
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-Appellants-Cross-Appellee,

v.

LISA JACKSON, ADMINISTRATOR U.S. Environmental Protection Agency,
Respondant-Appellees-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
U.S. Environmental Protection Agency,
Respondant-Appellees-Cross-Appellant,

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JURISDICTIONAL STATEMENT

The district court had jurisdiction to hear this case through section 7002 of the Resource Conservation and Recovery Act (RCRA), RCRA's citizen suit provision. 42 U.S.C. § 6972(a)(2) (2006). The district court did not have jurisdiction to hear this case under 28 U.S.C. § 1331 (2006) for petitions filed under 5 U.S.C. § 553(e) (2006). The district court entered a final order from which this timely appeal originates. Citizen Advocates for Regulation and the Env't, Inc. v. Jackson, Civ. 000138-2010 (D.N.U. Jun. 2, 2010). This Court has jurisdiction to hear an appeal from a final order by a district court. 28 U.S.C. § 1291 (2006).

Petitioner, Citizen Advocates for Regulation and the Environment, Inc. (CARE), seeks judicial review under section 7006(b) of RCRA, 42 U.S.C. § 6976(b). Environmental Protection Agency (EPA) maintains that section 7006(b) does not grant this Court jurisdiction.

STATEMENT OF THE ISSUES

1. 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.

2. 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).

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

4. 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 stay 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?

5. 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?

6. 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 waste facilities from regulation?

7. 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

CARE petitioned EPA to withdraw authorization of New Union's hazardous waste program (HWP) on January 5, 2009. CARE, Civ. 000138-2010. CARE served a petition to EPA under RCRA section 7004(a) and the Administrative Procedure Act, 5 U.S.C. § 553(e) (APA). CARE, Civ. 000138-2010 at 4. Less than a year later, CARE filed an action in the District Court of New Union under RCRA section 7002(a)(2) seeking injunctive relief requiring EPA to act on its petition, or alternatively, for the district court to review EPA's constructive denial of the petition and constructive determination that New Union's HWP complied with RCRA. Id. CARE also filed in the United States Circuit Court for the Twelfth Circuit, Citizen Advocates for Regulation and the Env't, Inc. v. Jackson, C.A. 18-2010 (12th Cir. filed Jan. 4, 2010), under RCRA section 7006(b). The Twelfth Circuit stayed proceedings pending the outcome of the district court action. Id.

The district court denied CARE's motion for summary judgment and held jurisdiction was appropriate in this Court under RCRA section 7006(b). CARE, Civ. 000138-2010. CARE appealed the district court's decision seeking review of EPA's inaction, asserting it was a

constructive denial of the petition. CARE, C.A. 18-2010 at 1. CARE also sought consolidation of the cases. Id. at 1-2.

STATEMENT OF THE FACTS

In 1985, EPA received an application packet from New Union. App. A at 10. New Union sought approval of its HWP, seeking to utilize that program in lieu of the federal program under RCRA. App. A at 10. After a thorough review of the application, EPA determined New Union's program met all of RCRA's statutory and regulatory requirements for approval. App. A at 10. In 1986, having followed notice and comment procedures consistent with rulemaking, EPA approved New Union's HWP. App. A at 10. EPA determined New Union's Department of Environmental Protection (DEP) had the resources required by statute. App. A at 10. There has been a slow increase in the number of transportation, storage, and disposal facilities (TSDs) regulated by the state from 1200 TSDs in 1986 to 1500 TSDs in 2009. App. A at 11. Additionally, there has been a reduction in DEP personnel from fifty in 1986 to thirty presently with most of this loss occurring in and around 2000. App. A at 10.

While the record indicates New Union's HWP may be more robust, App. A at 10, 11, it gives no indication that the HWP has diminished the level of enforcement or effectiveness since its authorization. The record contains no specific information about the HWP in 1986, thus it provides no comparison with the current enforcement of New Union's HWP.

Ten years ago, New Union passed the 2000 Environmental Regulatory Adjustment Act (ERAA), transferring administration of all environmental statutes applicable to intrastate railroads to the New Union Railroad Commission (Commission) and imposed new requirements on the production and transport of Pollutant X. App. A at11-12. The ERAA removed criminal sanctions applicable to railroad facilities governed by the Commission for violations of

environmental statutes. App. A at12. However, the record indicates there is only one intrastate railroad in New Union, the New Union RR Co. (NURR), but it does not indicate that NURR handles hazardous wastes. See App. A at 12. Moreover, the record contains no indication that the transfer to the Commission had any effect on the environment or led to unregulated hazardous waste. New Union mandated (1) all in-state production of Pollutant X be phased out, (2) Pollutant X not be stored in New Union for more than 120 days while awaiting transport to an authorized facility, and (3) any transport of Pollutant X be conducted as quickly as reasonably possible with no stops, giving allowances for emergencies and refueling. App. A at12. Pollutant X is recognized as one of the "most potent and toxic chemicals to public health and the environment." App. A at 12. Cognizant of this fact, New Union enacted these restrictions to protect the health of its citizens and its environment. See App. A at 12. The record contains no information about burdens on transportation of Pollutant X.

SUMMARY OF THE ARGUMENT

The district court erred in ruling CARE's petition to EPA for withdrawal of New Union's HWP was not subject to petition under 42 U.S.C. § 6974 (2006) because EPA's approval of New Union's program constituted rulemaking. In approving New Union's HWP, EPA followed notice and comment procedures typical of rulemaking. Like most regulatory schemes, EPA's approval of one state program, coupled with the publication of that program in the Code of Federal Regulations (CFR), provides guidance for prospective applicants in a general way, while also providing future effect to approved HWPs. Furthermore, to hold EPA's authorization of state HWPs is an order, rather than a rule, would severely limit the public's right to participate in HWP promulgation and oversight.

In judicial proceedings, where two statutes are in conflict, the more specific statute will govern over the general. Since RCRA is a specifically drawn statute, its provisions apply to RCRA governance to the exclusion of others, thus acting in place of the generalized APA. Thus, a citizen's petition to EPA for repeal of a rule approving a state program is properly filed under RCRA section 7004, rather than the APA's general petition provision. Furthermore, RCRA section 7002(a)(2) provides jurisdiction for citizen suits concerning the Administrator's failure to perform any act or duty imposed under RCRA, thereby rendering reliance on 28 U.S.C. § 1331 jurisdiction unnecessary.

