Team No. 34

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION
AND THE ENVIRONMENT, INC.,

Petitioner-Appellant-Cross-Appellee,

v.

LISA JACKSON, ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent-Appellee-Cross-Appellant,

v.

STATE OF NEW UNION,

Intervenor-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF OF INTERVENOR-APPELLEE-CROSS-APPELLANT
STATE OF NEW UNION

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JURISDICTIONAL STATEMENT

Federal district courts have original jurisdiction over any civil action arising under the laws of the United States, including the Resource Conservation and Recovery Act (RCRA). 28 U.S.C. § 1331 (2006); 42 U.S.C. §§ 6901-87 (2006). The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. §§ 1291, 1294(1) (2006). While this Court has jurisdiction to hear this appeal, the district court did not have subject matter jurisdiction to hear the case. Consequently, this Court lacks jurisdiction to hear this case on its merits. *See infra* pp. 6-18.

STATEMENT OF THE ISSUES

1. Whether the district court lacks jurisdiction to order the EPA to respond to CARE's RCRA § 7004 petition, because the Administrator's action in granting, denying, or withdrawing authorization of a state's hazardous waste program constitute an order.
2. Whether federal question jurisdiction permits the district court to compel EPA to act on CARE's RCRA § 7004 petition.
3. Whether the Administrator's inaction on CARE's RCRA § 7004 petition constituted both a constructive denial of the petition and a constructive determination that New Union's hazardous waste program continues to meet RCRA's federal minimum standard, subject to judicial review under RCRA § 7006.
4. Whether, if this Court determines subject matter jurisdiction and constructive actions exist, this Court should lift the stay and proceed with judicial review, or remand to the district court.
5. Whether, if this Court determines judicial review of the merits is appropriate, the EPA must withdraw New Union's authorization, due to the current status of New Union's resources and performance.
6. Whether, if this Court determines judicial review of the merits is appropriate, New Union's transfer of regulatory authority to the New Union Railroad Commission renders New Union's program noncompliant or inconsistent with RCRA's federal minimum standard.
7. Whether, if this Court determines judicial review of the merits is appropriate, New Union's regulation of Pollutant X renders New Union's program noncompliant or inconsistent with RCRA's federal minimum standard, or violates the Dormant Commerce Clause.

STATEMENT OF THE CASE

Citizen Advocates for Regulation and the Environment, Inc. (CARE) filed a petition under the Resource Conversation and Recovery Act (RCRA) § 7004 requesting EPA to withdraw its authorization for New Union's hazardous waste program. 42 U.S.C. § 6974(a). EPA did not act on the petition. (R. at 4). A year later, CARE filed a citizen suit under RCRA § 7002(a)(2) seeking to compel EPA to act on CARE's petition. (R. at 4); 42 U.S.C. § 6972(a)(2). In the alternative, CARE sought judicial review of EPA's constructive denial of the petition and constructive determination that New Union's hazardous waste program continues to meet the federal minimum standard. (R. at 4). At the same time, CARE filed a petition under RCRA § 7006 for judicial review with this Court. (R. at 5); 42 U.S.C. § 6976. New Union successfully intervened in both cases. (R. at 4).

EPA moved to stay the petition for review filed in this Court, pending the district court's decision. (R. at 5). This Court granted the motion. (R. at 5). At the district court, the parties filed cross-motions for summary judgment, with New Union seeking to dismiss for lack of subject matter jurisdiction. (R. at 4-5). The district court granted New Union's motion for summary judgment, issuing three holdings.

First, the district court dismissed CARE's citizen suit for failure to state a claim upon which relief can be granted. (R. at 7). CARE's claim alleged the EPA Administrator's inaction on its RCRA § 7004(a) petition for rulemaking functioned as a failure to perform a nondiscretionary duty, establishing jurisdiction under RCRA § 7002(a)(2). (R. at 6); 42 U.S.C. §§ 6972(a)(2), 6974(a). The court determined, however, that EPA's authorization of New Union's hazardous waste program constituted an order, not a rule. (R. at 7). Concordantly, RCRA § 7004(a) failed to provide a basis to establish RCRA § 7002(a)(2) jurisdiction, which

would have allowed the district court to compel the Administrator to act on CARE's petition. (R. at 7); 42 U.S.C. §§ 6972(a)(2), 6974(a).

Second, the court dismissed CARE's alternative claim that federal question jurisdiction exists under the Administrative Procedure Act (APA). (R. at 7-8); 28 U.S.C. § 1331; 5 U.S.C. § 553(e) (2006). The court held that the specific jurisdictional provisions under RCRA control over general APA provisions. (R. at 8).

Third, the court determined RCRA § 7006(b) confers jurisdiction for any review of EPA's authorization of a state's hazardous waste program on the Court of Appeals. (R. at 8); 42 U.S.C. § 6976(b). The court never addressed the issue of whether the Administrator's inaction in regards to CARE's petition constituted a constructive denial or a constructive determination that New Union's program continues to meet the federal minimum standard. (R. at 8). All parties filed a timely appeal.

STATEMENT OF THE FACTS

In 1986, New Union applied for and received authorization from EPA for its hazardous waste program under RCRA. (Rec. doc. 3, p. 1). At the time, New Union's Department of Environmental Protection (DEP) reported it had 50 full-time employees, and New Union had 1,200 hazardous waste treatment, storage, and disposal facilities (TSDs), requiring RCRA permits. (Rec. doc. 1, pp. 17, 73). Since then the number of TSD's has grown to 1,500, while DEP's employees have decreased to 30. (Rec. doc. 5 for 2009, pp. 23, 52). Recently, New Union has suffered budget issues, which directly contributed to the decrease in employees. (Rec. doc. 5 for 2009, p. 50). While the overall number of permits DEP issued has decreased, it offset the decrease in employees by reprioritizing permit issuance. (Rec. doc. 5 for 2009, p. 20). As a result of the budget constraints the EPA, under its RCRA mandate, assisted New Union in the

inspection of TSD facilities as well as in enforcement measures against violators. (Rec. doc. 5 for 2009, p. 23).

In 2000, New Union's legislature passed the Environmental Regulatory Adjustment Act (ERAA) which, among other things, modified two state laws. (Rec. doc. 5 for 2000, pp. 105-07). It amended the Railroad Regulation Act, which established the New Union Railroad Commission (Commission). *Id.* The Commission regulates New Union intrastate railroad freight rates, railroad tracks, rights of way, and railroad yards, to the maximum extent allowable by the Commerce Clause of the United States Constitution. *Id.* The ERAA transferred "all standard setting, permitting, inspection, and enforcement authorities of the DEP under any and all state environmental statutes" to the Commission. *Id.* Additionally, the ERAA created an exemption from criminal liability for facilities under the Commission's jurisdiction. *Id.*

The ERAA also amended the Hazardous Regulation Act to strengthen New Union's regulatory authority regarding Pollutant X. *Id.* The Pollutant X amendment was split into three major sections. *Id.* First, facilities under DEP's purview must submit a plan to minimize—and eventually eliminate—the generation of Pollutant X, and then must submit once per year a summary of their reduction of Pollutant X. *Id.* Second, the DEP can no longer issue permits allowing treatment, storage, or disposal of Pollutant X in New Union, except for storage over a period of less than 120 days to prepare for shipment to a safe, out-of-state disposal facility. *Id.* Third, the amendment reinforces interstate transfer of Pollutant X through New Union but restricts permissible delays for transporters of Pollutant X to emergency stops or necessary refueling. *Id.*

