Team No. 11

No. 18-2010
No. 400-2010

In The

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

Citizen Advocates for Regulation and the Environment, Inc.

Appellant,

v.

Lisa Jackson, Administrator, U.S. Environmental Protection Agency

Appellee,

On Appeal from the U.S. District Court
for the District of New Union

BRIEF FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEAL CASES

UNITED STATES DISTRICT COURT CASES

STATUTES

JURSIDICTIONAL STATEMENT

CARE served a petition on the EPA pursuant to 42 U.S.C. § 6974 and 5 U.S.C. § 553(e). They then filed an action with the court under 42 U.S.C. § 6972 for injunction and to mandate that the EPA act on the petition. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 because CARE filed a civil action arising under a law of the United States. In the alternative, the District Court has jurisdiction here under 42 U.S.C. § 6972(a)(2).

The Court of Appeals has jurisdiction under 28 U.S.C. § 1291 because CARE is appealing a final grant of summary judgment from the District Court. Also CARE's action in the Court of Appeals seeking judicial review of a constructive denial and thus has jurisdiction pursuant to 42 U.S.C. § 6976(b).

The District Court's grant of summary judgment to the appellee (defendant below) and denial of the same to the appellant (plaintiff below) constitutes a final order disposing of all claims brought by the parties. Therefore, this appeal is from a final order and properly before the Court of Appeals.

STATEMENT OF ISSUES

1. Whether a district court has jurisdiction to order EPA to act regarding CARE's petition for revocation of a regulation under RCRA's citizen suit provision when the petition is filed in accordance with RCRA § 7004.
2. Whether a district court has jurisdiction to order EPA to act regarding CARE's petition for revocation of a regulation under federal question jurisdiction when the APA requires agencies to provide any interested person the right to petition for repeal of a rule.
3. Whether EPA's failure to act on CARE's petition constituted a constructive denial of the petition and a constructive approval of New Union's program under RCRA § 3006, both

of which are subject to judicial review under RCRA § 7006(b), given that the constructive action doctrine has been applied in similar contexts.

4. Whether this court should lift its stay and proceed with judicial review of EPA's constructive actions when there is a presumption for initial review of administrative action in courts of appeal.
5. Whether EPA must withdraw its approval of New Union's program under RCRA § 3006(e) where New Union's resources and performance were not sufficient to meet RCRA's criteria for state program approval and where EPA does not have discretion to take action other than withdrawing approval.
6. Whether EPA must withdraw approval under RCRA for New Union's entire hazardous waste program given that the New Union ERAA removed railroad hazardous waste facilities from regulation and given that the ERAA removes criminal sanctions for environmental statute violations at railroad facilities.
7. Whether EPA must withdraw approval under RCRA for New Union's hazardous waste program given that ERAA's treatment of pollutant X causes New Union's program to be in violation of the Commerce Clause and inconsistent with the federal program.

STATEMENT OF THE CASE

On January 4, 2010, appellant Citizen Advocates for Regulation and the Environment, Inc. (CARE) filed an action, No. 400-2010 in the U.S. District Court for the District of New Union seeking an injunction requiring the Environmental Protection Agency to act on CARE's petition filed under the Resource Conservation and Recovery Act (RCRA), § 7004. (Dist. Ct. Opinion p. 4). CARE alternatively sought judicial review of EPA's constructive denial of the petition and EPA's constructive determination that New Union's program meets approval

criteria. (Dist. Ct. Opinion p. 4). New Union filed a motion to intervene which the district court granted. (Dist. Ct. Opinion p. 4). All parties filed motions for summary judgment, agreeing the facts CARE alleged were uncontested and no additional facts were needed to decide the matter. (Dist. Ct. Opinion p. 4). In its order from June 2, 2010, the court subsequently denied CARE's petition for summary judgment and granted EPA's and New Union's petitions. (Dist. Ct. Opinion p. 9). CARE appealed the June 2 order of the district court to this court. EPA appealed as well, contesting the district court's finding that it lacked jurisdiction under RCRA § 7006(b). (12th Cir. Order p.1).

CARE also filed an action, No. 18-2010, in the Twelfth Circuit Court of Appeals on January 4, 2010, seeking judicial review of EPA's constructive denial of CARE's RCRA § 7004 petition. (12th Cir. Order p.1). The Court of Appeals stayed that action pending the decision of the district court in action No. 400-2010. At the same time as it filed its appeal of the district court's denial of summary judgment, CARE also requested the Court of Appeals lift its stay in No. 18-2010 and consolidate both actions. (12th Cir. Order p. 1-2).

STATEMENT OF FACTS

EPA approved New Union's hazardous waste program in 1986. (Rec. doc. 2, p.1). Though at the time EPA found New Union to have sufficient resources to administer and enforce the program, including sufficient inspection and permitting facilities, it also noted fewer resources might result in program inadequacy. (Rec. doc. 3, p. 16). At the time of program approval, New Union's Department of Environmental Protection (DEP) reported 1,200 hazardous waste treatment, storage, and disposal facilities (TSDs) in the state requiring permits. (Rec. doc. 1, p. 17). DEP also reported a staff of 50 full-time employees devoted to the program. (Rec. doc. 1, p. 73).

As of 2009, DEP reported more TSDs (1,500), (Rec. doc. 4 for 2009, p. 23), than in 1986 and fewer program resources (thirty full-time employees). (Rec. doc. 4 for 2009, p. 52). TSD increases occurred gradually, while resource loss occurred primarily since 2000. (Rec. doc. 4 for 2009, p. 50). DEP's 2009 report to EPA also indicated the reduction in resources resulted from a hiring freeze instituted by New Union's governor. (Rec. doc. 4 for 2009, p. 53). New Union's Governor's Director of Budget indicates that more resource reduction is likely, (Rec. doc. 4 for 2009, p. 53), with cuts concentrated on programs like the hazardous waste program in which state employees perform functions federal employees would otherwise perform. (Rec. doc. 6, June 6, 2009).

DEP's resource shortage has resulted in a backlog of permit applications. As of 2009, 900 TSDs had expired permits, some of which were twenty years old, continuing via operation of law alone. (Rec. doc. 4 for 2009, p. 20). Moreover, DEP reports that it receives approximately fifty applications a year for new facilities permits and permits for expanded operation and cannot process them all in a given year without a prioritization system. (Rec. doc. 4 for 2009, p. 20).