EPA's inaction was not a constructive denial of CARE's petition because EPA's delayed response was reasonable. Under RCRA section 7004(a), timely response to citizen petitions is a discretionary agency action. The only requirement is EPA's response be delivered in a reasonable time. Therefore, inaction only becomes constructive denial if an agency's delay is unreasonable. The reasonableness of delay considers the need for quality agency determinations and the burdens imposed by compelling swift action. Delay is judged by the context of each statute, looking to whether the statue imposes deadlines or swift deliberation, whether any party is prejudiced by delay, and whether mandating action adversely affects agency interests.

RCRA does not exhort quick response to CARE's petition and none of CARE's interests are prejudiced by EPA's delay. EPA must prioritize its discretionary duties and utilize its resources to maximum efficiency. Therefore, this Court should determine EPA's delayed response was reasonable and hold EPA did not constructively deny CARE's petition.

EPA did not constructively determine New Union's HWP met RCRA standards because CARE's petition does not obligate EPA to make that determination. EPA enforces RCRA's

criteria for authorization, but general deficiencies, or changes to state HWPs do not compel EPA to initiate withdrawal proceedings.

CARE argues EPA's inaction on its petition was a constructive determination New Union's HWP met RCRA requirements, but CARE's petition does not mandate EPA review New Union's HWP. Judicial review of EPA's inaction is improper because courts defer to agency enforcement strategies, and inaction does not infringe the liberty or property rights of CARE or New Union. Therefore, this Court should hold EPA did not constructively determine New Union's HWP met RCRA authorization requirements.

Assuming EPA's inaction was final agency action subject to judicial review, this Court should remand to the district court so EPA can initiate proceedings to consider withdrawing authorization of New Union's HWP. Statutory appellate review is confined to the administrative record relied on by the agency, and courts review whether a rational connection exists between the facts in the record and the agency action. Since EPA has not developed an agency record, this Court lacks the ability to engage in meaningful review. The only remedy following review is compelling agency action. Therefore this Court should remand so EPA can follow public hearing procedures and provide a reasoned decision. This Court can then review the record and EPA's decision.

Authorization of a state program is based on 42 U.S.C. § 6926(b) (2006) which mandates a state program be equivalent with the federal program, consistent with the federal or other state programs, and that there be adequate enforcement requirements. Once EPA authorizes a state program, it is not mandated to withdraw the authorization when the state program falls below one of the relevant standards. EPA must withdraw only once it has made an official determination after public hearing that the state program does not meet one of the § 6926(b)

requirements. Thus, investigation towards withdrawing authorization is a discretionary agency activity similar to prosecution and is judicially unreviewable.

New Union's HWP continues to meet all the § 6926(b) requirements despite the reduction in resources because there is no indication on the record of a decrease in enforcement. Because the record contains no information about the levels of enforcement in 1986, when EPA approved New Union's program, there is no basis to determine it has decreased to a level below which authorization is appropriate.

New Union's transfer of administration of railroad facilities to the Commission does not necessitate withdrawal of authorization because state programs need not be the same as the federal program and RCRA permits flexible interpretations of the equivalency requirement. Moreover, EPA is the proper agency to make the equivalency determination, and doing so through the courts would undermine EPA's cooperation with New Union. Finally, the record gives no indication that the only intrastate railroad in New Union handles hazardous waste, nor, even if it did, that there have been any environmental impacts due to the Commission administering the environmental laws.

New Union's treatment of Pollutant X does not violate the consistency requirement or the Commerce Clause. The regulations for Pollutant X are consistent with other state programs because the restrictions on transportation are reasonable within the standards set out in 40 C.F.R. § 271.4 (2010). New Union does not violate the Commerce Clause because the restrictions on Pollutant X are not imposed to create in-state economic advantage. The restrictions are in place to protect the health and environment of New Union which is permissible use state legislative authority even if it does cause incidental effects on interstate commerce.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, applying the same criteria used by the district court. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 465 n.10 (1992). If no genuine issue of material fact is in dispute, then the reviewing court determines whether the district court correctly applied the substantive law. Phelan v. Laramie Cnty. Cmty. College Bd. of Trs., 235 F.3d 1243, 1246 (10th Cir. 2000), cert. denied, 532 U.S. 1020 (2001). On appeal, the summary judgment evidence is viewed in the light most favorable to the nonmovant, with all factual inferences made in the nonmovant's favor. See Behrens v. Pelletier, 516 U.S. 299, 309 (1996). CARE maintains this Court may review non-withdrawal of New Union's authorization on the merits. CARE, C.A. 18-2010 at 1. However, EPA maintains that withdrawal of authorization is an unreviewable, discretionary agency action, therefore there is no standard of review for issues five through seven. See Tex. Disposal Sys. Landfill Inc. v. EPA, 2010 U.S. App. Lexus 9401 (5th Cir. May 7, 2010).

ARGUMENT

I. CARE has the Right to Petition EPA to Withdraw Approval of New Union's HWP Exclusively Under RCRA, Thus the District Court had Jurisdiction to Hear CARE's Citizen Suit.

CARE has the right to petition EPA for withdrawal of New Union's authorization under RCRA section 7004, and RCRA section 7002 provides exclusive jurisdiction for the district court to hear CARE's citizen suit. RCRA allows "[a]ny person [to] petition the Administrator for the promulgation, amendment, or repeal of any regulation . . . ." 42 U.S.C. § 6974. Under the CFR "regulation and rule have the same meaning." 1 C.F.R. § 1.1 (2010) (emphasis added). RCRA's petition provision supersedes APA's petition provision because specific statutes on point govern over statutes of general applicability. Green v. Bock Laundry Mach. Co., 490 U.S.

504, 524-25 (1989). Likewise, RCRA section 7002, which provides citizen suit jurisdiction in this case, is more specific and therefore supersedes 28 U.S.C. § 1331. 42 U.S.C. § 6972.

A. EPA's Authorization of New Union's HWP was a Rule Rather Than an Order, Therefore CARE's Petition was Properly Submitted Under RCRA Section 7004.

