C.A. No. 400-2010

IN THE UNITED STATES COURT OF APPEALS FOR THE
TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION
AND THE ENVIRONMENT, INC.,
Petitioner-Appellant-Cross-Appellee,

v.

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

v.

STATE OF NEW UNION,
Intervenor-Appellee-Cross-Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT OF NEW UNION

BRIEF FOR THE RESPONDENT-APPELLEE-CROSS-APPELLANT

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JURISDICTIONAL STATEMENT

EPA challenges the ability of any court to hear this matter as the case is not ripe. To the extent the dispute is justiciable, the United States District Court of New Union had jurisdiction under 42 U.S.C. §6972 (a) (2). The judgment of the District Court was entered on June 2, 2010. CARE and EPA each filed timely Notices of Appeal from the final order of the District Court to the United States Court of Appeals for the Twelfth Circuit, which granted review on September 29, 2010. While this Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review final administrative agency decision, there has been no final agency decision in this matter. In addition, as explained below, the absence of a developed administrative record deprives this Court of the ability to provide meaningful appellate review. At most, this Court should remand the matter to the lower court to order further administrative proceedings.

STATEMENT OF THE ISSUES

1. Whether the District Court has authority to rule on a citizens' suit challenging the actions of a government agency when those actions are quasi-legislative, not quasi-judicial.

2. Whether a federal district court can exercise federal question jurisdiction when there is no substantial nor disputed federal issue presented.

3. Whether a citizens' suit is ripe for judicial review under 42 U.S.C. § 6976 (b) when there has been no final agency action, no unreasonable delay resulting in constructive action, and no hardship to the parties will result from withholding court consideration at this time.

4. Whether a Court of Appeals should proceed with judicial review of an agency's inaction when there is no administrative record for the Court to review.

5. Whether EPA must withdraw its approval of New Union's program despite New Union's resources and performance being sufficient and EPA having discretion to take action other than withdrawing approval.

6. Whether EPA must withdraw its approval of a state's entire RCRA program when the program is meeting nearly all requirements and only one division of the program is defective.

7. Whether the ERRA's treatment of Pollutant X violates the Commerce Clause of the United States Constitution when the infringement is minimal and done in the interest of human health and environmental protection.

STATEMENT OF THE CASE

This is an action under RCRA, whereby CARE, a citizens' group, seeks to compel EPA to strip New Union of its ability to regulate hazardous waste within its state. CARE filed suit against EPA on January 4, 2010. EPA had not yet replied to CARE's petition and in response, CARE filed an action in United States District Court of New Union under RCRA §7002(a)(2), 42 U.S.C. § 6972, seeking: "an injunction requiring EPA to act on that petition or, in the alternative judicial review of EPA's constructive denial of the petition and EPA's constructive determination that New Union's hazardous waste program meets the criteria for approval despite the alleged facts." CARE v. EPA, C.A. 400-2010 (12th Cir. 2010).

New Union filed an unopposed motion to intervene under Fed. R. Civ. P. 24, which the District Court granted. Id. at 1. The parties filed cross-motions for summary judgment. Id. at 1. CARE filed simultaneously with this complaint a petition for review with the Court of Appeals, C.A. No. 18-2010, seeking judicial review of EPA's constructive denial and determination on the same grounds. Id. at 2. New Union filed an unopposed motion to intervene in this case, which this Court has granted. On EPA's motion, the Court of Appeals stayed that proceeding, pending the outcome of this action. Id. at 2. On, September 29, 2010, the Twelfth Circuit ordered the parties to submit briefs addressing all seven issues on appeal. Id. at 2-3.

STATEMENT OF FACTS

The Resource Conservation and Recovery Act ("RCRA") gives EPA authority to control this country's hazardous waste from its creation to its ultimate destruction and the ability to license states to do the same. EPA granted a RCRA permit to the State of New Union in 1986.

(Rec. doc. 2, p.1) At that time, New Union's program included 1,200 treatment, storage and disposal facilities. (Rec. doc. 2, p.1; Rec. doc. 3, p.16)

In 2000, the State of New Union passed several amendments under the Environmental Regulatory Adjustment Act ("ERAA"). Two of these amendments are pertinent to the state's approved RCRA programs. The first of these relevant amendments transferred control of the state's Department of Environmental Protection ("DEP") to the Commissioner of the Railroad. (Red. Doc. 4 for 2000, pp. 103-105). The second pertinent amendment addressed the handling of a toxic pollutant, Pollutant X. (Rec. doc. 4 for 2000, pp. 105-107) The second pertinent amendment required all facilities within New Union that handle Pollutant X to submit a yearly plan for reduction of the chemical. Id. The second pertinent amendment also sought to prevent long term storage of Pollutant X within the state of New Union since the state lacks the ability to handle a spill or mishap involving the toxin. Id. Finally, the second pertinent amendment regulates the transport of Pollutant X through New Union. Id.

Citizen Advocates for Regulation and the Environment ("CARE") petitioned EPA to revoke the state's permit to operate the program. CARE v. EPA, Civ. 000138-2010 at 1. The group claimed that the changes under the ERAA made New Union's hazardous waste program incongruent with EPA's regulations and thus the program's permit should be revoked. Id. CARE also claims that New Union has withdrawn support for the DEP and its facilities, and that one hazardous waste was handled inconsistently with the federal RCRA program. Id.

SUMMARY OF THE ARGUMENT

This Court does not have proper jurisdiction to hear this case. However, even if it does EPA should prevail on the merits. The District Court properly exercised jurisdiction over this matter because EPA's act of granting permits to states like New Union is a rulemaking action.

Rulemaking actions, or "quasi-legislative" actions, are subject to the jurisdiction of district courts under 42 U.S.C. § 6972 (1976). The act of granting a permit to New Union was quasi-legislative, because it is broad in scope, applies uniformly to all affected parties, and is prospective in nature. The district court could not properly exercise federal question jurisdiction over this case because there is no substantial or disputed issue. Though CARE claims that the statute regarding EPA's response to citizens' suits is unduly vague, this ambiguity is addressed and amended by 42 U.S.C. § 6972.

Though the District Court had jurisdiction pursuant to 42 U.S.C. § 6972, this Court should not address the merits of the case because it is not ripe for review. EPA has not made any action which could be considered "final agency action" and has not unreasonably delayed to the point of its inaction becoming constructive action of any kind. EPA's ultimate decision may address CARE's concerns, thus mooting the issue completely. In the alternative, even if the Court deems EPA's inaction a constructive denial of CARE's petition, meaningful appellate review is impossible at this point due to the lack of any administrative record and should therefore be remanded without lifting the stay.