The resource shortage also impairs New Union's inspections of TSDs. DEP reported that it could only inspect 10% of TSDs in a year and that it requested EPA to assist in inspections of another 10% of TSDs in New Union. (Rec. doc. 4 for 2009, p. 23). Moreover, DEP reported only six enforcement actions in 2009, four of which were administrative orders, two of which were civil actions. (Rec. doc. 4 for 2009, p. 25). EPA also conducted a similar number of enforcement actions, as did environmental groups. (Rec. doc. 4 for 2009, p. 26). These approximately eighteen enforcement actions were conducted in the face of twenty-two reported major permit violations and hundreds of minor violations. (Rec. doc. 4 for 2009, p. 24).

In 2000, New Union enacted the Environmental Regulatory Adjustment Act (ERAA). (Rec. doc. 4 for 2000, pp. 103-05). One provision of ERAA amended the New Union Railroad Regulation Act (RRA), which established the New Union Railroad Commission. This provision transferred "all standard setting, permitting, inspection, and enforcement authority of . . . DEP under any . . . environmental statute[] to the Commission." (Rec. doc. 4 for 2000, pp. 103-05). Moreover, ERAA removed criminal sanctions for environmental statute violations for facilities falling under the jurisdiction of the Commission. (Rec. doc. 4 for 2000, pp. 103-05).

A second provision of ERAA amended New Union's hazardous waste program's approach to Pollutant X (X). The provision recognized X to be among the most toxic chemicals to public health and the environment and further recognized that New Union currently has no TSDs for X and that only nine exist in the country. (Rec. doc. 4 for 2000, pp. 105-07). It required all X generators in New Union to submit annually plans for the reduction of X generation until such generation entirely ceases. (Rec. doc. 4 for 2000, pp. 105-07). Further, the ERAA provision banned DEP from issuing TSD permits, with an exception only for temporary storage while shipments of X awaited transport to a TSD outside of New Union. (Rec. doc. 4 for 2000, pp. 105-07). The provision did, however, allow for transport of X through or out of New Union to an out-of-state TSD, provided that the transport is "as direct and fast as is reasonably possible, with no stops within the state except for emergencies and necessary refueling." (Rec. doc. 4 for 2000, pp. 105-07).

SUMMARY OF ARGUMENT

This Court should reverse the New Union District Court's grant of summary judgment on jurisdictional grounds to EPA and New Union. Moreover, this Court should find EPA's inaction regarding CARE's petition for revocation of approval of New Union's program to be a

constructive denial of CARE's petition and a constructive approval of the program. This Court should then find that it has the authority to review EPA's constructive approval of New Union's program. This Court should then lift its stay in action No. 18-2010 and in reviewing EPA's constructive approval should order EPA to withdraw approval.

The district court has jurisdiction to order the EPA to act on CARE's petition under both RCRA § 7002(a)(2) and APA § 553(e). Jurisdiction is proper under RCRA § 7002(a)(2) because CARE had a valid RCRA § 7004 petition for revocation and the statutory language mandates the Administrator take action. Additionally, the EPA used rulemaking procedures in promulgating New Union's program and thus its approval of the program considered a regulation under both RCRA and the APA. Along with the RCRA § 7002, the APA § 553(e) provides jurisdiction to the district court for petitions for revocation. Though both statutes address similar issues, they are reconcilable and therefore should both be given effect.

This Court should construe the EPA's failure to respond to CARE's petition as a constructive denial and thus a constructive approval of New Union's program. This Court should follow other jurisdictions with similar policy goals and apply the constructive action doctrine to the RCRA because statutorily prescribed duties were not performed by EPA for an extended period of time. Moreover, this Court should liberally interpret the RCRA's appellate review provision and find that it covers EPA's constructive actions. Those actions are functionally similar to the actions specified in RCRA § 7006(b). There is also no clear congressional intent suggesting the appellate review provision not apply. As such, this Court should lift its stay and proceed with judicial review of EPA's constructive actions because initial review in courts of appeal is generally preferred to district court review.

This Court should also order EPA to withdraw approval for New Union's program because New Union's resources and performance fail to meet RCRA's approval criteria, because the New Union ERAA withdraws all railroad hazardous waste facilities from regulation, and because ERAA's treatment of X violates the Commerce Clause and makes New Union's program inconsistent with the federal program.

First, New Union's resources and performance fail to meet RCRA's approval criteria by creating a lack of equivalency with the federal program. Moreover, this lack of equivalency removes EPA's discretion in withdrawing approval because it is one of three conditions RCRA sets forth that mandate withdrawal. Second, New Union's failure to regulate all hazardous waste facilities in the state necessitates EPA's withdrawal of approval because equivalency between state and federal programs requires state programs to permit *all* hazardous waste facilities. Furthermore, ERAA's removal of all criminal penalties for violations of environmental statutes results in inadequate enforcement of compliance, another of RCRA's conditions mandating withdrawal.

Finally, ERAA's treatment of X violates the Commerce Clause because it improperly burdens interstate commerce. The outright ban ERAA imposes on treatment, storage, or disposal of X in New Union exceeds the benefits to public health the ban provides. Furthermore, ERAA's ban on X TSDs causes New Union's program to be inconsistent with the federal program because it unreasonably operates as a ban on moving X into New Union for treatment, storage, or disposal.

ARGUMENT

Issue 1:

The District Court has jurisdiction to order the EPA to act on CARE's petition because CARE petitioned for revocation of a regulation and because Administrator responses to such are petitions are mandatory.

Under RCRA § 7002 (a)(2) any person can bring an action against the Administrator where they fail to perform a nondiscretionary duty. 42 U.S.C § 6972(a)(2). CARE filed a petition for revocation pursuant to RCRA § 7004 alleging that New Union's program should no longer be considered valid under RCRA. CARE alleged that the program failed to meet the criteria set forth by the EPA. CARE's petition for revocation is valid under § 7004 because it seeks review of EPA's application of a regulation, not of an order. In addition, RCRA § 7004 mandates that the Administrator take action concerning the petition In this case, however, the EPA failed to take any action in regards to the petition.

a. EPA's approval of New Union's hazardous waste program followed the APA's rulemaking procedure and should therefore be considered a regulation.

Under RCRA § 7004, any person has the right to petition the Administrator for repeal of a regulation. 42 U.S.C. § 6974 (2006). 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." 5 U.S.C. § 551(4) (2006).

For the promulgation of a rule, the APA requires adequate notice and the opportunity for public comment. 5 U.S.C. § 553(b).

