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

IN THE UNITED STATES TWELFTH CIRCUIT COURT OF APPEALS

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

v.

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

Appeal from the United States District Court for the District of New Union
United States District Judge Romulus N. Remus, Presiding

[BRIEF FOR RESPONDENT-APPELLEE-CROSS-APPELLANT]

Questions Presented For Review

1. Whether the district court erred in ruling that RCRA § 7002(a)(2) does not provide jurisdiction for district courts to order the EPA to act on a petition for revocation of New Union's hazardous waste program, and therefore improperly granted New Union's motion for summary judgment.

2. Whether the district court correctly granted summary judgment in determining that 28 U.S.C. § 1331 does not provide jurisdiction for district courts to order the EPA to act on a petition for revocation of a hazardous waste program, filed under 5 U.S.C. § 553(e).

3. Whether EPA's inaction on a petition for revocation of New Union's hazardous waste program constitutes a constructive denial of that petition and is therefore subject to judicial review.

4. Should the court rule that it does have jurisdiction and that the EPA's inaction is a constructive denial of the petition: whether this Court should remand the case to the court below for proceedings pursuant to RCRA §§ 3006 (3), 7004.

5. Should this Court decide to not remand the case; whether New Union's resources and performance are sufficient to meet approval criteria, considering EPA's discretion in taking action other than withdrawing approval.

6. Should this Court decide to not remand the case; whether New Union's present failure to regulate railroad hazardous waste facilities, pursuant to the 2000 Environmental Regulatory Adjustment Act, requires the EPA to withdraw its authorization of the entire New Union hazardous waste program.

7. Should this Court decide to not remand the case: whether the 2000 Environmental Regulatory Adjustment Act's treatment of Pollutant X negatively affects the equivalency of New Union's hazardous waste removal program as compared to the program under RCRA; whether the treatment of Pollutant X is inconsistent with federal or other state-approved programs; and whether the treatment of Pollutant X violates the Commerce Clause of the United States Constitution.

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Jurisdiction

Petitioner-Appellant Citizen Advocates for Regulation and the Environment ("CARE") brought suit against the Administrator of the EPA, Lisa Jackson, for failure to respond to a petition submitted pursuant to 42 U.S.C. § 6926(b). The district court correctly determined that it did not have jurisdiction to order the EPA to act pursuant to 28 U.S.C. § 1331. However, the trial court incorrectly ruled that it did not have jurisdiction pursuant to RCRA § 7002 (a) (2).

Regarding the appeal from the District Court of New Union, this Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. §1291(a).

Standard of Review

This court reviews the denial of a motion for summary judgment de novo, reaching its own conclusions of law and fact. Hayes v. Whitman, 264 F.3d 1017, 1022 (10th Cir. 2001) (citing Simms v. Okla. Ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999)). "Summary judgment is appropriate if the record reflects no genuine issues of material fact and [the moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Statement of the Case

This case centers on CARE's dissatisfaction with the implementation of New Union's Hazardous Regulation Act. The HRA is New Union's program operating "in lieu of the federal program under RCRA." Citizen Advocates for Regulation of the Environment, Inc. v. Jackson, Civ. 000138-2010, slip op. at 4 (D.N.U. June 2, 2010); see 42 U.S.C. § 6926 (b) (2006). Citizens are authorized under RCRA to petition to the EPA for the "promulgation, amendment, or repeal of any regulation . . .. [And w]ithin a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition." 42 U.S.C. § 6974 (2006). If the

petition challenges a rule promulgated by the EPA, the proper jurisdiction is in the Court of Appeals, District of Columbia Circuit. 42 U.S.C. § 6976 (a) (2006). However, if the challenged action is an order (issuance or denial of permits or state programs) jurisdiction is proper in the local Court of Appeals (here, the Court of Appeals for the Twelfth Circuit). 42 U.S.C. § 6976 (b) (2006).

On January 5, 2009, CARE filed a petition with the EPA under §7004 of RCRA and §553 (e) of the Administrative Procedure Act ("APA"). See 42 U.S.C. § 6972 (2006); 5 U.S.C. § 553(e) (2006). The petition requested withdrawal of EPA's approval for New Union's HRA. As of yet, the EPA has not taken action regarding this petition.

Subsequently, on January 4, 2010, CARE filed an action in the District of New Union (Civ. 000138-2010) requesting "an injunction requiring EPA to act on [the] petition or, in the alternative, judicial review of EPA's constructive denial of the petition and EPA's constructive determination that New Union's hazardous waste program meets the criteria for approval." Citizen Advocates for Regulation of the Environment, Inc. v. Jackson, Civ. 000138-2010, slip op. at 4 (D.N.U. June 2, 2010). New Union joined the suit as an intervenor unopposed. Id.

Simultaneously, CARE filed this present action in the Court of Appeals for the Twelfth Circuit (C.A. No. 18-2010); however, this decision was stayed pending the outcome of the court below.

Statement of the Facts

In 1976, Congress substantially reformed the Solid Waste Disposal Act ("SWDA") and enacted the Resource Conservation and Recovery Act ("RCRA"). Olga L. Moya & Andrew L. Fono, Federal Environmental Law: The User's Guide, 87 (3rd ed. 2010); see also 42 U.S.C. §§ 6901-6992 (2006). RCRA was enacted to provide for the safe handling of hazardous wastes

throughout the United States. 42 U.S.C. § 6902 (2006). RCRA provides for the EPA to allow States to administer their own waste management programs, so long as they are "'more stringent' than their federal counterpart, but not less." United States v. Southern Union Co., 643 F.Supp.2d 201, 207 (D.R.I. 2009) (citing 42 U.S.C. § 6929 (2006); 40 C.F.R. § 271.1 (i) (2008)).

The EPA authorized the State of New Union administer and to enact its own hazardous waste program in 1986. (Rec. Doc. 3, p. 1-2.) When New Union's Department of Environmental Protection ("DEP") applied for approval from the EPA the state contained "1,200 hazardous waste treatment, storage and disposal facilities ("TSDs") in the state requiring permits." Citizen Advocates for Regulation of the Environment, Inc. v. Jackson, Civ. 000138-2010, slip op. at 10 (D.N.U. June 2, 2010). Approximately 900 of these facilities are currently permitted. (Rec. doc. 4 for 2009, p. 20.) However, between 1986 and 2009 there has been a net loss of twenty employees, coinciding with a net rise of 300 TSDs. (Rec. doc. 1, p. 17; Rec. doc. 1, p. 73; Rec. doc. 4 for 2009, p. 23; Rec. doc. 4 for 2009, p. 52.) Additionally, the Director of Budget for New Union has made comments stating "[New Union] would concentrate resource cuts on discretionary programs and programs in which state employees performed the functions that federal employees would otherwise perform." Citizen Advocates for Regulation of the Environment, Inc., slip op. at 11.

"In 2000, the New Union legislature enacted the Environmental Regulatory Adjustment Act (the "ERAA") . . .." Id. at 11-12. One important piece of the ERAA is an amendment to the Railroad Regulation Act ("RRA"), which had established a Commission to oversee intrastate railroads "to the extent allowed by the Commerce Clause in the federal Constitution." Id. at 12. The amendment changed "all standard state environmental statutes to the Commission." Id. (citing Rec. doc. 4 for 2000, pp. 103-05.) Additionally, the amendment removed the

Commission's power to enforce criminal sanctions for violations of environmental statutes. (Rec. doc. 4 for 2000, pp. 103-05.)

The ERAA also amended the New Union Hazardous Regulation Act ("HRA") with regards to the generation, permitting and transportation of Pollutant X and facilities generating Pollutant X. (Rec. doc. 4 for 2000, pp. 105-07.) (Reprinted in Appendix).

Summary of the Argument

In an action brought by Citizen Advocates for Regulation and the Environment ("CARE") under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et seq. (1976), seeking an injunction requiring the Environmental Protection Agency ("EPA") to act on a petition to commence proceedings to withdraw its approval of New Union's hazardous waste regulatory program or, in the alternate, requesting judicial review of EPA's constructive denial of its petition, the United States District Court for the District of New Union denied CARE's motion for summary judgment and granted New Union's motion for summary judgment.

