UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF NEW UNION

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

U.S. ENVIRONMENTAL PROTECTION AGENCY'S MOTION AND MEMORANDUM OF LAW IN SUPPORT THEREOF
"MEASURING BRIEF"

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Jurisdictional Statement

This Court has appellate jurisdiction under 28 U.S.C. § 1291 (2010) because the District Court of New Union issued a final judgment, refusing to assert jurisdiction. This Court should review the District Court's decision *de novo* because it is a question of jurisdiction requiring interpretation of the jurisdictional provisions in the Administrative Procedures Act ("APA") and Resource Conservation and Recovery Act ("RCRA").

Statement of Issues

A. Whether RCRA § 7002(a)(2) provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004.

B. Whether 28 U.S.C. § 1331 provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed under 5 U.S.C. § 553(e).

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

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

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

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

G. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because the New Union 2000 Environmental

Regulatory Adjustment Act renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause?

Summary of the Argument

The Environmental Protection Agency ("EPA") argues that this Court has jurisdiction under RCRA, § 7002(a)(2), because EPA regulations create a non-discretionary duty for EPA to answer the Citizen Advocates for Regulation and the Environment, Inc.'s ("CARE") petition to withdraw approval from New Union's hazardous waste program. *See* 40 C.F.R. § 271.22 (2010). Congress has mandated that the EPA respond to petitions within a reasonable amount of time. 42 U.S.C. 6974(a) (2010). EPA's failure to respond to CARE's petition has not yet become unreasonable given the complexity of the decision involved and, therefore, this is not a constructive denial of CARE's petition.

Even if EPA had constructively denied CARE's petition, the Court should not order EPA to withdraw authorization of New Union's hazardous waste program because RCRA does not provide "standards by which [a court] can review the EPA's decision not to commence withdrawal proceedings." *Texas Disposal Systems Landfill Inc., v. EPA*, 377 F. App'x 406, 408 (5th Cir. 2010) (unpublished *per curiam* decision). Moreover, EPA does not have to withdraw approval from New Union's program because the program still meets the federal standards of RCRA and EPA has oversight and enforcement mechanisms available to ensure it continues to meet such standards. *See* 42 USC § 6926(e) (2010); 40 CFR § 271.22 (2010).

Statement of Facts

Congress passed RCRA in 1976 and gave EPA authority to control hazardous waste generated, transported, stored and disposed of. P.L. 94-580, 90 Stat. 2795 (1976); *see* 42 U.S.C.

§ 6901 et seq. (2010). Congress set national goals for RCRA, including protecting human health and the environment, conserving energy and natural resources, and ensuring that wastes are managed properly. 42 U.S.C. § 6902(a). The Hazardous and Solid Wastes Amendments of 1984 (HWSWA) strengthened RCRA by including small quantity generators of hazardous waste and enacting requirements for hazardous waste incinerators. P.L. 98-616, 98 Stat. 3221 (1984)[1].

RCRA also provides for a federal-state partnership, whereby the EPA can authorize a state's hazardous waste program to carry out RCRA, granting the state primary enforcement. 42 U.S.C. § 6902(a)(7). The state program must be consistent and at least as stringent as the federal program. 42 U.S.C §§ 6926(b).

EPA approved New Union's hazardous waste program in 1986, finding that New Union's DEP had adequate resources to fully administer and enforce its program including issuing permits, inspecting facilities, and enforcing RCRA provisions. (R. at 10.) When approved, DEP had 1,200 hazardous waste treatment and storage and disposal facilities (TSD) requiring permits under RCRA. (R. 1, p. 17.) It also had 50 full-time employees in its program. (*Id.*) In 2009, the DEP had 1,500 TSDs and thirty full-time employees in its program. (*Id.*) The decrease in New Union's hazardous waste program was similar to decreases in state resources to other public health regulatory programs and was most likely caused by a decrease in state finances due to the tough economic climate. (R. at 10-11.) DEP employment has also been affected by the Governor's hiring freeze, which is likely to continue for the next two years with 5-10% layoffs of all state employees. (*Id.*)

In 2000, the New Union legislature enacted the Environmental Regulatory Adjustment Act ("ERAA") amending environmental and other legislation. The ERAA amended the state's

hazardous waste program by removing all criminal sanctions for violations of environmental statutes by facilities falling under the jurisdiction of the Railroad Commission. (R. at 11-12.)

The ERAA also amended the state hazardous waste program in respect to how Pollutant X is treated. (R. at 12.) The ERAA, EPA, and the World Health Organization specifically recognized that Pollutant X is highly toxic to public health and the environment. (*Id*.) In 2000, there were only nine treatment and disposal facilities ("TSD") in the country authorized by the EPA to process Pollutant X. (*Id.*) New Union recognized the danger that Pollutant X represents and was concerned that indefinite storage, or improper treatment and disposal posed a danger to its citizens and environment, so it made the following changes to the state's program by:

> 1. Requiring every generator of Pollutant X to make and submit a plan to minimize its generation of pollutant X. This report is required to be submitted yearly, also reporting reductions from previous year.
>
> 2. Allowing the DEP to issue permits for the storage of Pollutant X for 120 days while awaiting transportation to a facility outside of the state.
>
> 3. Allowing any person to transport Pollutant X through, in or out of the state, as long as they do it in an expedient manner with only stops in the state for emergencies.

(*Id.*)

During this economic recession, the New Union DEP has not been able to address all of the overwhelming number of permit applications it has received. (R. at 11.) To combat this common problem, the DEP prioritized permit issuance in the following order: "new facilities; permitted facilities seeking to expand operations; facilities with permits that expired fifteen or more years ago; and permitted facilities having the greatest potential for harm to the public health or environment because of the volume or toxicity of hazardous waste handled." (*Id.*)

The DEP recognized that it could not inspect more than 10% of TSDs a year and asked

EPA to help by inspecting facilities for the past couple of years. (R. at 11.) In 2009, both the DEP and EPA took enforcement actions in New Union. (R. at 14.) It prioritized inspections to "facilities that have "reported unpermitted releases of hazardous waste into the environment and to facilities reporting other violations posing the greatest potential for harm to the public health or the environment because of the volume or toxicity of the hazardous waste they are permitted to handle." (*Id.*) In 2009, the DEP and EPA both undertook a comparable number of enforcement actions. (R. at 11.)

