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David Sive Award for Best Brief Overall

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TWENTY-THIRD ANNUAL PACE UNIVERSITY LAW SCHOOL NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

David Sive Award for Best Brief Overall*

Respondent-Appellee-Cross-Appellant

UNIVERSITY OF PITTSBURGH SCHOOL OF LAW
MEGAN COLLELO, LAUREN BURGE & MARIELISE FRAIOLI

C.A. No. 18-2010 and C.A. No. 400-2010
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.,
Petitioner-Appellant-Cross-Appellee,
v.
LISA JACKSON, ADMINISTRATOR,
United States Environmental Protection Agency,
Respondent-Appellee-Cross-Appellant,
v.
STATE OF NEW UNION,
Intervenor-Appellee-Cross-Appellant.

On Appeal from the United States District Court for the District of New Union

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

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

JURISDICTIONAL STATEMENT

Jurisdiction Below

The district court had jurisdiction pursuant to Section 7002(a) of RCRA and 28 U.S.C. § 1331 (2006). In dismissing the Complaint, the district court found that it lacked subject matter jurisdiction. This appeal seeks review of that decision.

Jurisdiction on Appeal

On June 2, 2010, the district court granted New Union's motion for summary judgment, and entered a judgment that "CARE's action is dismissed." Therefore, the district court's order is a final decision, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

This appeal presents the following issues:

Whether RCRA § 7002(a)(2) provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004.

Whether 28 U.S.C. § 1331 provides jurisdiction for district courts 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).

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

Assuming the answer to Issue I and Issues II and/or III is positive, whether this Court should lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions, or should remand the case to the lower court to order

EPA to initiate and complete proceedings to consider withdrawal of New Union's hazardous waste program.

Assuming this Court proceeds to the merits of CARE's challenge, whether EPA must withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria.

Assuming this Court proceeds to the merits of CARE's challenge, whether EPA must withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act effectively withdraws railroad hazardous waste facilities from regulation.

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

STATEMENT OF THE CASE

Procedural Background

Citizen Advocates for Regulation and the Environment (CARE) filed a citizen's suit in the United States District Court for the District of New Union on January 4, 2010 seeking an injunction requiring the U.S. Environmental Protection Agency (EPA) to either act on their pending petition or, alternatively, for the court to review an alleged constructive denial of the petition by EPA. Soon after the filing, New Union successfully obtained status as an intervenor in accordance with Rule 24 in the case before the district court and in the petition for review filed with the Court of Appeals, which CARE filed simultaneously with the action pending in the district court. The Court of Appeals stayed proceedings on the petition filed before them pending a decision in the district court.

On June 2, 2010, the district court rendered its decision on cross-motions for summary judgment filed by CARE and New Union. In granting New Union's petition for summary judgment, the court opined that it lacked jurisdiction to hear the claim under the Resource Conservation and Recovery Act (RCRA) §§

7002(a)(2) and 7006(b), and 28 USC § 1331. CARE and EPA both filed appeals with the United States Court of Appeals for the Twelfth Circuit, which will now review the claims.

Factual Background

In 1986, pursuant to its authority under RCRA, EPA approved New Union's hazardous waste program to operate in lieu of the federal program. Although CARE admits that New Union's program was indeed in accordance with RCRA guidelines at the time of approval, it contends that the state's administration of its RCRA program has incrementally lapsed.

CARE contends that the resources allocated to the program have decreased significantly, preventing the state from effectively administering the program. New Union's RCRA program oversees permitting, inspections, and enforcement. CARE alleges that New Union is not adequately addressing demands on the state hazardous waste program. CARE further argues that a number of statutes adopted by New Union are inconsistent with its duties and obligations under the program; CARE's petition alleges that these statutes have withdrawn from regulation a number of facilities whose oversight is mandated by RCRA, and have even eliminated certain forms of waste from regulation in violation of the federal program, and the Commerce Clause of the Constitution. In light of these alleged failures, on January 5, 2009, CARE petitioned EPA to withdraw its approval of New Union's state RCRA program under Sections 7006(b) and 7002(a)(2). EPA has not yet acted on this petition.

SUMMARY OF THE ARGUMENT

The approval of New Union's hazardous waste program was a rulemaking rather than an adjudication because it created a generally applicable rule that had future effect. Since the approval was a rulemaking, the district court has jurisdiction to order EPA to act on CARE's petition pursuant to RCRA § 7002(a)(2). Additionally, the more general 28 U.S.C. § 1331 must yield RCRA's more specific jurisdictional provision, and thus the district court does not have jurisdiction under 28 U.S.C. § 1331 to order EPA to act on CARE's petition.

EPA's failure to act on CARE's petition to withdraw approval of New Union's hazardous waste program did not constitute a

constructive denial of the petition and constructive determination that New Union's program continued to meet approval requirements because it did not represent the culmination of EPA's decisionmaking process. Because EPA has not taken an action which qualifies as a final agency action, the suit is not yet ripe for judicial review under either RCRA §§ 7002(a)(2) or 7006(b). Furthermore, CARE's petition is time barred since it was filed after the expiration of the 90-day statute of limitations contained in those sections.

Assuming that the district court has jurisdiction under RCRA § 7002(a)(2) and/or 28 U.S.C. § 1331, and assuming that EPA's failure to respond to CARE's petition constituted a constructive denial and constructive determination, and the Court of Appeals has jurisdiction to review these two actions under RCRA § 7006(b), the Court should not lift the stay on C.A. No. 18-2010. Rather, the Court should remand to the district court to order EPA to begin withdrawal proceedings under RCRA §§ 3006(e) and 7004 because this is in the interest of judicial economy and best carries out Congressional intent. Assuming that the Court proceeds to the merits of CARE's challenge, EPA is not required to withdraw its approval of New Union's approved state program. New Union's hazardous waste program continues to meet the approval requirements detailed in 40 C.F.R. Part 271, including permitting, inspection, and enforcement functions.

Amendments made to the Railroad Regulation Act (RRA) by the Environmental Regulatory Adjustment Act (ERAA) have no bearing on approval status since these changes do not render New Union's program deficient under the requirements of state hazardous waste programs; this is true even taking into account the removal of explicit state criminal sanctions. Federal enforcement mechanisms remain in place, and New Union's program remains in accordance with the enforcement requirements necessary for approval. In fact, the ERAA does not affect the equivalency of New Union's state program with the federal program and does not create inconsistencies with federal and other approved state programs. In addition, the ERAA's treatment of Pollutant X does not place New Union's hazardous waste disposal program in violation of the Commerce Clause since state actions that use the least discriminatory means possible to address legitimate state concerns that outweigh any

apprehension of interruption to the flow of commerce do not violate the Commerce Clause.

STANDARD OF REVIEW

The questions of law to be evaluated by this Court should be reviewed *de novo*. *Theriot, Inc. v. United States,* 245 F.3d 388, 395 (5th Cir. 1998). Review of federal agency action is governed by the Administrative Procedure Act, 5 U.S.C. § 551 (2006), and should only be overturned if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that is could not be ascribed to a difference in view or to the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

ARGUMENT

I. RCRA § 7002(A)(2) PROVIDES JURISDICTION FOR DISTRICT COURTS TO ACT ON CARE'S PETITION FOR THE REVOCATION OF EPA'S APPROVAL OF NEW UNION'S HAZARDOUS WASTE PROGRAM.

