C.A. No. 18-2010

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION
AND THE ENVIRONMENT, INC.,
Appellant,

v.

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

v.

STATE OF NEW UNION,
Intervenor-Appellee

On Appeal from The United States District Court
For the District of New Union

BRIEF FOR INTERVENOR-APPELLEE, STATE OF NEW UNION

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Federal Circuit Cases

Federal District Cases

Statutes

Rules

Regulations

Constitutional Provisions

Legislative History

Other Authorities

JURISDICTIONAL STATEMENT

This is an appeal from the District Court for the District of New Union granting summary judgment in favor of New Union and dismissing CARE's claims. The district court properly determined jurisdiction was unavailable under both RCRA Citizen Suit jurisdiction and Federal Question jurisdiction. RCRA § 7002(a)(2); 28 U.S.C. § 1331. This court has jurisdiction based on 28 U.S.C. § 1291 (2006), which grants jurisdiction over all final decisions of the lower courts.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether RCRA § 7002(a)(2) 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 pursuant to RCRA § 7004.

II. 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).

III. 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 § 7006(b).

IV. Assuming the answer to issue 3 is positive and the answer to either or both of issues 1 and 2 is positive, should this Court lift the state in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions or should the Court remand the case to the lower court to order EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program?

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

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

VII. Assuming this Court proceeds to the merits of CARE's challenge, must EPA 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

This is an appeal from a final order of the United States District Court for the District of New Union. (Order Granting Mot. Summ. J.; June 2, 2010.). On January 5, 2009, the Citizen Advocates for Regulation and the Environment, Inc. ("CARE") served a petition on the Administrator of the Environmental Protection Agency ("EPA"), under § 7004 of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901- 6992k, 6974 (2006) ("RCRA") and § 553(e) of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2010) ("APA"). (Order 4.). The petition requested that EPA commence proceedings to withdraw its approval of New Union's hazardous waste program. EPA has taken no action on that petition. (Order 4.).

On January 4, 2010, CARE filed (with all notice requirements fulfilled) an action in District Court for the District of New Union under RCRA §7002(a)(2). (Order 4.). The action sought either an injunction requiring EPA to act on the petition or judicial review of EPA's inaction. (Order 4.). New Union filed an unopposed motion to intervene under Federal Rule of Civil Procedure 24, which the district court granted. (Order 4.). The parties filed cross-motions for summary judgment, agreeing that the facts alleged by CARE were uncontested and no further facts were necessary to decide the matter. (Order 4.). Recognizing potential obstacles to jurisdiction, CARE filed its complaint simultaneously with a petition for review with the Court of Appeals, C.A. No. 18-2010, again seeking judicial review of EPA's inaction on the same grounds. (Order 4-5.). On EPA's motion, the Court of Appeals stayed that proceeding pending

the outcome of the district court decision. (Order 5.). New Union's motion to intervene was granted. (Order 5.).

The district court denied CARE's motion for summary judgment, finding that CARE's cause of action against EPA failed to state a claim. (Order 7.). Specifically, the district court found that because EPA's approval or disapproval of New Union's program was an order rather than a rule, it was not subject to petition under § 7004, nor under 28 U.S.C. § 1331, Federal Question Jurisdiction. (Order 7.). The court further stated that even if such action was available under §7004, the petition would nonetheless be time-barred by the ninety day statute of limitations for judicial review established in § 7006(a) and (b). (Order 7.).

STATEMENT OF THE FACTS

In 1986, EPA approved New Union's hazardous waste program in lieu of the federal program, pursuant to RCRA § 3006. (Order 5.). New Union's program met all of RCRA's statutory and EPA's regulatory requirements for approval. (Order 5.). New Union's annual reports indicate a gradual increase in waste treatment, storage and disposal facilities ("TSDs") since 1986. (Rec. doc. 5 for 2009, p. 23.). At the program's inception, only 1,200 TSDs were in operation, while the 2009 Annual Report indicated an increase to 1,500 TSDs. (Rec. doc. 1, p. 17.). Originally, fifty full-time employees were dedicated to the state program. (Rec. doc. 1, p. 73.). However, due to the state's budgetary cuts, only thirty full-time employees were reported in 2009. (Rec. doc. 5 for 2009, p. 23.). The Department of Environmental Protection ("DEP"), is New Union's environmental administrator in charge of enforcing New Union's state program. (Rec. doc. 2, p. 1.). DEP's 2009 Annual Report to EPA also indicated that the Governor directed a freeze on hiring state employees, expected to continue for the next two years. (Rec. doc. 5 for 2009, p. 53.).

In 2000, the New Union legislature enacted the Environmental Regulatory Adjustment Act ("ERAA"), which contained two provisions delegating duties to New Union's Railroad Commission ("Commission"). (Rec. doc. 5 for 2000, pp. 103-107.). The Commission is charged with regulating intrastate railroad freight rates, railroad tracks and rights of way, and railroad yards, to the extent allowed by the Commerce Clause of the United States Constitution. (Rec. doc. 5 for 2000, pp. 103-105.). The first provision ("Provision 1"), transfers "all standard setting, permitting, inspection, and enforcement authorities of the Department of Environmental Protection under any and all state environmental statutes to the Commission." (Rec. doc. 5 for 2000, pp. 103-105.). Moreover, it removes criminal sanctions for violations of environmental statutes, by facilities falling under the jurisdiction of the Commission. (Rec. doc. 5 for 2000, pp. 103-105.).

The second provision ("Provision 2") sets procedural standards in response to the increased threat of Pollutant X. (Rec. doc. 5 for 2000, pp. 105-107.). Recognizing that Pollutant X is "one of the most potent and toxic chemicals to public health and the environment", Provision 2 seeks to minimize the threat Pollutant X presents. (Rec. doc. 5 for 2000, pp. 105-107.). Under Provision 2, facilities generating Pollutant X must now submit an annual minimization plan until Pollutant X generation entirely ceases. (Rec. doc. 5 for 2000, pp. 105-107.). Additionally, the DEP may only grant permits to facilities transporting Pollutant X to an out-of-state permitted facility under the condition that Pollutant X is only stored at the local facility for under 120 days. (Rec. doc. 5 for 2000, pp. 105-107.). Persons can transport Pollutant X through New Union, if they do so in a manner as direct and fast as is reasonably possible, stopping only for emergencies and necessary refueling. (Rec. doc. 5 for 2000, pp. 105-107.).

The destination must be one of the nation's nine facilities designed and permitted to treat Pollutant X. (Rec. doc. 5 for 2000, pp. 105-107.).

SUMMARY OF THE ARGUMENT

The district court properly granted New Union's summary judgment and dismissed CARE's claim. CARE is unable to properly assert jurisdiction under RCRA § 7002(a)(2) or 28 U.S.C. § 1331. RCRA § 7004(a) only gives a person the right to petition an action involving a *regulation* and 5 USC § 553(e) only gives a person the right to petition an action involving a *rule*. CARE's petition involves neither a regulation nor a rule, but the review of an order. The court also does not have Federal Question jurisdiction, because CARE petitioned for Federal Question jurisdiction pursuant to APA § 553(e), which has a more specific equivalent statute, RCRA § 7004. When there exists a more specific equivalent to a statute, the more specific governs over the general. Here, RCRA § 7004 is the more specific equivalent statute to APA § 553(e); RCRA § 7004 governs over APA § 553(e). Thus, APA § 553(e) does not provide the court jurisdiction to review CARE's action. Because CARE is unable to successfully assert jurisdiction, this Court should dismiss CARE's claim.