Additionally, the resources allotted to and performance implemented by New Union's RCRA program are sufficient for EPA's continued approval of New Union's state program. The State continues to meet all RCRA requirements, as it has done since 1986. However, if this Court finds that New Union's program is not meeting RCRA requirements, EPA retains the discretion to take action other than withdrawing approval. EPA should be allowed to finish the administrative process of determining whether a RCRA violation has occurred or alternatively, EPA should be allowed to partially withdraw approval of New Union's program. Finally, the New Union Environmental Regulatory Adjustment Act's ("ERAA") treatment of Pollutant X

does not violate the Commerce Clause because it does not unnecessarily burden interstate commerce and has a basis in human health and environmental protection.

For the foregoing reasons, this Court should maintain the stay in C.A. No. 18-2010 and should remand this case to the District Court to order EPA to initiate administrative proceedings.

ARGUMENT

I. STANDARD OF REVIEW

The District Court denied CARE's motion for summary judgment and granted New Union's motion for summary judgment. The entry of summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). This Court should apply the *de novo* standard of review to determine if the District Court properly granted summary judgment with respect to questions of law. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). Under a *de novo* standard, the Court is entitled to make its own findings of law, regardless of the legal holdings of the lower court. First Options of Chicago v. Kaplan, 514 U.S. 938, 947 (1995).

II. EPA'S GRANTING OF A RCRA PERMIT TO NEW UNION IS A RULEMAKING ACTION BECAUSE THE PROCEDURES USED ARE WIDESPREAD, PROSPECTIVE AND APPLY UNIFORMLY TO ALL STATES AND IS THEREFORE SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT UNDER RCRA § 7002 (a) (2).

EPA's decision to grant permits to states for the regulation of hazardous materials is a rulemaking function. 42 U.S.C. § 6972. A government agency's action may be qualified in one of two ways as either quasi-legislative rulemaking, or as quasi-judicial order issuing. While quasi-legislative rulemaking may be attacked through citizens' suits, quasi-judicial order issuing may not be challenged through a citizens' suit. 42 U.S.C. § 6974. Additionally, only suits attacking rulemaking actions are subject to the jurisdiction of federal court. 42 U.S.C. § 6974.

EPA's decision to grant permits to states for the regulation of hazardous materials is a rulemaking action and is thus subject to the jurisdiction of the District Court. The District Court erred by granting New Union summary judgment, dismissing this action for lack of jurisdiction.

Rules, as defined by the APA, tend to be broader in scope than orders. Specifically, 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). A rule is an action that is intended to have broad coverage, that is applied uniformly to all similarly situated parties, and that operates prospectively rather than retrospectively. Northwest Covenant Medical Center v. Fishman, 770 A.2d 233, 241 (N.J. 2001). Rules may also be highly particularized and yet still maintain their characterization as a rule. Id. at 242.

Conversely, orders are narrower in their scope than rules and are typically accompanied by a fact-finding process. The APA defines an order as a "whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." 5 U.S.C. § 551(6) (1946). The making of an order is considered "quasi-judicial" because it involves "fact finding, hearing of witnesses and evidence." Id. Additionally, orders "apply specifically to the litigants" and are not far reaching in effect. Id.

Six characteristics are generally considered by the court when determining whether agency action is an order or rulemaking. In Northwest, at 242, the court held that a decision regarding charitable funding by the Department of Health and Senior Services ("DHSS") was a rulemaking action. In that case, a group of hospitals brought suit after their petition for an increase in charitable funds was denied by the DHSS. The DHSS argued that the decision to grant funds to a particular hospital was an order, not a rule, but the court disagreed, holding it

was a rule and gave six characteristics of agency created rules. A rule (1) "is intended to have wide coverage, encompassing a large segment of the regulated or general public…"; (2) applies uniformly to all similarly situated parties; (3) is prospective in nature; (4) "prescribes a legal standard or directive that is not otherwise expressly provided by or obviously inferable from the enabling statutory authorization,"; (5) "reflects an administrative policy" that was either not specifically expressed by "any official and explicit agency determination, adjudication or rule" or constitutes a change from a previous agency position on the same topic; and (6) "reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy." Id., at 135-36.

The Northwest court held that an action need not meet all six characteristics to qualify as rulemaking. Though the financing decision in the case only applied to small group of petitioning hospitals, the Court still found that "the underlying issue was the allocation of…charity care subsidies" to all other hospitals applying for charity subsidies from the DHSS. This made the decision not only prospective and far-reaching, but also made it applicable to all similarly situated parties.

The Northwest court next focused on the lack of quasi-judicial characteristics accompanying the DHSS's decision. There were no fact-finding procedures accompanying the decision, specifically, "there was no hearing officer, and there [was] no evidence that [the petitioning hospital] had an opportunity to have a hearing, or present witnesses or evidence…" Id., at 139. The breadth of this issue and its application to all similarly situated hospitals, coupled with the lack of fact-finding that is characteristic of quasi-judicial action, qualified the decision as rulemaking.

EPA's granting of permits, including its granting of a permit to New Union, meets three out of the six characteristics of rulemaking. First, the procedures used by EPA are widespread in their coverage because they apply to all states. Second, the procedures apply uniformly to all states. Every state that applies for a permit must follow the same procedures, and the EPA holds every state to the same standard as New Union. Finally, the procedures for granting permits to states are prospective in nature because they apply to all future actions of the given state.

The procedures used by EPA are widespread in their coverage because they apply to all states, not just to New Union. As was the case in Northwest, the standards by which New Union is judged apply on a larger scale, namely to all other states applying for permits, and thus the process must be viewed on a larger scale. The court in Northwest viewed the DHSS's charity subsidies program as a whole, rather than just focusing on the agency's interaction with the plaintiff hospital. Here, the Court should follow the standard set forth in Northwest and view EPA's permit-granting procedures on a large scale, rather than solely focusing on the agency's interaction with New Union. This expanded view point allows the permit-granting process to be analyzed as a rulemaking.

The actions of the EPA in granting permits to states like New Union not only comply with the characteristics of rulemaking, but are devoid of many of the characteristics of quasi-judicial issuance of orders. There was never a hearing officer or fact-finding process during which parties could present evidence and witnesses. Orders are considered "quasi-judicial" because they have many characteristics in common with the legal trial process. Without such features, an action cannot be considered an order and thus, EPA's action is a rulemaking.

III. THE DISTRICT COURT DOES NOT HAVE JURISDICTION TO HEAR THIS CASE UNDER 28 U.S.C. §1331 BECAUSE THERE IS NO SUBSTANTIAL AND DISPUTED FEDERAL ISSUE.