Procedural History

On January 5, 2009 CARE petitioned EPA to commence proceedings pursuant to RCRA § 3006(b), 42 U.S.C. § 6926(b), and the APA, 5 U.S.C. § 553(e), to withdraw its 1986 approval of New Union's hazardous waste regulatory program. (R. at 4.) EPA did not respond to the petition and a year later CARE sought an injunction, under RCRA's citizen suit provision in the District Court for New Union to require the EPA to act on that petition or, alternatively, review EPA's constructive denial of the petition. (*Id.*)

The District Court of New Union found that it did not have subject matter jurisdiction or jurisdiction under RCRA to review the EPA's withdrawal of authorization. (R. at 7.) Relying on the specific nature of the action and the similarity of approving a state program to issuing a permit, it found that the EPA's decision to withdraw approval of a state program is an order, rather than a rule. (*Id.*) The court refused jurisdiction reasoning that RCRA's citizen suit provision only allowed citizens to petition rules under RCRA. (*Id.*) It added that even if it heard the case, it would be time barred under RCRA §7006 since the approval would have occurred in 2000 when New Union approved the ERAA. (*Id.*)

The court refused federal subject matter jurisdiction under the APA because it found that

RCRA, not the APA, governed judicial review of this case. (R. at 8.) It refused to consider whether EPA's failure to withdraw proceedings was a constructive denial because it found that "the wording of § 7006(b) leaves no doubt that Congress intended that jurisdiction for review of all EPA actions regarding whether state programs meet RCRA's approval be in the Court of Appeals." (*Id.*) It granted New Union's motion for summary judgment and dismissed the case. (R. at 9.)

Argument

A. The District Court has jurisdiction under RCRA § 7002(a)(2) to order EPA to respond to CARE's petition to commence withdrawal proceedings because EPA has a non-discretionary duty to respond to petitions.

The District Court has jurisdiction to order EPA to respond to CARE's petition under RCRA § 7002(a)(2). RCRA's citizen suit provision allows any person to file suit against the EPA alleging that the EPA failed to perform any non-discretionary duty. 42 U.S.C. § 6972(a)(2) (2010). The citizen suit provision grants jurisdiction to "the district court for the district in which the alleged violation occurred" and allows the court to "order the Administrator to perform the act or duty[.]" 42 U.S.C. § 6972 (a).

The District Court did not give deference to EPA's regulatory determination that granting and withdrawing of approval of a state program was subject to petition through a citizen suit. (R. at 6-7.) The court resorted to using the APA's definitions of a rule and order to find that this action was an order instead of a rule. However, whether this action is a rule or an order is the incorrect inquiry. (R. at 6.) The correct question is whether the EPA has a non-discretionary duty to answer CARE's petition.

RCRA § 7002(a)(2) allows "any person to commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act

or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 6972(a)(2). Congress did not address whether the EPA has a nondiscretionary duty to answer petitions regarding state withdrawal proceedings in RCRA. *See* 42 U.S.C. § 6926(e). However, EPA has, through its regulations, created a non-discretionary duty for the Administrator to "respond in writing to any petition to commence withdrawal proceedings." 40 C.F.R. § 271.23(b)(1) (2010). Since Congress charged EPA with administering RCRA, and Congress is silent on whether petitions regarding state withdrawal proceedings are nondiscretionary, the EPA's interpretation merits *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (holding that Chevron deference is appropriate when "delegated authority to the agency to the agency to issue rulings with the force of law."); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (granting deference when an agency interpretation of an ambiguous statute is reasonable); *United States v. Power Engineering Co.*, 3030 F.3d 1232, 1236 (10th Cir. 2002); *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1395 (D.D.C. 1991). Moreover, the court "must accept an agency's construction of its own regulations unless it is 'plainly wrong.'" *Hazardous Waste Treatment Council*, 938 F.2d at 1396.

Through its regulations EPA has created a nondiscretionary duty to answer petitions "alleging failure of the State to comply with the requirements of" RCRA. 40 C.F.R. § 271.23(b)(1) (2010). Therefore, the district court has jurisdiction to review EPA's response, or lack of response, because CARE is alleging that EPA has failed to execute a non-discretionary duty. (R. at 6.)

B. The District Court does not have subject matter jurisdiction under 28 U.S.C. § 1331 because EPA's action is not rulemaking.

A suit which arises under the APA poses a federal question and, therefore, grants federal courts jurisdiction under 28 U.S.C. §1331 (2010). *Oryszak v. Sullivan*, 576 F.3d 522, 524-525 (D.C. Cir. 2009). However, CARE filed a petition under APA Section 553(e), which grants a person the right to "petition for the issuance, amendment or repeal of a rule." 5 U.S.C. § 553(e) (2010). The District Court does not have jurisdiction because EPA's grant or withdrawal of a state's hazardous waste program is not rulemaking and RCRA leaves the decision to commence this action to agency discretion.

The District Court characterized EPA's grant or withdrawal of a state program as an order rather than a rulemaking because it found that under the APA's rulemaking definition this was an order. It pointed to the fact that the action was specific towards one party, New Union, rather than general in nature, and only considers one issue: whether the state's program meets EPA's standards. This analysis was correct; the EPA's action in granting or withdrawing state authorization is not rulemaking. The APA defines a rule as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting[.]

5 U.S.C. § 551(4).

Under RCRA, once a state applies for authorization, it is authorized unless the EPA finds that (1) the program is not equivalent to the Federal program, (2) the program is not consistent with the Federal program or how the program is administered in other states, or (3) that the program does not adequately enforce RCRA. 42 U.S.C. § 6926(b). EPA is required to publish

notice within ninety days if it expects the program to be authorized and, after an additional 90 days, it is required to publish whether the criteria for authorization have been met.

