Team No. 41

CA. No. 18-2010

CA. No. 400-2010

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

v.

LISA JACKSON, ADMINISTRATOR,
United States Environmental Protection Agency,
Respondent-Appellee-Cross-Appellant

v.

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

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

Brief for LISA JACKSON, ADMINISTRATOR,
United States Environmental Protection Agency, Respondent-Appellee-Cross-Appellant

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JURISDICTIONAL STATEMENT

Federal district courts have original jurisdiction to hear claims "arising under the Constitution, laws, or treaties of the United States," including the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq*. 28 U.S.C. § 1350 (2006). The Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from final decisions of the District Court for the District of New Union. 28 U.S.C. 1291, 1294(1) (2006). The Court of Appeals for the Twelfth Circuit has jurisdiction to review EPA action "in granting, denying, or withdrawing authorization or interim authorization" of state hazardous waste programs within the district of New Union. 42 U.S.C § 6976 (b)(2).

STATEMENT OF THE ISSUES

I. Whether the court below erred in dismissing CARE's claim based on a finding that RCRA § 7002(a)(2) does not provide jurisdiction for district courts to order the EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004.

II. Whether the court below was correct in dismissing CARE's claim based on a finding that 28 U.S.C. § 1331 does not provide jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to 5 U.S.C. § 553(e).

III. Whether EPA's failure to act on CARE's petition requesting EPA to initiate proceedings to consider withdrawal of New Union's hazardous waste program constitutes a constructive denial of that petition and a constructive determination that New Union's program continued to meet RCRA's criteria for program approval, thus allowing for judicial review under RCRA § 7006(b).

IV. Whether this Court should lift the stay in C.A. No. 18-2010 and proceed with review of EPA's constructive actions, as argued by CARE, or whether this Court should remand the case to the lower court to order EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program.

V. Whether the EPA must withdraw its approval of New Union's program based on CARE's assertion that its resources and performance fail to meet RCRA's approval criteria.

VI. Whether the EPA must withdraw its approval of New Union's program based on CARE's assertion that the New Union 2000 Environmental Regulatory Adjustment Act effectively withdraws railroad hazardous waste facilities from regulation.

VII. Whether the EPA must withdraw its approval of New Union's program based on CARE's assertion that the New Union 2000 Environmental Regulatory Adjustment Act renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, and in violation of the Commerce Clause.

STATEMENT OF THE CASE

On January 5, 2009, the Citizen Advocates for Regulation and the Environment ("CARE") filed a petition with the U.S. Environmental Protection Agency ("EPA") requesting that the EPA commence proceedings to withdraw its approval of New Union's hazardous waste regulatory program. (R. at 4). The EPA took no action on that petition and on January 4, 2010, CARE filed a complaint in the United States District Court for the District of New Union. (R. at 4). CARE's complaint sought an injunction requiring the EPA to act on its petition, or, in the alternative, judicial review of the EPA's constructive denial of the petition, and the EPA's constructive determination that New Union's hazardous waste program meets the criteria for program approval. (R. at 4). New Union intervened in the suit under FRCP Rule 24. (R. at 4). The parties filed for summary judgment in the District Court. (R. at 4). CARE simultaneously filed a petition for review with the Court of Appeals seeking judicial review on the same grounds, and New Union filed an unopposed motion to intervene in that case. (R. at 5). The proceeding under the Court of Appeals is stayed, pending the outcome of this action. (R. at 5).

On June 2, 2010, the District Court granted New Union's motion for summary judgment and CARE's action was dismissed. (R. at 9). The court held that: (1) EPA's approval or disapproval of New Union's program is not subject to petition and CARE's cause of action

compelling EPA to act on the petition is therefore dismissed for failure to state a claim; (2) CARE's petition is time-barred and it would therefore be futile for the district court to assert jurisdiction; (3) The Administrative Procedure Act does not govern EPA's response to permits under RCRA, and CARE therefore can not file an action under the Act; and (4) under 42 U.S.C. § 6926(b), the Court of Appeals has jurisdiction for review of all EPA actions regarding state program approval. (R. at 6-8).

Following the District Court's decision, CARE and the EPA each filed a notice of appeal with this Court. (R. at 1). The EPA appeals the district court's holding that it lacks jurisdiction under 42 U.S.C. § 6976(b). (R. at 1). The EPA takes issue with CARE's petition to lift its earlier stay and consolidate the earlier filed action with the current claim. (R. at 2). The EPA also takes issue with CARE's claim that EPA's inaction is a "constructive" determination of New Union's continued program approval, as well as CARE's arguments that New Union's hazardous waste program no longer meets RCRA approval criteria and must be withdrawn. (R. at 2). The EPA requests that this Court reverse the district court's finding that it lacks jurisdiction over CARE's claims. (R. at 1). This Court granted review on September 29, 2010. (R. at 3).