Here, approval of New Union's program is a rule because it is a statement of general applicability in that approval applies statewide and not to individual TSDs. Moreover, approval represents policy implementation because New Union's program provides cradle to grave regulation of hazardous wastes in conformance with the objectives of RCRA. See generally 42 U.S.C. § 6902 (2006) (setting forth objectives of RCRA including a state and federal partnership,

protection of health and the environment, promoting improves waste management techniques, and providing guidelines for waste collection, transport, recovery and disposal). Therefore, according to the APA's definition, the EPA's approval of New Union's plan should be considered rulemaking.

Other jurisdictions have considered whether EPA approval of state plans in other statutory contexts constitutes rulemaking. In a case involving state implementation plans under the Clean Air Act (CAA), the Sixth Circuit considered whether approval of a state plan was a rulemaking. In Buckeye Power, Inc. v. EPA, 481 F.2d 162, 162 (6th Cir. 1973) (vacated on other grounds), the court held that approval or disapproval of a state implementation plan under the CAA was at least informal rulemaking. Id. at 170. Approval of state plans under the CAA is analogous to EPA's approval of state programs under RCRA because approval in both instances implements statutory goals and because approval is generally applicable statewide. See also Citizens for a Better Envt. v. Costle, 515 F. Supp. 264, 270-71 (N.D. Ill. 1981) (holding *approval* of state plan under CAA to be rulemaking); Dressam v. Costle, 759 F.2d 548, 556 (6th Cir. 1985) (holding *disapproval* of state plan under CAA to be rulemaking).

Though RCRA § 7006(a) and (b) appear to separate jurisdiction for judicial review based on a rule versus order distinction, this characterization of the separation is inapposite. 42 U.S.C. § 6976(a) (jurisdiction for judicial review of the promulgation of final regulations proper in U.S. Court of Appeals for the District of Colombia); § 6976(b) (jurisdiction for permitting decisions and withdrawal of approval under RCRA 3006(e) in the Circuit Court of Appeals in judicial district where petitioner resides). The correct distinction is not rule or order, but rather whether the petition is attacking the validity of a regulation or attacking the application of a regulation. Waste Mgmt. of Ill., Inc. v. EPA, 714 F. Supp. 340, 346 (N.D. Ill. 1989). The court in Waste

Management held jurisdiction over petitions attacking the application of a regulation to fall under RCRA § 7006(b), while those attacking a regulations' validity fall under § 7006(a). CARE's petition attacks the application of program approval because it challenges EPA's failure to withdraw approval, rather than challenging the initial promulgation of approval.

As well, New Union contends that EPA's actions constituted adjudication rather than rulemaking because New Union is a single and particular party. Though New Union is a single legal entity, in the context of hazardous waste regulation EPA's approval of its program applies to thousands of TSDs in the state. New Union's narrow construction of the single party aspect of APA's regulation definition is incorrect because the program regulates each individual TSD, not New Union as a single legal entity.

b. RCRA § 7004 mandates Administrator action rather than allowing EPA discretion.

RCRA § 7004 states, "the Administrator *shall* take action with respect to [petitions filed under § 7004]." 42 U.S.C.A. § 6974 (2006) (emphasis added). The Supreme Court addressed the meaning of the word "shall" in the context of a drug forfeiture statute and stated, "Congress could not have chosen stronger words to express its intent that the forfeiture be mandatory." US v. Monsanto, 491 U.S. 600, 607 (1989). The Court analyzed the ambiguity of "shall" in Union Electric Co. v. EPA, 427 U.S. 246, 247 (1976). In that case, an electric company petitioned the EPA for review of the EPA's approval of emission standards. Union Electric, 427 U.S. at 246. The Court considered the language in the Clean Air Act and referred to the word "shall" as mandatory and clear. Id. at 252 ("[T]he Administrator *shall* approve an implementation plan if it satisfies the eight specified criteria.") (internal quotations omitted) (emphasis added). Like the action required in Union Electric, here, the Administrator is mandated to act on petitions that satisfy the criteria set out in RCRA § 7004.

When the Court has interpreted "shall" as something other than "must," it has specifically stated a valid exception. In W. Wis. Ry. Co. v. Foley, 94 U.S. 100, at 103 (1876), the Court laid out a specific exception to the rule: "'Shall' ought undoubtedly to be construed as meaning 'must,' for the purpose of sustaining or enforcing an existing right; but it need not be for creating a new one." This exception does not apply in this case because CARE is not attempting to create a new right, but simply enforce the right provided by RCRA § 7004. Thus, the right to petition the EPA is an existing right and the Administrator is required to act on CARE's petition.

Moreover, though the Court has construed "shall" to be permissive in certain contexts, see, e.g., Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 432 n. 9 (citing Fed. Rule Civ. Proc. 16(e) ("The order following a final pretrial conference *shall* be modified *only* to prevent manifest injustice.")), here "shall" is not conditional. RCRA § 7004 contains no conditional language connected to the use of the word "shall" and is thus purely mandatory. Since the Administrator is required to take action with respect to the petition, and the petition concerns a regulation and not an order, the district court has jurisdiction under RCRA § 7002(a)(2) to act on the Administrators failure to perform their duty.

Issue 2:

The district courts have federal question jurisdiction over CARE's petition because the APA requires each agency to give interested parties the right to petition for repeal of rules.

The EPA violated the APA by not acting on CARE's petition because the APA requires that each agency give interested persons the right to petition for repeal of rules. The EPA ignored CARE's petition, thus effectively denying them their right to petition. Because the APA is a federal law, the district court has jurisdiction over CARE's claim under 28 U.S.C. § 1331.

a. The APA and RCRA both address petitions regarding regulations and because RCRA can be reconciled with the APA, the court should give effect to both statutes.

The APA and RCRA both provide rights to interested parties to petition for the "promulgation, amendment, or repeal" of any regulation. 42 U.S.C. § 6974(a); 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the . . . repeal of a rule."). As the Supreme Court stated,

> "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible." Morton v. Mancari, 417 U.S. 535, at 551 (1974) (internal citations omitted).

The RCRA and the APA both act in regards to jurisdiction over petitions to repeal regulations. Both statutes grant jurisdiction to district courts and can therefore be reconciled and considered together.