RCRA § 7002(a)(2) grants citizens the right to commence a civil action in the appropriate district court against the Administrator of the Environmental Protection Agency (EPA) for an alleged failure to perform a mandatory duty. 42 U.S.C. § 6972(a)(2) (2006). The lower court erred when it found that it did not have jurisdiction under RCRA § 7002(a)(2) and granted New Union's motion for summary judgment on the issue. The district court does have jurisdiction to order EPA to act on CARE's petition because EPA's approval of New Union's hazardous waste program was a rulemaking, and thus the district court has jurisdiction to order EPA to act under RCRA §§ 7002(a)(2) and 7004.

A. EPA's Approval of New Union's Hazardous Waste Program Constituted a Rulemaking rather than an

Adjudication.

The Administrative Procedure Act (APA) defines a rule in § 551(4) as "[t]he whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. § 551(4) (2006). *Londoner v. City & County of Denver*, 210 U.S. 373 (1908) and *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915) make the distinction between what agency actions constitute orders (the output of adjudicatory procedures), and what actions constitute rules (the output of the rulemaking procedure), respectively. Justice Holmes distinguished *Bi-Metallic*, in which Colorado increased the value of all taxable property in Denver by forty percent, from *Londoner*, where a tax was apportioned to individual property owners based on the proportion of the benefits they received. 239 U.S. at 445-46. Holmes illustrated the distinction between rulemaking and adjudication when he stated that "[i]n *Londoner v. Denver* . . . a relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds . . . but that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid." *Id.*

The *Attorney General's Manual on the Administrative Procedure Act* (1947) further clarifies the distinction between a rule and an order. A rule may be of either general or particular applicability for either a class or a single person. *Id.* at 13. A defining characteristic of a rule is that it is "of future effect, implementing or prescribing future law." *Id.* In contrast, an order defines "past and present rights and liabilities." *Id.* The Supreme Court of California has described "adjudicatory matters" as instances that impact individuals and are "determined by facts particular to the individual case," whereas rulemakings "involve the adoption of a 'broad, generally applicable rule of conduct on the basis of public policy.'" *Horn v. Cnty. of Ventura*, 596 P.2d 1134, 1138 (Cal. 1979).

Courts have determined that when EPA makes changes to state RCRA programs, these actions are rulemakings under the APA. For example, in *U.S. v. Southern Union Co.*, 643 F. Supp. 2d 201 (D.C.R.I. 2009), the petitioners challenged an action in which EPA approved a change to Rhode Island's RCRA statute

that granted conditional exemptions to small quantity generators, a regulation more stringent than the federal program. Despite the fact that the approved modification was specific to the Rhode Island RCRA program, the court was nonetheless convinced that EPA's approval constituted a rulemaking. *Id.* The court stated that EPA's decision to use notice and comment procedures and to allow for public participation indicated that "EPA intended to use its legislative rulemaking authority in authorizing the changes to Rhode Island's program." *Id.* at 212 (citations omitted). The court additionally noted that "the authorization imposed new standards and other affirmative obligations on hazardous waste generators in Rhode Island not already outlined in the law." *Id.* at 212-13.

The principle distinctions between rulemaking and adjudication described above make clear that the approval of a state hazardous waste program is a rulemaking rather than an adjudication. EPA has the authority to enact regulations via rulemaking. 42 U.S.C. § 6912 (2006). In approving New Union's state program, EPA's action created a general guideline with wide-sweeping effect on all waste generators and any other party interested in the handling of hazardous waste throughout the state, not just one party. In addition, the state program had future effect, rather than retroactive or present effect. By following the notice and comment procedures required under APA § 553, including publication of notice in the Federal Register, the state program could not have effect for at least 30 days following publication. Finally, similarly to *U.S. v. Southern Union Co.*, the newly approved state hazardous waste plan imposed a set of new standards and obligations on all affected parties within New Union. Therefore, this action was clearly a rulemaking as opposed to an adjudication.

B. EPA's Categorization of its Action is Entitled to Deference by the Court.

Although the lower court is correct in its assertion that the EPA is not entitled to the level of deference discussed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), in regard to its determination of whether or not their action constitutes a rulemaking or an adjudication, the courts have still afforded some degree of deference to the agency's categorization if its own action. The court in *British Caledonian*

Airways, Ltd. v. Civil Aeronautics Board, 584 F.2d 982 (D.C. Cir. 1978) examined the action of the Civil Aeronautics Board in formulating the requirements on tariffs for carriers performing charter flights. The plaintiff petitioned the court to review the Board's action because it contended that the Board's declaratory order actually constituted a rulemaking and, since it did not go through APA § 553 notice and comment procedure, should be deemed invalid. *Id.* at 983. The court stated that an agency has discretion to decide whether to proceed by a rulemaking or adjudication. *Id.* at 993.

In *American Airlines, Inc. v. Department of Transportation,* 202 F.3d 788 (5th Cir. 2000), the plaintiffs challenged an order issued by the Department of Transportation (DOT) regarding air passenger services. In determining that DOT's action constituted an order, the court stated that "[i]n determining whether an agency action constituted adjudication or rulemaking, we look to the product of the agency action. We also accord significant deference to an agency's characterization of its own action." *Id.* at 797. Since an order is the outgrowth of an adjudicatory action, and since the agency categorized its action as a declaratory order, the court therefore found "that the agency engaged in adjudication rather than rulemaking." *Id.* at 797-98.

In the case at hand, the lower court erred by failing to give any degree of deference to EPA's characterization of its decision to approve New Union's RCRA program. EPA characterized its action as a rulemaking and followed notice and comment procedures under APA § 553. *See CARE v. EPA*, Civ. 000138-2010 (June 2, 2010). As such, EPA is entitled to deference concerning this characterization, and the approval should be treated as a rulemaking.

C. The District Court has Jurisdiction to Order EPA to Act on CARE's Petition under RCRA § 7002(a)(2).

Under RCRA § 7002(a)(2), a petitioner may commence an action against the Administrator for an alleged failure to perform a nondiscretionary duty in the proper district court. 42 U.S.C. § 6972(a)(2) (2006). Under RCRA § 7004, "any individual may petition the administrator for the promulgation, amendment, or repeal of any regulation . . ." 42 U.S.C. § 6974 (2006). Section

7004 also requires that the Administrator "*shall* take action with respect to such petition," indicating that responding to CARE's petition was a nondiscretionary duty. *Id.* (emphasis added). Because EPA's approval of New Union's hazardous waste program was a rulemaking, CARE properly petitioned EPA under RCRA § 7004. Under § 7004, EPA is required to respond to such petitions, and failed to do so. Therefore, CARE properly brought suit under § 7002(a)(2) to compel the Administrator to perform her nondiscretionary duty by responding to the petition, and the district court has jurisdiction to hear that claim and to order EPA to take such action.