STANDARD OF REVIEW

The district court's decisions to dismiss for failure to state a claim and for lack of subject matter jurisdiction are questions of law. *PCI Transp. Inc. v. Fort Worth & W.R.R. Co.*, 418 F.3d 535, 540 (5th Cir. 2005). Appellate courts review questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

The district court correctly held CARE failed to state a claim upon which relief can be granted, because it filed a petition under RCRA § 7004, which only applies to rulemaking actions. The Administrator's granting, denying, or withdrawing authorization of a state's hazardous waste program constitutes an order, not a rule. Jurisdiction under RCRA § 7002(a)(2) only exists when the EPA Administrator fails to perform a nondiscretionary duty. Because RCRA § 7004 does not apply to orders, the Administrator did not fail to perform a nondiscretionary duty. Accordingly, CARE could not establish subject matter jurisdiction under RCRA § 7002(a)(2). The court also correctly held the APA does not confer federal question jurisdiction, because the more specific and expansive RCRA provisions control over the general APA provisions.

The Administrator's inaction on CARE's petition does not constitute a constructive action of any kind. A failure to act is not equivalent to a denial; accordingly, it cannot constitute a determination. RCRA § 7006 confers jurisdiction in limited circumstances. This provision does not contemplate judicial review over the Administrator's mere inaction, thus the Courts of Appeals lack jurisdiction. Even if this Court held judicial review is appropriate, it should remand to the district court to allow commencement of proper RCRA procedures to determine whether withdrawal of New Union's program is appropriate.

If the Court of Appeals determines RCRA § 7006 review is proper, it still cannot force the EPA to withdraw New Union's authorization. In order to withdraw a state's authorization the Administrator must hold a public hearing, afford the state the opportunity to contest allegations on the record, and provide reasons for the Administrator's ultimate decision. None of these procedures have occurred. By hearing the merits of this case this Court is bypassing the EPA's expertise.

Even if this Court hears this case on the merits, withdrawal of New Union's program is a drastic measure that is not justified. No specific regulations or requirements exist that establish minimum standards for resources and enforcement. RCRA allows each state to establish its own staffing and permitting standards. The ERAA's transfer of regulatory authority to the Railroad Commission does nothing to modify New Union's hazardous waste program. Instead, it directly transferred the existing enforcement scheme for railroads from the DEP to the Commission, which does not render the program inconsistent or noncompliant with the federal minimum standard. The ERAA's more stringent regulation of Pollutant X is proper under RCRA. It permissibly expands the scope of DEP's purview over Pollutant X generation, transportation, treatment, storage, or disposal. Finally, the ERAA does not violate the Dormant Commerce Clause. New Union enacted the ERAA for public health and welfare purposes, which greatly outweighs the minimal burdens it imposes on interstate commerce.

DISCUSSION

1. The district court lacks jurisdiction under RCRA § 7002 because the EPA does not have a mandatory duty to respond to CARE's petition under RCRA § 7004.

Under RCRA's citizen suit provision, any person may bring a civil action against the EPA Administrator for failure to perform any nondiscretionary act or duty prescribed by RCRA.

42 U.S.C. § 6972(a)(2). CARE's suit alleges the EPA Administrator failed to perform a nondiscretionary function by not responding to CARE's petition to withdraw federal authorization for New Union's hazardous waste program. Under RCRA, any person may petition the Administrator for the "promulgation, amendment, or repeal of any regulation," and within a reasonable time "the Administrator shall take action with respect to such petition." *Id.* § 6974(a). CARE's petition fails to fulfill the requirements in RCRA § 7004, because the grant, denial, or withdrawal of a state's authorization to operate its hazardous waste program is an order, not a rule, and does not qualify as a "regulation." Accordingly, the district court correctly dismissed CARE's suit for failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(6).

A. The Administrator's action in granting, denying, or withdrawing authorization of a state's hazardous waste program is an order, not a rule, and does not meet the definition of "regulation" in RCRA § 7004.

RCRA § 7004(a) requires the EPA Administrator only to respond to petitions regarding the promulgation, amendment, or repeal of any regulation. 42 U.S.C. § 6974(a). RCRA fails to specifically define the term "regulation." The language directly preceding "regulation" is "promulgation, amendment, or repeal." *Id.* Each of these terms refers specifically to rulemaking-type actions. *See* 5 U.S.C. § 551(5). Consequently, regulations are rules.

1) *Contrasting specific RCRA provisions with the APA definition for rules and orders, supports that actions regarding a state's hazardous waste program are orders, not rules.*

In drafting RCRA, Congress failed to expressly define whether the process of granting, denying, or withdrawing authorization of a state's hazardous waste program constituted a rulemaking action or resulted from an adjudicative-type proceeding. Congress did, however, draw a distinct difference between rules and orders when drafting the APA. The APA defines a rule as a "whole or part of an agency statement of general or particular applicability and future

effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). In comparison, the APA defines an "order" as a "whole or part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6).

While the APA definitions fail to provide a clear indication of whether actions regarding a state's program constitute rules or orders, the context in how Congress drafted RCRA does. The best indication of this intent rests in RCRA § 3006: "Whenever the Administrator determines after *public hearing* that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State." 42 U.S.C. § 6926(e) (emphasis added). The APA provision regulating adjudicative proceedings states "this section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a); *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (defining an adjudicatory proceeding as "designed to produce a record that is to be the basis of agency action-the basic requirement for substantial-evidence review"), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). Because RCRA specifically requires the Administrator to hold a public hearing before notifying a state of potential withdrawal proceedings, it evidences Congress's intent that the Administrator must conduct an adjudicative-type proceeding to initiate withdrawal of a state's authorization for its hazardous waste program.

This is further supported by RCRA's judicial review provision. 42 U.S.C. § 6976. Congress in that provision delineated appropriate jurisdiction depending on whether the action is an adjudicative-type action or a rulemaking action. First, RCRA § 7006(a) mandates that a party may file a petition for review of the Administrator's actions in "promulgating, amending, or

repealing any regulation" only in the United States Court of Appeals for the District of Columbia. *Id*. § 6976(a). This language is identical to the language used in RCRA § 7004(a), dealing exclusively with petitions regarding rulemaking actions. *Id*. § 6974(a). Congress, on the other hand, created a distinct judicial review provision for adjudicative-type actions by the Administrator, which states "Review of the Administrator's action . . . in granting, denying, or withdrawing authorization" may be had by any interested party in the Circuit Court of Appeals with proper personal jurisdiction over the parties. *Id*. § 6976(b). The similarity in the language used by Congress for RCRA §§ 7004(a) and 7006(a), compared to § 7006(b) indicates Congress intended that the Administrator's actions, relating to a state's hazardous waste program, constitute orders. *Id*. §§ 6974(a), 6976. CARE and EPA's interpretation that granting, denying, or withdrawing authorization of a state's hazardous waste program constitutes a rule and not an order would at best render RCRA § 7006(b) meaningless, and at worst would cause a conflicting standard for courts to follow in deciding jurisdiction between subsection (a) and (b). This interpretation would violate the basic presumption that courts should construe statutes "so as to avoid rending superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). In this case, as the district court correctly noted, CARE and EPA's interpretation would not just render one term meaningless—instead it would invalidate an entire provision. (R. at 7).