The APA and RCRA § 7004(a) are reconcilable because the APA provides certain rights to interested persons, while the RCRA provides the procedures behind those rights. 42 U.S.C. § 6974(a); 5 U.S.C. § 553(e). Both statutes give the district court jurisdiction in this case and giving effect to the APA does not change the application of the RCRA. Therefore, though RCRA provides various procedures that are not accounted for in the APA, both statutes can co-exist and should be regarded as effective. Because both statutes should be regarded as effective, the district court has jurisdiction to order the EPA to act under the APA.

b. The procedure followed by the EPA in approving New Union's hazardous waste program followed the rulemaking procedure of the APA.

The EPA followed rulemaking procedures when approving New Union's plan. As the above analysis demonstrates, courts have treated similar instances of following rulemaking procedures as rulemaking. Rulemaking is an essential part of the EPA's enforcement of environmental laws and allows the EPA an effective and efficient way to further their policies. Am. Airlines, Inc. v. Civil Aeronautics Bd., 359 F.2d 624, 629 (D.C. Cir., 1966). The court in

American Airlines stated, "rule making is not to be shackled," because rulemaking looks to future law or policy. Id. The approval of New Union's program was essentially making future policy for an entire state's hazardous waste program. By using rulemaking procedures the EPA was making future policy for the state of New Union in an effective and efficient manner.

Additionally, the EPA agrees that they used rulemaking procedures. The approval of the plan should therefore be considered a rule. The agencies enjoy broad discretion in making their own procedures and especially in deciding whether or not to use rulemaking or adjudication. Interstate Natural Gas Ass'n of Am. v. FERC, 285 F.3d 18, at 58 (D.C. Cir. 2002). The EPA chose to use rulemaking procedures to approve state hazardous waste plans and they have the discretion and ability to make that decision.

The district courts have jurisdiction to order EPA to act on CARE's petition. The APA is applicable despite RCRA also having a similar section on petitions. Both statutes are reconcilable because they do not contradict each other and both provide jurisdiction to the district court. Furthermore, the petition is valid under the APA, which only confers the right to petition for repeal of *rules*, 5 U.S.C. 553(e), because EPA used rulemaking procedures in promulgating program approval.

Issue 3:

The EPA's failure to act on CARE's petition constituted a constructive denial and a constructive approval of New Union's program because other jurisdictions have applied the constructive action doctrine in similar contexts and because liberal construction of statutes authorizing appellate review conserves judicial resources.

a. This court should follow other jurisdictions and apply the constructive action doctrine to RCRA where statutorily derived duties were not performed for an extended period of time.

This Court should construe the EPA's failure to respond to CARE's petition as a constructive denial and thus a constructive approval of New Union's program because other

jurisdictions with similar policy goals have applied the constructive action doctrine to environmental statutes. See, e.g., Scott v. Hammond, 741 F.2d 992 (7th Cir. 1984) (failing to submit discharge limits under the CWA may amount to a constructive submission by the state of no limits); San Francisco Baykeeper v. Whitman, 297 F.3d 877 (9th Cir. 2002) (constructive submission doctrine applied to failure of state to submit TMDLs under the CWA); Alaska Ctr for the Envt. v. Reilly, 762 F. Supp. 1422 (W.D. Wash. 1991) (application of constructive submission to state failure to submit TMDLs under CWA.)

In Scott, the statute at issue was the Clean Water Act (CWA). The CWA requires each state to develop Total Maximum Daily Loads ("TMDL") for the discharge of pollutants into waterways within the state's boundaries. 33 U.S.C. 1313(d)(1)(C) (2006). States then are required to submit their proposed TMDL's to the EPA for approval. 33 U.S.C. 1313(d)(2). After the state's submission, the EPA has thirty days to make its decision regarding the proposed TMDL's. Id. If the EPA approves, the state must then incorporate the proposals. Id. If the EPA disapproves, however, it must implement water quality standards for the state's waterways within thirty days of the date of disapproval. Id.

In Scott, Illinois and Indiana failed to make any TMDL submissions to the EPA. This triggered a non-discretionary duty on the part of the EPA to promulgate TMDL's for discharges of pollutants into Lake Michigan. Holding the lower court's dismissal of the TMDL claim erroneous, the Seventh Circuit stated that "if a state fail[s] over a long period of time to submit proposed TMDL's . . . such failure may amount to a constructive submission by the state of no TMDL's." Scott, 741 F.2d at 996. The court reasoned that in light of the short statutory time lines for both state submissions and EPA responses to state submissions, it was unlikely that Congress intended for such "an important aspect of the federal scheme of water pollution

control" to be stalled by the refusal of states to act. Id. at 997. The court further emphasized that such inaction by states should not be allowed "to defeat the intent of Congress that TMDL's be established promptly in accordance with the statutory timetable". Id. at 998. As well, the court pointed out that construing the provision such that inaction by states would not trigger a duty by the EPA to establish TMDL's would render the provision "wholly ineffective ." Supra Scott at 998; see also Alaska Center for the Envt., 762 F. Supp. 1422, 1426 (finding that a court's interpretation of the provision "should be reasonable, and where the result of one interpretation is unreasonable while the result of another is logical, the latter should prevail.").

Like the states' failure to make TMDL submissions in Scott, here the EPA failed to respond to CARE's RCRA § 7004 petition. EPA's failure to respond should operate as a constructive action in the same manner as the failure to promulgate TMDLs in Scott because both the RCRA and the CWA mandate responses within a prescribed time limit. 33 U.S.C. § 1313(d)(2) (establishing thirty day limit on EPA response to state submission); 42 U.S.C. § 6974(a) (establishing that EPA must respond to petitions within a reasonable time). Though RCRA § 7004's "reasonable time" limitation is more open ended than CWA's thirty day time limit, it nevertheless confines EPA's response discretion and should not be read out of the RCRA by expansive interpretations of "reasonable".

Moreover, finding that EPA's non-response to CARE's petition is not a constructive action would strip citizens of their enforcement role under RCRA § 7004. Such a finding would effectively allow the EPA to ignore RCRA § 7004 petitions by sanctioning EPA inaction, thus rendering the petitions nullities. Congress provided for any interested person to be able to petition EPA for repeal of regulations and thus likely intended such petitions to play a meaningful role in the regulation of hazardous waste. Congress likely did not intend RCRA §

7004 to be meaningless, much as they did not intend state inaction to render the CWA's TMDL provisions meaningless. See Scott, 741 F.2d at 998 (noting strong presumption against statutory interpretations that render provisions wholly ineffective). In order to give effect to RCRA § 7004, this court should find that EPA's non-response to CARE's petition operates as a constructive denial, thus allowing judicial review.

b. This court should liberally interpret statutes authorizing appellate review of agency action where actions to be reviewed are functionally similar to the actions specified in the statute and where there is no clear congressional intent to the contrary.