CARE brings this appeal to reverse summary judgment because CARE takes issue with the decision of the district court that it lacked jurisdiction to order the EPA to make a decision on CARE's petition. Additionally, CARE requests this Court lift its stay of an action it had filed with this Court seeking judicial review of EPA's alleged constructive denial of CARE's petition. EPA agrees with CARE that the lower court has jurisdiction to order the EPA to make a decision on CARE's petition. However, the EPA takes issue with CARE's request that this Court lift its stay on CARE's action seeking judicial review of EPA's alleged constructive denial.

While the EPA may choose to act on a citizen suit petition for revocation, a district court has jurisdiction to order action. RCRA § 7002(a)(2), but not 28 U.S.C. § 1331, provides

jurisdiction for a district court to order the EPA to act on a citizen suit petition for revocation of EPA's authorization of a state's hazardous waste program. The EPA's authorization of New Union's hazardous waste program was a rule, not an order, therefore, RCRA § 7004 (which allows for citizen suit petitions) is applicable.

EPA's failure to act on CARE's petition for revocation of New Union's hazardous waste program does not qualify as a constructive denial. The "constructive submission doctrine" turns on whether an agency is required to act; therefore, courts have construed the "constructive submission doctrine" narrowly. RCRA § 7004 allows, but does not mandate, EPA action with respect to citizen suit petitions; therefore, the "constructive submission doctrine" is not applicable and EPA's inaction should not be subject to judicial review. However, if this Court finds that EPA did constructively deny CARE's petition, this case should be remanded back to the district court to begin a review of New Union's hazardous waste program. EPA should be allowed to "actually" review New Union's alleged inadequacies, rather than have these inadequacies "constructively" reviewed by this Court.

However, if this Court decides to proceed on the merits of CARE's challenge, EPA must not be required to withdraw its approval of New Union's entire hazardous waste program. RCRA heavily emphasizes enforcement of hazardous waste programs by states over enforcement by the federal government. Courts have held that EPA's withdrawal of a state hazardous waste program would be a drastic step, that withdrawal is not a prerequisite to EPA enforcement, and withdrawal it is not the only remedy for an inadequate state hazardous waste program.

Argument

I. DISTRICT COURTS HAVE JURISIDCTION UNDER RCRA § 7002 (a) (2) TO ORDER THE EPA TO ACT ON CITIZEN SUIT PETITIONS FOR DECISION ON REVOCATION OF STATE ADMINISTERED PROGRAMS

RCRA § 7002(a) (2) provides jurisdiction for local district courts to order the EPA to act on CARE's petition for revocation of EPA's authorization of New Union's hazardous waste program, which CARE filed pursuant to RCRA § 7004. RCRA § 7002(a) (2) states that "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" and that these actions "shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur." 42 U.S.C. § 6972 (2006).

Citizen suits play an important role in the enforcement of RCRA because "those who live in close proximity to hazardous waste facilities often are the most diligent enforcers of RCRA's mandates." Sierra Club v. Chem. Handling Corp., 824 F. Supp. 195, 197-98 (D. Colo. 1993) (finding that because the "EPA must classify cases in order to maximize its scarce enforcement resources" some violations may not be pursued as aggressively by the EPA as they should).

Additionally, the EPA has taken the position that the citizen suit provision of RCRA is available to all citizens whether or not a state is authorized. 49 Fed. Reg. 48300 (Dec. 12, 1984). See also Lutz v. Chromatex, Inc., 725 F. Supp. 258, 261-62 (M.D. Pa. 1989); 45 Fed. Reg. 85016 (Dec. 24, 1980) (finding that a citizen suit may be brought under RCRA § 7002 after a state has received authorization to operate its program in lieu of the federal program, where the EPA granted interim and then final authorization to Texas' hazardous waste program).

A. EPA's 1986 authorization of New Union's hazardous waste program in lieu of federal program was a rule, not an order

RCRA § 7004 provides that "[a]ny person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under this Act. Within a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition, and shall publish notice of such action in the Federal Register, together with the reasons therefore." 42 U.S.C. 6974 (a) (2006).

While New Union argues that RCRA § 7004 is not applicable because EPA's 1986 approval was an order, EPA argues that RCRA § 7004 is applicable because the EPA's approval of New Union's hazardous waste program was a rule making act. RCRA does not specifically define which administrative actions qualify as rule makings and which actions qualify as orders.

However, the Administrative Procedures Act ("APA") defines a rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy describing the organization, procedure, or practice requirements of an agency," 5 U.S.C. § 551 (4) (2006), whereas the APA defines an order as a "whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing," 5 U.S.C. § 551 (6) (2006), where a license includes an "agency permit." 5 U.S.C. § 551 (8) (2006). However, the APA is a general authority for rulemaking for all federal agencies, whereas RCRA provides a more specific authority for rulemaking provisions for EPA. In the present case, the EPA treated New Union's initial approval of its hazardous waste program as a rule making procedure. Before approving New Union's solid waste program, EPA used a public notice and comment procedure, and incorporated the results of this procedure during the approval process. Citizen Advocates for Regulation of the Environment, Inc., slip op. at 6. The process and criteria used by the EPA to

determine whether to approve or disapprove state applications for approval of a hazardous waste management programs in lieu of a federal program is governed by 40 C.F.R. § 271.

B. The EPA Administrator shall take action on citizen suit petitions under RCRA § 7004, but action is not mandatory

RCRA § 7004 provides that any person may petition the EPA Administrator for the "promulgation, amendment, or repeal of any regulation" and that the Administrator "shall take action with respect to such petition and shall publish notice of such action in the Federal Register, together with the reasons therefore." 42 U.S.C. § 6974 (2006). However, use of the word "shall," instead of the word "must," indicates that Congress did not intend to require the Administrator to take action on citizen suit petitions. See Guiterrez de Martinez v. Lamagno, 515 U.S. 417, 432-433 n. 9 (1995), (discussing at length linguistic interpretations of "shall" and noting that "virtually every English-speaking jurisdiction has held that shall means may in some contexts.") Therefore, the Administrator is not required to take action on a citizen suit petition, though he may take action if he chooses.

C. RCRA does not explicitly provide relief for appealing EPA's inaction on citizen suit petitions

RCRA § 7004 explicitly provides jurisdiction for citizens to petition the Administrator, and allows for the Administrator to take action on these petitions if he chooses. Specifically, the Court of Appeals has jurisdiction to review EPA decisions granting or denying authorization and interim authorization, when decisions were brought about by citizen suit petitions. See Washington Dept. of Ecology v. U.S.E.P.A., 752 F.2d 1465, 1468 (9th Cir. 1985) (finding that RCRA "gives each Court of Appeals jurisdiction to review an EPA action granting or denying interim authorization to a state within the circuit"). See also Wyckoff Co. v. E.P.A., 796 F.2d 1197, 1201 (9th Cir. 1986).

RCRA does not explicitly provide jurisdiction for appealing inaction of the EPA. However, public policy considerations emphasizing the benefits of citizen suit petitions implicitly give the Court jurisdiction to force EPA to act on citizen suit petitions. See generally Sierra Club, 824 F. Supp. at 197-98; Lutz, 725 F. Supp. at 261-62.

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

"[D]istrict courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2006). Where plaintiffs have alleged violations of a federal statute, courts have determined original jurisdiction was available under 28 U.S.C. § 1331 . Winston v. Shell Oil Co., 861 F. Supp. 713, 715 (C.D. Ill. 1994); abrogated by Waldschmidt v. Amoco Oil Co., 924 F. Supp. 88 (C.D. Ill. 1996). In the present case, CARE's citizen suit petition concerns alleged inadequacies of New Union's hazardous waste program, a state administered program, not RCRA's federal hazardous waste program.