2) *Case law supports that actions regarding a state's hazardous waste program constitute orders.*

A series of federal court cases—addressing the distinction between rulemaking and adjudication—also confirms that Congress intended the Administrator to institute adjudicative-type proceedings to grant, amend, or revoke a state's hazardous waste program. In *United States v. Florida East Coast Railway Company*, the Supreme Court, in referring to a divisive circuit

court split, defined rulemaking as "proceedings for the purpose of promulgating policy-type rules or standards" and adjudications as "designed to adjudicate disputed facts in particular cases." 410 U.S. 224, 245 (1973). In that case, the Court held that a final order by the Interstate Commerce Commission, which established per diem rates for railroad companies' standard boxcars, more closely resembled rulemaking, and not an adjudicative order. *Id*. at 245-46. The Court reasoned the incentive payments were applicable broadly to all railroad companies, finding "[n]o effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances." *Id*. This distinction weighs heavily in favor of the district court's ruling that revocation of a state's hazardous waste program constitutes an order, because it would be party specific, singling out solely New Union. *Id*. at 246; *see Yesler Terrace Cmty. Council v. Cisnerosi,* 37 F.3d 442, 448-50 (9th Cir. 1994).

The Court of Appeals for the District of Columbia case *Friends of the Earth v. Reilly* supports that withdrawal constitutes an order, not a rule. 966 F.2d 690 (D.C. Cir. 1992). In that case, the court determined that the "public hearing" language in RCRA § 3006 failed to trigger the requirements of APA § 554 for a formal adjudication. *Id*. at 694-95. But notably, the court never held the proceedings constituted rulemaking. Rather, the court only held that since the provision lacked language specifically indicating congressional intent to require APA § 554 proceedings, it represented an informal adjudicative proceeding. *Id*.; *see Aageson Grain & Cattle v. U.S. Dep't of Agric.*, 500 F.3d 1038, 1046 (9th Cir. 2007) (holding the language in National Appeals Division closely modeled the APA § 554 requirement for a formal adjudication, compared to the less formal RCRA § 3006 language analyzed in *Friends of the Earth*). According to the D.C. Circuit's reasoning, RCRA withdrawal proceedings do not even constitute APA § 554 formal adjudications, much less rulemaking. *See Izaak Walton League of Am. v.*

Marsh, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981) ("Informal adjudication is a residual category including all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings.").

3) *The Code of Federal Regulations supports that actions regarding a state's hazardous waste program are orders.*

Further confirmation that the Administrator's actions relating to New Union's hazardous waste program constitute orders derives from the Code of Federal Regulations for RCRA. As the district court correctly noted, the regulations listing the criteria to approve a state's hazardous waste program constitute rules. 40 C.F.R. § 271 (2010). These regulations are "general in nature, they apply to all states, and they are forward looking, they govern future decisions by EPA," whereas approval of New Union's specific program "involves a single state" and is based off the criteria listed in 40 C.F.R. § 271. (R. 7); *see San Juan Cable LLC v. P.R. Tel. Co., Inc.*, 612 F.3d 25, 33 n.3 (1st Cir. 2010) ("[R]ulemaking is not party-specific but, rather, tends to focus on policy considerations and results in orders that are, by definition, orders of future effect.").

Moreover, 40 C.F.R. § 271.22 lists a non-exhaustive list of factors the Administrator may take into account when determining whether to withdraw a state's program authorization. This type of fact-based determination represents precisely what courts presciently took into account when defining adjudication. *See Fla. E. Coast Ry. Co.*, 410 U.S. at 246 ("The factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts.").

Finally, 40 C.F.R. § 271.23 outlines various procedures the Administrator must follow when ordering the commencement of proceedings to determine whether to withdraw authorization of a State program. This regulation states the Administrator: (1) "may conduct an informal investigation"; (2) "shall fix a time and place for the commencement of the hearing and

shall specify the allegations against the State which are to be considered"; and (3) "[w]ithin 60 days after the certification of the record and filing of the Presiding Officer's recommended decision, the Administrator shall review the record before him and issue his own decision". *Id.* These requirements all constitute aspects of an adjudicative-type proceeding and order.

B. The EPA's interpretation that the actions of the Administrator regarding a state's hazardous waste program constitute rules does not receive *Chevron* deference.

In *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.* the Supreme Court established a two-part test for determining whether a court should defer to an agency's formal interpretation of a statute: (1) whether the intent of Congress is clear as to the meaning of the provision; and (2) if it is not, whether the agency's interpretation is reasonable. 467 U.S. 837, 842-44 (1984). The EPA contends the court should defer to its interpretation that granting, denying, or withdrawing authorization of a state's hazardous waste program under RCRA constitutes a rulemaking action. But the Court in a subsequent case expressly limited the breadth of *Chevron* deference in two ways. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

First, *Chevron* deference only applies to an agency's interpretation of a statute that takes place through a formal rulemaking or adjudication process. *Id*. at 230. In this case, the EPA never promulgated a rule, or created an order through an adjudicative process establishing that granting, denying, or withdrawing authorization of a state's hazardous waste program is rulemaking. Instead, the EPA simply asserted this interpretation after litigation commenced, and not through any formal process. This is precisely the type of interpretation that the Court did not intend *Chevron* to cover. *See id*. at 231 n.11 (quoting Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 872 (2001) ("This suggests that *Chevron's* domain should be relatively narrow, rather than broad, corresponding to delegations of power that single out agencies that have been given especially significant types of responsibility.")).

The Fifth Circuit has held that a court should afford significant deference to an agency's characterization of its actions. *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 797-98 (D.C. Cir. 1978) (citing *British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 992 (D.C. Cir. 1978)). But the *American Airlines* and *British Caledonian Airways* cases are clearly distinguishable from the case at hand because. First, they pre-date the *Mead Corp.* limitation to *Chevron*. Second, in those cases, the agencies issued an order through an adjudicative proceeding. 202 F.3d at 798; 584 F.2d at 992-94. In this case, however, the EPA never issued a final order through a rulemaking or adjudicative proceeding, and thus the court should not afford the EPA's interpretation deference. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156-57 (1991) ("Our decisions indicate that agency 'litigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court.").

Second, the Court has held *Chevron* deference only applies in cases where there is "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Mead*, 533 U.S. at 229 (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 596-97 (2000) (Breyer, J., dissenting) (stating *Chevron* fails to apply where there is doubt that Congress intended to delegate interpretive authority to an agency)). In this case, the district court correctly noted that the EPA is interpreting the APA and not RCRA, because EPA's interpretation would essentially define what a rule includes. 5 U.S.C. § 551(4). This Court should not afford the EPA's interpretation *Chevron* deference.

2. 28 U.S.C. § 1331 fails to provide jurisdiction for the court to force EPA to act on CARE's petition.