The district court erred in ruling CARE's petition was not subject to petition under RCRA section 7004 because EPA's authorization of New Union's HWP was a rule. 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 . . . ." 5 U.S.C. § 551(4) (2006). The APA defines an order as part of an agency's final disposition, different from rulemaking but consistent with licensing. 5 U.S.C. § 551(6). The Supreme Court recognized the line dividing rules from orders is not always clear, but holds agency proceedings which establish policy-type rules or standards typify rulemaking procedures, while proceedings adjudicating disputed facts typify orders. United States v. Fla. East Coast Ry. Co., 410 U.S. 224, 245 (1973); see also, ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88 (1913) (addressing quasi-judicial agency act); Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 304-05 (1937) (addressing quasi-judicial agency act).

EPA followed rulemaking procedures during the authorization process of New Union's HWP. Not only did EPA use notice and comment procedures, it also incorporated the approval of New Union's program in 40 CFR Part 272. CARE, Civ. 000138-2010 at 6. The CFR is designed specifically as a compilation of agency regulations, with Part 272 including a list of all approved state programs. These regulations provide guidance to states constructing hazardous waste programs. 40 C.F.R. §§ 272.1, 272.2 (2010). Rulemaking and agency orders are recognized as separate and distinct, but drawing a workable distinction is exceedingly difficult.

David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 924-25 (1965).

EPA's authorization of New Union's HWP bears the indicators of a rule because it is consistent with the APA definition of a rule; it is general in applicability and has future effects. 5 U.S.C. § 551(4). The district court reasoned EPA's action was not general in applicability because it considered New Union a single and particular party. In doing so, the district court ignored the Supreme Court's holding in Florida East Coast that an agency's reliance on individualized facts is not dispositive in whether the agency action is a rule or an order. Fla. East Coast Ry., 410 U.S. at 246. Here, while EPA relied on New Union's factual application in granting authorization, the decision to approve the program is a prospective application of policy, addressing generally applicable future effects consistent with rulemaking. Authorization has future effect because it granted New Union the right to administer RCRA after the authorization was given, and because other states can review New Union's program as a model for constructing future state HWPs. EPA did not adjudicate a particular set of disputed facts in an adversarial setting as is typical of orders.

Furthermore, notice and comment is typical of rulemaking while formal trial-type hearings are usually required in orders. Shapiro, supra, at 930, 936; see also, Stephen G. Breyer et al., Administrative Law and Regulatory Policy: Problems, Text, and Cases 652-65 (5th ed. 2002) (separating analysis for formal rulemaking, notice and comment rulemaking, formal adjudication, and informal adjudication). Here, EPA's adherence to notice and comment procedures, paired with its listing of New Union's HWP in the CFR, is consistent with rulemaking procedures. The procedure an agency follows for a given act determines whether that act is a rule or an order. See Fla. East Coast Ry., 410 U.S. at 245; General Elec. Co. v. EPA, 290

F.3d 377, 382-83 (D.C. Cir. 2002); see also Breyer, supra, at 665. In authorizing New Union's HWP, the district court acknowledged that on a strictly procedural level, EPA acted with rulemaking procedures. CARE, Civ. 000138-2010 at 6. EPA's publication of New Union's HWP authorization in the Federal Register and in the CFR is also significant. The CFR incorporates rules of general applicability, whereas orders are not published. In ruling that EPA's authorization of New Union's HWP was an order, the lower court overlooked this basic function of the CFR.

Furthermore, public policy supports the view that EPA's authorization of New Union's HWP is a rule. In petitioning EPA for repeal of a state's HWP authorization, citizens are limited to filing petitions under RCRA or the APA. As discussed in Part I.B infra, under both the APA's petition provision and RCRA section 7004, the right for a citizen to petition is limited to the repeal, promulgation, or amendment of rules. The legislative history surrounding RCRA's passage supports the conclusion that legislators desired public participation in EPA's state HWP authorization process. See H.R. Rep. No. 94-1491(I) at 29 (1976) reprinted in 1976 U.S.C.C.A.N. 6238. If this Court were to hold EPA's approval of New Union's program was an order as opposed to a rule, then the right to petition the agency for repeal of a state's formerly approved program would cease. Consequently, interested parties might resort to either expensive, burdensome litigation or to apathetic non-action. Moreover, citizen petitions, along with EPA oversight, allow for an extra level of enforcement and protection from non-complying state programs. Until the legislature decides to allow for petitions calling for the repeal of an order, EPA's authorization of state HWPs should be considered a rule.

Therefore, the district court's determination that New Union's HWP authorization was an order is a mischaracterization subject to reversal. EPA's authorization of New Union's HWP was

a rule because EPA followed notice and comment procedures, published its authorization in the CFR, and had future effect. To hold otherwise would severely limit the public's right to participate in HWP promulgation and oversight.

B. CARE's Petition is Governed by RCRA's Petition Provision Because it is More Specific than APA's Petition Provision, Therefore this Court Should Apply RCRA's Jurisdiction Provision.

RCRA grants citizens the right to petition EPA regarding state HWP authorization and therefore is more specific than APA's petition provision which governs all agencies generally. Where two statutes are applicable but direct different action, the more specific statute is given effect. Cal. Save Our Streams Council, Inc. v. Yeutter, 887 F.2d 908, 911 (9th Cir. 1989). The Ninth Circuit in California Save Our Streams Council further held that "[t]o read the specific—and independently complete—statute as only supplementary to the more general legislation would render 'nugatory' the carefully crafted scheme of review." Id. (citing Block v. North Dakota ex rel. Bd. of Univ. and School Lands, 461 U.S. 273, 285 (1983) (noting precisely drawn and detailed statutes preempt more general remedies)); see also, Brown v. General Servs. Admin., 425 U.S. 820, 828-29 (1976) (holding Civil Rights Act of 1964 provides specific jurisdictional remedies for employment discrimination which preempt general jurisdictional remedies such as § 1331 federal question jurisdiction). In RCRA, Congress included sections 7004, providing interested parties the right to petition EPA, and 7002 providing jurisdiction in federal district courts to address citizens' concerns with hazardous waste specifically. 42 U.S.C. §§ 6974, 6972. Thus, RCRA's petition provision preempts § 553(e). Furthermore, federal jurisdiction is appropriate under RCRA section 7002, rendering § 1331 unnecessary. See Brown, 425 U.S. at 828-29.