This process cannot be rulemaking because it does not have all three steps that are required for rulemaking; a proposed rule, receipt and consideration of comments, and a final rule with the basis of action. *Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 101 (4th Cir. 2006). In *Ohio River Valley Environmental Coalition, Inc. v. Kempthorne*, the court held that agency's approval of state amendments to its mining program was rulemaking because it did go through these steps.[2] *Id.* In this case, once the state requests authorization, EPA does not publish notice of a proposed rule. Additionally, while there is an opportunity for a public hearing, 42 U.S.C. § 6926(b), there is no requirement that the EPA incorporate findings from the public hearing into its decision. *See Friends of the Earth v. Reilly*, 966 F.2d 690, 693 (D.D.C. 1992) (noting that RCRA's withdrawal statute only requires a public hearing and nothing more).

Moreover, the decision of whether to withdraw a state program is committed to agency discretion by law and, therefore, not subject to judicial review. 5 U.S.C. § 701(a)(2). RCRA states "*[w]henever* the Administrator determines after a public hearing that a state is not administering and enforcing a program authorized by [RCRA] . . . the Administrator shall withdraw authorization and establish a Federal program pursuant to [RCRA]." 42 U.S.C. § 6926(e) (emphasis added). Congress's use of the word 'whenever' gives the agency discretion to

[2] Additionally, in *Ohio River Valley Environmental Coalition*, the agency's governing statute granted jurisdiction to its actions in approving state programs. 473 F.3d at 101. As discussed in Section A, RCRA only requires the EPA to respond in writing to petitions to withdraw state authorization.

determine if a state's program is in compliance with RCRA and if it determines that the state is not in compliance, then Congress requires the EPA to take action.[3]

The EPA's decision to withdraw authorization from a state's program is akin to an enforcement action because it "involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). EPA must not only determine whether the state's program meets the minimum statutory requirements, *see* 42 U.S.C. § 6943(a), but also if it meets the technical requirements established through regulation. *See* 40 C.F.R. § 271.22(a) (2010). Additionally, the EPA is required by statute to implement a federal program in place of the state program once it withdraws authorization. 42 U.S.C. § 6926(e). The agency must determine whether its resources are better spent helping the state come into compliance, or establishing this program. Because "[t]he agency is far better equipped than the courts to deal with the many variables[,]" the decision to withdraw authorization from a state's program is committed to the EPA's discretion and not subject to review by a court. *Heckler*, 470 U.S. at 832.

C. EPA did not constructively deny CARE's petition because there is no statutory deadline for response and EPA has not taken an unreasonable amount of time to respond.

CARE's theory that EPA's failure to answer the petition constitutes a constructive denial to the petition is unsupported by case law. CARE's sole cite to judicial precedent is *Scott v. City of Hammond*, a case finding a constructive submission under the Clean Water Act that is inapplicable here. (R. at 8); *Scott v. City of* Hammond, 741 F.2d 992 (7th Cir. 1984) (*per curiam*). Respondents could find no instance where a court upheld a constructive determination

[3] This is similar to the wording in the Clean Air Act, which requires the EPA to regulate a pollutant if it makes an endangerment finding. *Massachusetts v. E.P.A.*, 549 U.S. 497, 532-533 (2007). The Supreme Court found that the EPA does not have to regulate a pollutant if it does not make the endangerment finding. *Id.*

theory for EPA approving a state program under RCRA and found no cases citing to *Scott* in the context of RCRA. The constructive submission theory is unsupported by RCRA precedent and should be dismissed.

Comparing *Scott*'s Clean Water Act reasoning to EPA's handling of New Union's RCRA hazardous waste program does not support a constructive approval by the EPA. In *Scott*, the Seventh Circuit held that the State of Indiana had constructively submitted no "total maximum daily load" ("TMDL") standards for discharges into Lake Michigan. 741 F.2d at 994. EPA inaction on a state issuing no TMDLs is inherently different from EPA's inaction on an already-approved hazardous waste program that is argued to have become insufficient. First, RCRA lacks a statutory requirement that EPA must review New Union's hazardous waste program.[4] Under the Clean Water Act, states are required to submit TMDLs within 180 days of EPA identifying pollutants requiring TMDLs. 33 U.S.C. § 1314(a)(2)(D) (2010); *Scott*, 741 F.2d at 996. However, under RCRA, New Union has no obligation to re-submit its changed program to EPA, unlike Indiana's requirement in *Scott* to submit TMDLs to EPA within 180 days. *Id.*

Congress has delegated to EPA the power to set RCRA standards and determine when a state is not in compliance. RCRA Section 3006(e) requires providing notice to states that their program is insufficient "whenever the [EPA] Administrator determines that the program [does not meet RCRA standards]." 42 U.S.C. § 6926(e) (2010). Under *Chevron*, EPA is given deference to implement reasonable regulations where the statute is silent. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Chevron*

[4] RCRA § 4007(a) requires EPA to "review approved plans from time to time" but has no statutory guidelines for when EPA should do so. 42 U.S.C. § 6947(a) (2010), 40 CFR § 256.04 (2010).

discussion, *supra*, part B. Whether a state is administering and enforcing its hazardous waste program under RCRA falls squarely under such deference.

Lastly, EPA rules stipulate that the EPA Administrator "*may* withdraw program approval when a state no longer [meets certain criteria]." 40 C.F.R. § 271.22 (2010) (emphasis added); *see Texas Disposal Systems Landfill, Inc. v. EPA*, 377 F. App'x 406, 408 (5th Cir. 2010) (unpublished *per curiam* opinion). EPA is accorded no such deference under the Clean Water Act for TMDLs since Congress mandated EPA approve submitted programs by the states within thirty days of submission. 33 U.S.C. 1313(d)(2). Even if New Union's changes to its hazardous waste program constituted a constructive submission of a new program, EPA was under no obligation to consider whether that program violated RCRA; in short, a constructive determination cannot be inferred from inaction when a determination is not required.