The District Court has jurisdiction to hear this case under 42 U.S.C. § 6972, but it does not have jurisdiction to hear this case under federal question jurisdiction, 28 U.S.C. § 1331. A case can only be brought in federal court under federal questions jurisdiction if there is a substantial and disputed federal question at issue. Giles v. Chicago Drum, Inc., 631 F.Supp.2d 981 (N.D. Ill. 2009). Here, there is no such issue.

CARE claims that there is a federal question at hand because the APA is unclear as to whether and how EPA must respond to CARE's petition. However, RCRA provides that all citizen-filed petitions shall be accepted by the agency and responded to in a timely manner. 42 U.S.C. 6974(a). Although the APA does not provide a rigid timeline for agency response to petitions, RCRA standards clarify this ambiguity. Additionally, when there are two competing laws, the more specific of the two is to be followed. Preiser v. Rodriguez, 411 U.S. 475 (1973).

Federal question jurisdiction was addressed in Giles, 631 F.Supp.2d 981, where residents of a town brought a tort suit against a company that was improperly handling environmentally hazardous materials. The plaintiff-citizens moved to remove the case to federal court, claiming there was a federal question because the defendants allegedly violated a federal law. Id. at 983. The court held that a mere reference to RCRA in a negligence claim against a private party is not enough to confer federal question jurisdiction, and noted that federal question jurisdiction requires there be a "substantial and disputed federal issue." Id. at 984.

The U.S. Supreme Court addressed the issue of statutory interpretation in Preiser, 411 U.S. at 483-485. In that case, prisoners sought early release from prison by participating in various programs and through general good behavior while serving time in a state prison. Id. All three prisoners lost their "good time" as punishment for various infractions. Id. The

prisoners filed suit under 42 U.S.C. § 1983, claiming the revocation of their earned "good time" was a violation of due process. Id.

Two statutes were at issue in Preiser. The first was the more specific federal habeas corpus statute. Habeas corpus proceedings are more rigorous in their requirements, offering federal relief to state prisoners only after all possible state remedies have been exhausted. Id. The plaintiff-prisoners though, sought to avoid these rigorous requirements by filing suit under 42 U.S.C. § 1983, which was more general in its requirements. Id. The plaintiffs argued that they should be granted federal relief under the more general statute because "their complaints plainly came within the literal terms of that statute" and there was "no justifiable reason to exclude them from the broad remedial protection provided by that law." Id. at 489. The Supreme Court disagreed, holding that while the prisoners may have qualified for federal relief under the more general 42 U.S.C. § 1983, the more specific habeas corpus statute was controlling. Id. at 490.

CARE's petition does not meet the requirements for jurisdiction under 28 U.S.C. §1331 because no federal question is at issue. CARE claims jurisdiction under the federal question statute, alleging the APA Rule is ambiguous as to whether EPA must respond to citizen-filed petitions such as theirs.

Though the APA is meant to provide guidelines for all government agencies, RCRA provides more detailed procedures for EPA to follow when dealing with hazardous chemicals such as Pollutant X. United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act at 30-31 (1947). These more specific statutes also provide an opportunity for citizens to file suits regarding their enforcement and require EPA to respond to petitions within a reasonable time.

The RCRA statute clarifies any ambiguities left by the APA. Since there is a statute more specific than the APA which is on point, the more specific statute - RCRA - must control. If RCRA had not provided such a clear answer to CARE's concerns, then federal question jurisdiction may have been possible in this case. However, because RCRA supersedes the APA with regard to specificity and directly addresses CARE's concern, there is no longer a "substantial and disputed" federal issue in this case and thus no basis for federal question jurisdiction.

IV. THIS COURT SHOULD NOT ADDRESS THE MERITS OF THE CASE BECAUSE CARE'S SUIT IS NOT YET RIPE FOR JUDICIAL CONSIDERATION AND DUE TO LACK OF ANY ADMINISTRATIVE RECORD, MEANINGFUL APPELLATE REVIEW WOULD BE IMPOSSIBLE AT THIS TIME.

The purpose of the doctrine of ripeness is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized" and its effects felt in a concrete way by the challenging parties. Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967). Courts note that "the doctrine's application remains a confused mix of principle and pragmatic judgment reflecting its mixture of article III case and controversy requirements with prudential restraints on the exercise of jurisdiction." Sierra Club v. Yeutter, 911 F.2d 1405, 1410 (10th Cir. 1990). The court in Yeutter expressed the difficulty in the application of the ripeness doctrine when it is an agency's inaction "rather than a more traditional agency action" that is being challenged by the petitioner. Yeutter at 1410. ("The difficulty in application is aggravated in this case because [petitioner] is challenging the [agency's] failure to act rather than a more traditional agency action.")

A. CARE's suit is not ripe for judicial review because the issues are not yet fit for judicial consideration and no hardship to the parties will result from the withholding of court consideration at this time.

CARE's suit is not yet ripe for judicial review and accordingly, this Court should not address the merits of the case at this point. In determining whether a case is ripe for judicial review, the court must evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs at 149. Courts look to four factors in making a ripeness determination: "(1) whether the issues in the case are purely legal; (2) whether the agency action involved is 'final agency action' within the meaning of the Administrative Procedure Act, *5 U.S.C. §704*; (3) whether the action has or will have a direct and immediate impact upon the plaintiff and (4) whether the resolution of the issues will promote effective enforcement and administration by the agency." HRI, Inc. v. EPA, 198 F.3d 1224, 1235-36 (10th Cir. 2000). See also, Ash Creek Mining Co. v. Lujan, 934 F.2d 240, 243 (10th Cir. 1991). None of these facts weigh strongly in favor of ripeness of the issues. This case is not ripe for judicial review and the Court should not address the merits of the case.

1. The issues are not purely legal.

The first factor to consider in making a ripeness determination is whether the issues in the case are purely legal. HRI at 1235-36. If, as here, they are not purely legal, this factor weighs in favor of a lack of judicial ripeness. In the case at hand, the issues, at best, involve mixed questions of law and fact. "Where disputed facts exist and the issue is not purely legal, greater caution is required prior to concluding that an issue is ripe for review." Yeutter at 1417. CARE seeks judicial review of EPA's alleged constructive denial of its petition and of EPA's alleged constructive determination that New Union's RCRA program meets the criteria for approval despite facts alleged in CARE's petition. CARE's original petition recited a litany of facts on

which the EPA has yet to make a determination. A factual dispute exists in this case. As such, the issues are not purely legal and this factor suggests a lack of judicial ripeness.

2. The agency action involved is not final agency action within the meaning of the Administrative Procedure Act.

The second of the four factors to be considered in making a ripeness determination is whether the agency action involved is "final agency action" within the meaning of the APA. HRI, at 1235-36. Here, EPA has made no final agency action within the meaning of the APA.

a. There has been no traditional "final action."

