Team 20

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

LISA JACKSON, ADMINISTRATOR,
U.S. 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

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

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JURISDICTIONAL STATEMENT

It is the position of the Environmental Protection Agency (EPA) that the citizen suit provision of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(2) (2006), grants jurisdiction to the district court to decide whether it should order the EPA to act on a petition filed by Citizen Advocates for Regulation and the Environment, Inc. (CARE) pursuant to 42 U.S.C. § 6974(a) (2006). However, the district court properly held that it lacks subject matter jurisdiction under 28 U.S.C. § 1331 (2006) to order the EPA to act on CARE's petition filed pursuant to 5 U.S.C. § 553(e) (2006) of the Administrative Procedure Act (APA). On June 2, 2010, the district court entered summary judgment in favor of the State of New Union, constituting a final order. Both CARE and the EPA have filed timely notices of appeal, and thus, this Court has jurisdiction under 28 U.S.C. § 1291 (2006). CARE lacks alternative jurisdiction in this Court pursuant to 42 U.S.C. § 6976(b) (2006), because the EPA's inaction regarding Appellant's petition constitutes neither a constructive denial, nor a constructive determination.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether RCRA § 7002(a)(2) provides jurisdiction for district courts to decide whether to order the EPA to act on CARE's petition for revocation of the EPA's authorization of New Union's hazardous waste program, filed pursuant to RCRA § 7004(a), when the EPA has taken no action with regard to the petition.

II. Whether district courts lack jurisdiction under 28 U.S.C. § 1331 to order the EPA to act on CARE's petition for revocation of the EPA's authorization of New Union's hazardous waste program, filed pursuant to 5 U.S.C. § 553(e), when the EPA has taken no action with regard to the petition.

III. Whether the district court should have found that the EPA's failure to act on CARE's petition was not an action subject to judicial review under RCRA § 7006(b) when the petition was filed less than a year before this action commenced and a constructive action requires unreasonable delay.

IV. Whether, assuming the district court has jurisdiction and the EPA's failure to act constituted a constructive denial and determination, this court should remand the case to the district court to order the EPA to act on the appellant's petition when the APA

requires that an action be final before it is subject to judicial review and no record exists on the alleged constructive action.

V. Whether, despite New Union's enforcement struggles, the EPA maintains withdrawal discretion under 40 C.F.R. § 271.21, and may bring independent enforcement action under RCRA § 3008(b) without first needing to withdraw program authorization.

VI. Whether, despite New Union's administrative shift and elimination of certain criminal penalties, the EPA maintains its purely discretionary withdrawal authority under 40 C.F.R. § 271.21 because New Union continues to "administer and enforce" its program under RCRA § 3006(e).

VII. Whether the indirect interference with interstate commerce that resulted from New Union's ban on Pollutant X is justified both under RCRA and the *Commerce Clause* because the federal standard is not relaxed, and because restrictions were rooted in concerns for public health.

STATEMENT OF THE CASE

On January 5, 2009, CARE petitioned the EPA to commence proceedings to withdraw its authorization of New Union's hazardous waste program. R. at 4. The EPA took no action on the petition, and on January 4, 2010, CARE filed an action in the district court under RCRA § 7002(a)(2) and 28 U.S.C. § 1331 requesting an injunction requiring the EPA to act on the petition, or in the alternative, judicial review of the EPA's constructive denial of the petition and constructive determination that New Union's program meets the approval criteria. CARE also filed a claim with this Court seeking review of the EPA's alleged constructive denial and determination which was stayed. *Id.* at 4–5. The court granted New Union's uncontested motion to intervene, and the parties all filed cross-motions for summary judgment. *Id.*

The district court granted New Union's motion for summary judgment, reasoning that the court lacked jurisdiction for all claims filed in the district court. R. at 9. Furthermore, the court reasoned that jurisdiction did not lie under RCRA § 7002(a)(2) because the EPA's authorization of New Union's program constituted an order rather than a rule, and that jurisdiction did not lie under § 1331 because the specific provisions of RCRA would govern the claim over the general

APA provisions. R. at 6–8. The district court also concluded that RCRA § 7006(b) indicates Congressional intent that judicial review of any EPA action regarding state program approval, including a constructive denial and determination, should be in the Court of Appeals. *Id.*

CARE and the EPA appealed the district court's determination that it lacked jurisdiction to order the EPA to act on CARE's petition for revocation of the EPA's approval of New Union's hazardous waste program under RCRA § 7002(a)(2). *Id.* at 1. CARE further takes issue with the district court's ruling that it lacked jurisdiction under 28 U.S.C. § 1331. *Id.* Additionally, CARE requests this Court to lift the stay of the appellate action, to review the EPA's action as a constructive denial under § 7006(b), and to consolidate its appellate filing with its appeal. *Id.* at 1–2. However, the EPA and New Union take issue with lifting the stay, arguing that the EPA did not constructively approve New Union's hazardous waste program. *Id.* at 2.

STATEMENT OF THE FACTS

In 1986, New Union applied for the EPA to authorize its state hazardous waste program under RCRA § 3006(b). R. at 10. As CARE acknowledges, at the time of filing, New Union's program fulfilled all statutory and regulatory criteria for authorization, so the EPA accordingly granted its authorization. R. at 5. Although the EPA noted that there was a risk of inadequacy if less resources were dedicated to the program, the agency found that New Union's Department of Environmental Protection (DEP) had sufficient resources to fully administer and enforce the program in accordance with the federal requirements of issuing timely permits, inspecting facilities regularly, and taking action against all significant violations. R at 10.

On January 5, 2009, CARE petitioned the EPA under RCRA § 7004 and § 553(e) of the APA to commence proceedings to withdraw its 1986 authorization of New Union's regulatory program, highlighting facts dating back to 1986 that CARE alleges render the program

inadequate. R. at 4. Although CARE points out that the number of hazardous waste treatment, storage and disposal facilities (TSDs) has increased while the resources dedicated to the program have decreased, New Union's DEP was still able to issue 125 permits during the previous year and to bring regular enforcement actions commensurate with the rate of enforcement actions brought by the EPA and environmental groups. R. at 11. Recognizing the potential inability to inspect more than ten percent of the TSDs per year, the DEP sought out the EPA's assistance and the EPA will continue to offer support as needed. *Id*. New Union's 2009 Annual Report stated that even with a decline of the state's finances, the decrease in the DEP's hazardous waste resources was "no greater than twenty percent more than decreases in resources the state devotes to other public health regulatory programs." R. at 10. As a result of the decrease in state resources, the governor issued a hiring freeze for all state agencies except for the few vacancies found to be "critical to protection of civil order." R. at 10.

In 2000, New Union's legislature enacted the Environmental Regulatory Adjustment Act (ERAA), updating previous legislation. R. at 12. First, recognizing the limited resources of the DEP, the ERAA amended the Railroad Regulation Act (RRA) to transfer the DEP's regulatory burden over intrastate railroads in New Union to the New Union Railroad Commission (NURC), an agency with more congressional oversight than the DEP. R. at 12. While this amendment removed criminal sanctions for railroad violations of environmental statutes, the Commission retained all "standard setting, permitting, inspection and enforcement authorities of the DEP" consistent with the state environmental laws in regulating facilities. R. at 12.

The state legislature also amended the state hazardous waste program, effectively banning Pollutant X by precluding its extended storage and requiring its prompt transport because of the severe danger the chemical poses to public health and the environment. *Id*. The

state legislature recognized the EPA's strict standards in authorizing only nine TSDs across the country to treat or dispose of Pollutant X under RCRA and found that there were no properly designed facilities in New Union capable of controlling such a toxic chemical without risking the safety of New Union residents. *Id.*

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c)(2). This Court reviews summary judgment decisions *de novo*. *Salve Regina Coll. V. Russell*, 499 U.S. 225, 238 (1991). The burden rests upon the moving party to show the absence of a genuine issue of material fact, but he only need establish "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). However, under such review, appellate courts are to "examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158–59 (1970).