STATEMENT OF THE FACTS

In 1986, EPA approved New Union's hazardous waste program to operate in lieu of the federal program pursuant to § 3006(b) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6926(b). (R. at 1). New Union's hazardous waste program is operated by the state agency DEP. (R. at 1). It is uncontested that when EPA originally approved New Union's program, it met all of RCRA's criteria for approval. New Union had the resources to fully administer the program, issue permits, and conduct biennial inspections of all facilities, taking immediate action against any significant DEP violation in accordance with RCRA

requirements. (Rec. doc. 2, 1). At the time of approval, there were 1,200 hazardous waste treatment, storage and disposal facilities ("TSDFs") requiring DEP permits and there were 50 full-time employees dedicated to implementing the program. (Rec. doc. 1 at 17, 73). Since 1986, state allocated resources to DEP have been gradually strained. Due to budget shortages beginning in 2000, the number of DEP's full-time employees decreased to 30, while the number of hazardous waste facilities increased to approximately 1,500. (Rec. doc. 4 for 2009, p. 50).

Despite economic limitations, DEP's program remains operational. DEP currently receives approximately 50 permit applications each year for new facilities and facility expansions, and is able to issue approximately 125 permits each year. (Rec. doc. 4 for 2009, p. 19). A temporary shortage of DEP employees led to a backlog of approximately 900 expired permits awaiting consideration, some of which have been expired for as long as 20 years. (R. doc. 4 for 2009 at 20). However, these expired permits are continued by operation of law until DEP makes final decisions on their applications. (R. doc. 4 for 2009 at 20). In response to this backlog, DEP prioritizes its permitting program by first issuing permits for new facilities and expansions, followed by permits which have been expired for 15 or more years, and lastly permits for facilities with "the greatest potential for harm to the public health or environment because of the volume or toxicity of hazardous waste handled." (R. doc. 4 for 2009 at 20). As a result of this policy, permits for all new facilities and expansions are issued in a timely manner and in full compliance with state program requirements, while the expired permits may take longer to address.

DEP is currently performing inspections on approximately 10 percent of TSDFs in the state each year. (Rec. doc. 4 for 2009, p. 22). New Union enlisted the EPA's help in conducting inspections. (*Id.* at 23). The EPA conducted inspections on approximately 10 percent of New

Union TSDFs in 2008 and anticipates inspecting the same amount of facilities in 2009. *Id.* New Union prioritizes the inspection of facilities with unreported and unpermitted releases, as well as facilities reporting violations posing the greatest potential for harm to the public health and the environment. In response to the 2008 inspections, DEP undertook six enforcement actions (Rec. doc. 4 for 2009, p. 25-26). In the same year, the EPA undertook six enforcement actions in the state, and environmental groups filed a total of six citizen suits. *Id*. Irrespective of enforcement actions, there remained many minor permit violations and several notable violations. *Id.* at 24.

In 2000, the New Union legislature passed the Environmental Regulatory Adjustment Act ("ERAA"), which, among other things, amended the Railroad Regulation Act ("RRA") to transfer "all standard setting, permitting, inspection, and enforcement authorities" for railroad hazardous waste facilities from the DEP to the New Union Railroad Commission (the "Commission"). (Rec. doc. 4 for 2000, pp. 103-105). The amendment to RRA also removed the Commission's authority to pursue criminal sanctions for permit violations. (Rec. doc. 4 for 2000, pp. 103-105).

The ERRA also set forth regulations pertaining to Pollutant X. New Union enacted this legislation because Pollutant X is "among the most potent and toxic chemicals to public health and the environment." (Rec. doc. 4 for 2000, pp. 105-107). In addition, the legislature was concerned that there are presently no treatment or disposal facilities ("TSDFs") in New Union capable of preventing exposure of persons or the environment to releases of Pollutant X. *Id.* The provision outright proscribes the treatment and disposal of Pollutant X, while imposing conditions for storage. *Id.* Under ERAA, permits for storage of Pollutant X are time limited to 120 days and available only to those awaiting transportation to a facility outside the state which is permitted and designed to treat or dispose of the Pollutant X. *Id.* New Union requires all

transport of Pollutant X through or out of the state to be conducted "as direct and as 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).

STANDARD OF REVIEW

Issues pertaining to jurisdiction are reviewed by courts de novo. *Natural Resources Defense Council v. EPA*, 542 F.3d 1235, 1241 (2008). A district court's granting of summary judgment is also reviewed de novo. *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1008 (9th Cir. 2006). Therefore, this court's jurisdiction to decide Petitioner and Respondent's jurisdictional claims and claims under RCRA must be reviewed de novo.

SUMMARY OF THE ARGUMENT

The district court had jurisdiction to order EPA action on CARE's petition pursuant to §7002(a)(2). Agency action on a § 7004(a) petition is a "non discretionary" duty and the lower court erred when it granted New Union's motion for summary judgment based on the conclusion that EPA's authorization of New Union's DEP was an order instead of a rule-making. However, the district court properly granted the motion for summary judgment in holding that it did not have federal question jurisdiction to order the EPA to act on CARE's petition based on the conclusion that CARE's petition did not meet the standard required under 28 U.S.C. §1311.