Additionally, traditional statutory interpretation contends that the specific governs over the general. See Green v. Bock Laundry Machine Co., 490 U.S. 504, 524-525 (1989). Whereas 28 U.S.C. § 1331 applies to all federal administrative agencies, RCRA § 7002 (a) (2) grants jurisdiction for citizen suits brought on behalf of RCRA and alleged state hazardous waste program violations.

III. EPA'S NON-ACTION ON CARE'S PETITION SHOULD NOT BE CONSIDERED A "CONSTRUCTIVE DENIAL" BECAUSE THIS DOCTRINE IS NOT APPLICABLE TO DISCRETIONARY ACTIONS; OR ACTIONS WHICH ARE NOT DELAYED UNREASONABLY

CARE asks this Court to consider EPA's inaction on the petition to withdraw New Union's hazardous waste program a "constructive denial" of the RCRA §3006(e) petition. See 42 U.S.C. § 6926(b). To support this position, CARE relies on Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984). In Scott, the court addressed whether the EPA had failed to perform a mandatory duty under the Clean Water Act ("CWA"). See 33 U.S.C. §§ 1251-1387. Similar to RCRA, the CWA implements a cooperative federalist system, where the states have the primary authority to set a Total Maximum Daily Load ("TMDL") for pollutants. However, in contrast to RCRA, "[n]either states nor the EPA showed much inclination to start – let alone finish – the TMDL process. As a result, most of the existing TMDLs are the result of citizen-suit legislation against both states and the EPA." Robin Kundis Craig, Environmental Law in Context: Cases and Materials 846 (2d ed., 2008).

The "constructive" action theory raised by CARE arises out of Scott. 741 F.2d at 998. The Scott court ruled that the EPA's inaction was "tantamount of approval of state decisions." Id. The CWA citizen suit statute at issue in Scott provides for suits "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary." 33 U.S.C. § 1365 (a) (2) (2006). Additionally, the court emphasized that the EPA has no duty to act before a deadline set by the statute, but that the EPA's egregious failure to act over years constituted an "excuse" not to act. Scott, 741 F.2d at 998. The court ruled that "EPA's inaction [was] tantamount to approval of state decisions that TMDL's are unneeded." Id.

Courts have construed the "constructive submission doctrine" narrowly. Hayes, 264 F.3d at 1024. Hayes similarly relied on the citizen suit provision in the CWA. Id. at 1022-24. However, the court did not find that the EPA's delay was a constructive acceptance of "no TMDLs" because the state was in the process of promulgating them. Id. at 1023. "The constructive-submission theory turns on whether the state has determined not to submit a required TMDL . . .." Id. (citing Scott, at 997). Additionally, courts have found the constructive submission theory inappropriate even when the TMDLs were inadequate. Sierra Club v. Hankinson, 939 F. Supp. 865, 872 n. 6 (N.D. Ga. 1996) (holding that the proper analysis would be under the Administrative Procedure Act).

The moving party has the duty to prove that the EPA has a non-discretionary duty to perform. San Francisco BayKeeper v. Whitman, 297 F.3d 877, 881 (9th Cir. 2002). If CARE fails to meet these burdens and, thus the duty is found to be discretionary, this court would not have subject matter jurisdiction over the claim because the discretion would rest with the EPA. Natural Resources Defense Council, Inc. v. Fox, 30 F.Supp.2d 369, 375 (S.D.N.Y. 1998). Here, CARE has failed to show that §7004 confers a mandatory action by EPA on a petition. RCRA § 7004 states that the "[a]dministrator shall take action with respect to such petition." 42 U.S.C. § 6974 (2006). There is scant case law interpreting the meaning of "shall" within RCRA, however the court below noted: "shall does not necessarily indicate a mandatory action." CARE, slip op. at 6 (citing Guiterrez de Martinez, 515 U.S. at 432-33 n. 9 (1995)).

This ambiguity surrounding the construction of the statute should be resolved in the EPA's favor because of the undisputed facts in the case. The petition was submitted by CARE over one year before this action began. However, there has been no showing that this constitutes

"undue delay" that the doctrine rests on. Additionally, CARE must show that the EPA has "clearly and unambiguously" decided not to act. Hayes, 264 F.3d at 1024.

CARE has failed to meet the hurdles to the "constructive" approval doctrine, and as such the EPA's inaction should not be subject to judicial review.

IV. SHOULD THIS COURT FIND THAT THE EPA CONSTRUCTIVELY DENIED CARE'S PETITION: THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT TO BEGIN REVIEW OF NEW UNION'S HAZARDOUS WASTE PROGRAM

Should this Court agree with CARE and rule that the "constructive submission doctrine" applies to non-discretionary actions under RCRA, the Court should remand the case to the district court in order to begin proceedings consistent with a normally denied petition for review.

The application of the "constructive submission doctrine" to citizen petitions under RCRA should follow the procedure outlined in Scott. In Scott, the Court of Appeals for the Seventh Circuit remanded to the district court for further proceedings. Scott, 741 F.2d at 998. The "constructive submission doctrine" would simply force upon the EPA "the duty to either approve or disapprove the 'submission.'" Id. at 997. Should the EPA "approve" of CARE's petition, the EPA would then proceed to withdraw New Union's hazardous waste program. However, if the EPA "disapproves" of CARE's petition, it would be considered a review of an action modifying a permit, 42 U.S.C. § 6976(b), and, therefore, subject to judicial review in the Court of Appeals under the Administrative Procedure Act. U.S. Brewer's Ass'n, Inc. v. Environmental Protection Agency, 600 F.2d 974, 978 (D.C. Cir. 1979) (citing Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975)).

Therefore, should the Court follow the doctrine of Scott, it follows that the Court should also follow the procedure of Scott. Additionally, it accords with the reality of the situation here,

to allow the EPA to “actually” review the New Union features rather than “constructively” review them before allowing this Court to review these actions.

V. THE EPA MAY CONTINUE TO AUTHORIZE NEW UNION’S PROGRAM BECAUSE NEW UNION'S RESOURCES AND PERFORMANCE ARE SUFFICIENT

The Resource Conservation and Recovery Act (RCRA) of 1976, which amended the Solid Waste Disposal Act, was a statute created by Congress with the goal to "promote the protection of health and environment and to conserve valuable material and energy resources." 42 U.S.C. § 6902(a) (2006). Objectives to accomplish these goals include "establishing a viable [f]ederal-[s]tate partnership to carry out the purposes of this Act and insuring that the Administrator will . . . give a high priority to assisting and cooperating with [s]tates in obtaining full authorization of [s]tate programs," 42 U.S.C. § 6902 (a) (7) (2006), and by "providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems." 42 U.S.C. § 6902 (a) (8) (2006). The statute emphasizes the enforcement of hazardous waste programs by individual states (in lieu of the federal program) that have undergone approval by the EPA.

A. RCRA allows the EPA to authorize individual state hazardous waste programs in lieu of, but equivalent to, the federal waste management program

Enforcement by individual states is accomplished by RCRA § 3006 (b), which requires that the Administrator authorize a state's hazardous waste program within ninety days of the state's application unless the Administrator determines that the state program is "not equivalent to the [f]ederal program," that the program is "not consistent with the [f]ederal or [s]tate programs applicable in other [s]tates," or that the program does "not provide adequate enforcement of compliance with the requirements of [RCRA]." 42 U.S.C. § 6926 (b) (2006). Once the Administrator authorizes a state's hazardous waste program, the state "is then

authorized to regulate hazardous waste. State actions taken under the authorized program have the same force and effect as actions taken by the EPA" as provided by RCRA § 3006 (d). Hermes Consol., Inc. v. People, 849 P.2d 1302, 1305-06 (Wyo. 1993) (citing to 42 U.S.C. § 6926 (d)).