EPA has yet to take any traditional final action with regard to CARE's petition and therefore the "action" does not fit within the meaning of the APA. To the contrary, the challenged agency "action" - EPA's inaction on CARE's petition - is not yet "final." In Citizens for a Better Environment v. Costle, 617 F.2d 851, 854 (D.C. App. 1980), a citizens group sued EPA when EPA had not issued regulations identifying characteristics of hazardous waste by the eighteen month deadline imposed by Congress. There, the court held that the case was not ripe for judicial review because no final agency action had been taken. The court noted that EPA was "acting in good faith, wrestling with difficult questions" and that until EPA acted by issuing final regulations, the court would not review its decision. Id. at 854. The court also warned that courts should be "wary of injecting judicial pronouncements into the administrative process before final action has been taken." Id. at 854.

As in Citizens, here EPA has not issued a determination on CARE's petition and this "inaction" cannot be considered final agency action within the meaning of the APA. In HRI v. EPA, the court held that the underlying question of the case was not yet ripe for judicial review "because EPA has not completed its decision-making process with respect to that issue." Id. Similarly here, EPA has not yet "completed its decision-making process" with regard to CARE's

petition or the underlying factual issues raised by that petition. Therefore, the Court should find that the lack of finality to EPA's decision-making process renders the issue at hand unripe.

b. The EPA's inaction cannot be deemed "constructive" final action either.

As CARE has argued, courts have also found that in certain circumstances, agency inaction can become "final action" for purposes of a ripeness analysis. Coalition for Sustainable Resources v. U.S. Forest Service, 259 F.3d 1244, 1251 (2001). In the absence of a statutory deadline for action, inaction can become "final agency action" in three situations: "First, the agency might affirmatively reject a proposed course of action . . .. Second, the agency might unreasonably delay in responding to the proposal . . . Third, the agency might delay in responding to the proposal beyond the time in which action could be effective." Id. None of those situations is present here. By alleging that EPA's outward inaction on CARE's petition is equivalent to a "constructive denial" of that petition, CARE seeks to entangle this Court in an administrative decision that has yet to occur. This Court must not allow itself to fall prey to CARE's scheme by deeming EPA's inaction final or constructive action of any kind.

If an agency affirmatively rejects a proposed course of action, this may be deemed final agency action. Id. If an agency "explicitly determines after review" not to change a rule this "inaction" in most situation, would be considered final action. NRDC v. Adm'r, EPA, 902 F.2d 962, 983 (D.C. Cir. 1990) (opinion of Wald, C.J.). Agency inaction might also be final if an agency has completed a rulemaking and there is "some clear indication that the disputed issue was considered during the rulemaking procedure." NRDC, at 989. There is no indication that EPA has made any determination "after review" of the facts alleged in CARE's petition, nor has EPA completed a rulemaking procedure while considering CARE's petition. EPA has not affirmatively rejected CARE's proposed withdrawal of New Union approval.

The second situation in which agency inaction can become final action is when an agency unreasonably delays in responding to a proposal. Coalition for Sustainable Resources at 1251. Furthermore, "there are many factors that result in delay, and a court is generally ill-suited to review the order in which an agency conducts its business." Environmental Defense Fund Inc. v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970).

In Coalition for Sustainable Resources v. U.S. Forest Service, 259 F.3d at 1252 (2001), the United States Forest Service was working collaboratively with the Department of the Interior making forest-plan revisions and had not yet adopted or rejected a plan proposed by a citizens' group. The court held that given the complexity of the issues involved and the benefits of a coordinated approach, the Forest Services was not unreasonably delaying its decision whether to implement the technique proposed by the citizens' group. Id. EPA must work collaboratively with New Union's DEP to gather the information necessary to responsibly and fully consider the merits of CARE's petition.

In Beyond Pesticides v. Whitman, 294 F.2d 1 (D.C. App. 2003), the court rejected petitioners' unreasonable delay claim and held that the case was not ripe for judicial review because the inaction involved was not tantamount to final agency action. In that case, EPA began a review of the pesticide in question in 1997 and completed a new draft preliminary risk assessment of the pesticide in 2002. Id. The court found that while the process was "undoubtedly taking longer than plaintiffs would prefer" the court had "no basis to find that EPA is either ignoring or intentionally prolonging the process." Id. at 8-9. The court also noted that in light of the fact that EPA had been directed by Congress to perform over 600 re-registration reviews of various pesticides, the delay was not unreasonable and administrative inaction did not have "precisely the same impact on the rights of the parties as a denial of relief." Id. at 9.

In the present case, less than one year elapsed from the date CARE served a petition on the EPA requesting that EPA commence proceedings to withdraw its approval of New Union's waste regulatory program and the date in which CARE filed an action in New Union District Court alleging that EPA had constructively denied its petition - far less than the five years deemed reasonable for review in Beyond Pesticides. Over 900 TSDs have permits in New Union, over 50 new facilities or permitted facilities requested amended permits in 2009, and 125 RCRA permits were issued by New Union in 2009. (Rec. Doc. 4 for 2009, pp.19-20*)* The issues involved are complex and the type of investigation by the EPA necessary for a fair determination to be made on the merits of CARE's petition will take time - unfortunately, more time than CARE would prefer. The fact that EPA has not formally responded to CARE's petition does not immediately lead to the conclusion that EPA is not acting in good faith or wrestling with difficult and complex issues. See Citizens for a Better Environment v. Costle, 617 F.2d 851, 854 (D.C. App. 1980). Nor does a slight delay immediately indicate that EPA is "ignoring or intentionally prolonging" the administrative process. Beyond Pesticides, at 8-9.

The third situation in which inaction can become final action is if the agency delays in responding beyond the time in which action may be effective. Coalition for Sustainable Resources, at 1251. Once EPA has made a decision the opportunity for judicial review will exist. EPA has not delayed in responding to CARE's petition beyond the time in which action could be effective. EPA has had less than one year to coordinate a review with New Union's RCRA program and to gather the facts necessary to make a fair and proper determination on CARE's petition. EPA's alleged "delay" has not affected any of CARE's rights to file for a review of EPA's ultimate decision. Furthermore, EPA's decision, once made, may address CARE's concerns, at which point even CARE would likely agree that action could be effective.

In Coalition for Sustainable Resources v. U.S. Forest Service, 250 F.3d at 1252 (10th Cir. 2001), the court held that even though the species a citizens' group sought to protect faced were "in danger of extinction," the agency had not delayed in responding to the petition beyond the time in which action could be effective. Id. at 1252.