As the Court of Appeals for the District of Columbia has stated "jurisdiction is, of necessity, the first issue for an Article III court." *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984). The APA does not establish subject matter jurisdiction for federal courts, and instead jurisdiction is conferred under 28 USC § 1331, which states "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." But, the Supreme Court has held § 1331 grants jurisdiction over a suit that "arises under" a "right of action" created by the APA, or other federal statute. *Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988). CARE asserts it can commence this suit under RCRA's citizen suit provision, alleging the EPA Administrator failed to perform a nondiscretionary act or duty under RCRA. 42 U.S.C. § 6972(a)(2). In order to establish federal question jurisdiction, CARE must prove the EPA Administrator failed to perform an act or duty prescribed by RCRA.

CARE claims that even if this Court holds it lacks federal question jurisdiction under RCRA, the district court erred in holding it lacked jurisdiction under the APA to force the EPA to act on CARE's petition. The APA's petitioning provision states "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). CARE's contention fails for multiple reasons. First, the granting, denying, or withdrawing of a state's authorization constitutes an order, not a rule. *See supra*, pp. 7-11. Because CARE's petition is not a rule, neither the strictures of the specific RCRA § 7004 provision nor the more general APA provision for rulemaking petitions applies.

Second, Congress drafted a rulemaking petition provision specifically for RCRA, which states "Any person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under this chapter." 42 U.S.C. § 6974(a). The Supreme Court has repeatedly held

"it is commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). This is especially applicable in this case, because CARE is bringing this suit under the RCRA citizen suit provision. Following the specific-over-general presumption, if CARE's jurisdictional claim fails under RCRA § 7004 then the court cannot rely on the more general provision for rulemaking petitions of the APA to establish jurisdiction. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (*"*Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

Finally, the more specific RCRA § 7004 lists additional requirements that go above and beyond the more general APA § 553(e) requirement. 42 U.S.C. § 6974(a); 5 U.S.C. § 553(e). In drafting RCRA, Congress required that the Administrator must take action in regards to rulemaking petitions within a "reasonable time," and must also publish notice of the action with the reasons for the decision. 42 U.S.C. § 6794(a). The more general APA § 553(e) does not require any response or action by the agency in responding to a rulemaking petition. 5 U.S.C. § 553(e). This is notable, because the Supreme Court has held "the only agency action that can be compelled under the APA is action legally *required*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Even if this Court finds APA § 553(e) applies, the APA provision requires no action by an agency in response to petitions, and there is no basis under the provision for a court to order the EPA to act on CARE's petition. *Cf.* 5 U.S.C. § 555(e) (requiring action only if the agency denies a petition). Because the Administrator has no duty to act on petitions for the withdrawal of a state's hazardous waste program, CARE has no actionable claim under RCRA § 7002(a)(2) and the federal court lacks § 1331 jurisdiction. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008) ("The party seeking to assert federal jurisdiction . . .

has the burden of proving by a preponderance of the evidence that subject matter jurisdiction exists.").

3. EPA's non-action on CARE's petition is not an agency action, and does not constitute a constructive denial or determination.

The RCRA judicial review provision allows a court to review final regulations promulgated by the EPA or the Administrator's denial of any petition for the amendment, or repeal of any regulation in accordance with the APA. 42 U.S.C. § 6976(a); 5 U.S.C. §§ 701-06. But, the provision precludes the APA provision in two circumstances. First, a person may only file for review of the Administrator's rulemaking actions or the Administrator's denial of any petition for rulemaking actions in the United States Court of Appeals for the District of Columbia. 42 U.S.C. § 6976(a)(1). Second, RCRA § 7006(b) allows review of the Administrator's action in granting, denying, or withdrawing authorization of a state's hazardous waste program only in the Circuit Court of Appeals where personal jurisdiction exists. *Id.* § 6976(b). CARE erroneously argues the lack of response by the Administrator to CARE's petition constitutes a constructive denial and a constructive determination that New Union's hazardous waste program continues to satisfy the requirements for program authorization under RCRA § 3006. *Id.* § 6926.

EPA's failure to act on CARE's petition is not equivalent to a denial of the petition. The APA defines an agency action as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). In a recent case, the Supreme Court directly addressed the issue of whether an agency's "failure to act" is equivalent to a constructive denial by the agency. *Norton*, 542 U.S. at 62-63. The Court held "[a denial] is the agency's act of saying no to a request; [failure to act] is simply the omission of an action without formally rejecting a request." *Id.* The Court explained for an agency's inaction to

constitute a "failure to act," the agency must have failed to take one of the actions discretely defined in APA § 551(13). *Id*. Accordingly, in order for the Administrator's inaction to constitute a "failure to act" it must relate to a rule, order, license, sanction, relief, or the equivalent denial thereof. *See generally* 5 U.S.C. § 551 (defining each of those terms). EPA's non-response to CARE's petition fails to fall into any of these categories, and under *Norton* would not qualify as a constructive denial or determination.

This conclusion is further supported by another recent Supreme Court case where the Court addressed whether inaction by the Bureau of Alcohol, Tobacco and Firearms (ATF) in response to an application for disabilities relief constituted a "denial" under the statute. *United States v. Bean*, 537 U.S. 71, 75-76 (2002). The Court held the ATF's inaction on the application failed to constitute a denial, because the relevant statute requires an actual decision by the ATF, and "mere inaction . . . does not invest a district court with independent jurisdiction to act on an application." *Id*. Similarly, in this case, neither court retains jurisdiction to review the EPA's failure to act, because RCRA § 7006 only grants jurisdiction over the Administrator's actions regarding rulemaking, or the Administrator's action in granting, denying, or withdrawing authorization of a state program. 42 U.S.C. § 6976.

A constructive denial is a precondition to finding a constructive determination. Since the Administrator's inaction on CARE's petition does not constitute a constructive denial, it cannot constitute a constructive determination. At the district court, CARE relied on *Scott v. City of Hammond* to argue the EPA's inaction constituted a constructive determination. 741 F.2d 992 (7th Cir. 1984). That case is inapplicable, because Congress statutorily prescribed the EPA to promulgate "total maximum daily load" for the Clean Water Act. *Id*. at 998. The court determined EPA's inaction was equivalent to an approval of state decisions that TMDL's are

unnecessary. *Id*. In this case, however, no statutory prescription exists in RCRA requiring the Administrator to respond to petitions for withdrawing authorization of a state's hazardous waste program. Since this case does not involve a petition for rulemaking and the Administrator has not made an actual decision, no grant of authority exists in RCRA § 7006 for any court to review the Administrator's "mere inaction." *Id*.

4. If there is jurisdiction for the district court to hear the case, then this Court should remand the case to initiate proper RCRA proceedings.

If this Court finds a basis for jurisdiction and determines EPA made a constructive denial and determination, it should remand the case to the district court. Remand is required for three reasons. First, this Court cannot lift the stay in Case No. C.A. No. 18-2010 because there is no jurisdiction to review a constructive determination under RCRA § 7006(b). 42 U.S.C. § 6976(b). Second, the EPA must follow procedural requirements before making any determination that affects a state's authorization. *See Id*. § 6926(e); 40 C.F.R. § 271.23. Third, this Court cannot properly review EPA's determination since there is no record. For these reasons, remand is the only option if this Court does not accept New Union's jurisdictional arguments.

