Team No. 42

CA. NO. 18-2010

CA. 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
UNITED STATES DISCTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR LISA JACKSON, ADMINISTRATOR,
U.S. Environmental Protection Agency,
Respondent-Appellee-Cross-Appellant

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JURISDICTIONAL STATEMENT

Federal District Courts have jurisdiction over any civil action arising under the laws of the United States, including the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k (2006); 28 U.S.C. § 1331 (2006). The Court of Appeals for the Twelfth Circuit has jurisdiction over 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).

STATEMENT OF THE ISSUES

I. Whether the district court has jurisdiction to hear Citizen Advocates for Regulation and the Environment, Inc.'s (CARE) RCRA claim.

II. Whether RCRA's specific jurisdiction replaces the Administrative Procedure Act's (APA) general jurisdiction.

III. Whether EPA's actions constituted a constructive denial of CARE's petition such that it is a final decision, reviewable in district court.

IV. Whether this Court should remand this case to EPA to initiate and complete proceedings considering CARE's petition.

V. Whether EPA has discretion to withdraw approval of New Union's (NU) state program if the program's resources and performance fail to meet the requirements of RCRA.

VI. Whether the EPA has discretion to partially withdraw approval of NU's program because the program delegated regulation of hazardous waste facilities to the New Union Railroad Commission (Commission).

VII. Whether EPA has discretion to withdraw approval of NU's program if its treatment of Pollutant X is not equivalent to or consistent with the Federal program, or violates the Commerce Clause of the U.S. Constitution.

STATEMENT OF THE CASE

CARE brought suit seeking an injunction requiring EPA act on CARE's petition for rulemaking pursuant to 42 U.S.C. § 6972 (2006). CARE also petitioned the court alleging EPA's inaction was constructive denial of CARE's petition. CARE asked the court to review

EPA's constructive determination that NU hazardous waste program met the criteria for an approved RCRA program. The court granted NU's motion to intervene under Fed. R. Civ. P. 24.

Simultaneously, CARE filed a petition for review with the Court of Appeals seeking review of EPA's inaction. The Court of Appeals granted NU's motion to intervene. The Court of Appeals stayed its proceeding pending the outcome of this action.

All parties filed cross-motions for summary judgment, agreeing the facts alleged by CARE were uncontested and that no further facts were necessary to decide the matter. The District Court held that RCRA did not grant it jurisdiction over CARE's petition. The District Court also held RCRA precluded general jurisdiction under 28 U.S.C. § 1331 (2006) and the APA, 5 U.S.C. §§ 500–596 (2006). All parties filed a timely appeal.

STATEMENT OF THE FACTS

EPA approved NU's hazardous waste program in 1986. R. Doc. 2, 1. EPA determined that the program complied with RCRA. EPA noted that dedicating fewer resources to the program might render NU's program inadequate. R. Doc. 2, 1; R. Doc. 3, 16. NU changed the implementation of its program with enforcement becoming "less than robust," and, in recent years, dedicated fewer resources. See R. Doc. 4, 19–26, 2009. EPA never withdrew approval of NU's program or instigated administrative or judicial actions alleging noncompliance.

In 2000, NU passed the Environmental Regulatory Adjustment Act (ERAA). R. Doc. 4, 105–107, 2000. NU regulated every hazardous waste facility located within its borders except for the New Union Railroad Company (NURC). See R. Doc. 4, 103–105, 2000; R. Doc. 6, Aug. 14, 2000. The ERAA delegated railroad regulation to the Commission and eliminated criminal sanctions for railroad RCRA violations. R. Doc. 4, 103–105, 2000. NURC had the only qualifying facility. R. Doc. 6, Aug. 14, 2000.

The ERAA also requires generators of Pollutant X to submit plans and reports to EPA during generation activities. R. Doc. 4, 105–107, 2000. Furthermore, both in- and out-of-sate transporters of Pollutant X must convey the pollutant "to a facility designed and permitted to treat or dispose of Pollutant X." R. Doc. 4, 105–107, 2000. The ERAA recognizes Pollutant X is "among the most potent and toxic chemicals to public health and the environment" and forbids long-term storage of Pollutant X in NU. R. Doc. 4, 105–107, 2000. EPA only approved nine cites to manage Pollutant X and approved none in NU. R. Doc. 4, 105–107, 2000.

On January 5, 2009, CARE petitioned EPA to withdraw approval of NU's program. Order Granting Mot. Summ. J. June 2, 2010. EPA contemplated the petition. Id. CARE grew impatient and less than a year later filed claims in the District Court of New Union and the Court of Appeals requesting review of EPA's inaction. Id.

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court reviews questions of law *de novo*. Pierce v. Underwood, 487 U.S. 552, 558 (1988). If the court finds RCRA ambiguous, the court defers to EPA's interpretation if it is supported by the language of the statute and is reasonable. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–44 (1984). This Court reviews the district court's jurisdictional determination under RCRA and APA *de novo* while deferring to the EPA's interpretation where the Court finds RCRA ambiguous. See Evans v. Chater, 110 F.3d 1480, 1482 (9th Cir. 1997).

A cause of action presumptively lies outside the federal court's jurisdiction. Kokken v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). Federal courts possess only the limited jurisdiction authorized by the Constitution and by statute. Id. Federal court jurisdiction cannot

be expanded by judicial decree. Id. The party asserting jurisdiction bears the burden of establishing jurisdiction. Id. Appellate courts should not construe appellate review too narrowly. Vineland Chem. Co. v. EPA, 810 F.2d 402, 405 (3d Cir. 1987) (citing Crown Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980) (per curium)). However, absent clear and convincing evidence of a contrary congressional intent to place jurisdiction elsewhere, courts construe statutes granting district court's jurisdiction generously. Id. at 406 (citing Florida Power & Light Co. v. Lorian, 470 U.S. 729, 745 (1985) and Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 769–99 (1985)).

SUMMARY OF THE ARGUMENT

The District Court for the District of New Union or the District Court for the District of Columbia has exclusive jurisdiction to hear CARE's claim that EPA failed to perform a nondiscretionary duty. RCRA obligates EPA to respond to petitions for rulemaking within a reasonable time. CARE's petition is a rulemaking to which EPA has yet to respond. In RCRA, Congress explicitly grant jurisdiction over claims of nonperformance of a nondiscretionary duty to district courts. District courts are better suited than the appellate courts to hear these claims. District courts can take testimony, require discovery, and sort through factual situations where agencies did not create formal records. District court review is necessary for the appellate court to have a record to review. Therefore, CARE properly filed its citizen suit in the District Court for the District of New Union.

RCRA's specific Congressional grant of jurisdiction replaces general APA jurisdiction. Specific statutes take precedent over general statutes. APA governs general review of agency final actions. Congress gave citizens the ability to require EPA to fulfill its nondiscretionary duties. This specific RCRA review precludes APA review. Moreover, RCRA review is adequate and APA general jurisdiction is not necessary. Therefore, the district court correctly

dismissed CARE's petition under APA general jurisdiction.