Furthermore, EPA's inaction on CARE's petition is not subject to judicial review under RCRA § 7006(b), because EPA's inaction does not constitute any type of action for which RCRA § 7006(b) provides judicial review. RCRA § 7006(b) only allows for the review of issuing, denying, modifying, or revoking any permit or in granting, denying, or withdrawing authorization. EPA's failure to act on CARE's petition does not amount to any of the mentioned actions. Also, judicial review of CARE's petition is time barred under RCRA § 7006(b). The statute provides that a petitioner should bring action under RCRA § 7006(b) within ninety days of the issuance, denial, modification, revocation, grant, or withdrawal that the petitioner

challenges. Because ninety days have expired since EPA took any action that could resemble an issuance, denial, modification, revocation, grant, or withdrawal, CARE's petition is not subject to judicial review.

Assuming the court has jurisdiction and judicial review over CARE's petition, this Court should maintain the stay and remand to the district court. The district court would then be able to order the EPA to initiate and complete proceedings to consider the withdrawal of New Union's program. The EPA is the more appropriate and efficient authority to make the factual determination of program approval under its statute, RCRA.

However, if this Court does lift the stay and proceed with the merits of CARE's claim, New Union's state program does not warrant withdrawal of approval. First, New Union's program is equivalent to the Federal Program. New Union's treatment of Pollutant X is more stringent than the federal program and therefore equivalent. Furthermore, the EPA has statutory authority to determine whether a state program is equivalent to the federal program. Because EPA argues that New Union's program is equivalent, the court should respect the determination and deem New Union's program equivalent. Even if the court concludes that the transfer of Provision 1 effectively removed railroad hazardous waste facilities from regulation, withdrawal of the entire program is unwarranted under the doctrine of severability. The program's overall purpose of protecting public health and the environment is still intact without the railroad hazardous waste facilities regulation. Therefore, withdrawing the entire program would be an overly extreme action for the court to take.

Second, New Union's program is consistent with the Federal and State programs applicable in other states. The program, and especially its treatment of Pollutant X, does not

violate the Commerce Clause, therefore the court should not automatically deem it inconsistent. Furthermore, the EPA is entitled deference in determining whether a state program is consistent.

Third, New Union's program has sufficient resources and performance to maintain adequate enforcement of compliance. RCRA § 3006 allows for dual enforcement between the state programs and the federal programs. The EPA still retains the ability to guarantee that the program maintains adequate enforcement capabilities. EPA's continued assistance and approval are evidence of the sufficiency of New Union's enforcement capabilities.

STANDANRD OF REVIEW

An appellate court reviews a lower court's grant of summary judgment *de novo*, a standard of review in which no form of appellate deference is acceptable. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). During a *de novo* review, the appellate court will use the same legal standard used by the district court; specifically, "summary judgment is appropriate if there is no genuine issue as to any material fact." *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir. 1994) (*quoting* Fed. R. Civ. P. 56(c)). "While the party moving for summary judgment bears the burden of showing the absence of a genuine issue of material fact, the moving party. . . need only point out. . .that there is an absence of evidence to support the nonmoving party's case." *Id.* (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Moreover, "[w]hen applying this standard, [the appellate courts] examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). "As with all summary judgment determinations, [the court] reviews the matter *de novo* to decide whether the record as a whole establishes that the defendant was entitled to judgment as a matter of law." *City of Chi. v. Envt'l Def. Fund*, 948 F.2d 345, 347 (7th Cir. 1991).

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT IT DOES NOT HAVE JURISDICTION UNDER RCRA § 7002(A)(2) OR 28 U.S.C. § 1331 TO ORDER EPA TO ACT ON CARE'S PETITION.

The district court properly granted New Union's motion for summary judgment because there is no jurisdiction to hear CARE's claims, which do not rise under the RCRA statute, as CARE suggests. The Citizen Suit Provision in RCRA authorizes citizens to sue EPA to perform a mandatory duty under the statute. RCRA § 7002(a)(2). For a court to have jurisdiction under RCRA's Citizen Suit provision, the petitioner must allege that an opposing party violated RCRA. RCRA 7002(a)(2). However, EPA did not violate RCRA § 7004 so CARE is not entitled to assert RCRA Citizen Suit jurisdiction.

The district court properly granted New Union's motion for summary judgment because there is no jurisdiction to hear CARE's claims, which do not rise under the APA, as CARE suggests. A court has Federal Question jurisdiction when an interested party brings suit arising under a federal statute, such as the APA. However, EPA did not violate the APA so CARE is not entitled to Federal Question jurisdiction. Additionally, specific statutes govern over general statutes when dealing with the same basic subjects. *State ex rel. Siegelman v. U.S. EPA*, 911 F.2d 499, 504 (11th Cir. 1990). APA, as the general statute, again does not provide jurisdiction in this case. Therefore, the district court does not have jurisdiction under 28 U.S.C. § 1331, pursuant to APA § 553(e). Since jurisdiction is a threshold determination, the district court properly dismissed CARE's petition for lack of jurisdiction under both RCRA § 7002(a)(2) and 28 U.S.C. § 1331.

A. The district court properly held that it does not have Citizen Suit jurisdiction or Federal Question jurisdiction, because EPA's initial approval is neither a regulation nor a rule, but an order.

EPA's initial approval of New Union's program is an order, for which neither RCRA nor APA provide the court jurisdiction. EPA is not required to respond to petitions targeting orders. EPA is only required to take action on petitions targeting regulations or rules. RCRA § 7004 grants authority for any person to "petition the Administrator for the promulgation, amendment, or repeal of any *regulation* under this Act." RCRA § 7004 (emphasis added). References to a regulation may include a rule because courts have referred to rules and regulation interchangeably. *See PBW Stock Exchange, Inc. v. SEC*, 485 F.2d 718, 722-723 (3rd Cir. 1973). Likewise, the APA § 553(e) grants federal question jurisdiction to a person who has "the right to petition for the issuance, amendment, or repeal of a *rule*." APA§ 553(e) (emphasis added).

The APA defines a rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency . . . ." APA § 551(4). Rule promulgation will be prospective, having a definite effect on broad classes of unspecified individuals. For example, RCRA directs the EPA to promulgate a "rule" requiring that any facility generating, transporting or disposing of hazardous waste to apply for and secure a permit. *See Environmental Defense Fund v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1986). The rule is applied prospectively and affects a broad group of unspecified individuals, any and all facilities participating in the generation, transportation, or disposal of hazardous waste.

An order, in contrast, "is the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." APA § 551(6). Orders have an immediate effect on specific individuals, oftentimes resolving disputes between two specific parties. For example, an order is the

approving or revising an original or revised state implementation plan. *Bethlehem Steel Corp., v. Gorsuch*, 742 F.2d 1028, 1032 (7th Cir. 1987).