This court should interpret RCRA § 7006(b) to allow judicial review of the EPA's constructive denial of CARE's petition (and thus constructive approval of New Union's program) because other jurisdictions with similar policy goals have applied the constructive action doctrine in the context of environmental statutes. See, e.g., Crown Simpson Pulp Co. v Castle, 445 U.S. 193 (1980) (finding EPA's veto of a state-issued NPDES permit functionally similar to denial of a permit in states without approved permit programs); Modine Mfg. Corp. v. Kay, 791 F.2d 267 (3d Cir 1986) (reviewing agency's interpretation of pretreatment standards under the CWA); Vineland Chem. Co, Inc v. EPA, 810 F.2d 402 (3d Cir. 1987) (reviewing EPA's termination of interim status under RCRA).

In Modine, the court considered whether the CWA afforded the appellate court direct review of the EPA's application of pretreatment standards. 33 U.S.C. § 1369(b)(1) (2006). The court held that the CWA afforded jurisdiction to appellate courts to directly review the agency's interpretation of pretreatment standards. Modine, 791 F.2d at PIN CITE. Furthermore, the court noted that the legislative history concerning the CWA was "silent on whether EPA interpretations of promulgated standards are within the jurisdiction of the court of appeals" and therefore found no clear congressional intent to preclude such review. Modine, 791 F.2d at 270.

Given that there were no facts in dispute, the court noted that placing initial review with the district court would rely on the same record and apply the same standard as an appeals court ultimately would which would be "duplicative, wasteful and inefficient". Id.

The Supreme Court has also stated that jurisdiction provisions allowing for appellate review of agency action "should be construed generously absent clear and convincing evidence of a contrary congressional intent." Modine, 791 F.2d at 270 (citing Lindahl v. Office of Pers. Mgmt., 470 U.S. 768 (1985)). Moreover, the Court generally prefers initial appellate review over district court review because where the "agency has already compiled an administrative record . . . district court fact finding is unnecessary." Modine, 791 F.2d at 270 ; see also Vineland Chem. Co. v. EPA, 810 F.2d at 403, 406 (finding that the court's jurisdictional analysis was not limited to a literal reading of RCRA but rather should use a common sense analysis of congressional intent which included reading the statute in conjunction with the legislative history and case law favoring appellate review of agency action.). Furthermore, the court advised that construing statutes to provide appellate review of some agency action while allowing for district court review of other related actions could result in an unnecessarily bifurcated review system that would be an inefficient division of judicial resources. Vineland, 810 F.2d at 407.

This court should follow Modine and liberally construe statutes authorizing appellate review of agency action where the action to be reviewed is functionally similar to the specified actions and where there is no clear congressional intent to the contrary. RCRA § 7006(b) authorizes review of EPA action granting or withdrawing authorization under RCRA § 3006(e). 42 U.S.C. § 6976(b). EPA's constructive approval of New Union's program is functionally similar to § 7006(b)'s specified action of "granting authorization" in that both actions have the result of allowing a state hazardous waste program to operate under RCRA. See Vineland, 810

F.2d at 407 (finding that termination of interim status is the functional equivalent of a denial of a permit application on the merits in that both require a facility to cease operations).

As in Modine, the legislative history regarding RCRA § 7006(b) is silent with respect to whether the appellate court should review constructive approvals. See H.R. Rep. No. 94-1491 (1976) reprinted in 1976 U.S.C.C.A.N. 6238. This silence thus demonstrates that there is no clear legislative intent to preclude such review. See, e.g., Modine, 791 F.2d at 270. Moreover, there are no facts in dispute. This absence of a factual dispute supports initial appellate review because utilizing the fact-finding capabilities of the district court would result in "an inefficient division of judicial resources." Vineland, 810 F.2d at 407. This Court should therefore follow Modine and liberally interpret RCRA § 7006(b) authorizing appellate review of agency action.

Courts that strictly interpret statutes authorizing appellate review, like the court in Hempstead County and Nevada County Project v. EPA, 700 F.2d 459 (8th Cir. 1983), do so at the expense of judicial efficiency. In Hempstead the court held that RCRA § 7006(b) did not confer jurisdiction for direct review of an interim status determination because such determinations are not actions in permit issuance. Hempstead, 700 F.2d at 462. The court reasoned that it only has the jurisdiction that Congress confers upon it by statute and that the review provision of RCRA § 7006(b) specifically outlines what agency acts are reviewable. Hempstead, 700 F.2d at 461.

This court should reject Hempstead because such a strict interpretation of statutes authorizing appellate review of agency action results in an inefficient use of judicial resources. If this court finds that constructive approvals are not subject to direct appellate review, that would likely result in an unnecessarily bifurcated system of review in which the specified actions of granting, denying, or withdrawing authorization would be reviewed at the appellate level while

related actions such as constructive approvals would be reviewed in district courts. For those actions that would be initially reviewed in the district court under the Hempstead interpretation, the additional layer of review yields no additional benefit in that the district court would have before it the same record and would apply the same standard as the appellate court. For this reason, this court should follow Modine and liberally construe statutes authorizing appellate review of agency action.

Issue 4:

This court should lift its stay and proceed with judicial review of EPA's constructive actions because initial review in courts of appeal is generally preferred to district court review.

In Florida Power & Light Co v. Lorion, 470 U.S. 729, 745 (1985), the Supreme Court held that absent a firm indication that Congress intended to locate initial review of agency action in district courts, courts should not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeal. While Florida Power referred specifically to APA review, courts have interpreted its holding as generally applicable to review of agency action. Modine, 791 F.2d at 270. The Court in Florida Power also stated that where the agency has already compiled an administrative record the district court's fact finding capability is unnecessary. Florida Power, 470 U.S. at 744. Furthermore, the Court asserted that construing a statute to provide appellate review of some agency actions and district court review of other similar actions may result in an inefficient division of judicial resources. Florida Power, 470 U.S. at 744 ; see also Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 798 (1985) (holding that to afford initial review to the district court, who would rely on the same record and apply the same standards as the appellate court would ultimately use, would be wasteful and inefficient.)