II. THE GENERAL, 28 U.S.C. § 1331, MUST YIELD TO THE SPECIFIC, RCRA.

Having established that the action in question is a rule, the analysis must progress with this distinction in mind. When reviewed in a vacuum, the EPA's rule-making action would lend itself to an exercise of federal question jurisdiction under 28 U.S.C. § 1331 (2006). However, when considering the issues at hand in the aggregate, the general 28 U.S.C. § 1331 must yield to the specific, RCRA. *See Bulova Watch Co. v. United States*, 365 U.S. 753 (1961); *Green v. Bock Laundry Mach. Co.,* 490 U.S. 504 (1981) (finding as a general rule that a specific statute controls over a general one without regard to priority of enactment). As such, 28 U.S.C. § 1331 does not provide jurisdiction for district courts to order EPA to act on CARE's petition.

In Green v. Bock Laundry Machine Company, an injured felon on work-release, Green, brought a product liability action against the manufacturer of a commercial dryer which he claimed caused him to lose his arm. 490 U.S. 504 (1981). During the trial, the defense impeached Green's character by eliciting admission that Green had been convicted of conspiracy to commit burglary and burglary, both felonies. Id. at 506. On appeal, Green argued that the district court erred in denying Green's pretrial motion to exclude the impeaching evidence. Id. The Court of Appeals affirmed the district court's ruling, holding that Rule 609(a), which allowed impeachment of a witness by prior felony convictions in a civil context, was not subject to a Rule 403 balancing test. Id. Thus, the judge had no duty to exclude the evidence in light of its prejudicial value. Id. In the Supreme

Court's majority opinion, Justice Stevens reasoned that Rule 609 contains it own weighing language and its specificity meant the application of the more general Rule 403 balancing test would go against what Congress clearly intended by including explicit language to the contrary within Rule 609. Id. at 526.

The lower court here made note of this "old maxim of statutory interpretation that the specific governs over the general," citing *Green v. Bock*, 490 U.S. 504. *CARE v. EPA*, Civ. 000138-2010 (June 2, 2010). EPA agrees with the trial court that the APA, 5 U.S.C. § 553(e), is a general statutory authority for rulemaking petitions, while RCRA § 7002 is the specific statutory authority for such an action under RCRA. 42 U.S.C. § 6972 (2006). As such, 5 U.S.C. § 553(e) is replaced by the overlapping and more specific provisions of RCRA. Such a finding is analogous to the Court's holding in *Green*; had Congress intended 28 U.S.C. § 1331 to be the source of jurisdiction for rulemaking petitions under RCRA it would have remained silent on the matter and omitted the jurisdictional element of RCRA § 7002. *See* 490 U.S. at 526. As such, the district court does not have jurisdiction to order EPA to act on CARE's petition under 28 U.S.C. § 1331.

III. EPA'S FAILURE TO ACT ON CARE'S PETITION DOES NOT CONSTITUTE A CONSTRUCTIVE DENIAL AND CONSTRUCTIVE DETERMINATION.

Although EPA has not yet responded to CARE's petition to revoke approval of New Union's hazardous waste program, this inaction in and of itself does not constitute a constructive denial of the petition and a constructive determination that New Union's program continues to meet approval criteria. Even if this inaction were a constructive denial and determination, it is not a final agency action and thus is not subject to judicial review under either RCRA § 7002(a)(2) or § 7006.. Additionally, the suit is time barred and thus is also precluded from judicial review by this court under RCRA §§ 7002(a)(2) and 7006.

A. EPA's Failure to Act on CARE's Petition does not Constitute a Constructive Denial.

In *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987), the Sierra Club petitioned EPA to add strip mines to its list of fugitive emissions sources under the Clean Air Act (CAA). *Id.* at 785. Although the agency stated that it was gathering information, it failed to take action on Sierra Club's request for nearly two years. *Id.* Petitioners brought a citizen suit similar to the claim at issue here, arguing that by not responding to the petition, the Administrator had failed to perform a nondiscretionary duty under the CAA. *Id.* at 787.

The court said that a duty of timeliness exists if the statute "categorically mandate[es] that *all* specified action be taken by a date-certain deadline." *Id.* at 791. The court assessed a number of factors in making the determination of whether the petitioner has a right to timely decision making, including whether there are Congressionally-imposed deadlines on the agency, if "the statutory scheme implicitly contemplates timely final action," if there will be an effect on the petitioner's interests aside from timely decisionmaking, and if there will be an adverse effect on the agency in dealing with more pressing matters should the court require expedition of the process. *Id.* at 797. The court then stressed the deference due to the agency in developing a timetable for action: "[w]hen we assess these factors, we must remember that '[a]bsent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of a rulemaking proceeding is entitled to considerable deference." *Id.* (*quoting Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C. Cir. 1983)).

In order for an agency's failure to act to constitute a constructive denial, the agency inaction must have "precisely the same impact on the rights of the parties as denial of relief." *Id.* at 793. Further, the inaction should represent an "agency recalcitrance . . . in the face of a clear statutory duty . . . of such magnitude that it amounts to an abdication of statutory responsibility." *Id.* It is clear that EPA's inaction in the case at hand did not constitute a constructive denial and constructive determination. EPA was not under a specific deadline for responding to CARE's petition. Although some time has passed since the petition was submitted, EPA has many pressing

concerns to address and must prioritize among them, and EPA is entitled to some deference in these decisions. This inaction does not represent "agency recalcitrance," but rather is simply a delay in beginning investigations needed to properly respond to the petition.

The case before the Court is easily distinguishable from *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984), in which the court found that there was a "constructive submission." In that case, EPA required states to promulgate total maximum daily loads (TMDLs) for certain identified pollutants for the waters within their borders within 180 days. *Id.* at 996-97. When the states did not make their submissions to EPA within the allotted time period, the court found that the delay may have constituted a "constructive submission" that TMDLs for Lake Michigan were unnecessary. *Id.* at 997. The court further added that "the states' inaction *in view of the short statutory deadlines*, may have ripened into a refusal to act." *Id.* at 997-98 (emphasis added). In comparison, there is no statutorily imposed deadline on EPA to act on petitions for withdrawal under RCRA § 3006(e). 42 U.S.C. § 6296(e) (2006). Without such deadlines, it is within the agency's discretion to determine when action is appropriate. Thus, EPA inaction in this case does not constitute a constructive denial of the permit and constructive determination that New Union's hazardous waste program continues to meet approval criteria.

B. CARE's Suit is not Ripe for Judicial Review because a Constructive Determination is not a Final Agency Action.

Even if the Court finds there was a constructive denial, this Court does not have jurisdiction to hear this case under RCRA § 7006 because a constructive denial is not a final agency action. *See Sierra Club v. EPA*, 922 F.2d 337, 347. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (2006). The Supreme Court has articulated a two part analysis for determining if an action constitutes a "final agency action" for purposes of judicial review. An action is "final" if (1) it represents "the 'consummation' of the agency's decisionmaking process" and is not "merely tentative or interlocutory [in] nature;" and (2) it is an action "by

which 'rights and obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). *See also Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1976). Additionally, EPA has not taken final action if they have merely deferred taking action. *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 68 (D.C. Cir. 2000).