While the EPA has not yet responded to the petition, one year is a reasonable amount of time for EPA to consider a matter of such importance. EPA is mandated by RCRA Section 7004 to act "within a reasonable time" in response to a petition "for the promulgation, amendment, or repeal of [RCRA] regulation[s]." 42 U.S.C. § 6974(a). Similarly, under APA Section 553, individuals are "give[n] . . . the right to petition for the issuance, amendment, or repeal of a rule," 5 U.S.C. § 553(e), and an agency must "conclude a matter presented to it within a reasonable time." *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 418-19 (D.C. Cir. 2004), (citing 5 U.S.C. § 555(b)). In determining the reasonability of the delay in agency action, courts often apply the standard from *Telecommunications Research and Action Center v. FCC* ("*TRAC*"):

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of

> economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d 70, 79-80 (D.C. Cir. 1984) (citations omitted) (internal quotation marks omitted). TRAC factors have been adopted by the First, Ninth and Tenth Circuits. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191, n.18 (10th Cir. 1999); *Independence Min. Co., Inc. v. Babbitt*, 105 F.3d 502, 505 (9th Cir. 1997); *Towns of Wellesley, Concord and Norwood, Mass. v. F.E.R.C.*, 829 F.2d 275, 277 (1st Cir. 1987).

The Ninth Circuit adopted the *TRAC* factors in *Independence Min. Co. v. Babbitt*, where a mine company sought to order the Secretary of Interior to determine the validity of the mine company's mineral patent claims on the basis of an unreasonable delay. *Independence Min. Co., Inc. v. Babbitt*, 105 F.3d at 505. The Ninth Circuit grouped related factors, (1) "rule of reason" with (2) "congressional timetable," (5) "serious economic harm" with (3) "public welfare," and (4) "intentional delay" with (6) "bad faith." *Id.* at 507-11. For the first two *TRAC* factors, "rule of reason" and "congressional timetable," the court dismissed the congressional timetable because Congress had not provided one. *Id.* at 507. Examining the "rule of reason," it looked at whether, upon applying for the patents, the mine had an absolute right to have the patents issued, thereby necessitating an expedited process. *Id.* at 508-509. The Ninth Circuit's assessment of the "serious economic harm" and the "public welfare" factors examined whether there was reason to believe the mine would not be able to continue its operations and whether there was sufficient proof of impending job loss, finding none in either situation. *Id.* at 509-10. Finally, the mining company asserted that the Department of the Interior could show bad faith without singling out the plaintiff if they could be shown to have "intentionally delay[ed] the application

process in a manner clearly contrary to Congress' intent." *Id.* at 510. The court found that the Secretary had shown no unwillingness to comply with the Act.

Whether EPA has exceeded a reasonable amount of time depends on the application of the *TRAC* test to the facts in this case. The first factor, the amount of delay being governed by a rule of reason, is the most important. *In re Core Communications, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). One year is a reasonable amount of time to delay. *See id.* (holding that six years was unreasonable)*; In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (reasoning that six years is unreasonable); *Towns of Wellesley, Concord and Norwood, Mass. v. F.E.R.C.,* 829 F.2d 275, 277-78 (1st Cir. 1987) (deciding that fourteen months is reasonable); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 325 (D.C. Cir. 1980) (deciding that four years is unreasonable). CARE has no right to a judgment in its favor just like the mine company in *Independence Min. Co.* had no right to a vested patent before the Department of Interior considered whether to vest the patent. 105 F.3d at 508-509. Factor two, the "congressional timetable," gives no further insight because the applicable statutory scheme for both RCRA and APA, as described above, merely require that the delay be reasonable. 42 U.S.C. § 6974(a); 5 U.S.C. 553(e). The third factor comparing the importance of "economic regulations" with those "when human health and welfare are at stake" could weigh in favor of finding some delays unreasonable under RCRA that may have been reasonable if assessed under "economic regulations." But, "this factor alone can hardly be considered dispositive when, as in this case, virtually the entire docket of the agency involves issues of this type." *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987).

The fourth factor, which considers the impact on the agency's priorities from expediting the action, strongly favors allowing EPA to prioritize its own programs. Requiring EPA to

analyze every groundless petition would consume valuable staff resources and could inhibit its mission to protect human health and safeguard the environment. *See Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-1101 (D.C. Cir. 2003) (denying a finding of unreasonable delay where doing so would delay action for others waiting for agency action). Additionally, EPA has a mandate from Congress and an interest in delegating authority to states to conserve staff resources reasons as well as to encourage self-determination through the state and federal RCRA partnership. 42 U.S.C. § 6902(a)(7).

The fifth factor, taking into account the "nature and extent of the interests prejudiced by delay," is minimal. The interest of CARE, while sufficient for standing, should not be seen to outweigh the interest of EPA and the State of New Union. The final *TRAC* factor clarifies that courts are free to determine reasonability of delay where, as here, no impropriety is found, but are not mandated to do so. The *TRAC* factors support a finding that EPA's delay is reasonable. EPA is still within the statutory timeframe for answering CARE's petition and did not constructively deny it. The court should dismiss the claim.

D. Even if EPA constructively denied CARE's petition and district courts have jurisdiction under RCRA or the APA to consider the case, the proper remedy is to have EPA utilize its expertise to assess the petition.

Courts are reticent to hold "mere inaction [on a petition] . . . [to] be . . . an order rejecting [it]." *American Rivers v. FERC*, 170 F.3d 896, 896 (9th Cir. 1999). When an agency is found to have an unreasonable delay in acting on a petition, mandating a "judicially reviewable response," is available to circuit courts, but is an "extraordinary remedy reserved for extraordinary circumstances." *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 417, 420 (D.C. Cir. 2004). The APA itself supports this interpretation, stating that "each *agency* shall proceed to conclude a matter presented to it[]" within a reasonable time. 5 U.S.C. § 555(b) (2010)

(emphasis added). Where, as here, the standard for constructive denial of the petition is the same as an unreasonable delay, courts should seek a remedy with the most deference given to agencies. Additionally, Congress intended specific procedural processes in RCRA that have not been satisfied. RCRA Section 3006(e) stipulates that

> "[w]henever 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 and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

42 U.S.C. § 6926(e). Congress is clear that EPA is to give notice to a state and hold a public hearing and reiterates those requirements twice as prerequisites to withdrawal of the state's program. *Id.*

Were this Court to order EPA to withdraw authorization from New Union's program, it would subvert Congressional intent because (a) the Court would be acting where Congress intended EPA to act and (b) the Court would be ignoring the requirement for a public hearing. A "constructive determination" that New Union's program continued to meet RCRA's criteria for program approval cannot, by definition, include a constructive determination that EPA gave New Union notice that its program failed to meet those same criteria. If this Court reviews the sufficiency of New Union's program, any finding of insufficiency would require giving notice to New Union and allowing 90 days for it to respond. Additionally, by determining whether the New Union program should be withdrawn, the Court would ignore Congress's intent to require a public hearing, which Congress emphasized in section 3006(e). 42 U.S.C. § 6926(e); *see Friends of Earth v. Reilly*, 966 F.2d 690, 691-92 (D.C. Cir. 1992) ("The text requires only a

'public hearing'; it does not require either that the withdrawal hearing [be subject to the Equal Access to Justice Act] or [be] 'on the record'").