Here, even if EPA were to find that New Union's RCRA program was operating ineffectively and New Union to be facing "a dire situation" - a finding whose likelihood is uncertain at this time - action at that point could still be effective. This Court must find that EPA has taken no traditional final action, nor can EPA's inaction be deemed constructive final action, and therefore, this factor too, weighs in favor of a lack of judicial ripeness.

3. There is little immediate impact from the EPA's inaction.

The third factor to consider in making a ripeness determination is whether the action has or will have a direct and immediate impact upon the plaintiff. HRI, Inc. v. EPA, 198 F.3d 1224, 1235-36 (10th Cir. 2000). CARE has failed to show that there is an immediate impact from EPA's inaction. The plaintiff bears the burden of proving evidence to establish that the issues are ripe. Coalition for Sustainable Resources v. U.S. Forest Service, 259 F.3d at 1249 (10th Cir. 2001). At best, the immediate impact is uncertain. As the court in Coalition stated, "given the lack of finality and the factual issues implicated the possibility . . . is not enough to make this case fit for immediate judicial resolution." Id. at 1252. Until EPA can further investigate the facts alleged in CARE's petition, the impact of EPA's inaction remains uncertain at best. Until then, this factor weighs in favor of lack of judicial ripeness.

4. Resolution of these issues by the court will not promote effective administration.

The fourth factor to consider in making a ripeness determination is whether a resolution of the issues will promote effective administration. HRI, Inc. v. EPA, 198 F.3d 1224, 1235-36

(10th Cir. 2000). A court resolving or addressing the merits of this case at the present time would not promote efficiency or effective administration. To the contrary, judicial involvement at this stage might actually impede the efforts of EPA and New Union in making a determination on CARE's petition. EPA and New Union's DEP, with their specialized expertise, "should be allowed a first chance to balance the competing interests at stake and choose a course of action." Coalition at 1253. As the court noted in Yeutter, 911 F.2d at 1414, "the danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that the courts are the most appropriate body to police this aspect of their performance." Furthermore, courts do not sit as "monitors of the wisdom and soundness of Executive action," Laird v. Tatum, 408 U.S. 1, 15 (1972), nor may the courts substitute their "judgment for that of the agency." Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

Since EPA has not yet investigated the facts alleged in CARE's petition to the extent of being able to issue a determination, no administrative record has been made, and judicial involvement at this point would be ineffective and inefficient. In fact, a resolution of the merits at this time might actually impede rather than promote efficient administration of RCRA. Once a final decision on CARE's petition has been made, that final decision can be "reviewed by the courts more effectively and efficiently." See Coalition, 259 F.3d 1244. Until EPA has been able to fully investigate the facts and render a final decision on CARE's petition, this Court should not address the merits of this case. See Sierra Club v. Nuclear Regulatory Comm'n, 825 F.2d 1356, 1362 (9th Cir. 1987). This factor weighs in favor of a lack of judicial ripeness.

5. No hardship to CARE will result from the withholding of court consideration at this time.

If hardship to the parties will result from the withholding of court consideration, then this factor may weigh in favor of ripeness. Such is not the case here. EPA has not yet made a

decision on CARE's petition. EPA's decision, once made may very well address CARE's concerns, thus mooting the issue. See Citizens for a Better Environment, at 854. If EPA's decision is not satisfactory to CARE, ample opportunity will exist for review of that decision. See Citizens for a Better Environment at 854. Once a final decision has been made by EPA, exclusive jurisdiction will lie with the court to hear a "petition for review of action of the Administrator." 42 U.SC. § 6976. None of CARE's rights to seek judicial review of EPA's decision, once issued, will be affected nor will any hardship to CARE result from the court exercising judicial restraint at this time.

The issues presented are not fit for judicial consideration and no hardship to the parties will result from the withholding of court consideration at this time. CARE's suit is not yet ripe for judicial review and accordingly, this Court should not address the merits of the case.

B. Even if EPA's inaction on CARE's petition was to be deemed a "constructive denial" of that petition, meaningful appellate review by the Court of Appeals would be impossible at this point because of the lack of any administrative record.

Even if EPA's inaction was deemed a "constructive denial" of CARE's petition, due to the lack of any administrative record, meaningful appellate review by this court would be impossible. For this reason, the court should not lift the stay in C.A. 18-2010 and should instead remand to the District Court. The District Court may then order EPA to begin proceedings and to make a determination on CARE's petition. At that point, if CARE is not satisfied with EPA's determination, CARE can then properly appeal to the District Court of Appeals in D.C. for judicial review of that decision. Then and only then will this court have proper jurisdiction to judicially review EPA's decision. At this time, no final determination - constructive or otherwise - has been made on CARE's petition and jurisdiction lies with the district court to order EPA to act if it chooses - but jurisdiction does not rest with this Court at this time.

Petitions for termination or revocation of RCRA permits may be filed with the EPA by any interested person. 40 C.F.R. §124.55(a). If the Regional Administrator of the EPA denies a request, that denial may be appealed to the Environmental Appeals Board (EAB) under *40* C.F.R. §124.5(b). If an interested person is still not satisfied with the final permit decision of the Environmental Appeals Board, those EAB decisions are generally reviewable in the Court of Appeals and are based on the administrative record before the Agency. See generally Rhode Island v. EPA, 378 F.3d 19 (1st Cir. 2004).

In Sierra Club v. EPA, 992 F.2d 337, 347 (D.C. Cir. 1993), the court held that "because the Agency itself acknowledges that the rule under review does not represent final regulation . . . an action to enforce the Agency's timely compliance with [RCRA § 4010(c)] must be brought in district court."

Similarly, here, EPA has not made a final determination on CARE's petition. Nor has EPA's alleged delay rendered its inaction a constructive action of any kind. There has been no final action for the court to review, thus CARE's action "must be brought in district court." Id.

Furthermore, even if this Court were to hold that EPA's inaction should be considered "final action," meaningful appellate review would be impossible due to the absence of any administrative record. In Environmental Defense Fund v. Hardin, 428 F.2d at 1099 (D.C. Cir. 1970), the court found that Department of Agriculture's inaction was tantamount to a final determination but that "Nevertheless, meaningful appellate review . . . [was] impossible in the absence of any record of administrative action." The Environmental Defense Fund court remanded the case to the Secretary of the Department of Agriculture "for a fresh determination on the question . . . or for a statement of reasons for his silent but effectual refusal" and permitted the Secretary to provide them with the record necessary for review. Id., at 1100. In the present

case, meaningful appellate review is also impossible due to the lack of administrative record. If the Court takes action at all, it should remand to the District Court to order EPA to initiate proceedings under RCRA § 3006(e) and § 7004. If CARE is still dissatisfied with EPA's decision after the investigation and administrative proceedings are complete, CARE can then appeal that final agency action. Only then will the Court of Appeals have the administrative record necessary for "meaningful appellate review" of the EPA's decision. Id. at 1099.