In this case, EPA's alleged constructive denial of CARE's petition is not a final agency action and thus is not reviewable by this Court. The fact that EPA has not yet made a decision concerning CARE's petition does not represent the "consummation of the agency's decisionmaking process." *Bennett*, 520 U.S. at 178. EPA was not required to act on the petition within a specific time frame. 42 U.S.C. § 6974(a) (2006). Indeed, EPA could take action on the petition today and render the court's consideration of this issue moot. Nothing has been published in the Federal Register concerning the petition. *See* 42 U.S.C. § 6974(a) (2006); *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996). These factors indicate that the Agency's decisionmaking process has not yet been fully carried out, and weigh against it being considered a final agency action. Because it is not a final agency action, this Court does not have jurisdiction to review it under RCRA §§ 7002(a)(2) or 7006.

C. CARE's Suit is Time Barred.

Even if the Court finds that there was a constructive denial and determination, and these actions constituted final agency action and are ripe for review, the suit is time barred and as such judicial review is not available under RCRA §§ 7002(a)(2) and 7006. Section 7006(b) provides that judicial review under that section can only be had if the action is "made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day." 42 U.S.C. § 6976(b) (2006). The facts which CARE claims caused New Union's hazardous waste program to be inadequate arose years ago, and are clearly outside of the ninety day statute of limitations. Even if CARE argues that the relevant date is the date on which EPA constructively denied their petition, there is no basis for determining when such denial occurred since Section 7004(a) does not require the Administrator to act on a petition

within a specified time period. 42 U.S.C. § 6974(a) (2006). Therefore, the action before this Court is time barred.

IV. THE COURT SHOULD REMAND TO THE DISTRICT COURT TO ORDER EPA TO BEGIN WITHDRAWAL PROCEEDINGS

Assuming that the district court has jurisdiction under RCRA § 7002(a)(2) and/or 28 U.S.C. § 1331, and assuming that EPA's failure to respond to CARE's petition constituted a constructive denial of the petition and a constructive determination that New Union's program continues to meet RCRA's approval criteria and the Court of Appeals has jurisdiction to review these two actions under RCRA § 7006(b), the Court should not lift the stay on C.A. No. 18-2010. Rather, the Court should remand to the district court to order EPA to begin proceedings to consider withdrawal of New Unions RCRA program under RCRA §§ 3006(e) and 7004.

A. It is in the Interest of Judicial Economy and Best Carries out Congressional Intent to Remand the Case.

Under this set of assumptions, both the district court and the Court of Appeals could have jurisdiction to move forward with this case. The district court has jurisdiction under RCRA § 7002(a)(2) to hear CARE's citizen suit in which they are seeking an injunction requiring the Administrator to perform a nondiscretionary duty by acting on CARE's petition. On the other hand, assuming that there was a constructive denial and constructive determination, the Court of Appeals has jurisdiction to review EPA's actions under § 7006(b). In this case, the Court should not lift the stay on C.A. No 18-2010, because it makes more sense given the statutory scheme and because it is in the interest of judicial economy to instead remand to the district court and require the district court to order EPA to begin withdrawal proceedings.

Some courts have said that, under laws such as the Clean Air Act, if jurisdiction exists in both the Court of Appeals and the district court, then the Court of Appeals jurisdiction cancels out district court jurisdiction. *See Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 661 (D.C. Cir. 1975). However, the

situation here is factually quite different, and the structure of RCRA suggests that in this case, the district court is best situated to move this case forward.

The *Oljato* case involved national performance standards for coal fired power plants under the Clean Air Act. The court found that that the Court of Appeals was the proper court to exercise jurisdiction because Congressional intent favored consistent application of national standards across the country and avoided bifurcated litigation. *Id.* at 660-61. In the case at hand, however, lifting the stay and reviewing the constructive denial and determination in the Court of Appeals would go against Congressional intent. Congress assigned EPA the task of implementing RCRA and regulating hazardous wastes. 42 U.S.C. § 6912 (2006). EPA has the expertise to oversee RCRA, while the Court does not. Congress expressed its intention that EPA and the states have broad discretion and flexibility in implementing federal and state hazardous waste programs in order to achieve the desired results. *See* 45 Fed. Reg. 33,290, 33,385 (May 19, 1980). This intent is best carried out by remanding to the district court, which will then order EPA to begin withdrawal proceedings. EPA can then apply its process and expertise in assessing whether withdrawal is necessary or what changes New Union may need to make in order to correct any deficiencies in its program. The Court of Appeals could then review EPA's actions afterward if need be. This is more efficient than choosing to have this Court review the constructive denial and determination without the benefit of EPA's record. As such, the Court should not lift the stay on C.A. No. 18-2010, and should instead remand to the district court to order the EPA to begin withdrawal proceedings.

V. EPA IS NOT REQUIRED TO WITHDRAW ITS APPROVAL OF NEW UNION'S STATE PROGRAM.

Assuming that the Court proceeds to the merits of CARE's challenge, EPA is not required to withdraw its approval of New Union's approved state program. While there may be some deficiencies in the available funding that have prevented New Union from carrying out its approved state program as fully as would be ideal, its resources and funding are still sufficient for EPA to continue to approve of New Union's state RCRA program.

In the alternative, even if New Union's resources and performance are insufficient to support EPA's continued approval of the state program, EPA is not required to withdraw its approval of the program. Rather, EPA has discretion to initiate proceedings to withdraw the approval of any approved state RCRA program, and may take corrective actions other than simply withdrawing New Union's state program approval. 42 U.S.C. § 6926 (2006).

A. New Union's Program is Sufficient for EPA's Continued Approval

RCRA § 3006 provides that states may develop and enforce their own hazardous waste programs to operate in lieu of the federal program. *Id.* State programs must be approved by the EPA Administrator before they can take effect. *Id.* Approved state programs must be at least as stringent as the federal RCRA requirements, and are permitted but not required to be more stringent than the federal program. *Id.* In addition, an approved state program must comply at all times with the requirements detailed in 40 C.F.R. Part 271, which describes the procedures and criteria for the approval, revision, and withdrawal of state hazardous waste programs. 40 C.F.R. § 271.1 (a), (c), and (g). Because the resources devoted to New Union's approved hazardous waste program and New Union DEP's performance in carrying out the program are sufficient to satisfy the standards for continued approval under 40 C.F.R. Part 271, EPA is not required to withdraw approval of the state program.

i. Permitting

The regulations applicable to state approved programs do not require the New Union DEP to respond to permit applications within a specified amount of time. Under 40 C.F.R. § 271.14 (2010), certain provisions of Parts 124 and 270 are incorporated and applied to state permitting programs, and state permitting must comply with those specific provisions at all times. None of these sections state a time period within which the state must respond to an application. While RCRA § 3005 does include time periods in which the EPA or state must respond to a permit

application, those dates only apply to permit applications submitted before November 8, 1984. 42 U.S.C. § 6925(c) (2006).

