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UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CA No. 18-2010

CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONTMENT, INC.,

Plaintiff-Appellant-Cross-Appellee

v.

Lisa JACKSON, Administrator,

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent-Appellee-Cross Appellant

v.

STATE OF NEW UNION,

Intervenor-Appellee-Cross- Appellant

Appealed from the United States District Court for the District of New Union

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BRIEF FOR THE RESPONDENT-APPELLEE-CROSS APPELLANT,
Lisa JACKSON, Administrator,
U.S. ENVIRONMENTAL PROTECTION AGENCY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICITON

The District Court of New Union had jurisdiction to hear this matter because this case arises from the Resource Conservation and Recovery Act (RCRA), 42 United States Code sections 6901–6992k codifies the RCRA, Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901–6992k (2006)), and section 6972 authorizes citizen suits, "any person may commence a civil action . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter . . . [a]ny action brought under . . . this subsection may be brought in the district court for the district in which the alleged violation occurred." 42 U.S.C. § 6972 (2006). Further, the Twelfth Circuit Court of Appeals has jurisdiction to consider this appeal because Citizen Advocates for Regulation and the Environment, Inc. (CARE) filed suit, in the district in which it resides, requesting that the Administrator's actions of authorizing New Union's hazardous waste program be reviewed and 42 United States Code section 6976, judicial review, states "[r]eview of the Administrator's actions under section 6926 [authorized State hazardous waste programs] . . . may be held by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides." *Id.* § 6976 (b); R. at 4. The final order dismissing CARE's action was entered on June 2, 2010, and a Notice of Appeal was filed on September 29, 2010. R. at 1–3.

STATEMENT OF THE ISSUES

1. Whether RCRA section 7002(a)(2)[1] 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 section 7004[2].

1. Codified at 42 U.S.C. § 6972.
2. Codified at 42 U.S.C. § 6974.

2. Whether 28 U.S.C. section 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 section 553(e).

3. Whether EPA's failure to act on CARE's petition that EPA initiate proceeding to consider withdrawing approval of Ne Union's hazardous waste program under RCRA section 3006(e)[3] 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 section 3006(b), both subject to judicial review under RCRA section 7006(b)[4].

4. 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. Whether EPA must withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria?

6. Whether EPA must withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act effectively withdraws railroad hazardous waste from state regulation?

7. Whether EPA must withdraw approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act renders New Union's program not equivalent to federal RCRA program, inconsistent with the federal program and other state approved programs, or in violation of the Commerce Clause?

STATEMENT OF THE CASE

This matter comes before this Court pursuant to an action initiated by CARE against Lisa Jackson, Administrator of EPA, under 42 United States Code section 6972(a)(2) seeking either: 1. an injunction requiring EPA to act on CARE's petition or 2. judicial review of EPA's constructive denial of CARE's petition and EPA's constructive determination that New Union's hazardous waste program meets the RCRA's minimum requirements for state program approval.

3. Codified at 42 U.S.C. § 6926.
4. Codified at 42 U.S.C. § 6976.

R. at 1; *see* 42 U.S.C. § 6972(a)(2). The State of New Union intervened pursuant to Federal Rules of Civil Procedure Rule 24. R. at 1; Fed. R. Civ. P. 24. CARE, unsure of whether the district court had jurisdiction filed a petition for review with this Court on January 4, 2010 seeking judicial review of EPA's constructive denial and determination that New Union's hazardous waste program meets the RCRA's minimum requirements for approval of a state program. R. at 1, 4. New Union also filed an uncontested motion to intervene on CARE's filing to this Court. R. at 5.

On June 2, 2010, the District Court of New Union, granted New Union's motion for summary judgment, and dismissed CARE's action, for failure to state a claim. R. at 7, 9. of the court concluded that the actions of EPA were an order, not a rule, and therefore not subject to petition under RCRA. R. at 7–8; Further the District Court of New Union held that it did not have jurisdiction to review EPA's "constructive denial of the petition or "constructive" determination that New Union's program currently meets the approval criteria brought by CARE because Congress' intent is clear. R. at 4. The RCRA confers jurisdiction to the Court of Appeals when determining whether a state program meets the RCRA's criteria for approval. *Id.* Both, Lisa Jackson, EPA, and CARE took issue with district court's holding and filed appeals. R. at 1. Further, CARE requests that this Court lift its stay of action and consolidate its two actions. This Court has certified seven issues for review. R. at 2–3.

STATEMENT OF FACTS

In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA), the RCRA governs hazardous waste management, including the generation, transportation, treatment, storage and disposal of hazardous waste. R. at 5. The RCRA authorizes the Administrator of the Environmental Protection Agency (EPA) to 1) establish minimum

requirements in order for a storage facility to satisfy the federal standards set out in the RCRA in handling waste management, 2) inspect facilities that have been given permits by EPA to mange hazardous waste, and 3) grants options on enforcing violations of the RCRA. *Id.* Additionally, Congress in favoring administration and enforcement by states gave EPA power to approve state programs that would manage hazardous waste *in lieu of* the federal program, the RCRA. *Id.* The state program at a minimum had to be consistent with the RCRA and other approved state programs. *Id.* In 1986, EPA approved New Union's hazardous waste program, New Union DEP. R. at 10. DEP was implemented *in lieu* of the RCRA. *Id.* EPA found that New Union had adequate resources to fully administer and enforce its proposed program. *Id.* DEP is responsible for 1) issuing permits to treatment, storage, and disposal facilities (TSDs) operating in New Union, 2) regularly inspecting RCRA regulated facilities in the state and 3) taking enforcement action if a facility violated regulation laid out by DEP. *Id.* Since the DEP's inception there has been a reduction in DEP's budget while the numbers of TSDs in the state requiring permits continue to grow. *Id.* Additionally, in 2000, the New Union legislature enacted the 2000 Environmental Regulatory Adjustment Act (the ERAA). R. at 11. The ERAA contains amendments to environmental legislation in the state. *Id.* One of the amendments transfered "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes to the Commission[5]" and removed criminal sanctions for environmental violations. R. at 12. Another amendment limited the amount of Pollutant X that is allowed to be generated within the state, asserted more stringent guidelines for TSDs handling Pollutant X and required efficiently transporting Pollutant X out of New Union. *Id.* Citizen Advocates for Regulation and the Environment, Inc. (CARE) served a petition on the

5. The Commission is a newly established New Union agency.

Administrator of EPA claiming that since 1986 New Union DEP has lost resources and no longer meets RCRA threshold requirements for approval. R. at 5. CARE's allegations are based off of documents that New Union submitted to EPA. *Id.* CARE, unsatisfied with the action taken by EPA on its petition filed a citizen suit against EPA in the District Court of New Union. R. at 4.