No final or "constructive final" agency action have yet been taken by EPA, so proper jurisdiction lies with the district court. This Court must remand to the court below and order EPA to initiate proceedings and develop an administrative record.

V. NEW UNION'S RESOURCES AND PERFORMANCE ARE SUFFICIENT FOR EPA'S CONTINUED APPROVAL OF NEW UNION'S PROGRAM BECAUSE THE STATE PROGRAM IS MEETING ALL RCRA REQUIREMENTS.

"Under [RCRA], 42 U.S.C.S. § 6901 et seq., States can apply to [EPA] for authorization to administer and enforce their own hazardous waste programs after they promulgate regulations consistent with RCRA's requirements. 42 U.S.C.S. § 6926(b) (1976). If authorization is granted, the state is authorized to carry out such program in lieu of the federal program and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste. 42 U.S.C.S. § 6926(b). United States v. Power Eng'g Co., 125 F. Supp. 2d 1050, 1056 (Dist. Col. 2000). "Any action taken by a State under a hazardous waste program authorized under []RCRA has the same force and effect as action taken by [EPA]." Power Eng'g Co., at 1056, citing, 42 U.S.C.S. § 6926(d).

Once authorization is granted by EPA to a state to administer and enforce a hazardous waste program under the RCRA, 42 U.S.C.S. §§ 6901-6992, it cannot be rescinded unless EPA finds that (1) the state program is not equivalent to the federal program, (2) the state program is not consistent with federal or state programs in other states, or (3) the state program is failing to

provide adequate enforcement of compliance in accordance with the requirements of federal law. 42 U.S.C.S. § 6926(b)(1-3).

A. New Union's resources and performance are sufficient for EPA's continued approval of New Union's program.

New Union has dedicated adequate resources and its performance is sufficient for EPA's continued approval of New Union's hazardous waste program. EPA's original finding that New Union's hazardous waste program met all benchmarks has not changed since the state continues to pass RCRA inspection. DEP's program is equivalent to the federal program, consistent with other state authorized programs and provides adequate enforcement mechanisms.

1. DEP's program is equivalent to the federal program.

New Union's DEP program is equivalent to the federal program. RCRA grants EPA the power to inspect and regulate the enforcement of hazard waste management. The equivalency of the programs can be seen in the paralleled treatment of waste and inspection of permit programs.

EPA sets out rigorous standards for how to transport hazardous waste. RCRA requires EPA to promulgate standards for the handling of hazardous waste by transporters that are "necessary to protect human health and the environment." 42 U.S.C. § 6923(a). "As set forth in Section 3003(a), such standards must provide for identification of the hazardous waste being transported at both its 'source' and 'delivery points,' as well as for labeling of such waste, compliance with a manifest system to track hazardous waste, and transport to treatment, storage and disposal facilities (TSDFs) permitted under" RCRA. Hazardous Waste Management Units, 1-4 Law of Hazardous Waste § 4.01, citing: 33 U.S.C. § 1411 (1976). Likewise, DEP also sets out rigorous standards for the transportation of Pollutant X under the ERAA. DEP governs the transport of Pollutant X entering, leaving, and lingering in the state, sets out standards for storage for when Pollutant X is being held in New Union and mandates that a detailed plan of action

concerning the treatment of Pollutant X be gradually implemented and conveyed to EPA every year. (Rec. doc. 5 for 2000, pp. 105-107).

EPA may issue permit programs to private parties who seek to create, hold, and dispose of hazardous waste. 42 U.S.C. § 6927 (1976) authorizes EPA to conduct regular inspections of hazardous waste TSDs. 42 U.S.C. § 6927. New Union's DEP also maintains the power to request specific types of information and is authorized to conduct regular inspections of hazardous waste sites. (Rec. doc. 4 for 2009, p. 23) The state and federal programs not only work similarly, but work together simultaneously. While DEP performed 150 inspections of TSDs in 2008, EPA also performed 150 inspections of TSDs in 2008 in tandem with DEP. (Rec. at 5 for 2009, p. 22) The relationship demonstrates how equivalently the two work.

2. DEP's program is consistent with other state programs.

DEP's hazardous waste program is consistent with other state programs. States must establish a program that sufficiently meets EPA's standards in order to earn approval of a hazardous waste program that will work in lieu of EPA's hazardous waste disposal program at least as stringent as EPA's federal program. Hazardous Waste Treatment Council & Laidlaw Environ. Serv. Inc., v. EPA, 938 F.2d 1390, 1392 (D.C. App. 1991). The state program must be consistent with other hazardous waste programs such as federal and EPA-authorized state programs. Id. The state program must also have an enforcement mechanism to ensure that all parties within the state will follow RCRA. Id. New Union's program is equivalent.

New Union performs reasonable inspections on facilities. The majority of state statutes concerning the RCRA application to states require that the state's governmental environmental protection body inspect regularly or at reasonable times. New Union's Notice's enforcement provisions are equivalent to other state programs. New Union has met all of EPA's requirements

for authorization of the state's hazardous waste program. 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 hazardous waste program. (Rec. doc. 2, p.1) EPA found that the DEP could (1) issue permits in a timely fashion, (2) inspect RCRA regulated facilities at least every other year, and (3) take enforcement actions against all significant violations. (Rec. doc. 2, p. 1) Despite DEP lay-offs, its hazardous waste program continues to meet RCRA standards.

3. DEP's hazardous waste program provides an adequate enforcement provision.

New Union's DEP is providing adequate enforcement provisions in compliance with the requirements of federal law under 42 U.S.C.S. § 6926(b)(3). Once authorization is granted by EPA to a state to administer a hazardous waste program under the RCRA, 42 U.S.C.S. §§ 6901-6992, it can be rescinded if EPA finds that the state program is failing to provide adequate enforcement in accordance with the requirements of § 6926(b)(3).

a. The RCRA amendment does not change the manner in which parties are criminally sanctioned in any substantive way.

The New Union DEP's hazardous waste program provides adequate enforcement provisions to compel actors within its jurisdiction to comply with RCRA regulations. Section 6928 covers the federal enforcement of RCRA against non-complying parties. Much discretion is left up to individual states as to how parties are to be sanctioned. Here, New Union has adequate enforcement provisions. In DEP's latest Annual Report to EPA in 2009 DEP adequately enforced RCRA requirements. DEP took six enforcement actions during 2008. (Rec. doc. 4 for 2009, p. 25) "Four [of those actions] were administrative orders requiring both compliance and the payment of penalties in amounts derived from EPA's penalty policy, and two were civil actions, requesting injunctions and the judicial assessment of penalties." Id. However, EPA and allied citizens took on an additional twelve actions, four being criminal and

eight being civil. Id. at 26. Four additional permit violations occurred that have not yet been dealt with. Id. at 24.

