withdraw the program. EPA may use a number of enforcement controls and state assistance to ensure that New Union's program is equivalent to federal standards, before taking the extreme measure of withdrawal proceedings. Moreover, under the 2000 Environmental Adjustment Act, New Union's treatment of pollutant X does not violate the Commerce Clause. Even if EPA determines that a program regulation of, for example,

railroads, is inconsistent with RCRA, it should be given deference to take appropriate corrective action.

STATEMENT OF CONTESTED FACTS

The State of New Union relies entirely upon the uncontested factual record as jointly stipulated to by the Parties in this action. A statement of the facts at issue is thereby submitted along with this Motion and consistent with *Fed. R. Civ. Pro.* 56; New York Local Rule of Civil Procedure 56.1(a); California Local Rule 473(c)(R); New Jersey Local Rule of Civil Procedure, 56.1; and Tennessee Local Rule 56.

STATEMENT OF THE CASE

RCRA is a "comprehensive environmental statute that governs the treatment, storage, and disposal" hazardous waste." *Merghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Its "primary purpose is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of waste which is nonetheless generated, so as to minimize the present and future threat to human health and the environment" 42 U.S.C. § 6972(b). RCRA "empowers EPA to regulate wastes from cradle to grave in accordance with . . . rigorous safeguards and waste management procedures." *Chi. v. Envtl. Def. Fund*, 511 U.S. 328, 331 (1994).

Although RCRA and its implementing regulations impose extensive federal requirements for treatment, storage, and disposal of hazardous waste, the statue allows EPA to authorize State hazardous waste management programs "in lieu of the Federal program." 42 U.S.C. § 6929(b). To be authorized the state program must (1) be “equivalent to the Federal program,” (2) be “consistent with the Federal or State programs applicable in other States,” and (3) “provide

adequate enforcement of compliance with [RCRA's] requirements." *Id*. EPA subsequently authorized New Union's hazardous waste program ("Program") in 1986.

RCRA also empowers EPA to withdraw its authorization of state hazardous waste programs "whenever [EPA] determines . . . a State is not administering and enforcing a program authorized under this section in accordance with [RCRA], [it] shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, [EPA] shall withdraw authorization of such program[.] [EPA] shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal. 42 U.S.C. § 6929. However, RCRA's statutory language provides no law to apply concerning EPA's decision whether to commence withdrawal proceedings.

EPA "may withdraw program approval when a State program no longer complies with the requirements of [EPA's regulations] and the states fails to take corrective action." 40 C.F.R. § 271.22(a)(2005). EPA's regulations also provide a non-exclusive list of circumstances under which authorization "may" be withdrawn. *Id* Furthermore, any "interested person" may petition EPA to commence withdrawal proceedings and EPA "shall respond in writing to any petitioner. However, like the statute, the regulatory text commits the decision to commence withdrawal proceedings to EPA's discretion through the use of the subjective term "may."

RCRA establishes federal minimum standards and the states are free to adopt stricter guidelines that are reasonably based in the protection of human health and the environment and do not act as a barrier to the interstate transport of hazardous wastes. 42 U.S.C. § 6929.

I. RCRA'S CITIZEN SUIT PROVISION DOES NOT PROVIDE JURISDICTION FOR THE DISTRICT COURT TO HEAR CARE'S CLAIM FOR REVIEW OF ITS PETITION BECAUSE EPA APPROVAL OF NEW UNION'S PROGRAM IS NOT A RULE.

EPA's decision to approve New Union's hazardous waste management program ("Program") is not rulemaking and therefore is not subject to judicial review.

A. Summary judgment is appropriate because EPA's approval of New Union's Program is not a rule.

The District Court's grant of summary judgment should be affirmed because EPA's decision to *approve* a state program is an order and not a rule.

RCRA does not draw a distinction between agency actions that constitute rulemaking versus an administrative order. However, the Administrative Procedure Act ("APA") focuses upon the "dichotomy between rulemaking and adjudication." *Bowen v. Georgetown Univ. Hosp*. 488 U.S. 204 at 218 (1988) (Scalia, J., concurring) (internal citations omitted). Agencies whose actions are governed by the APA framework are subject to "searching and careful" review by the courts. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The APA, defines a "rule" as a "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency[.]" 5 U.S.C. § 551(4). Rules affect "individual rights and obligations" and operate with the binding "force of law" *Morton v. Ruiz*, 415 U.S. 199, 232, 235 (1974). Rulemaking governs an entire class, as opposed to particular members of a group. *Flying Tiger Line, Inc. v. Boyd,* 244 F.Supp. 889, 892 (D. D.C. 1965).

By contrast, adjudication is the "agency process for the formulation of an order," and an 'order' is "the whole or a part of a final disposition whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making[.]" 5 U.S.C. § 551(6) - (7).

Orders, issued via adjudication, focus on individualized impacts of the party involved in the proceedings. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294-95 (1974). Orders render the "decisionmaking process [complete]" and must determine obligations or rights bearing potential legal consequences. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

The district court correctly identified that EPA's approval of New Union's Program was an order and not rulemaking. EPA's decision to approve the Program applies to New Union's specific circumstances and not to state programs generally. Moreover, EPA approves each state hazardous waste management program based upon to an application submitted at a specific time and evaluated according to current information provided by the state. The fact that a state program operates "in lieu" of the federal program also is immaterial. EPA reviews the program and determines if the State's application meets the "federal minimum standards" at the time of approval and actively assumes that the program will evolve and change.

Under 40 C.F.R. 271(3)(C), "[o]fficial State applications for final authorization may be reviewed on the basis of Federal self-implementing statutory provisions that were in effect 12 months prior to the State's submission of its official application. Therefore, EPA specifically approves each program based upon present and even past condition of the state program and not according to forward looking factors. Accordingly, EPA's approval of New Union's Program is not a rule and not subject to judicial review. Summary judgment should be affirmed.

B. Notice and comment procedures, prior to approval of a state hazardous waste program do not by themselves constitute rulemaking.

EPA's approval of New Union's Program departs from the APA's mandatory rulemaking procedures. 5 U.S.C. § 553. Although EPA published notice of its intention to authorize New Union's Program in the Federal Register, publication alone does not satisfy these requirements.

EPA is obligated to follow its own regulations, even if those procedures are "generous beyond the requirements that bind such agencies," *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959). EPA is also bound to follow its procedural requirements. *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 396 (D.C. Cir. 1992)(per curiam). In *Int'l Fabricare*, plaintiffs argued that EPA prematurely placed a contaminant in a category, prior to being reclassified under the Safe Drinking Water Act. *Id*. at 387-89. However, EPA's redesignation of the contaminant's category was not a failure to follow procedure because "EPA [was] continuing its deliberations concerning the weight-of-evidence classification for [the contaminant]," and therefore did not need to follow rulemaking procedures. *Id*. at 396.