To further illustrate, the Court of Appeals for the Seventh Circuit in *Finer Foods, Inc. v. US Department of Agriculture*, identified that an order has limited, specific application. *Finer Foods, Inc. v. U.S. Dep't of Agric*., 274 F.3d 1137, 1139 (7th Cir. 2001). The court held that the Department of Agriculture's suspension of a specific dealer's license was an order as defined by APA § 551(e). The court's rationale for the distinction was that the suspension had affected a specific party, Finer Foods, Inc., and also had the immediate effect on the specific party. *Id.*

Identical to the suspension issued in *Finer Foods, Inc*., EPA's initial approval of New Union's state program was an order as defined by 5 APA § 551(e). When EPA approved New Union's state program in 1986, only one party, New Union, was affected. Moreover, the initial approval had an immediate effect on New Union and allowed for New Union's program to begin operating in lieu of the federal program. (Order 5.). EPA's initial approval is an order which does not warrant jurisdiction under RCRA's Citizen Suit provision or APA Federal Question jurisdiction.

Additionally, EPA is not entitled deference to deem their initial approval of New Union's program as a rule, when its characteristics clearly evidence an order. RCRA does not provide any applicable definitions for "rule" or "order", effectively rendering RCRA silent and ambiguous as to the characteristics of each. *See* RCRA. If a statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute which it administers. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The district court recognized that the EPA is not interpreting RCRA when it is deeming its initial approval a rule instead of an

order; the definitions of "rule" and "order" are in the APA, a non-environmental statute governing all administrative agencies. (Order 6.). The EPA has no deference to interpret the APA since the APA is not a statute administered by the EPA. *Alaska Dep't of Envtl. Conservation*, 540 U.S. 461, 509 (2004). EPA only has deference to interpret RCRA. *See generally Chevron*, 467 U.S. 837 and *United States v. Mead Corp.*, 553 U.S. 218 (2001).

B. The district court properly held that it does not have Federal Question jurisdiction because more specific statutes govern over general statutes.

Federal Question jurisdiction is again improper because the APA, as a general authority for administrative agencies, is not available for CARE to assert as a jurisdictional basis. Rather, RCRA, the more specific statute governing the EPA, is the appropriate route to establish jurisdiction. 28 U.S.C. § 1331. As a general principle, specific statutes take precedence over general statutes when dealing with the same basic subjects. *Siegelman*, 911 F.2d at 504. Allowing the APA to govern over policies of the more specific RCRA statute would "mock the fundamental maxim of statutory construction that the terms of a more specific statute take precedence over those of a more general statute where both statutes speak to the same concerns." *Union of Concerned Scientists v. Nuclear Regulatory Com'n.* 711 F.2d 370, 380-381 (D.C. Cir.1983) (citing *Busic v. United States*, 446 U.S. 398, 406 (1980)). Therefore, Federal Question jurisdiction, only obtainable pursuant to APA 553(e), is not appropriate.

For example, in *Siegelman*, the Eleventh Circuit Court of Appeals held that RCRA was a more specific statute than the National Environmental Policy Act (NEPA) and should therefore govern EPA's actions. *Siegelman*, 911 F.2d at 504. The court recognized that RCRA more specifically addressed EPA's actions concerning permit issuance and hazardous waste management. NEPA only addressed agency environmental policies in general and did not

provide regulations as specific as RCRA. *Id.* "If there were no RCRA, NEPA would seem to apply." *Id*. at 504.

Comparatively, the APA is the general authority for administrative agencies and not an appropriate jurisdictional route when RCRA is more applicable. APA, similar to NEPA, is general in that it governs actions of federal agencies as a whole. (Order 6.). It directs government agencies on the procedures necessary for promulgating their rules and regulations. *See* APA *generally*. The APA is applicable only where a specific statute is not. *See Steadman v. S.E.C.*, 450 U.S. 91, 105 (1981). RCRA, on the other hand, is the functional equivalent and more specific counterpart of APA § 553(e). RCRA § 7004; APA § 553(e); (Order 8.) RCRA specifically governs EPA's process for issuing permits to hazardous waste management facilities. Since specific governs over general, CARE is unable to use APA as an avenue for Federal Question jurisdiction.

If the court, nonetheless, concludes that it has Federal Question jurisdiction, APA § 553(e) does not provide a remedy for CARE's claim. APA § 553(e) only provides the *right* to petition a rule. The text of the statute does not require or suggest that an agency take action on such petition. APA § 553(e) (emphasis added). The only indication of suggested agency response is in the legislative history accompanying the statute. *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981). The legislative history recommends that the agency receive, consider, and respond to all petitions. Senate Judiciary Committee Print, June 1945, reprinted in Administrative Procedure Act: Legislative History, 79th Cong. 1944-46, S.Doc.No. 248, 79th Cong., 2d Sess. 11, 21 (1946). The legislative history also makes clear, however, that "Congress did not intend to compel an agency to undertake rulemaking merely because a petition has been filed." *Id.* The plain language of the APA would only give CARE the right to file their petition

with the EPA and no more. RCRA, on the other hand, explicitly mandates that the EPA *shall* take action on such petition. RCRA § 7004(a). However, as stated previously, RCRA Citizen Suit jurisdiction is unavailable because EPA's initial approval was an order. The district court properly noted that even if Federal Question jurisdiction was available, the APA would not support an action for an injunction requiring EPA to act on CARE's petition. (Order 8.).

The district court properly held that it does not have Citizen Suit jurisdiction or Federal Question jurisdiction to order EPA to act on CARE's petition. The Court of Appeals also does not have Citizen Suit jurisdiction over CARE's claim because RCRA only grants the power to petition actions involving regulations, while EPA's initial approval is an order. Likewise, Federal Question jurisdiction is not available because the APA only grants the power to petition for actions involving rules, not orders. The court also does not have Federal Question jurisdiction over CARE's petition because RCRA, as the more specific statute, applies as opposed to the APA. Much less, the APA does not provide any remedy for CARE's claim. Thus, the district court properly granted summary judgment and dismissed CARE's claim.

II. JUDICIAL REVIEW UNDER RCRA § 7006(B) IS NOT AVAILABLE.

EPA's inaction on CARE's petition is not subject to judicial review by the Court of Appeals or the district court because the inaction of EPA does not amount to an action included in RCRA's judicial review provision. RCRA § 7006(b) provides judicial review for a limited amount of actions. RCRA 7006(b) states, in pertinent part: "Review of the Administrator's action. . . (2) in granting, denying, or withdrawing authorization or interim authorization under section 3006, may be had by any interested person in the Circuit Court of Appeals of the United States . . . ." RCRA § 7006(b). EPA's failure to act on CARE's petition does not amount to a grant, denial, or withdrawal subject to judicial review under RCRA § 7006(b).

Even assuming that EPA's inaction constitutes a "constructive denial" or "constructive determination", judicial review is still unavailable because the time limitation of RCRA § 7006(b) has expired. RCRA § 7006(b) provides, "[a]ny such application shall be 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." RCRA § 7006(b). Because CARE failed to timely file an action within the ninety days of EPA's "constructive action," EPA's action is not subject to judicial review.

A. EPA's failure to act does not amount to a "constructive determination" or "constructive denial" warranting § 7006(b) judicial review.

EPA's inaction does not amount to a "constructive determination" or "constructive denial" warranting § 7006(b) judicial review. Construing EPA's inaction as an action and allowing CARE's petition to be heard would, in effect, allow states to assume state program approval without actual EPA regulation. This would undermine EPA's control in protecting public health and the environment.