SUMMARY OF ARUGMENT

Congress' purpose in creating the Resource Conservation and Recovery Act (RCRA) was to regulate hazardous waste in the United States of America; Congress delegated this area of law to the Environmental Protection Agency (EPA). EPA further interpreted the RCRA by promulgating codes further explaining the intricacies of the RCRA. Through EPA interpretation and Congressional intent the RCRA is clear in delegating jurisdiction to district courts in the matter of ordering EPA to act on a citizen petition. In this case, CARE petitioned EPA to withdraw its approval of New Union pursuant to the RCRA's citizen suit section. Further, the lower court claimed that EPA's approval of New Union's hazardous waste program was an order and not a rule, denying the court jurisdiction over the matter and therefore the District Court of New Union erred when granting New Union's motion for summary judgment due to lack of subject matter jurisdiction. However, the court's determination was incorrect. EPA's approval was a rule. Under the RCRA EPA rulings are subject to petitions by citizen groups, and pursuant to the RCRA district courts may order EPA to act on a citizen suit. Additionally, when there is a statue governing a specific area of law, such as the RCRA, it supersedes broad statutes granting general jurisdiction, like 28 United States Code section 1331, when the statutory method proscribed is adequate. The District Court of New Union correctly granted summary judgment for lack of jurisdiction under section 1331 of the United States Code, because Congress specifically wrote a statute dictating the appropriate jurisdiction under the RCRA.

EPA's inaction on CARE's petition is not a "constructive" action of any kind and is therefore not reviewable by this Court. CARE asserts that EPA's inaction is a denial; nevertheless courts have determined that agency inaction is not equivalent to an agency denial. Further, Congress has not set forth a specific timing constraint on EPA expressing when EPA must take action therefore leaving that decision to EPA. EPA has the discretion to determine when action is most appropriate or needed. Since EPA neither constructively denied the petition nor made any determinations on New Union's hazardous waste program judicial review is unviable under the RCRA. However, assuming arguendo that EPA's inaction was a "constructive" denial of the petition and contemporaneously a "constructive" determination that New Union's program continues meets the criteria for approval, under the RCRA, this Court cannot review discretional determinations of EPA. EPA's decision to decide whether or not to advance to a withdrawal proceeding against a state is a discretionary determination. When making discretionary decisions the United States Supreme Court has stated that an agency's decision not to take enforcement measures is presumed immune from judicial review. Though this is a rebuttable presumption, the power to rebut such a presumption must be conferred by statute. Here the RCRA does not give courts judicial review of discretionary decisions and therefore EPA constructive determination is not reviewable.

EPA does not have to initiate withdrawal proceedings, because New Union's resources and performance are sufficient to maintain approval. New Union's program still governs and regulates the generation, transportation, treatment, storage and disposal of hazardous waste in New Union. New Union's program is consistent to the RCRA and other approved state programs. Additionally, it was Congress' intent to have states take responsibility for hazardous waste programs in their states. In fact, Congress specified alternatives to withdrawal explicitly

set forth in the RCRA thereby reserving withdrawal for extreme circumstance. When a state program lags in resources or falls short of the minimum requirements set forth in the RCRA, EPA may extend the state's time to comply or create and implement a state compliance schedule instead of proceeding to withdrawal. Therefore, if New Union DEP did fall short of the federal program, EPA does not have to withdraw approval from its program.

Finally, New Union's legislature enacted the New Union 2000 Environmental Regulatory Adjustment Act which delegated railroad hazardous waste facilities to another state agency to regulate and altered the treatment of pollutant X in the state. The delegation of the railroad hazardous waste facilities does not require EPA to withdraw approval from the entire program, because the new agency controlling the railroad hazardous waste has been charged with responsibilities that are consistent with the federal program. Furthermore, the treatment of Pollutant X is consistent with other state programs and does not violate the Commerce Clause because Pollutant X is allowed to be shipped through New Union and leaves available areas in New Union for possible disposal sites in the future.

STANDARD OF REVIEW

The issue of whether the district court had subject matter jurisdiction pursuant to 28 United States Code section 1331, is a question of law and therefore subject to de novo review. *Dumdeang v. Comm'r of Internal Revenue*, 739 F.2d 452, 453 (9th Cir. 1984) (interpreting jurisdiction under United State Code is a question of law and therefore reviewed de novo); *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000). The issue ascertaining whether or not this Court should lift the stay or remand to the district court is a mixture of law and fact, and therefore also subject to de novo review. *League of Wilderness Defenders/Blue mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). The rest of

the issues before this Court requires review of the whether EPA's decision making was arbitrary and capricious when deciding not to withdraw approval from a state program, and therefore the appropriate standard for reviewing agency decisions is deferential and will only be set aside for abuse of discretion. *Greer v. Ill. Housing Dev. Auth.,* 524 N.E.2d 561, 576 (Ill. 1988) (reversal is only appropriate if the agency abused its discretion in making its determinations).

ARGUMENT

I. THE LOWER COURT ERRED WHEN GRATNING SUMMARYJUDGMENT FOR NEW UNION, PURSUANT TO THE RCRA, BECAUSE THE STATUTE SPECIFCICALLY DESIGNATES JURISDICTION TO THAT COURT.

A. EPA's Approval of New Union DEP was a Rule.

The APA defines a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organizations, procedure, or practice requirement of an agency." 5 U.S.C. 551(4) (2006). The statutory requirement for rule-making sets out in pertinent part that a "general notice of proposed rule-making shall be published in the Federal Register." 5 U.S.C. 553 (b) (2006). However, it is not always necessary to follow the APA guidelines when creating a rule. *Guadamuz v. Bowen*, 859 F.2d 762, 771 (9th Cir. 1998) (holding failure to meet the APA's formal rule-making requirements in adopting a procedure was not fatal.) Although rules are generally considered to be broad in nature and can affect a generalized group, rules may apply to specifically named parties and the agency may find that naming persons will be the most effective expressions of the rule's coverage. *SBC Commc'n, Inc., v. F.C.C.*, 154 F.3d 226, 233 (5th Cir. 1998) (holding even though a single telecommunications company had a line-of-business restriction imposed upon it the restriction was considered a rule under the Telecommunications Act). An agency's interpretation of the APA may not be entitled to the

same weight as agency's interpretation of its own substantive mandate, but its characterization of its own proceeding is entitled to weight. *Int'l Tel. & Tel. Corp., Commc'ns Equip. & Sys. Div.* (*Int'l Tel. & Tel. Corp.*) *v. Local 134, Int'l Broth. of Elec. Workers*, 419 U.S. 428, 441 (1975).