DEP ensured that every major infraction on RCRA in 2008 was enforced whether by itself, EPA or private allies. At the filing of this brief, investigation and enforcement were still ongoing concerning the remaining four major infractions on RCRA in 2008. New Union has been consistently meeting its requirements under RCRA and will continue to do so as it has just experienced a ten percent rise in staff positions. (Rec. doc. 4 for 2000, pp. 103-105)

However, if this Court determines that DEP was no longer able to properly enforce RCRA due to its inability to prosecute criminally, EPA would be able to operate in its place. While § 6926 authorizes state programs to operate in lieu of federal RCRA programs, the federal government retains both its criminal and civil enforcement powers under § 6928. § 6926 allows EPA to take action when a violation occurs. Power Eng'g Co., at 1232. EPA reserves the right to take enforcement action when it feels that a state has assessed inadequate penalties. 40 C.F.R. § 271.16(c) (2004). Here, the removal of criminal penalties from the jurisdiction's commission would not allow serious RCRA violators to escape criminal prosecution. EPA may still criminally prosecute serious offenders when necessary.

b. EPA retains the discretion to take action against New Union other than withdrawing approval.

New Union's resources and performance are sufficient for EPA's continued approval of New Union's program. However, even if DEP resources and performance were insufficient, EPA retains the discretion to determine whether to investigate and enforce a rule within its jurisdiction. "An agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831-32 (1985). "The agency is far better equipped than the courts to

deal with the many variables involved in the proper ordering of its priorities." Id. Here, CARE's suit is not ripe for adjudication as EPA has not been through the proper administrative process.

i. CARE's suit is not ripe for adjudication because it has not exhausted its administrative remedies.

EPA is not required to immediately withdraw its approval of a state hazardous waste program when the program has defaulted on a portion of its overall duties. EPA has a process, established by RCRA, for dealing with a state hazardous waste program that has defaulted on a portion of its duties. RCRA establishes a process that citizens' suits must adhere to when challenging EPA's handling of state hazardous waste programs. "Before withdrawing a state's authorization to administer a hazardous waste program, the EPA must hold a public hearing and allow the state a reasonable period of time to correct the perceived deficiency. 42 U.S.C.S. § 6926(e)." Harmon Indus. v. Browner, 191 F.3d 894 (8th Cir. 1999). CARE filed suit prematurely asking EPA to withdraw approval of New Union's hazardous waste program. Less than one year later, without providing EPA a reasonable period of time to reply to its detailed complaint concerning the state of the New Union DEP's state hazardous waste program, CARE filed suit in the United States District Court for the State of New Union. CARE's lawsuit was filed prematurely and is not yet ripe for adjudication.

EPA may take action to correct New Union's purported inadequacies other than withdrawing approval of the entire program. First, it is a well accepted rule of statutory construction that the specific governs over the general. CARE filed its lawsuit prematurely without first properly exhausting its administrative remedies as stated under RCRA. The temporary failure of New Union's Railroad Commission to properly regulate hazardous waste facilities would not require EPA to withdraw its approval of the entire program, but rather to begin an administrative process to correct the state's program. Only after the state failed to

correct the problem after the appropriate window of time and EPA failed to enforce the order would CARE be able to file suit in federal court. Since CARE has not gone through the proper administrative proceedings, this suit is not yet ripe and must be stayed until CARE's administrative remedies have been exhausted.

ii. EPA should be allowed to execute its administrative process.

EPA should be allowed to carry out its administrative process before CARE is able to file suit concerning RCRA issues in federal court. 42 U.S.C. § 6926 (e) states,

> Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

Here, EPA has not been given the opportunity to take the appropriate RCRA action described in (C.F.R.) §271.22(a) and must be given the opportunity to do so before moving forward. EPA must be permitted to retain the authority to take un-coerced action in this matter.

EPA is still proceeding with the administrative process. RCRA is silent on the exact time EPA has to respond to citizens suits. If it is determined that Congress has not spoken to the precise question at issue, we "must assume that Congress implicitly delegated to the agency the power to make policy choices that [represent] a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." Ohio v. Dep't of the Interior, 880 F.2d 432, 441 (D.C. Cir. 1989) (quoting Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 844-45 (1984). In Shell Oil Comp. v. EPA, 950 F.2d 741 (D.C. Cir. 1990), the court held that the EPA should be given discretion in interpreting its own RCRA requirements as long as it provides adequate notice and opportunity for comment. Here, EPA is seeking to carry out its obligations under RCRA which includes giving notice to both parties to argue the issues. For these reasons,

EPA should be allowed to carry out the proper administrative process under RCRA to ensure that all parties are treated equally and fairly, judicial economy and that Congress' intent is followed under RCRA.

VI. DEP'S ALLEGED AND TEMPORARY FAILURE TO REGULATE TSD'S COULD WARRANT PARTIAL REVOCATION OF ITS PROGRAM RATHER THAN WITHDRAWAL OF ITS ENTIRE PROGRAM BECAUSE IT IS STILL MEETING ALL OTHER RCRA REQUIREMENTS.

The failure of one facet of New Union's hazardous waste program does not require EPA to withdraw approval from the entire program. RCRA allows EPA to approve state programs that cover only some of the federal requirements. Nancy McLaughlin, 29 Harv. Envtl. L. Rev. 1 at 84 (2005). If this Court determines that New Union's waste program is inadequate, EPA could grant New Union's DEP a partially-approved program that met only certain requirements.

An avenue exists for granting partially-approved state hazardous waste programs under RCRA. EPA authorizes state hazardous waste programs under § 6926(b). However, § 6926(c)(4) provides that states that meet all requirements of the originally-passed and un-amended 1976 version of RCRA, but that fall short of meeting all of the 1984 RCRA amended requirements may be partially approved by EPA. The pertinent section states:

> In the case of a state permit program for any State which is authorized . . . .
> [1] until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and
> [2] such program amendments receive interim or final authorization, **the Administrator shall have the authority . . . . to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984**. The Administrator shall coordinate with States the procedures for issuing such permits.

42 U.S.C. § 6926(c)(4). When a state hazardous waste program is not meeting RCRA requirements, EPA may intercede and issue or deny permits to parties within the state in lieu of the state doing so, while leaving the overall RCRA sanctioned state program intact. Id. This procedure is overseen by the EPA Administrator and is allowed as long as the state works with

the EPA to congruently administer and license permits under the amendments. Id. This § 6926(c)(4) procedure relegating, EPA to administer all parts of the program that (1) fall under the 1984 Amendments and (2) are not meeting those requirements would continue until the state program was prepared and equipped to resume control of its entire program.