To illustrate, in *General Motors Corp. v. EPA*, the Court of Appeals for the District of Columbia deemed EPA's inaction as a failure to act and nothing more. *General Motors Corp. v. EPA*, 168 F.3d 1377 (D.C. Cir 1999). EPA, in that case, failed to issue a determination of validity on a delay order submitted pursuant to the Clean Air Act. The court explained that EPA's inaction was more damaging than an express denial because the inaction essentially leaves the non-complying source without a means of knowing the validity of the delay order. *Id.* at 500. Though scolding the EPA for its failure to act, the Court of Appeals nonetheless distinguished between inaction and denial. *Id.*

EPA's inaction in this case should also be distinguishable from an explicit determination or denial, as evidenced by *General Motors*. CARE petitioned EPA on January 5, 2009, requesting that EPA withdraw its approval of the New Union's hazardous waste program that had been in effect since 1986. (Order 4.) EPA did not take any action on the petition. (Order 4.). Since EPA's inaction is distinguishable from determination or denial, the inaction does not constitute an action warranting judicial review under RCRA § 7006(b). *See generally General Motors*, 168 F.3d 1377.

As a policy concern, construing EPA's failure to act as constructive denial or constructive determination would be unreasonable. EPA, as Administrator of RCRA, is charged with protecting the public health and the environment. RCRA § 1003. To achieve their goals, EPA acts as the chief authority implementing and enforcing waste management standards under RCRA. *See Meghrig v. KFC Western, Inc.* 516 U.S. 479 (1996). Pursuant to the goals of RCRA, states can propose their own program to operate in lieu of the federal program. RCRA § 3006. EPA's approval or denial of the state program determines whether the state program meets RCRA's criteria. Construing inaction to constitute approval or denial of the state program would strip EPA of its authority to execute RCRA policies and goals. States could effectively deem their programs approved without necessarily meeting RCRA criteria. To avoid unreasonable consequences, EPA's inaction should not be construed as any type of "constructive determination" or "constructive denial" of state programs.

B. Even if EPA's failure to act constitutes a "constructive determination" or "constructive denial" the ninety day time limitation of RCRA § 7006(b) bars CARE's claim.

Even if the court finds EPA's inaction was a "constructive denial" or "constructive determination", the court should still conclude that RCRA § 7006(b) judicial review is

unavailable because of the ninety day time limitation imposed on bringing suits against the administrator. RCRA § 7006(b) requires a party to file a claim within ninety days of the Administrator's action. As an exception, a party can only bring an action after the ninetieth day if the application is based solely on grounds which arose after such ninetieth day. RCRA § 7006(b). However, if neither of these requirements is met, judicial review of the action is improper. CARE's claim was filed approximately one year after EPA's constructive action and is accordingly time barred from judicial review. The exception allowing for extended time is also unavailable because EPA's constructive action did not occur after the original ninety day time limitation. Therefore, judicial review under RCRA § 7006(b) is not applicable to CARE's claim.

By enacting RCRA, Congress set an explicit ninety day time limitation for petitioners to bring a claim under RCRA § 7006(b). After ninety days, the court is prohibited from hearing the claim. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-134 (2008). As an absolute prohibition, the parties cannot waive it, nor can a court extend that deadline for equitable reasons. *Dolan v. United States*, 130 S.Ct. 2533, 2535 (2010). Furthermore, "most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims." *John R. Sand*, 552 U.S. at 133-134; *see also Chevron USA, Inc. v. U.S. EPA*, 908 F.2d 468, 470 (9th Cir. 1990) (The court, in finding an interest in administrative finality, required "that some limitation be placed on the ability to challenge EPA actions. . . .") Therefore, Congress intended to implement a strict time limitation for parties to bring actions under RCRA § 7006(b).

The ninety day time period under RCRA § 7006(b) commences to run as soon as the agency action is deemed to have occurred. To illustrate, in *West Virginia Highlands*

Conservancy v. Johnson, the court held that the time period commenced on the date that the EPA issued a final agency action excluding coal-containing waste from regulation. *W. Va. Highlands Conservancy v. Johnson*, 540 F.Supp.2d 125, 135 (D.D.C. 2008). The complaint against the EPA, filed twenty years after the agency action took place, was dismissed because the ninety day period for the petitioner to bring action commenced in 1986, when EPA issued the final agency action. *W. Va. Highlands Conservancy v. Johnson*, 540 F.Supp.2d at 135.

Similar to the time limit commencement in *West Virginia Highlands*, CARE's time limit commencement began when EPA's constructive action occurred and therefore expired ninety days after EPA received the petition. CARE issued its petition to the EPA on January 5, 2009. (Order 4.) EPA's failure to act, deemed constructive action, occurred when it received the petition from CARE. The ninety day time limitation began to run on that day and expired ninety days thereafter. Accordingly, CARE's suit, filed approximately one year after EPA's constructive action is untimely and should therefore be dismissed.

The exception provided for in RCRA § 7006(b) also does not apply to CARE's claim. The exception permits a claim to be asserted after the ninety day limitation only if events which gave rise to the action occurred after the ninety days. Essentially, if the agency "reopens" its decision, providing the opportunity for renewed comment and objection, the statutory period for seeking review will restart. *American Railroads and Ohio v. EPA*, 846 F.2d 1465 (D.C. Cir. 1988). Since the constructive action of EPA does not qualify as a reopening, the exception does not apply and CARE's claim is therefore time-barred.

To illustrate, in *Edison Electric Institute v. United States EPA*, the Court of Appeals for the District of Columbia held that the Agency's explicit request for comment and objection to a proposed rule was sufficient to apply the reopen doctrine. *Edison Electric Institute v. United*

States EPA, 2 F.3d 438, 442 (D.C. Cir. 1993). In comparison, the District Court for the District of Columbia said that an agency action merely "reexamining a former choice" is insufficient for reopening. *See Public Citizen v. NRC,* 901 F.2d 147, 151 (D.C.Cir.1990). EPA's constructive action is insufficient for the purposes of the reopen doctrine. EPA never solicited comments or objections to their constructive determination or constructive denial of CARE's petition. Furthermore, the EPA's constructive action is more akin to reexamining a former choice since New Union's program had already been in effect since 1986. EPA's constructive action does not constitute the reopen doctrine and therefore does not warrant application of RCRA's § 7006(b) exception.

EPA's inaction is not subject to judicial review RCRA § 7006(b) because it is not a "constructive determination" or "constructive denial". Granting judicial review of inaction of this nature would produce unreasonable outcomes and hamper RCRA's intent of promoting the protection of health and environment. Additionally, even if EPA's action is deemed a constructive action, the time limitation set forth in RCRA § 7006(b) has expired and the exception extending the limitation is inapplicable, thus barring judicial review. Therefore, EPA's inaction is not subject to judicial review and CARE's suit should be dismissed.

III. ASSUMING JUDICIAL REVIEW IS AVAILABLE UNDER RCRA 7006(B), THE COURT SHOULD REMAND THE CASE TO THE DISTRICT COURT TO ORDER EPA TO INITIATE AND COMPLETE PROCEEDINGS.

Even if judicial review is available to this Court under RCRA § 7006(b), this Court should decline lifting the stay and proceeding on the merits. Instead, this Court should remand the case to the District Court for the District of New Union so that the lower court can issue an order mandating that EPA initiate and complete proceedings on CARE's petition. EPA is the proper body to decide the overall sufficiency of New Union's state program because courts and

agencies play different roles in administrative adjudication. The court decides issues of statutory construction whereas the agency applies the law to the factual scenarios at hand. *See e.g., I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Additionally, it is more efficient for the EPA to decide program approval since an agency is more properly equipped to make decisions which relate directly to the act it administers. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-377 (1989) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). Therefore, this court should remand the case to the lower court to allow for the more appropriate and more efficient EPA decision-making.