Should this Court review issues arising under RCRA § 7006(b), judicial review "shall be in accordance with §§ 701–706 of [the APA]." 5 U.S.C. § 6976(b). Section 706 of the APA requires this court to "compel agency action unlawfully withheld or unreasonably delayed," and to set aside agency actions which it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706 (2006).

SUMMARY OF THE ARGUMENT

The district court erred in holding that it lacked jurisdiction under § 7002(a)(2) to determine whether it can order the EPA to act on CARE's petition for revocation of New Union's hazardous waste program, filed pursuant to RCRA § 7004(a). Contrary to the unsound reasoning of the district court, § 7004(a) gives rise to a nondiscretionary duty, and the EPA's

authorization of New Union's program constituted a rule. Therefore, jurisdiction is proper under RCRA § 7002(a)(2). However, the district court correctly dismissed CARE's claim pursuant to 5 U.S.C. § 553(e) and properly reasoned that the specific provisions of RCRA provide jurisdiction, rather than the general APA provisions. Moreover, CARE fails to assert a cause of action for its claim pursuant to the APA because the EPA's complete lack of action regarding CARE's petition constitutes neither an agency action, much less a final agency action.

The record does not indicate any undue delay as defined in case law, so the inaction of the EPA is not a reviewable action under RCRA § 7006(b). Alternatively, if this Court does find the inaction to be a constructive determination and denial, § 7006(b) is the improper statute under which to bring this action and, regardless, the action is time barred. Furthermore, even a constructive action fails to meet the finality requirement of reviewability, and the case should be remanded to the district court to compel final action on a nondiscretionary duty. If this Court does find judicial review proper, the action should still be remanded to the district court to establish a record upon which judicial review can be applied.

RCRA § 3008 gives the EPA federal authority to enforce RCRA violations, which includes, but is not limited to, the withdrawal of New Union's authorized program. While the *Harmon* court asserted that the EPA forfeits this enforcement authority upon authorization of a state program, this reasoning contravenes the plain language of § 3008, the EPA's interpretation its withdrawal authority in 40 C.F.R. § 271.22, as well as the enforcement policy of RCRA. Also, New Union's removal of criminal sanctions for certain violations, as well as its unauthorized delegation of oversight authority to a new state agency, violates RCRA. However, the EPA's withdrawal authority remains strictly discretionary under 40 C.F.R. § 271.22 because RCRA simply preempts New Union's program to the extent that they are in conflict. Finally,

New Union's prohibition of Pollutant X does not violate RCRA because this prohibition is more strict than the federal program, and grounded in the protection of public health and the environment. This prohibition also escapes a *Commerce Clause* attack because it does not facially discriminate against other States, and any indirect discrimination was expressly authorized by Congress and rooted in a legitimate State interest other than economic protection.

ARGUMENT

I. RCRA § 7002(a)(2) PROVIDES JURISDICTION IN DISTRICT COURTS TO ORDER THE EPA TO ACT ON APPELLANT'S PETITION FILED UNDER RCRA § 7004(a), AS § 7004(a) CREATES A NONDISCRETIONARY DUTY AND EPA'S APPROVAL OF NEW UNION'S PROGRAM WAS A RULEMAKING.

When interpreting a statute, the plain language should serve as the starting point. *Staples v. United States*, 511 U.S. 600, 605 (1994). RCRA § 7002(a)(2) gives "any person" a cause of action "against the Administrator where there is alleged a failure of the Administrator to perform an act or duty under [RCRA] which is not discretionary with the Administrator." 42 U.S.C. § 6972(a)(2). It further states "[t]he district court shall have jurisdiction . . . to order the Administrator to perform the act or duty referred to in paragraph (2)." *Id.* Thus, under RCRA, a plaintiff must bring "a claim that the Agency has failed to perform a nondiscretionary act . . . in the district court, not in the court of appeals." *Sierra Club v. U.S. EPA*, 992 F.2d 337, 347 (D.C. Cir. 1993). CARE's petition pursuant to RCRA § 7004 is precisely such a claim. Because the EPA's authorization of New Union's hazardous waste program constituted a rule and not an order, the district court improperly concluded that it lacked jurisdiction under § 7002(a)(2).

A. RCRA § 7004(a) Creates a Reviewable Nondiscretionary Duty thus Establishing Jurisdiction in District Courts Pursuant to RCRA § 7002(a)(2).

The plain language of RCRA § 7004(a) imposes a mandatory duty upon the EPA Administrator to take specific actions within a reasonable time after receiving certain petitions.

The provision states in full:

> "Any 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 therefor."

42 U.S.C. § 6974(a). This language does not give rise to a duty to take enforcement actions. Rather, the provision gives rise to clearly defined nondiscretionary duties and provides a meaningful standard against which a court can review agency actions. Thus, § 7004 is reviewable in district courts pursuant to § 7002(a)(2).

1. *The Word "Shall" Generally Imposes Discretionless Obligations Within a Statute.*

Congressional use of the term "'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive." *Association of Civil Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). Applying this general rule, the Supreme Court in *National Ass'n of Home Builders v. Defenders of Wildlife* held that because § 402(b) of the Clean Water Acts states that the EPA "shall approve" a state discharge program if nine specific criteria are satisfied, the EPA does not have discretion to deny such an application if indeed the nine straightforward criteria are met. 551 U.S. 644, 661 (2007). Similarly, § 7004(a) of RCRA states that "the Administrator shall take action," and "shall publish notice" and the reasons therefor within a reasonable time after receiving certain petitions. 42 U.S.C. § 6974(a). The use of the term "shall" in this provision not once, but twice, establishes that at some point following the receipt of such a petition, the Administrator must act on it, and publish her decision and reasoning in the Federal Register. To clarify, while § 7004(a) gives rise to a nondiscretionary duty to act, the agency still has the discretion to take whatever action it deems most appropriate in responding to the petition.

2. *The EPA's Inaction with Regard to CARE's Petition is Reviewable Because it Does Not Constitute an Agency Decision "Not to Prosecute or Enforce" under* Heckler v. Chaney.

Although the APA strongly favors judicial review of agency actions, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), an agency decision "not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion," and is therefore not reviewable. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). *Chaney* reasoned that such decisions "not to enforce often involve[] a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* at 831. Additionally, to determine what constitutes a nondiscretionary duty "requires careful examination of the statute on which the claim of agency illegality is based." *Webster v. Doe*, 486 U.S. 592, 600 (1988).

The District Court of the District of Columbia followed *Chaney* in a case brought by the Sierra Club pursuant to the citizen suit provision of the Clean Air Act (CAA), which mirrors the language of RCRA § 7002(a)(2), alleging that Administrator failed to perform a mandatory duty by not acting to prevent the construction of three major emitting facilities in Kentucky. *Sierra Club v. Jackson*, 2010 U.S. Dist. LEXIS 72641, at *5 (D.D.C. July 20, 2010). Because § 167 of the CAA is titled "Enforcement" and "charges the EPA Administrator with preventing the installation of major air pollution sources in attainment areas" under certain circumstances, *id.* at *3 (citing 42 U.S.C. § 7477 (2006)), the district court held that the decision not to enforce was committed to agency discretion and was therefore unreviewable pursuant to *Chaney*. *Id.* at *23.