Conversely, the Nuclear Regulatory Commission's ("NRC") decision to select a hand full of nuclear reactor models to be pre-approved for use in NRC regulated plants constituted rulemaking. *Nuclear Info. Res. Serv. v. Nuclear Regulatory Com.*, 969 F.2d 1169 (D.C. Cir. 1992). Prior to 1987, NRC employed a 'design-as-you-go' approach that led to a "regulate-as you-go" regime where each plant was individualized and unique. *Id.* at 1171. However, in 1987, NRC employed rulemaking procedures where by public notice was published, draft standards were developed, and stakeholders provided substantive comments that shaped the approval process of a select few reactors. *Id*. at 1172. Plaintiffs request for additional hearing procedures for siting permits was denied because the prior approval remained valid and rulemaking

procedures that developed the original criteria were ‘tailored to avoid reconsideration’. *Id*. at 1177

What is more, when reviewing an order by an agency, courts must exercise a narrowly defined review function, where “substantial evidence” will be found conclusive, and agency rulings on nonfactual questions are held to a rational basis standard of review. ***Pub. Serv Comm'n v. Fed. Power Comm'n.***, 543 F.2d 757, 782 (D.C. Cir. 1974). “The court cannot disrupt an agency's orderly decision-making process by intervening to correct temporary or interlocutory agency actions or conclusions before the agency reaches a definitive position on an issue.” ***Ala. v. U.S. Army Corps of Eng'rs***, 382 F. Supp. 2d 1301, 1322 (N.D. Ala. 2005); see 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.").

Unlike the broadly applied standardized models used by the NRC, EPA evaluates each state program individually, based on the unique considerations of each state’s particular plans and resources. Here, EPA considers New Union's unique circumstances. Congress clearly intends, once minimum requirements are met, for states to have great latitude to implement their individual programs with the flexibility to mold each program to the unique needs of each state. 42 U.S.C. § 6942-6943. Thus, the process of approval is adjudicatory in nature.

CARE endeavors to force EPA to reconsider New Union's Program approval and not the review of regulations. However, RCRA aims to “assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources including energy and materials which are recoverable from solid waste and to encourage resource conservation”, with federal technical and financial assistance to state authorities to implement their particular plans. 42 USCS §§ 6941 et seq.

Review or revocation of state plans requires even more fact specific exercises in decision-making, which do not fit the broad, forward thinking, policy development goals of rulemaking procedures. The court should affirm the lower court's ruling and find that EPA approval proceedings are not a rule, and further, that withdrawal requirements constitute an order only after EPA notifies the state of inadequacies in the program; a required first step if EPA has determined that program approval should be withdrawn. Review or consideration of programs are informal discretionary duties of the Administrator, and therefore are neither a rule, nor an order. The adjudicatory nature of New Union's Program approval, and the informal discretionary nature of review or withdrawal of the Program bars CARE from claiming a petition under RCRA § 7004 and jurisdiction under RCRA § 7006(a). 42 U.S.C. §§ 6974, 6976(a). Therefore, the District Court's order of summary judgment should be affirmed.

C. The District Court correctly determined EPA is not entitled to *Chevron* deference as to when administrative action is a rule and not and order.

Although an agency's interpretation of a statute it is charged with administering is entitled to deference, the courts are the final authorities on issues of statutory construction. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981).

Where an agency's interpretation of a statute comes into question, a court must first consider, whether the agency's interpretation should be accorded deference analysis under *Chevron*. *U.S. v. Mead Corp.*, 533 U.S. 218 (2001). An agency decision "qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law." *Id*. at 303. By enacting RCRA, Congress clearly intended EPA to promulgate rules regulating all aspects of hazardous waste management.

Applying the *Chevron* formulation requires the court to first determine "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural*

Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) ("Chevron"). If so, the plain language of the statue applies. *Chevron*, 467 U.S. at 842-43. When faced with ambiguity or silence, the court must instead decide whether the agency offers a "permissible construction of the statue." *Id*. at 843.

Chevron's first prong rests on the premise that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. Therefore, deference applies to an agency's interpretation of the statute it is entrusted to administer. *Ark. v. Ok.*, 503 U.S. 91, 112 (1992).

An administrative agency is best suited to exercise its informed discretion over whether to proceed by individual adjudication or by general rulemaking. *Davis v. EPA.*, 348 F.3d 772, 785 (9th Cir. 2003) (holding agencies have discretion to apply either procedural mode.)

However, when an agency's decision is premised on its understanding of a specific congressional intent, it engages in the quintessential judicial function of deciding what a statute means. *ATF v. FLRA*, 464 U.S. 89, 99 (1983). In this case, "the agency's interpretation . . . cannot bind a court." *Id*. citing *Zuber v. Allen*, 396 U.S. 168, 192-193 (1969); *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). When EPA interprets regulations within its purview, it is granted even greater deference to its interpretation and is upheld unless plainly erroneous. See *U.S. v. Midwest Suspension & Brake*, 49 F.3d 1197, 1203 (6th Cir. 1995).

In *Dominion Energy*, petitioners requested formal evidentiary hearings to review EPA's denial for renewal of a thermal variance for a discharge permit from their electrical generating facility's cooling system. *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 13-14 (1st Cir. 2006). However, the CWA only calls for the opportunity for hearings, and the EPA had eliminated evidentiary hearings for these types of permits and renewals. *Id.* at 19. Accordingly, formal hearings, on the record, are not required for permit renewal under the CWA. *Id*. The

court's ruling turned on the issue of whether Dominion was pleading EPA's dereliction of a non-discretionary duty. *Id*. at 16. Ultimately, the opportunity for hearings on the record must be specified by the statute. *Id*. 18. Subsequently, EPA's opinion in the matter was derived from interpreting were interpreting the CWA and not the APA. *Id*. at 18-19. The court held that EPA had discretion and was not bound by the formal hearing requirements of the APA. *Id*.

On the other hand, withdrawal proceedings for a state program under RCRA did not constitute an adjudication required by the statute, "to be determined on the record after opportunity for an agency hearing." *Friends of Earth v. Reilly*, 966 F.2d 690, 692 (D.C. Cir. 1992). The court agreed, finding that "the withdrawal proceeding is not an 'adversary adjudication' " as defined by 5 U.S.C. § 504(b)(1)(C). *Id*. at 691. It reasoned that RCRA's section 3006(e) only requires a "public hearing", whereas 7001(b) specifically requires a hearing subject to APA § 554, and that contrasting language should be presumed to bestow specific requirements to particular parts of the statute. *Id*. at 691-94.