RCRA section 7004 applies more specifically than § 553(e). CARE relies on § 1331 federal question jurisdiction as the basis for the district court's jurisdiction. As the district court found, however, "[t]he first problem with this alternative is the old maxim of statutory interpretation that the specific governs over the general." CARE, Civ. 000138-2010 at 6 (citing Green, 490 U.S. at 524-25). Section 1331 is a "general subject matter jurisdiction statute covering questions arising under federal law." Cal. Save Our Streams, 887 F.2d at 910 n.2. Since CARE's petition was filed under RCRA section 7004 jurisdiction is appropriate under RCRA section 7002. While CARE also filed under § 553(e), that general provision is inappropriate because RCRA section 7004 is specifically on point for petitions concerning state HWP authorization.

Specific statutes govern over general statutes. There remains no doubt that Congress intended for citizen suits to arise under RCRA section 7004 and petitions for repeal of a rule filed under RCRA section 7002; consequently, § 1331 and § 553(e) have been preempted in this case.

II. EPA did not Constructively Deny CARE's Petition Because its Delayed Response was Reasonable.

EPA did not engage in unreasonable delay in responding to CARE's petition, therefore its inaction was not a constructive denial of the petition. RCRA section 7004(a) provides any person the opportunity to petition EPA to consider repeal of its authorization of state HWPs. EPA must take action within a reasonable time following receipt of such petition and publish notice of action along with the reasons therefor in the Federal Register. 42 U.S.C. § 6974. RCRA section 7006(b) provides judicial review of EPA actions in granting, denying, or withdrawing authorization of state HWPs and review takes place in the circuit court in accordance with APA sections 701 through 706. 42 U.S.C. § 6976 (2006).

When analyzing agency inaction for unreasonable delay, courts should first determine whether the authorizing statute creates an explicit or general duty of timeliness. Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987). When agencies are not bound by explicit deadlines, courts should consider both the need for quality agency action and the burdens created by compelling agency action. Id. (citing Natural Res. Def. Council, Inc. v. Train, 510 F.2d 692, 711 (D.C. Cir. 1974)). In Sierra Club v. Thomas, EPA issued a proposal for rulemaking to consider whether strip mines qualify for fugitive emission regulations under the Clean Air Act. Id. at 784. Sierra Club claimed unreasonable delay and sought to enjoin EPA to reach a final decision. Id. The D.C. Circuit discussed four instances of unreasonable delay including: (1) effective final action unacknowledged, (2) recalcitrance in the face of duty, (3) unreasonable delay of final action, and (4) APA duty to avoid unreasonable delay. Id. at 793-97. The court stated its preference to not review agency inaction for fear of upsetting agency priorities, but resolved that review was required in order to determine if the delay was so egregious as to grant Sierra Club's request for relief. Id. at 797.

Under the four categories of delay in Thomas, courts will determine the reasonableness of delay by the context of the statute authorizing agency action. Id. (citing Pub. Citizen Health Research Grp. v. Auchter, 702 F.2d 1150, 1158 (D.C. Cir. 1983)). Where a party claims it has been deprived of a timely agency decision due to inaction, the Thomas court provides three factors for consideration: (1) whether Congress has imposed any applicable deadlines or exhorted swift deliberation or the statute implies timely final action; (2) whether any interests will be prejudiced by delay; and (3) whether an order to expedite the proceedings will adversely affect the agency's higher priorities. 828 F.2d at 797. Along with these factors, courts must show

considerable deference toward agency control over the timetable of rulemaking proceedings. Id. (quoting Sierra Club v. Gorsuch, 715 F.2d 653, 658 (D.C. Cir. 1983)).

The Thomas court concluded no congressional intent existed to expedite EPA rulemaking for regulating fugitive emissions. 828 F.2d at 797. The Court determined Sierra Club was not prejudiced by delay because Sierra Club had no statutory right to regulate strip mining. Finally, the court noted the complex issues EPA must consider and resolved to not interfere with EPA priorities. Id. at 798. Therefore, despite the year-long duration since concluding public comment, the court held EPA did not engage in unreasonable delay and denied Sierra Club's request for relief. Id. at 799.

Applying the D.C. Circuit's reasoning from Thomas to this case establishes EPA did not engage in unreasonable delay, and therefore judicial review under RCRA section 7006(b) is improper. RCRA section 7004(a) only mandates EPA respond within a reasonable time. The statutory language and legislative history does not provide a deadline or exhort swift deliberation. See H.R. Rep. No. 94-1491(I) at 66 (explicitly noting the citizen suit provision in RCRA section 7002 and petition provision in RCRA section 7004 provide sufficient protections for overzealous and relaxed regulations). Furthermore, the record does not indicate whether CARE has any statutory right which is prejudiced by delay. Conversely, expediting EPA action could harm CARE by promulgating regulations without timely consideration. Finally, compelling swift EPA response possibly obstructs agency planning and priorities.

EPA has not constructively denied CARE's petition because under RCRA, CARE is not entitled to an expedited response and the one year delay since receiving CARE's petition was reasonable within the context of RCRA. Therefore, this Court should hold EPA has not

constructively denied CARE's petition and forgo review until EPA has made a final determination.

III. A Constructive Denial of CARE's Petition Would not Entail EPA has Constructively Approved New Union's HWP Because EPA May Deny CARE's Petition Without Determining New Union's HWP Meets Authorization Requirements.

EPA's delayed response to CARE's petition is not a constructive determination that New Union's HWP meets RCRA authorization requirements, because such petitions do not require EPA to investigate state HWPs. Prior to withdrawing approval of state HWPs, RCRA section 3006(e) requires the Administrator to hold a public hearing and then provide up to ninety days for corrective action. If corrective action is not taken, the Administrator must withdraw authorization of the program. 42 U.S.C. § 6926. Citizen petitions filed under RCRA section 7004(a) do not obligate EPA to review state HWPs.

Where a plan of enforcement fails to create a legally binding commitment on agencies, courts will forgo review of agencies' inaction in order to avoid detrimental interference. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 71-72 (2004). In Norton, the Southern Utah Wilderness Alliance (SUWA) claimed the Bureau of Land Management (BLM) violated the Federal Land Policy and Management Act of 1976 when it failed to protect public lands. Id. at 60. Specifically, SUWA claimed BLM failed to regulate off-road vehicles in wilderness study areas (WSAs). Id. at 60-61. SUWA sought review under APA section 706(1) to compel agency action unlawfully withheld. Id. at 61.