Conversely, RCRA § 7006(b) does not authorize judicial review by this court when there has been no agency action and the EPA's failure to act on CARE's petition requesting the withdrawal of a New Union's state authorized hazardous waste program is not an action, "constructive" or otherwise. Even if CARE were to convince this court that failure to act on such a petition was a "constructive determination" by the EPA, the petition is barred by a 90-day statute of limitations under § 7006(b). If this court finds the above arguments unpersuasive, this

court should not lift the stay on C.A. No. 18-2010, it should instead employ the doctrine of "primary jurisdiction" and remand this case to the lower court to order the EPA to initiate proceedings under RCRA §§ 3006(e) and 7004(a).

If this court proceeds on the merits of CARE's challenge, the claim should still fail. Nothing in RCRA indicates that the EPA must withdrawal authorization of New Union's hazardous waste program. DEP's resources and performance are sufficient for EPA's continued approval and the EPA's decision to withdrawal state authorization is discretionary. Even if the EPA concludes after an investigation that New Union's program is no longer consistent with the federal program, the EPA can take action other than withdrawing approval, by conducting inspections and bringing enforcement actions.

Additionally, the transfer of regulation of railroad hazardous waste facilities to the Commission does not require the EPA to withdraw its approval of New Union's program because federal regulations permit intrastate agency transfer of hazardous waste programs. Further, the ERAA provision pertaining to New Union's treatment of Pollutant X does not adversely affect the equivalency of the state program with the federal program because state programs can differ from the federal program as long as they fulfill the requirements set forth in the regulations and New Union's program still sufficiently complies. Similarly, the treatment of Pollutant X is still consistent with the federal or other approved state programs because it does not "unreasonably" restrict the pollutant's free movement as required by RCRA regulations. Lastly, the treatment of Pollutant X under ERAA does not violate the Commerce Clause because the burden on interstate commerce, if any, is slight, and far outweighed by the local benefit and public interest of preventing releases of Pollutant X. CARE's challenge should be dismissed.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO ORDER EPA TO ACT ON CARE'S PETITION PURSUANT TO § 7002(a)(2) BECAUSE AGENCY ACTION ON A PETITION IS A "NON DISCRETIONARY" DUTY UNDER § 7004(a), THUS THE LOWER COURT ERRED WHEN IT GRANTED NEW UNION'S MOTION FOR SUMMARY JUDGMENT

A. The District Court Has Jurisdiction to Order Administrator Action for Failure to Perform a "Non-Discretionary" Duty

RCRA § 7002(a)(2) allows for suits against the EPA for alleged failures to perform "any act or duty" under the chapter that is "not discretionary." 42 U.S.C. § 6972(a)(2). Further, the statute provides that the action may be brought in the district court where the alleged violation occurred or in the District Court of the District of Columbia. *Id.* CARE served a petition on the EPA requesting the withdrawal of New Union's hazardous waste program pursuant to RCRA § 7004(a). (R at 1). That section affords any person the opportunity to petition for "the promulgation, amendment, or repeal of any regulation under this chapter." 42 U.S.C. § 6974(a). Once a petition has been filed with the EPA, the section sets out certain "non discretionary" duties for the administrator. The pertinent section declares that the administrator "shall take action with respect to such petition and shall publish notice of such action in the Federal Register, together with the reasons therefore." *Id.*

This language expressly indicates a "non discretionary" duty on the part of the EPA to respond to CARE's petition. *See Nat'l Wildlife Fed'n v. Adamkus,* 936 F.Supp. 435, 440 (W.D.Mich.1996) (holding that EPA did have nondiscretionary duty to respond to petition to commence withdrawal proceedings under the Clean Air Act). Further, the word "shall" in § 7004 does not indicate that agency action is "discretionary." *See Scott v. City of Hammond*, 741 F. 2d 992 (7th Cir. 1984) (holding that the word "shall" can imply a "non discretionary duty" under the Federal Water Pollution Control Act §304(a)(2)(D)) (quoting *Sierra Club v. Thomas*, 828 F.2d

783, 790 (D.C.Cir.1987). Therefore, assuming the petition was properly filed under § 7004(a), the district court should have jurisdiction to order the EPA to take action on CARE's petition under § 7002(a)(2).

B. EPA's Approval of New Union's Program Was a Rule, Not an Order

The district court rejected the above argument by holding that authorization of New Haven's DEP was an order, not a rule-making, thus RCRA § 7004(a) could not apply to this case (R at 7). However, the court erred in this conclusion, as the decision to authorize New Union's DEP is clearly a rule-making under the Administrative Procedure Act ("APA"). The APA delineates when agency action is either a "rulemaking" or an "adjudication". 5 U.S.C. § 551. A rule refers to:

> the whole or a part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate, or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Id. § 551(4). Therefore, rulemaking is an agency's process for creating, amending, or repealing a rule. *Id.* On the other hand, an order "means the 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, but including licensing." *Id.* § 551(6).