As with the permitting procedures in *Dominion Energy*, procedures for program renewal fall under the auspices of APA § 554, as well as for formal administrative adjudications are under APA §§ 554, 556, 557. However, the APA looks to requirements within the *statute* for the review process. Where procedures are provided in RCRA, and not required under the APA, the court defers to EPA's interpretation of RCRA. EPA may decide when action is appropriate.

In *Friends of Earth*, the court deferred to EPA's discretion as to whether a withdrawal proceeding is adjudication, required by statute. In the instant case, EPA should be given deference over the procedure used to evaluate New Union's Program. Statutory construction of 3006(e), as well as adherence to CFR 271.23 for procedures for withdrawal proceedings of New Union's program, provides sufficient guidance for the EPA to reasonably interpret its meaning.

A refusal to initiate proceedings for consideration of New Union's Program is not an unreasonable construction of RCRA, and this Court should affirm the district court's findings.

An administrator may be granted broad discretion, through explicit statutory language, over whether to provide relief to petitioners. *U.S. v. Bean*, 537 U.S. 71, 75 (2002). This may include inaction, where courts have held that agencies have discretion, bestowed by statute, to deny relief through inaction on an application. *Id*. at 76. Judicial review in these instances is generally limited to an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. at 77; 5 U.S.C. § 706(2)(A). A court may similarly determine that an agency's regulatory interpretation is unreasonable, if it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

EPA has discretion over the type of procedures it uses to review both NU's program and CARE's petition for review. Judicial deference should be given to EPA's decision to monitor NU's program and not take action on CARE's petition. The court should affirm the lower court and grant summary judgment.

II. 28 U.S.C. § 1331 DOES NOT PROVIDE JURISDICTION FOR THE DISTRICT COURT TO ORDER EPA TO ACT ON CARE'S PETITION FOR REVOCATION OF EPA'S APPROVAL OF NEW UNION'S HAZARDOUS WASTE PROGRAM, FILED UNDER 5 U.S.C. § 553(E).

Every agency must "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). However, the APA does not provide an independent basis of subject matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105 (1977). Federal jurisdiction is limited where statutory provisions and limitations that prevent a claim from being brought in federal court via 28 U.S.C. § 1331. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505 (2006). The statutory conditions for reviewability often delineate between "the classes

of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating that authority." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243-46 (2010).

What is more, "if a state elects to create more stringent standards, nothing within RCRA gives them legal effect. Their legal affect flows from state law." *Ashoff v. City of Ukiah*, 130 F. 3d 409, 414 (9th Cir. 1997). Elements of state programs "which are not specifically provided for in the . . . federal revised criteria have no effect pursuant to federal law and are not enforceable in federal court." 47 Fed. Reg. 57026, 57032 (Oct. 23, 1998).

CARE's claim pursuant to APA § 553(e) cannot be reviewed because they have already filed under RCRA § 7004. Even without a § 7004 claim, RCRA prescribes avenues for relief for claimants requesting review of programs and rules, which precludes the general APA federal jurisdiction. 42 U.S.C. §§ 6972, 6974.

Likewise, in *Dominion Energy*, the district court determined that it did not have subject-matter jurisdiction in a citizen's suit. The suit was brought to directly challenge an EPA ruling on whether to hold hearings, and therefore fell within the limiting jurisdictional language of the CWA, requiring jurisdiction exclusively within the circuit court under 33 U.S.C. § 1369(b)(1)(E).

In *Reed Elsevier*, there was no statutory implication of subject-matter jurisdiction for Federal courts. By contrast, in *Dominion Energy* that statute specifically limited jurisdiction to the circuit court. Similarly, RCRA § 7002 and § 7006(a) & (b) all delineate the appropriate courts for each type of claim by CARE, however, because the claims are based on a discretionary action by the Administrator, it cannot be brought under § 7002. 42 U.S.C. § 6972(a)(2). CARE has alternately included their petition under RCRA § 7004, in an effort to gain jurisdiction under RCRA § 7006(a) for a rulemaking. However, EPA's inaction is not a rulemaking and thus CARE cannot bring their claim under RCRA § 7004.

The authority to hear a case with subject-matter jurisdiction cannot be waived or forfeited. *U.S. v. Cotton*, 535 U.S. 625, 630 (2002). Courts may be obliged to determine if subject-matter jurisdiction exists, whether or not a party challenges its jurisdiction. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). If the court determines that it does not have it, the complaint must be dismissed in its entirety. *Arbaugh*, 546 U.S. at 506-11. Furthermore, Federal Courts may dismiss any state law issues for the failure to state a claim, *Id*. at 514.

RCRA does not grant jurisdiction for CARE's claim. The claim does not raise the question of whether or not it arises under federal law, but whether a claim can be reviewed in any court in light of EPA's discretionary authority granted under both the APA § 704 and RCRA. Even if APA § 553(e) granted federal question jurisdiction in the district court, the EPA decision was neither a rule, nor a final order, and therefore falls outside of APA § 553(e) review.

III. EPA'S DISCRETIONARY DECISION NOT TO WITHDRAW NEW UNION'S APPROVED PROGRAM IS NOT A CONSTRUCTIVE DETERMINATION SUBJECT TO REVIEW OF ACTIONS OR ORDERS UNDER RCRA § 7006(B).

EPA's inaction in regards to CARE's petition is not a constructive denial and therefore is not the subject of judicial review.

Although the term "constructive denial" is absent from both RCRA's statutory language and EPA's governing regulations, CARE contends that EPA's alleged failure to commence withdrawal proceedings amounts to a "constructive determination" that New Union's Program complies with RCRA. CARE relies on *Scott v. City of Hammond* for this supposition. 741 F.2d 992 (7th Cir. 1948)(per curium)("Scott"). In *Scott*, a state's "prolonged failure" to submit proposed total maximum daily load ("TMDL") criteria for particular pollutants amounted to the "constructive submission" by that state of no such criteria. *Id*. at 997.

Agency inaction by itself does not constitute "denial" for the purposes of seeking judicial review. *U.S. v. Bean*, 537 U.S. 71 (2002). Instead, judicial review is warranted only after an agency has failed to take some specific *and* statutorily mandated action. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004).

Indeed, *Scott* supports this supposition. In *Scott*, petitioners brought suit under the Clean Water Act ("CWA"). *Scott*, 741 F.2d at 996. The CWA requires States to identify impaired waterbodies within their boundaries and establish TMDLs for the discharge of pollutants into the waterways. *Id*. at 996. The CWA provides that, if a state does not submit TMDL guidelines for an impaired waterbody, EPA has a nondiscretionary duty to approve or disapprove this "no TMDL" finding within thirty days. *Id*. Whether EPA has failed to act on the "no TMDL" finding within this 30 day window is a nondiscretionary duty actionable under CWA's citizen suit provision. *Hayes v. Whitman*, 264 F.3d 1017, 1023 (10th Cir. 2001).