A. The Court of Appeals does not have jurisdiction under RCRA § 7006(b).

The Court of Appeals cannot lift the stay because it does not have jurisdiction under RCRA § 7006(b). The Court of Appeals has jurisdiction to review the Administrator's action "in granting, denying, or withdrawing authorization or interim authorization under section 6926." 42 U.S.C. § 6976(b). RCRA's review provisions are specific and only allow the Court of Appeals to review certain actions. 42 U.S.C. § 6976; *see Hempstead Cnty. & Nevada Cnty. Project v. EPA*, 700 F.2d 459, 461-62 (8th Cir. 1983).

If the EPA constructively determined New Union's state program complied with RCRA and its regulations, that decision is not a grant, denial, or withdrawal of New Union's

authorization. *See supra* pp. 16-18. Rather, such a constructive determination is what occurs during a "stage prior" to possible withdrawal. *See Hempstead Cnty.*, 700 F.2d at 461-62. In *Hempstead*, the Eighth Circuit determined it did not have jurisdiction under RCRA § 7006(b) to review the "interim status" of a permit, because it was not a final determination within the scope of 7006(b). *Id*. The court referred to the interim status as a "stage prior to the EPA issuance or denial of a permit." *Id*. Similarly, the EPA's determination that a state's program is in compliance occurs after EPA grants a state's authorization and before the possibility of withdrawal. Subjecting these determinations to review in the Court of Appeals would stretch the reach of RCRA § 7006 to its breaking point, because virtually any challenge to a state's authorization would be appealable directly to the Courts of Appeals. 42 U.S.C. § 6976.

Further, even if this Court determined EPA's inaction was a constructive determination, this Court would not have jurisdiction under RCRA § 7006(b). The EPA's "constructive action" is not a final agency action, but rather would be a failure to perform a nondiscretionary act, because the Administrator did not engage in the proper procedures under RCRA. 42 U.S.C. § 6926; 40 C.F.R. § 271.23. Only the district court would have jurisdiction to review such a failure under RCRA § 7002(a)(2). 42 U.S.C. § 6972(a)(2); *Sierra Club v. EPA*, 992 F.2d 337, 347 (D.C. Cir.) (dismissing a claim under RCRA § 7006(a) because there was not a final regulation, but rather the agency failed to perform a nondiscretionary act).

B. New Union is entitled to certain procedures before its authorization can be withdrawn.

CARE ultimately seeks to have New Union's authorization withdrawn. The EPA Administrator, however, "shall not withdraw authorization" without first notifying the state of the reasons for withdrawal. 42 U.S.C. 6926(e). CARE's argument for judicial review of EPA's constructive actions fails to recognize this requirement. Before any action can occur that affects

New Union's state program, the EPA must follow certain procedural requirements. 40 C.F.R. § 271.23. Consequently, if jurisdiction exists and if there is a constructive determination, the Court must remand and order the EPA to follow these procedures.

New Union has a strong interest in maintaining its state program. The procedural requirements of RCRA § 3006(e) and 40 C.F.R. § 271.23 protects this interest. If, by failing to act, the EPA constructively made a determination about withdrawal, it necessarily failed to comply with these procedures. New Union is entitled to these procedures before its authorization can be affected in any way. Specifically, RCRA § 3006(e) requires the Administrator to give the state notice of the reasons for withdrawal and give the state time to take corrective steps. 42 U.S.C. § 6926(e). If this Court determines the EPA should have commenced proceedings, then the EPA is required to follow the procedures set forth in 40 C.F.R. § 271.23.

C. **Without a record, this Court cannot review any action regarding New Union's authorization**.

This Court should also remand because the absence of a record would make it impossible to properly review EPA's actions. *See Hempstead*, 700 F.2d at 462. This Court should afford New Union the opportunity to resist withdrawal of its authorization by allowing them to build a record. Review of a constructive determination is unfair to New Union because it has not had the chance to respond to CARE's claims. EPA proceedings represent the proper forum where the record should be built. *Id*.

Further, this Court is unable to review the determination not to commence withdrawal proceedings because RCRA § 3006 and applicable regulations do not provide appropriate standards. *Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 Fed. App'x 406, 408 (5th Cir. 2010). In *Texas Disposal*, the EPA made a determination that withdrawal was unnecessary after receiving

a petition. *Id*. at 407. Concordantly, the Fifth Circuit held the determination was not subject to review. *Id*.

5. If this Court proceeds with CARE's challenge, it cannot withdraw New Union's authorization.

Under RCRA, states can administer their own hazardous waste programs if they receive authorization from the EPA. 42 U.S.C. § 6926(b). The EPA must approve a state program unless it determines: (1) the State program is not equivalent to the Federal program; (2) the State program is not consistent with the federal program or other state programs; or (3) the state program does not adequately enforce RCRA requirements. *Id*. EPA has the power to withdraw this authorization. *Id*. § 6926(e). EPA implemented regulations to govern authorization and withdrawal of authorization. 40 C.F.R. § 271.

Congress intended RCRA to establish a "federal-state partnership" in which the Administrator gives "a high priority to assisting and cooperating with States in obtaining full authorization of State programs." 42 U.S.C. 6902(a)(7). Accordingly, withdrawal of state authorization is a drastic measure that a court should only compel in dire circumstances. *See United States v. Power Eng'g Co*., 303 F.3d 1232, 1238-39 (10th Cir. 2002). Withdrawal burdens the federal government by requiring a comprehensive federal replacement program. *Id*.

A. This Court cannot compel the EPA to withdraw authorization because the EPA's determination of whether to initiate withdrawal proceedings and whether New Union's program remains compliant with RCRA are discretionary.

The EPA can withdraw an authorized state hazardous waste program. 42 U.S.C. § 6926(e). Before withdrawal can occur, however, the EPA must take two steps: (1) there must be a public hearing, and (2) the Administrator must make a determination that the state is not administering or enforcing the program. *Id*. These two steps represent discretionary actions. *See Sierra Club v. EPA*, 377 F. Supp. 2d 1205, 1207-08 (N.D. Fla. 2005) (interpreting an identical

provision under the Clean Water Act); *Amigos Bravos v. EPA*, 324 F.3d 1166, 1171 (10th Cir. 2003) (holding federal enforcement authority under the Clean Water Act is discretionary).

While RCRA § 3006(e) contains mandatory "shall" language, this duty only arises after the EPA takes the two steps. *See Sierra Club*, 377 F. Supp. 2d at 1207. The statute does not provide specific requirements concerning when or how the Administrator is required to determine a state's program is not in compliance. Congress therefore left a gap for the agency to fill. *Chevron,* 467 U.S. at 843; *see supra* pp. 12-13. While the EPA addressed the gap, it did so by giving itself the latitude to decide when and how to withdraw a state's authorization. In fact, the regulations provide that the Administrator "may withdraw" authorization if a state does not comply with certain requirements and fails to correct the problem. 40 C.F.R. § 271.22. Since RCRA § 3006(e) is silent regarding when and how the Administrator should act, this Court must defer to the agency's interpretation as long as it is reasonable. *Chevron*, 467 U.S. at 843.