EPA's non-action was not final action reviewable by a court. Agency action is final when it marks the consummation of the agency's decision-making process and determines the legal rights and obligations of parties. EPA will continue reviewing CARE's petition and issue a rulemaking after EPA determines an appropriate response. Even if EPA's non-action constitutes the consummation of EPA's process, EPA never determined the legal rights and obligations of CARE or NU. Rather, CARE, EPA, and NU have the same rights and obligations as they had prior to the petition. CARE still has the right for EPA to rule on its petition and NU has the rights and obligations flowing from an approved RCRA program. Moreover, even though EPA authorized NU to enforce regulations within the state, EPA can still enforce RCRA in NU. The remedy of deeming agency inaction is a drastic measure only used in rare situations of long agency inaction. Here, EPA's non-action is not a constructive denial or final agency action allowing review.

Even if EPA's actions constitute constructive denial, this Court should remand the case to EPA to exercise its primary jurisdiction. Primary jurisdiction allocates power between agencies and courts. The analysis requires determining if the purposes for primary jurisdiction exist: first, to ensure the uniform application of statutes; and second, to ensure the court does not disrupt to agency's scheme of implementation. When applying the doctrine, courts consider three factors: first, the extent to which the task lies at the heart of the agency's appointed duties; second, the expertise of the agency needed to unravel technical, intricate facts; and third, the aid provided a court by an agency determination. Here, overseeing state programs lies at the heart of EPA's RCRA duties. Congress intended for states to regulate disposal of hazardous waste and EPA oversee's this process. Next, there are technical, intricate facts EPA must wade through to

reach a conclusion. NU's program spans multiple decades, thousands of disposal sites, and several state agencies. Lastly, EPA's determination of the correct course of action would clarify the issues facing NU and address any NU deficiencies. This would greatly aid the court by saving it time and resources necessary to make these evaluations. Therefore, to uniformly implement RCRA and not interfere with EPA's statutory scheme, CARE's petition should be remanded to EPA.

NU's program meets RCRA approval criteria for resources and performance. Under RCRA, EPA authorizes states to enforce hazardous waste programs in lieu of the federal program. RCRA standards are the minimum standards state programs must follow. While NU's program's resources and enforcement have decreased since EPA originally authorized the program, CARE—the party carrying the burden of proof—presents no evidence that NU's program fails to meet the minimum standards. Even if NU's resources or performance are lacking, EPA may exercise its discretion to solve the problem in a reasonable manner.

Withdrawal of a state program is a drastic measure. RCRA allows withdrawal when states fail to abide by RCRA. To avoid arbitrary and capricious action, EPA must take certain steps before withdrawing a state program. These steps include: holding a public hearing; determining that NU's program is not RCRA-compliant; and giving NU notice and an opportunity to remedy its non-compliance. RCRA, like other environmental protection statutes, requires EPA to notify states implementing sub-par state programs before withdrawing authorization.

EPA may respond to NU's new railroad regulations in myriad ways. Even if RRA no longer complies with RCRA, CARE incorrectly argues that complete withdrawal is EPA's only option. RRA minimally impacts NU's program because NU delegated railroad environmental

regulation to the Commission and NU had only one railroad accounting for one hazardous waste facility out of 1,500.

EPA will best serve RCRA's objectives by continuing its approval of NU's program. EPA can mitigate RRA's shortcomings by intervening in a limited manner. Pursuant to RCRA, EPA can bring suit directly against the Commission or revoke the railroad's hazardous waste permit. Additionally, EPA can utilize federal enforcement mechanisms to ensure compliance.

Under ERAA, NU's program remains equivalent to and consistent with RCRA. CARE's argument that inconsistent or non-equivalent programs must be withdrawn is erroneous. ERAA is consistent with RCRA's mandates, including the requirement that generators submit plans and reports to EPA, and that out-of-state transporters of Pollutant X dispose of the pollutant in a RCRA-approved facility. ERAA's treatment of Pollutant X upholds RCRA's purpose to protect health and the environment while encouraging uniformity in national environmental law. To change ERAA's provision requiring the safe disposal of Pollutant X would not only violate RCRA, but would endanger humans and the environment.

On its face or under the Pike balancing test, ERAA does not violate the Commerce Clause. The rule is not discriminatory on its face, and alternatively, ERAA falls under an exception to the Commerce Clause because the benefits of the law clearly outweigh any potential burdens. For these reasons, CARE's claim should be remanded to the United States District Court for the District of New Union to be remanded to EPA for completion of EPA proceedings.

ARGUMENT

I. CONGRESS GRANTED THE DISTRICT COURT JURISDICTION OVER DISPUTES ARISING FROM NONDISCRETIONARY AGENCY ACTIONS.

CARE can petition the district court to require that EPA act on its petition, but cannot

petition the district court to require EPA to take a specific action regarding the petition. A statute specifically vesting jurisdiction in a particular court cuts off jurisdiction in other courts. Telecomm. Research & Action Ctr. v. FCC, 750 F.2d 70, (D.C. Cir. 1984). RCRA states, "[D]istrict court[s] *shall* have jurisdiction . . . to order the administrator to perform [an] act or duty . . . ." 42 U.S.C. § 6972(a) (2006) (emphasis added). The terms "may" and "shall" in RCRA are intended to announce important differences and require strict adherence. 4 William H. Rodgers, Jr., Environmental Law § 7.6 (2d ed. 2010). Therefore, only a district court may hear CARE's cause of action requesting that EPA perform a nondiscretionary duty.

EPA has a nondiscretionary, or mandatory, duty to review CARE's petition within a reasonable time. 42 U.S.C. § 6974(a) (2006) states the administrator *shall* act within a reasonable time on a petition to amend or repeal a regulation. The word "shall" imposes a mandatory duty to act. Envtl. Def. Fund v. Thomas, 870 F.2d 892, 898 (2d Cir. 1989). In Environmental Defense Fund, 870 F.2d at 896, the court found that EPA must make some decision on a petition for rulemaking under the Clean Air Act (CAA). In Environmental Defense Fund, 870 F.2d at 896, several citizen groups like CARE petitioned EPA to revise outdated CAA regulations. The citizen groups petitioned for new regulations to replace obsolete regulations. Petitioning is citizens' only means to initiate changes to existing environmental regulations. See Auer v. Robbins, 519 U.S. 452, 459 (1997); Envtl. Def. Fund, 870 F.2d at 896. In RSR Corp. v. EPA, 102 F.3d 1266, 1271 (D.C. Cir. 1997), the court determined that an agency's failure to amend a rule in light of changed circumstances was not arbitrary and capricious. The court held that petitioners needed to request EPA to issue a new rule. RSR Corp., 102 F.3d at 1267. Like the citizen groups in RSR Corp. and Environmental Defense Fund, CARE petitioned to replace obsolete RCRA regulations. RCRA citizen suit provisions are based on CAA citizen suit

provisions. Robert L. Glicksman, The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties, 10 Widener L. Rev. 353, 354 (2004). This reading reflects Congress' intent to ensure EPA cannot indefinitely postpone review of petitions for rulemaking. See Natural Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conserv., 700 F.Supp. 173, 178–79 (S.D.N.Y. 1988). Therefore, the district court must determine whether EPA fulfilled its mandatory duty. As in Environmental Defense Fund, EPA must make some decision on the petition, because RCRA is based on the CAA and imposes upon EPA the mandatory duty to respond to petitions within a reasonable time.

A. Courts Should Read RCRA Parallel to Other Environmental Protection Statutes Requiring District Court Jurisdiction Over Unreasonable Delay Claims.