Scott and its progeny comports with the Supreme Courts understanding that the statute under which inaction is alleged must also require agency action within a particular time *and* specify a consequence for the failure to act. *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)("JDG"). "Absent specific statutory direction, an agency's failure to meet a mandatory time limit does not void subsequent agency action." *Brock v. Pierce County*, 476 U.S. 253, 259 (7th Cir. 1997). Therefore, "if a statute does not specify a consequence for noncompliance . . . the federal courts will not . . . impose their own coercive sanction." *JDG*, 510 U.S. at 63.

This case departs from *Scott* because RCRA § 3006(e) only provides that EPA must initiate withdrawal proceedings "whenever the Administrator determines after public hearing that a State is not administering and enforcing a program[.]" 42 U.S.C. 6926(e). The statute is otherwise entirely silent on when and how EPA must engage in this formal review process. Conversely, the CWA mandates that EPA approve or disapprove particular TMDLs within a

statutorily prescribed timeframe. *Scott* suggests that EPA's duty to approve or disapprove a state's water quality standards might be nondiscretionary, *within the context of that statute*. Because RCRA is silent in this matter EPA cannot have "constructively approved" the program.

RCRA 's language is wholly silent on when and how EPA should commence withdrawal proceedings. The matter is instead codified in RCRA's enabling regulations. Accordingly, EPA "may order the commencement of withdrawal proceedings . . . in response to a petition from an interested person alleging" a State's failure to comply with [RCRA]. 40 C.F.R. § 271.23(b)(1). However, EPA's regulations do not provide a timetable for response. In fact, EPA is only required to "respond in writing to any petition to commence withdrawal proceedings." *Id.* at § 271.23(b)(1). Therefore, the Supreme Court's test for when inaction constitutes constructive denial is not satisfied and judicial review is inappropriate.

A. RCRA's plain language indicates that EPA's decision to commence withdrawal proceedings is discretionary and therefore not subject to judicial review.

As stated above, 40 C.F.R. § 271(b)(3) mandates that EPA respond in writing to a petition for review of a State waste management program. New Union concedes that this court could compel EPA to perform its non-discretionary duty to respond to CARE's petition in writing, as provided by 40 C.F.R. § 271(b)(3).

However, under 40 C.F.R. § 271.23, EPA "may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph." 40 CFR 271.23(b)(1). "The use of a permissive verb — 'may review' instead of 'shall review' — suggests a discretionary rather than mandatory review process." *Rastelli v. Warden, Metro. Cor. Ct.r*, 782 F.2d 17, 23 (2d Cir. 1986); *See also Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (holding the mandatory "shall" normally

creates an obligation impervious to judicial discretion.). What is more, Congress demonstrates the "special contradistinction between the permissive "shall" and mandatory "may" within the same statutory section. *U.S. ex. Rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1945).

By contrast, an agency may be compelled to act on a petition once a threshold inquiry has been met. *Natural Resources Def. Council v. EPA*, 542 F.3d 1235 (9th Cir. 2008). In *N.R.D.C. v. EPA*, judicial review was appropriate where EPA failed to perform a non-discretionary duty to issue guidelines for addressing point source pollutant listed under the CWA. 542 F.3d. at 1242. Once EPA listed an industry within a point source category it was required to issue guidelines, and longer had discretion to make further formal determinations. *Id*. at 1253.

Moreover, judicial review only suitable "when [EPA] has taken a definitive position in relation to a particular program[.]" *Vineland Chem. Co. v. EPA*, 810 F.2d 402, 408 (3d Cir. 1987). In *Vineland*, judicial review was appropriate because terminating a facility's "interim approval" status ended EPA's "proceedings and require[d] the facility to cease operations." *Id.* at 407. Terminating the facility's interim status, for noncompliance, "is the functional equivalent of a denial of a permit application on the merits" and therefore subject to judicial review. *Thermalkem, Inc. v. EPA*, 25 F.3d 1233, 1237 (3d Cir. 1994).

This case is factually distinct from both *Thermalkem* and *Vineland*. In both cases, the alleged permit denial constituted final agency action, thereby triggering judicial review on the merits. However, in this case, EPA is not required to determine whether cause exists for withdrawing a state program. Instead all that is required is that the administrator responds in writing to the petitioner. EPA has discretion over whether to conduct a ruling on the merits. Because EPA has not made a ruling, this Court is effectively without a decision to review.

This case is also distinguishable from *N.R.D.C. v. EPA* and *Train*. In both cases EPA issued a "final decision" based on the merits of the contested permits and the courts were able to

review the substance of these of these decisions against the framework provided by the CWA and CAA. In this case, RCRA and the federal regulations only require that EPA respond in writing to the petition. As this is the only non-discretionary requirement provided in the statues, judicial review could only compel EPA to respond to the request. EPA has, by CARE's own admission, declined to review the substantive merits of New Union's approved state program as it exists in its current form. Therefore, this court could not review the substance of this decision under the RCRA paradigm and judicial review is inappropriate

B. Even if EPA determines that the approval of New Union's hazardous waste management program constitutes a rulemaking, it is not subject to review under RCRA § 7006(a).

RCRA § 7006(a) grants jurisdiction for review of EPA requirements and final rules, as well as "denial of any petition for the promulgation, amendment or repeal" of RCRA regulations. *API v. EPA*, 216 F.3d 50, 51 (D.C. Cir. 2000)("API"); 42 U.S.C.S.§ 6976(a). Conversely, RCRA § 7006(b) provides permits review and "granting, denying, or withdrawing authorization" of state hazardous waste management programs. 42 U.S.C. § 6976(b). Accordingly, permits and issues surrounding state hazardous waste management programs are reviewable under RCRA 7006(b), while "promulgation of regulations … [involving] the interpretation of a regulation or governing standard or ruling [and constituting] a decision of uniform or widespread application[,]" are subject to 7006(a). *Hazardous Waste Treatment Council v. EPA*, 910 F.2d 974, 976 (D.C. Cir. 1990)("HWTC v. EPA").

In *API*, EPA's deferral to a listing determination so as to determine if a substance was indeed hazardous was not a determinative final rule because it had "none of the characteristics of final agency action." 216 F.3d at 53. An agency's announcement of the future intent or consideration toward making law or policy does not amount to promulgating final rulings, and

such analysis does not signal that a regulatory determination was intended. *Id*. (citing *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 775-77 (D.C. Cir. 1996)). "A decision to defer has no binding effect on the parties or on [EPA's] ability to issue a ruling in the future." *Id*.

In *HWTC v. EPA,* petitioners alleged that EPA's approval of a city permit, after carefully considering the site conditions, types of wastes to be disposed, and the types of disposal units, amounted to rulemaking and was therefore subject to judicial review. 910 F.2d at 976. However, EPA's actions involved a specific area with unique considerations, and did not narrow or interpret existing agency regulations. Therefore, the permit approval was not rulemaking. *Id*.