However, authorization of a state plan is not irrevocable. RCRA § 3006 (e) provides that the Administrator "shall withdraw authorization of such program and establish a Federal program pursuant to this subtitle" if the Administrator determines, after a public hearing, that the state "is not administering and enforcing a program authorized . . . in accordance [with RCRA requirements]." 42 U.S.C. 6926 (e) (2006). Additionally, even after the Administrator has authorized the state to administer and enforce its own hazardous waste program, the EPA retains its "full enforcement authority, although authorized states have primary enforcement responsibility." Florida Power & Light Co. v. E.P.A., 145 F.3d 1414, 1417 (D.C. Cir. 1998) (citing to Waste Management of Illinois, Inc. v. EPA, 945 F.2d 419, 420 (D.C. Cir. 1991)). See also E.P.A. v. Envtl. Waste Control, Inc., 698 F. Supp. 1422 (N.D. Ind. 1988). Additionally, state law will be preempted when the "remedies sought by the state conflict with the remedies ordered by the federal government." Hermes Consol., Inc. v. Wyoming, 849 P.2d 1302, 1307 (Wyo. 1993) (finding that "Congress did not intend to occupy the entire field" of hazardous waste regulation, therefore, pre-emption will occur only if "state law conflicts with the federal law and complying with both would be impossible."); see also LaFarge Corp. v. Campbell, 813 F. Supp. 501, 508 (W.D. Tex. 1993) (finding that state law is preempted to the "extent it actually conflicts with federal law") (citing Hillsborough County, Fla. v. Auto. Med. Labs, 471 U.S. 707, 713 (1985)).

In the present case, New Union's hazardous waste program has not been preempted because New Union's program does not conflict with RCRA. Rather, CARE alleges that New Union's shortage of resources and manpower at the DEP has led to lackluster implementation and enforcement of New Union's hazardous waste program. Therefore, CARE argues that because New Union no longer has the resources to maintain the enforcement undertaken in 1986 when New Union's program was authorized, EPA must withdraw its approval of New Union's program because it fails to meet RCRA's approval criteria. State hazardous waste programs are required to implement federal RCRA criteria; therefore, state standards are "effective pursuant to RCRA." Ashoff v. City of Ukiah, 130 F.3d 409, 412 (9th Cir. 1997) (finding that citizen suits may not be commenced when "a state elects to create more stringent standards, nothing in RCRA gives them legal effect. Their legal effect flows from state law").

B. Regulatory requirements under RCRA are superseded by state authorized hazardous waste programs

As stated previously, authorized state hazardous waste plans operate in lieu of RCRA. See also Williamsburgh-Around-the-Bridge Block Association, et al. v. Jorling, et al., No. 89-CV-471, slip op. at 10, 1989 WL 98631 (N.D.N.Y. August 21, 1989) (also found in Appendix at B), (stating "[b]y their own terms, the hazardous waste regulations promulgated under RCRA applicable to owners and operators do not apply in states with their own []hazardous waste programs"). Therefore, the "regulatory requirements under RCRA are superseded by state regulations in those states having EPA authorization." Dague v. City of Burlington, 732 F. Supp. 458, 465 (D. Vt. 1989). See also Thompson v. Thomas, 680 F.Supp. 1, 3 (D.D.C.1987) (finding that when the EPA authorized Wisconsin to enforce its own hazardous waste program, federal regulations were superseded by the state regulations. Therefore, "alleged violations by 3M of the [state] regulations should be brought in the [] state court pursuant to [state] law.").

When a state seeks have its environmental program operate in lieu of the federal program, the attorney general of that state "must certify to the EPA that the state program is consistent with the federal program." See Chem. Waste Mgmt., Inc. v. Templet, 770 F. Supp. 1142, 1151 (M.D. La. 1991) aff'd, 967 F.2d 1058 (5th Cir. 1992), certiorari denied 506 U.S. 1080; see also 40 CFR § 271.7. Generally, when the EPA grants final authorization for a state to administer its own hazardous waste management program, there is an implicit determination that the state's program was equivalent to RCRA. See Dague, 732 F. Supp. at 465 (finding that the "EPA implicitly determined that Vermont's program was equivalent to the federal program, consistent with federal and state programs in other states, and adequate in its enforcement mechanisms" when it granted final authorization of Vermont's program).

Additionally, a question of the sufficiency of alleged evidence has been used to deny citizen suits. See Families Concerned About Nerve Gas Incineration v. U.S. Dept. of Army, 380 F. Supp. 2d 1233 (N.D. Ala. 2005) (finding that new evidence alleged by citizens after completion of permitting process by EPA for an Army chemical weapon incinerator was not sufficient to establish failure of compliance with the permit). In the present case, all parties agreed with facts and data provided by CARE. However, this new data does not infer that New Union is no longer in compliance with RCRA; rather, it shows that there has been a change in the state's circumstances over the years.

C. If New Union's program is insufficient under RCRA, the EPA has discretion to take actions other than withdrawing approval of the program

Courts have held that the EPA's withdrawal of an authorized state hazardous waste program is an "'extreme' and 'drastic' step that requires the EPA to establish a federal program to replace the cancelled state program." U.S. v. Power Eng'g Co., 303 F.3d 1232, 1238-39 (10th Cir. 2002), certiorari denied 538 U.S. 1012 (citing to Waste Mgmt., Inc. v. EPA, 714 F. Supp.

340, 341 (N.D.Ill.1989)). In Power Eng'g Co., the court found that "nothing in the text of the [RCRA] statute suggests [withdrawal] is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement." Power Eng'g Co., 303 F.3d at 1232.

Under RCRA, if the EPA Administrator determines, after public hearing, that a state is not in compliance, he shall notify the state. 42 U.S.C. § 6926(e) (2006). If the state does not take corrective action within a reasonable time after notification, the Administrator shall withdraw authorization. Id. Additionally, under RCRA, the Administrator may order the commencement of withdrawal proceedings on his own initiative or in response to a petition from an interested person. 40 C.F.R. § 271.22(a). The Administrator may also choose to conduct an informal investigation of the allegation in the petition to determine whether a cause exists to commence withdrawal proceedings. Id.

Thus, the EPA is "only limited in that it must withdraw authorization after it has determined that the state is not in compliance." Texas Disposal Sys. Landfill Inc. v. U.S. E.P.A., 377 F. Appx. 406, 408 (5th Cir. 2010). See Pub. Citizen, Inc. v. EPA, 343 F.3d 449, 452 (5th Cir. 2003) (finding that the EPA correctly interpreted that the Clean Air Act gave it discretion to allow full approval of a state's clean air program once the state had adequately responded to deficiencies). In this case, the EPA has not determined that New Union's hazardous waste management program is not in compliance with RCRA. Rather, the EPA has decided not to respond to CARE's citizen suit petition alleging failures in compliance.

EPA authorization of a state's hazardous waste program has been described as "very much a one-way street that is granted but almost never withdrawn." 4 Envtl. L. (West) § 7:22. Additionally, because the EPA "retains some residual authorities to override repugnant [s]tate decisions " there is a "lower the reluctance to approve authorizations in the first place and to seek

retaliatory takebacks in the event of regrets." 4 Envtl. L. (West) § 7:22 (citing 40 C.F.R. § 271.19 (1990)).

VI. NEW UNION'S PRESENT FAILURE TO REGULATE RAILROAD HAZARDOUS WASTE FACILITIES DOES NOT REQUIRE THE EPA TO WITHDRAW ITS APPROVAL OF THE ENTIRE PROGRAM

In 2000, New Union's legislature enacted the Environmental Regulatory Adjustment Act ("ERAA") which amended the Railroad Regulation Act ("RRA"). The RRA had established a New Union Railroad Commission, which was responsible for regulating intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards. (Rec. doc. 4, for 2000 pp. 103-05.) The ERAA amended the RRA by transferring "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the Commission." (Rec. doc. 4 for 2000, pp. 103-105.) CARE argues that the EPA must withdraw its approval of New Union's program because, under the ERAA amendment, New Union no longer regulates all facilities regulated by RCRA.