Courts look to other environmental statutes to determine the meaning of a specific environmental protection statute and Congress' intent in passing that statute. See U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992). RCRA parallels the statutory scheme of other statutes regulating environmental hazards. For example, under the CAA, the district courts have exclusive jurisdiction to review a citizen suit claiming EPA unreasonably delayed acting in the face of a mandatory duty. 42 U.S.C. § 7604(a) (2006); Sierra Club v. Thomas, 828 F.2d 783, 790 (D.C. Cir. 1987). See also 42 U.S.C. §§ 9659(a)(2), (b)(2) (2006) (Comprehensive Environmental Response, Compensation, and Liability Act grants district courts exclusive jurisdiction to enforce nondiscretionary duties); 16 U.S.C. § 1540(g)(1)(C) (2006) (Endangered Species Act states, "[A]ny person may commence a civil suit on his own behalf . . . against the Secretary where there is alleged a failure of the Secretary to perform any [mandatory] act or duty); Modine Mfg. Corp. v. Kay, 791 F.2d 267, 269 (3d Cir. 1986) (citing 33 U.S.C. § 1365 (2006)) (CWA grants district courts jurisdiction over suits alleging EPA failed to perform a

mandatory duty). Like RCRA, other environmental statutes grant district courts jurisdiction to review claims of unreasonable delay.

RCRA, like other environmental protection statutes, vests jurisdiction over unreasonable delay claims in the district court where the violation occurred or in the District Court for the District of Columbia. RCRA reads, "[A]ny person may commence a civil action on his own behalf . . . against the [EPA] where there is alleged a failure of the [EPA] to perform any [mandatory] act or duty under this Act." 42 U.S.C. § 6972(a)(2) (2006). Where Congress specifically grants district courts jurisdiction to review agency delay, the district court has jurisdiction over those claims. Sierra Club v. Thomas, 828 F.2d at 790. Since Congress specifically granted district court jurisdiction over mandatory duties, and agency review of a RCRA petition without unreasonable delay is a mandatory duty, CARE correctly filed its petition with the district court.

B. The District Court Has Jurisdiction to Decide CARE's Unreasonable Delay Claim and Require EPA to Act on CARE's Petition.

The district court cannot determine the merits of CARE's claim. Even though Congress allows district courts to hear suits claiming EPA failed to fulfill a nondiscretionary duty, Congress did not vest district courts with the power to require EPA take a specific action. District Courts may only require EPA take *an* action, but are powerless to dictate the substance of EPA's decision. See Bennett v. Spear, 520 U.S. 154, 172 (1997) (citing SEC v. Chenery Corp., 318 U.S. 80, 94–95 (1943)). Therefore, the district court can compel the EPA to review CARE's petition, but cannot dictate the outcome of that review.

Congress granted district courts jurisdiction over claims for unreasonable delay because district courts decide these claims and monitor an agency's response better than appellate courts.

See Sierra Club v. EPA, 992 F.2d 337, 346 (D.C. Cir. 1993). One of the district courts' traditional roles is making factual determinations of whether agencies fulfilled nondiscretionary duties. Sierra Club v. Thomas, 828 F.2d at 791. District courts, unlike appellate courts, admit evidence and create reviewable records. David Currie, Air Pollution: Federal Law and Analysis § 9.11 (1981). Without a record, appellate courts have nothing to review; appellate courts rely on district courts to provide records. Id.

District court jurisdiction would not unnecessarily delay the cause of action or "result in improper consideration of factors outside the administrative record . . . ." Inv. Co. Insti. v. Bd. of Governors of the Fed. Reserve Sys., 551 F.2d 1270, 1279 (D.C. Cir. 1977). A district court will create a record that includes EPA's reasons for taking over a year to review CARE's petition, filed in 2009. Without this record, this Court has nothing to review. Moreover, the district court can only review whether EPA's yearlong review amounts to "unreasonably delay." For these reasons, Congress granted jurisdiction over CARE's claim that EPA "unreasonably delayed" its review of CARE's petition to the district court, and the district court incorrectly dismissed CARE's petition.

II. RCRA'S GRANT OF SPECIFIC JURISDICTION PRECLUDES APA GENERAL JURISDICTION.

District courts do not have general jurisdiction when a statute "[precludes] judicial review" and that review is adequate. 5 U.S.C. § 701(a)(1) (2006); 5 U.S.C. § 704 (2006); Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967). Whether and to what extent a statute precludes judicial review is determined by the express language of the statute, the structure of the statutory scheme, Congress's objectives in passing the legislation, the legislative history, and the nature of the administrative action involved. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984).

Where Congress specifically grants independent jurisdiction in the district courts to review agency delay (e.g., 42 U.S.C. 6972(a)(2)), the district court has jurisdiction. Sierra Club v. Thomas, 828 F.2d at 787. While APA confers general jurisdiction to district courts over any claim by a person "adversely affected or aggrieved by agency action," RCRA adequately provides for citizen suits and precludes APA review. See 5 U.S.C. § 702 (2006).

A. RCRA Precludes APA Review Because RCRA Specifically Allocates Jurisdiction for Citizen Suits.

RCRA precludes general jurisdiction because Congress intended RCRA to specifically govern waste disposal from "cradle-to-grave." Envtl. Def. Fund, Inc. v. Gorsuch, 713 F.2d 802, 804 (D.C. Cir. 1983). Congress enacted RCRA as a comprehensive scheme governing disposal of waste. Coal. for Health Concern v. LWD, Inc., 60 F.3d 1188, 1190 (6th Cir. 1995); Waste Mgmt. of Ill., Inc. v. EPA, 945 F.2d 419, 420 (D.C. Cir. 1991). RCRA governs judicial review of EPA's treatment of CARE's petition to withdraw NU's hazardous waste program because the statute contains express language conferring jurisdiction to various courts. Furthermore, Congress intended RCRA as a complete statutory scheme. Finally, EPA engaged in a rulemaking by approving NU's program.

Congress encouraged state cooperation by giving states the opportunity to enact state programs with EPA approval. Waste Mgmt., 945 F.2d at 420. Congress created several forms of enforcement to ensure state compliance. First, Congress grants anyone the ability to petition for the "promulgation, amendment, or repeal of any regulation under [RCRA]" and requires the EPA act on those petitions within a reasonable time. 42 U.S.C. § 6974(a) (2006). Second, Congress requires EPA to enforce federal standards and create federal programs where state programs fall below minimum standards. 42 U.S.C. § 6928(a) (2006); Safety-Kleen, Inc. v. Wyche, 274 F.3d

846, 863 (4th Cir. 2001), (citing Old Bridge Chems., Inc. v. N.J. Dep't of Envtl. Prot., 965 F.2d 1287, 1296 (3d Cir.1992)). Third, Congress allows citizen suits to challenge any person or entity that violates permitting requirements by contributing to waste disposal and presenting an imminent and substantial endangerment. 42 U.S.C. § 6972(a)(1) (2006). Fourth, citizens may bring suit against EPA where EPA fails to perform a nondiscretionary duty. Id. § 6972(a)(2).