Although this Court is granted statutory authority to review this case under RCRA § 7006(b), remand to the lower court is more appropriate, despite this Court's authority. Remand would allow the district court to order EPA to initiate and complete proceedings to consider the withdrawal of the New Union state program, a decision more properly allocated to an agency. "While certain aspects of statutory interpretation remain within the purview of the courts. . . others are properly understood as delegated by Congress to an expert and accountable administrative body." *Neguise v. Holder*, 129 S.Ct. 1159, 1172 (2009). "The only role for a court is to ensure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Kleepe*, 427 U.S. at 390, 409 (citing *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). The proper role for the court is to enforce certain decisions made by the administrative agency, not to make those decisions for them.

For example, in *National Ass'n of Home Builders v. Defenders of Wildlife*, the Supreme Court indicated their preference for agency interpretation as opposed to judicial interjection. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 657-658 (2007). The

lower court, instead of adhering to the "ordinary remand rule," interjected their own judgment and concluded that petitioners were eligible under the specific statute which the respondent agency was in charge of administering. The Supreme Court reversed the Ninth Circuit decision for "erroneously depriving the agency of its usual administrative avenue." *Id*. at 657-658.

Similar to *Nat'l Ass'n of Home Builders*, the EPA is the more appropriate authority to decide if New Union's state program meets RCRA § 3006 criteria. The EPA, as the agency administering RCRA, has the congressional authority to implement and enforce RCRA, which includes approving state programs such as New Union's. Remanding to the lower court would allow EPA to fulfill is appropriate role.

Additionally, remand to the lower court to order EPA to initiate and commence proceedings is a more efficient allocation of expertise. Where issues arise that are primarily of fact, "analysis of the relevant documents 'requires a high level of technical expertise '[the court] must defer to 'the informed discretion of the responsible federal agencies." *Marsh*, 490 U.S. at 376-377 (1989) (citing *Kleppe*, 427 U.S. at 412)); *See also Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983). The more proper venue is one having more procedures and facilities to resolve the facts. *Hempstead County v. U.S. EPA*, 700 F.2d 459, 462 (8th Cir. 1983).

Likewise, the EPA has better procedures and facilities in place than both the Court of Appeals for the Twelfth Circuit and the District Court for the District of New Union. Since the facts pertaining to the case are uncontested, the ultimate decision is whether New Union's program continues to meet RCRA criteria for approval. (Order 4.). The EPA is familiar with not only RCRA but also New Union's program, as the program has been approved under EPA authority since 1986. The EPA is more properly equipped to make the determination of

approval. This court should remand the case to the district court to order EPA to initiate program approval.

IV. EPA'S WITHDRAWAL OF APPROVAL IS UNWARRANTED BECAUSE THE NEW UNION PROGRAM STILL COMPLIES WITH THE FEDERAL SCHEME OF EQUIVALENCY, CONSISTENCY AND ADEQUATE ENFORCEMENT UNDER RCRA §3006.

Withdrawal of New Union's program is unwarranted because the program still meets all the criteria necessary for approval under RCRA § 3006(b). The overall purpose of RCRA § 3006(b) is to encourage states to implement their own programs in lieu of the federal program. The state program will be approved provided it is 1) equivalent to the federal program, 2) consistent with the Federal or State programs applicable in other states, and 3) provides adequate enforcement of compliance under RCRA. RCRA § 3006(b). The EPA, as administrator of RCRA has the authority to withdraw the state program and implement the Federal program in its place if the state program fails to meet these requirements. RCRA § 3006(e). However, withdrawal of authorization for a state program is an extreme and drastic step. *United States v. Power Engineering Co.*, 303 F.3d 1232, 1238-1239 (10th Cir. 2002) (quoting *Waste Mgmt., Inc. v. EPA*, 714 F.Supp. 340, 341 (N.D.Ill. 1989)). Instead, if the Administrator determines that the state program is insufficient, the Administrator will notify the state and provide the state ninety days to increase its standards to the point of compliance. Then, if the state fails to take corrective action, the EPA can withdraw program approval and institute the federal program. As RCRA § 3006(b) encourages state programs, EPA prefers compliance as compared to the drastic step of withdrawal. New Union's state program is 1) equivalent to the federal program, 2) consistent with the Federal program or State programs applicable in other states, and 3) provides adequate enforcement of compliance. New Union's program meets all of RCRA § 3006(b) criteria, therefore, the program should not be withdrawn.

A. The New Union program is equivalent to the federal program.

Withdrawal of the New Union program approval is unwarranted because the New Union program remains equivalent to the federal program. First, New Union's treatment of Pollutant X renders the program more stringent than the Federal program and therefore equivalent. Second, the transfer of railroad hazardous waste facility regulation from the DEP to the Commission does not affect the overall equivalency of the whole program. To determine whether a state program is equivalent to the federal program, courts use federal standards as a minimum. *Chemical Waste Mgmt., Inc. v. Templet*, 967 F.2d 1058, 1059-1060 (5th Cir. 1992). In effect, the federal regulatory scheme establishes a uniform baseline standard that states must meet to gain approval. *United States v. Southern Union Co.*, 643 F. Supp. 2d 201, 207 (D.R.I. 2009). If a state program has more stringent standards than the federal program, the equivalence prong is satisfied. *Chemical Waste Mgmt., Inc.*, 967 F.2d at 1059-1060. Withdrawal of the New Union program is unwarranted because neither the treatment of Pollutant X, nor the transfer of railroad hazardous waste facility regulation affects the equivalency of the state program.

1. New Union's program is equivalent to the federal program, because New Union's treatment of Pollutant X is more stringent than the federal program.

ERAA's provision for treating Pollutant X renders New Union's program equivalent to the federal program. Congress intends for RCRA to allow state programs to operate in lieu of the Federal program only when state programs meet, at a minimum, the level of regulation established by the Federal program. *Southern Union Co.*, 643 F. Supp. 2d at 207. The intent behind RCRA is to protect human health and the environment from the dangers of hazardous waste, and setting the minimum standards for state programs is a means by which RCRA achieves this goal. *Southern Union Co.*, 643 F. Supp. 2d at 207. In developing their own

programs, states may add to the federally mandated requirements and may impose requirements that are "more stringent" than the federal counterpart, but not less. 42 U.S.C. § 6929; 40 C.F.R. § 271.1(i) (2008). When a state program provides more stringent standards than the Federal program, the state program fulfills the equivalency requirement. 42 U.S.C. § 6929; 40 C.F.R. § 271.1(i) (2008). New Union's treatment of Pollutant X is more stringent than the Federal program and enhances the program's ability to satisfy the intent of RCRA.

For example, the District Court for the District of Rhode Island in *Southern Union Co.*, upheld the equivalency of a state program when the newly implemented policies to Rhode Island's waste management program were determined to be more stringent than the Federal Program. *Southern Union Co.*, 643 F. Supp. 2d at 207. The court reasoned that the state program simply layered on additional requirements. *Id*. at 209-211. The additional requirements were deemed stricter than the Federal program and upheld by the court.