However, the EPA's inaction in this case is not governed by *Chaney* because "careful examination" of RCRA indicates that § 7004(a) does not concern substantive "enforcement actions," but rather a procedural non-discretionary duty. *Chaney*, 470 U.S. at 831; *Webster*, 486 U.S. at 600. Whereas § 167 of the CAA is one of two primary enforcement tools to achieve

national air quality standards, and is aptly titled "Enforcement," RCRA § 7004(a) governs agency procedure with regard to petitions, and is titled "Petition for Regulations and Public Participation."[1] 42 U.S.C. § 7477; 42 U.S.C. § 6974(a). Furthermore, while *Chaney* emphasized prosecution or enforcement "through civil or criminal process," *Chaney*, 470 U.S. at 831, and § 167 of the CAA suggests that the Administrator shall take action through "seeking injunctive relief," 42 U.S.C. § 7477, no courts are involved in the nondiscretionary duty arising under RCRA § 7004(a). Lastly, unlike in *Chaney* and *Sierra Club*, the EPA in this case does not need to rely on a number of complex balancing factors particular to its own expertise when considering whether to act on a petition. Therefore, RCRA § 7004(a) gives rise to a nondiscretionary duty which is not governed by *Chaney*.

3. *Assuming,* Arguendo*, that the EPA's Inaction with Regard to CARE's Petition Constitutes an Agency Decision "Not to Prosecute or Enforce," This "Inaction" Successfully Rebuts the Presumption of Unreviewability Because it Establishes Clear Guidelines for Judicial Review.*

Chaney establishes that the presumption of unreviewabilty for agency decisions not to enforce can be rebutted if the governing statute "clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." *Chaney*, 470 U.S. at 834. For example, the Labor-Management Reporting and Disclosure Act mandates that upon complaint from a union member, the "Secretary shall investigate . . . and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action." *Id.* at 833 (citing 29 U.S.C. § 481 (2006)). This satisfied the criteria for rebuttal of *Chaney's* presumption. *Id*.

Similarly, RCRA § 7004(a) contains clearly defined guidelines that provide a meaningful standard for courts to use in reviewing EPA actions. Courts can determine whether the EPA has

[1] RCRA has its own detailed, comprehensive enforcement provisions: § 3008 which governs hazardous waste management, § 9006 which governs underground storage tanks, and § 11005 which governs medical waste. 42 U.S.C. §§ 6928, 6991e, 6992d (2006).

received a petition without difficulty. Moreover, courts can easily determine whether the agency has taken the appropriate actions under § 7004(a) simply by looking in the Federal Register. The only question left for courts is what constitutes an unreasonable delay, which they are readily prepared to answer. *See infra* Part III.A. Thus, because § 7004(a) clearly withdraws discretion from the EPA and provides clear guidelines for exercise of its enforcement power, *Chaney's* presumption of unreviewability is successfully rebutted and jurisdiction lies in district courts.

B. The District Court Erred in Holding that the EPA's Authorization of New Union's Hazardous Waste Program under RCRA § 3006 was an Order and not a Rule.

As noted *supra* in Part I.A, RCRA § 7004(a) authorizes any person to petition the EPA to make, amend, or repeal regulations. Therefore, the EPA's action in authorizing New Union's hazardous waste program must have constituted a regulation for jurisdiction to lie under RCRA § 7002(a)(2). The APA does not include "authorization" in its definitions of "rule" or "order," but it states, "[a] rule means the whole or a part of an agency statement of general or particular applicability and future effect," and includes certain particularized actions such as rate-setting or the approval of a corporate reorganization. 5 U.S.C. § 551(4) (2006). Thus, a "rule" is usually understood to refer to an action intended to address a class of situations, rather than a named individual. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). An "order," by contrast, is anything other than a rulemaking, includes licensing, and is typically a product of an adjudication, which involves only a few highly motivated parties. 5 U.S.C. § 551(6)–(7) (2006).

The district court erroneously emphasized that the EPA's authorization of New Union's program affected only the single party of New Union in concluding that the EPA's action was not general in nature. To the contrary, the authorization of the state regulatory plan affected every entity involved in the cradle-to-grave process of hazardous waste. R. at 5, 10. In addition, the authorization in 1986 was forward looking, and therefore, the authorization was of "future

effect," further indicating that the authorization constitutes a rule.

Additionally, while orders involve only a few highly motivated parties, rules are created by notice and comment requirements of the APA, which are intended to "assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion). When considering authorization of New Union's program, the EPA issued public notice, provided an opportunity for public comment, and published its decision in the Federal Register, indicating that the action applied generally to a large number of affected parties. R. at 6. Furthermore, RCRA § 3006(b) provides that when considering an application for authorization of a state program, the Administrator must issue notice of whether he expects the state program to be authorized and shall provide the opportunity for a public hearing. 42 U.S.C. § 6926(b). Thus, the very language of the statute further supports that the authorization was of general applicability to a large number of regulated entities.

Lastly, the district court erroneously held that the *only* reason Congress created a bifurcated jurisdictional system in RCRA §§ 7006(a) and (b) is because (a) provides jurisdiction for the review of *rules*, and (b) creates jurisdiction for the review of *orders*. R. at 7. However, this distinction is entirely arbitrary. Subsection (a) grants jurisdiction in the Court of Appeals for the District of Columbia for review of regulations, and subsection (b) grants jurisdiction in the local Court of Appeals for review of actions taken pursuant to RCRA §§ 3005 and 3006. 42 U.S.C. § 6976. However, the D.C. Circuit also holds the necessary expertise to hear cases regarding orders. *See, e.g.*, *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs.*, 417 F.3d 1272 (D.C. Cir. 2005) (holding that certain permits issued under the CWA were adjudications). Thus, a better rationalization, which the district court fails to consider, is that the EPA regulations will be national in scope, whereas state program authorization and permitting

decisions are more likely to have regional effect. As such, it would be in the best interest of parties to bring their claim in the Court of Appeals in their respective region for such matters. Therefore, because the EPA's authorization of New Union's program applies broadly, has effect in the future, and adheres to the rulemaking process, this action constitutes a rule.

C. The EPA's Determination that Authorization of a State Program Constitutes a Rule is Entitled to *Chevron* Deference Because the EPA is Interpreting RCRA, the Term "Authorization" in RCRA § 3006 is Ambiguous, and the EPA's Interpretation is Reasonable.

An agency's construction of a statute which it administers is entitled to deference from a reviewing court if the statute being construed is silent or ambiguous to the specific issue, and the agency's interpretation is a permissible construction of the statute. *Chevron v. Natural Recourse Defense Council, Inc.*, 467 U.S. 837 (1984). In determining what qualifies as a permissible construction of the statute, the agency's interpretation need not be the only permissible adoption, but simply one that is reasonable within the context of the statute. *Id.* However, *Chevron* does not apply to agency interpretations of statutes which are broadly applicable to many agencies and are specially administered by none, such as the APA. *Id.*

In *Chevron*, NRDC challenged the EPA's interpretation of the words "stationary source" to include all of the pollution-emitting devices within the same industrial group. *Id.* Under this "bubble policy" interpretation, the installation or modification of one piece of equipment would not require a permit if the total emissions of the industrial group did not increase. *Id.* After reviewing the statutory language, the Court found that the phrase "stationary source" was ambiguous, and that the EPA's interpretation of the provision was reasonable. *Id.*

Similarly, whether "authorization" under RCRA § 3006 constitutes a rule or an order is ambiguous, and the EPA's interpretation that such "authorization" amounts to a rulemaking is reasonable for the reasons set forth *supra* in Part I.B. Similar to "stationary source" in the CAA,

whether "authorization" of a state program constitutes a rule or an order is ambiguous in RCRA. Neither "authorize" nor "authorization" are found in the definition provisions of RCRA. 42 U.S.C. § 6903 (2006). Additionally, Congress offers no language as to whether authorization under RCRA § 3006 constitutes an order or a rule, further establishing the term's ambiguity.