EPA's initial approval of New Union's program in 1986 was a rulemaking. Although its approval of New Union's program was directed to this individual state, the regulations of hazardous waste are of general application. *See generally Londoner v. City of Denver*, 210 U.S. 373 (1908); *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 194 (1947). EPA treated this as an informal rulemaking by offering notice and comment opportunity to be

heard. Agencies are permitted to build policy incrementally as they see fit. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Therefore, EPA's action was a rulemaking and not an order, and the district court had jurisdiction to order EPA to act under RCRA §7002(a)(2) for the EPA's failure to act on a nondiscretionary duty to respond to petitions under §7004(a).

II. THE DISTRICT COURT PROPERLY DISMISSED CARE'S CLAIM WHERE 28 U.S.C. § 1331 DOES NOT PROVIDE JURISDICTION FOR DISTRICT COURTS TO ORDER EPA TO ACT ON CARE'S PETITION FOR REVOCATION OF NEW UNION'S HAZARDOUS WASTE PROGRAM, FILED UNDER 5 U.S.C. § 553(e)

The Administrative Procedure Act ("APA") requires federal agencies to give interested persons "the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). For cases arising under this provision, 28 U.S.C. § 1331 will apply and district courts will have original jurisdiction. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitutions, laws, or treaties of the United States"). However, APA § 553 does not apply to EPA's inaction on CARE's petition, and 28 U.S.C. §1311 is not implicated.

RCRA and the APA both govern rulemaking petitions. While APA § 553 covers rulemaking petitions pertaining to all federal agencies, RCRA § 7004 specifically covers rulemaking petitions under RCRA. 42 U.S.C. § 6974. Where two competing statutes address the same matter, the more specific statute will govern. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524. RCRA § 7004 is the specific authority for rulemaking petitions under RCRA, and therefore replaces APA § 553 for actions pertaining to RCRA. Consequently, APA § 553 does not apply to CARE's petition under RCRA.

Moreover, while APA § 553 governs rulemaking petitions, it does not govern orders. 5 U.S.C. § 553(e). A rulemaking is defined by the APA as "an agency statement of general or

particular applicability . . . designed to implement, interpret, or prescribe law or policy . . .” 5 U.S.C. § 551(4). An order is an adjudicatory action applying fact to law “in specific situations involving specific parties.” (R. at 6) (citing 78 Harv. L. Rev. 921, 924 (1965)). The district court held that the EPA’s approval of New Union’s hazardous waste program was an order, not a rulemaking. (R. at 7). Therefore, CARE’s petition for revocation of New Union’s hazardous waste program does not fall under APA § 553.

Lastly, APA § 553(e) does not require federal agencies to act on petitions; it merely requires agencies to give interested persons the “right to petition a . . . rule.” 5 U.S.C. § 553(e). The lack of such a requirement is apparent when § 553 is compared to the corresponding provision in RCRA § 7004. RCRA gives interested persons the right to petition while also requiring the EPA to take timely actions on those petitions. 42 U.S.C. § 6974. This explicit requirement in RCRA underscores the clear lack of such a requirement in APA § 553. Therefore, because the APA does not require federal agencies to act on rulemaking petitions, CARE does not have a valid claim under APA § 553.

APA § 553 is clearly inapplicable to the EPA’s approval of New Union’s hazardous waste program. CARE’s claim therefore does not fall under the APA, and 28 U.S.C. § 1311 does not provide jurisdiction for the district court to order EPA to act on CARE’s petition.

III. THE EPA’S FAILURE TO ACT ON CARE’S PETITION THAT REQUESTS THE WITHDRAWAL OF A STATE AUTHORIZED HAZARDOUS WASTE PROGRAM IS NOT ACTION OR A “CONSTRUCTIVE DETERMINATION” AND THE PETITION WAS NOT TIMELY. THUS, JUDICIAL REVIEW UNDER RCRA § 7006(B) IS NOT PROPER.

A. The EPA’s Failure to Act on CARE’s Petition Requesting Withdrawal of Authorization Pursuant to 3006(e) Was Not a “Constructive Determination.”

Judicial review under § 7006(b) gives each Court of Appeals jurisdiction to review EPA action granting or denying authorization to a state for its program within the circuit for the district in which authorization occurs. *See State of Washington Dept. of Ecology v. United States EPA*, 752 F.2d 1465 (9th Cir. 1985). More specifically, allowing judicial review "of the Administrator's *action* … in granting, denying, or withdrawing authorization or interim authorization for state hazardous waste programs." 42 U.S.C 6976(b)(2)(emphasis added). Prior interpretation of § 7006 suggests that an agency must take some affirmative action with respect to authorization. *See United Technologies Corp. v. United States EPA*, 821 F.2d 714, 720–21 (D.C. Cir. 1987) (Court of Appeals had no jurisdiction for judicial review under §7006(a) because it could detect no "action" of the Administrator or a "denial" of any petition).