Like *HWTC v. EPA*, EPA's analysis is specific to New Union's particular Program. As with petitioners in *HWTC v. EPA*, CARE requests review of particular instances of permit review and local staffing for EPA's consideration of the program. This type of analysis requires program and site specific consideration that is not conducive to the broad application of rulemaking.

As in *API*, CARE claims EPA's deferral of a formal review constitutes a final action. However, EPA's discretion to evaluate an approved state performance, within the guidelines of its approved program, allows for deferral of a formal decision and therefore is not a final rule subject to judicial review. Therefore, summary judgment is merited.

IV. EVEN IF EPA'S DECISION NOT TO CONSIDER WITHDRAWING NEW UNION'S HAZARDOUS WASTE PROGRAM CONSTITUTES CONSTRUCTIVE DENIAL OF THE PROGRAM, THIS COURT SHOULD DEFER TO EPA'S CONGRESSIONALLY INTENDED DISCRETION TO DETERMINE IF THE PROGRAM COMPORTS WITH RCRA'S FEDERAL MINIMUM STANDARDS.

There is a "strong presumption that Congress intends judicial review of an administrative action. *Bowen v. Mich. Acad, of Family Physicians*, 476 U.S. 667, 670 (1986). However, "an agency's decision not to take enforcement action" is presumptively unreviewable. *Heckler v. Chaney*, 470 U.S. at 821.

A. The decision not to commence withdrawal is an enforcement action and therefore presumptively unreviewable.

EPA's decision not to commence withdrawal proceedings is an enforcement decision that is presumptively unreviewable. *Heckler*, 470 U.S. at 821.

RCRA § 3006(e) provides that "[w]henever the Administrator *determines* . . . that a State is not administering and enforcing" an authorized program, EPA shall withdraw authorization. 42 U.S.C. § 6926(e) (emphasis added). This "agency's decision not to invoke an enforcement mechanism provided by statue . . . [is] not typically subject to judicial review." *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003). "The presumption against judicial review of such refusal avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency's construction of its governing statutes." *NY Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 331 (2d Cir. 2003) ("NYPIRG"). Therefore, an agency's actions falling within its discretion are immune from judicial review, even when potential issues for review arise. *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 279 (1987).

Petitioners in *Public Citizens* claimed the court was required to review alleged deficiencies in Texas' authorized Clean Air Act (CAA) permitting program. *Pub. Citizen*, 343 F.3d at 454-55. However, the Court held that the CAA provided EPA statutory discretion to grant approval despite known deficiencies in the program. 42 U.S.C. § 7661(a)(g). Therefore, EPA's interpretation of the CAA was a "permissible construction of the [statute]," and not 'clearly erroneous.'" *Id*. at 457-59. Congress's intended for the EPA to make these administrative decisions because the CAA authorizes it to determine whether to commence either withdrawal proceeding or a formal review process. *Id*. at 465.

Likewise, in *NYPIRG*, the Second Circuit concluded that EPA's refusal to issue notices of deficiency to New York State was unreviewable. 321 F.3d at 332 ("By placing the initiation of enforcement procedures within the agency, Congress left the decision of when and whether they are warranted to the institutional actor best equipped to make it.").

CARE's takes aim at the singular notion that "since EPA has had years to [commence withdrawal proceedings] when confronted with egregious evidence of the inadequacy of New Union's program" judicial review is required in lieu of the formal agency review procedures prescribed in RCRA. However, this argument fails in light of the fact that EPA continually reviews the adequacy of New Union's hazardous waste management program and choosing from the suite of available enforcement decisions *at its discretion*.

New Union files an Annual Report with the EPA ("Report") outlining all actions taken with respect to the Program. (Rec. Doc. 5 *et. sec.*). This report paints a clear picture of the extent to which New Union's Program comports with RCRA's federal minimum standards. Indeed, the EPA is provided with statistics as to the number of permits issued, inspections conducted, and any changes or re-prioritizations in these procedures the state has undertaken. EPA is therefore well aware of the quality of New Union's program.

In light of this data, EPA has continually assisted New Union in administering its Program. In 2009, EPA issued "the same number of comparable [enforcement] actions" as New Union's Department of Environmental Protection ("DEP"). (Rec. Doc. 4 for 2009 p. 26) What is more, EPA conducted 150 facility inspections in 2009 and agreed to conduct a comparable number of studies in the future. (Rec. Doc. 4 for 2009, p. 23).

EPA is actively choosing from the myriad of enforcement actions available to it under RCRA. It is clear that Congress intended EPA to enforce RCRA according to this discretion.

Accordingly, EPA could *choose* to commence formal withdrawal proceedings, but has not yet employed its discretion to do so. Therefore, EPA's determination is presumptively unreviewable.

Indeed, the Supreme Court recognizes that Congressionally empowered agencies is in the best position to determine how and when to enforce its statutory mandates. These decisions require the agency to weigh the complex ramifications of different enforcement mechanisms against the backdrop of a detailed, specialized area of particular expertise. Congress did not intend to leave these decisions to the court. The EPA is in the best position to determine if New Union's program comports with RCRA and not the District Court.

B. Even if EPA's decision not to commence withdrawal proceedings was not presumptively unreviewable, judicial review is inappropriate because neither RCRA nor EPA's regulations provide the applicable substantive law.

Judicial review is inappropriate because RCRA and EPA's regulations do not provide any substantive law for a court to apply.

Courts lack jurisdiction where "statutes are drawn in such broad terms that in a given case there is no law to apply" *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 79-752, at 26 (1945)). Agencies are afforded unreviewable, "absolute discretion" when a statute leaves the court "no law to apply." *Overton Park*, 401 U.S. 402, 413 (1971). A lack of meaningful statutory standards for a court to apply indicates Congress intended no role for the courts. *Id*. at 410.

Determining whether any substantive law exists for the courts to apply begins by "carefully examin[ing] . . . the statute on which the claim of agency illegality is based." *Webster v. Doe*, 486 U.S. 592, 600 (1988). "The overall statutory structure must be considered, . . . as well as whether the subject matter is indeed an area of executive action in which the courts have long been hesitant to intrude." *Helgeson v. Bureau of Indian Affairs, Dept. of Interior*, 153 F.3d

1000, 1003 (9th Cir. 1998). Subsequently, "[a]n agency's own regulations can provide the requisite law to apply." *Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir, 1998).

RCRA's text is entirely silent on when EPA must commence withdrawal proceedings. It directs that EPA "shall withdraw authorization" if it determines that the state program is not equivalent to the federal regulatory scheme. 42 U.S.C. § 6927(e). However, RCRA provides no substantive guidance on when it should exercise the discretion to begin this process. In fact, the only guidance RCRA provides is that EPA should make this determination "after a public hearing." *Id*. § 6927. Guidance as to the substance of these hearings is not provided.