Moreover, in determining that authorization of a state hazardous waste program constitutes a rule, the EPA is interpreting RCRA, not the APA. The APA includes detailed definitions for the terms "rule," "rulemaking," "order," "adjudication," and "license," and is therefore not the source of ambiguity at issue. 5 U.S.C. §§ 551(4)–(8). RCRA's use of "authorization" avoids any terms that were clearly defined in the APA definitions of "rule" and "order." 5 U.S.C. §§ 6926, 6976. Thus "authorization," as used in RCRA §§ 3006 and 7006, creates the source of ambiguity at issue. Therefore, because the EPA possesses unquestionable expertise pertaining to RCRA, this Court should give considerable weight to the EPA's decision. Thus, jurisdiction is proper under RCRA § 7002(a)(2) because the EPA's "authorization" constitutes a rule and RCRA § 7004(a) gives rise to a nondiscretionary duty.

II. 28 U.S.C. § 1331 DOES NOT PROVIDE JURISDICTION FOR DISTRICT COURTS TO ORDER THE EPA TO ACT ON CARE'S PETITION, FILED UNDER 5 U.S.C. § 553(e).

Federal district courts have "original jurisdiction arising under the . . . laws . . . of the United States" including the APA. 28 U.S.C. § 1331. Section 553(e) of the APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). APA § 702 grants a fallback cause of action for "person[s] suffering legal wrong because of agency action, or adversely affected by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. CARE fails to establish a cause of action for its claims under § 553(e) because RCRA provides a more specific provision,

and because the EPA has not performed an agency action, much less a *final* agency action.

A. RCRA § 7002(a)(2) is the Specific Review Provision that Provides a Cause of Action for CARE, Not § 553(e) of the APA.

The Supreme Court has held that a "general statutory rule usually does not govern unless there is no more specific rule." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989). In *Radzanower v. Touche Ross & Co.*, the petitioner brought an action against a national banking association with its principal office in Boston, Massachusetts for an alleged violation of federal securities laws pursuant to a general Securities Exchange Act provision which stated that venue was proper in any district where the violation occurred. 426 U.S. 148, 153 (1976). However, the case was dismissed because proper venue for such an action lay only under a more narrowly tailored, particularly applicable provision providing that certain actions, like the one at issue, against a *national banking association* may be heard within the district where such "association may be established." 12 U.S.C. § 94 (2006).

Like the narrowly tailored venue provision used in *Radzanower*, RCRA § 7004(a) is more narrow and specific to the facts at hand than the broad, general provision in § 553(e) of the APA. RCRA § 7004(a) and § 553(e) of the APA both grant similar rights to petition. However, as previously discussed in Part I.A, § 7004(a) grants a specific right to petition to the Administrator of the EPA regarding RCRA regulations. This differs from the APA provision which grants a general right to petition *any* agency regarding regulations under *any* statute. Additionally, § 7004(a) provides specific duties that the Administrator must perform after receipt of the petition, while the § 553(e) is silent in this regard. Therefore, the specific RCRA provisions govern rather than the fallback provisions of the APA.

B. Assuming, *Arguendo*, that the Court Proceeds with Analysis of a Claim Arising Under § 553(e), CARE Fails to Assert a Cause of Action Under § 702 of the APA Because the EPA has Not Performed an Agency Action, Much Less a *Final* Agency Action.

28 U.S.C. § 1331 and § 702 of the APA respectively provide jurisdiction in district courts and a cause of action for petitions filed under § 553(e) of the APA. 28 U.S.C. § 1331; 5 U.S.C. §§ 553(e), 702; *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004). In addition, §706(1) of the APA provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Furthermore, the APA defines agency action as "the whole or a part of an agency rule, order . . . or failure to act." 5 U.S.C. § 551(13). However, "agency action," as required by §§ 551(13), 702, and 706(1), be it a failure to act or otherwise, must be a *discrete* listed agency action that the agency is legally *required to take*. *S. Utah*, 542 U.S. at 64.

In *Southern Utah*, the respondent organization filed an action pursuant to §706(1) alleging that the Bureau of Land Management (BLM) failed to act to protect certain wilderness study areas (WSAs) as required by the Federal Land Policy and Management Act (FLPMA) because it failed prevent the use of recreational all-terrain vehicles in such areas. 542 U.S. at 60. Although the BLM is charged with retaining public lands for multiple use management, § 1782 of FLPMA provides that "'the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.'" *Id.* at 59 (quoting 43 U.S.C. § 1782(c) (2006)). However, the Supreme Court held that while § 1782 was "mandatory as to the object to be achieved," it left BLM "a great deal of discretion in how to achieve it." *Id.* at 66. Therefore, § 1782(c) did not mandate a *discrete* agency action, nor an action the agency was *required to take*. *Id.* at 67.

Section 553(e) of the APA is similar to § 1782(c) in that it too is mandatory in its

objective, but leaves a great deal of discretion to the EPA in deciding how to achieve the objective. Simply put, § 553(e) requires the agency to give "interested person[s] the right to petition for the issuance, amendment, or repeal of a rule," but it provides no further mandate as to how an agency should achieve this. Thus, because § 553(e) does not require an agency to act on such a petition in any manner whatsoever, the EPA has a "great deal of discretion" in determining how to achieve this objective. Therefore, under APA § 553(e), the EPA has not failed to take a "discrete" action that it was "required to take." As such, no "agency action" exists and no cause of action lies pursuant to §§ 702 and 706(1) of the APA. Furthermore, should this court be persuaded that the EPA's inaction constituted an "agency action," such action is surely not a *final* action, as required by *Bennett v. Spear*, for the reasons elaborated in Part IV.A. 520 U.S. 154 (1997). Therefore, because RCRA provides a more specific provision for review, and because the EPA has performed neither an agency action, nor a final agency action, the district court properly concluded that it lacked jurisdiction for CARE's action filed under 553(e) of the APA.

III. RCRA § 7006(b) DOES NOT PROVIDE JURISDICTION TO THE COURT OF APPEALS BECAUSE THE EPA'S FAILURE TO RESPOND TO CARE'S PETITION IS NOT AN ACTION SUBJECT TO JUDICIAL REVIEW.

RCRA § 7006(b) grants judicial review of the "Administrator's *action* . . . in granting, denying, or withdrawing authorization . . . under section 3006" in the Circuit Court of Appeals. 42 U.S.C. § 6976(b) (emphasis added). As noted in Part II.B, the APA defines an "action" to "include . . . [a] failure to act," 5 U.S.C. § 551(13), but courts have interpreted this to mean that only inaction constituting unreasonable delay is reviewable. *See Natural Res. Def. Council, Inc. (NRDC) v. Adm'r, U.S. EPA*, 902 F.2d 962, 995 (D.C. Cir. 1990) (Silberman, J., dissenting) (explaining that the APA "imposes a general duty . . . to avoid unreasonable delay" that permits

review of agency inaction). Even if this Court finds that there has been undue delay, the inaction is not reviewable under RCRA § 7006(b) because the petition is in response to an EPA rulemaking and the claim is barred by the statute of limitations.

A. There was No Unreasonable Delay of Response to Constitute a Reviewable Action of the EPA Under RCRA § 7006(b).

The Supreme Court has held that agency procedures are within the discretion of those agencies "to which Congress had confided the responsibility for substantive judgments." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978). Acknowledging this deference to agencies, the court in *Telecommunication Research & Action Center (TRAC) v. FCC* stated that the first stage of assessing unreasonable delay is to consider whether it "is so egregious as to warrant mandamus." 750 F.2d 70, 79 (D.C. Cir. 1984).