CARE argues, *inter alia*, that the failure to act on their January 5, 2009 petition constitutes a "constructive" grant of authorization by the EPA which should suffice for agency "constructive" action required for judicial review. *See Scott v. City of Hammond*, 741 F. 2d 992 (7th Cir. 1984) (holding that failure of the EPA to respond to "constructive submission" by state could amount to failure to perform nondiscretionary duty which could properly be raised in citizen's suit under the Clean Water Act (CWA)); *But see Hayes v. Whitman*, 264 F.3d 1017,1021 (10th Cir. 2001) ("Only upon this determination that the states' inaction was so clear as to constitute a "constructive submission" of no TMDLs would the EPA then incur a nondiscretionary duty to approve or disapprove the constructive submission"). CARE's petition concerned RCRA § 3006(e), which provides guidelines for the EPA to withdraw authorization for state hazardous waste programs that fail to meet the regulations promulgated pursuant to RCRA § 3006(a). 42 U.S.C. 6926(a)-(e). This court should not apply *Hammond* to RCRA's

7006(b) judicial review provision because such application would misinterpret RCRA's statutorily conveyed discretion with respect to withdrawal of authorization.

In *Hammond*, the court addressed CWA § 303(c) (33 U.S.C. 1333) which dealt with the EPA's obligations to respond to state initiated proposals for total maximum daily load limits (TDMLs). Once those proposals are submitted, the relevant provision reads:

> If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements.

33 U.S.C. 1313(c)(3). The CWA places the initial burden on the states to promulgate pollutant standards then subsequently shifts the weight to the administrator to either approve or disapprove those standards within sixty days. 33 U.S.C. § 1313(c)(2),(3). Thus, the plaintiff-appellant in *Hammond* sought to compel agency action where the statute demands it and where no previous agency action occurred. By contrast, CARE demands that this court extend *Hammond*'s holding to the reverse situation here; arguing the EPA is mandated to take action under RCRA § 3006(e) to *withdraw prior* approval of New Union's hazardous waste program.

In 1986, pursuant to RCRA § 3006(a), the EPA approved New Union's hazardous waste program upon a finding of "adequate resources to fully administer and enforce the program." (Rec. doc. 2, p.1). The language in § 3006(a) requires the EPA to actively respond to state submissions similar to CWA § 303(c); it reads, "[w]ithin ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized…" 42 U.S.C. § 6926(a). Under RCRA, it would be at *this* stage of the agency action in which *Hammond* might apply. However, it cannot apply at the

"withdrawal of authorization" stage under RCRA § 3006(e) at issue here where the provision begins,

> *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 such program and establish a Federal program pursuant to this subchapter.

42 U.S.C. § 6926(e) (emphasis added).

The word "whenever" begins the section, indicating that the agency has the discretion to withdrawal authorization and is required to notify the state of its decision, but is not initially mandated to respond as it is under § 3006(a). *See Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 295 (D.C.Cir.1981) (distinguished by *Hammond* holding that judicial review was improper where the EPA's inaction with regard to Colorado River basin states' continuing planning process, which was adopted in conjunction with water quality standards for salinity, was not unlawfully withheld or unreasonably delayed); *See also Texas Disposal Systems Landfill Inc. v. US EPA*, 377 Fed.Appx. 406, ("the EPA is only limited in that it must withdraw authorization after it has determined that the state is not in compliance"). Furthermore, when questions of statutory interpretation are involved, "[i]f Congress has not addressed the precise question at issue, the Court may not simply impose its own construction on the statute; it must determine whether the agency's answer is based on a permissible construction of the statute." *Alaska Center for the Env't v. Reilly*, 762 F.Supp. 1422, 1429 (W.D.Wash.1991) (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)).

In conclusion, *Hammond* does not extend to discretionary agency action like that specified in RCRA § 3006(e). Furthermore, judicial review under § 7006(b) is only proper when

there has been some agency determination either to grant or withdraw authorization for state hazardous waste programs. Therefore, CARE's action is not subject to judicial review.

B. CARE's Petition is Time Barred from Judicial Review

Even if this court concluded that failure to act on CARE's petition was a "constructive" action or grant of continued authorization under § 7006(b) and §3006(b), the petition is still time-barred from judicial review by a statute of limitations. The pertinent section requires that "[a]ny such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day." 42 U.S.C. § 6976(b). Generally speaking, time established statutes of limitations "[have] acted as an absolute bar [that cannot] be overcome by the application of judicially recognized exceptions . . . such as waiver, estoppel, equitable tolling [,] . . . fraudulent concealment, the discovery rule . . . and the continuing violations doctrine." *West Virginia Highlands Conservancy v. Johnson*, 540 F.Supp.2d 125 (2008) (quoting *Felter v. Norton*, 412 F.Supp.2d 118, 124 (2006)).