To overcome the presumption favoring appellate review of agency action there must be clear congressional intent to the contrary. Florida Power, 470 U.S. at 736-37. Given that the legislative history of RCRA § 7006 is silent as to whether the appellate court should review constructive actions, there is no clear legislative intent to prefer district court review over appellate court review in cases of EPA constructive actions. H.R. Rep. No. 94-1491 (1976) reprinted in 1976 U.S.C.C.A.N. 6238; see also Modine, 791 F.2d at 270 (noting that CWA's legislative history was "silent on whether EPA interpretations of promulgated standards are within the jurisdiction of the court of appeals" and therefore found no clear congressional intent to preclude such review). As well, given that all facts alleged by CARE are uncontested and that the parties agree there are no further facts necessary to decide the matter, use of the district court's fact finding capabilities would be an inefficient use of judicial resources. With facts already established, district court review would duplicate application of the legal standard application performed at the appellate level.

Moreover, ordering EPA on remand to initiate proceedings to consider withdrawal of New Union's program would also be an inefficient use of resources. EPA's proceedings for assessing whether to repeal program approval include a public hearing where the parties put forth evidence which is then considered by a neutral decision maker; this is a fact-finding function. Given that New Union's self submitted reports to the EPA form the basis of CARE's factual allegations, which all parties stipulate as true, there would be no need for this additional fact-finding process. Therefore, this court should lift the stay and proceed with judicial review of EPA's constructive approval.

Issue 5:

The EPA must withdraw approval of New Union's program because the insufficiency of its resources and performance creates a lack of equivalence with the federal program and because the EPA does not have discretion to take action other than withdrawal.

a. The insufficient resources and performance of New Union's program cause a lack of equivalency with the federal program.

Under RCRA § 3006(b), EPA must authorize a state program unless it finds the program lacks equivalence with the federal program outlined in RCRA §§ 3002-3005. 42 U.S.C. § 6926(b) (2006). The equivalency requirement mandates that state programs be at least as stringent as the federal program, effectively setting a floor for state regulation of hazardous waste. Old Bridge Chems. Inc. v. N.J. Dept. of Envtl. Prot., 965 F.2d 1287, 1292 (3d. Cir. 1992). In assessing equivalency of state programs, courts have compared the particular component of a state program at issue with the corresponding RCRA regulation and assessed whether the two provisions were identical in all material respects. Safety-Kleen Inc. v. Wyche, 274 F.3d 846, 863 (4th Cir. 2001).

Given that New Union's performance inspecting TSDs, issuing permits, and its enforcement actions differ materially from the corresponding RCRA provisions, New Union's program therefore lacks equivalency with the federal program. Under 40 C.F.R. § 271.15(b)(1) a state must maintain a program which is capable of making comprehensive surveys of *all* facilities and activities subject to the state director's authority. While New Union reported the presence of 1500 TSDs in its 2009 Annual Report to the EPA, they also indicated performance of inspections for 150 TSDs during the previous year and that they expected to perform the same number in the present year. (Rec. doc. 4 for 2009, p. 22). In soliciting the EPA to inspect a comparable number of TSDs a year, New Union acknowledged that it only had the capacity to inspect 10% of TSDs a year. (Rec. doc. 4 for 2009, p. 23). Even with the assistance of the EPA,

however, New Union still falls substantially short of mirroring the regulation which requires a state to make comprehensive surveys of *all* facilities.

40 C.F.R. § 271.13(a) mandates that state law require permits for *all* TSDs and prohibit the operation of facilities without such permits. New Union issued 125 permits in 2009. (Rec. doc. 4 for 2009, p. 19). Those issuances are against a backlog of 900 facilities operating with expired permits. (Rec. doc. 4 for 2009, p. 20). These expired permits are the functional equivalent of having no permit because both permit situations result in no regulation of a TSD's present activity. As well, New Union received about fifty applications from new facilities or facilities seeking to expand their operations. (Rec. doc. 4 for 2009, p. 20). New Union's provision of permits for less than 15% of the facilities within its boundaries differs substantially from the EPA's regulations because those regulations require permits for *all* TSDs. 40 C.F.R. § 271.13(a) (2006). Moreover, there is no indication in the regulations that the requirement of permitting for all TSDs indicates that in some situations permitting for less than all TSDs is appropriate.

40 C.F.R. § 271.16 provides that enforcement of program requirements be available for *each* instance of violation. While New Union reported that it took six enforcement actions the previous year and that the EPA and citizen's groups each took a comparable number of enforcement actions, this is against the backdrop of twenty-two major permit violations and hundreds of minor violations. (Rec. doc. 4 for 2009, p. 24). Such a small percentage of violations met with enforcement action because New Union lacks adequate enforcement resources. Though enforcement is available as a matter of law, New Union's lack of resources effectively denies enforcement availability for the vast majority of violations. Moreover, New Union's lack of resources is not an isolated problem, but rather is a situation that the state itself

admits will continue into the future. (Rec. doc. 4 for 2009, p. 53). Thus, this effective lack of availability creates a lack of equivalence between New Union's program and the corresponding RCRA regulation.

For these reasons, this court should find that New Union's program differs materially from the federal program and that New Union's program therefore lacks equivalency.

b. EPA must withdraw approval of New Union's program because it lacks discretion to take action other than withdrawal where the state's program lacks equivalency.

If after public hearing, the EPA determines that a state's program lacks equivalency, the EPA is required to establish a federal program if the state does not take corrective action after being given a reasonable time to do so, not to exceed ninety days. 42 U.S.C. § 6926(e). Though EPA's criteria for withdrawal of approval of a state program listed in 40 C.F.R. § 271.22 state that "the Administrator *may* withdraw program approval when a State program no longer complies with the requirements of this subpart," (emphasis added), EPA's withdrawal is not permissive if a state program is not equivalent with the federal program. See 42 U.S.C. § 6976(e) (2006). The criteria in § 271.22 are a non-exhaustive set of circumstances any of which are sufficient for EPA to withdraw program approval. See 40 C.F.R. § 271.22(a). § 271.22 does not, however, purport to subvert the clear language of RCRA which mandates EPA withdraw authorization when a state program lacks equivalency and the state has not taken corrective action. Given that the New Union program inadequacies that render it not equivalent to the federal program are not curable within the ninety day time period, the EPA has a mandatory duty to withdraw approval of New Union's program and lacks discretion to take other action.