There is nothing in the record evincing a public hearing of any sort regarding the withdrawal of New Union's hazardous waste program. Remanding to the court below will empower the District Court to set appropriate time constraints on EPA in determining the compatibility of New Union's program with RCRA. If the Court finds jurisdiction for the District Court in issues A & B above and a constructive denial of CARE's petition in issue C, it should remand the issue to the district court with instructions that EPA proceed under normal citizen suit petitioning processes pursuant to RCRA §§ 3006(e) and 7004. Reviewing the EPA action to determine a possible withdrawal of the state program is not consistent with RCRA.

E. EPA is not required to withdraw its approval of New Union's hazardous waste program exempting railroad hazardous waste from criminal provisions because it does not represent an outright ban and EPA can overfile when it decides criminal sanctions are necessary.

The ERAA exempts railroad hazardous waste facilities from receiving criminal sanctions. This does not require EPA to withdraw approval of New Union's program because this is not a total ban of an activity otherwise mandated under RCRA, and if criminal enforcement is necessary against a company managing railroad hazardous waste in New Union, EPA can overfile thereby pursuing its own enforcement action. *See United States v. Power Eng'g Co., et al.*, 3030 F.3d 1232 (10th Cir. 2002); *United States v. Elias,* 269 F.3d 1003 (9th Cir. 2001); *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999); *Blue Circle Cement, Inc. v. Bd. Of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994) [hereinafter *Blue Circle Cement*]. It is EPA's decision to withdraw program approval because it is a time consuming decision based on the balancing of resources and EPA's expertise, which courts are not suited to balance. *See*

Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (deferring to an agency when the decision requires a complicated balancing of factors).

EPA requires that a state or local ordinance or regulation must comply with federal goals and standards under RCRA. *Blue Circle Cement,* 27 F.3d at 1499. Blue Circle Cement, Inc. brought suit to challenge a local ordinance that prohibited the use of hazardous waste fuels. *Id.* at 1502. The Tenth Circuit reasoned that Congress set only a floor, not a ceiling, for states to regulate the treatment, storage, and disposal of solid and hazardous waste and, therefore, a local regulation must be consistent with the structure and purpose of RCRA as a whole. *Id.* at 1504-05. *Accord ENSCO, Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986) (holding that an ordinance that prohibited the storage, treatment, or disposal of "acute hazardous waste" subverted federal policies under RCRA).

Ordinances will be struck when they represent a total ban of an activity otherwise encouraged by RCRA but those that fall short of a total ban may be upheld if the ordinance is a reasonable response to a legitimate local concern for safety or welfare. *Blue Circle Cement*, 27 F.3d at 1505; *ENSCO, Inc. v. Dumas*, 807 F.2d at 745 (suggesting that courts should take a hard look at ordinances that impose an outright ban). New Union's exemption of criminal sanctions does not represent a total ban of an activity that RCRA otherwise encourages and, thus, may be upheld. The program still allows civil enforcement of violations by New Union and does not preclude federal criminal enforcement measures. *See Blue Circle Cement*, 27 F.3d at 1505 (striking only ordinances that result in a total ban).

Furthermore, EPA may bring separate enforcement suits in states with authorized hazardous waste programs. EPA's ability to overfile is a critical and powerful enforcement mechanism under RCRA. The Tenth Circuit has upheld EPA's ability to overfile even when an

authorized state has already initiated its own enforcement action. *United States v. Power Eng'g Co.*, 3030 F.3d 1232. In *Power Engineering Company,* the Colorado Department of Public Health and the Environment ("CDPHE") discovered that the Power Engineering Company ("PEC") was treating and disposing of hazardous waste without a permit and, thus, brought suit to force compliance. *Id.* at 1235. However, before CDPHE issued its Final Administrative Compliance Order, EPA requested that CDPHE bring other RCRA corrective actions and if CDPHE failed to, EPA would bring its own enforcement action. *Id.* EPA argued that RCRA § 3008(a) only requires EPA to provide notice to an authorized state before overfiling, giving the state an opportunity to act and correct its defect. *Id.* at 1237. In contrast, PEC argued that § 3006(b) prohibits overfiling because the state program is to be carried out "in lieu of the Federal program." *Id.* The Tenth Circuit decided that, as has the Ninth Circuit and multiple state courts, RCRA is ambiguous as to whether EPA can overfile and, thus, deferred to EPA's interpretation. *Id.* at 1240*; see United States v. Elias,* 269 F.3d 1003. The Tenth Circuit agreed with EPA, deciding that "program" in 3006(b) only refers to administration of the regulatory program and not to enforcement, thereby allowing EPA to enforce actions in an authorized state without violating RCRA. *Power Eng'g Co.*, 3030 F.3d at 1237.

EPA may mandate different enforcement provisions than the state and is only required to notify the state to enforce before it brings suit. 42 U.S.C. § 6926(e) (2010); *see United States v. Power Eng'g Co.*, 3030 F.3d at 1247. Therefore, if New Union refuses to apply criminal sanctions to railroad hazardous waste after EPA notice, EPA may bring suit to enforce the federal criminal provisions of RCRA even when the state is already pursuing enforcement.