Regulation is promulgated under RCRA when it is published in the Federal Register. 5 U.S.C. § 553. In *Horsehead Resource Development Co.* the intervenor, Conversion System's Inc. (CSI), petitioned for the delisting of electric arc furnace dust from RCRA's hazardous waste list. *Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090 (D.C. Cir. 1997). EPA published a Notice of Proposed Rulemaking, indicating its intent to grant CSI's delisting petition. *Id.* EPA Administrator signed the final de-listing rule. *Id.* at 1092. EPA filed the de-listing rule with the Office of the Federal Register. *Id.* The rule was published in the Federal Register and was effective the next day. *Id.* The point of contention in this case was whether the term promulgate should receive its ordinary meaning. *Id.* The term "'promulgate' means 'to make known by open declaration' or 'to make public…the terms of a new rule.'" *Id.* at 1093. The court held that EPA rule was promulgated when it was published in the Federal Register. *Id.*; *see also Nat'l Grain & Feed Ass'n Inc. v. OSHA*, 845 F.2d 345 (D.C. Cir. 1998); *United Techs. Corp. v. OSHA*, 836 F.2d 52, 54 (2d Cir. 1987) (holding that promulgation means to make known by public declaration and promulgation is satisfied by publishing a decision in the Federal Register).

This case is similar to *SBC Communication Inc.*, in that case the court held that the action of the F.C.C. was a rule, even though it was addressed only to one party; in the present case EPA's actions only affected New Union therefore this Court should hold as the court in *SBC Communication Inc.* held and find that EPA's action was a rule. Additionally, according to *International Telephone & Telephone Corp.*, the agencies characterization of its own mandate deserves weight. Since EPA followed all the procedural mandates under the APA in order to

constitute its action as a rule, this Court should show deference to EPA and consider EPA's action a rule since that was the intent of EPA.

Finally, procedurally speaking EPA's action was a rule and not an order. EPA used a notice and comment procedure and incorporated the result in 40 Code Federal Regulations Part 272, the Federal Register. This case is analogous to *Horsehead Resource Development Co.*, because in that case EPA published a notice of the proposed rule-making, allowed interested parties to comment and then promulgated its rule in the Federal Register and that court held that EPA had issued a rule; here EPA uses the notice and comment procedure and promulgated the rule in the Federal Register. Therefore, this Court should hold as the court in *Horsehead Resource Development Co.*, held and find because the decision was published and open for comment that EPA's actions were a rule.

B. EPA's Approval of New Unions' Program Not an Order.

In order to classify the difference between a rule and an order the Court has to bypass the RCRA and look directly at the Administrative Procedure Act (APA), which is the governing law. 5 U.S.C. § 551. The APA defines an order as "the whole or a part of a ***final disposition***, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6) (emphasis added). Congress defined "order," as used in the APA, in terms of "final disposition" which must have "some determinate consequences for the party to the proceeding." *Int'l Tel. & Tel. Corp.*, 419 U.S. at 444. Administrative orders are not final and reviewable unless and until they impose an obligation. *Air Cal. v. U. S. Dep't. of Transp.*, 654 F.2d 616, 621 (9th Cir 1981). A "final appealable order," is an order that has an ongoing effect and there is no further administrative review available. *Finer Foods, Inc. v. U.S. Dept. of Agric.*, 274 F.3d 1137, 1140 (7th Cir. 2001). An order is a

final disposition given to a party imposing some kind of obligation on that party. *Int'l Tel. & Tel. Corp.*, 419 U.S. at 443. In *International Telephone & Telephone Corp*. the petitioner alleged that the respondents violated a section of the National Labor Relations Act, (NLRA). *Id.* at 434. After the hearing, the trial examiner held that the respondents had violated a provision of the NLRA and recommended that they be ordered to cease their unlawful conduct. *Id.* at 436. However, this recommendation did not have a binding effect on either party, it was simply a recommendation. *Id.* at 438. This decision was a preliminary administrative determination made for the purpose of attempting to resolve a dispute. *Id.* at 440. Since neither party was obligated to do anything after this hearing and this was not the final disposition of the case, the Court held that it was not an order. *Id.* at 448.

This Court should find that EPA's approval of New Union's Hazardous Waste Program was a rule and not an order. EPA approved New Union's program in lieu of the RCRA, in 1986, and determined that New Union's program met all the criteria for approval. EPA's approval of New Union's program was not a final action because EPA could revoke the approval of the DEP if necessary. This is similar to *International Telephone & Telephone Corp.*, in which the Supreme Court held the recommendation was not final action and therefore not an order pursuant to the APA; here, EPA's recommendation of approval not final action because New Union does not have an obligation to act by and EPA may revoke approval if necessary. Therefore this Court should find as the Supreme Court found and conclude that EPA did not issue an order. Since EPA's approval must be considered a rule because there was no final action CARE's citizen suit was properly brought under RCRA, 42 United States Code section 6974, and the lower court's ruling granting summary judgment in favor of New Union should be reversed.

C. Because EPA's Action was a Rule the District Court had Jurisdiction to Order EPA to Act on CARE's Petition.

The District Court had jurisdiction to order EPA to act on CARE's petition for revocation of New Union's Hazardous Waste Program pursuant to RCRA. *See* 42 U.S.C. § 6974. The RCRA states that "any person may commence a civil action on his own behalf against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." *Id.* § 6972(a)(2). Further, Congress intended that the district court hear such actions, evidenced by the plain language of the statute which states, "any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District of Colombia." *Id.* Since, CARE's petition is based around circumstances occurring in New Union pursuant to the statutory language the lower court had jurisdiction over CARE's citizen suit. For the foregoing reasons, the district court's decision to grant summary judgment for New Union for lack of subject matter jurisdiction should be reversed because jurisdiction was proper under the RCRA, 42 United States Code section 6972.

II. BECAUSE CONGRESS EXPLICITLY DICTATED UNDER THE RCRA WHERE JURISIDCITON IS APPROPRAITE, 28 UNITED STATES CODE SECTION 1331 IS SUPRECEDED.

The district court's holding granting New Union motion for summary judgment for lack of subjection matter jurisdiction pursuant to 28 United States Code section 1331 should be affirmed. When Congress wrote the RCRA it specified where jurisdiction to bring a citizen suit was proper in doing so the RCRA became the specific authority governing jurisdiction in this area. 42 U.S.C. § 6972. Therefore, the RCRA supersedes any general statute authorizing jurisdiction. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-525 (1989), (holding

specific rules will govern over more general rules.) The RCRA states "[a]ny person may petition the Admistrator for the promulgation, amendment, or repeal of any regulation under this Act." *Id.* § 6974. Congress designated a specific statute within the RCRA to govern judicial review. *Id.* § 6976. Section 6976(a) grants jurisdiction when for judicial review of EPA's promulgated regulations. *Id.* § 6976(a). However, the statute specifically states that judicial review is appropriate only in the United States Court of Appeals for the District of Colombia. *Id.*§ 6976(a)(1). A litigant may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in a federal district court under 28 U.S.C. section 1331 because the specific statutory method, if adequate, is exclusive. *Gen. Fin. Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983); 28 U.S.C. § 1331.