Although *TRAC* was decided on other grounds, the court developed a list of factors to evaluate unreasonable delay. *Id*. at 80. These "*TRAC* factors" were applied in *Muwekma Tribe v. Babbitt* when the Muwekma Tribe claimed the Bureau of Indian Affairs (BIA) unreasonably delayed addressing a petition for recognition in violation of § 706(1) of the APA. 133 F. Supp. 2d 30, 31 (D.D.C. 2000). The court stated that, in assessing the egregiousness of agency delay, courts should consider: (1) the "the rule of reason" governing agency decisionmaking; (2) whether Congress provided any indication of a timetable; (3) whether the subject to be addressed is a matter of human health or welfare; (4) the effect of expediting the action on the agency's other activities; (5) the nature and extent of the interests that are prejudiced by delay; (6) that there is no need to find agency impropriety. *Id*. at 36 (citing *TRAC*, 750 F.2d at 80).

The first consideration is whether the agency's decisionmaking followed the rule of reason. *Id*. This Court should also recognize that there are some situations of unavoidable delay. *Id*. The *Muwekma* court found that a letter issued by the governor stating the petition would be

considered at some point in the next two-to-four years suggested unreasonable delay because there was "no clear end in sight." *Id*. at 37. Contrary to the "ambiguous, indefinite time frame" provided by the BIA in *Muwekma*, the EPA in this case has had the petition for less than a year and nothing in the record supports a contention that the agency has no purpose of acting. *Id*.

Next, courts should also look to whether Congress provided a timetable indicating an expectation of agency action within the statute to further define the rule of reason. *Id*. at 38. Notably, the *Muwekma* court found that, even if no timeline was indicated, "Congress [did not] intend[] petitions to languish in the review process indefinitely." *Id*. at 39. However, the court stated that Congress might have intended a more open time frame, recognizing the limited resources of agencies. *Id*. Accordingly, as there is no explicit timeline outlined in RCRA § 7004, this Court should find that the EPA did not violate the rule of reason or Congressional intent by failing to respond to CARE's petition after less than one year.

Further, courts have considered the third and fifth factors together, holding that "delays are less tolerable when human health and welfare are at stake . . . [and] the nature and extent of the interests prejudiced by delay should be considered." *Id*. In *Muwekma*, the court stated that while economic interests alone were not enough to compel agency action, the "nexus between human welfare and 'economic' considerations . . . weighs in favor of compelling agency action based on unreasonable delay." *Id*. Though, the case at hand is distinguishable, as there is already regulation in place to protect the environment which is even more restrictive than the federal program. *See infra* Part VII. Any delay would only extend the stringent New Union program designed around public health and safety. In addition, the record contains no history of injury to New Union residents resulting from the regulation of Pollutant X. Finally, it can be argued that since any petitions to the EPA regarding the withdrawal of a state hazardous waste

program would include public health concerns, it would be unreasonable to consider this petition before the others only because there is an implication on health.

The fourth factor this Court must consider is whether expediting the delayed action would have a negative impact on the agency's other responsibilities. Notably, if an acceleration would "serve only to delay other important [agency] matters, then the delay in question may be considered reasonable." 133 F. Supp. 2d at 40. This was applied in *Muwekma*, where the court recognized that "compelling the agency to assign the plaintiff top priority may produce an inequitable result." *Id.* at 41. Unlike the *Muwekma* court, the district court in this case never questioned the agency as to whether there were other, more pressing interests that might be adversely affected by an immediate response to the petition.

Finally, this Court should consider EPA's lack of impropriety in its alleged delay. In *Muwekma*, the court found unreasonable delay despite a lack of impropriety on the record because the remaining *TRAC* factors weighed heavily against the BIA. *Id*. However, in the case at bar, the *TRAC* factors do not collectively weigh in favor of compelling agency action. As such, this Court should strongly consider the lack of impropriety behind the EPA's delay in finding that it is not unreasonable. After performing the suggested *TRAC* analysis, this Court should find that the EPA has not unreasonably delayed in responding to CARE's petition and has, therefore, not acted. Since the APA specifically only provides judicial review of final actions, the Court of Appeals does not have jurisdiction to hear this case.

B. Any Judicial Review Available is Limited to the Court of Appeals for the District of Columbia Circuit Under RCRA § 7006(a)(1) and Any Cause of Action Under § 7006(b) is Time Barred.

In *Cement Kiln Recycling Coalition v. EPA*, the court held that RCRA § 7006(a)(1) "invests [the Court of Appeals for the District of Columbia Circuit] with jurisdiction over

petitions for review of EPA 'action . . . denying any petition for the promulgation, amendment or repeal of any regulation under [RCRA].'" 493 F.3d 207, 226 (D.C. Cir. 2007) (citing 42 U.S.C. § 6976(a)(1)). That court also found that whether something is a regulation under RCRA is "substantially similar to the question of whether it is a legislative rule under the APA." *Id.* at 226. As explained in Part I.B, the EPA's authorization of New Union's hazardous waste program was a rulemaking. As such, a constructive authorization of amendments to and a constructive denial of a petition for the repeal of that regulation is limited to the judicial review of the Court of Appeals for the District of Columbia Circuit under RCRA § 7006(a)(1).

Alternatively, if this Court finds that the EPA's authorization of New Union's program was not a rule or that this constructive action is properly challenged under RCRA §7006(b), the district court properly held that this challenge is time barred. The court in *Cement Kiln* explained that "Congress has declared a preference for immediate review by providing that a challenge to a final RCRA regulation must be brought within ninety days of promulgation." 493 F.3d at 215. According to the record, CARE argues for withdrawal of New Union's program based on changes made, most recently, in 2000. R. at 10-12. Constructive authorization ten years ago significantly surpasses the ninety-day provision, and since CARE challenges no other subsequent EPA action, this action should be excluded based on the statute of limitations.

IV. ASSUMING, *ARGUENDO*, THAT THERE HAS BEEN A CONSTRUCTIVE DENIAL AND DETERMINATION, THE COURT OF APPEALS LACKS JURISDICTION BECAUSE THERE HAS BEEN NO FINAL ACTION AND THE COURT OF APPEALS SHOULD REMAND TO THE DISTRICT COURT TO COMPEL SUCH FINAL AGENCY ACTION.

In *Bennett v. Spear*, the Supreme Court explained that "The APA, by its terms, provides a right to judicial review of all 'final agency action.'" 520 U.S. 154, 175 (1997) (citing 5 U.S.C. § 704). Accordingly, this court should assess the finality of a constructive determination and

denial before assuming jurisdiction to review those actions. If the court finds that these constructive actions are not final for judicial review, the case should be remanded to the district court to compel agency action on a nondiscretionary duty, as addressed in Part I. Even if the court finds these constructive actions to be final actions for the purpose of judicial review, the court must remand this case to the district court to establish a record.

A. Tests Employed by Courts to Determine if Agency Inaction is a Final Action Indicate that the EPA's Failure to Act is Not Subject to Judicial Review.

Even when not explicitly in statutes, courts have found "jurisdiction to review agency action . . . [is] subject to the general limitation that only *final* agency action is subject to immediate judicial review." *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1387 (4th Cir. 1990) (emphasis added). In *NRDC*, the court's per curiam decision outlined two tests applicable to the facts of this case that are applied by courts to determine when inaction constitutes a final action. 902 F.2d at 983–97. In that case, the EPA Administrator adopted revisions to the national ambient air quality standards after soliciting public input on the various particulates it intended to regulate. *Id*. at 966. When the final rule was adopted, the Administrator declared an intent to continue research on acid deposition without revising the regulation of that particulate. *Id*. at 982. An environmental group filed an action in the court of appeals to review the Administrator's decision regarding acid deposition in which the court had to determine whether the Administrator had made a final action on acid deposition regulation by failing to create a standard. *Id*.