EPA may partially approve the New Union DEP's hazardous waste program. The 1984 amendments to RCRA titled the Hazardous and Solid Waste Amendments of 1984 deal more specifically with toxic chemicals such as Pollutant X. If this Court finds that New Union has not been properly handling Pollutant X under RCRA then EPA has the authority under § 6926(c)(4), to partially withdraw approval of the state program's handling of Pollutant X or all hazardous wastes governed by the 1984 Amendments and to begin administering compliance with those amendments itself. EPA could then continue approval of the overall RCRA-authorized program while overtaking the handling of Pollutant X specifically under § 6926(c)(4).

Partial approval would better serve the interests of all parties than a court-ordered revocation of the state's entire RCRA program. In this instance, DEP's program should be given partial approval to focus on the licensing and revocation of state programs, rather than on the prevention of Pollutant X pollution and related consequences. DEP would be better suited to take corrective action against parties not meeting RCRA requirements. If this Court found that New Union was improperly handling Pollutant X under RCRA then EPA would have the authority to partially withdraw approval of the state program's handling of Pollutant X or all hazardous wastes governed by the 1984 Amendments. 42 U.S.C. § 6926(c)(4). An EPA Administrator would then be free to manage and supervise the handling of Pollutant X itself, while allowing New Union to continue its hazardous waste program.

VII. ERAA'S TREATMENT OF POLLUTANT X DOES NOT VIOLATE THE COMMERCE CLAUSE BECAUSE IT DOES NOT UNNECESSARILY BURDEN COMMERCE.

New Union's hazardous waste program is valid under the Commerce Clause and should remain as the State's avenue of properly disposing of hazardous waste. A primary requirement for EPA-authorized state hazardous waste programs to meet is that the program cannot be inconsistent with either federal or state programs. Hazardous Waste, 938 F.2d at 1392. A state program must be consistent with the federal and other state programs to remain valid under the Commerce Clause. Conversely,

> Any aspect of the state program which unreasonably restricts, impedes, or operates as a ban on the free movement across the state border of hazardous wastes from or to other states for treatment, storage, or disposal at facilities authorized to operate under the federal or an approved state program shall be deemed inconsistent.

Id., at 1392. However, if the program "has a basis in human health or environmental protection" it will be consistent with the Commerce Clause. Id., at 1393. In order for a state hazardous waste program to be deemed inconsistent and thus infringe upon the Commerce Clause of the United States Constitution, it must (1) prohibit the free movement of hazardous wastes from other states *and* (2) have no basis in the protection of human health. Id., at 1392-93. Here, no provisions of ERAA unreasonably restrict, impede, or operate as a ban on the free movement of hazardous waste over state boundaries and regardless, the state's program has a basis in human health and environmental protection.

A. The ERAA does not unreasonably restrict, impede or operate as a ban on the free movement of hazardous waste over state boundaries.

An "incidental [burden] on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Where a state statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will

be upheld unless the burden imposed on" commerce is excessive in relation to the benefits obtained. Id. The slight burden on commerce will be tolerated when a local purpose exists that cannot be as alternatively achieved through other means. Id. A restriction in state law that has a basis in human health or environmental protection is consistent with other programs and the Commerce Clause. Hazardous Waste, at 1393.

Section 1 of ERAA is consistent with federal hazardous waste programs and is therefore consistent under the Commerce Clause. Section 1 of ERAA states that every facility within New Union's jurisdiction that is generating Pollutant X must submit within ninety days, a plan to minimize the production of Pollutant X. Facilities must also submit to the DEP a report stating the reduction in generation of Pollutant X during the previous year coupled with a plan for the additional reduction of Pollutant X in the upcoming year. (Rec. doc. 4 for 2000, pp. 105-107) Section 1 exclusively regulates the manner in which parties report the generation and plan to reduce Pollutant X within New Union's boundaries without interfering in inter-state commerce or mandating the reduction of Pollutant X. (Rec. doc. 4 for 2000, pp. 105-107) This is proper as New Union may impose a more stringent environmental standard than EPA requires. § 6929.

Section 3 of ERAA is consistent with the federal hazardous waste program and is therefore consistent under the Commerce Clause. Section 3 of ERAA states that persons may only transport Pollutant X through and out of the state to a designed and permitted facility if the transport "shall be 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. 105-107). Section 3 equally governs both the exiting of the state by in-state parties as well as the entrance to the state through out-of-state parties and is therefore consistent under the Commerce Clause.

Section 2 of ERAA is consistent the federal hazardous waste program and is therefore consistent under the Commerce Clause. Section 2 of ERAA states that DEP may not issue permits that allow for the treatment, storage or disposal of Pollutant X, unless it is for the temporary storage of Pollutant X while awaiting transportation to a permitted and designed facility located outside of the state. The storage cannot exceed 120 days. (Rec. doc. 4 for 2000, pp. 105-107). While the consistency of Section 2 may be questioned on its face, the overall purpose of ERAA vindicates any potential restriction on commerce as New Union's legislature passed it in order to protect the health of New Union's citizens as well as New Union's environment.

B. DEP's program has a basis in human health and environmental protection.

ERAA does not unreasonably restrict the free movement of hazardous wastes across state borders; however, if this Court finds restrictions on inter-state commerce, the regulations would be permissible as long as they work to ensure the human health and environmental protection of New Union. A state law may prohibit the treatment, storage or disposal of hazardous waste if it is motivated by a basis in human health or environmental protection. Hazardous Waste Treatment, at 1392.

A state can regulate hazardous waste through its state as long as there is a legitimate local purpose and it does not unevenly regulate out-of-state parties. In City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978), the Court held that the New Jersey legislature could not ban the importation of all waste into its state's landfills. The Court noted that New Jersey was banning all out-of-state waste and garbage from entering the state while putting absolutely no restrictions on New Jersey-produced waste. Id.

Here, New Union is regulating both in-state and out-of-state parties equally and consistently, seeking to protect the health and environment of its citizens. Pollutant X is one of the "most potent and toxic chemicals to public health and the environment." (Rec. doc. 4 for 2000, pp. 105-107) New Union has no disposal facilities that are capable of "preventing exposure of persons or the environment to releases of Pollutant X." (Rec. doc. 4 for 2000, pp. 105-107) The ERAA recognizes the dangers of Pollutant X and DEP's inability to adequately protect its citizens from it and therefore bans its long-term storage in the interest of human health and environmental protection. (Rec. doc. 4 for 2000, pp. 105-107)

CONCLUSION

For the foregoing reasons, this Court should maintain the stay on C.A. No. 18-2010 and should remand to the District Court to order the EPA to initiate administrative proceedings.