The EPA has not yet withdrawn authorization of any state's hazardous waste program. However, in 1989 the EPA considered whether to withdraw its approval of North Carolina's hazardous waste program. 54 Fed.Reg. 15940 (April 20, 1989) (Order to Recommence Proceedings to Determine Whether to Withdraw Hazardous Waste Program Approval). After North Carolina enacted a statute requiring a "thousand-fold dilution of discharges from commercial hazardous waste treatment facilities into surface waters above public drinking water intakes," id, petitioners alleged that the statute made the state's hazardous waste program inconsistent with programs administered by other states and inconsistent with federal hazardous waste programs, therefore, making it ineligible for authorization under RCRA. The EPA concluded that it was not required to assess the alleged inconsistencies of the statute, and

declined to withdraw authorization. In Hazardous Waste Treatment Council v. Reilly, the United States Court of Appeals - District of Columbia Circuit reviewed the EPA's decision not to commence withdrawal proceedings and held that EPA's interpretations of its regulation was permissible. 938 F.2d 1390, 1392 (D.C. Cir. 1991). Therefore, the EPA is given considerable discretion when deciding whether to withdraw a state's hazardous waste program.

As previously discussed, public policy favors state hazardous waste regulation over federal regulation. Additionally, the EPA has been extremely cautious in withdrawing state waste disposal program authorization -- in fact; it has never withdrawn a state program under RCRA. See generally Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390, 1392 (D.C. Cir. 1991). Therefore, while the EPA may choose to withdraw authorization or take other corrective actions, the EPA is not required to withdraw entire authorization of New Union's entire hazardous waste program if only aspects of its program are inconsistent with the federal program. Rather, the EPA may choose to take corrective actions including inspection by the EPA of New Union's hazardous waste and railroad facilities. This would be consistent with past actions, in which the EPA inspected a number of facilities in New Union last year, and has promised to do so again this year. (Rec. doc. 4 for 2009, p. 23.)

VII. ERAA'S TREATMENT OF POLLUTANT X DOES NOT ADVERSELY AFFECT THE EQUIVALENCY OF THE STATE PROGRAM, IS NOT INCONSISTENT WITH THE FEDERAL OR OTHER APPROVED STATE PROGRAMS, AND DOES NOT VIOLATE THE COMMERCE CLAUSE

A. New Union's ERAA amendment regulating Pollutant X does not significantly impact its overall hazardous waste program

New Union's ERAA amendment concerning Pollutant X recognizes that Pollutant X is among the "most potent and toxic chemicals to public health and the environment" and recognizes that there are "presently no treatment or disposal facilities in New Union designed

and permitted to, or capable of, preventing exposure of persons or the environment to releases of Pollutant X." (Appendix A.) Therefore, the amendment requires facilities generating Pollutant X to submit plans minimizing generation and prohibits the DEP from issuing permits for the treatment, storage, and disposal of Pollutant X except for storage while awaiting transportation outside of the state. (Appendix A) (Rec. doc. 4 for 2000, pp. 105-107.)

As discussed previously, when only aspects of a state's program are inconsistent with the federal program, the EPA may choose to withdraw authorization or take other corrective actions but is not required to withdraw entire authorization of New Union's hazardous waste program.

B. New Union's ERAA amendment regulating Pollutant X does not violate the Commerce Clause

The Commerce Clause of the United States Constitution grants to Congress the power and authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Therefore, states are "limited in their ability to discriminate or place barriers against interstate and foreign commerce." Templet, 770 F. Supp. at 1147-48 (citing to Healy v. Beer Institute, Inc., 491 U.S. 324, 325 n. 1 (1989)). In National Solid Wastes Management Assoc. v. Alabama Department of Environmental Management, the Eleventh Circuit, relying on the Supreme Court's decision in City of Philadelphia v. New Jersey, "held that hazardous waste is an object of commerce and subject to the Commerce Clause." 910 F.2d 713, 719 (11th Cir.1990), cert. denied, 501 U.S. 1206 (1991)).

To test the validity of a statute under the Commerce Clause, the Supreme Court has approved the following test: "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the

putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). See LaFarge Corp. v. Campbell, 813 F. Supp. 501, 513 (W.D. Tex. 1993) (finding that a state statute prohibiting the burning of hazardous waste-derived fuel near a residential area does not violate the Commerce Clause because prohibition applied evenhandedly, had only an "incidental impact" on interstate commerce, and had a strong public interest to protect human health and safety).

In the present case, New Union's 2000 Environmental Regulatory Adjustment Act (the "ERAA") contained an amendment which stated that "[a]ny person may transport Pollutant X through or out of the state to a facility designed and permitted to treat or dispose of Pollutant X, provided, however, that such transport shall be as direct and fast as is reasonably possible, with no stops within the state except for emergencies and necessary refueling." (Rec. doc. 4 for 2000, pp. 105-107.) ERAA applies to all people transporting Pollutant X throughout the state. Additionally, ERAA has only an incidental impact on interstate commerce because it did not prohibit transportation; rather, it directed transportation "be as direct and fast as is reasonably possible." (Appendix at A.)

In Chemical Waste Management, Inc., the court held that statutes prohibiting treatment, storage and disposal facility authorized by the state from receiving hazardous waste generated outside of the United States were unconstitutional and invalid under the commerce clause. 770 F. Supp. 1142 (M.D. La. 1991) aff'd, 967 F.2d 1058 (5th Cir. 1992). In the present case, ERAA's amendment does not prohibit New Union from receiving shipments of Pollutant X generated out of state. Rather, to promote public health and safety, and because there are presently no treatment or disposal facilities in New Union capable of adequately and safely treating Pollutant X and because there are only nine treatment and disposal facilities in the entire country that have been

authorized by EPA, the ERAA amendment provides that transportation of Pollutant X within the state "shall be as direct and fast as is reasonably possible." (Rec. doc. 4 for 2000, pp. 105-107.)

Conclusion

For the foregoing reasons, Respondent-Appellee Lisa Jackson, Administrator of the Environmental Protection Agency, requests that this Court affirm the decision of the court below, granting summary judgment in favor of New Union regarding whether 28 U.S.C. § 1331 provides jurisdiction to the district court; and reverse the lower court's decision pursuant to RCRA § 7004 that the district court lacked jurisdiction to order the EPA to act on CARE's petition. Additionally, the EPA requests that this Court deny CARE's request to lift its action seeking judicial review of EPA's alleged constructive denial. If this Court accepts CARE's request to lift the stay, this Court should remand to the district court for proceedings under RCRA §§ 3006(e) and 7004. If this Court proceeds on the merits of CARE's challenge, and finds that New Union's program does not meet RCRA's criteria for a state program, the EPA requests that this Court give the EPA discretion to take remedial actions other than mandating that the EPA withdraw authorization of New Union's hazardous waste program.

Appendix

New Union's Amendment to the Hazardous Waste Program, included in the 2000 Environmental Regulatory Adjustment Act

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

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

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

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

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

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

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

1989 WL 98631
United States District Court, N.D. New York.

WILLIAMSBURGH-AROUND-THE BRIDGE BLOCK ASSOCIATION, Thomas Hameline, Thomas Ptacek and Peter Scibetta, Plaintiffs,
v.
Thomas C. JORLING, in his official capacity as Commissioner of the New York State Department of Environmental Conservation, George A. Danskin, in his official capacity as Chief Permit Administrator for the New York State Department of Environmental Conservation Administration, and Radiac Research Corporation, Defendants.

No. 89-CV-471.Aug. 21, 1989.

Attorneys and Law Firms

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Nixon, Hargrave, Devans & Doyle, Albany, N.Y., for defendant Radiac Research; Thomas West, of counsel.

Opinion

MEMORANDUM DECISION AND ORDER

McAVOY, District Judge.