EPA's interpretation is reasonable because it provides the agency with the discretion needed to properly address delicate authorization decisions. The two steps leading up to withdrawal are equivalent to an agency's decision to pursue enforcement actions—the enforcement action in this case is the withdrawal. These type of agency decisions are discretionary and "unsuitable for judicial review" for three primary reasons. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). First, these decisions involve "a complicated balancing of a number of factors which are peculiarly within" an agency's expertise. *Id*. Second, these decisions do not "infringe upon areas" such as liberty or property interests because the agency is not exercising its "coercive power." *Id*. at 832. Third, these decisions are similar to prosecutorial decisions which are solely within the province of the executive branch. *Id*.

Withdrawal of state authorizations involves decisions properly within the agency's area of expertise. When a party challenges a state's authorization, the EPA—rather than a court—should be the actor to determine if the agency should commit its resources to pursue withdrawal. *See id*. at 831-32. This is the only way to prevent "undue judicial interference" with the EPA's lawful discretion. *Norton*, 542 U.S. at 66.

Since the two steps are discretionary, the EPA has flexibility in the way it addresses an insufficiency in a state's program. First, the EPA is not required to base withdrawal on "technical, temporary or otherwise unimportant" failures in the state program. *See Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 771 (D.C. Cir. 1992) (discussing primacy under the Safe Drinking Water Act). Second, the EPA can negotiate with New Union about any insufficiencies—including giving the state more time to comply. *Id*. Third, the EPA remains free to intervene to grant and enforce state permits. *See* 40 C.F.R. § 271.19; *Waste Mgmt. of Ill. Inc. v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill. 1989). Under RCRA § 3008(a), the EPA may enforce the requirements of RCRA if the state does not. 42 U.S.C. § 6928; *Wyckoff Co. v. EPA*, 796 F.2d 1197, 1200-01 (9th Cir. 1986). These multiple avenues give the EPA the opportunity to avoid the drastic measure of withdrawal. Based on the priority of the federal-state partnership, the EPA should not immediately withdraw New Union's authorization, but rather work with the state to allow it to keep its authorization.

Even if this Court finds it must order the EPA to act, it can only order the EPA to exercise its discretion, and cannot direct the agency on how to act. *Norton*, 542 U.S. at 65. Further, even if this Court finds EPA had a mandatory duty, it should still order New Union to address any insufficiency. If New Union fails to comply with the order, then the Court can order

the EPA to commence withdrawal proceedings. *See Save the Valley, Inc. v. EPA*, 223 F. Supp. 2d 997, 1013-14 (S.D. Ind. 2002).

B. New Union's program adequately enforces requirements under RCRA.

CARE challenges whether New Union's state program is adequately enforcing RCRA based on a perceived lack of resources and inadequate enforcement. This raises the issue of what level of enforcement is "adequate" under RCRA § 3006(b). 42 U.S.C. § 6976(b). The EPA has broad discretion to determine when a state program is adequately enforcing RCRA. *See Mobil Oil Corp. v. EPA*, 871 F.2d 149, 152 (D.C. Cir. 1989).

CARE argues a reduction in New Union's staffing and funding requires withdrawal. (R. at 4). This argument fails because RCRA and the EPA's regulations lack specific requirements regarding staffing or funding. While the EPA requires a state to submit staff information as part of the authorization process, there are no regulations specifying minimum standards. *See* 40 C.F.R. § 271.6(b)(1). Other environmental acts, such as the Clean Water Act, specifically require the EPA Administrator to set minimum standards for "funding, personnel qualifications, and manpower requirements." 33 U.S.C. § 1314(i)(2)(D) (2006); *see also* 42 U.S.C. § 7410(2)(E) (listing a similar provision in the Clean Air Act). The absence of this type of standard in RCRA, while present in similar statutes, demonstrates Congress knows how to impose such requirements. *See Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485 (1996). A failure to impose the requirements in RCRA indicates that staffing and funding are not primary considerations. This Court should not require New Union to fund or staff its program in a certain way, as long as it can maintain adequate enforcement. Before withdrawing a state's program, the state must lack the capability to enforce large portions of RCRA, rather than mere inconsistencies. *See Save the*

Bay, Inc. v. EPA, 556 F.2d 1282, 1290 (5th Cir. 1977) (stating the mishandling of a single permit would likely never give the EPA grounds to revoke a state's NPDES authority).

CARE also argues New Union's program is not adequately enforced due to a backlog of permits. This argument fails because there are no regulations prohibiting a backlog of permits. *See* 40 C.F.R. §§ 271.13-14. Withdrawing the state's program will not solve the backlog of permit applications; instead, it will put the burden of addressing these applications on the federal government. Finally, New Union has remedied the issue by reprioritizing the order in which it addresses permits. (Rec. doc. 4 for 2009, p. 20).

6. New Union's transfer of regulatory authority to the Railroad Commission does not render New Union's program noncompliant or inconsistent with the federal minimum standard.

A. New Union's transfer of authority is compliant with the federal minimum standard.

New Union's program remains compliant with the federal minimum standard set forth in 40 C.F.R. part 271. The court should only compel withdrawal of a state authorization in dire circumstances, because it requires the federal government to quickly establish a comprehensive replacement program. *Power Eng'g Co.*, 303 F.3d at 1238-39. In this case, the issue is whether the ERAA substantially limits New Union's state-run RCRA program, requiring the EPA to withdraw New Union's authorization. *See* 40 C.F.R. § 271.22(a)(1)(ii). The ERAA does nothing to limit or strike down any State authorities to implement RCRA.

New Union's program is compliant with EPA's minimum standard. The ERAA transferred all RCRA civil enforcement responsibilities from DEP to the Commission. (Rec. doc. 5 for 2000, pp. 103-05). The ERAA did not change or modify any civil enforcement provisions. *Id.* The Commission must enforce RCRA's civil provisions just as the DEP would have done

prior to the ERAA. The railroad remains under the purview of RCRA, and the Commission must enforce RCRA's provisions.

The ERAA changed one provision. It exempts any *facilities* falling under the Commission's jurisdiction from criminal liability. *Id*. This change does not render New Union's program inconsistent or noncompliant with the federal minimum standard. The EPA's regulations for authorization require criminal penalties to be available against any "person." 40 C.F.R. § 271.16(a)(3)(ii). RCRA defines "person" as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States." 42 U.S.C. § 6903(15). The term "facility" does not appear anywhere in the statutory definition of "person." Creating an exemption for facilities does not exempt any individual violators contemplated in the statutory definition of person. *See United States v. Dee*, 912 F.2d 741, 744 (4th Cir. 1990) (holding multiple individuals liable for RCRA violations at a federal facility rather than extending sovereign immunity protections from the federal facility to the individuals). Instead, the ERAA exempts the facilities themselves from criminal liability arising from any actions undertaken by persons at the facilities. Criminal penalties are still available against all categories of "persons" in the statutory definition.