CARE served a petition on the administrator on January 5, 2009 requesting that the EPA take action to withdraw approval of New Union's hazardous waste program. (R. at 1). This action challenging the EPA's failure to act on that petition was not filed until January 4, 2010, nearly a year later. *Id.* Now CARE asserts that this court has jurisdiction to review the EPA's "constructive determination." However, such a constructive determination could not transpire in the previous ninety days; it could occur no later than January 5, 2009, upon the EPA's receipt of CARE's petition.

The claim even faces additional "timeliness" bars outside RCRA § 7006(b)'s ninety day requirement because CARE's position ultimately hinges on the use of New Union DEP' Annual

reports to the EPA beginning as early as 2000, over ten years ago (Rec. doc. 5). This indicates that CARE's claim is likely barred by the six-year statute of limitations set out in 28 U.S.C. § 2401(a). *See Johnson*, 540 F.Supp.2d 125, 134 (2008) (holding that a properly conceptualized challenge to agency inaction could nevertheless be untimely pursuant to 28 U.S.C. § 2401(a)).

IV. RATHER THAN LIFTING THE STAY ON C.A. NO. 18-2010, THIS COURT SHOULD REMAND TO THE DISTRICT COURT TO ORDER EPA TO INITIATE PROCEEDINGS UNDER RCRA §§ 3006(e) AND 7004.

If this court accepts the arguments put forth by CARE thus far, this court should not lift the stay, and instead invoke the doctrine of primary jurisdiction and remand to case to the court below, deferring to administrative discretion in resolving the issue arising under RCRA §§ 3006(e) and 7004. The purpose "of the doctrine . . . is to ensure that courts and agencies with concurrent jurisdiction over a matter do not work at cross-purposes." *Fulton Cogeneration Associates v. Niagara Mohawk Power Corp*., 84 F.3d 91, 97 (2d Cir.1996) (quoting *United States v. W. Pac. R.R. Co*., 352 U.S. 59, 64 (1956)).

Under the "primary jurisdiction" doctrine, this court is obliged to consider four factors:

(1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
(2) whether the question at issue is particularly within the agency's discretion;
(3) whether there exists a substantial danger of inconsistent rulings; and
(4) whether a prior application to the agency has been made.

Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. and Tel. Co., 46 F.3d 220, 222 (2d Cir.1995); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F.Supp. 1333 (D.N.M.1995).

When a claim involves intricate and technical environmental regulatory questions, courts have deferred to agency expertise. *See U.S. v. Homestake Mining Co*., 595 F.2d 421, 429 (8th Cir.1979) (holding that the district court was without authority to determine an extension

question under the Clean Water Act and, by doing so without remanding matter to the EPA, the court invaded the EPA's primary jurisdiction).

Under RCRA §§ 3006(e) and 7004, Congress delegated sole authority to the EPA to authorize or withdraw authorization for state hazardous waste programs. With regard to environmental protection statutes generally, courts have questioned primary jurisdiction most often as applied to RCRA . *See generally PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998); *Davies v. Nat'l Coop. Refinery Assoc.,* 963 F. Supp. 990 (D. Kan. 1997); *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.,* 877 F. Supp. 476 (D. Minn. 1995).

In the case at hand, the EPA contains the authority and expertise to properly resolve this issue before the court. The EPA is most familiar with the intricacies of state hazardous waste programs and involvement with New Union's program specifically dates back to 1986 when it authorized the program. (Rec. doc. 2, p. 1). Similarly, an agency action has technically been initiated, as CARE has already filed a petition with the EPA noting reasons to withdraw authorization. (R. at 1). For these reasons, this court should decline to lift the stay on C.A. No. 18-2010 and remand to the lower court to order the EPA to initiate agency proceedings.

V. NEW UNION'S RESOURCES AND PERFORMANCE ARE SUFFICIENT FOR EPA'S CONTINUED APPROVAL OF NEW UNION'S HAZARDOUS WASTE PROGRAM

RCRA is a comprehensive environmental statute enacted in 1976 to "minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b). Under Subtitle C of RCRA, 42 U.S.C. §§ 6921-39(f), the EPA administers a federal program that regulates the generation and transportation of hazardous wastes, as well as a permitting program for treatment, storage and disposal facilities ("TSDFs"). *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 331`(1994). In addition, the EPA may authorize states to administer

their own hazardous waste programs "in lieu of" the federal program. 42 U.S.C. § 6926(b). To qualify for authorization, a state program must (1) be equivalent to the federal program, (2) be consistent with the federal program and (3) provide adequate enforcement. *Id.* Furthermore, state programs must be no less stringent than the federal program. 42 U.S.C. § 6929. These requirements are embodied in EPA regulations at 40 C.F.R. Part 271.