Congress' express powers are enumerated in Article I, Section 8 of the Unites States Constitution giving Congress the power to decide which courts have jurisdiction over certain areas of law. U.S. Const. art. 3, § 2, cl. 1. In *American Portland Cement Alliance*, the petitioners sought judicial review in the District of Colombia Circuit Court of Appeals pursuant to RCRA. *Am. Portland Cement Alliance v. EPA* 101 F.3d 772 (D.C. Cir. 1996). The petitioners wanted the court to review petitions challenging the "Regulatory Determination of Cement Kiln Dust." *Id*. Pursuant to RCRA, 42 United States Code section 6976(a)(1), only three types of EPA actions are reviewable: 1) the promulgation of final regulations, 2) the promulgations of requirements and 3) the denial of petitions for the promulgations, amendment or repels of RCRA regulations. *Id*. at 775. The court held that Congress clearly recognizes how to provide courts with jurisdiction over "determinations" and since "determinations" are not one of the three enumerated EPA actions reviewable under RCRA the court did not have jurisdiction over the matter. *Id.* at 775–779.

This Court should affirm the district courts finding that it lacked jurisdiction pursuant to 28 United States Code section 1331. Like in *American Portland Cement Alliance,* where the court expressly followed the RCRA in determining whether the court had jurisdiction over EPA's action, this Court should strictly follow the RCRA in determining whether the lower court had jurisdiction over EPA's action. Therefore, since EPA's action is regulated by the RCRA, the specific authority, the APA should not be examined as a default provision stating that jurisdiction may be granted pursuant to 28 United States Code section 1331. Further the APA is not guiding in this case because there is a specific statute within the RCRA dictating which courts have jurisdiction over varying EPA actions. Here, Congress has specifically spoken on this issue by setting forth a judicial review section under the RCRA making review under 28 United States Code section 1331 improper. The RCRA must be followed per Congress's command. Thus, the lower court's decision granting New Union's motion of summary judgment, for lack of subject matter jurisdiction pursuant to 28 United States Code section 1331 was correct and should be affirmed.

III. JUDICIAL REVIEW UNDER THE RCRA IS INAPPROPRIATE BECAUSE EPA'S INACTION WAS NOT A CONSTRUCTIVE DENIAL.

CARE is not be entitled to judicial review of EPA's inaction because EPA's inaction does not constitute a constructive denial. Further, the inaction by EPA is not unreasonable. When determining if agency inaction is reasonable courts look to three factors: 1) did Congress specifically designate a time for the agency to act, 2) if the delay has caused harm and 3) whether there would be harm in forcing the agency to abandon its schedule and act on a specific issue. *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir 1987). Because EPA's inaction does not

constitute a constructive denial of CARE's petition, and because the inaction by EPA has not been unreasonable CARE is not entitled to seek judicial review pursuant to the RCRA.

A. EPA Did Not Constructively Deny CARE's Petition Because Inaction is Not the Same as a Denial.

EPA's inaction, concerning CARE's petition to withdraw approval of New Union's hazardous waste program, was not a constructive denial of the petition and therefore was not subject to judicial review pursuant to the RCRA. The Supreme Court has directly spoken on this issue and ruled that, "[a] failure to act is not the same as a denial. The latter is the agency's act of saying no to a request; the former is simply the omission of an action." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004); *see also United States v.* Bean, 537 U.S. 71, 75 (2002) (concluding that inaction by the ATF did not amount to a denial); *Kaufman v. Mukasey*, 524 F.3d 1334, 1338 (D.C. Cir. 2008) (holding that a failure to act is not the same as a denial).

Whether agency inaction amounted to a constructive denial was considered by the *Kaufman* court when a man petitioned the Attorney General, the State Department, and the United States Citizenship and Immigration Services Bureau in an attempt to have his citizenship renounced. *Kaufman*, 524 F.3d at 1336–37. When the departments and agency failed to respond to his requests, instead referring him to other authorities, the plaintiff filed suit alleging that because the Department, Attorney General and Bureau did not respond to his requests, that this lack of action constituted a denial of his right to renounce his citizenship. *Id.* The court determined that agency inaction was not the same as a denial. *Id.* at 1338. The Supreme Court has also considered the issue of whether agency inaction constitutes a denial. *See Norton*, 542 U.S. at 55. In *Norton* the Southern Utah Wilderness Alliance sought declaratory and injunctive relief from the Bureau of Land Management's failure to act to protect Utah's lands from

environmental damage under the APA, and to compel agency action unlawfully withheld. *Id.* The Court held that agency inaction was not the same as a denial and that a section 6976 claim can only go forward if the plaintiff asserts that an agency failed to take action that it was required to take. *Id.* at 63.

A constructive submission, as opposed to a constructive denial, was found in *Scott v. City of Hammond*, however, in that case the constructive submission was committed by the state. 741 F.2d 992, 996 (7th Cir. 1984). In *Scott*, an Illinois citizen brought a citizen suit pursuant to section 1365(a)(2) of the Clean Water Act (CWA), complaining about the pollution entering into Lake Michigan. *Id.* at 994. The CWA, section 303(d), required Illinois to submit Total Maximum Daily Load (TMDL) requirements for the water within its boundaries. *Id.* at 996. Illinois was specifically required to specify TMDL's but failed to do so. *Id.* The court held that if a state fails, over a long period of time, to submit proposed TMDL's the prolonged failure could amount to the state constructively submitting that TMLD's were not necessary. *Id.* The court further explained that the failure of regulating TMLD's could constitute a constructive submission and then EPA would be under a duty to either approve or disapprove this constructive submission. *Id.* at 997. However, a submission is not the same as a denial; a submission is "[a] yielding to the authority or will of another." Black's Law Dictionary 683 (3d Pocket ed. 2006). Alternatively, a denial is "an agency's act of saying no to a request." *Norton,* 542 U.S.at 63.

In the present case, CARE asserts that EPA's inaction on its petition requesting EPA to revoke New Union DEP's approval constituted a constructive denial. However, like the determination in *Norton,* inaction by an agency is not the same thing as a denial. Like the plaintiff in *Kauffman*, who asserted that EPA's inaction was a constructive denial because the

agency referred him to alternatives for assistance and did not make a final decision on his claim, CARE also asserts that EPA's failure to make a final decision on the petition is a constructive denial. And like in *Kauffman* where the court rejected that argument and held that inaction is not a denial, this Court should also rule that the EPA's inaction is not a constructive denial.

The *Scott* case is distinguishable from the present case for two reasons. First, the facts are distinguishable because in *Scott* it is the state that failed to act and not the agency. In the present situation, it is the EPA that CARE claims has failed to act and not the state.. The second difference is that the *Scott* court ruled that the state's inaction was a constructive submission and not a constructive denial, which is an entirely different action. As defined previously, a constructive submission is the yielding of authority to another. Unlike the situation in *Scott*, where the state failed to act on TMDL's and was found to have constructively submitted a determination of no TMDLs to EPA; here EPA is not yielding its authority to another agency nor is it denying that it may take action. In the case at bar EPA has merely not taken action on CARE's petition yet and inaction is not a constructive denial. Therefore, this Court should hold as the *Kaufmann* held and find that EPA should be granted the authority to act when the agency determines is the most appropriate time and when action is needed.