The Supreme Court conceded BLM had a duty to manage WSAs but noted BLM's discretion when it came to achieving that goal. Id. at 66. The Court distinguished between discreet final agency actions and inaction. Id. at 63. Discreet actions are subject to judicial review, but inaction without formally rejecting a request to act is not reviewable. The Court held

APA section 706(1) only allows courts to compel nondiscretionary agency action, but it cannot tell agencies how to act. Id. at 64. Where agencies choose not to act to correct general deficiencies in enforcement programs, such inaction is not the same as discreet final agency action, and therefore not subject to judicial review. Id. at 66; see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 892-93 (1990) (holding individual flaws in an enforcement plan do not mandate wholesale correction).

Courts will not compel agency action when state programs are threatened by new legislation. Challenges are not ripe for judicial review until the effects of new state plans are known. Cross Timbers Concerned Citizens v. Saginaw, 991 F. Supp. 563, 569 (N.D. Tex. 1997). In Cross Timbers, a citizen group claimed EPA failed to take action under the Clean Water Act against a state's water effluent strategy for feedlots. Id. at 656. State plans must be approved by EPA, but EPA is not required to determine whether new laws threaten water quality standards until states submit legislation for review or the effects of new plans are realized. Id. at 569; see also Abbott Labs v. Gardner, 387 U.S. 136, 148-49 (1967) (discussing ripeness doctrine as protection against judicial entanglement where issues are either unfit for review or where hardship is insufficiently realized) rev'd on other grounds, Toilet Goods Association v. Gardner, 387 U.S. 167 (1967). The court dismissed the group's claims brought under the Clean Water Act for lack of subject matter jurisdiction. Cross Timbers, 991 F. Supp. at 573.

Finally, agency decisions to not take enforcement action are presumptively not reviewable. Heckler v. Chaney, 470 U.S. 821, 831 (1985). Courts are hesitant to inject themselves into agency decision making due to agencies' superior understanding of their complex regulations and finite resources. Id. Courts are especially hesitant to review inaction because inaction generally does not infringe liberty or property rights. Id. at 832.

In this case, neither CARE's petition, nor legislative changes in New Union's HWP obligate EPA to investigate New Union's HWP. EPA has not constructively determined New Union's HWP meets RCRA criteria simply by not responding to CARE's petition. EPA's enforcement discretion encourages courts to avoid interfering through judicial review, especially where an agency chooses not to act. See Norton, 542 U.S. at 63-64 (noting agency discretion over enforcement strategy).

Despite the legislative changes to New Union's HWP, the record does not indicate any harm suffered by CARE due to DEP's diminished resources. CARE, Civ. 000138-2010; App. A at 10-12. Judicial review is also improper based on constructive action because EPA's inaction has not infringed the liberty or property rights of CARE or New Union's residents.

EPA has not made a constructive determination New Union's HWP meets RCRA criteria simply because it has not responded to CARE's petition. The issues surrounding New Union's HWP are not yet fully developed and CARE cannot provide any evidence of hardship. Therefore, this court should refrain from judicially reviewing EPA's inaction.

IV. Without an Administrative Record, this Court Should Forgo Review and Remand to the District Court so EPA can Consider Withdrawal of New Union's HWP.

Judicial review is improper because EPA has not developed a factual record for this Court to evaluate EPA's purported constructive actions. Therefore, this Court should remand to the district court so EPA can initiate and complete proceedings to consider withdrawal. Review of final agency actions under RCRA is in accordance with APA sections 701-706. 42 U.S.C. § 6976. Review is confined to the administrative record relied on by the agency, not a record created by the reviewing court. Fla. Power and Light Co. v. Lorion, 470 U.S. 729, 743 (1985) (citing Camp v. Pitts, 411 U.S. 138, 142 (1973)). Courts require a record in order to determine whether a rational connection exists between the facts on the record and the agency decision.

Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962). RCRA section 3006(e) requires EPA hold a public hearing and provide opportunity for corrective action by states before withdrawing authorization of state programs. 42 U.S.C. § 6926. EPA has not engaged in either of these actions, if this Court undertakes judicial review, it will do so without a developed agency record.

The record should clearly and sufficiently explain the reasons for the decision. Envtl. Def. Fund, Inc. v. Hardin, 428 F.2d 1093, 1099-1100 (D.C. Cir. 1970). In Hardin, the D.C. Circuit addressed whether judicial review was available when an agency failed to act. The Secretary of Agriculture issued notices of cancellation for certain DDT uses, but took no action on a request for interim suspension. Id. at 1096. The petitioners appealed the Secretary's decision and sought to compel action to comply with their request. Id. The Secretary argued judicial review was only available by the district court on a writ of mandamus and not by the circuit court. Id. at 1096. The court disagreed and held failure by an administrator to perform his duties would not bar statutory appellate review when inaction amounts to final action. Id. at 1098. Notably, the court concluded meaningful appellate review was impossible in the absence of an administrative record. Id. at 1099. Therefore, the case was remanded to the agency to provide a statement of reasons for its action. Id. at 1100.

Consistent with Hardin's reasoning, this Court should forgo review until it has an agency record and reasons for EPA's determinations. Remand is proper to allow EPA to initiate and complete authorization proceedings concerning New Union's HWP. When EPA completes the statutorily required public hearing and provides reasonable opportunity for corrective action, this Court will have an administrative record to conduct judicial review.

Without a developed record, this Court lacks the necessary information to engage in meaningful review and the only remedy available would be to compel agency action. EEOC v. Liberty Loan Corp., 584 F.2d 853, 856 (8th Cir. 1978). Whether this Court remands or decides to undertake judicial review, the result will be that EPA initiate withdrawal investigation and provide reasons for its decision. Therefore, this Court should not lift the stay until after EPA has completed its procedures required by RCRA section 3006(e) and then proceed with review.

V. Because New Union's HWP Meets RCRA's Requirements for Authorization, Withdrawal is not Required.

EPA is charged with authorizing states to administer RCRA, which regulates safe handling of hazardous wastes from cradle to grave. City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331 (1994). For state HWPs to merit authorization, EPA must determine the state HWP is: (1) equivalent to the federal program, (2) consistent with federal or other state programs, and (3) is capable of adequately enforcing RCRA's requirements. 42 U.S.C. § 6926(b). If an authorized state no longer satisfies these requirements then EPA may withdraw authorization, however withdrawal is a drastic step rarely employed. See United States v. Power Eng'g Co., 303 F.3d 1232, 1238-39 (10th Cir. 2002), cert. denied, 538 U.S. 102 (2003).