A. New Union's Performance is Sufficient to Meet EPA's Continued Approval

New Union's hazardous waste program was authorized in 1986. (Rec. doc. 2, p. 1). The New Union agency responsible for the program is DEP. *Id.* If a state continually complies with RCRA requirements, there is no basis for withdrawal of its authorization. *See* 40 C.F.R. § 271.23. EPA codified "Criteria for Withdrawing Approval of State Programs" at 40 C.F.R. § 271.22. This regulation contains a list of circumstances in which state hazardous waste programs are no longer in compliance, and where the EPA may therefore consider withdrawal. 40 C.F.R. § 271.22. These circumstances include issues surrounding permitting, inspections and enforcement. *Id.*

1. New Union's Permitting Performance is Sufficient

State hazardous waste programs must require permits for all TSDFs required to obtain permits under the federal program. 40 C.F.R. § 271.13(a). In addition, permits must be "administered in conformance with" the federal program. 40 C.F.R. § 271.14. A state program is non-compliant if it fails to "exercise control over activities required to be regulated under this part, including . . . failure to issue permits." 40 C.F.R. § 271.22(a)(2)(i). The question here is whether a delay in reissuing expired permits results in non-compliance under this provision. The scope of actions that constitute a "failure to issue permits" is not defined, but the surrounding regulations offer some guidance.

Courts consistently choose to interpret regulations in such a way as to "avoid conflict" with the governing statute, *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), and the same principle should apply to interpretations of two regulations implementing the same statute. EPA regulations anticipate that neither the EPA nor the states will respond immediately to each and every permit request. *See* 40 C.F.R. § 270.51. If a permitting authority is delayed in the reissuance of an expired permit, the permit will "continue in force," allowing the TSDF to remain in operation pending a decision. *Id.* It would be contradictory to interpret delays as noncompliant with state program requirements when EPA acknowledges and makes provisions for these delays. Therefore, the phrase "failure to issue permits," a non-compliant act, must be read to exclude the delayed reissuance of expired permits.

DEP currently receives approximately 50 permit applications each year for new facilities and facility expansions, and is able to issue approximately 125 permits each year. (Rec. doc. 4 for 2009, p. 19). DEP also has a backlog of approximately 900 expired permits awaiting consideration, some of which have been expired for as long as 20 years. *Id.* at 20. These expired permits are continued by operation of law until DEP makes final decisions on their applications. *Id.* DEP addresses this shortcoming by prioritizing its permitting program: it first issues permits for new facilities and expansions, followed by permits which have been expired for 15 or more years, and lastly addresses permits for facilities with "the greatest potential for harm to the public health or environment because of the volume or toxicity of hazardous waste handled." *Id.* Under this policy, DEP issues permits for new facilities and expansions in a timely manner and in full compliance with state program requirements, while the expired permits will take several years to address. But as explained above, the delayed reissuance of expired permits is not a "failure to

issue permits" and not a failure to comply with RCRA requirements. New Union's permitting performance is therefore sufficient.

2. New Union's Inspection Performance is Sufficient

RCRA requires states with hazardous waste programs to "thoroughly inspect" every TSDF at least once every two years. 42 U.S.C. § 6927(e)(1). EPA regulations further require states to maintain "a program for periodic inspections" of TSDFs. 40 C.F.R. § 271.15. A state program is considered noncompliant if it fails to "inspect and monitor activities subject to regulation." 40 C.F.R. § 271.22(a)(3)(iii).

DEP is currently able to perform inspections on approximately 10 percent of TSDFs in the state, and is therefore not currently meeting the biennial inspection requirement. (Rec. doc. 4 for 2009, p. 22). In light of this shortfall, New Union enlisted the EPA's help in conducting inspections. *Id.* at 23. The EPA conducted inspections on approximately 10 percent of New Union TSDFs in 2008 and anticipates inspecting the same amount of facilities in 2009. *Id.* In addition, New Union has adopted a policy consistent with the purpose of RCRA that prioritizes the inspection of facilities with unreported and unpermitted releases, as well as facilities reporting violations posing the greatest potential for harm to the public health and the environment. *Id.*

While New Union is not currently meeting RCRA's biennial inspection requirement, its performance is not entirely noncompliant under 40 C.F.R. § 271.22. DEP has not failed to "inspect and monitor activities subject to regulation." *See id.* Rather, DEP is inspecting and monitoring facilities periodically as required under EPA regulations. *See* 40 C.F.R. § 271.15. Its only shortcoming is its inability to conduct inspections at the rate prescribed under RCRA, and it is responding with a good faith effort to achieve RCRA's purpose. Therefore, New Union's

inspection performance is compliant with the standards set in 40 C.F.R. § 271.22 and should be deemed sufficient.