B. <u>EPA's Inaction Has Not Been Unreasonable Because Agencies Are Given Deference On When To Act On an Issue And EPA Was Not Under an Obligation to Act.</u>

EPA's inaction has not been unreasonable. An agency action is not to be deemed unreasonable unless the delay is "so egregious as to warrant mandamus." *Sierra Club*, 828 F.2d at 797. Courts use slightly different tests to determine if agency inaction is unreasonable but all of them focus on a culmination of the following: whether Congress has imposed a statutory deadline, whether interests other than timely decision making are negatively impacted by delay

and whether an order expediting the process will have a negative effect on the agency. *Id.* "Absent a precise statutory timetable . . . an agency's control over a timetable of rulemaking proceedings is entitled to considerable deference." *Id.* However, different circuits use different tests to determine reasonableness; there is no one iron-clad test. *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

A court is only allowed to compel agency action when the agency is under a duty to act. *Beyond Pesticides/ Nat'l Coal. Against the Misuse of Pesticides v. Johnson*, 407 F. Supp. 2d 38, 39 (D.C. 2005). Courts must determine the delay from the time that the agency became obligated to act. *Id.* In *Johnson* a challenge was brought concerning EPA's delay in responding to the plaintiffs' petition. *Id.* The plaintiff argued that EPA had been under a duty to act since 1993, when EPA first became aware of the viability of alternatives to pesticides from steel producers, and not in 2001 which was when the plaintiffs first petitioned EPA. *Id.* However, the court disagreed and determined that EPA was not under a duty to act until the formal petition was filed by the plaintiffs in 2001. *Id.* at 40. In considering the first factor as stated in *Sierra Club*, the *Johnson* Court reasoned that without a statutory requirement specifying when to act, an agency will be granted considerable deference in determining when action is appropriate. *Id.* Next the court determined that the second factor was not dispositive because virtually all of EPA's docket is filled with actions of this kind, and to force the agency to put one environmental concern in front of the others would take away from EPA's granted authority—namely to exercise discretion, expertise, and knowledge when choosing which actions are necessary. *Id.* at 41. The court summarized its determinations by stating that it is a well established presumption that government officials, agency officials, are presumed to have acted in good faith and that the

burden is on the petitioner to establish that the agency has not acted in good faith regarding its duties. *Id.* The court held that EPA's inaction did not amount to an unreasonable delay. *Id.*

Though courts' decisions differ regarding the reasonableness of agency inaction there is one common concurrence among courts governing this area; courts are reluctant to upset agency priorities unless the inaction is egregious. *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001). Further, an agencies determination of when it is appropriate to act is given considerable deference. *Id.* In *Sierra Club* the court applied the three part inquiry discussed above, when the petitioner, Sierra Club, brought an action seeking declaratory and injunctive relief to compel EPA to make a ruling regarding the strip mines. *Sierra Club*, 828 F.2d at 784. The court first considered whether Congress had imposed a statutory deadline for the completion of the rulemaking; the court ruled that there was no evidence that Congress had required a specific timetable for EPA to accomplish its task. *Id.* at 797. Secondly, the court held that even though the rulemaking concerning mines would affect health and human welfare, that this factor could not be dispositive because virtually EPA's entire docket was concerned with matters affecting health and human welfare. *Id.* at 798. The court noted that when considering the second factor it is pertinent to compare the matter at hand with the other matters confronting EPA. *Id.* In considering the third factor the court noted that Congress had assigned EPA a very broad mandate and that because Congress had given EPA limited resources EPA must prioritize how to best utilize those resources. *Id.* Finally the *Sierra Club* Court held that the three years that had passed since EPA became under a duty to act was not unreasonable because EPA must be afforded the amount of time necessary to prioritize and accomplish its tasks. *Id.*

Like in *Johnson,* EPA in the present case has not been under a duty to act until formally petitioned by CARE to withdraw approval from New Union DEP. CARE petitioned EPA to

withdraw approval from New Union's program on January 5, 2009. Applying the *Sierra Club* test, the first prong addresses whether the statute specifically designates a timeframe for the agency to act, here the RCRA does not specifically specify a time frame for EPA to act. In evaluating the second prong, it is necessary to determine whether the inaction negatively affects human welfare. However even if EPA's delay to act may affect human health the court in *Sierra Club* determined that this factor is not dispositive when EPA's entire docket is filled with tasks that affect human health. Finally, the third factor also weighs in favor of EPA's inaction being reasonable, because if the court required EPA to act other environmental initiatives may be set aside which would then usurp Congress' intent in bestowing EPA discretion in these matters. This Court should find as the court in *Sierra Club* and hold that EPA is entitled to deference on when and how to act on CARE's petition, and therefore has not been unreasonable in its delay in acting on CARE's petition.

C. Because there was Not a Constructive Denial of CARE's Petition by EPA CARE is Not Entitled to Judicial Review Under RCRA.

Pursuant to the Resource Conservation and Recovery Act review is entitled to any interested person when there has been an issuance, denial, or modification of any permit under section 6925 . 42 U.S.C. § 6976(b). Review is also appropriate under this section if there is a grant, denial or a withdrawal proceeding to revoke a permit which was granted pursuant to RCRA section 6926. *Id.* Because there was no denial, modification of any permit or a constructive denial to New Unions state approved program, CARE would not be entitled to judicial review pursuant to the RCRA. For the foregoing reasons this Court should find that judicial review is inappropriate because EPA did not constructively determine any matter concerning New Union DEP nor did it constructively deny CARE's petition.

IV. EPA'S DECISION NOT TO PURSUE WITHDRAWAL PROCEEDINGS OF NEW UNION DEP IS NOT SUBJECT TO JUDICIAL REVIEW BECAUSE IT WAS A DISCRETIONARY DETERMINATION

Assuming arguendo that EPA's inaction on CARE's petition was a constructive denial of that petition and contemporaneously a constructive determination that New Union DEP continues to meet the RCRA minimum criteria; this court should not lift the stay and proceed to judicial review but alternatively remand to the district court below to order EPA to initiate proceedings under the RCRA. EPA's determination not to withdraw approval from New Union DEP is a discretionary determination and therefore not reviewable. *See Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 Fed. Appx. 406, 408 (5th Cir. 2010) (per curiam) (holding "that the EPA's decision not to commence [a] withdraw[al] proceeding is a discretionary, non-enforcement decision that is unreviewable"). In *Texas Disposal Systems Landfill Inc.*, the appellants petitioned EPA to withdraw its authorization from Texas' hazardous waste program. *Id.* at 407. The petition alleged that Texas was in violation of the RCRA and EPA made a determination not to withdraw approval of Texas' program, finding no insufficiency within its program. *Id.* Additionally the appellant in *Texas Disposal Systems Landfill Inc.* argued that EPA's determination not to proceed with withdrawal was not only a refusal to enforce but additionally an informal adjudication. *Id.* at 408. The court disagreed with the appellant's argument that EPA's own regulations gave the court discretion to scrutinize EPA's determination. *Id.* Instead the court citing the RCRA and EPA's regulations, discussing state authorization and the withdrawal process, stated that EPA is only limited in that it withdraw authorization after it has determined that the state is not in compliance. *Id.*; 42 U.S.C. § 6926(e); 40 C.F.R. § 271.23(b)(1) (2009). Further the court held that since EPA did not find that Texas' program was in violation of the RCRA then its determination not to proceed with withdrawal

was not subject to review. *Tex. Disposal Sys. Landfill Inc.*, 377 Fed. Appx. at 408 (citing *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review pursuant to the [APA]"))[6].