In fact, the regulations anticipate that the permitting authorities may not address permit applications immediately. In states with approved RCRA programs, the operation of a permit will continue indefinitely even after it has expired as long as the permittee has submitted a complete and timely application to renew the permit. 40 C.F.R. § 270.51(d) (2010). The existing permit will remain in effect until the state issues or denies the new permit. *Id.* Thus, while a backlog of permit applications is not ideal, Congress recognizes that efficiency and the interests of public health are best served under the current system. This pragmatic approach puts no temporal cap on how much time states have to respond.

ii. Inspections

RCRA § 3007(e) describes the inspection requirements for state programs. A state with an approved program "*shall* commence a program to thoroughly inspect every facility for the treatment, storage or disposal of hazardous waste for which a permit is required . . . no less often than every two years . . ." 42 U.S.C. § 6927(e)(1) (2006) (emphasis added). While the use of the word "shall" often indicates a mandatory duty on behalf of the state, the Supreme Court has noted that "shall" is sometimes incorrectly used when it is really intended to mean "will," "should," or "may." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432-33 n.9 (1995). When this provision is read in context and in relation to other inspection regulations, it becomes clear that this is a case in which "shall" really indicates that inspections "should" be conducted on a biennial basis, but are not necessarily required to be conducted within that time period.

Section 3007(e) of the Act goes on to say that the Administrator is required to promulgate regulations governing "the minimum frequency and manner of such inspections," and in doing so may "distinguish between classes and categories of facilities commensurate with the risks posed by each class or category." 42 U.S.C. § 6927(e)(1) (2006). This indicates that the regulations may require different time periods in which inspections must occur, and that it is proper to prioritize facilities

by risk, much as New Union has done in deciding which facilities to inspect most frequently. The corresponding regulations do not include a requirement concerning how often TSD facility inspections must be completed. They only require "periodic inspections" that are capable of determining compliance, verifying the accuracy of information submitted by the permittee, and verifying that monitoring at the facility is adequate. 40 C.F.R. § 271.15(b)(2) (2010). These other provisions indicate that while it would be ideal to inspect facilities biennially, this is an aspirational goal rather than a strict requirement, and as such New Union's inspection program is adequate for purposes of continued approval of the state RCRA program.

iii. Enforcement

A State administered RCRA program is required to provide a State agency with a certain level of enforcement authority. The agency must have the ability "to restrain immediately and effectively any person by order or by suit in state court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment." 40 C.F.R. § 271.16(a)(1) (2010). It must also have the authority "to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit;" and the ability "to access or sue to recover in civil court penalties and to seek criminal remedies, including fines . . ." 40 C.F.R. § 271.16(a)(1), (2) (2010).

New Union's enforcement program includes all of these required components, and makes use of them in taking corrective actions against those violating state RCRA permits. While there are violations that have gone unpunished, there is nothing in the statute or regulations that require the state to take action on each and every violation. In addition, it is anticipated in the statute and regulations that states will have assistance from EPA and from citizens, as has occurred in New Union. EPA retains some enforcement authority in states with approved programs under RCRA § 3008 and 40 C.F.R. § 271.19, and citizens can bring suit against anyone who is violating the terms of a RCRA permit under RCRA § 7002 and 40 C.F.R. § 271.16(d). Therefore, New Union's enforcement program meets all requirements for

continued approval of its state RCRA program and the Administrator is not required to withdraw approval.

B. EPA has Discretion to Take Action Other than Withdrawing Approval.

Even if the resources that New Union has devoted to its RCRA program and New Union's implementation of the program are deemed inadequate, the Administrator still is not required to withdraw approval of New Union's approved RCRA program. The statute gives the Administrator discretion to determine whether withdrawal of approval is appropriate in a given circumstance. 42 U.S.C. § 6926 (2006). Additionally, EPA has the option to take corrective action to fix deficiencies in the state program instead of simply withdrawing approval. *Id.*

The language used in both the statute and the regulations indicate that, while the Administrator has the authority to withdraw approval, she has discretion in choosing whether it is appropriate to do so. Section 3006(e) gives the Administrator the authority to withdraw authorization of state programs. 42 U.S.C. § 6926(e) (2006). Although under this section the Administrator must notify the state of deficiencies in the state program and must withdraw authorization if those problems are not corrected, the initial determination in which the Administrator finds that the state program is inadequate is not a mandatory duty. *Id.* This is an instance in which the Administrator may exercise discretion to determine that a state program is inadequate, and the related mandatory duties are only triggered after the initial determination has been made. *See*, *e.g., Natural Res. Def. Council v. Train*, 545 F.2d 320 (2d Cir. 1976).

The regulations list a number of circumstances which may lead the Administrator to withdraw program approval, including a failure to issue permits, to take action concerning permit violations, to take enforcement action, and to properly inspect and monitor regulated activities. 40 C.F.R. § 271.22(a). The regulations state that "[t]he 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." *Id.* (emphasis added). This reinforces the conclusion that the Administrator has discretion as to whether to

begin proceedings to withdraw approval of a state program. Additionally, it highlights the fact that the Administrator must take other steps before simply withdrawing approval of the state RCRA program. The Administrator needs to hold a public hearing, provide notice of deficiency to the state, and give the state ninety days to correct the program before the Administrator proceeds with the program withdrawal process. *Id.*, 42 U.S.C. § 6926(e) (2006).

CARE brought this suit pursuant to RCRA's citizen suit provision in § 7002(a)(2). This section provides that "any person" may bring suit to compel the Administrator to perform a non-discretionary duty. 42 U.S.C. § 6972(a)(2) (2006). Because the EPA Administrator has discretion to make a determination concerning the adequacy of an approved state RCRA program, the Court lacks jurisdiction to compel the Administrator to withdraw approval of the state program. Therefore, EPA is not required to withdraw approval of New Union's approved state RCRA program.

VI. EPA IS NOT REQUIRED TO WITHDRAW ITS APPROVAL OF NEW UNION'S STATE PROGRAM BECAUSE OF CHANGES MADE TO THE RRA

While CARE argues that ERAA effectively withdraws railroad hazardous waste from regulation, such an assertion is facially incorrect. Rather, New Union has shifted regulation to a newly created New Union Railroad Commission. (R. at 3). This transfer is a shifting of authority—not a complete dissolution of regulation by New Union. In creating and implementing a Commission uniquely focused and attuned to the regulation of interstate railroad freight rates, railroad tracks and rights of way, and railroad ways, New Union has appropriately exercised the very power bestowed upon it by Congress in RCRA § 3006 (providing that states may develop and enforce their own hazardous waste programs to operate in lieu of the federal program). 42 U.S.C. § 6926 (2006). This arrangement does not render New Union's program deficient under the requirements of state hazardous waste programs. 40 C.F.R. Part 271 (2010). Even in light of the removal of explicit state criminal sanctions, federal enforcement mechanisms remain in place and unhindered, rendering New Union's program in accordance with

the enforcement requirements necessary for approval. *See United States v. Flanagan,* 126 F. Supp. 2d 1284, 1287 (D.C. Cal. 2000); *United States v. MacDonald & Watson Waste Oil Co.,* 933 F.2d 35, 44 (1st Cir. 1991) (finding that federal criminal provisions of RCRA, notably 42 U.S.C. § 6928(d), are meant to apply within states having authorized programs and that this federal criminal jurisdiction subsumes both states and federal permits).