It is a standard canon of statutory construction that "if Congress includes particular language in one section of a statute but omits it in another section, it is presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 30 (1997). RCRA specifically addresses the term "facility" elsewhere in its framework. The federal government statutorily waived sovereign immunity specifically for

actions undertaken at federal solid waste management facilities. 42 U.S.C. § 6961. This express waiver of sovereign immunity for federal facilities does not impute the definition of "person" to facilities. Instead, it highlights their distinction in RCRA's framework. *Cf. Consol. Cos., Inc. v. Union Pac. R.R. Co.*, 499 F.3d 382, 386-87 (5th Cir. 2007) (determining "facility" in RCRA refers to "contiguous or adjacent tracts of property"). If Congress meant to add facility to the statutory definition of person, it would have done so. The Commission may still bring criminal enforcement against any person for actions that violate RCRA. The criminal exemption only applies to facilities implicated by—but whose owners are not direct violators of—RCRA's criminal provisions. This is compliant with the federal minimum standard, and does not warrant withdrawal of New Union's authorization.

B. New Union's transfer of authority is consistent with the federal minimum standard.

The federal minimum standard allows states to create any program components that are greater in scope so long as they do not render the program inconsistent with the Federal program and other State programs. 40 C.F.R. §§ 271.1(h), 271.4. The EPA lists three requirements that are of particular importance in determining whether a broader State program is consistent.

First, the state program cannot contain any aspect that "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 [authorized facilities]." *Id.* § 271.4(a). Nothing about the Commission's activities would serve to restrict movement. The ERAA functions solely as a transfer of enforcement responsibilities from the DEP to the Commission. No new restrictions on movement are in place.

Second, EPA may deem the state program inconsistent if the state law (1) has no basis in human health or environmental protection and (2) acts as a prohibition on treatment, storage, or

disposal of hazardous waste within the state. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1395 (D.C. Cir. 1991); 40 C.F.R. § 271.4(b). The ERAA's transfer of responsibility has the same basis in environmental protection as New Union's federally authorized program. The Commission must enforce environmental protections with regards to railroads just as the DEP enforced them prior to the ERAA. No aspect of the ERAA's transfer of responsibility to the Commission prevents treatment, storage, or disposal of hazardous waste in New Union. New Union's program will function the same way it did prior to enactment of the ERAA.

Third, the state manifest system must remain consistent with the federal minimum standard. 40 C.F.R. § 271.4(c). The transfer of responsibility to the Commission does nothing to modify the manifest system. Since the ERAA transferred responsibility for civil enforcement to the Commission, the same program remains in place with the same manifest system. The ERAA only modified the actor engaging in the enforcement actions. The Commission complies with all three requirements.

RCRA regulations also prohibit actions rendering the State program inconsistent with the federal program and state programs applicable in other States. *Id*. § 271.4. The ERAA's transfer of responsibility to the Commission contains no provisions rendering the state program inconsistent. The ERAA directly transferred civil enforcement responsibility, without modifying the details of the program. The only detail it modified was to add an exemption from criminal liability for facilities falling under the Commission's jurisdiction. It is a long-established principle in RCRA that differences or disparities in state requirements do not automatically render state programs inconsistent. Notice of Final Determination on South Carolina's Application for Final Authorization, 50 Fed. Reg. 46437-01 (Nov. 8, 1985) (to be codified at 40 C.F.R. 270.1); *see Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 785

(4th Cir. 1991). The mere addition of a limited criminal exemption does not render the program inconsistent or noncompliant. *See supra* pp. 26-27. Because New Union's program functions the same as it did prior to the ERAA, it remains consistent with the federal standard and other state programs.

The federal minimum standard also prevents states from creating partial programs. 40 C.F.R. § 271.1(h). The definition of "partial" is not specifically contemplated in the regulation. The EPA does not consider state programs that are unable to regulate "Indian lands" as partial programs. *See id.*; *see also Wash. Dep't of Ecology v. United States*, 752 F.2d 1465, 1468-69 (9th Cir. 1985). A partial program, then, is one lacking full enforcement power over activities occurring within the state's territory. New Union retains full enforcement power in its entire state under the ERAA; it merely transferred enforcement provisions for environmental issues implicating the railroad from the DEP to the Commission. Two agencies now handle enforcement issues instead of only one.

C. Even if this Court finds the EPA must withdraw authorization of the railroad hazardous waste program, this does not lead to a determination that EPA must withdraw authorization for New Union's entire hazardous waste program.

If this Court orders the EPA to withdraw the railroad hazardous waste program, it would affect only a small subset of New Union's RCRA program. The DEP would regain control of the entire program, including railroad facilities, as authorized by the original 1986 regulatory scheme. Since New Union has one intrastate railroad, a mandatory withdrawal of the railroad hazardous waste program would function as a minimal modification to New Union's entire program. Withdrawal is too drastic a measure for EPA to employ in this case, because it would force the federal government to assume control of New Union's entire hazardous waste program. *See Power Eng'g Co.*, 303 F.3d at 1238-39. More than 1,500 TSD facilities exist under DEP's

purview, as compared with the mere handful of facilities under the Commission's purview. *Compare* (Rec. doc. 5 for 2009, p. 23) (listing the number of New Union facilities requiring RCRA permits) *with* (Rec. doc. 5 for 2000, pp. 103-05) (delineating the limited number of railroad facilities under the Commission's jurisdiction). If this Court decides to order EPA to withdraw railroad hazardous waste authorization, the proper remedy is to allow DEP to continue management of the full program.

7. New Union's regulation of Pollutant X does not render New Union's program noncompliant or inconsistent with the federal minimum standard and does not violate the Dormant Commerce Clause.

A. New Union's regulation of Pollutant X is compliant with the federal minimum standard.

The ERAA's new requirements do not render New Union's program noncompliant. RCRA allows states to enact restrictions that are more stringent than the federal minimum standard. 42 U.S.C. § 6929 ("Nothing in this [statute] shall be construed to prohibit any State or political subdivision thereof from imposing any requirements . . . which are more stringent than those imposed by [the federal program]."); *see Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001). New Union now requires all generators of Pollutant X to engage in a coordinated, long-term plan for reduction of Pollutant X generation. New Union further eliminates all future permits allowing treatment, storage, or disposal of Pollutant X. These two requirements greatly enhance the stringency of New Union's regulation over Pollutant X generators. *See United States v. S. Union Co.*, 643 F. Supp. 2d 201, 207-08 (D.R.I. 2009) (discussing Rhode Island's more stringent RCRA program, which permissibly eliminates the federal small-quantity generator exemption within Rhode Island). New Union's enhanced regulations of intrastate Pollutant X generation, treatment, storage, and disposal are more

stringent than the federal minimum standard. This is permissible under RCRA and does not render New Union's program noncompliant.

Whenever a state's program is broader in scope than RCRA's authorization criteria requires, anything beyond the scope of the federally approved program is not considered part of the state authorized RCRA program. 40 C.F.R. § 271.1(h)(i)(2); *see Hazardous Waste Treatment Council*, 945 F.2d at 785. The ERAA's third requirement requires interstate transporters of Pollutant X to make the fewest possible stops along their route through New Union. It restricts permissible delays for Pollutant X transporters to necessary refueling or emergency stops while traveling through the state. The ERAA thus broadens the scope of DEP's regulatory authority to include a subset of traffic regulation, which the federal minimum standard does not contemplate. The ERAA's broader regulatory scope cannot be scrutinized to determine whether New Union's program remains compliant with the federal minimum standard. It can, however, be used to determine whether the program remains *consistent* with the federal minimum standard due to the limiting language in 40 C.F.R. § 271.1(h)(i)(2).