1. *"The Rulemaking Cycle Test" Does Not Grant Jurisdiction to the Court of Appeals Because the EPA has Not Yet Initiated the Rulemaking Cycle*.

In *NRDC*, Judge Edwards found that "where a rulemaking procedure has been completed and an issue has been properly raised during the course of the rulemaking, the Agency's failure to

address or resolve that issue does not render it unreviewable by the court of appeals," finding the decision not to act to be a final action. *Id*. at 989. This test was further explained in *Association of National Advertisers v. FTC* when the court stated that "[p]ostponing review until relevant agency proceedings have been concluded permits an administrative agency to develop a factual record, to apply its expertise to that record, and to avoid piecemeal appeals." 627 F.2d 1151, 1156 (D.C. Cir. 1979) (citations omitted). In this case, there is no record of the EPA even initiating the rulemaking cycle. R. at 4. Accordingly, even a constructive denial or determination cannot be considered final since the Administrator has not addressed the issue and was not permitted to develop a factual record on that issue.

2. *"The Actual Final Decision Test" Does Not Grant Jurisdiction to the Court of Appeals Because the EPA has Not Made an Actual Decision.*

In *NRDC*, Judge Silberman relied on the plain language of the statutory term "final action," in holding that agency inaction is not reviewable at all. 902 F.2d at 997. He found that "when the agency has failed to decide, no matter how close the agency is to that decision," the matter is unreviewable. *Id.* Accordingly, a constructive denial and determination are not subject to judicial review because no actual, final decision was made.

B. Because this Action is Not Ripe, it is Not Appropriate to Subject the EPA to Appellate Court Interference.

In *Sierra Club v. Gorsuch*, the D.C. Court of Appeals held that "[t]he requirement of finality is in essence a question of ripeness, focusing on the appropriateness of the issues presented for judicial review." 715 F.2d 653, 657 (D.C. Cir. 1983). The rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs*., 387 U.S. at 148–49. To

evaluate ripeness, this court should consider: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

CARE filed this petition under RCRA § 7004 to engage in public participation in the revision of a regulation under RCRA, as encouraged by § 7004(b). A delay in review would not cause hardship to CARE because they are not immediately affected by any EPA promulgation or withdrawal of such rulemaking. Since their interest is in promoting agency adherence to environmental law, CARE's goals would be better served if the EPA was given the opportunity to fully assess the concerns of the petition before responding. Also, judicial intervention would inevitably interfere with the EPA's other administrative responsibilities. This Court should recognize that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Vt. Yankee*, 435 U.S. at 543. Finally, since the record lacks any sort of factual development regarding the EPA's constructive actions, this Court would benefit from further fact-finding. Therefore, because the challenge to this constructive action is not ripe, this action is not final. Thus, it is not subject to judicial review by this Court.

C. Alternatively, if this Court Finds Jurisdiction under RCRA § 7006(b), Public Policy Suggests that it Should First Remand the Case to the District Court to Establish a Record on Which it can Review the Constructive Actions.

The seventh circuit pointed out that agency-inaction cases might not have a record for the court of appeals to review. *Ind. & Mich. Elec. Co. v. EPA*, 733 F.2d 489, 490 (7th Cir. 1984). In the case at hand, there is no record of any EPA action regarding the petition or any responses that might have been made to New Union before receipt of the petition. Recognizing that appellate courts are "not designated and are ill-equipped to serve as fact-finding forums," this Court

should remand this case to the district court to establish a record. *Abestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 769 (2d Cir. 1988). This Court should also consider public policy regarding the conservation of judicial resources. If this court assumes jurisdiction and engages in fact-finding, it confuses the role of courts and may lead to duplicate filings and interference with agency decisionmaking. This would go against both public policy and the purpose of RCRA to address environmental harms quickly. 49 U.S.C. § 6902 (2006).

V. BASED ON THE STATUTORY LANGUAGE AND PURPOSE OF RCRA, THE EPA HAS SIGNIFICANT INDEPENDENT ENFORCEMENT AUTHORITY, WHICH INCLUDES, BUT IS NOT LIMITED TO, THE ABILITY TO WITHDRAW AUTHORIZATION FOR STATE PROGRAMS

In determining the EPA's withdrawal authority, this Court must be guided by 40 C.F.R. § 271.22 (2009), which clearly describes the EPA's withdrawal authority as discretionary. Moreover, under RCRA § 3008, it is clear that the EPA has substantial, independent enforcement authority that it may exercise in lieu of program withdrawal. 42 U.S.C. § 6928. As such, this Court could only infer a mandatory obligation to withdraw if it held that the EPA forfeited this discretionary enforcement authority when it authorized New Union's hazardous waste program. Such a finding would contravene the plain language of the statute, as well as the general policy of cooperative environmental enforcement that pervades environmental law generally, and RCRA in particular.

A. Even If New Union's Enforcement was "Inadequate" Under RCRA § 3006(b), This Would Not Trigger a Mandatory Withdrawal of New Union's Program Under § 3006(e) Because Withdrawal is Discretionary, and the EPA has Other Enforcement Options Which May be Exercised in Lieu of Withdrawal.

1. *The Court Must Defer to the EPA's Determination That the EPA's Withdrawal Authority for State Programs is Discretionary*.

The EPA is only required to withdraw program authorization if "a State is not administering and enforcing a program authorized [under RCRA]." 42 U.S.C. § 6926(e).

Without elaboration, this characterization is ambiguous, and the Court must defer to the EPA's reasonable interpretation of its withdrawal authority, as they are the expert agency for RCRA. *Chevron*, 467 U.S. at 843–44. In this case, the Court must look to 40 C.F.R. § 271.22, where the EPA asserts that its withdrawal authority is strictly discretionary. *See* 40 C.F.R. § 271.22 (stating the EPA "may withdraw program approval" when a state program no longer complies with RCRA). Under no circumstances is the EPA required to withdraw program authorization.

Under *Chevron*, this Court must uphold the EPA's withdrawal authority as strictly discretionary, because the EPA's interpretation of RCRA § 3006(e) is reasonable. *Chevron*, 467 U.S. at 844. In fact, when looking at the statute as a whole, it is clear that a contrary interpretation that limits the EPA's discretion in the withdrawal process would contravene Congressional intent. Notably, if this Court requires the EPA to withdraw authorization in response to all RCRA infractions, this would nullify the EPA's enforcement authority under RCRA § 3008(a)(2). *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (holding that, if possible, a statute must be interpreted such that "no clause, sentence, or word shall be superfluous, void, or insignificant"). As such, the EPA's withdrawal authority must be upheld as discretionary.

2. *The EPA is Not Required to Bring an Action Against New Union, and Even if it Was, The EPA May Bring Its Own Action Without First Withdrawing New Union's Program Authorization.*

While RCRA § 3008(a)(2) provides for federal enforcement when a violation occurs within a state with an approved program, this obligation is not triggered just because New Union New Union's enforcement resources have decreased. Importantly, RCRA does not require regulatory perfection, but merely requires that a state's enforcement be "adequate" and oversight procedures be "comprehensive." 42 U.S.C. § 6926(b); 40 C.F.R. § 271.15 (2009). In this case, New Union's enforcement and inspection numbers are commensurate with federal oversight, and

environmental groups continue to have an active role in filing citizen suits. R. at 11. Despite challenges, the EPA finds that New Union's enforcement and oversight are sufficient. A contrary holding would set an absurd precedent, where the EPA would be forced to intervene in every state that faces financial hardship amidst a nationwide recession.