***1** This action arises from the alleged unlawful issuance of a permit by New York State officials in violation of the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. § 6901 *et seq*. The plaintiffs seek declaratory and injunctive relief. The defendant Radiac Research Corporation ("Radiac") moves to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Radiac also moves to dismiss plaintiffs' second cause of action against the state defendants Thomas C. Jorling ("Commissioner"), in his official capacity as Commissioner of the New York State Department of Environmental Conservation ("DEC") and George A. Danskin, in his official capacity as Chief Permit Administrator for the New York State DEC, on the ground that the cause of action is barred by the eleventh amendment. Finally, Radiac argues alternatively that the Court should dismiss plaintiffs' complaint on abstention grounds. The state defendants, Commissioner and Chief Permit Administrator Danskin, also move to dismiss for lack of subject matter jurisdiction, and alternatively, on the ground that the court should abstain. The plaintiffs have cross-moved for summary judgment.

On August 14, 1989, the Court heard oral arguments on the motions at Utica, New York. At that time, the Court reserved decision. The preliminary issue before the Court was whether plaintiffs could properly bring an action against the Commissioner and Chief Permit Administrator of the DEC for issuing a permit in violation of RCRA. Although the case law on point is scarce, based upon consideration and review of the oral arguments, pleadings, memorandum of law, affidavits, and all papers submitted in support of and in opposition to this motion, the Court has determined that the complaint should be dismissed for lack of subject matter jurisdiction and failure to state a claim. The basis for the Court's decision will be discussed below.

FACTS

For the purposes of determining whether this Court has subject matter jurisdiction, and whether the amended complaint states a cause of action, the Court will look only at the amended complaint. In examining the amended complaint, the Court will assume that all the facts alleged are true. The amended complaint[1] states the following.

Plaintiff, Williamsburgh-Around-the-Bridge Block Association ("Association") is an unincorporated association of 200 residents of the Williamsburgh section of Brooklyn. The Association's purpose is to protect the health and safety of its members. (Amended Complaint ¶ 2). Members of the Association all reside in the vicinity of the hazardous waste storage facility ("warehouse") operated by defendant Radiac. The members are all adversely affected due to the threat of a fire or explosion at the warehouse, including the release of toxic gases which might infiltrate the members' homes. (Amended complaint ¶ 2). Plaintiffs Thomas Hameline, Thomas Ptacek and Peter Scibetta, all members of the Association, allege injury-in-fact because the operation of the warehouse diminishes the market value of their residences, and presents a continuing threat to their health and safety, and the environment in which they live. (Amended complaint ¶ 3, 4, 5)

***2** Radiac operates a hazardous waste storage facility in a warehouse located at 33 South First Street, in the Williamsburgh section of Brooklyn, N.Y. (Amended Complaint ¶ 10). Hazardous wastes, including ignitable and reactive wastes, are shipped to the warehouse temporarily, until there is enough accrued to ship the wastes to a permanent disposal site or a waste reclamation center. (Amended Complaint ¶ 10). The warehouse is

located in a heavily traveled, densely populated area, with a residential population of over 25,000 in the surrounding half-mile. (Amended Complaint ¶ 12).

The warehouse is a facility for storage of hazardous wastes within the meaning of RCRA and the regulations promulgated thereunder. 42 U.S.C. § 6903; 40 C.F.R. § 260.10. As such, Radiac must secure a permit. 42 U.S.C. § 6925; 40 C.F.R. Part 264. (Amended Complaint ¶ 13).

New York State has established its own program to regulate the treatment, storage and disposal of hazardous waste, and has been authorized by the EPA to enforce its state hazardous management waste programs in lieu of the federal program. (Amended Complaint ¶ 14) (6 N.Y.C.R.R. Part 373; 42 U.S.C. § 6926[2]) However, a state hazardous waste program authorized pursuant to § 6926 must be equivalent to or at least as stringent as the federal hazardous waste program. (Amended Complaint ¶ 15) (40 C.F.R. Parts 264 and 266; 42 U.S.C. § 6926(b); 40 C.F.R. § 271.12[3]).

40 C.F.R. § 264.176[4] requires that containers holding ignitable or reactive waste and stored in a hazardous waste storage facility be located at least 50 feet from the facility's property line. There are no variances from this requirement provided for in Part 264 or 266. (Amended Complaint ¶ 16). The warehouse measures 35 feet in width and 100 feet in length. The warehouse fronts a street, with the sides perpendicular to the street. Both the side and the back wall of the warehouse adjoin other buildings. Due to the location of the warehouse, no wastes can be stored in compliance with the fifty-foot buffer zone requirement of 40 C.F.R. § 264.176. (Amended Complaint ¶ 17).

On December 14, 1988, defendant Commissioner issued a decision authorizing the Region 2 DEC Department staff to issue a permit to operate the warehouse. The Commissioner's decision granted Radiac a variance from the fifty-foot buffer zone requirement imposed by 40 C.F.R. § 264.176. (Amended Complaint ¶ 18, Exhibit A). Defendant Danskin, Chief Permit Administrator of the DEC, issued Radiac a permit to operate its warehouse on March 23, 1989, pursuant to the Commissioner's decision. (Amended Complaint ¶ 19).

As a first cause of action, the complaint alleges that the Radiac permit violates the requirements of 42 U.S.C. § 6926(b) and 40 C.F.R. § 271.12 because it authorizes operation of a hazardous waste storage facility in violation of the fifty-foot buffer zone requirement of 40 C.F.R. § 264.176. (Amended Complaint ¶ 20, 21).

***3** As a second cause of action, the complaint alleges that the New York State regulations governing hazardous waste management facilities require that containers holding ignitable or reactive waste and stored in a hazardous waste storage facility must be located at least fifty feet from the facility's property line. (Amended Complaint ¶ 23); 6 N.Y.C.R.R. § 373-2.9(g)[5]. A variance may be permitted from requirements imposed on a hazardous waste storage facility, but the Commissioner may not grant any variance which would result in regulatory controls less stringent than those in the RCRA-delegated program. (Amended Complaint ¶ 24); 6 N.Y.C.R.R. § 373-1.1(e)[6]). In granting a variance from the fifty-foot buffer zone requirement, the Commissioner erroneously concluded that granting the variance would not result in regulatory controls less stringent than those imposed by RCRA. (Amended Complaint ¶ 25).

For relief, plaintiffs seek (1) a declaration that the permit issued to Radiac violates 40 C.F.R. § 271.12(2) a permanent injunction directing the Commissioner and Mr. Danskin to revoke the permit issued to Radiac (3) an award of attorneys' fees and reasonable costs (4) and other and further relief the court may deem appropriate.

DISCUSSION

The preliminary issue to be determined by this Court is whether plaintiffs can assert a cause of action under federal law against New York State officials for issuing a permit to a private individual allegedly in violation of RCRA, where New York State has opted to administer its own EPA approved program in lieu of the Federal program. The Court holds that plaintiffs cannot assert such a cause of action under federal law. The Court's decision rests on two basis. First, the Court holds that where a state is authorized by the EPA, under RCRA, to administer its own program, the state program operates "in lieu" of the federal program. Accordingly, any cause of action plaintiffs' may have against state officials arises under state law, not federal law. Second, the Court holds that 42 U.S.C. § 6972(a)(1)(A) does not apply to state officials who issue permits in violation of RCRA under a state authorized program.

In examining the question before it, the Court notes that the plaintiffs commenced the action alleging subject matter jurisdiction under 28 U.S.C. § 1331, granting jurisdiction to cases arising under federal laws, and 42 U.S.C. § 6972(a)(1)(A)[7], a section of the citizens' suit provision of RCRA.

Defendants contend that because the EPA has delegated its responsibilities under RCRA to the State of New York under 42 U.S.C. § 6926(b) (*see supra*, ftnt. 2), the state program operates "in lieu of" the federal program. The defendants argue that neither the provisions of RCRA which plaintiffs claim were violated or the citizens suit provision of RCRA, 42 U.S.C. § 6972(a), have force or effect in New York State. Because the disputed permit was issued under state law, the defendants insist the resolution depends solely on state law. The Court agrees with the defendants. Accordingly, the complaint must be dismissed for lack of a federal question.