The current case is analogous to the *Texas Disposal Systems Landfill Inc.* case because like in *Texas Disposal Systems Landfill Inc.* where the plaintiff wanted judicial review of EPA's determination not to withdraw Texas' approval here CARE wants this Court to lift the stay and proceed to judicial review of EPA's constructive determination that New Union DEP is sufficient and therefore EPA will not proceed to withdrawal proceedings. The court in *Texas Disposal Systems Landfill Inc.* held that when EPA did not proceed with withdrawal proceedings after it determined that Texas' program was sufficient was a discretionary determination which is unreviewable. Therefore, this Court should hold as the court did in *Texas Disposal Systems Landfill Inc.*, and find EPA's constructive determination of New Union's program to be a discretionary, non-enforcement decision which is unreviewable and should remand to the District Court of New Union to order further proceedings under the RCRA.

V. THE RCRA PROVIDES EPA WITH ALTERNATIVES TO WITHDRAWING AUTHORIZATION FROM STATE PROGRAMS.

Congress promulgated the RCRA with the intent that states would share in the responsibility of managing their hazardous waste. 42 U.S.C. § 6901(a)(4) ("while the collection and disposal of solid wastes should continue to be primarily the function of the State, regional and local agencies, the problems of waste disposal . . . [is] a matter of national [concern]"); *see*

6. This presumption is rebuttable if Congress intended that judicial review was appropriate pursuant to statutory language. *Heckler*, 470 U.S. at 834–35. However, in *Texas Disposal Systems Landfill Inc.*, the court determined that neither the RCRA nor the EPA regulations explaining the RCRA designated review of a determination to not withdraw. 377 Fed. Appx. at 408.

42 U.S.C. § 6902(a)(7) ("establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring the Administrator will . . . give high priority to assisting and cooperating with States in obtaining full authorization of State programs"). When a state program is as comprehensive and stringent as the federal program under the RCRA, EPA has congressional authority to delegate hazardous waste control to that state. 42 U.S.C § 6926. Only in extreme egregious situations will EPA withdraw state approval and only after giving the state every opportunity to comply with the minimum standards set forth in the RCRA. *See* 40 C.F.R. §§ 271.21(e)(1), 271.21(g); Reversion of Iowa Hazardous Waste Management Program, 50 Fed. Reg. 26562–01 (proposed June 27, 1985) (to be codified at 40 C.F.R. pt. 271) (EPA granted Iowa numerous extensions allowing it ample time to bring its program into compliance with the RCRA); Susan Adams Brietzke, *Hazardous Waste in Interstate Commerce: Minimizing the Problem After City of* Philadelphia v. New Jersey, 24 Val. U. L. 77, 79 (1989).

A. New Union DEP is in Compliance with the RCRA.

The RCRA requires states' hazardous waste programs to set standards for hazardous waste facilities within the state, cover all transporters of hazardous waste within the state, set procedures for receiving hazardous waste facility reports, and develop inspection and surveillance procedures of waste facilities. *See* 42 U.S.C. § 6926; 40 C.F.R. § 271.15. When EPA approved New Union DEP it determined that New Union was in compliance with minimum federal requirements and was consistent with other state hazardous waste programs. R. at 10. Though resources have changed DEP still governs all the requirements of the minimum federal program. *See id.* Therefore EPA does not have grounds to proceed to withdrawal because New Union DEP is in compliance with the RCRA. 42 U.S.C § 6926(e). This Court should find that

New Union DEP is in compliance with the RCRA and therefore withdrawal proceeding are inappropriate.

B. EPA has the Discretion to Extend a State's Compliance Time When a State Program Falls Short of Meeting Minimum Requirements or May Proscribe a Compliance Schedule for the State.

When a state's hazardous waste program no longer meets federal requirements EPA may initiate or may implement a revision to the state program and extend the state's time to comply instead of proceeding to withdrawing state authorization. *See* 42 U.S.C. §§ 6905, 6912, 6926; 40. C.F.R. §§ 271.21(a), 271.21(e)(3). EPA was granted the ability to extend a states' compliance time because of Congress' strong desire for states to regulate their own hazardous waste. *See* H.R. Rep. No. 1491, 94th Cong., 2d Sess. 1976 (1976). Additionally, EPA may also organize and implement a compliance schedule for a state whose program is no longer in compliance with the RCRA. 40 C.F.R. § 271.21(g). Had Congress intended a mandatory withdrawal proceeding upon a states' noncompliance it would not have provided alternatives to withdrawal under the RCRA. Therefore, this Court should find that even if the Court determines that New Union DEP no longer meets the requirements under the RCRA, EPA has alternatives to mandatory withdrawal; EPA has the discretion to either put New Union on a time extension which allows New Union time to comply or set New Union a compliance schedule.

VI. EPA DOES NOT HAVE TO WITHDRAW APPROVAL FROM NEW UNION BECAUSE THE RCRA ALLOWS DEP TO DELEGATE ENVIRONMENTAL RESPONSIBILITIES BETWEEN STATE AGENCIES.

State hazardous waste programs must continuously be updated due to new regulations being promulgated by EPA. *See* 40 C.F.R. § 271.21; 42 U.S.C. § 6926. Additionally changes in a state's economic situation may cause budget cuts and require resources to shift within state agencies causing a state to no longer comply with RCRA regulations or to shift responsibilities

within state agencies. 40 C.F.R. § 271.21. Due to such circumstances states are required to communicate changes in their programs to EPA and acquire approval of any substantial revisions to their approved programs. *Id.*

A. EPA May Initiate Program Revisions to New Union DEP Instead of Proceeding to Withdrawal of the Entire State Program.

"Either EPA or the approved State may initiate program revision." 40 C.F.R. § 271.21(a). States are allowed to transfer part of any program from the approved state agency to any other state agency, but need to notify EPA and identify any new division of responsibilities among the agencies involved. *Id.* § 271.21(c). There are two phases of authorization. 40 C.F.R § 271; *Unites States v. Conservation Chem. Co. of Ill.*, 660 F.Supp. 1236, 1239 (N.D. IN 1987). Phase I authorization allows a state's regulations and procedures to displace the federal regulations while Phase II authorization grants a state permit issuing and enforcement procedures. *Conservation Chem. Co. of Ill.*, 660 F. Supp. At 1239. A state program may have one or both phases of authorization. *See id.* As a protective measure to ensure violations are being acted upon the RCRA gives EPA enforcement capabilities despite a state having authorization. 42 U.S.C. § 6928 (allowing EPA to file criminal and civil actions against violators of the RCRA). EPA may even file suit when a state has taken action against a facility in violation of the RCRA. *Id.*; *see generally* Jeffery G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two: Statutory Preclusions on EPA Enforcement*, 29 Harv. Envtl. L. Rev. 1 (2005). Further EPA may supplement federal resources and regulate a specific area that a state, whose hazardous waste program is approved, no longer has the resources to regulate on its own. *See* 40 C.F.R. § 271.23(a).