Even if the EPA were required to bring enforcement actions against RCRA violators in New Union, it would be able to bring its own enforcement action under RCRA § 3008(a)(2) without any obligation to withdraw New Union's authorization. However, CARE is likely to rely on one Eighth Circuit case, which asserted that withdrawal is necessary before any enforcement action could be brought. *See Harmon Industries v. Browner*. 191 F.3d 894, 899 (8th Cir. 1999). Though, this case was wrongly decided and should not be followed.

Controversially, the Eighth Circuit determined that the EPA forfeits its enforcement authority upon authorization of a state program. *Id.* While RCRA holds that state permitting actions shall have the "same force and effect" as federal permits, 42 U.S.C. § 6926(d), *Harmon* extrapolates this language, applying it to the enforcement context. *Id.* Declaring that "administration and enforcement of the program are inexorably intertwined," *Harmon* infers that the EPA must withdraw a state's authorization prior to brining any enforcement action. However, this strained inference from *Harmon* is clearly insufficient to trump § 6928, which grants the EPA significant federal enforcement authority regardless of state authorization.

Even if this Court finds the statute ambiguous as to what state actions are given the "same force and effect" as federal action, the EPA has settled this issue against the notion of mandatory program withdrawal. *See* 40 C.F.R. § 271.16 (2009) (asserting that, beyond a notice requirement, the EPA's enforcement authority is not restricted despite state authorization). This interpretation is reasonable, and deserves deference under *Chevron*, because the EPA's ability to

bring targeted enforcement actions is critical to achieve RCRA's goals of fairness and national deterrence. EPA, *RCRA Enforcement Response Policy,* 26 Envtl. L. Rep. (Envtl. L. Inst.) 35645, at *5 (March 15, 1996). If the EPA were forced to bring withdrawal actions, RCRA's enforcement scheme would simply collapse, as withdrawal is such an extreme tactic can only realistically be used for the most egregious RCRA violations. *Id.*

VI. BY MERELY SHIFTING REGULATORY AUTHORITY AND ENFORCEMENT PRIORITIES, THE 2000 ENVIRONMENTAL REGULATORY ADJUSTMENT ACT DOES NOT TRIGGER AUTOMATIC PROGRAM WITHDRAWAL UNDER RCRA § 3006(e).

The New Union 2000 ERAA accomplishes two purposes: it eliminates criminal sanctions for intrastate railroads, and it shifts regulatory responsibility for that industry over to a new state agency. Despite these changes, the EPA is not required to withdraw New Union's program.

A. New Union's Elimination of Criminal Sanctions for Certain Railroad Activity Represents a Failure of Their State Program, But Does Not Compel the EPA to Withdraw Authorization for New Union's Program.

RCRA establishes a "floor," which sets the minimum standards applicable to hazardous waste management. *Old Bridge Chems., Inc. v. N.J. Dept. of Envtl. Prot.*, 965 F.2d 1287, 1296 (3d Cir. 1992). By removing criminal sanctions for intrastate railroad violations, New Union lowers this "floor," and fails to provide an adequate remedy under 40 C.F.R. § 271.16, which requires that criminal remedies be available. In response to these violations, the EPA may, at its discretion, withdraw New Union's program. 40 C.F.R. § 271.22.

However, the EPA is only *required* to withdraw New Union's program if New Union is "not administering and enforcing" its authorized program and, after the EPA's notification, New Union fails to rectify this situation within a reasonable time. 42 U.S.C. § 6926(e). Though, until there is a criminal violation that goes unpunished, it cannot be said that New Union has failed to enforce RCRA. Moreover, even after the ERAA, criminal violations would not go unpunished

because criminal sanction still may be obtained if a RCRA claim is pursued in federal court.

Moreover, to the extent that a state provision conflicts with RCRA, the EPA need not take any action because RCRA will automatically preempt that provision, allowing claims to be brought in federal court. U.S. CONST. art. 6, § 1, cl. 2; *See Boyes v. Shell*, 199 F.3d 1260, 1269–70 (3d Cir. 2000). This *Supremacy Clause* argument was applied in the *Boyes* case, which is analogous to the case at hand because, in both cases, the state legislatures limited remedies that would otherwise be available under RCRA; New Union eliminated criminal sanctions for RCRA violations committed by certain railroads, R. at 12, while *Boyes* dealt with a Florida provision that prohibited Florida courts from ordering remediation in response to leaks from certain underground storage tanks. *Id.* at 1269. In *Boyes*, the EPA was not required to take any action against Florida. *Id.* Rather, RCRA preempted the state law to the extent that they are in conflict, and the appropriate remedy under RCRA could still be obtained in federal court. Similarly, withdrawal is not necessary in the case at hand because New Union residents can simply file criminal charges in federal court. As in *Boyes*, no action from the EPA is necessary.

B. While New Union Should Have Notified the EPA About Its Administrative Program Changes, the EPA is Not Required to Withdraw Program Authorization.

When New Union transferred railroad environmental regulatory authority to a newly-created agency (NURC), they should have notified the EPA in accordance with 40 C.F.R. § 271.21(c) (2009) (requiring approved states to notify the EPA "whenever they propose to transfer all or part of any program from the approved State agency to any other State agency"). In fact, NURC is not authorized to administer any portion of the state program until approved by the EPA. *Id.* However, this oversight in approval does not require the EPA to withdraw New Union's entire program. Specifically, despite New Union's regulatory oversight, its program survives both statutory and constitutional attacks on its validity.

First, New Union's administrative change does not require that the EPA withdraw New Union's authorization. RCRA § 3008(e) mandates withdrawal only when a State "is not administering and enforcing [its] program." It is undisputed that NURC is a state agency, and that it will have all the same enforcement and regulatory authority that DEP had over its railroads. So long as NURC administers and enforces the program, no EPA action is necessary.

Second, because New Union's administrative structure does not conflict with RCRA, New Union need not worry about RCRA preemption. While in *Boyes*, a Florida program was invalidated for lack of proper authorization, 199 F.3d at 1269–70, the program was only invalidated because it conflicted with RCRA. *Id.* at 1269 (holding a Florida statute in conflict with RCRA because it eliminated certain measures of remediation that was available under RCRA). However, because New Union's program does not conflict with RCRA in any way, this case is distinguishable from *Boyes* and survives an attack under the *Supremacy Clause*.

VII. BECAUSE NEW UNION'S RESTRICTIONS ON POLLUTANT X ARE MORE STRINGENT THAN REQUIRED BY RCRA AND BASED ON THE PROTECTION OF HUMAN HEALTH, NEW UNION AVOIDS PROBLEMS OF EQUIVALENCY, CONSISTENCY, AND CONSTITUTIONALITY.

RCRA requires that state programs be both "equivalent" and "consistent" with RCRA. 42 U.S.C. § 6926(b). However, New Union's ban on Pollutant X does not run afoul of these requirements because the federal standard is not relaxed, and because this prohibition is rooted in concerns for public health and the environment. Moreover, while the *Commerce Clause* has a "negative aspect" that prohibits states from unjustifiably burdening the flow of interstate commerce, U.S. CONST. art. 1, § 8, cl. 3; *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994), New Union's program survives scrutiny because: (1) RCRA expressly authorized this type of incidental burden on interstate commerce; and (2) New Union avoided

discriminating against other States, and grounded their policy in the protection of public health and the environment.

A. By Making New Union's Environmental Regulations More Strict, and Based on the Protection of Human Health and Environmental Welfare, New Union's Program Continues to be Both Equivalent To and Consistent With RCRA.