The equivalency requirement of RCRA allows state programs to be more restrictive but not less stringent than the federal program. 42 U.S.C. § 6929; United States v. Manning, 434 F. Supp. 2d 988, 998 (E.D. Wash. 2006). This sets a floor, but not a ceiling, on what state programs may require. Old Bridge Chem., Inc. v. N.J. Dept. of Envtl. Prot., 965 F.2d 1287, 1296 (3d Cir. 1992), cert. denied, 506 U.S. 1000 (1992). Equivalency to the federal program is a determination that fundamentally belongs to EPA regional offices and is addressed on a case-by-case basis. Memorandum from Matthew Hale, Director of Office of Solid Waste, to RCRA Directors, Regions I – X, Determining Equivalency of State RCRA Hazardous Waste Programs (Sept. 7,

2005). Equivalency is not explicitly defined under RCRA statutes or regulations. Id. While equivalency is not explicitly defined, EPA interprets equivalency to mean state programs must regulate the same wastes and facilities the federal program regulates. See 40 C.F.R. §§ 271.9-271.12 (2010). However, EPA flexibly interprets equivalency, focusing primarily on the program's environmental results instead of its method of implementation. Hale, supra.

The consistency requirement principally addresses the flow of hazardous wastes between states. Hazardous Waste Treatment Council v. State of South Carolina, 945 F.2d 781, 793 (4th Cir. 1991). Courts address the consistency requirement of RCRA section 3006 by employing a dormant Commerce Clause analysis. See, e.g., Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 783 (4th Cir. 1996). RCRA does not provide sufficient evidence of congressional intent to allow states to contravene the Commerce Clause. Id. EPA, on the other hand, evaluates consistency based on whether the state program "unreasonably restricts, impedes, or operates as a ban on the free movement . . . of hazardous waste from or to other states . . . ." 40 C.F.R. § 271.4. The regulation does not imply that any restriction on the flow of interstate hazardous waste is impermissible, only unreasonable restrictions. Envtl. Tech., 98 F.3d at 783 n.14 (noting EPA's position that consistency is evaluated by the reasonableness of the restrictions).

Adequate enforcement requires state programs have sufficient power and resources to enforce the state HWP, it does not mandate state enforcement mirror federal enforcement. Titan Wheel Corp. of Iowa v. EPA, 291 F. Supp. 2d 899, 913 (S.D. Iowa 2003). EPA regulations require certain, specific enforcement provisions in state HWPs. See 40 C.F.R. §§ 271.15-271.16 (2010). However, these regulations do not determine the meaning of the statute and the statutory language does not include these stricter requirements. Moreover, neither the statutory language

nor the regulatory language mandates EPA withdraw authorization when EPA has not made a determination that a state program is insufficient under RCRA section 7004.

A. EPA's Decision to not Withdraw Approval of New Union's HWP is an Unreviewable Discretionary Agency Act.

EPA's decision to investigate whether a state is properly administering and enforcing its HWP is an unreviewable discretionary act. RCRA only requires EPA withdraw authorization if, after a public hearing, it determines the state HWP does not meet the requirements of RCRA section 3006 and corrective action is not taken within ninety days. 42 U.S.C. § 6926(e). The Fifth Circuit observed, "EPA is only limited in that it must withdraw authorization after it has determined that the state is not in compliance." Tex. Disposal, 2010 U.S. App. Lexus 9401 at *3 (emphasis added). There is no statutory language mandating EPA make this determination. Agency inaction is not judicially reviewable where such enforcement action is discretionary. Heckler, 470 U.S. at 835 (indicating an agency's authority to conduct examinations and investigations constitutes enforcement action); Massachusetts v. EPA, 549 U.S. 497, 527 (2007) (indicating agency discretion is at its height in decisions to not engage in enforcements actions, but less robust when denying a petition for rulemaking). Agency decisions to engage in enforcement actions are, like prosecutorial discretion, committed to absolute agency discretion. Heckler, 470 U.S. at 831.

Additionally, an agency's failure to respond to a petition may be judicially reviewable, however that does not transform the underlying subject matter of the petition into a judicially reviewable act if it was not so in the first place. Tex. Disposal, 2010 U.S. App. Lexus 9401 at *4 (citing ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270 (1987)) (noting "Supreme Court's holding [in ICC] that an action committed to agency discretion does not become reviewable merely because the agency gives a reviewable reason for an otherwise unreviewable action").

In this case, EPA has not made any investigations or determinations about New Union's HWP beyond its initial approval in 1986. EPA has the option to hold a public hearing, to investigate New Union's HWP, notify New Union of noncompliance if applicable, and then, after a reasonable time, withdraw authorization. 42 U.S.C. § 6926(e). This process is similar to prosecution, consisting of an investigatory period, communication with a violator, and, if appropriate, withdrawal of a violator's permission to perform certain acts. See Heckler, 470 U.S. at 835. This analogy substantiates EPA's position that withdrawal of authorization is a discretionary agency enforcement act that should be treated with the same level of judicial reviewability as prosecution—none. See Id. at 831. Merely because EPA has not responded to CARE's petition does not turn the underlying issue, New Union's authorization, into a judicially reviewable subject. Tex. Disposal, 2010 U.S. App. Lexus 9401 at *4.

In the alternative, if this Court determines EPA made a constructive determination which is reviewable, then this Court should deem EPA to have constructively interpreted its own regulations on withdrawal of authorization. See 40 C.F.R. § 271.22 (2010). When an agency interprets its own regulations, that determination "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). Because the record does not indicate any requirements of authorization have suffered substantial alteration or degradation, this Court should defer to EPA's constructive determination. Alternatively, if this Court views EPA as having interpreted RCRA section 3006, EPA should still receive substantial deference. Courts defer to agency interpretation where the statutory language interpreted by the agency is ambiguous, unless it is arbitrary, capricious, or contrary to the statutory language. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984). RCRA section 3006 has been viewed as

ambiguous. See, e.g., Evco Assocs., Inc. v. C.J. Saporito Plating Co., No. 93 C 2038, 1995 WL 571438, at *2 (N.D. Ill. Sept. 25, 1995). Therefore this Court should defer to EPA's determination because it is not erroneous, arbitrary and capricious, or contrary to statutory language.