Even after EPA has granted authorization to a state program, there remains a strong federal presence. *MacDonald,* 933 F.2d at 44. In *MacDonald,* the First Circuit affirmed that the federal government's ability to obtain criminal penalties against generators and other persons who knowingly transport hazardous waste absent proper permitting, even after granting approval to Rhode Island's state hazardous waste program. *Id.* at 45. Appellants, hired to remove and clean up contaminated soil, had authorization to dispose of liquid, but not solid, waste. *Id.* at 39. Lacking the proper permit, appellants were cited with violating criminal provisions within 42 U.S.C. § 6928(d). *Id.* at 43. They argued that Rhode Island's authorized state program displaced the federal program, leaving no federal crime and ousting the federal court of jurisdiction. *Id.* The court found no merit in this contention, holding that § 6928(d) and companion federal criminal provisions "are meant to apply within states having authorized programs" and that had Congress intended otherwise "its intentions surely would have been manifested." *Id.* at 44.

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." (R. at 3). The Commission, by design, is a state agency and the Commissioners are state employees, with appointees chosen by the Governor, State Senate, and State House of Representatives. *Id.* CARE may wish to argue that ERAA's removal of criminal sanctions for violations of environmental statutes by facilities falling under the jurisdiction of the Commission leaves New Union in violation of the enforcement provision requirement. 40 C.F.R. § 271.16(a)(ii) (2010). Relevant jurisprudence renders such an assertion patently false.

The intent of Congress is to have an ever-present enforcement of federal criminal sanctions, and New Union has

done nothing to hinder such an effort. *MacDonald,* 933 F.2d at 44. In *MacDonald,* the silence of the Rhode Island program did not obstruct EPA from unilaterally enforcing RCRA's criminal provisions, and New Union's absence of criminal sanctions should be handled in the same manner. *Id.* at 43. As such, the federal criminal enforcement mechanisms of RCRA, 40 C.F.R. § 271.16, remain in place within New Union.

For the reasons above (*See* Part V.B.), even if it is found that New Union fails to meet the requirements under RCRA, EPA has discretion to initiate proceedings to withdraw the approval of any approved state RCRA program, and may take corrective actions other than simply withdrawing New Union's State program approval. 42 U.S.C. § 6926 (2006).

VII. EPA IS NOT REQUIRED TO WITHDRAW APPROVAL OF NEW UNION'S STATE PROGRAM DUE TO PASSAGE OF THE ERAA

Assuming that the Court proceeds to the merits of CARE's challenge, the content of New Union's 2000 Environmental Regulatory Adjustment Act (ERAA) does not lead to the conclusion that EPA must withdraw approval of New Union's approved state RCRA program. The relevant provisions of ERAA amended the New Union hazardous waste program relating to the regulation of Pollutant X. (R. at 3). ERAA requires that facilities generating Pollutant X submit and carry out plans to reduce generation of the pollutant each year until Pollution X generation ceases entirely. *Id.* The Act prohibits DEP from issuing permits allowing treatment, storage or disposal of Pollutant X, except for temporary storage while awaiting transport to a treatment or disposal facility located outside the state. *Id.* Additionally, Pollutant X can only be transported through or out of the state if transport is done as quickly and directly as possible. *Id.*

RCRA § 3006(b) requires that a state program must not be approved if it is "not equivalent to the Federal program" or "not consistent with the Federal or State programs applicable in other states. . ." 42 U.S.C. § 6926(b) (2010). The Administrator has the power to withdraw approval of an approved state program if it no longer meets these requirements. 42 U.S.C. § 6926(e) (2006).

State programs also must not regulate hazardous waste, a recognized type of interstate commerce, in a manner that violates the Commerce Clause. In this case, EPA is not required to withdraw approval of New Union's program because ERAA does not affect the program's equivalency to the federal RCRA program, does not render it inconsistent with federal or other approved state programs, and does not violate the Commerce Clause.

A. ERAA does not Affect the State Program's Equivalency with the Federal Program.

Despite the changes made by ERAA, New Union's state RCRA program is still equivalent to the federal program. A state program does not have to be exactly the same as the federal program in order to be considered equivalent; because New Union's program is still at least as stringent as the federal program, it is considered equivalent to the federal RCRA program. According to § 3006, a state program must be "equivalent" to the federal RCRA program in order to become and to continue as an approved state program. 42 U.S.C. § 6926(b), (e) (2006). Equivalency is not defined in the statute, but is determined by EPA on a case-by-case basis. U.S. Environmental Protection Agency, *Determining Equivalency of State RCRA Hazardous Waste Programs*, 1-2 (Sept. 7, 2005).

RCRA includes a "savings clause," which provides that "no State . . . may impose any requirements less stringent than those authorized under this subchapter respecting the same matter governed by such regulations . . ." 42 U.S.C. § 6929 (2006). Additionally, it says that "[n]othing in this chapter shall be construed to prohibit any State . . . from imposing any requirements . . . which are *more* stringent than those imposed by such regulations." *Id.* (emphasis added). This indicates that the federal regulations create a floor, rather than a ceiling, for regulation of hazardous wastes. The inclusion of this provision shows that Congress believed that "hazardous waste is not an area of particular federal importance requiring one uniform national system or plan of regulation. In fact, although Congress recognized the need for federal regulation, it stated that 'the collection and disposal of solid wastes should continue to be primarily a function of the State.'" *Old Bridge Chems., Inc. v.*

N.J. Dept. of Environmental Prot., 965 F.2d 1287, 1292 (3d Cir. 1992) (*citing* 42 U.S.C. § 6901(a)(4) (2006)).

EPA has determined that in assessing equivalency of a state program, the focus should be on whether the state program "provide[s] equal environmental results as the federal counterparts," and not on whether the state regulations directly track federal requirements. EPA, *Determining Equivalency*, at 2. As such, the focus is on ensuring that state programs "meet the minimum national standards, rather than [focusing on] line-by-line comparisons of State and Federal regulations." 61 Fed. Reg. 18,822 (Apr. 29, 1996). This gives states flexibility to implement their own regulatory programs, consistent with RCRA's purposes and goal of hazardous waste regulation remaining primarily as a state function.

New Union's program, as amended by ERAA, remains equivalent to the federal program. ERAA's regulation of Pollutant X makes the state program more stringent than the federal program, not less so. These more stringent requirements are permissible under RCRA's savings clause. 42 U.S.C. § 6929 (2006). The amended program continues to meet and exceed the applicable "minimum national standards." 61 Fed. Reg. 18,822 (Apr. 29, 1996). ERAA also promotes RCRA's overall goals, including protection of human health and the environment, and reducing or eliminating hazardous waste generation. 42 U.S.C. § 6902 (2006). Therefore, New Union's state program remains equivalent to the federal RCRA program, and EPA is not required to withdraw its approval of the state program for this reason.

B. ERAA does not Create Inconsistencies Between the New Union State Program and Federal or other Approved State Programs.