To ensure timely adjudication of claims and actions, Congress provides for judicial review of agency actions dependent on the type of action the court is petitioned to review. See § 6972. Specifically, district courts have jurisdiction to enforce permits or to order EPA to perform nondiscretionary duties. § 6972(a). Congress grants the Court of Appeals for the District of Columbia jurisdiction over review of final agency action promulgating rules or denying a petition to enact rules. 42 U.S.C. § 6976(a) (2006). This comprehensive scheme demonstrates how specific jurisdiction under RCRA precludes APA general jurisdiction.

EPA authorization of NU's program is a rule. The APA defines a rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4) (2006). Authorization of a state program is a rule because it generally applies to the facilities found within a state and governs the entities' future conduct. See Buckeye Power, Inc. v. EPA, 481 F.2d 162,170–72 (6th Cir. 1973) (EPA's approval of CAA state program was rulemaking requiring EPA to follow APA notice and comment requirements). EPA authorization does not apply to one specific facility, but governs *all* facilities within a state. One of NU's Department of Environmental Protection (DEP)'s main tasks is approving permits for hazardous waste disposal facilities. This is similar to the nationwide permit system the Corps of Engineers implemented in Nat'l Assoc. of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272 (D.C. Cir. 2005). There, the court determined that

the general nature of the permitting system created a rule and not individual permits. Id. at1281–82. Likewise, EPA's authorization of NU's state hazardous waste program is a general rule applicable to all NU waste generation and disposal sites. The authorization applies to 1,500 NU approved sites. Therefore, authorization is a rule and CARE's petition to repeal that rule is governed by RCRA.

B. RCRA Contains Adequate Provisions for Judicial Review.

By including 42 U.S.C. § 6972 (2006), Congress ensured that all citizen claims against EPA for failure to carry out a discretionary duty could be heard. The Court of Appeals for the District Court of the District of Columbia reviews denials for new regulations and challenges to state programs. 42 U.S.C. § 6976 (2006). CARE can petition a district court to order EPA to take nondiscretionary action. See § 6972(a). Review of petitions is required by the statute because 42 U.S.C. § 6974(a) (2006) states that the administrator *shall* review petitions within a reasonable time. Citizens can petition review of final agency action on petitions for rulemaking. See § 6976(a). Congress determined citizens' rights will be adequately adjudicated through RCRA's judicial review scheme. Since EPA's actions are directly reviewable by a court, RCRA adequately addresses CARE's rights and the district court correctly granted summary judgment.

III. EPA'S ACTIONS WERE NOT CONSTRUCTIVE DENIAL OF CARE'S PETITION OR FINAL AGENCY ACTIONS REVIEWABLE BY THE DISTRICT COURT.

Courts owe substantial deference to agencies when agencies fulfill their obligations. Cobell v. Norton, 240 F.3d 1081, 1096 (D.C. Cir. 2001). Determining whether EPA's actions were final actions enabling district court review requires analyzing two questions. First, the district court must analyze the finality element to determine whether the action marks "the 'consummation' of the agency's decisionmaking process." Bennett v. Spear, 520 U.S. 154, 177–

78 (1997) (citing Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)). Courts apply this prong in a pragmatic and flexible way. Abbott Labs. v. Gardner, 387 U.S. 136, 149–50 (1967). The second inquiry is whether the agency determined rights or obligations "from which 'legal consequences will flow.'" Bennett, 520 U.S. at 178, (citing Port of Bos. Marine Terminal Assn. v. Rederiaktiebolaget Transatl., 400 U.S. 62, 71 (1970)). Both prongs show the EPA did not take final agency action.

Before a court reviews any action, petitioners must prove the agency took final action. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990). A claim that the agency "unlawfully withheld or unreasonably delayed" action is an exception to this rule. Cobell, 240 F.3d at 1095. If the agency acted reasonably, then the agency is given "considerable latitude" to determine the event commencing the judicial review period. Pub. Citizen v. Nuclear Reg. Comm'n, 901 F.2d 147, 153 (D.C. Cir. 1990) (citing Assoc. Gas Distrib. v. FERC, 738 F.2d 1388, 1391 (D.C. Cir. 1984)). EPA has some discretion to decide when to take action, unless Congress expressly requires the agency to act. See Natural Res. Def. Council v. Fox, 30 F.Supp. 2d 369, 377 (S.D.N.Y. 1998). An agency decision not to act is generally committed to the agency's discretion and not judicially reviewable. Heckler v. Cheney, 470 U.S. 821, 831 (1985). "An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." Id. The agency must determine if it should act, the best method to act, if the action fits within the agency's policies, and allocate resources to implement the actions. See id. at 831–32. Because courts prefer to review a factual record developed by the agency through the application of its expertise, courts rarely review non-final agency action. Int'l Chem. Workers Union, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (per curiam).

A. EPA's Inaction Does Not Mark Consummation of the Decision Making Process.

Final agency action occurs "[w]hen EPA considers and rejects a proposed regulation . . . ." Assoc. of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1058 (D.C. Cir. 2000). In Assoc. of Battery Recyclers, petitioners asked EPA to promulgate a regulation, EPA held a notice and comment period, EPA denied the petition, and the court determined those actions marked the culmination of EPA's inquiry. Id. Here, EPA took none of those steps. Therefore, the review process is incomplete. Until EPA completes the review process, the agency has not produced a document, record, order, or rule that marks the consummation of the process, and judicial review of the merits of CARE's petition is premature.

B. EPA Has Not Determined Any Rights or Obligation From which Legal Consequences Will Flow.

The parties to this litigation have the same legal rights and obligation they possessed prior to CARE's petition. In Bennett v. Spear, 520 U.S. 154, 178 (1997), the Court determined legal rights flowed from a biological opinion (BiOp) because the BiOp issued by the Fish and Wildlife Service had the direct and applicable legal consequence of allowing the Department of Interior (DOI) to 'take' an endangered species. EPA determined DOI had the right to 'take' an endangered species. Id. Here, the continued review of CARE's petition does not impose duties upon any party or determine any party's rights or obligations, because the parties have the same legal rights and obligations they possessed before CARE's petition. CARE has the right to have EPA accept or deny its petition and NU can continue its RCRA-compliant program. Once EPA rejects or upholds CARE's petition, CARE can petition in the Court of Appeals for the District of Columbia to review EPA's final agency action. See 42 U.S.C. § 6976(a) (2006). EPA has not determined any rights or obligations; thus, this Court has no final action to review.

C. EPA Has Not Unreasonably Delayed or Unlawfully Withheld Action.

RCRA only requires EPA act on a petition within a reasonable time. CARE filed its petition with EPA less than one year ago. RCRA compels EPA to act on a petition within a reasonable time, but leaves the determination of reasonable time to the district courts and the agency. 42 U.S.C. §§ 6972(a), 6974(a) (2006); see Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1999).

CARE asserts that EPA unlawfully withheld action, which amounted to final agency action. The remedy for an agency unlawfully withholding action is not to treat non-action as final agency action. Rather, the appropriate remedy is to require EPA to take action. Forest Guardians, 174 F.3d at 1190 (citing Attorney General's Manual on the Administrative Procedure Act, 108 (1947)). This remedy is only available when Congress requires agency action by a concrete date. Hercules, Inc. v. EPA, 938 F.2d 276, 282 (D.C. Cir. 1991). If this Court determines that RCRA's phrase "reasonable time" creates a statutory deadline, then the district court can find that the agency violated its duty to review petitions within a reasonable time and create a timeline in which the agency must act. See id. Therefore, the district court only has jurisdiction to require EPA to act on CARE's petition within a reasonable time.