B. New Union Meets RCRA Requirements Because no Agency Determination or Facts on the Record Indicate New Union's HWP has Fallen Below RCRA Authorization Standards.

The resources and performance of New Union's HWP meet the requirements of RCRA because the record does not establish New Union's HWP fell below enforcement adequacy from the initial authorization in 1986.The adequacy of enforcement element of RCRA section 3006(b) is the only issue raised by New Union's reduction in resources devoted to the HWP. Consistency and equivalency are not at issue because interstate transport and stringency of the state's regulations are not affected by New Union's resources. See Hazardous Waste Treatment Council v. State of South Carolina, 945 F.2d 781, 793 (4th Cir. 1991); 40 C.F.R. §§ 271.9-271.12. Neither the language of RCRA section 3006(b), nor cases addressing the subject clarify what level of enforcement is required for adequacy. EPA promulgated regulations to address the adequacy of state enforcement. 40 C.F.R. §§ 271.15-271.16 (addressing a range of requirements from certain values in fines, to the ability to enjoin violations, and others).

No party asserts EPA's authorization in 1986 did not meet the requirements of RCRA section 3006. Moreover, EPA was interpreting its own regulations by authorizing New Union's HWP, thus the determination that it contained adequate enforcement should be given exceptionally high deference. Bowles, 352 U.S. at 414. If the record does not indicate the level of enforcement in 1986 then there is no factual basis to establish it has decreased.

EPA found New Union's HWP met these requirements in 1986 and there has been no finding by EPA that adequacy of enforcement has decreased. App. A at 10. The only reduction in resources New Union has experienced since 1986 is the number of personnel devoted to the program. App. A at 10. New Union's HWP had fifty full-time employees when the program was authorized and now there are thirty. App. A at 10. The record does not indicate whether thirty employees in 2010 provide less enforcement than fifty in 1986. While the record includes facts such as the DEP issuing 125 permits during 2009, permits being continued by operation of law, and a gradual increase of TSDs since 1986, the record does not indicate how many enforcement actions and investigations occurred or permits issued in 1986. While this may be a "less than robust implementation and enforcement of RCRA," App. A at11, it does not indicate that this implementation has decreased from the 1986 level.

C. Transfer of Environmental Statute Administration from DEP to Commission does not Mandate EPA Withdraw Authorization, Because New Union's HWP is Equivalent and Contains Sufficient Enforcement Mechanisms.

While DEP no longer administers New Union's environmental statutes for railroad facilities, the HWP is still equivalent to the federal program and there are sufficient enforcement mechanisms to meet the requirements of RCRA section 3006. Under RCRA, equivalency is evaluated by the stringency of the state program. LaFarge Corp. v. Campbell, 813 F. Supp. 501, 508 (W.D. Tex. 1993). EPA regulations require the same facilities and wastes that would be covered by the federal program are covered under authorized state HWPs. 40 C.F.R. §§ 271.9-217.12. However, stringency is principally evaluated by whether the state program results in more environmental harm than the federal program. Hale, supra. Moreover, EPA is the proper body to make equivalency determinations because Congress specifically charged EPA with

doing so. United States v. S. Union Co., 643 F. Supp. 2d 201, 213 (D.R.I. 2009) (noting that EPA is specifically charged with equivalency determinations); see also Titan Wheel, 291 F. Supp. 2d at 913 (noting a court may not substitute its view of equivalency in place of EPA).

For a state HWP's enforcement to be adequate, it need not equal EPA enforcement mechanisms. Titan Wheel, 291 F. Supp. 2d at 913 (noting state programs' penalties may be less burdensome than federal penalties). Moreover, even if there are perceived deficiencies in state enforcement, EPA is not mandated to withdraw authorization. Harmon Indus., Inc. v. Browner, 191 F.3d 894, 901 (8th Cir. 1999). In Harmon, the Eighth Circuit permitted EPA to impose fines where a state administered plan had failed to assess penalties for a RCRA violation, but it did not require EPA to withdraw authorization. Id. at 901-02. Allowing EPA to work with a state and not mandating withdraw of authorization is consistent with congressional intent to put states in the lead of administering RCRA. Id. at 899.

EPA has not determined New Union's transfer of environmental statute administration to Commission affects New Union's HWP. EPA determined New Union's program met equivalency requirements in 1986 and has made no determination since, thus this Court should not substitute its own determination of equivalency for EPA's. If this Court construes EPA's inaction on the petition to be a constructive denial, then EPA's determination should be deferred to. Deference is consistent with congressional intent to respect EPA decisions on equivalency.

EPA has continued to work with New Union by inspecting 150 TSDs annually and taking enforcement actions during the time Commission was administering New Union's environmental laws. App. A at12. During that same period, EPA supplemented New Union's enforcement and did not find the state program lacked equivalent or sufficient enforcement. This cooperative

approach to hazardous waste brings to fruition the congressional intent of states taking the lead in hazardous waste management, with EPA providing support.

Finally, the record does not indicate the railroad facilities now regulated by the Commission actually transport any wastes regulated under RCRA. See App. A. at 11-12. While it may have handled hazardous waste at the time of New Union's HWP authorization, there is no factual basis on the record to infer it still does. Furthermore, the record does not indicate that there havae been any environmental problems caused by NURR in the ten years the Commission has administered New Union's environmental laws.

D. New Union's Treatment of Pollutant X does not Adversely Affect Equivalency, Consistency, or Violate the Commerce Clause Because New Union can Enact Stricter Regulations than are Required by the Federal Program and these Regulations do not Obstruct Interstate Transfer of Hazardous Wastes.

1. Equivalency is Not at Issue Here Because New Union's HWP Imposes More Stringent requirements on Pollutant X than the Federal Program.

Equivalency is not at issue regarding Pollutant X because states can impose greater restrictions on hazardous waste than the federal program. Old Bridge, 965 F.2d at 1296. Pollutant X is treated with more stringency than the federal program because DEP requires minimization and eventual elimination of Pollutant X within New Union, reports on reductions in Pollutant X, and limited TSD permits for storage less than 120 days while awaiting transport to an authorized facility outside the state. App. A at12. However, the record indicates EPA allows transport, storage, and disposal in nine locations. App. A at12. Thus, EPA's treatment of Pollutant X is less stringent than New Union's and causes no conflict with equivalence.

2. Consistency is Met Because New Union's Treatment of Pollutant X does not Unreasonably Burden its Interstate Transport.