Likewise, the ERAA's treatment of Pollutant X is more stringent than the federal program and therefore deemed equivalent. In 2000, the New Union legislature recognized that the EPA and World Health Organization found Pollutant X "to be among the most potent and toxic chemicals to public health and the environment." (Rec. doc. 4 for 2000, pp. 105-107.) To combat the threats of Pollutant X the ERAA enacted Provision 2, which imposes stricter requirements on handlers of Pollutant X than the preexisting state program did. *See* (Rec. doc. 4 for 2000, pp. 105-107.). Provision 2 requires facilities that generate Pollutant X to annually submit both plans and reports indicating the facilities' minimization and reduction of Pollutant X generation. (Rec. doc. 4 for 2000, pp. 105-107.). Also, Provision 2 prohibits the DEP from issuing permits allowing the treatment, storage or disposal of Pollutant X containing wastes unless storage is for less than 120 days while awaiting transportation to one of the nation's nine

facilities permitted to treat Pollutant X. (Rec. doc. 4 for 2000, pp. 105-107.). Finally, the Provision mandates that the transportation of Pollutant X through the state be as direct and fast as reasonably possible, with no stops within the state except for emergencies and refueling. (Rec. doc. 4 for 2000, pp. 105-107.). Provision 2 simply layers on additional requirements to the already existing state program. These additional requirements, like the requirements in *Southern Union Co.*, are stricter than the Federal program and therefore remain equivalent.

Furthermore, EPA has the administrative authority to deem state programs equivalent. The district court in *Southern Union Co.* stated "Congress specifically authorized the EPA to ensure that state programs are 'equivalent' and 'consistent' with the federal program." *Southern Union Co.*, 643 F. Supp. 2d at 207. Recognizing that EPA had statutory authority to determine whether a state program is more stringent, and thus equivalent, to the federal program, the court held that EPA's determination that Rhode Island's program was more stringent in fact rendered the Rhode Island program more stringent. *Id.*

The court should likewise respect the EPA's determination that, with the ERAA's treatment of Pollutant X, New Union's program remains equivalent to the federal program. The EPA explicitly argues that the ERAA's treatment of Pollutant X does not adversely affect the program's equivalency. (Order 3.). EPA approved the New Union program in 1986, implying that the program was equivalent to the Federal program. Provision 2 has been incorporated in the approved state program for over nine years. (Rec. doc. 4 for 2000, pp. 103-107.). This Court should adopt EPA's determination that the ERAA's treatment of Pollutant X does not adversely affect New Union's equivalence to the federal program.

2. Assuming that Provision 1 withdrew railroad hazardous waste facilities from regulation, the New Union program as it stands is still equivalent to the federal program.

Assuming the ERAA effectively withdrew railroad hazardous waste facilities from regulation, the withdrawal of the entire New Union program is unwarranted because Provision 1 of the ERAA amendments ("Provision 1") can be severed from the program as a whole. Once Provision 1 is effectively severed, the remainder of the New Union program remains equivalent to the Federal program. The doctrine of severability focuses on the overall Congressional intent of statutes as a whole. *See New York v. United States*, 505 U.S. 144 (1992). The invalid provision of a statute may be severed from the original statute if, once severed, the statute still fully operates as a law. *Id*. This common sense approach suggests that severability may be necessary in order to achieve Congress's overall purpose in enacting a statute. *Id.* at 186. The overall intent of Congress should not be frustrated by the invalidity of one provision. *Id*. The purpose of enacting RCRA § 3006 was to allow state programs to protect public health and the environment. The New Union state program still effectively protects the public and environment from hazardous waste once Provision 1 is severed. Since the program's overall purpose is still achieved, the program therefore remains equivalent to the federal program, despite the withdrawal of railroad hazardous waste facility regulation.

To illustrate, in *New York v. United States*, the Supreme Court held that an unconstitutional provision included as part of an overall policy act, did not render the Act invalid. *New York*, 505 U.S. 144. The court recognized that the remainder of the Act, as it stood without the provision, was still enforceable because of severability. *Id*. at 186. The provision was severable from the Act because the overall purpose of the Act was not defeated once the provision was removed. The Court ultimately held that Congress, in originally enacting the overall policy act, had a specific purpose to ensure proper disposal sites across the nation.

Despite the two invalidated provisions, Congress wanted to maintain the purpose of waste regulation by means of the Act and therefore upheld the Act. *Id*. at 150.

Similar to *New York v. United States*, the New Union state program still advances the purpose and intent of RCRA, despite the severance of Provision 1, and is therefore equivalent to the federal program. Congress enacted RCRA to protect the environment and public health from hazardous waste. RCRA § 1003(a). RCRA § 3006 encourages states to create their own programs in lieu of the federal program to advance the purpose of protecting the environment and public health. The enactment of the ERAA contained two provisions; the first Provision effectively removes railroad hazardous waste facility regulation from state regulation, the second provision increases the oversight in regulating Pollutant X. (Rec. doc. 4 for 2000, p. 103-107.) The severance of one provision, the removal of hazardous waste facilities from regulation, does not affect the overall goals of the New Union state program. The overall purpose of enacting Provision 2 is to remove the threat that Pollutant X poses to the environment and public health, thus furthering the goals of RCRA. (Rec. doc. 4 for 2000, p. 105-107.) Likewise, the overall purpose of New Union's state program, protecting human health and the environment, is still achieved. The New Union state program, along with the inclusion of Provision 2, should not be withdrawn because it advances the overall purpose of RCRA, much like the program in *Environmental Encapsulating Corp.* Therefore, because Provision 1 can be severed, the New Union state program should remain viable and intact in the interest of achieving the goals of Congress.

B. The New Union program is consistent with the federal program.

New Union's treatment of Pollutant X meets the consistency requirement of RCRA § 3006 because it (1) does not violate the commerce clause and (2) EPA has discretion to, and does, deem the treatment consistent under its definition. In the past, courts have interpreted

consistency to mean validation under the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). If a provision violated the Commerce Clause, the provision was automatically inconsistent and thus failed to meet RCRA § 3006 criteria. *Id*. While violation of the Commerce Clause automatically renders a program inconsistent, the EPA recognized that further clarification was necessary. *See generally Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991). The EPA formulated a definitional guideline for inconsistency in 40 C.F.R. § 271.4 (2007). EPA intended this definition to encompass only "unreasonable restrictions or impediments . . . ." 50 Fed. Reg. 46438 (1985). Courts soon recognized that EPA, having provided its explicit interpretation of consistency in 40 C.F.R. § 271.4, is entitled deference in deciding what is deemed "consistent" or "inconsistent." *South Carolina*, 945 F.2d 781, 793. New Union's state program remains consistent to the federal program and should not be withdrawn. First, New Union's treatment of Pollutant X is not automatically inconsistent because it does not violate the Commerce Clause. Second, New Union's treatment of Pollutant X is not inconsistent according to the definition and deference of the EPA.