A petition to repeal a regulation or withdraw authorization cannot be used to grant a court jurisdiction if the petitioner allowed the regulation to take effect without availing itself of the right to review during the statutory review period. U.S. Brewers Assoc., Inc. v. EPA, 600 F.2d 974, 978 (D.C. Cir. 1979). Here, CARE had an opportunity to review the authorization of NU's program within 90 days of EPA's approval. See 42 U.S.C. § 6976(a) (2006). CARE did not avail itself of that opportunity and cannot cause this Court to review the entire program by petitioning for its withdrawal and challenge the agency's response. Allowing this type of

challenge would render meaningless the 90-day filing window; anyone could petition for the repeal of a regulation and challenge the entire program after the denial. The only exception to the 90-day requirement is if a new challenge arises after the initial review period expires. U.S. Brewers Assoc., 600 F.2d at 978. Even then, the court should not pass upon the merits until it has the benefit of the agency's review. Id. at 979. Therefore, EPA has not unreasonable delayed or withheld action and the district court has no action to review.

IV. THIS COURT SHOULD REMAND THIS CASE TO EPA TO INITIATE AND COMPLETE PROCEEDINGS CONSIDERING CARE'S PETITION.

EPA should determine the merits of CARE's petition because this is at the heart of the task with which EPA is charged. EPA also has specialized knowledge necessary to wade through intricate facts. Furthermore, an agency determination would aid the court if again presented with this case—*after* EPA's final action—when it is ripe for judicial review.

The doctrine of primary jurisdiction applies to judicially reviewable claims that are within the expertise of an administrative agency. Reiter v. Cooper, 507 U.S. 258, 268 (1993); United States v. W. Pac. R.R.Co., 352 U.S. 59, 64 (1956). The doctrine allows a court to stay proceedings until an agency rules on the case. Reiter, 507 U.S. at 268. This promotes the proper relationship between the courts and agencies. W. Pac. R.R.Co., 352 U.S. at 63–64. The doctrine applies when the purposes of the doctrine are relevant and will be furthered by its application. Id. at 64. These purposes are: 1) to ensure uniformity with which a statute is interpreted and applied; and 2) to avoid the possibility that a court's ruling may disturb or disrupt an agency's regulatory regime.

Three factors guide courts in deciding whether to apply the doctrine of primary jurisdiction. Chi. Merch. Exch. v. Deaktor, 414 U.S. 113, 114–15 (1973) (per curium). First, the

court must consider the extent to which an agency determination lies at the heart of the assigned task. Amer. Auto. Mfrs. Assoc. v. Mass. Dep't of Envtl. Prot., 163 F.3d 74, 81 (1st Cir. 1998) (citing Massachusetts v. Blackstone Valley Elec. Co., 67 F.3d 981, 992 (1st Cir. 1995)). Second, the court looks to whether the agency possesses expert and specialized knowledge necessary to unravel intricate, technical facts in implementing the statute in question. Id. Third, courts consider whether an agency determination would aid the court in deciding the matter. Id.

A. The Determination of NU's Compliance With RCRA Lies at the Heart of the Agency's Task.

EPA is charged with enforcing state hazardous waste programs to ensure compliance with minimum federal standards. 42 U.S.C. §§ 6928(a)(1)–(3) (2006). This oversight is at the heart of the agency's task because the agency is tasked with creating a comprehensive waste disposal scheme. Waste Mgmt. of Ill., Inc. v. EPA, 945 F.2d 419, 420 (D.C. Cir., 1991) (citing Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390, 1392–93 (D.C. Cir. 1991)). The states play an integral role in that scheme by experimenting with varying programs and enforcing those programs, allowing EPA to expend its resources elsewhere. Ashoff v. Ukiah, 130 F.3d 409, 410 (9th Cir. 1997). EPA has authority to enforce minimum standards when states do not, and to withdraw approval of state programs when states fall out of compliance. See §§ 6928; 6926(e). This scheme allows EPA to create uniform minimum standards complying with RCRA while allowing state experimentation with degrees of protection. To ensure uniformity, this Court should give EPA the opportunity to consider and rule on CARE's petition.

B. EPA Possesses Expert and Specialized Knowledge.

NU's program is a complex regulatory structure approved by EPA. It now spans several agencies and regulates multiple chemicals. In enacting RCRA, Congress struck a balance

between federal power and state power used to implement RCRA. EPA oversees over 20,000 large quantity generators and over 1,500 treatment, storage, or disposal facilities. EPA, State Summary Analysis: The National Biennial RCRA Hazardous Waste Report, ES-3, -6 (2001). NU's program, as with other state programs, is a complex regulatory structure requiring expert and specialized knowledge to oversee.

Managing these sites in a uniform manner requires expertise only found in EPA. In City of Fresno v. United States, 709 F. Supp. 2d 888, 923 (E.D. Cal. 2010), the court found it did not have the expertise or the resources necessary to address the scientific issues presented within a RCRA claim. Likewise, in River Village W. LLC v. Peoples Gas Light & Coke Co., 618 F. Supp. 2d 847, 855 (N.D. Ill. 2008), the court found litigation would be hindered by years of research and discovery necessary for the district court to develop a basic scientific understanding of the claim. Here, EPA possesses vast knowledge of NU's program, having approved it in 1986 and monitored it ever since. The district court and the court of appeals should not assert jurisdiction until EPA rules on CARE's petition, because EPA possesses expertise necessary to wade through the technical, intricate facts.

C. If This Case Arises Again, a Decision From EPA Will Aid the Court's Determination.

EPA's determination on the merits will aid future court decisions by allowing EPA to justify its decision. Courts are limited to the record presented and can only give the remedy for which is petitioned. See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1126 (D.C. Cir. 1979). In contrast, EPA has the ability to research outside of the information presented by the parties to a rulemaking and to create varying programs based on the varying needs of the waste disposal sites and individual states. These resources enable EPA to review CARE's

petition more quickly and accurately than the court.

EPA must also weigh the interests Congress delegated it to weigh. If EPA withdraws approval, it must create a program satisfying RCRA and administer that program until NU proposes a complying program. 42 U.S.C. § 6926(e) (2006). The agency must also consider potential economic damages. 42 U.S.C. § 6901(a)(4) (2006). Without EPA balancing these concerns, this Court cannot make an informed decision on the reasonableness of any action EPA takes. Interjecting the court's interpretation of RCRA would interfere with EPA's regulatory regime and decrease the uniformity with which it operates its federal program and oversees state programs. "Postponing review until relevant agency proceedings have been concluded 'permits an administrative agency to develop a factual record, to apply its expertise to that record, and to avoid piecemeal appeals.'" Telecomm. Research & Action Ctr. v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984). Therefore, this Court should give EPA the opportunity to rule on CARE's petition.

V. NU'S PROGRAM MEETS RCRA APPROVAL CRITERIA FOR RESOURCES AND PERFORMANCE.

Under RCRA, EPA authorizes states to enforce hazardous waste programs "in lieu of the Federal program . . . ." 42 U.S.C. § 6926(b) (2006); Coal. for Health Concern v. LWD, Inc., 60 F.3d 1188, 1190 (6th Cir. 1995). State programs must comply with RCRA's standards for approval. See § 6926(b); 40 C.F.R. §§ 271.1(g), (i)(1-2) (2010). EPA approved NU's program in 1986. Thus, NU must regulate and enforce all in-state hazardous waste regulations in lieu of EPA.