The majority of courts are in agreement that EPA can overfile. *See United States v. Power Eng'g Co.*, 3030 F.3d 1232; *United States v. Elias*, 269 F.3d 1003. However, the Eighth

Circuit is the one voice of dissent. *Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 904 (8th Cir. 1999). In *Harmon Industries, Inc. v. Browner*, Harmon Industries voluntarily notified the Missouri Department of Natural Resources (MDNR) that it had been discarding a volatile solvent residue behind one of its plants. *Id*. at 897. The MDNR and Harmon instituted a cleanup plan but while Harmon was cooperating with MDNR, EPA instituted an enforcement action against Harmon. *Id.* MDNR had released Harmon from any claim for monetary penalties based on its voluntary compliance and cooperation. *Id.* The Eighth Circuit affirmed the district court's decision that EPA's imposition of civil penalties violated RCRA. *Id.* at 904. The court held that once EPA authorized a state to implement and enforce a hazardous waste program, it could not bring individual enforcement actions within the state unless the state failed to take any action. *Id.* at 899. While the "in lieu" language in § 3006(b) refers to the RCRA state authorized program, the court decided "program" also included enforcement actions. *Id.*; 42 U.S.C. § 6926. The court reasoned that Congress intended to give states the primary role in enforcement and thus, authorizes the state to act in place of the federal government.[5] *Harmon Industries*, 191 F.3d at 899.

However, the Eighth Circuit agrees with other Circuit courts that, at a minimum, EPA can bring enforcement actions if the state does not take any action. Even if *Browner* applies, EPA can still bring a criminal enforcement action for railroad hazardous waste. *See Harmon Industries, Inc. v. Browner*, 191 F.3d at 901 (allowing EPA enforcement when the state fails to take any action). By removing criminal sanctions from railroad hazardous waste, New Union

[5] State courts, along with the circuit courts, disagree with the Eighth Circuit's decision in *Browner*, believing that the court read too much into the statutory phrases "in lieu of" and "same force and effect." *See, e.g.*, *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d. 1054, 1116 (W.D. Wis. 2001) (finding "in lieu of" to be superfluous and "same force and effect" to be limited only to permits and, therefore, not including enforcement actions).

will not be taking criminal action against RCRA violators. Therefore, EPA is authorized under *Browner* to take action as New Union will have failed to and *Browner* will not preclude its ability to enforce RCRA in New Union for railroad hazardous waste.

The Ninth Circuit and the Tenth Circuit disagree with *Browner*'s holding and analysis. *See United States v. Power Eng'g Co. et al*, 3030 F.3d 1232 (10th Cir. 2002); *United States v. Elias,* 269 F.3d 1003 (9th Cir. 2001). The Ninth Circuit declined to apply *Browner* because the Eighth Circuit did not give *Chevron* deference to EPA and went too far in holding that state primary enforcement ability meant that EPA could not enforce at all after the state brought any enforcement measures. *Id.* at 1007. *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that when a statute is ambiguous, deference must be given to the agency if its interpretation is reasonable). Since RCRA Section 3008(a) allows EPA to initiate civil enforcement with a state program in effect, Congress did not intend to allow state enforcement authority to entirely preempt federal regulation. 42 U.S.C. § 6928; *see Elias*, 269 F.3d at 1010. Because of the lack of clear Congressional intent for state preemption, the Ninth Circuit deferred to EPA's interpretation. *Elias*, 269 F.3d at 1010. The court concluded that the federal government only loses its primary enforcement ability but federal enforcement measures are not supplanted by an authorized state program. *Id.* at 1011.

By not applying criminal provisions to railroad hazardous waste, New Union is still operating within its authorization from EPA under RCRA. The majority of courts agree that EPA can overfile and retains oversight and enforcement power of state authorized programs, even if the state is pursuing other enforcement measures. The ability to overfile allows EPA in this case to enforce criminal sanctions for railroad hazardous waste and, therefore, it is within EPA's discretion to decide when withdrawal proceedings are necessary.

The DEP has solicited EPA in the past to help enforce RCRA in New Union. In 2009, both the DEP and EPA took enforcement actions in New Union, indicating that New Union and EPA have established a cooperative program that includes implementing, at a minimum, the federal provisions of RCRA. (R. at 14.) New Union's program complies with RCRA federal standards and it solicits EPA for help in areas where the program is not meeting its potential. (R. at 11.)

RCRA does not prohibit EPA enforcement of a state authorized program. *See United States v. Flanagan,* 126 F. Supp. 2d. 1284 (C.D. Cal. 2000). EPA approves less stringent criminal enforcement provisions as part of a state RCRA program, believing that federal criminal enforcement is permitted following state authorization. *Id.* at 1290 (relying on legislative history to find that California's criminal provisions did not require EPA to withdraw authorization). Under this reasoning, New Union's decision not to bring criminal sanctions, even though less stringent than federal requirements, still allows for EPA enforcement and does not mandate withdrawal.

Withdrawal of authorization of a state's program is a process that requires a complex balancing of many factors, including EPA's ability to establish a replacement program in the state. This decision is not suited for a court's review because there are no standards by which the court can judge EPA's decision. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Moreover, the court should defer to EPA's interpretation of RCRA because the statute clearly leaves the decision to withdraw state approval to EPA. RCRA states that "whenever the Administrator determines after a public hearing that a state is not administering and enforcing a program authorized under this section. . . ." the decision to withdraw is left to the EPA Administrator alone. 42 U.S.C. § 6926(e). EPA's regulations support this interpretation by outlining

circumstances when EPA may withdraw program authorization but is not mandated too. 40 C.F.R. § 271.22(a) (2010).

Based on the numerous violations and multiple permit applications, exempting criminal sanctions for railroad hazardous waste allows the DEP and now the Railroad Commission to focus on more pressing issues of the state's hazardous waste program and devote its time accordingly. Furthermore, exempting criminal sanctions from state authority still allows EPA to step in and enforce these provisions as it sees necessary independent from whether the state has taken action. EPA retains discretion to withdraw authorization and the facts presented here do not compel withdrawal. Due to economic constraints, the exemption is legitimate since it allows New Union's hazardous waste program to operate efficiently and effectively, promoting public welfare and safety.

The Twelfth Circuit should adopt a rule analogous to *Power Engineering Co.* and *Elias*, allowing EPA to overfile when it deems necessary even when the state has already taken enforcement measures. EPA has the discretion as whether to withdraw authorization and such a decision includes balancing complex and technical factors better left to the agency than a court. However, even if the Court decides to hold similar to *Browner*, EPA will still be able to overfile and enforce criminal sanctions since New Union will be taking no such action involving railroad hazardous waste.