In this case when New Union's legislature enacted 2000 Environmental Regulatory Adjustment Act (the "ERAA") transferring "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes" to the Commission, it was acting with authority proscribed under the RCRA. Congress has anticipated delegations among agencies in a particular state, and EPA codified that exception. EPA may initiate revisions to New Union DEP to determine whether the Commission is within compliance of the RCRA. However, when New Union's legislature removed criminal sanctions for violation of environmental statutes it created a gap in New Union's compliance with the federal minimum requirements. The Commission would fail Phase II authorization because it removed criminal penalties which are specifically articulated in the RCRA but that would not affect Phase I authorization. Regardless, this does not affect EPA's ability to supplement and regulate enforcement actions in New Union. This Court should find that EPA does not have to withdraw approval from New Union's entire program, because it may implement the federal program to regulate railroad hazardous waste facilities in place of the state program without jeopardizing all of New Union DEP or EPA may issue a non-compliance order and allow New Union time to correct the situation.

VII. BECAUSE NEW UNION DEP IS CONSISTENET WITH THE FEDERAL PROGRAM, OTHER STATE PROGRAMS AND DOES NOT VIOLATE THE COMMERCE CLAUSE EPA DOES NOT HAVE TO WITHDRAW APPROVAL.

There are two consistency requirements set forth in EPA regulations. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1392 (D.C. Cir. 1991). For a state program to be deemed consistent with the federal program and other state programs, the state must abide by the first requirement, and inconsistency with the second requirement gives the EPA discretion to withdraw the state program. *Id.* EPA is not required to withdraw approval from New Union's

state program because it is consistent with both of the consistency requirements. Further, the Commerce Clause requires that a states hazardous waste program not discriminate against out-of-state residents, and not unduly burden interstate commerce. *See* U.S. Const. art. 1, § 8, cl. 3. New Union's program neither discriminates nor significantly burdens interstate commerce therefore, the EPA is not required to withdraw New Unions program.

A. New Union's State Program, Including the 2000 Environmental Regulatory Adjustment Act, is Equivalent to the Federal and Other State Programs.

New Union DEP is consistent with the federal and other state programs because the program meets the consistency requirements set forth in EPA regulations. Pursuant to the EPA's own regulations, "a state program must be consistent with the Federal program and State programs applicable in other States." 40 C.F.R. § 271.4. This regulation specifically sets forth two requirements to be considered for a program to be consistent with both Federal and other state programs. *Id.* The first and second requirements mandate that:

> (a) [a]ny aspect of the State program which unreasonably restricts, impedes or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under Federal or an approved State program shall be deemed inconsistent.
>
> (b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of

> hazardous hazardous waste in the State may be deemed inconsistent. *Id.*

Further, it is a well established principle that when a statute is ambiguous or silent in a certain area, that courts defer to agency interpretation and give it substantial deference. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844-45 (1984). A challenge to the EPA's interpretation of its own regulation gets great deference as well; the EPA's interpretation should be accepted unless it is "plainly wrong." *See Chem. Mfrs. Ass'n v. EPA*, 919 F.2d 158, 170 (D.C. Cir. 1990).

The District of Columbia Court of Appeals had opportunity to review state and federal consistency while reviewing the decision by the EPA to not withdraw the state program of North Carolina. *Reilly*, 938 F.2d at 1392. In *Reilly* a site for a prospective hazardous waste treatment facility failed to comply with a statutory mandate. *Id.* Senate Bill 114 required a thousand-fold dilution of discharges into surface waters that were above public water facilities this requirement had the effect of blocking the construction of the new hazardous waste facilities. *Id.* The company which sought to build the new hazardous waste facility requested EPA withdraw North Carolina's state approved hazardous waste program. *Id.* The plaintiff claimed that the prohibition of the new facility was inconsistent with other federal and state approved programs. *Id.* The court upheld the Administrative Law Judge's (ALJ) determination that Senate Bill 114 did not "unreasonably restrict or operate as a ban on the free movement of hazardous waste across North Carolina's borders within the meaning of paragraph (a) of section 271.4." *Id.* at 1394. Secondly, the ALJ found that because Senate Bill 114 did have a basis in human health and did not prohibit all treatment of hazardous waste within the state, the Bill was not inconsistent with other federal and state programs. *Id.* The ALJ and circuit court both upheld North Carolina's hazardous waste program with Senate Bill 114 in effect. *Id.* at 1397.

In the present case, New Union does not unreasonably restrict, impede or ban the free movement of hazardous waste across the state. New Union DEP was recently amended and now recognizes that Pollutant X is among the most toxic chemicals to the public health and the environment. There are no treatment or disposal facilities in New Union that are capable of preventing the environment and the citizens of New Union from coming in contact with this hazardous waste. Because New Union does not have the capability to dispose of this type of dangerous hazardous waste within its borders, the newly adopted amendment to New Union DEP mandates that waste be transported out of the state to a state that does have the capability of treating Pollutant X. R. at 12. New Union allows Pollutant X to be stored for 120 days in the state and further authorizes transporters to move Pollutant X through the state while traveling to one of the qualified treatment plants in another state. *Id.*

Like in *Reilly*, where the court that a stringent dilution requirement did not unreasonably restrict movement of hazardous waste within the state or between states, this Court should also hold that the stringent regulation on Pollutant X is not an unreasonable restriction of hazardous waste within New Union or other border states. Additionally the *Reilly* Court found that the regulation was founded in the protection and safety of human health and the environment by attempting to prevent storage and production of a highly dangerous hazardous waste within North Carolina. Likewise this Court should hold as the *Reilly* Court held and also find that ERAA amendments were founded in the protection and safety of human health and the environment by attempting to prevent storage and production of a highly dangerous hazardous waste in New Union because there is no potential for proper disposal within the state border and therefore not unreasonable. Further, New Union's treatment of Pollutant X only regulates hazardous waste to the extent necessary because New Union does not have the technology within

the state to properly dispose of Pollutant X. There is nothing in ERAA amendments that prohibit any other form of hazardous waste. Therefore, requiring Pollutant X be disposed of properly in others states, that do possess the technology, is a smart, conscientious resolution to this problem. Because New Union's state program is consistent with section 271.4, EPA is not required to withdraw approval from New Union DEP.