A. CARE Presents No Evidence That NU's Program Fails to Meet Minimum Standards.

RCRA standards are a floor, not a ceiling, for state programs. 42 U.S.C. § 6929 (2006); 40 C.F.R. §§ 271.1(g), (i)(1–2) (2010); Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 863 (4th Cir.

2001), (citing Old Bridge Chems., Inc. v. N.J. Dep't of Envtl. Prot., 965 F.2d 1287, 1296 (3d Cir. 1992)). If a state program's standards are more stringent than the federal standards, RCRA does not mandate that courts accept citizen suits based on the more stringent state criteria. See, e.g., Ashoff v. City of Ukiah, 130 F.3d 409, 412 (9th Cir. 1997). The default rule in civil cases is that burden of proof rests upon the party filing a claim. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56 (2005) (citing 2 J. Strong, McCormick on Evidence §§ 337, 412 (5th ed. 1999)).

CARE carries the burden of proving NU's program's standards fell below federal minimum standards. NU's program may decline in effectiveness if the program does not dip below minimum standards. In 1986, EPA noted fewer resources might render NU's program inadequate, but the Record contains no evidence that NU is not currently complying with RCRA's minimum requirements for resources and performance. Even if NU's level of performance and resources were more stringent than RCRA required in 1986, NU nevertheless complies with RCRA today. As plaintiff, CARE fails to establish that a reduction in NU's program's resources or performance results in a failure to comply with RCRA. Therefore, this Court should find that NU's program continues to warrant EPA approval.

B. Even if NU's Resources and Performance Are Lacking, EPA Must Exercise its Discretion to Reasonably Address Problems.

The Code of Federal Regulations mandates "the procedures EPA will follow in approving, revising, and withdrawing approval of State programs . . . ." 40 C.F.R. § 271.1(a) (2010). EPA may withdraw approval from states that fail to comply with 40 C.F.R. § 271.22(a) (2010), but "[w]ithdrawal of authorization for a state program is an 'extreme' and 'drastic' step that requires the EPA to establish a federal program to replace the cancelled state program." United States v. Power Eng'g Co., 303 F.3d 1232, 1238–39 (10th Cir. 2002) cert. denied 538

U.S. 1012; (citing Waste Mgmt., Inc. v. EPA, 714 F. Supp. 340, 341 (N.D. Ill. 1989)).

Creating a federal replacement program would be an extreme step because, compared to the rest of the country, the state contains a large number of hazardous waste facilities. In 1999, EPA reported 1,575 hazardous waste treatment, storage and disposal facilities (TSDs) nationwide. EPA, State Summary Analysis: The National Biennial RCRA Hazardous Waste Report ES-6 (2001). By comparison, in 2009, NU's program covered 1,500 hazardous waste treatment, storage and disposal facilities. Since NU contains roughly the same number of TSDs as the rest of the states combined, withdrawal of NU's state program would require EPA to establish a replacement federal program covering half of all TSDs. Thus, EPA withdrawal of NU's state program would be an extreme, drastic measure.

EPA lacks cause to take an extreme, drastic measure against NU. In fact, CARE's argument that EPA must violate statutory requirements to prematurely withdraw NU's program is arbitrary and capricious because premature withdrawal is contrary to general environmental law principals as well as RCRA's mandates.

1. Withdrawal, Without Prior Notice, is Incongruent With General Environmental Law Principals.

EPA may exercise its authority to withdraw approval of a state program only "when a State program no longer complies with . . . this subpart, and the state fails to take corrective action." 40 C.F.R. 271.22(a) (2010) (listing requirements for state compliance with RCRA). Therefore, withdrawal violates federal law because EPA cannot withdraw authorization of NU's program without first deeming NU non-compliant and giving the state a chance to remedy any deficiencies. EPA has not met either requirement.

Like RCRA, other environmental protection statutes require EPA to notify states before

taking action impacting the state program. These statutes guide EPA's interpretation of RCRA, as "[m]any of the requirements for State [hazardous waste] programs are made applicable to States by cross-referencing other EPA regulations." 40 C.F.R. § 271.1(c) (2010). Like RCRA, CAA and CWA require state notice and an opportunity for states to remedy problems prior to EPA withdrawal of state programs. See 33 U.S.C. § 1342(c)(3) (2006); 42 U.S.C. § 7410(k)(1)(C)(5) (2006). Therefore, RCRA's notice requirement parallels the larger statutory environmental protection scheme.

2. EPA Withdrawal is Arbitrary and Capricious Because it Violates RCRA.

When choosing a remedy for a state program's non-compliance, EPA must exercise discretion. Withdrawal is a possible remedy for inadequate state enforcement, but RCRA is silent regarding whether withdrawal is the *only* appropriate remedy. See 42 U.S.C. § 6926(a) (2006); United States v. Power Eng'g Co., 303 F.3d 1232, 1239 (10th Cir. 2002). Thus, RCRA does not mandate a nondiscretionary remedy—it contains a gap. When a statute is silent on an issue, EPA has gap-filling authority to act in a reasonable manner. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984) (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)). Therefore, even if NU's resources and enforcement fall below RCRA's minimum standards, EPA is not bound to withdraw its approval of NU's state program. Instead, EPA must act reasonably.

Reason requires EPA to implement a less extreme remedy than withdrawal of NU's entire state program. When a statute fails to address an issue, EPA is restricted in that it may not interpret the statute in a way that is "arbitrary and capricious." Chevron, 467 U.S. at 844. APA requires courts to set aside agency rules if those rules are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (2006). An

action is arbitrary when it is "founded on prejudice or preference rather than on reason or fact" and is "capricious" when it is "contrary to the evidence or established rules of law." Black's Law Dictionary 119, 293 (9th ed. 2009). A court cannot substitute an agency's reasonable statutory interpretation with its own. Chevron, 467 U.S. at 844. Therefore, if EPA reasonably interprets RCRA to mean that withdrawing authorization is only one possible remedy for a non-compliant state program, this Court must allow the agency to take alternative action.

RCRA does not specify when withdrawal is required, but it states when withdrawal is permissible. RCRA allows EPA to withdraw authorization only: (1) after a public hearing; (2) if EPA determines a state's administration and enforcement fail to accord with RCRA; and (3) the state fails to take corrective action after receiving notification of non-compliance. 42 U.S.C. § 6926(e) (2006). Here, EPA has taken none of the prerequisite steps to justify withdrawing NU's program.

First, the record contains no evidence that the public had an opportunity to weigh in on whether EPA should withdraw approval. RCRA encourages public participation. 42 U.S.C. § 6976(b)(1) (2006) ("Public participation . . . shall be provided for, encouraged, and assisted by the Administrator and the States."). If this Court orders EPA to withdraw NU's program, only the citizen members of CARE, and not the greater public, will have their opinions heard. This would be inconsistent with RCRA.

Second, EPA's determination that a state program is non-compliant is key; EPA cannot withdraw authorization without first finding a program deficient. See Pub. Citizen, Inc. v. EPA, 343 F.3d 449, 459–60 (5th Cir. 2003) (CAA requires EPA find deficiency before withdrawing authorization). EPA has not concluded that NU's program is lacking; it merely mentioned in 1986 that fewer resources could result in insufficient performance. CARE has not alleged or

shown that NU realized this fear.