F. EPA need not withdraw authorization because New Union has sufficient resources and performance to implement its hazardous waste program.

While New Union's hazardous waste program is not as well funded and staffed as it was when authorized, it still, at a minimum, meets federal standards. EPA is not required to withdraw authorization but can instead initiate its own inspections and bring its own enforcement measures when the state fails to take action or address problems adequately. *See United States v.*

Power Eng'g Co, et al., 3030 F.3d 1232 (10th Cir. 2002); *United States v. Elias,* 269 F.3d 1003 (9th Cir. 2001); *Wyckoff v. EPA*, 796 F.2d 1197, 1200 (9th Cir. 1986); *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d. 1390, 1396 (D.C. Cir. 1991).

In *Wyckoff v. EPA*, the Ninth Circuit ruled that the state program does not supplant EPA's power to monitor and test a hazardous waste facility under Section 3013 of RCRA. 796 F.2d at 1200. Washington State, where Wyckoff owned two wood treatment plants, was granted interim authorization by EPA under RCRA Section 3006(c). *Id.* at 1199-99. EPA issued orders under RCRA Section 3013 requiring Wyckoff to submit written proposals for monitoring and testing the hazardous waste at its facilities after receiving information that the hazardous waste could present a substantial risk to human health or the environment. *Id.* at 1198. Applying *Chevron*, the court found no clear congressional intent to remove federal oversight from state authorized hazardous waste programs and, therefore, deferred to EPA's interpretation of Section 3013 to retain certain oversight and enforcement powers. *Id.* at 1200. *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (granting deference to reasonable agency interpretations in light of ambiguous statutory language).

Furthermore, RCRA Section 3008(a)(2) states that the EPA must give notice when taking enforcement actions in an authorized state. 42 U.S.C. § 6928(a)(2) (2010); *Wyckoff,* 796 F.2d at 1200. Therefore, EPA retains powers of oversight and enforcement of authorized state hazardous waste programs when such a program fails to meet federal requirements in some instances. *Id*. Otherwise, this provision would be superfluous. EPA can aid authorized states in inspection or supplement states' enforcement. *Id.* According to a majority of courts, EPA can overfile and bring an enforcement action against a RCRA violator even if the state has already acted. *See*

supra Part E; *United States v. Power Eng'g Co, et al.*, 3030 F.3d 1232; *United States v. Elias,* 269 F.3d 1003.

While RCRA requires consistency between federal and state programs for hazardous waste, it does not require uniformity. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d. at 1396. In *Hazardous Waste Treatment Council v. Reilly,* the D.C. Circuit upheld the EPA's authorization of the state statute regulating hazardous waste in North Carolina. *Id.* at 1392. The court held that RCRA explicitly allows authorized states to impose more stringent standards than the federal government and, therefore, the EPA Administrator's ruling that the North Carolina's statute is consistent with RCRA even though it required a new hazardous waste treatment technology not under federal law. *Id.* at 1396.

EPA approved New Union's hazardous waste program in 1986 because it met federal standards and could have exceeded such standards by requiring more stringent protections and using more resources and employees than required. (R. at 10). A decrease in resources and performance does not mean that New Union's program has fallen below federal standards. The state program must only conform to the federal program but does not need to be uniform, following the rationale employed in *Reilly*. *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d. at 1396. While New Union may have had a more stringent program when authorized, it is only required to operate at federal standard and can, thus, decrease resources and employees without violating the provisions of RCRA. Coupled with EPA's ability to oversee and enforce the program, EPA may find withdrawal of authorization to be unwarranted, a decision best left to the agency.

Withdrawing approval of a state program costs EPA time and resources. If required to withdraw, EPA would have to institute a federal program to replace the state's program and

initiate many proceedings. Furthermore, EPA considers many factors, including technical and detailed facts that only EPA has the expertise to balance when making their decision. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The court may not substitute it judgment for that of the agency's when the decision involves complex considerations. Therefore, EPA does not have to withdraw authorization of New Union's hazardous waste program as if can monitor and enforce the program when it finds such inadequacies.

G. The 2000 ERAA does not violate the Commerce Clause or render New Union's program inconsistent with the federal program because it does not impede the free movement of Pollutant X across state borders.

The Commerce Clause of the Constitution gives the federal government the power "regulate Commerce with foreign Nations, and among the several States. . . ." U.S. CONST. art. I, § 8, cl. 3. This affirmative power to regulate commerce also carries with it the implication that states cannot burden commerce by discriminating against the free flow of commerce. *United Hauler's Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 550 U.S. 330, 338 (2007); *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 782 (4th Cir. 1996). Waste qualifies as commerce, and therefore states are not allowed to discriminate against out of state waste either directly or indirectly. *Hazardous Waste Council v. Reilly*, 938 F.2d 1390, 1391 (D.C. Cir. 1991). Congress may override the dormant commerce clause and allow states to regulate, but courts require a clear statement of congressional intent to allow any discrimination on the free flow of waste *Envtl. Tech. Council v. Sierra Club*, 98 F.3d at 783.

RCRA requires that state programs be consistent with the federal program to obtain approval. 40 C.F.R. § 271.4 (2010). The consistency requirements are similar to the constitutional requirements under the dormant Commerce Clause. A state's program may be deemed inconsistent if it "unreasonably restrict[s], impede[s], or operate[s] as a ban on the free

movement across the state border[.]" *Id.* Additionally, laws which "have no basis in human health or environmental protection and act[] as a prohibition on the treatment, storage, or disposal [of hazardous wastes]" are inconsistent. *Id.* Finally, if the state system does not meet RCRA's requirements it is deemed inconsistent. *Id.* New Union's program is not inconsistent and does not violate the Commerce Clause because the ERAA does not ban the free movement of Pollutant X across state borders. The program purpose is to protect human health and environmental and still meets RCRA's requirements.