***4** It is well settled that the "starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 108 S.Ct. 376, 381 (1987) (citations omitted). In determining whether the authorized state program applies instead of the federal program, the Court looks to the language of the statutory scheme that Congress established when it enacted RCRA.

When Congress enacted RCRA, it created a regulatory program for the management of hazardous wastes. Congress also envisioned that states would carry the main burden of regulating hazardous wastes. 42 U.S.C. § 6926. Under 42 U.S.C. § 6926, a state, although not required, may enact its own hazardous waste program. Before a state program is approved by the EPA Administrator, the Administrator must find that the State program is equivalent to the federal program under RCRA, consistent with the Federal or State programs applicable in other States, and that the state has adequate enforcement mechanisms to review compliance with the requirements. 42 U.S.C. § 6926(b). Review of the Administrator's decisions with respect to granting, denying, or withdrawing authorization for state programs under § 6926 rests exclusively with the Circuit Court of Appeals. 42 U.S.C. § 6976(b).

Once authorized by the EPA, an approved state is entitled to carry out its own program, "in lieu" of the federal program, and to issue and enforce permits for the storage, treatment, or disposal of hazardous wastes. 42 U.S.C. § 6926(b). Approved states are authorized to "administer and enforce *their* hazardous waste program *in lieu* of the Federal program ..." 40 C.F.R. § 271.3(b)(1). It is clear that the state is empowered to enforce state, not federal law, as approved state programs operate "in lieu" of the federal programs. *See* 42 U.S.C. § 6926(b). Owners and operators in states with approved RCRA programs are required to follow the state program, not the federal program. By their own terms, the hazardous waste regulations promulgated under RCRA applicable to owners and operators do not apply in states with their own RCRA hazardous waste program.[8] 40 C.F.R. § 264.1(f).
In states where there is no authorized state program in place, the Administrator is entitled to issue orders assessing civil penalties, to require immediate compliance, or to commence an action in district court for appropriate relief. 42 U.S.C. § 6927(a)(1). If the state has an authorized state program however, although the EPA has enforcement powers, the Administrator is required to first notify the State in which the violation occurred prior to issuing an order or commencing a civil action. 42 U.S.C. § 6928(a)(2). Additionally, the Administrator may review permits issued under an authorized state program, to ensure that they are in compliance with the approved state program. 40 C.F.R. § 271.19. In the event that a state fails to issue permits that meet the requirements of RCRA, the EPA Administrator is authorized to withdraw program approval. 42 U.S.C. § 6926(e).[9]

***5** On March 28, 1986 the EPA granted New York final authorization to implement its own hazardous waste management program, having found that New York's program met all of the statutory and regulatory requirements established by RCRA. 51 F.R. 17737. Both the 50-foot buffer requirement of 6 NYCRR § 373-2.9(g) (*see supra*, ftnt. 5) and the variance provision found in 6 N.Y.C.R.R. § 373-1.1(3) (*see supra*, ftnt. 6) were part of the state program which the EPA approved and authorized to operate in "in lieu" of the Federal program in 1986.
In *Thompson v. Thomas*, 680 F.Supp. 1 (D.D.C.1987), pointed to by defendants, the district court issued a very brief decision, dismissing plaintiffs' RCRA and CERCLA suit against the EPA, Administrator, and a private defendant, 3M. The *Thompson* court held that alleged violations by 3M of RCRA regulations were superceded by state regulations, as the EPA authorized Wisconsin to enforce its own hazardous waste program "in lieu" of the federal program. *Id.* at 3. Accordingly, the district court dismissed the claims against 3M under RCRA, finding that the alleged violations of Wisconsin law should be brought in state court. *Id.*[10]

Similarly, the trial court in *Luckie v. Gorsuch* 13 ELR 20406 (D.Ariz.1983) dismissed a claim against a state official under RCRA, where the plaintiff claimed jurisdiction under 42 U.S.C. §§ 6972(a)(1) and 6972(a)(2), for the alleged improper handling of an asbestos dump. The *Luckie* court dismissed plaintiffs claim against the state official under 6972(a)(2), finding that there was no implicit federal cause of action to review state decisions of a permit application. The trial court first examined the relationship between the state and the EPA. The court noted that the state was not delegated authority to enforce RCRA directly, as the EPA was. The state could take over the EPA's function, if it adopted a state implementation plan approved by the EPA. The court concluded that as long as the state had its own plan, its responsibilities to enforce the program stem not from RCRA, but from state law. RCRA merely gives the state the authority to regulate waste through its own approved program. If the state fails to enforce its own program, the EPA is required to notify the state, and if the situation is not corrected, the EPA Administrator is "[s]hall withdraw authorization of such a program and establish a Federal Program ..." 42 U.S.C. § 6926(e). As the *Luckie* court noted, the language of the section creates a mandatory duty on the part of the Administrator, enforceable under § 6972(a)(2).

The *Luckie* court dismissed the RCRA claims, finding that plaintiffs must rely on other law than the RCRA citizen's suit provision. The *Luckie* court concluded that plaintiffs had adequate remedies to enforce the state law, by either suing the state under state law, or suing to require the EPA to either notify the state of its failure to implement the state plan, or withdraw EPA approval. *Id.*
***6** *District of Columbia v. Schramm*, 631 F.2d 854 (D.C.Cir.1980) is also persuasive. In *Schramm*, the

plaintiff sued the EPA, the State of Maryland, and their respective officials, to revoke the operating permit of an advanced wastewater treatment plant that discharged effluent into a creek. *Id.* at 856. The suit was brought under the Water Pollution Control Act Amendments of 1972, ("Clean Water Act"). *Id.* (citing 33 U.S.C. § 1251-1376). Similar to RCRA, a state, such as Maryland, with a program approved by the EPA could assume responsibility for licensing under the National Pollution Discharge Elimination System ("NPDES"), which required anyone who discharged effluent to obtain a permit. *Id.*11

The plaintiff challenged the EPA's12 decision not to veto the NPDES permit, and also sought review of the State's decision to issue the NPDES permit. The *Schramm* court dismissed the plaintiff's complaint, concluding that there was no implied federal cause of action. *Id.*

The court analyzed the legislative history, and determined that in authorizing the creation of state NPDES permit programs, Congress made clear that state permits would be issued under State law and would be state, not federal actions. *Id.* Moreover, before authorizing states to issue permits, Congress required states to create adequate enforcement mechanisms for administering its own program, which included enactment of necessary laws. *Id.* The *Schramm* court concluded that requiring states to create sufficient legal rights and remedies to deal with violations of state permits, Congress must have intended that states apply their own law in deciding controversies. *Id.* Accordingly, the *Schramm* court held that the complaint should be dismissed against the state insofar as it dealt with the states's issuance of a NPDES permit.

This Court, after reviewing the statutory scheme of RCRA, is convinced that *Thompson, Luckie,* and *Schramm,* should be followed. In enacting RCRA, Congress intended that states with EPA authorized programs administer their own programs in lieu of the federal program. The statutory provisions of RCRA require the states to have adequate enforcement mechanisms in place before they obtain EPA authorization. After a state program is reviewed and approved by the EPA, the states administer and enforce their own programs, which arise under state, not federal law. If a state fails to implement its program in a manner that is consistent with the RCRA requirements, the EPA may withdraw authorization of the program. Based upon the extensive statutory scheme which clearly spells out the requirements of the state program, Congress's mandate that authorized state programs operate *in lieu* of federal programs, and the power of the EPA Administrator to withdraw authorization from states who fail to satisfy RCRA requirements, the Court holds that state law operates *in lieu* of federal law, where a state has an authorized program under RCRA. Accordingly, the Court finds that plaintiffs' complaint should be dismissed for lack of subject matter jurisdiction. The plaintiffs cause of action arises under state law, or in the alternative, plaintiffs can petition the EPA to notify the state that it is not complying with the federal program.