New Union's hazardous waste management program lacks equivalence with the federal program with respect to its inspections of TSDs, issuance of permits, and enforcement of compliance. To prevent EPA withdrawal of program approval, New Union would need to rectify

these program insufficiencies within the ninety day window allotted by the statute. 42 U.S.C. §6926 (e). However, given the extent of these program violations, resolving these issues in such a short window of time would not only be impracticable but likely impossible.

New Union's economic situation has significantly deteriorated since the initial approval of the program. Since approval, New Union has experienced severe financial hardship resulting in hiring freezes the governor expects to continue for several more years. (Rec. doc. 4 for 2009, p. 53). It is precisely this stark economic picture that accounts for New Union's less than robust implementation and enforcement of RCRA. Taking into account such severe budgetary constraints and the bleak prospect of their improving within the ninety day period for corrective action, it is likely impossible that New Union will be able to correct its program inadequacies that cause it to lack equivalency with the federal program. Therefore, EPA is required to withdraw program approval.

Issue 6:

EPA must withdraw approval of New Union's entire program because removal of railroad facilities from regulation causes a lack of equivalence with the federal program and lack of adequate enforcement of compliance.

a. Equivalency between state and federal programs requires state programs to permit *all* hazardous waste facilities.

RCRA seeks to establish a "viable Federal-State partnership to carry out the purposes" of RCRA. 42 U.S.C. § 6902(a)(7) (2006). The core of that partnership is the State operation of hazardous waste programs in lieu of the Federal program. See 42 U.S.C. §§ 6926, 6902. For a State to operate its own program, EPA must determine the state program to be equivalent with the Federal program under RCRA §§ 6922-25. 42 U.S.C. § 6926(b) (authorizing state programs unless Administrator finds the state program not equivalent to the federal program); see also, H.R. Rep. No. 94-1491, at 7 (1976) reprinted in 1976 U.S.C.C.A.N. 6238, 6244.

If EPA, after a public hearing, determines that a State is not operating its program in accordance with § 6926(b), EPA must[1] withdraw approval and establish a Federal program after giving the State no more than ninety days to take appropriate corrective action. 42 U.S.C. § 6926(e) (2006). A requirement of operating in accordance with § 6926(b) is that the State program must be equivalent to the Federal program. Therefore, if EPA finds New Union's program to be not equivalent to the Federal program, EPA must withdraw approval.[2]

Equivalency in the context of RCRA means that the state program must meet federal minimum standards of hazardous waste treatment, storage, and disposal. See Chem. Waste Mgmt., Inc., 967 F.2d 1058, 1060 (5th Cir. 1992) (citing H.R. Rep. No. 94-1491, at 7 (1976)). Part of meeting the federal minimum standards is having a permit program for hazardous waste storage facilities. RCRA § 3005(a) (requiring all owners and operators to have a permit); RCRA § 3004(a)(7) (requiring state compliance with § 6925 permitting). Therefore, for a state program to be equivalent to the federal program, it must establish permit requirements equivalent to § 6925.

New Union does not regulate railroad hazardous waste facilities. (Rec. doc. 4 for 2000, pp. 103-05). It does not permit those facilities. (Rec. doc. 4 for 2000, pp. 103-05). Excluding railroad facilities from permitting means that New Union does not require permits for all

[1] The use of the word "shall" in §6926(e) indicates that withdrawal is mandatory upon determination that the state program is not equivalent to the federal program. See Anderson v. Yungkau, 329 U.S. 482, 485 (1949) (noting that shall is "ordinarily the language of command," and that when a statute or rule uses both may and shall "the normal inference is that each is used in its usual sense.") Though mandatory withdrawal is conditional on a state not taking appropriate corrective action, if that condition is met, EPA does not have a choice. It *shall* withdraw approval. See also Williamsburgh-Around-The Bridge Block Assoc. v. Jorling, 1989 WL 98631, 5 (N.D.N.Y 1989) (noting language in § 6926(e) creates a mandatory duty for EPA).

[2] As discussed above in Issue 5, though EPA's criteria for withdrawal of approval of a state program listed in 40 C.F.R. § 271.22 appear to make withdrawal a permissive action, withdrawal is not permissive if a state program is not equivalent with the federal program. See 42 U.S.C. § 6976(e).

hazardous waste facilities[3]. It is this lack of permitting that causes New Union to not meet the federal minimum standards. See 42 U.S.C. §§ 6925(a), 6924(a)(7). Because they do not meet those standards, New Union's program is not equivalent to the federal program outlined by the standards. This lack of equivalence requires the EPA to withdraw approval for New Union's program if after no more than ninety days New Union does not take appropriate corrective action. 42 U.S.C. § 6926(e).

b. New Union's removal of criminal penalties for railroad facilities' violations of RCRA results in inadequate enforcement of compliance.

For a state program to operate in accordance with RCRA § 3006(b), it must have adequate enforcement of compliance. 42 U.S.C. § 6926(b). EPA defines the requirements for adequate enforcement of compliance in its regulations at 40 C.F.R. § 271.16. EPA requires state agencies to have available criminal remedies against any person who knowingly transports, stores, or disposes of hazardous waste without a permit. 40 C.F.R. § 271.16(a)(3)(ii) (listing multiple actions criminal sanctions are available for). Availability of criminal remedies is mandatory. 40 C.F.R. § 271.16(c) (contrasting the mandatory provisions above (c) with the highly recommended yet not mandatory recommendations below (c)); 40 C.F.R. § 271.16(a) ("Any State agency administering a program *shall* have available the following remedies . . . ") (emphasis added).

ERAA removes criminal remedies for violations of environmental statutes, including RCRA, at railroad hazardous waste facilities. (Rec. doc. 4 for 2000, pp. 103-05). By eliminating a required enforcement mechanism, New Union's hazardous waste program does not operate in accordance with RCRA § 3006(b) because it has inadequate enforcement of compliance. This

[3] There is nothing in the context of RCRA that suggests "all" indicates less than all. Because railroad hazardous waste facilities are hazardous waste facilities, "all" includes them.

inadequate enforcement requires EPA to withdraw approval of New Union's program if after no more than ninety days New Union has not provided for criminal remedies for RCRA violations at railroad facilities. See 42 U.S.C. § 6926(e).

Moreover, continuing approval of a state program that does not regulate all hazardous waste facilities subverts RCRA's goal of providing a "cradle to grave" system for hazardous waste regulation. If a state chooses not to regulate an entire class of facilities (in this case railroad facilities), it creates a gap in regulatory coverage. Such a gap potentially provides opportunities for transport and storage in ways that expose society to greater risk than the means provided for in RCRA and approved state programs.