EPA is also not required to withdraw approval of New Union's hazardous waste program because ERAA does not cause the program to be inconsistent with the federal or other approved state programs. Under RCRA § 3006(b) and (e), an approved state hazardous waste program must be "consistent with the Federal or State programs applicable in other States;" if the Administrator finds that a program is inconsistent, she must begin proceedings to withdraw its approval. 42 U.S.C. § 6926(a),

(e) (2006). This language is vague and gives the agency broad discretion to implement this provision and corresponding regulations. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1396 (D.C. Cir. 1991).

The regulations relating to consistency reiterate that state hazardous waste programs must be consistent with federal and other state programs, and also include further requirements. 40 C.F.R. § 271.4 (2010). First, a state program or aspect of a state program will be deemed inconsistent if it "unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program." 40 C.F.R. § 271.4(a) (2010). Second, a state law or state program may be considered inconsistent if it "has no basis in human health or environmental protection and . . . acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State." 40 C.F.R. § 271.4(b) (2010).

The North Carolina state hazardous waste program's consistency was at issue in *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d at 1390. North Carolina passed a law requiring hazardous waste discharged into surface water to be diluted one thousand fold by the receiving river; this requirement rendered operations at a new state-of-the-art waste treatment facility economically infeasible. *Id.* at 1394. The petitioners argued that by passing this law, North Carolina was failing to treat its share of the nation's hazardous waste. *Id.* at 1393. An administrative law judge and the Regional Administrator found that withdrawal was not warranted, and the issue in the case became whether EPA had properly interpreted 40 C.F.R. § 271.4(b) relating to consistency. *Id.* at 1394-95.

Under EPA's interpretation, two requirements must both be met before withdrawal is warranted under 40 C.F.R. § 271.4(b): (1) the aspect of the program must have "no basis in human health or environmental protection" *and* (2) must "act as a prohibition on the treatment, storage or disposal of hazardous waste in the State." 40 C.F.R. § 271.4(b) (2010); *Hazardous Waste,* 938 F.2d at 1395. EPA's interpretation is that a state law only "prohibits" hazardous waste treatment when it "effects a total ban on a particular waste treatment technology within a state."

Hazardous Waste, 938 F.2d at 1395. The court deferred to the agency's interpretation of its own regulations because the interpretation was not "plainly wrong." *Id.* (*citing Chem. Mfrs. Ass'n v. EPA*, 919 F.2d 158, 170 (D.C. Cir. 1990); *Chevron*, 467 U.S. at 844-45). This interpretation was also consistent with the goal of encouraging states to develop their own programs by providing them with a level of flexibility in implementing their programs. *Hazardous Waste*, 938 F.2d at 1396; 45 Fed. Reg. 33,290, 33,385 (May 19, 1980). The court concluded that North Carolina's regulation did not constitute a statewide ban on a particular waste treatment technology, and as such it did not prohibit the treatment of hazardous waste under 40 C.F.R. § 271.4(b). *Hazardous Waste*, 938 F.2d at 1397. The court did not address whether the regulation had a basis in human health or environmental protection because it was unnecessary given the fact that it was not a prohibition, and both factors must be fulfilled in order for the state law to violate 40 C.F.R. § 271.4(b). *Id.*

This Court should undertake a similar analysis for ERAA's regulation of Pollutant X. Under EPA's interpretation of 40 C.F.R. § 271.4(b), ERAA does not create a statewide ban on the treatment, storage, or disposal of Pollutant X. ERAA still allows for short-term storage of Pollutant X. New Union will no longer issue permits for treatment or disposal of Pollutant X, but there are no existing facilities that are able to carry out either of these functions in the state. The regulation also provides for gradually eliminating any production of Pollutant X in New Union, so the need for such treatment and disposal facilities will not exist in the near future. As such, interpreting the ERAA as a complete statewide ban on the treatment, storage or disposal of Pollutant X is flawed.

Even if the Court does find that ERAA affects a total ban on treatment, storage, and disposal of Pollutant X in New Union, ERAA is based on legitimate concerns, including protecting human health and the environment. As such, it is not inconsistent with 40 C.F.R. § 271.4(b). Both the World Health Organization and EPA have found that Pollutant X is "among the most potent and toxic chemicals to public health and the environment." (R. at 3). Additionally, there are no treatment or disposal facilities in New Union that can adequately handle

Pollutant X and prevent the public or the environment from exposure to the pollutant; in fact, there are only nine such facilities in the entire country. *Id.* The record shows that New Union has legitimate concern for the effect this pollutant will have on the public and on the environment. Because ERAA is based on human health and environmental protection, New Union's program is not inconsistent under 40 C.F.R. § 271.4(b), since to be deemed inconsistent a program must *both* have no basis in protecting human health or the environment, *and* must act as a prohibition on treatment, storage, or disposal within the state.

Additionally, New Union's hazardous waste program is not inconsistent under 40 C.F.R. § 271.4(a) (2010) because it does not "*unreasonably* [restrict, impede, or operate] as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal." (emphasis added). ERAA does restrict the movement of Pollutant X within New Union; however, these restrictions are not unreasonable. People are free to transport Pollutant X through the state or out of the state, as long as they in a manner that is quick, direct, and which avoids unnecessary delay within the state. DEP will still issue permits to allow for temporary storage of the pollutant while it awaits transport out of the state. These restrictions are reasonable and are intended to limit any potential exposure to the pollutant. They clearly do not ban free movement through or within the state. As such, ERAA is also consistent with the federal and other state programs under 40 C.F.R. § 271.4(a).

New Union's hazardous waste program also continues to be consistent with other approved state programs. Pollutant X is a hazardous waste listed under RCRA § 3001. 42 U.S.C. § 6921 (2006). Under 40 C.F.R. § 271.9, states must list and control all hazardous wastes listed by the federal program. New Union is clearly controlling Pollutant X, and under RCRA's savings clause, the state is free to impose restrictions that are more stringent. 42 U.S.C. § 6929 (2006). Because New Union has listed Pollutant X and has imposed at least the minimum requirements, its regulation of the pollutant is consistent with other state program, which must also meet these minimum standards. Therefore, EPA is not required to withdraw approval of New Union's hazardous waste program because ERAA does not render the program

inconsistent under 42 U.S.C. § 6926(b) and (e) and 40 C.F.R. § 271.4.

C. ERAA's Treatment of Pollutant X does not Place New Union's Hazardous Waste Disposal Program in Violation of the Commerce Clause.

ERAA is State legislation designed to regulate hazardous waste, a recognized type of interstate commerce. It is well established that no state may attempt to isolate itself from a problem common to the several states by raising barriers to the free flow of interstate commerce. *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). However, states that use the least discriminatory means possible to address legitimate state concerns that outweigh any apprehension of interruption to the flow of commerce are not in violation of the Commerce Clause. *Kassel v. Consol. Freightways Corp.,* 450 U.S. 662 (1981). As such, assuming that the Court proceeds on the merits of CARE's challenge, ERAA should be found constitutional.

i. ERAA is not Per Se Unconstitutional.