It is a violation of RCRA to operate a program that is not equivalent to the federal program. 42 U.S.C. § 6926(b). However, rather than setting a federal standard, RCRA states 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 RCRA]." 42 U.S.C. § 6929 (2006). As such, a state program is only considered non-equivalent if it is less stringent than the federal program. *See* 40 C.F.R. § 271.21(e) (explaining that if the federal program changes, states must amend their own programs to remain at least as strict). In this case, New Union's ban on Pollutant X is *stricter* than the federal standard, and therefore equivalent to RCRA. R. at 12.

New Union's program, as amended, is also not "inconsistent" with RCRA because the ERAA was rooted in concerns for human health. R. at 12. Since Congress neither defined the term "consistent" in RCRA § 3006(b), nor explained its impact for program withdrawal, this Court must look to the EPA for guidance. *Chevron*, 467 U.S. at 844. Specifically, the EPA identifies two conditions that must be met if a program is to be "inconsistent:" the program must have no basis in human health or environmental protection, and it must act as a prohibition on the treatment, storage, or disposal of hazardous waste in the state. 40 C.F.R. § 271.4 (2009). In the case at hand, the EPA concedes that New Union's ERAA constitutes a prohibition on the treatment, storage, or disposal of Pollutant X in the state. R. at 12. *See Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1394 (D.C. Cir. 1991) (holding that waste restrictions only constitute a *prohibition* if the restriction is state-wide). However, New Union's

program is not "inconsistent" because it fails the second prong; New Union's prohibition on Pollutant X is firmly rooted in human health and environmental welfare.

In fact, New Union's legislature listed health concerns at the top of its rationale, relying heavily on the World Health Organization's conclusion that Pollutant X is "among the most potent and toxic chemicals to public health and the environment." R. at 12. While CARE may speculate that other interests motivated the ban, New Union was clearly concerned about public health. As such, the ERAA does not render New Union's program "inconsistent" with RCRA.

Though, even if this court found that New Union's program was inconsistent or not equivalent with RCRA, these violations would not mandate a withdrawal by the EPA. By tightening its restrictions on Pollutant X, it cannot be said that New Union is not "administering and enforcing" its program under RCRA § 3006(e). As such, this Court should deny CARE's request for mandatory withdrawal. In fact, since New Union's program remains consistent and equivalent with RCRA, EPA is powerless to withdraw New Union's program. 40 C.F.R. § 271.22.

B. New Union's Authorized Program Does Not Violate the Commerce Clause.

While waste is an article of commerce subject to scrutiny under the dormant *Commerce Clause*, *City of Phila. v. New Jersey*, 437 U.S. 617, 622 (1978), New Union's indirect limitations on interstate commerce are justified by virtue of Congressional approval, combined with New Union's important interest in protecting public health and the environment.

1. *RCRA Authorized New Union to Interfere with Interstate Commerce.*

The Supreme Court has held that Congress may permit the states to engage in practices otherwise unconstitutional under the Commerce Clause. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). In such cases, judicial scrutiny is not appropriate because Congress has already acted on

the issue of interstate commerce and has struck the balance it deemed appropriate. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). While the EPA faces a heavy burden to demonstrate an "unambiguous indication" of such approval, *id.*, New Union's ERAA is paradigmatic of the kind of commerce restrictions that Congress explicitly approved with RCRA.

While RCRA provides minimum standards for regulation and enforcement, states are encouraged to pass strict environmental laws that will harm interstate commerce. 42 U.S.C. § 6929. As such, RCRA exempts New Union's program from attack under the *Commerce Clause*. The Supreme Court applied this rule in the analogous *Prudential Ins. Co. v. Benjamin*, where the Court considered the validity of a South Carolina statute that taxed foreign insurance companies as a condition of certification in the state. 328 U.S. 408, 408 (1946). While this interfered with interstate commerce, this tax was permissible under the McCarran Act, which explicitly authorized taxes to "support existing and future state systems for regulating and taxing the business of insurance." *Id.* at 429 (citing 15 U.S.C. §§ 1011-1015). Here, the Court held that Congress must have known that disparate levels of taxation would interfere with interstate commerce, and that Congress intended "to throw the whole weight of its power behind the state systems" despite harm to commerce. *Id.* at 430. As such, South Carolina's statute was immune from *Commerce Clause* scrutiny. *Id.*

In the case at hand, Congress, through RCRA, similarly intended to empower approved states to retain substantial control of their own hazardous waste programs. Like in *Prudential*, Congress was surely aware that disparate regulations would impede interstate commerce. Despite this, Congress explicitly gave the states authority to deviate from a national standard to make the regulations stricter. 42 U.S.C. § 6929. It would be absurd to argue that Congress

intended that all states with ambitious, strict programs could be overturned due to Commerce Clause considerations. As such, New Union's program is immune from this scrutiny.

2. *Regardless of Exemption, New Union's Program Survives a Commerce Clause Challenge Because it Does Not Discriminate Against Other States and it is Rooted in Public Health Concerns.*

The Supreme Court has announced a general rule that states cannot discriminate facially when it comes to interstate commerce. *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55 (1992). However, in the case at hand, New Union does not discriminate against any other state. R. at 12. Rather, New Union's ERAA serves as a blanket prohibition against the treatment, storage or disposal of Pollutant X within the state, without any favoritism to New Union. R. at 12. This sets New Union apart from the disfavored programs characterized by protectionism and in-state favoritism. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 790–91 (4th Cir. 1991) (holding unconstitutional a State program that "compel[s] in-state facilities to give preference to in-state waste, to reserve a specific amount of in-state capacity for in-state waste, to limit the acceptance of out-of-state waste . . . and to bar waste from specific states").

New Union's program constitutes an evenhanded prohibition on a dangerous pollutant, which will only indirectly affect interstate commerce. As such, New Union's program is presumed valid unless the resulting burdens on commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Given the enormous risks associated with Pollutant X, New Union's prohibition is surely justifiable.

In fact, banning this chemical reflects such an important state interest that New Union's prohibition on Pollutant X would be permitted even under the heightened standard that is applied to discriminatory restrictions. The Supreme Court has held that so long as a discriminatory law is "demonstrably justified by a valid factor unrelated to economic protectionism" and that there

are no adequate "nondiscriminatory alternatives" available, it does not run afoul of the *Commerce Clause*. *See New Energy*, 486 U.S. at 278 and *Chemical Waste Management v. Hunt*, 504 U.S. 334, 342 (1992). To that end, Courts have upheld restrictive state programs that prohibited the importation or transport of certain products, if there is a potential for disease or the destruction of a natural resource. *See Maine v. Taylor*, 477 U.S. at 131 (upholding a state prohibition on the importation of live baitfish that could potentially destroy Maine's fisheries); *Clason v. Indiana*, 306 U.S. 439, 443 (1939) (upholding Indiana's restrictions on transportation of dead animals without a license because of the potential for disease). In that same vein, given the dangerous nature of Pollutant X, New Union's prohibition would likely be allowed even if it discriminated against other states. As such, New Union's non-discriminatory prohibition should surely be upheld under the less stringent *Pike* standard.

CONCLUSION

For the foregoing reasons the EPA respectfully requests that this Court reverse the district court's decision to dismiss CARE's action brought under RCRA § 7002(a)(2), and to affirm the district court's decision to dismiss CARE's action brought under § 553(e) of the APA. The EPA also respectfully requests that this Court find that its inaction with regard to CARE's petition does not constitute a constructive denial or determination, but should this court hold to the contrary, the EPA requests this Court to remand this case to the lower court for the appropriate proceedings. If the case proceeds to the merits of CARE's challenge, the Court should not require the EPA to withdraw New Union's program authorization because: (1) RCRA gives the EPA significant federal enforcement authority under RCRA § 3008; (2) New Union's isolated RCRA infractions do not trigger mandatory program withdrawal under RCRA § 3006(e); and (3) New Union's ban of Pollutant X does not contravene RCRA or the *Commerce Clause*.