B. New Union's regulation of Pollutant X is consistent with the federal minimum standard.

The EPA regulations identify three conditions of particular importance to determine whether a broader state program remains consistent. First, the state program cannot contain any aspect that "unreasonably restricts, impedes, or operates as a ban on the free movement" of hazardous waste across state borders. *Id*. § 271.4(a). None of the new ERAA amendments unreasonably impede or act as a ban on interstate hazardous waste transfers. The first ERAA amendment does not restrict interstate movement of hazardous waste—it requires a generation reduction plan from New Union generators. The second ERAA amendment changes the intrastate permitting system, also placing no ban on interstate hazardous waste movement. The

third ERAA amendment actually facilitates transfer across New Union's borders. Interstate transporters are free to transport Pollutant X through New Union.

Second, the state program may be deemed inconsistent if the state law (1) has no basis in human health or environmental protection *and* (2) acts as a prohibition on treatment, storage, or disposal of hazardous waste within the state. *Reilly*, 938 F.2d at 1395; 40 C.F.R. § 271.4(b). Both elements must be present in order to support a finding of inconsistency. *Reilly*, 938 F.2d at 1395. All three of the new ERAA amendments satisfy the first element, because they have a basis in human health and environmental protection. New Union lacks the ability to safely generate, treat, store, or dispose of Pollutant X. In the preamble to the ERAA's amendment to the state hazardous waste program, the legislature stated: "[T]here are presently no treatment or disposal facilities in New Union designed and permitted to, or capable of, preventing exposure of persons or the environment to releases of Pollutant X." (Rec. doc. 5 for 2000, pp. 105-07). New Union's legislature enacted the three amendments precisely to protect human health and the environment. *Id*. ("Recognizing that Pollutant X is said by EPA and the World Health Organization to be among the most potent and toxic chemicals to public health and the environment.").

The three amendments also satisfy the second element. The first ERAA amendment mandates abatement of Pollutant X generation, which does not affect treatment, storage, or disposal. Likewise, the third ERAA amendment enforces expedited interstate transfer of Pollutant X through New Union, which does not affect treatment, storage, or disposal. The second ERAA amendment, however, requires the cessation of nearly all treatment, storage, or disposal of Pollutant X in New Union, except for storage over a period of less than 120 days prior to transportation to a safe facility outside the state. While this prohibits nearly all treatment, storage, and disposal of Pollutant X within New Union, any such prohibition is permissible when

it occurs due to human health or environmental concerns. *See Reilly*, 938 F.2d at 1395 (stating both regulatory elements must be present to support a finding of inconsistency). Because New Union enacted the prohibition for precisely those concerns, it does not result in a finding of inconsistency.

Third, the state law may not render the manifest system inconsistent with the federal minimum standard. 40 C.F.R. § 271.4(c). The ERAA changes no aspect of the state manifest system. It requires additional paperwork and monitoring to implement statewide elimination of Pollutant X generation, treatment, storage, and disposal. The manifest system remains unchanged.

Finally, while the three ERAA amendments modify New Union's implementation of its hazardous waste program, the changes are relatively minor in the overall scheme. Minor differences between New Union's program and the federal and other state programs do not result in a per se finding of inconsistency. Notice of Final Determination on South Carolina's Application for Final Authorization, 50 Fed. Reg. at 46437-01; *see Hazardous Waste Treatment Council*, 945 F.2d at 785. New Union's program remains consistent with the federal minimum standard.

C. New Union's regulation of Pollutant X does not violate the Dormant Commerce Clause.

The Commerce Clause of the United States Constitution has a negative, dormant aspect, which prevents states from enacting "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988); *see* U.S. Const., Art. I, § 8, cl. 3. A law is generally held invalid if it discriminates against interstate commerce on its face. *Or. Waste Systems, Inc. v. Dep't of Env. Qual. of Or.*, 511 U.S. 93, 99 (1994); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). A

law also may not discriminate in effect. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 354 (1997). If the law is not discriminatory on its face or in effect, it "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The ERAA's three requirements of generation reduction, permit cessation, and expedited interstate transfer of Pollutant X do not discriminate against interstate commerce on its face. No facilities exist within the borders of New Union that may safely treat, store, or dispose of Pollutant X—New Union's only options lie in other states. New Union does not burden interstate commerce by ceasing intrastate generation, treatment, storage, or disposal of Pollutant X, because no further Pollutant X will enter the stream of interstate commerce from New Union sources. Furthermore, the only restrictions placed by the ERAA on transporters of Pollutant X limit stops to emergencies or refueling. The ERAA reinforces that "[a]ny person may transport Pollutant X through or out of the state to a facility designed and permitted to treat or dispose of Pollutant X . . . .". (Rec. doc. 5 for 2000, pp. 105-07). These ERAA provisions facilitate interstate commerce.

The effects are also not disparate in impact. New Union generation, transportation, storage, and disposal facilities will produce or possess zero Pollutant X in the near future due to the ERAA. Transporters of Pollutant X utilize New Union's infrastructure to move Pollutant X to safe disposal facilities nationwide, and they may continue to do so. The new requirements only expedite transfers, and limit stops. Neither of these disproportionately burden out of state transporters—instead, they facilitate the transfer of Pollutant X through New Union.

Because the ERAA's requirements do not discriminate on their face or in effects, the sole question is "whether the State's interest is legitimate and whether the burden on interstate

commerce clearly exceeds the [putative] local benefits." *Pike*, 397 U.S. at 142. New Union clearly stated its interests in the amendment to the state hazardous waste program. (Rec. doc. 5 for 2000, pp. 105-07). It seeks to protect its citizens from the potentially catastrophic results of Pollutant X release. *Id.* The extreme hazard to public health and welfare presented by Pollutant X and the lack of safe facilities within New Union emphasize the legitimacy of New Union's interests. *See Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328, 341-42 (2008) (holding that a bond issuance statute did not violate the Dormant Commerce Clause because the state legislature designed it to protect and enhance the health, safety, and welfare of state citizens).

Because New Union's interests are legitimate, the issue is whether the burden on interstate commerce clearly exceeds the putative local benefits. *Pike*, 397 U.S. at 142. New Union will reduce its Pollutant X generation and emission to zero under this statute. The sole burden on interstate commerce is the expedited transportation requirement limiting stops to emergencies or refueling. This requirement largely facilitates rather than burdens interstate transporters. Transporters will arrive at safe facilities more quickly. While it is true this requirement will prevent Pollutant X transporters from staying for extended periods of time in New Union, the potential for grave harm caused by Pollutant X release greatly outweighs this relatively minor burden. *See Davis*, 553 U.S. at 341-42. The ERAA's treatment of Pollutant X does not violate the Dormant Commerce Clause.

CONCLUSION

This Court should affirm the district court's dismissal of CARE's claim for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. This Court should also not lift the stay in C.A. No. 18-2010. Finally, this Court should not reach the merits, and instead defer to RCRA's procedures and the EPA's expertise.