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Although "phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys. Inc. v. Dep't of Environmental Quality,* 511 U.S. 93, 98 (1994). With certain exceptions, the negative, or dormant Commerce Clause prohibits states from discriminating against the free flow of interstate commerce. The Commerce Clause applies to the interstate flow of hazardous waste. *Chemical Waste Mgmt. Inc. v. Hunt,* 504 U.S. 334, 340 (1992); *see also Philadelphia*, 437 U.S. at 621-23 ("All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.").

ERAA is best categorized as a quarantine law that distinguishes waste by toxicity and not origin. Thus, it cannot be per se unconstitutional. *Philadelphia*, 437 U.S. at 629; *see also Asbell v. Kansas,* 209 U.S. 251 (1908); *Reid v. Colorado,* 187 U.S.

137 (1902) (holding constitutional quarantines banning the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion).

In *Philadelphia v. New Jersey* the Court found that a New Jersey law prohibiting the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State" to be a violation of the Commerce Clause. 437 U.S. at 629. The Court held that the law violated the principle of nondiscrimination as it treated out-of-state waste differently than waste produced within the state. *Id*. Since New Jersey could not demonstrate a legitimate reason for distinguishing between foreign and domestically produced waste, it was clear to the Court that the state had "overtly moved to slow or freeze the flow of commerce for protectionist reasons" and struck down the New Jersey law. *Id.* at 628.

EPA concedes that provisions of ERAA touch upon matters of interstate commerce and are subject to analysis under the dormant Commerce Clause. As such, if the legislation is protectionist, it is per se unconstitutional. *Philadelphia*, 437 U.S. at 626. In *Philadelphia v. New Jersey* there was no way to distinguish the banned out-of-state waste from the waste created within New Jersey. *Id.* at 629. Thus, if one is harmful so is the other and to discriminate solely on origin is protectionist and unconstitutional. *Id.* This prejudicial and protectionist distinction of in-state versus out-of-state is not found in the ERAA. All forms of Pollutant X, whether native or foreign to New Union, are treated equally under ERAA. Thus, ERAA is better categorized as a quarantine law, which does not "discriminate against interstate commerce as such, but simply prevent[s] traffic in noxious articles, whatever their origin." *Id.* Therefore, ERAA is not per se unconstitutional.

ii. ERAA Addresses Legitimate State Concerns Which Outweigh Any Negative Ramifications to Commerce in the Least Discriminatory Manner Possible.

1. New Union's Legitimate State Concerns Outweigh Possible Impediment to Interstate

Commerce

When a state law falls within the realm of the Commerce Clause, the legitimate concerns of the state must be weighed against effects the legislation has on interstate commerce. *Kassel,* 450 U.S. at 662 (1981). New Union's legitimate concern for the possible contamination of Pollutant X through the state outweighs any negative effects that ERAA may have on interstate commerce. (R. at 3).

In *Kassel v. Consolidated Freightways Corporation,* the Court found that an Iowa statute that prohibited the use of 65-foot double trailer trucks, but permitted 55-foot single trailer trucks within the state unconstitutionally burdened interstate commerce. 450 U.S. at 662. To reach this conclusion, the Court employed a balancing test that compared the nature of the state's regulatory concern with the extent of the burden to interstate commerce. *Id.* at 670. Justice Powell noted that while a state's power to regulate commerce is never greater than in matters of local concern, such justifications could not be illusory. *Id.* Since the Idaho law placed a great burden on interstate commerce and Iowa had failed to present any persuasive evidence that the 65-foot doubles were less safe than 55-foot singles to counterbalance these concerns of commerce, the Court struck down the law. *Id.* at 671

Following the dormant Commerce Clause analysis, since ERAA is not protectionist, the Court should apply the balancing test utilized under *Kassel*. 450 U.S. at 662. Under this test, for ERAA to be constitutional, the benefits of keeping Pollutant X out of New Union must outweigh the burden this exclusion places upon inter-State commerce. *Id.* In light of New Union's reasonable provisions allowing safe and expedited passage of Pollutant X through the state, as well as the safety considerations of surrounding states, it is in the best interest of all that ERAA remain in effect. Its limited influence on interstate commerce is outweighed by the serious threat of contamination, recognized by both the World Health Organization and EPA. (R. at 3).

2. ERAA is the Least Discriminatory Option Available to New Union.

Mindful of New Union's current inability to process Pollutant X, ERAA can be warranted as the least discriminatory option available to deal with handling such a toxic and dangerous pollutant. *Chem. Waste Mgmt.,* 504 U.S. at 340. A state lacking certain types of waste disposal facilities is not uncommon and Congress has recognized that not all states can process all pollutants. *Nat'l Solid Wastes Mgmt. Ass'n v. Ala. Dep't of Envtl. Mgmt.,* 910 F.2d 713, 717 (11th Cir. 1990).

In *Chemical Waste Management Inc. v. Hunt,* the petitioner operated a commercial hazardous waste land disposal facility in Emelle, Alabama, that received both in-state and out-of-state wastes. 504 U.S. at 337. An Alabama act imposed, inter alia, a fee on hazardous wastes disposed of at in-state commercial facilities, and an additional fee on hazardous wastes generated outside, but disposed of inside, the state. *Id.* The Court found that Alabama's differential treatment of out-of-state waste violated the Commerce Clause. *Id.* at 339. The Court held that Alabama had not met its burden of showing the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake and thus found the law in question unconstitutional. *Id.* at 341.

The court in *Chemical Waste Management* held that the state has a burden of showing the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake, and that the state must first explore less discriminatory means. 504 U.S. at 340. In the case at hand, New Union can make such a showing. ERAA is a necessary measure that allows New Union to handle Pollutant X at a time when New Union is not equipped with facilities that are capable of handling such a volatile and toxic substance. It has been recognized by Congress on several occasions that because of geological factors or for other reasons, every state may not be able to create disposal facilities within its borders and will not be able to dispose of its waste within its own borders. *Nat'l Solid Wastes,* 910 F.2d at 717. Often a state that cannot safely dispose of wastes within its borders will reach agreements with another states (or states) to create mutually beneficial arrangements to deal with such shortcomings. *Id.*

Since New Union is using the least discriminatory means possible to address legitimate state concerns that outweigh any apprehension of interruption to the flow of commerce, ERAA should be found constitutional.

CONCLUSION

For the foregoing reasons, this Court should find that (1) district courts have jurisdiction to order EPA to act on CARE's petition; (2) 28 U.S.C. § 1331 does not provide jurisdiction to district courts to order EPA to act on CARE's petition; and (3) EPA's failure to act on the petition was not a constructive denial and constructive determination. If the Court does find there was a constructive denial and determination, the Court should not lift the stay on C.A. No. 18-2010, and should instead remand to the district court to order EPA to act. If the Court proceeds on the merits, it should find that EPA is not required to withdraw approval of New Union's program because (1) its resources and performance continue to meet RCRA approval criteria; (2) the failure to regulate railroad hazardous waste facilities does not require withdrawal of approval; and (3) ERAA does not affect the New Union state program's equivalency, consistency, or compliance with the Commerce Clause.