RCRA's legislative history is equally as vague. Congress provided that "[I]f the state program . . . becomes not equivalent. . .[EPA] after notice and opportunity for the State to have a hearing, is authorized to enforce the federal minimum standards[.]" *See e.g.* H.R. Rep. No. 9401491, at 31 (1976).

EPA's own regulations shed little additional light on the matter. The regulations include a list of non-extensive criteria for which EPA "may withdraw approval." 40 C.F.R. § 271.22. However, the use of permissive language reflects discretion and not binding law. *Perales v. Casillas*, 903 F.2d 1043 (5th Cir. 1990). EPA's implementing regulations also provide no substantive law for a court to apply. These regulations provide a list of non-exclusive criteria by which EPA "may withdraw program approval." 40 C.F.R. § 271.22 (2005). However, this use of permissive language is indicative of discretion and not binding law to be applied by the courts. *Hinck*, 550 U.S. at 503-04 (finding no law to apply where statute said IRS "may abate" interest); *Webster*, 486 U.S. at 600 (finding no law to apply where termination was authorized where CIA "'shall *deem* [it] necessary or advisable'"); *Heckler*, 470 U.S. at 835 (construing statutory provision that "[t]he Secretary is *authorized* to conduct examinations and investigations").

EPA's decision not to withdraw Texas' state hazardous waste management program unreviewable for lack of applicable law. *Tx. Disposal Systs. Landfill Inc. v. EPA*, 377 Fed. Appx., 406 (5th Cir. 2010) ("Texas Disposal"). In *Texas Disposal*, a private company petitioned EPA to withdraw the Texas state hazardous waste management program, alleging that State permitting requirements were inconsistent with RCRA. *Id*. at 407. Instead, EPA "issued a Determination" that there was not cause to commence proceedings to withdraw approval. *Id*. The company then filed suit challenging the determination, and was denied. *Id.*

Judicial review was inappropriate because "neither the statute, nor the regulations, present standards by which [the court] can review the EPA's decision not to commence withdrawal proceedings." *Id*. Moreover, EPA's regulations guiding enforcement of RCRA 3006(e) only provided that the administrator *may* conduct an investigation in response to a petition from an interested person. *Id. citing* 40 C.F.R. § 271.11(a). Instead, EPA was free to exercise its discretion as to when to enforce RCRA because neither the statue nor the regulations placed any meaningful limitations on that discretion. *Id*.

The Courts are wary of second guessing the EPA's discretionary interpretation of RCRA even where the agency has commenced withdrawal proceedings against a state. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1391 (D.C. Cir. 1991). In *HWTC*, petitioners challenged EPA's interpretation of an amendment to a state hazardous waste program, and established a specific dilution factor for particular pollutants. *HWTC*, 938 F.2d at 1392. The Court explained that the final decision of the regional administrator not to withdraw the state program "represents a final agency action that is subject to judicial review[.]" *Id* at 1394.

However, the preceding opinion of the ALJ was not the subject of judicial review, because his findings "[did] not constitute a definitive position with a direct and immediate impact on the rights of petitioners such that they represent a final statement of the agency's position. *See*

Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d 1525, 1531 (D.C. Cir. 1990). The representations of subordinate officials and the instigation of enforcement proceedings also do not constitute final agency action for the purpose of judicial review. *See, e.g., FTC v. Standard Oil Co.,* 449 U.S. 232, 241 (1980) (an agency's issuance of a complaint "is not a definitive statement of position" but rather "represents a threshold determination that further inquiry is warranted").

RCRA, EPA's regulations, and Congress' legislative history do not provide any substantive law for the courts to apply. Therefore, EPA's enforcement decision is presumptively unreviewable. What is more, this case is factually distinct from *HWTC*. In *HWTC*, the regional administrator issued a final decision on behalf of the EPA. In this case, no decision has been made. Therefore, there is no law for the court to apply. EPA should be allowed to commence withdrawal procedures when and where appropriate. Judicial review is unavailable.

V. STATE RESOURCE REALLOCATION IS NOT GROUNDS FOR A JUDICIAL ORDER COMPELLING EPA TO WITHDRAW APPROVAL OF THE PROGRAM.

EPA has not ignored its duty to monitor the New Union's Program because the decision to withdraw an authorized state program is left to EPA's discretion. *HWTC*, 938 F.2d at 1397.

In *HWTC*, EPA concluded that a North Carolina senate bill was not sufficiently prohibitive as to act as a statewide ban on the treatment of a particular hazardous waste. *HWTC*, 938 F.2d at 1395-97. Petitioners alleged EPA was required to find that the program was inconsistent with RCRA's because it acted "as a prohibition on the treatment of hazardous." *Id*. at 1395-96; *See also* 40 C.F.R.§ 271.4(b). However, the court found EPA had the discretion to determine when a program is consistent with RCRA and its decision not to commence withdraw proceedings was neither arbitrary nor capricious. *Id*. at 1396-97.

States enjoy broad discretionary latitude when formulating a state environmental program, so long as the statutory criteria are met. *Union Elec. Co. v. EPA*, 427 U.S. 246, 249-50 (U.S. 1976). CARE points to reduced staffing and unapproved private permits as a signal that reduced state resources have made the program in violation of federal standards. (R. at 11.) However, even if this were true, EPA would have discretion to review the program, and if necessary, order the state to correct any program deficiencies. See *Public Citizen*, 343 F.3d at 457; *see also Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 587-90 (5th Cir. 1981) (the CAA does not grant even EPA authority to question states' choices so long as statutory standards are met).

"States need not implement provisions identical" to the federal minimum standards. 40 C.F.R. 271.14. States are instead required to "establish requirements at least as stringent as the federal standards." *Id*. Determining if a state program is consistent with this program falls clearly within EPA's discretion as the agency congress empowered to enforce RCRA. *See, e.g., Chemical Mfrs. Ass'n v. EPA,* 919 F.2d 158, 162-63 (D.C.Cir.1990).

With respect to the Clean Air Act, EPA may consider a State Implementation Program's ("SIP") feasibility according to both economic and technological considerations. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 492-93 (U.S. 2001). What is more, EPA's position that it has no power whatsoever to reject a SIP because it is "economically or technologically infeasible" is entitled to great deference. *Train v. Nat'l Res. Def. Council*, 421 U.S. at 75.

New Union has prioritized both inspections and permit approvals, providing EPA with evidence of good faith efforts to properly implement its hazardous waste program. While congress intended for EPA to oversee state implementation of RCRA, the good faith efforts of state agencies are afforded wide discretion when using scarce state funds to implement their

hazardous waste management programs. Because of this, there is a presumption by EPA that states are efficaciously administering their programs.