New Union's treatment of Pollutant X does not raise an issue with consistency because New Union is permitted to implement a program that is more restrictive for production, storage,

and transportation of Pollutant X than the federal and other state programs. EPA initially analyzed consistency based on whether a state law violated the dormant Commerce Clause. See City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); see also Envtl. Tech., 98 F.3d at 783 n.14. Subsequently, EPA took the position that consistency was not focused on whether state law violated the Commerce Clause, but whether it imposed an unreasonable burden on interstate transport of hazardous waste. Envtl. Tech., 98 F.3d at 783 n.14.

Statutory language, congressional records, and cases addressing consistency give little guidance on interpreting this statutory requirement. See Chem. Waste Mgmt., Inc. v. Templet, 967 F.2d 1058, 1059-60 (5th Cir. 1992). However, EPA addressed consistency analysis in 40 C.F.R. § 271.4, which provides, authorized state programs will be analyzed for consistency based on whether state restrictions "unreasonably restrict[], impede[], or operate[] as a ban on the" interstate movement of hazardous wastes. A state HWP should only be deemed inconsistent if it imposes an unreasonable limitation on the interstate flow of hazardous wastes. Chem. Waste, 967 F.2d at 1059-60. Unreasonable limitations are those that "significantly decrease the flow of hazardous waste." Hazardous Waste Treatment Council v. State of South Carolina, 945 F.2d 781, 794 (4th Cir. 1991). This does not entail that state regulations cannot be stricter than EPA's regulations. Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390, 1396 (D.C. Cir. 1991). Furthermore, EPA's Office of Solid Waste Emergency Response emphasized that "reduction is the preferred method of addressing hazardous waste." Hazardous Waste Treatment Council v. State of South Carolina, 945 F.2d 781, 784 (4th Cir. 1991).

New Union's treatment of Pollutant X is stricter than EPA's and is designed to reduce the amount of the pollutant within the state boarders, while still allowing for its temporary storage and transportation across New Union to authorized, out of state facilities.

The record provides no indication of the amount of Pollutant X that traveled through New Union either before or after the passage of the ERAA. See App. A at11-12. Therefore, the record does not indicate the interstate transport of Pollutant X is actually burdened. Nor should a requirement of quick transportation and limited storage be deemed unreasonable based on the limited information on Pollutant X in the record. App. A at12.

3. The Commerce Clause is not Violated Because States May Impose Health and Safety Regulations that Affect Interstate Commerce, and the Record Does not Indicate Interstate Flow of Pollutant X has Been Affected by the ERAA.

New Union's treatment of Pollutant X does not violate the Commerce Clause because it is designed to protect the public health and environment, and is not designed to economically advantage other states. The Supreme Court recognized state laws protecting health and safety will sometimes conflict with interstate economic interests, however that does not mean the Commerce Clause has been violated. Exxon Corp. v. Governor of Md., 437 U.S. 117, 126 (1978). The dormant Commerce Clause is concerned with preventing state and local governments from using their regulatory power to economically favor local interests by prohibiting patronage of out-of-state competitors. C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 394 (1994); see U.S. Const. art. I, §9, cl. 3. Environmental preservation has been recognized as an interest states may preserve by passing laws that have an adverse impact on interstate commerce. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981). Additionally, the Supreme Court recognized waste management is a traditional function of local governments and should not be intruded upon based on Commerce Clause analysis. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 347 (2007). However, the relevant test is, if a "statute regulates 'evenhandedly,' and imposes only 'incidental' burdens on interstate commerce, the courts

must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' " Clover Leaf, 449 U.S. at 471 (citing Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).

Under the Pike test, if there is a legitimate local purpose, then the question becomes one of degree. 397 U.S. at 142. The extent of the burden that will be tolerated will depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Id. Where safety and welfare are the purposes behind the act, the Supreme Court has recognized a strong state interest in protecting its citizenry. See S. Pac. Co. v. Ariz. ex rel. Sullivan, 325 U.S. 761, 796 (1945) (Douglas, J., dissenting) (noting when a "state legislat[es] in the field of safety . . . the propriety of local regulation has long been recognized"); see also Pike, 397 U.S. at 143. Furthermore, the Supreme Court recognized waste management is beneficially related to health and the environment. United Haulers, 550 U.S. at 347.

New Union treats local producers of Pollutant X more stringently than out of state producers because the ERAA requires local producers to eventually phase out production of Pollutant X. App. A at12. This indicates New Union is not discriminating against interstate commerce by its requirements on producers, rather, it is requiring greater burdens on in-state commerce in order to protect public health and New Union's environment. Because the Commerce Clause only prohibits discrimination against interstate commerce by preferentially treating in-state economic activity, New Union's ERAA does not violate the Commerce Clause.

New Union treats interstate transporters of Pollutant X in an evenhanded manner because the ERAA imposes the same requirements on all persons transporting and

temporarily storing Pollutant X in New Union. App. A at12. Pollutant X has been recognized by the "EPA and the World Health Organization to be among the most potent and toxic chemicals to public health and the environment . . . ." App. A at12. New Union's strong interest in protecting its citizenry from a harsh chemical is not outweighed by the incidental burdens of ensuring quick transport through the state. The pollutant can still pass through the state, the only burden is that it must be done quickly to reduce the chances of exposing New Union's citizens and environment to its harmful effects. Moreover, the federal courts should not utilize the Commerce Clause to intrude into waste management, an area that is a traditional matter for local government. United Haulers, 550 U.S. at 347. Finally, the record does not indicate the amount of Pollutant X prior to the enactment of the ERAA to compare with the amount after the enactment. Therefore there is no basis to hold that interstate transport has actually been burdened.

CONCLUSION

EPA is the agency charged by Congress to administer RCRA and authorize state HWPs. For the reasons state above, this Court, consistent with that congressional delegation, should hold: (1) state authorization is a rule, (2) the APA petition provision does not provide jurisdiction, (3) EPA did not constructively deny CARE's petition nor constructively determine New Union's HWP met RCRA criteria, (4) judicial review is improper without an agency record, and (5) EPA is not mandated to withdraw authorization because withdrawal is a discretionary agency act and New Union's HWP meets the authorization requirements. Therefore, EPA requests this Court affirm the district court's dismissal.

We hereby certify that the brief for the _____ is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with the Rules.

Date: Tuesday, November 23, 2010