***7** In addition to finding that plaintiffs cause of action arises under federal law, not state law, the Court also rejects plaintiffs' contention that a section of RCRA's citizen suit provision provides an express cause of action for review of permit decisions made by state officials authorized to administer the state's hazardous waste program. (*see supra,* ftnt. 7). Plaintiffs argue that the plain meaning of 42 U.S.C. § 6972(a)(1)(A) provides an express cause of action in this case, and therefore, there is no need for the Court to look for an implied right. (*See supra,* ftnt 7). Plaintiffs point to the language that states that "any person may commence a civil action ... against any person who is alleged to be in violation of any regulation [or] requirement.... which has become effective pursuant to [RCRA] ..." 42 U.S.C. § 6972(a)(1)(A). Plaintiffs argue that the state defendants have issued a permit allowing Radiac to store ignitable reactive wastes, even though the wastes are not at least fifty feet from its facility's property line. Plaintiffs claim that if true, the allegations establish violations of: 42 U.S.C. § 6926(b), 40 C.F.R. § 271.12, 40 C.F.R. § 271.1(g), 40 C.F.R. § 264.176 (*See supra,* ftnt. 2, 3, 4). Plaintiffs contend that the statute specifically authorizes a suit for federal court review of a state agency permit decision.

After analyzing the statutory language of 42 U.S.C. § 6972(a), the Court does not find that plaintiffs' argument is persuasive. The language of § 6972(a)(1)(A) states that a suit may be brought against a person "who is alleged *to be* in violation ...". That language indicates that Congress intended the statute to apply to owners or operators of hazardous waste facilities that were operated *in violation* of RCRA. In *Luckie v. Gorsuch,* 13 ELR 20406 (D.Ariz.1983) the trial court dismissed a claim against a state official under § 6972(a)(1), for the state's alleged improper handling of an asbestos dump. The *Luckie* court held that in order for a state to be liable under § 6972(a)(1) the state must be the "instrumentality discharging the pollution." *Id.* (*citing O'Leary v. Moyer's Landfill, Inc.,* 523 F.Supp. 642 (E.D.Pa.1981) and *Love v. New York State Department of Environmental Conservation,* 529 F.Supp. 832 (S.D.N.Y.1981)). This Court agrees with the *Luckie* court, that in order for a state to be liable under § 6972(a)(1)(A), it must be an instrumentality involved in the handling of the hazardous wastes.

The Court's determination that § 6972(a)(1)(A) does not apply to state officials who issue permits in violation of RCRA is strengthened by the inclusion of § 6972(a)(2). § 6972(a)(2) specifically allows a suit against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under the chapter which is not discretionary. If § 6972(a)(1)(A), which specifically allows a suit against the United States,

created a cause of action against state or federal officials who issued permits, inclusion of § 6972(a)(2) would have been superfluous. The right to sue the Administrator would have already been encompassed by § 6972(a)(1)(A). Clearly, § 6972(a)(1)(A) does not encompass officials, federal or state, who issue permits. The Court holds that 42 U.S.C. § 6972(a)(1)(A) does not authorize a citizen suit against state officials who issue permits allegedly in violation of federal regulations. IT IS HEREBY ORDERED that plaintiffs' amended complaint is dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

1 Plaintiffs have amended their complaint pursuant to Rule 15(a) as of right.
Radiac originally moved to dismiss on the ground that plaintiffs' original complaint did not allege that plaintiffs had suffered any injury as a result of the acts complained of, or that any remedy granted by this Court would alleviate such injury. While Radiac was correct regarding plaintiffs' original complaint, plaintiffs amended complaint corrects any defects. The amended complaint alleges injury-in-fact, by decreased property values, and continuing health and safety dangers, sufficient to confer standing.
At oral argument on August 14, 1989, defendant Radiac conceded that plaintiffs' amended complaint was sufficient with respect to allegations of injury-in-fact to confer standing.

2 42 U.S.C. § 6926(b) provides in relevant part:
Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require for authorization of such program.... Such State is authorized to carry out such program in lieu of the Federal program under this Subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste ...

3 Part 271 is entitled "Requirements for Authorization of State Hazardous Waste Programs".
§ 271.12 is entitled "Requirements for hazardous waste management facilities." The preamble to the sections states "[t]he State shall have standards for hazardous waste management facilities which are equivalent to 40 CFR Parts 264 and 266".

4 § 264.176 states as follows:
§ 264.176 Special requirements for ignitable or reactive waste.
Containers holding ignitable or reactive waste must be located at least 15 meters (50 feet) from the facility's property line.

5 6 N.Y.C.R.R. § 373-2.9(g) provides:
Special requirements for ignitable or reactive waste. Containers holding ignitable or reactive waste must be located at least 15 meters (50 feet) from the facility's property line.

6 The regulation governing granting of variances, 6 N.Y.C.R.R. § 373-1.1(e) provides as follows:
(e) Variances. The department may, upon written application from any person who is subject to this Part, grant a variance from one or more specific provisions of this Part under the following conditions:
(1) Any application for a variance must:
(i) identify the specific provisions of this Part form which a variance is sought;
(ii) demonstrate that compliance with the identified provisions would, on the basis of conditions unique and peculiar to the applicant's particular situation, tend to impose a substantial financial, technological or safety burden of the applicant or the public; and
(iii) demonstrate that the proposed activity will have no significant adverse impact on the public health, safety or welfare, the environment or natural resources.
(2) The commissioner will not grant any variance which would result in regulatory controls less stringent than those in the RCRA-delegated program.
(3) In granting any variance, the commissioner may impose specific conditions necessary to assure that the subject activity will have no significant adverse impact on the public health, safety or welfare, the environment or natural resources.

7 42 U.S.C. § 6972(a), which is also referred to as RCRA Section 7002(a)(1)(a), states the following: § 6972. Citizens suits
(a) In general
Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf-
(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

8 40 C.F.R. § 264.1 states in relevant part as follows: §

264.1 Purpose, scope and applicability.

(b) The *standards in this part apply to owners and operators* of all facilities which treat, store, or dispose of hazardous waste, except as specifically provided otherwise in this part or Part 261 of this chapter.

(f) The *requirements of this part do not apply to a person who treats, stores, or disposes of hazardous waste in a State with a RCRA hazardous waste program* authorized under Subpart A of Part 271 of this chapter or in a State authorized under Subpart B of Part 271 of this chapter, or in a State authorized under Subpart B of Part 271 of this chapter for the component or components of Phase II interim authorization which correspond the person's treatment, storage or disposal processes; ...

9 40 C.F.R. § 271.22 Criteria for withdrawing approval of State programs.
(a) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this subpart, and the State fails to take corrective action. Such circumstances include the following:

(2) When the operation of the State program fails to comply with the requirements of this part, including:

(ii) Repeated issuance of permits which do not conform to the requirements of this part; ...

10 The district court's opinion unfortunately does not discuss the basis for its opinion. The court merely states:
RCRA allows any state to administer and enforce a hazardous waste program, provided it meets the minimum requirements of RCRA including the federal hazardous waste regulations promulgated under the ACT. The EPA has authorized the State of Wisconsin to administer and enforce its own hazardous waste program in lieu of the federal program dealing with hazardous wastes. Thus, the violations which the plaintiff alleges 3M has committed under the federal regulations promulgated under RCRA have been superseded in Wisconsin by the state regulations. Therefore, the Court concludes that the alleged violations by 3M of the Wisconsin regulations should be brought in the Wisconsin state courts pursuant to Wisconsin law.
Thompson, 680 F.Supp. at 3.

11 The Clean Water Act also has a citizen's suit provision, though the language is not as broad as 42 U.S.C. § 6972(a) (*See supra,* ftnt. 9). The citizen's suit provision provides: 33 U.S.C. § 1365
(a) Authorization; jurisdiction
Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf
(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

12 Similar to RCRA, 42 U.S.C. § 6926(e), after a public hearing, the EPA may withdraw its approval of a state's NPDES program that does not comply with federal law. 33 U.S.C. § 1342(c)(3).

Parallel Citations

30 ERC 1188, 58 USLW 2163

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