A. EPA retains its abilities to enforce RCRA

EPA retains all ability to enforce RCRA. Congress never intended to limit EPA's ability to enforce RCRA once a state program was authorized. *See Wyckoff Co. v. EPA,* 796 F.2d 1197, 1199-1200 (9th Cir.1986) (holding Congress did not intend to revoke EPA's power to issue orders under 42 U.S.C. § 3013 when state program is in effect). In addition, the language of the federal criminal provisions, 42 U.S.C. § 6928(d), criminalizes "any person" who acts without, or in respect to facilities lacking, "a permit under this subchapter." A permit under this subchapter is one issued by EPA or by an authorized state. *Wycoff*, 796 F.2d 1199; 42 U.S.C. § 6925.

What is more, the 1984 amendments to RCRA increased the applicable criminal penalties and simply substituted the language "under this subchapter" for the references to the specific subsections under which permits, federal and state, may be granted. H.R.Rep. No. 198, 98th Cong., 2d Sess. 54, pt. 1, *reprinted in* 1984 U.S.Code Cong. & Admin.News 5576, 5613. The new language, "without a permit under this subchapter," subsumed both state and federal permits, as both types are provided for within "this subchapter." *Id*. The latter did not, therefore, in any way narrow the scope of federal criminal jurisdiction. Nor did the legislative record hint at any intention by Congress to narrow the scope of federal criminal jurisdiction.

The fact that the state program operates "in lieu" of the federal program does not preclude federal prosecution for RCRA violations. *U.S. v. Elias*, 269 F. 3d 1003, 1010 (9th Cir. 2001) *cert. denied* 123 S. Ct. 72 (2002) ("Elias"). In *Elias*, the court determined that construing RCRA's "in lieu of" language to replace EPA's enforcement ability would contravene RCRA's plain language, and legislative history. *Id*. The plain text of RCRA § 6928(a) also allows EPA to exercise civil

enforcement powers once a state program takes effect. *Id*. Congress clearly intended federal enforcement provisions to survive the state program authroization. *Id*. at 1009.

To the contrary, Congress manifested its desire to retain a strong federal presence. H.R.Conf.Rep. No. 98-1133, 98th Cong., 2d Sess., October 3, 1984 at 110, *reprinted in* 1984 U.S.Code Cong. & Admin.News 5681; S.Rep. No. 98-284, 98th Cong., 1st Sess., October 28, 1983 at 45 ("The Federal government's ability to obtain criminal penalties against generators and other persons who knowingly cause the transportation of hazardous waste to an unpermitted facility is essential to the regulatory scheme.")

Accordingly, EPA has the discretion to enforce or otherwise act to maintain that program, beyond simple withdrawal of the Program

VI. WITHDRAWAL PROCEEDINGS ARE UNAVAILABLE BECAUSE NEW UNION HAS NOT BEEN ALLOWED TO CORRECT THE ALLEGED DEFICIENCIES IN ITS PROGRAM.

EPA may withdraw state authorization upon notice, comment, and an opportunity for a hearing, if a state program fails to meet certain requirements and appropriate action is not taken. However, replacing the State program is an "extreme" and "drastic" step, and one the EPA rarely takes. *U.S. v. Power Eng'g Co.*, 303 F.3d 1232, 1238-39 (10th Cir. 2002).

Moreover, EPA may withdraw an approved State program only after the "program no longer complies with [RCRA] *and* the state fails to take corrective action. 40 C.F.R. § 271.22(a). Use of the term "and" in a list means that all of the listed requirements must be satisfied. *United States v. O'Driscoll*, 761 F.2d 589, 597-98 (10th Cir.1985) (conjunctive terms indicate that all requirements must be satisfied); *cert. denied, O'Driscoll v. U.S.*, 475 U.S. 1020, (1986).

EPA has yet to exercise its discretion to review New Union's program, as controlled by the 2000 Environmental Regulatory Adjustment Act ("ERAA"). However, assuming, *arguendo*,

EPA elects to review the Program and subsequently determines its treatment of railroads does not comply with RCRA, New Union must be allowed to take corrective action.

Congress clearly intended for the States to shoulder the burden of managing hazardous wastes. The Federal - State dichotomy expressly created by Congress through RCRA is a constantly evolving and flexible framework whereby states implement federal minimum standards as well as their own, unique limitations pursuant to State law. RCRA's vague language and lack of strict standards indicates Congress intended to consistently review State programs as they evolve to address the needs of the differing States. Accordingly, where State standards no longer comport with RCRA's overarching goals to protect human and environmental health, Congress intended EPA to allow the States to correct these deficiencies *prior* to withdrawing the program. Withdrawal is an extreme and rarely taken step. The state should be allowed to take corrective action if it is determined the program no longer complies with RCRA.

VII. EVEN IF THIS COURT PROCEEDS ON THE MERITS OF CARE'S CHALLENGE, THE 2000 ENVIRONMENTAL ADJUSTMENT ACT IS CONSISTENT WITH RCRA, OTHER APPROVED STATE PROGRAMS, AND DOES NOT VIOLATE THE COMMERCE CLAUSE.

The collection and disposal of hazardous waste under RCRA is " primarily the function of State, regional and local agencies [.]" 42 U.S.C. § 6901(4) (Appendix D). Accordingly, any state may seek to "administer and enforce" a hazardous waste program upon approval by the EPA. 42 U.S.C. § 6929(b). Once approved, the state program operates "in lieu" of a federal program. *Id*. Ultimately, the right to issue permits for the storage treatment and disposal of hazardous wastes lie with the State upon final approval. *Id*.

A. New Union's treatment of Pollutant X under the 2000 Environmental Adjustment Act is consistent with RCRA.

A state program may only be approved if EPA determines it is equivalent to and consistent with RCRA. 42 U.S.C. § 6906. However, neither "consistent" nor "equivalent" are defined in the statute or regulations and the statutory or regulatory requirements do not specify a process for making equivalency or consistency determinations.

EPA guidance on making equivalency determinations states, "equivalent" implies that the state must regulate at least the same universe of waste and handlers, whereas "no less stringent" signifies that each aspect of the state regulations must be at least as stringent. *See,* Memorandum from Matthew Hale, EPA Director, Office of Solid Waste, to RCRA Directors, Regions I-X, Determining Equivalency of State RCRA Hazardous Waste Programs (Sept. 7, 2005), *available at* http://www.epa.gov/wastes/laws-regs/state/policy/fe-9-7-05.pdf. Accessed November 20, 2010.