Because New Union's program does not permit all hazardous waste facilities in the state, and is thus not equivalent to the federal program, and because ERAA creates inadequate enforcement of compliance by removing criminal sanctions for environmental statute violations at railroad facilities, EPA must withdraw approval of New Union's program.

Issue 7:

EPA must withdraw approval for New Union's program because ERAA's treatment of pollutant X causes New Union's program to violate the Commerce Clause and be inconsistent with the federal program.

a. ERAA's effective ban on permitting pollutant X TSD facilities imposes an improper burden on interstate commerce.

Dormant Commerce Clause jurisprudence finds in the Commerce Clause a prohibition on state laws that impose improper burdens on interstate commerce. U.S. Const. art. I, § 8, cl. 3; H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949). State laws that discriminate against out-of-state entities are per se invalid unless they achieve an important governmental purpose. Philadelphia v. New Jersey, 437 U.S. 617, 624-25 (1978); Maine v. Taylor, 477 U.S. 131, 138 (1986). If a state law is not facially discriminatory, however, there is a presumption of

validity unless the "burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).[4]

New Union's ERAA does not discriminate against out-of-staters. Both instate and out-of-state entities can transport X through New Union. ERAA's X generation minimization provisions also affect both instate and out-of-state entities alike. (Rec. doc. 4 for 2000, pp. 105-07). Furthermore, no entity may receive a permit for treatment, storage, or disposal of X in New Union whether in state or out. (Rec. doc. 4 for 2000, pp. 105-07). Therefore, ERAA does not discriminate against out-of-state entities. Because ERAA is not facially discriminatory, the Court's test from Pike v. Bruce Church applies.

This test requires the court to examine "(1) the nature of the . . . local benefits advanced by the [law]; (2) the burden the [law] imposes on interstate commerce; (3) whether the burden is clearly excessive in relation to the local benefits; and (4) whether the local interests can be promoted as well with a lesser impact on interstate commerce." Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs, 27 F.3d 1499, 1512 (1994) (citing Pike, 397 U.S. at 142) (internal quotations omitted).

[4] Though not addressed in this action, perhaps the strongest argument for invalidating ERAA is that RCRA preempts ERAA's X provisions through application of the Supremacy Clause. U.S. CONST. art. VI cl. II. State regulation of hazardous waste is not preempted by virtue of Congressional intent to preempt the entire field of interstate waste management. Philadelphia v. New Jersey, 437 U.S. 617, 620-21 n. 4. State hazardous waste laws are, however, preempted to the extent that they obstruct the achievement of Congress's intent in passing RCRA. Id. RCRA's stated purpose is to protect public health through safe treatment, storage, and disposal of hazardous waste. See 42 U.S.C. § 6902(a); Ensco, Inc. v Dumas, 807 F.2d 743, 745 (1986). ERAA's total ban on permits for X TSDs frustrates that objective by effectively banning any treatment, storage, or disposal of pollutant X. Blue Circle Cement Inc. v. Bd. of County Commissioners, 27 F.3d 1499, 1508 (1994) ("[O]rdinances that amount to an explicit . . . ban of an activity . . . otherwise encouraged by RCRA will ordinarily be preempted.") Though states may adopt regulations more stringent than those in RCRA, see 42 U.S.C. § 6929, they may not through the use of an outright ban claim the protection of RCRA's savings clause. See, Ensco, 807 F.2d at 745.

First, the local benefit to public health and safety from ERAA's effective banning of X TSDs in New Union is great. X is "among the most potent and toxic chemicals to public health," (Rec. doc. 4 for 2000, pp. 105-07), and courts have found public health and safety to be one of the few rationalizations that could support a total ban against a Commerce Clause challenge. Blue Circle Cement, 27 F.3d at 1508 fn. 7. However, the "purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670 (1981) (plurality opinion).

Second, the burden in this case, an outright ban on an activity encouraged by federal law,[5] is clearly excessive in relation to the health and safety benefit to New Union. A complete ban frustrates the purposes of RCRA and does not eliminate the potential danger to New Union citizens from X because transport through the state remains legal. (Rec. doc. 4 for 2000, pp. 105-07). Finally, a ban tailored to allow X TSDs in low residential density areas where public health and safety would not suffer from the presence of X could achieve the same benefit for New Union without imposing the same burden as a complete ban. There exists a solution to the state's concern for public safety that does not impose the same burdens as a complete ban on interstate commerce. For these reasons, the court should find ERAA's treatment of X to violate the Commerce Clause and should order EPA to withdraw approval of New Union's hazardous waste program.

b. ERAA's outright ban on the treatment and disposal of pollutant X in New Union is inconsistent with the federal program.

[5] ERAA's permitting ban effectively prevents any X TSDs from operating in New Union. RCRA's purpose is to provide for the treatment, storage, and disposal of hazardous waste and that objective cannot be achieved if states are allowed to ban such facilities from within their borders.

A state hazardous waste program must be consistent with the federal program and authorized state programs. See 42 U.S.C. § 6926(b). If a state program is inconsistent, EPA must withdraw authorization after notice and no more than ninety days for appropriate corrective action. 42 U.S.C. § 6926(e). "Any aspect of [a] State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage or disposal at facilities authorized under . . . an approved State program shall be deemed inconsistent." 42 C.F.R. § 271.4(a).

Though ERAA allows for the transport through the state of X, its effective ban on any X TSD unreasonably operates as a ban on moving X into New Union for treatment, storage, or disposal. ERAA's permitting ban prevents the construction of any X facility. This makes it impossible to move X into New Union for treatment, storage, or disposal because without such a facility there can be none of those. Though there are only nine states that have X capable TSDs, there is only one state, New Union, that would not permit one anywhere in the state as a matter of law.

In cases where the state program operates as a ban on the free movement of hazardous waste into a state for treatment, storage, or disposal EPA must withdraw approval because the agency does not have discretion in deeming the program inconsistent. 40 C.F.R. § 271.4(a) mandates EPA to deem bans on free movement as inconsistent and RCRA § 3006(e) mandates withdrawal when the state program is inconsistent with the federal program. Because New Union's program's ban on the movement of X into the state makes its program inconsistent, EPA must withdraw approval.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse the grant of summary judgment by the United States District Court for the District of New Union, or in the alternative, lift the stay in the Court of Appeals action and order EPA to withdraw approval for New Union's program.