When evaluating whether a law violates the Commerce Clause, courts analyze the law under a two-tiered test. If the law is discriminatory, either facially or in practical effect, the courts hold it as invalid. *United Hauler's Ass'n*, 550 U.S. at 339*; Envtl. Tech.*, 98 F.3d at 785. "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Hauler's Ass'n*, 550 U.S. at 339 (quoting *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality of Ore.,* 511 U.S. 93, 99, (1994)). The courts will uphold the law if a state can prove that the discriminatory law has a justification unrelated to economic protectionism. *Envtl. Tech.*, 98 F.3d at 785. This has proven to be a tough burden; the Supreme Court has only upheld laws where there was threat of disease and death. *Id.* However, if a statute is not facially discriminatory and only indirectly affects interstate commerce, the law is assumed valid unless the burdens on commerce outweigh local benefits *United Hauler's Ass'n*, 550 U.S. at 339; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Envtl. Tech. Council*, 98 F.3d at 785.

The analysis under RCRA is very similar. RCRA allows states to have more stringent requirements than the federal program as long as those requirements do not amount to an outright ban. *Blue Circle Cement*, 27 F.3d 1499, 1508 (10th Cir. 1994) (holding that ordinances

which are an "explicit or *de facto* total ban of an activity that is otherwise encouraged by RCRA will be ordinarily pre-empted by RCRA."). If a program "falls short" of a total ban, it should be upheld as long as it is supported by a legitimate concern for safety or welfare. *Id.*

The ERAA is not a per se violation of the Commerce Clause because it does not facially discriminate against out of state waste. Specifically, the statute does not impede the flow of Pollutant X across state lines. Therefore the Court should presume that the ERAA is valid under the Commerce Clause. Nor does the ERAA constitute the total ban of an activity that is otherwise encouraged by RCRA. The ERAA allows industries to use, store, and dispose of Pollutant X as long as it is done properly.

The next question is whether the amendments burden interstate commerce and whether there is a justifying legitimate concern. "[T]he person challenging a statute that regulates evenhandedly bears the burden of showing that the incidental burden on interstate commerce is excessive compared to the local interest." *Blue Circle Cement*, 27 F.3d at 1511. CARE has not presented proof that ERAA presents a burden on carriers of Pollutant X in the state of New Union to rebut the presumption of validity. Without proof, it is not clear that this constitutes a great financial or other burden on interstate shipping. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970) (holding that the state's legitimate interest in protecting the reputation of its fruit growers could not justify a $200,000 burden).

If a burden on interstate commerce is found, then the local purpose must be evaluated. "If a legitimate local purpose is found, then the question becomes one of degree." *Pike,* 397 U.S. at 142 (balancing the burden on commerce with the nature of the local interest); *see also Blue Circle Cement*, 27 F.3d at 1511. Both EPA and the World Health Organization recognize Pollutant X as one of the most potent and toxic chemicals to public health and the environment.

(R. at 12.) New Union has recognized the danger that Pollutant X represents, and is legitimately concerned that indefinite storage, or improper treatment and disposal could pose a danger to its citizens and environment. (*Id.*) This concern is true to the purposes of RCRA and justifies any burden that may be placed on interstate commerce by the ERAA.

For the reasons cited above, the ERAA does not violate the dormant Commerce Clause. However, the consistency inquiry requires that New Union's program meets RCRA's requirements as well. 40 C.F.R. § 271.4. To determine that the ERAA is inconsistent with RCRA, the court must consider "whether the [local] regulation is consistent with the structure and purpose of the [federal] statute *as a whole*." *Blue Circle Cement*, 27 F.3d at 1505. (quoting *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992)) (emphasis in original). The ERAA establishes a program which requires generators of Pollutant X to report the amount of Pollutant X that they generate, plan for reductions in future use, and limits the time that Pollutant X may be stored in the state. This is consistent with the goals of RCRA, which include minimizing the generation of hazardous waste and assuring that wastes are processed in a manner that protects human health and the environment. 42 U.S.C. § 6902; *see also Blue Circle Cement*, 27 F.3d at 1506 (identifying Congress's intent in passing RCRA to "facilitate resource recovery and conservation"). These measures will encourage generators to make efforts to properly dispose of pollutant X instead of storing it indefinitely.

EPA regulations state that it may withdraw approval if a state fails to issue permits for the treatment, storage, or disposal of a pollutant. 40 C.F. R. § 271.22. New Union's ERAA does state that only storage permits will be granted for Pollutant X. However, this is not a total ban. The amendments must be read in context of the preamble, which acknowledges that there are not any TSDs qualified for Pollutant X in New Union. *E.g. Envtl. Defense v. Duke Energy Corp.*,

549 U.S. 561, 578 (2007) (using the preamble to EPA Clean Air Act regulations to interpret meaning and application of regulations). When the amendments are read in this context it is clear that no treatment or disposal permits may be issued *because there are no facilities qualified to handle Pollutant X in New Union*. If a company applies for a permit to build a facility to treat or dispose of Pollutant X and New Union denies it citing the ERAA, then EPA has the discretion to withdraw approval under its regulations. However, whether the ERAA completely bans treatment is merely an "abstract disagreement over administrative policies" and no party will suffer any hardship through a premature decision. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967) (discussing when an issue is ripe for judicial review).

New Union's ERAA does not violate the dormant Commerce Clause and is consistent with RCRA because it does not impede interstate flow of Pollutant X and New Union's concerns regarding the impact of Pollutant X on public health and the environment are legitimate. EPA is not required to withdraw authorization merely because New Union chooses to enact more stringent requirements for the handling of pollutant X and the ERAA does not constitute a total ban on the treatment, storage, and disposal of Pollutant X.

Conclusion

This Court should find that RCRA § 7002(a)(2) grants jurisdiction to the District Court to order the EPA to perform any non-discretionary duties required by RCRA. In this case, the EPA has a non-discretionary duty to "respond in writing to any petition to commence withdrawal proceedings." 40 C.F.R. § 271.23(b)(1) (2010). The Court should leave the decision to withdraw New Union's hazardous waste program to EPA's discretion and technical expertise because there is no law to apply. In any case, the current state of New Union's hazardous waste

program does not require EPA to withdraw authorization and it does not violate the Commerce Clause because it is within the boundaries of RCRA.