Regulatory guidance also provides that "states need not implement provisions identical to the above listed provisions [but] must, however, establish requirements at least as stringent as the corresponding listed provisions[.]" 40 CFR 271.14. What is more, RCRA's "saving clause" expressly authorizes states to adopt or enforce requirements that are more stringent than the federal requirements. 42 U.S.C. § 6929; 40 C.F.R. 271.22(1). Therefore, the express provision of 42 U.S.C. § 6929 "reveals a congressional intent that hazardous waste is not an area of particular federal importance requiring one, uniform, national system or plan of regulation." *Old Bridge Chemicals, Inc. v. NJ Dep. of Envtl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992).

The dichotomy between state and federal environmental standards is not limited to RCRA. For example, the Clean Air Act does not preclude a state from "adopt[ing] or enforc[ing] any standard or limitation . . . so long as the state standards are not "less stringent" than those set

forth in the federally-approved state implementation plan. 42 U.S.C. § 7416. The Clean Water Act, using nearly identical language, preserves state requirements controlling pollution that are not "less stringent" than federal requirements. 33 U.S.C. § 1370.

EPA also directly contemplated that individual SIPs would vary from the federal program. EPA requires that all generators of hazardous waste file a Form 8700-12, entitled "Notification of Regulated Waste Activity." This form aids companies in determining whether and how they comply with RCRA notification requirements and specifically reserves a listing for "state or other wastes." The Form's instructions advise generators that "[m]any States have requirements that vary from the Federal regulations. These State regulations may be more strict than the federal requirements *by identifying additional wastes as hazardous*."

Where Congress has specifically authorized state or local government action, the dormant Commerce Clause is, however, inapplicable, even if the state action interferes with interstate commerce. *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.,* 472 U.S. 159, 174 (1985). In order for a state law to be removed from the reach of the dormant commerce clause, congressional intent to authorize the discriminating law must be either "unmistakably clear" or "expressly stated." *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 91-92 (1984). Congress need not state that it intends to override the dormant commerce clause, but it must affirmatively have contemplated the otherwise invalid state legislation. *Id.*

The Third Circuit examined a state's ability to designate wastes as hazardous within the context of RCRA and the dormant commerce clause. *See Old Bridge Chemicals*, 965 F.2d at 1288-89. The Court found unmistakably clear evidence that, "in legislating in this field, Congress has set only a floor, and not a ceiling, beyond which states may go in regulating the treatment, storage, and disposal of solid and hazardous wastes." *Id*. at 1292. Moreover, the court recognized that EPA's Form 8700-12 envisioned a "dual federal-state system of hazardous waste

regulation, with states able to categorize additional wastes as hazardous" *Id*. Likewise, Form 8700-12 reveals RCRA enables states to designate additional hazardous wastes. *Id*.

B. New Union's treatment of Pollutant X does RCRA or other EPA approved state hazardous waste management programs.

New Union's hazardous waste management program was approved by EPA in 1986. Until authorization is withdrawn, action taken by New Union pursuant to its program operates with "the same force and effect as action taken by [EPA]." 42 U.S.C. § 6926. However, "any aspect of a 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 . . . authorized to operate under the Federal or an approved State program shall be deemed inconsistent. 40 C.F.R. 271.4(a)

The Supreme Court has articulated a two-tiered approach to analyzing state economic regulations under the Commerce Clause. *Brown-Forman Distillers Corp. v. N.Y. Liquor Auth.*, 476 U.S. 573, 578-79 (1986). First, the Supreme Court generally strikes down state statutes that directly discriminate against interstate commerce or when its effect favors in-state economic interests over out of state interests. *Brown-Forman*, 476 U.S. at 579. However, when a statute is neutral on its face, has only indirect or incidental effects on interstate commerce and regulates even handedly, the statute will be up held "unless the burden imposed . . . is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The "critical consideration" in determining the degree scrutiny is the "overall effect of the statute on both local and interstate activity." *Brown-Formam*, 476 U.S. at 579.

In *Cloverleaf Creamery*, the Supreme Court reviewed a state environmental statute banning the sale of milk in plastic non-returnable, non-refillable containers. *Minn. v. CloverLeaf Creamery Co.*, 449 U.S. 456, 471 (1981). The Court stated, "if a state law purporting to promote

environmental purposes is in reality 'simple protectionism,' we have applied a 'virtually per se rule of invalidity.'" *Clover Leaf Creamery*, 449 U.S. at 471 (quoting *Phila. v. N.J.*, 437 U.S. 617, 624 (1978)). However, the statute "regulate[d] evenhandedly" by requiring all milk, regardless of origin, to be sold in plastic bottles. *Id.* at 471-72.

Conversely, in *City of Philadelphia*, the Court struck down a "protectionist" New Jersey environmental statute that banned the importation of most out of state wastes to instate landfills. However, although New Jersey's statue was ultimately overturned, the Court stated that the statute would not have violated the commerce clause had New Jersey elected to "slow[] the flow of all wastes into the states remaining landfills." *City of Philadelphia*, 437 U.S. at 626.

The Second Circuit also considered whether a state requirement that manufacturers of mercury-containing products must inform consumers that the products should be disposed of as hazardous waste. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d.Cir. 2001). Accordingly, a states' ability to adopt supplementary requirements that are more stringent than those imposed by the federal program "confers upon [the state regulations] if not a shield, at least a sturdy buffer against [a] Commerce Clause challenge." *Id.* at 113 citing, *Grocery Mfrs. of Am. v. Gerace*, 755 F.2d 993, 1005 (2d. Cir. 1985). Therefore, "for a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Id.* at 109. *See also Nat'l Paint & Coatings Ass'n v. City of Chi.*, 45 F.3d 1124, 1132 (7th Cir. 1995) ("No disparate treatment, no disparate impact, no problem under the dormant commerce clause.")

This approach is in harmony with the "consistency" provisions in 42 U.S.C. 271.4(a)-(b). Accordingly, state programs must not *unreasonably* restrict, impede or operate as a ban "on the free movement across the State boarder." (emphasis added). What is more, state programs acting

"a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent" if not based in "human health or environmental protection." *Id.*

The 2000 Environmental Adjustment Act is facially neutral. It does not favor instate interests over out of state interests. Therefore, the courts turn to whether the Act has a basis in protecting human health or the environment. EPA recognizes Pollutant X as a hazardous that poses a great risk to the environment and people. New Union is taking decisive and appropriate action to ensure that Pollutant X is properly disposed of a licensed disposal site.

Finally, the national policy of RCRA is "that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b). New Union's program only affects inter-state commerce in so far as it requires the speedy transport of this know toxin. If anything, the Act further facilitates RCRA's national policy. Accordingly, summary judgment in New Union's favor is merited.

CONCLUSION

For the aforementioned reasons, New Union asks this Court to affirm the District Court's grant of summary judgment in New Union is appropriate.

Respectfully Submitted,

/s_____

/s_____