Finally**,** RCRA's notice requirement is mandatory, not discretionary: "[I]f the Administrator determines that the state is not administering its program in accordance with the RCRA, he *shall* notify the state . . . ." Waste Mgmt., Inc. v. EPA, 714 F. Supp. 340, 341 (N.D. Ill. 1989) (citing § 6926(e) (emphasis added)). Only if the notified state fails to take appropriate action must EPA withdraw authorization. Id. Since EPA made no determination that NU's program is non-compliant, EPA cannot take additional steps toward program withdrawal.

VI. EPA MAY RESPOND TO NU'S RAILROAD REGULATIONS IN A PLETHORA OF WAYS.

RCRA does not mandate that EPA withdraw an entire state program to correct an anomaly. See 42 U.S.C. §§ 6901–6992k (2006). Rather, RCRA requires EPA to ensure NU's program fully complies with federal standards, giving the agency discretion to choose an appropriate response to problems with railroad hazardous waste regulation. When NU passed the ERAA in 2000, the state program provided for regulation of every hazardous waste facility located within its boarders with the single exception of NURC. ERAA amended the RRA, which delegated regulation relating to railroads to the Commission and eliminated criminal sanctions for railroad-related RCRA violations. The changes only affected NURC, the sole railroad in NU.

A. Limited EPA Intervention Is Not Plainly Inconsistent with RCRA.

CARE incorrectly asserts that complete withdrawal is EPA's mandatory response to RRA; EPA's response to problems with RRA is discretionary. EPA has several methods of intervening in NU's program to correct for deficiencies in RRA. Withdrawing an entire program is a drastic and extreme measure. Waste Mgmt. of Ill., Inc. v. EPA, 714 F.Supp. 340, 341 (N.D.

Ill. 1989). Limited intervention, enforcing only the railroad facility's permit, is not plainly inconsistent with RCRA's primary objectives of "promot[ing] the protection of health and the environment . . . ." 42 U.S.C. § 6902(a) (2006). In fact, ensuring that all permits comply with RCRA standards further these objectives.

Courts must give deference to EPA "if its reasons and policy choices satisfy minimum standards of rationality." Pub. Citizen, Inc. v. EPA, 343 F.3d 449, 455 (5th Cir. 2003); see also Tex. Oil & Gas Ass'n v. EPA, 161 F.3d 923, 934 (5th Cir.1998). Furthermore, courts should give EPA's interpretations of an environmental regulation "'controlling weight' unless 'plainly erroneous or inconsistent with the regulation.'" Pub. Citizen, Inc. v. EPA, 343 F.3d 449, 455–56 (5th Cir. 2003) (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). Therefore, even if this Court finds that ERRA renders NU's program insufficient, EPA does not have to withdraw approval altogether if an alternative remedy is rational and is not plainly inconsistent with RCRA.

NU contains 1,500 TDSs, yet only one railroad site, so EPA should not replace NU's entire state program as a result of one non-compliant site. CARE's argument that the only alternative to maintaining the *status quo* in NU is complete withdrawal is not in keeping with substantial case law concluding that EPA policies must meet a minimum level of rationality. EPA's rational options for bringing NURC into RCRA compliance include targeted responses to a specific problem, in contrast with CARE's argument for complete program withdrawal.

B. RCRA Contains Alternatives to Withdrawal.

Congress demonstrated its intent to avoid statewide intervention by providing alternatives in RCRA. Thus, a targeted response is not inconsistent with RCRA because ERAA requires NURC to comply with RCRA requirements. Among other things, the Commission has been

tasked with permitting and enforcement "under any and all state environmental statutes." Therefore, two scenarios are possible if a violation occurs: either the Commission failed to fulfill its delegated duties, or the railroad failed to comply with requirements the Commission now oversees. In the first instance, EPA may take direct action against the Commission; in the second, EPA may target the railroad.

First, EPA may bring a cause of action against a single non-complying offender. 42 U.S.C. § 6928(a)(2) (2006). An entire railroad site constitutes a single facility under RCRA. Consol. Cos., Inc. v. Union Pac. R.R. Co., 499 F.3d 382, 388 (5th Cir. 2007). Therefore, EPA can bring a cause of action against NURC to target site-specific RCRA violations. The action can result in either permit revocation or a $25,000 per day fine. § 6928(a)(3).

Second, if the Commission fails in its duty to uphold any environmental statute, EPA can bring suit directly against the Commission. Authorization of a state program does not extinguish EPA's enforcement capabilities. 42 U.S.C. § 6928(b) (2006). When the violation takes place in a state with an authorized program, "[EPA] shall give notice to the state in which such violation has occurred prior to issuing an order or commencing a civil action . . . ." § 6928(b). To comply with this federal regulation, EPA must first notify NU, then file suit to remedy any deficiencies in the Commission's railroad hazardous waste regulation.

Thus, EPA has multiple possible tools it may use to correct for the deficiencies in the amended RRA. EPA can revoke NURC's permit, fine the railroad, or bring suit against either the Commission or the NURC. Each approach focuses on effectively remedying the single problematic section of ERAA.

Even if EPA fails to bring NURC into RCRA compliance, complete program withdrawal is not the only legal recourse. Federal enforcement mechanisms are available even when EPA

authorizes state-implemented programs. United States v. Flanagan, 126 F. Supp. 2d 1284, 1287 (C.D. Cal. 2000). States operate programs "in lieu of" RCRA, but this does not mean that state programs supplant 42 U.S.C. § 6928(d)(2)(A) (2006). Flanagan, 126 F. Supp. 2d at 1287. In other words, federal enforcement mechanisms survive EPA authorization of state programs. Therefore, the Department of Justice may bring a claim against the railroad, the Commission, or any other individual responsible for RCRA violations.

VII. NU'S TREATMENT OF POLLUTANT X COMPLIES WITH RCRA AND THE COMMERCE CLAUSE.

Under ERAA, NU's program remains equivalent to and consistent with RCRA. Furthermore, the program is Constitutional. Even if this Court finds that ERAA renders NU's program's treatment of Pollutant X inadequate, RCRA does not mandate that EPA withdraw approval. Rather, the Administrator has discretion to continue to authorize NU's program.

A. NU's Program is Equivalent To and Consistent With the Federal Program Because its Mechanisms Governing Pollutant X Comply With RCRA.

RCRA requires that generators of hazardous waste engage in a system that ensures hazardous waste is transported to permitted facilities, that records are kept, and that drafting reports are sent to EPA. 42 U.S.C. §§ 6922(a)(1), (a)(5), (a)(6)(A–D) (2006). RCRA also requires EPA to promulgate special regulations for waste transporters "as may be necessary to protect human health and the environment." 42 U.S.C. § 6923(a) (2006). The statute only authorizes lawful hazardous waste transportation to facilities holding RCRA permits. § 6922(a)(4). In fact, RCRA criminally penalizes transporters that transport to a non-permitted site. United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 41 (1st Cir. 1991) (citing 42 U.S.C. § 6926(d)(1) (2006)).