1. New Union's treatment of Pollutant X does not violate the Commerce Clause.

New Union's treatment of Pollutant X is valid under both the strict scrutiny analysis and the lower level scrutiny test set forth in *Pike v. Bruce* (*Pike* test) of the Commerce Clause. *See generally Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Commerce Clause vests in Congress the power to regulate Commerce among the states and with foreign nations. U.S. Const., Art. I, § 8, cl. 3. The Supreme Court has distinguished two ways by which a statute violates the Commerce Clause. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). A statute can burden interstate commerce either by incidentally discriminating or affirmatively (facially)

discriminating against interstate transactions. *Id*. In this context, discrimination means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citing *Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994)). Since the treatment of Pollutant X is not facially discriminatory, the court should administer the *Pike* test to determine whether the treatment violates the Commerce Clause. However, even if the heightened standard of scrutiny is applied, New Union's treatment of Pollutant X is still valid.

i. The court should apply the lower-level scrutiny Pike test and deem valid the treatment of Pollutant X, because the treatment of Pollutant X is not facially discriminatory.

This Court should apply the *Pike* test to determine whether the treatment of Pollutant X violates the Commerce Clause, because the treatment of Pollutant X is not facially discriminatory. Under the *Pike* test, the court upholds a statute unless the burden imposed on interstate commerce is clearly excessive in relation to the putative benefits. *United Haulers*, 550 US at 334.

In *United Haulers*, the Supreme Court scrutinized a state statute that implemented "flow control" ordinances requiring trash haulers to deliver solid waste to a particular waste processing facility. *Id*. The Court held that the "flow control" ordinances should be scrutinized under the *Pike* test, because they were directed to legitimate local concerns and only affected interstate commerce incidentally. *Id*. at 346. The ordinance was not facially discriminatory because it treated all private waste facilities the same and the facility benefited the public. As the ordinance was only incidentally discriminatory, the *Pike* test was applied. *Id*. at 342. Furthermore, the legislation was not facially discriminatory because waste disposal is both typically and traditionally a local government function. *Id*. at 344.

New Union's treatment of Pollutant X is also not facially discriminatory and should be scrutinized under the *Pike* test. Provision 2 is directed to legitimate local concerns that only have an incidental affect on interstate commerce. Similar to the statute at issue in *United Haulers*, Provision 2 applies to all facilities and treats them equally. (Rec. doc. 4 for 2000, pp. 105-107.) Provision 2 is also preventative and prospective in managing potential problems Pollutant X may create. (Rec. doc. 4 for 2000, pp. 105-107.) The treatment of Pollutant X is not facially discriminatory, and the court should scrutinize whether it violates the Commerce Clause under the *Pike* test.

A statute violates the Commerce Clause under the *Pike* test if the statute's burden on interstate commerce is clearly excessive in relation to the putative local benefits. *United Haulers*, 550 U.S. at 346. Again, in *United Haulers*, the Supreme Court found the ordinances did not violate the Commerce Clause because they conferred significant health and environmental benefits on the citizens of the counties. *Id*. at 346-347. The Court considered the incentives for proper disposal as well as the enhanced enforceability that the ordinances created in concluding the ordinances promoted significant health and environmental benefits. *Id*.

Likewise, Provision 2 is valid under the *Pike* test because the putative local benefits outweigh any burden that might be imposed. The ERAA confers significant health and environmental benefits on the citizens of New Union. The ERAA recognizes that both the EPA and the World and Health Organization deem Pollutant X to be amongst the most potent and toxic chemicals to public health and environment. (Rec. doc. 5 for 2000, pp. 105-107.). Thus, the ERAA implements procedures for those facilities which generate Pollutant X as well as transporting Pollutant X to facilities already licensed to manage the toxin. (Rec. doc. 5 for 2000, pp. 105-107.). The ERAA also promotes enforceability in that it creates guidelines and

procedures for handling Pollutant X where there previously were none. (Rec. doc. 5 for 2000, pp. 105-107.). By doing so, the ERAA provides means by which to target those facilities and transporters in violation of the standards. The heightened standards lessen the threat Pollutant X toxins introduce and confer a significant benefit on the environment and public health of New Union. In effect, the putative local benefits of the ERAA far outweigh the ERAA's burden on interstate commerce. Thus, the ERAA's treatment of Pollutant X survives the *Pike* test, and cannot be deemed inconsistent for violating the Commerce Clause.

ii. The treatment of pollutant X is valid under the Commerce Clause even if the court applies the heightened level of scrutiny, because it serves a legitimate local purpose and there is no alternative nondiscriminatory means.

If the court were to apply the heightened level of scrutiny, the treatment of Pollutant X survives because it serves a legitimate local purpose of promoting the safety of the general public, and there are no alternative nondiscriminatory means of transporting Pollutant X. If a state's regulations do facially discriminate against interstate transactions, heightened scrutiny is applied and the state must demonstrate that the regulations serve a legitimate local purpose and that this purpose cannot be served by an alternative nondiscriminatory means. *Old Bridge Chemicals, Inc. v. New Jersey Dep't of Environmental Protection*, 965 F.2d 1287, 1291-1293 (3rd Cir. 1992).

New Union's treatment of Pollutant X survives strict scrutiny analysis because there is a legitimate local purpose and no alternative nondiscriminatory means are available. *Compare to Granham v. Heald*, 544 U.S. 460, 466 (2005). New Union enacted Provision 2 to ensure that the environment and public health are protected. (Rec. doc. 4 for 2000, pp. 105-107.) As Pollutant X is one of the most potent and toxic chemicals to human health and environment, New Union

has an interest in decreasing its presence in New Union. Provision 2 accomplishes New Union's legitimate local purpose. Furthermore, there are no alternative nondiscriminatory means to facilitate the safe transportation of Pollutant X. Only nine facilities exist in the United States that are authorized by EPA under RCRA to treat and dispose of this highly toxic chemical. (Rec. doc. 4 for 2000, pp. 105-107.) The only way to effectively minimize the threat of Pollutant X is to execute the expeditious transport of Pollutant X to the permitted facilities. There is not an outright ban on the transport, only an increased requirement of expediency. (Rec. doc. 4 for 2000, pp. 105-107.) New Union's treatment of Pollutant is the only means available to accomplish the legitimate local interest of protecting human health and the environment. Therefore, New Union's treatment of Pollutant X does not violate the Commerce Clause.

2. *New Union's treatment of Pollutant X is consistent with the federal program, because EPA is entitled deference to, and does, deem the treatment of Pollutant X consistent.*

EPA is entitled deference to deem New Union's program consistent because Congress has vested in the EPA the authority to interpret the term "consistent." *South Carolina*, 945 F.2d at 794. When an agency has provided its interpretation of a regulation, that interpretation is warranted the court's respect. *Alaska Dep't of Envtl. Conservation* , 540 U.S. at 487-488. The EPA has provided its own interpretation of "consistency" in 40 C.F.R. § 271.4 and thus deserves deference to determine what is considered "consistent" under its interpretation. The EPA is entitled deference to, and does, determine that New Union's treatment of Pollutant X is consistent.

The court in *South Carolina* held that the EPA had discretion to determine consistency because the EPA provided its interpretation of consistency in 40 C.F.R. § 271.4, and should therefore determine policies that do and do not fall under its definition. *South Carolina*, 945

F.2d at 794. Accordingly, the EPA has not withdrawn program approval, or notified New Union of noncompliance in the nine years since Provision 2 was enacted. *See* (Rec. doc. 4 for 2000, pp. 105-107.) In fact, the EPA explicitly argues that the treatment of Pollutant X is consistent with the Federal program. (Order 3.) Since EPA is entitled deference in its interpretation and qualification of consistency, New Union's treatment of Pollutant X is consistent with the Federal program.