B. New Union's State Program, EPA is Not Required to Withdraw New Union's Hazardous Waste Program Because DEP Does Not Violate the Commerce Clause.

New Union DEP is not in violation of the Commerce Clause; therefore the EPA is not required to withdraw its previously approved program. The Supreme Court stated that the test for determining if a statute or regulation is valid under the commerce clause is whether "the statute regulates even-handedly to effectuate a legitimate local public interest, and [whether] its effects on interstate commerce are only incidental, [if both are answered in the positive then] it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); U.S. Const. art. 1, § 8, cl. 3. When a state regulation does discriminate against other state waste it has generally been struck down without further inquiry. *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 790 (4th Cir. 1991).

When discrimination is not based on whether a person lives within a state or not, then when a Commerce Clause challenge is brought the test is utilized is the *Pike* balancing test. *Pike*, *397* U.S. at 142. The threshold question is whether or not the regulation discriminates against residents of other states. *Id.* If a statute operates evenhandedly, the statute will be upheld unless the burdens are "clearly excessive in relation to the putative local interest." *Maine v.* Taylor, 477 U.S. 131, 138 (1986). If the statute or regulation is neutral and does not discriminate

against out-of-staters, then when determining whether the statute or regulation violates the Commerce Clause, using the *Pike* analysis, it must first be determined whether there was a legitimate local purpose. *Id.* If a legitimate local purpose is found, then the issue becomes a balancing test between the local interest and the burden on commerce. *Id.* The burden on commerce that will be tolerated depends on "the nature of the local interest involved, and on whether it could be promoted with a lesser impact on interstate activities." *Id.* According to *Pike*, regulations which concern public safety are generally recognized as an important local interest. *Id.* at 143. Further, the tenth circuit has ruled that a person challenging a state statute or regulation which operates evenhandedly with in-staters and out-of-staters has the burden to prove that "any incidental burden on interstate commerce is excessive compared to the local interest." *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir. 1992). The *Pike* balancing test is not as strict as the Commerce Clause test which is applied when discrimination is found against out-of-staters. *Blue Circle Cement, Inc. v. Bd. of Cnty.* Comm'rs, 27 F.3d 1499, 1512 (10th Cir. 1994). Further, the Supreme Court recognized in *City of Philadelphia v. New Jersey*, that incidental burdens on interstate commerce may be unavoidable when a state regulates to protect its citizens. 437 U.S. 617, 624 (1978). The critical inquiry is whether the regulation is a protectionist measure or whether it can fairly be viewed as a law geared towards local concerns with only incidental effects on interstate commerce. *Id.*

In *Lafarge Corp. v. Campbell* a cement producer sought a determination on whether the statute prohibiting the burning of hazardous waste fuels within one half mile of a residence violated the Commerce Clause. 813 F.Supp. 501, 502 (W.D. TX 1993). The court determined that the prohibition operated evenhandedly between residents of the state and nonresidents therefore it applied the *Pike* balancing test. *Id.* at 512. The court applied the first inquiry under

the *Pike* test and determined that prohibiting the burning of hazardous waste near residences was a legitimate local interest. *Id.* at 513. The next inquiry was then to balance the benefits of the local interest of this regulation with the burden on interstate commerce. *Id.* The petitioners argued that because this statute would prevent nearly 80% of cement and lime kilns in Texas from burning the hazardous waste fuel and that because much of the hazardous waste could not be burned in Texas that it would force the majority of the hazardous waste fuel to be disposed of outside of the state. *Id.* The court held that statute did not violate the Commerce Clause because there were still four to five existing kilns in the state, that there were still areas in the state where hazardous waste burning kilns could be located and that the petitioners could offer to purchase the residences within the one half mile area of their kiln. *Id.* at 514.

In *Hazardous Waste Treatment Council*, South Carolina appealed the preliminary injunction by the district court when it passed a statute giving preferential treatment to hazardous waste produced in-state and limited the amount of out-of-state waste accepted into the state. 945 F.2d at 783. The court noted that by passing this statute, South Carolina was attempting to "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 791. The court decided that the statute was likely invalid because there is no basis to distinguish in-state waste versus out-of-state waste, and that an attempt to preserve in-state capacity is not a legitimate local interest strong enough to justify discrimination against other states. *Id.* at 792.

In the present case, New Union is not attempting to discriminate between out-of-staters and in-state residents therefore the *Pike* test would be the proper analysis of this issue. Similar to the holding in *Campbell* which determined that the prohibition on burning near residences did constitute a legitimate local interest, the present situation also bears on a legitimate local interest.

As mentioned, Pollutant X is among the most hazardous of wastes affecting people and the environment, therefore New Union's regulations regarding the amount of storage days allowable and the stringent Pollutant X transporting requirements are necessary to protect the citizens of not only New Union, but also surrounding states and the environment. This Court should hold as the *Campbell* Court held and find that EPA had a legitimate purpose just like Texas because of the overriding interests to protect New Union's citizens and the environment. The next consideration, under the *Pike* analysis, is to balance the local interest against the burden on interstate commerce. The burden on interstate commerce is not unreasonable in this instance because Pollutant X is allowed to be shipped through New Union, and is also allowed to be stored within New Union's borders for 120 days. Given the lack of technology to dispose of Pollutant X properly there must be some type of limit to the length of time that this pollutant can stay in a state where safe disposal is impossible. When balancing this local interest with the incidental burden on interstate commerce, it weighs in favor of New Union, which is similar to *Campbell*. The *Campbell* Court determined that because there was still availability in the state to create a hazardous waste disposal center that the regulations were not in violation of the Commerce Clause. This is analogous to the present situation because there are areas within New Union available for new hazardous waste disposal facilities. The regulation on Pollutant X, due to inability to properly dispose of this waste, does not take away from the ability of New Union to take part in the treatment of all other types of hazardous waste disposal. This Court should hold as the *Campbell* Court held and find that the local interest outweighs the incidental burden on interstate commerce. The EPA is not required to withdraw New Union's hazardous waste program because New Union DEP does not violate the Commerce Clause.

CONCLUSION

For the foregoing reasons, the EPA respectfully requests this Court to: 1) reverse the district courts granting of summary judgment for lack of subject matter jurisdiction under the RCRA, 2) affirm the district courts granting of summary judgment to New Union and dismissal of CARE's action for lack of subject matter under United States Code section 1331, 3) find that EPA's inaction was not a constructive action of any kind and is therefore not subject to review, 4) find that EPA does not have to withdraw approval of New Union's hazardous waste program because New Union's program is not in violation of the RCRA and the EPA has discretion on whether to proceed with withdrawal or may implement other enforcement options, and 5) New Union 2000 Environmental Regulatory Adjustment Act does not render New Union's program inconsistent with the federal program and does not violate the Commerce Clause.