ERAA complies with RCRA's explicit mandates. Consistent with RCRA, ERAA

requires generators to submit plans and reports to EPA throughout hazardous waste-generating activities. Furthermore, like § 6926(d)(1), ERAA requires both in- and out-of-sate transporters of Pollutant X to convey the pollutant "to a facility designed and permitted to treat or dispose of Pollutant X." Therefore, ERAA is equivalent to RCRA insofar as each pertains to generators and transporters of hazardous waste.

Additionally, ERAA's treatment of Pollutant X is consistent with one of RCRA's main purposes. The "general purpose of having federal minimum standards for hazardous waste disposal . . . is [to] provide *uniformity* among the states as to how hazardous wastes are regulated . . . ." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 30 (1976) (emphasis added) (reprinted in 1976 U.S.C.C.A.N. 6238, 6268). ERAA recognizes Pollutant X is "among the most potent and toxic chemicals to public health and the environment" and explains that NU does not contain one of the nine RCRA-approved cites to manage Pollutant X. ERAA promotes uniformity because its requirements, if adopted by all states lacking Pollutant X treatment facilities, would help protect human health and the environment.

Another of RCRA's primary objectives is "promot[ing] the protection of health and the environment . . . ." 42 U.S.C. § 6902(a) (2006). NU helps to achieve this central goal by limiting the amount of time Pollutant X may remain in that state, minimizing the risk of an accident leading to human and/or environmental harm. Contaminating NU would be disastrous because the state lacks the means to respond to that catastrophe. On a national level, permitted treatment facilities are very rare; at most, nine states—less than 20%—have the resources to manage or dispose of Pollutant X. Thus, most states must transport the contaminant to out-of-state treatment sites. ERAA employs a model of how states may safely dispose of Pollutant X while comporting with RCRA.

B. NU's Program Does Not Violate the Commerce Clause.

The U.S. Constitution gives Congress power "[t]o regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 98 (1994). In Chem. Waste Mgmt. v. Templet, 967 F.2d 1058, 1059 (5th Cir. 1992), the court held the Clause's provisions extend to the interstate flow of hazardous waste. "Hazardous wastes" include chemicals that threaten health and the environment when managed improperly. 42 U.S.C. § 6903(5)(B) (2010). Pollutant X meets this definition because it is toxic. Therefore, NU may not unjustifiably discriminate or burden other states with respect to Pollutant X. NU minimizes the time Pollutant X spends in NU, protecting human health and the environment. Since ERAA only requires Pollutant X be disposed of in a RCRA-approved cite, ERAA does not burden other states.

To decide whether statues violate the Commerce Clause, courts employ a two-tiered analysis. The first tier is "a virtually *per se* rule of invalidity," applicable when a state statute discriminates on its face or in effect, or has a discriminatory purpose. Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 785 (4th Cir. 1996) (citing Wyoming v. Oklahoma, 502 U.S. 437, 454–55 (1992)). An exception to this rule falls under the second tier. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Pike requires courts to test statutes for Commerce Clause compliance by balancing the burdens on commerce with local benefits. Id. Statutes which regulate "even-handedly to effectuate a legitimate local public interest" and have incidental consequences to interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Id.

1. NU's Program Does Not Facially Violate the Commerce Clause.

Under the Pike balancing test's first tier, NU's statute does not discriminate against other states. The purpose of ERAA is to safely deposit Pollutant X in a RCRA-approved storage facility; thus, it is irrelevant whether the facility is located outside of NU's borders. Since only nine facilities exist, 41 states do not have facilities. To forbid states from the quick and effective transport of a deadly chemical to a safe disposal site creates unnecessary risks to human health and the environment. The law is not discriminatory, but an exercise in pragmatic waste disposal. The U.S. Supreme Court found that a town violated the Commerce Clause in C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389 (1993) by enacting a flow control ordinance to amortize the cost of a recycling center. The town had a "number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance . . . ." Id. at 393. The town nonetheless required all solid waste to be handled at one particular transfer station, depriving out-of-state businesses access to the market. Id. at 386. Unlike the town in C&A Carbone, NU is not depriving other states' businesses access to a market. In contrast, NU is supplying other states with business every time it sends Pollutant X to an out-of-state treatment facility.

2. NU's Program Does Not Indirectly Violate the Commerce Clause.

The second tier of Commerce Clause analysis applies when statutes indirectly affect interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Courts uphold these laws **"**unless the burdens on commerce are 'clearly excessive in relation to the putative local benefits.'" Id. For example, in Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978), the U.S. Supreme Court deemed a New Jersey law keeping out-of-state solid and liquid wastes out of New Jersey "protectionist" because it suppressed competition while keeping costs of waste

disposal in New Jersey stable. The Court also held that New Jersey's law created undue burden on other states, thereby violating the Commerce Clause. Id. There, New Jersey law prohibited other states from disposing of waste in New Jersey landfills, citing public health concerns. Id. at 625. In contrast, NU does not cause an undue burden and it is not engaging in protectionism. Unlike the state in Philadelphia v. New Jersey, it does not block other states' access to waste disposal. Nor does ERAA thwart competition or provide an economic benefit to NU companies or citizens. Therefore, ERAA cannot be viewed as "protectionist" in the same way as New Jersey's law.

Furthermore, ERAA does not simply mandate the removal of Pollutant X from NU and allow dangerous dumping elsewhere. ERAA, instead, requires proper disposal of the pollutant in a RCRA-approved site. This provision encourages commerce by supplying business to the nine existing treatment and disposal facilities. There is no indication that NU wishes to ship its toxins to RCRA-approved sites *because* they are located out-of-state. Therefore, NU does not indirectly discriminate against other states by shipping Pollutant X out-of-state. To hold otherwise would be to infer that the Constitution requires every state to expend the necessary resources to create RCRA-compliant disposal facilities for every pollutant.

3. In the Alternative, NU's Program Falls Within the Public Health Exception Under Pike's Second Tier.

While CARE does not allege any burdens, the local benefits—avoiding toxic chemical contamination—significantly outweigh any potential burden on interstate commerce. An exception to *per se* invalidity allows courts to uphold facially discriminatory statutes when discrimination is justifiable "by the threat of death or disease." Envtl. Tech Council v. Sierra Club, 98 F.3d 774, 785 (4th Cir. 1996). Even if this Court finds the statute discriminatory on its

face, it should nonetheless find the statute valid because NU's program falls within the Pike exception to statutory invalidity pursuant to the Commerce Clause. Even if a discriminatory statute burdens another state, it passes Constitutional muster if the burdens are only incidental and "unavoidable when a State legislates to safeguard the health and safety of its people." Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978). Pollutant X is a very potent chemical. Therefore, limited discrimination is justified because ERAA protects NU citizens' health by prohibiting long-term storage of Pollutant X. Furthermore, any burdens other states might carry would be only incidental to protecting NU citizens from death and disease. Thus, even if NU's regulation of Pollutant X is *per se* invalid under the Commerce Clause, it falls under the public health exception and is valid.

CONCLUSION

For the foregoing reasons, the Court should remand the case to the district court and require the district court remand the case to EPA to exercise its primary jurisdiction. In the alternative, the Court should remand the case to the district court to determine if EPA failed to fulfill its nondiscretionary duty of timeliness. Additionally, the Court should find that NU's state hazardous waste program complies with RCRA. In the alternative, the Court should grant the agency deference in responding to NU's RCRA violations.