In conclusion, New Union's treatment of Pollutant X satisfies the consistency element of RCRA § 3006 and should therefore not be withdrawn. The treatment of Pollutant X does not violate the Commerce Clause, which would otherwise automatically render it inconsistent. Furthermore, New Union's treatment of pollutant X is consistent according to the EPA's determination, and the court should afford that determination deference.

C. The New Union program has adequate enforcement capabilities.

New Union's state program still retains adequate enforcement capabilities necessary for compliance with RCRA § 3006. Additionally, once a state program is deemed sufficient by the EPA, the EPA retains the ability to guarantee that the program maintains adequate enforcement capabilities. New Union's current resources and performance adequately meet the requirements for enforcement, as evidenced by EPA's continued assistance and involvement.

"The enforcement authority of an authorized State program need not be equivalent to the RCRA enforcement provisions. Instead, a State's authority should be adequate to meet the requirements listed in 40 C.F.R. 271.16 which were established pursuant to RCRA §§ 3006 and 7004." Statutory Checklist issued by EPA, Explanatory note 25, (http://www.epa.gov/waste/laws-regs/state/revision/models/statcl.pdf) (last visited Nov. 26, 2010. The EPA remains the decision-making authority regarding a state's enforcement capabilities and also participates as an additional enforcement authority. *United States v. Elias,*

269 F.3d 1003, 1011 (9th Cir. 2001) (referring to *United States v. MacDonald*, 933 F.2d 35, 44-45 (1st Cir. 1991)). Congress's intent in allowing the EPA to retain its enforcement powers in addition to the states enforcement powers was to have "RCRA's criminal enforcement provisions . . . to apply within a state having authorized programs . . . ." *United States v. Elias*, 269 F.3d 1003, 1011 (9th Cir. 2001) (referring to *United States v. MacDonald*, 933 F.2d 35, 44-45 (1st Cir. 1991)). Even after assisting the state with enforcement, the EPA has the ability to order an audit of the state program to ensure that compliance is accomplished. *See* Press Release from EPA, Inspector to N.M.'s Envtl. Enforcement (March 19, 1998) (1998 WL 34300461). The EPA can also hold a public hearing and notify the state of its inadequacy. RCRA § 3006. If the state does not increase their enforcement capabilities to the point of compliance, EPA may withdraw authorization. RCRA § 3006

The New Union program has sufficient resources and performance to comply with RCRA § 3006, as evidenced by EPA's participation and continued approval. In the past, if EPA has determined a state's resources and performance to be inefficient, the EPA takes action and either notifies the state or conducts an audit. The EPA would not continue to assist the state and provide additional compliance efforts. *See* Press Release from EPA, Inspector to N.M.'s Envtl. Enforcement (March 19, 1998) (1998 WL 34300461). The DEP 2009 Annual Report to EPA indicated that the Governor directed a freeze on hiring state employees, but that during the freeze, the state would concentrate resource cuts on discretionary programs and programs in which state employees performed functions that federal employees would otherwise perform. (Rec. doc 5 for 2009, pp. 50-53.) While DEP's shortage of resources has minimized RCRA enforcement in New Union, the program still has adequate resources to enforce the subtitles of RCRA, pursuant to 40 C.F.R. § 271.16.

In spite of the governmental freeze, New Union performed inspections of 150 TSDs during 2008 and expected to perform at the same level during the current year. (Rec. doc. 5 for 2009, pp. 22-23.) Since EPA assisted with the inspection process, a total of 300 TSDs were inspected during 2008, and are expected to be inspected in 2009. (Rec. doc. 5 for 2009, pp. 22-23.) In addition to the 300 inspections, New Union also issued 125 permits in 2008, with a plan to do the same in 2009. (Rec. doc. 5 for 2009, pp. 19-20.) New Union's enforcement actions are also in RCRA compliance. The DEP enforced 6 total violations during 2008, four being administrative and two being civil. (Rec. doc. 5 for 2009, pp. 24-25.) EPA again assisted New Union, resulting in a total of 12 enforcement actions. (Rec. doc. 5 for 2009, pp. 24-25). Though Provision 1 effectively removed criminal sanctions for violation of environmental statutes, the EPA and the federal government still retain the ability to criminally enforce any such violations. *See Elias*, 269 F.3d 1003 ; (Rec. doc. 5 for 2000, pp. 103-105.) Because EPA has dual enforcement abilities, Provision 1 does not render New Union's enforcement capabilities insufficient for RCRA § 3006 approval.

Therefore, the resources and performance of New Union are sufficient under RCRA § 3006 and do not warrant withdrawal of the state program. The temporary governmental freeze might reduce resources but it will not have the effect of rendering the New Union program invalid. Importantly, EPA has the right to supplement a state program with resources and performance, which it did in 2008 and expects to do in 2009. Furthermore, EPA's continued assistance and approval are evidence of the sufficiency of New Union's enforcement capabilities.

CONCLUSION

The district court properly granted New Union's motion for summary judgment and dismissed CARE's action. This court should find that there is no jurisdiction under RCRA §

7002(a)(2) or 28 U.S.C. § 1331 to order EPA to act on CARE's petition. EPA's initial approval of New Union's program is an order, for which neither RCRA nor APA provide the court jurisdiction. Additionally, EPA is not entitled deference to interpret their initial approval of New Union's program as a rule. The EPA only has authority to interpret RCRA, the statute it administers. Federal Question jurisdiction under 28 U.S.C. § 1331 is also unavailable because the APA is a general authority for administrative agencies while RCRA, the more specific statute governing the EPA, is the appropriate route to establish jurisdiction. Accordingly, CARE's action should be dismissed for lack of jurisdiction.

EPA's inaction on CARE's petition is not subject to judicial review because the inaction does not amount to an action included in the judicial review provision of RCRA § 7006(b). Even assuming that EPA's inaction constitutes a "constructive denial" or "constructive determination," judicial review is still unavailable because the time limitation of RCRA § 7006(b) has expired, thus time barring CARE's claim.

Nonetheless, assuming judicial review is available under RCRA § 7006(b), this Court should decline lifting the stay and proceeding on the merits. This Court should instead, remand the case to the district court so that the district court may issue an order mandating that EPA initiate and complete proceedings on CARE's petition, a decision more properly allocated to an agency administering RCRA. The EPA is the more appropriate authority to decide if New Union's state program meets RCRA § 3006 criteria.

Assuming the court were to proceed to the merits of CARE's challenge, withdrawal of New Union's program is unwarranted because the program still meets all the criteria necessary for approval under RCRA § 3006(b). First, New Union's state program is equivalent to the federal program. New Union's treatment of Pollutant X renders the program more stringent than

the Federal program and therefore equivalent. Also, the transfer of railroad hazardous waste facility regulation from the DEP to the Commission does not affect the overall equivalency of the whole program because it advances the purpose and intent of RCRA. Second, New Union's state program is consistent with the Federal program. New Union's treatment of Pollutant X meets the consistency requirement of RCRA § 3006 because it is constitutionally valid under the Commerce Clause. Further, EPA has discretion to deem the treatment consistent under its definition in 40 C.F.R. 271.4. Third, the New Union state program has sufficient resource and performance capabilities to provide adequate enforcement of compliance. New Union's current resources and performance adequately meet the requirements for enforcement under RCRA § 3006, which allows for dual enforcement powers of the state and the EPA. Once a state program is deemed sufficient by the EPA, the EPA retains the ability to guarantee that the program maintains adequate enforcement capabilities.