3. New Union's Enforcement Actions are Sufficient

States with hazardous waste programs must have "adequate enforcement" mechanisms. 42 U.S.C. § 6926(b). The specific enforcement mechanisms a state must possess are discussed in EPA regulations at 40 C.F.R. § 271.16, and include the ability to seek injunctions, and pursue civil and criminal penalties for permit violations. *See* 40 C.F.R. § 271.16. If a state fails to "act on violations of permits," it is considered noncompliant and the EPA may consider withdrawal of its program. 40 C.F.R. § 271.22.

Significantly, neither RCRA nor EPA's implementing regulations require a state to act on *all* permit violations; it must only have the authority to do so. A requirement to pursue all permit violations should not be read into the language of 40 C.F.R. § 271.22 where it does not exist. *See Safe Air for Everyone v. U.S. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) ("As a general interpretive principle, the plain meaning of a regulation governs"). Also significant is EPA's own discretion in whether to pursue permit violations under the federal program. Under RCRA, when EPA finds a permit violation, it "may" pursue enforcement actions. 42 U.S.C. § 6928(a)(1). EPA is therefore not required to act on all permit violations, and such a requirement should not be imputed on the states when it does not exist under the federal program. *See* 42 U.S.C. § 6929 (allowing, rather than mandating, a state to adopt a program more stringent than the federal program). States, therefore, are not required to pursue all permit violations.

In 2008, DEP undertook 6 enforcement actions. (Rec. doc. 4 for 2009, p. 25-26). In the same year, the EPA undertook 6 enforcement actions in the state and environmental groups filed 6 citizen suits. *Id.* There remained 6 significant permit violations and hundreds of minor

violations. *Id.* at 24. New Union, however, is not required to act on all permit violations. Its pursuance of 6 enforcement actions is sufficient to negate a finding that it failed to "act on permit violations." New Union enforcement actions are therefore sufficient and compliant under 40 C.F.R. § 271.22.

B. New Union's Resources are Sufficient to Meet EPA's Continued Approval

EPA regulations state that the EPA "shall approve [s]tate programs which conform to the applicable requirements . . ." 40 C.F.R. § 271.1(e). RCRA requires state hazardous waste programs to be equivalent to the federal program, consistent with the federal program, possess adequate enforcement, and be as stringent as the federal program. 42 U.S.C. §§ 6926, 6929. EPA regulations expand upon these requirements. 40 C.F.R. Part 271. Yet neither the statute nor the regulations implicate resources as an independent requirement. A lack of resources should therefore not form an independent basis for withdrawal. As long as a state's performance is sufficient, its resources should be deemed sufficient as well.

New Union's resources have decreased since its authorization in 1986, while the number of TSDFs in New Union has grown. (Rec. doc. 1, p. 17, 73; Rec. doc. 4, p. 23, 52). In addition, New Union is in the middle of a hiring freeze and expects additional layoffs of personnel operating the hazardous waste program. *Id.* at 53. This shortage of resources, however, is not independent grounds for withdrawal of the program. New Union's performance is sufficient, and its resources are therefore sufficient as well.

C. Even if the Court finds that New Union's Performance and Resources are Insufficient, EPA May Take Actions Other Than Withdrawal

Withdrawal of state authorization is an "extreme and drastic step that requires the EPA to establish a federal program to replace the cancelled state program." *U.S. v. Power Eng'g Co.*,

303 F.3d 1232, 1238-39 (10th Cir. 2002); *see also Waste Mgmt., Inc. v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill. 1989) ("the withdrawal of federal authorization is obviously an extreme step").

Under RCRA, the EPA "shall withdraw" authorization of a state program if it finds that the program is not in compliance. 42 U.S.C. § 6926(e). The EPA, however, can choose whether to commence proceedings that would lead to such a finding. 40 C.F.R. § 271.23 (the EPA "may order the commencement of withdrawal proceedings" on its own initiative or in response to a petition). Therefore, if the EPA chooses not to commence proceedings against a state program, withdrawal is not required. *See Texas Disposal Systems Landfill Inc. v. EPA*, 377 Fed. App. 406, 408 (2010) ("the EPA is only limited in that it must withdraw authorization after it has determined that the state is not in compliance").

Even if the EPA does commence proceedings and finds that a state program is noncompliant, the EPA can "take other action without officially withdrawing authorization." *RCRA Orientation Manual, 143*. *See also* 40 C.F.R. § 271.22 (if a program is no longer in compliance, the EPA "*may* withdraw program approval" (emphasis added)). Examples of alternatives to withdrawal include the EPA's ability to conduct inspections in authorized states, and its authority to bring independent enforcement actions. *U.S. v. Power Eng'g Co.*, 303 F.3d 1232, 1239 ("Nothing in the text of the statute suggests that [withdrawal] is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement."). Courts consistently hold that the EPA can bring enforcement actions in states that operate hazardous waste programs. *See United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001) (holding that where a state's enforcement is inadequate, the EPA can pursue violations). Therefore, even if New Union's resources and performance are insufficient for compliance with RCRA requirements, EPA may take actions other than withdrawal of New Union's authorization.

VI. THE TRANSFER OF REGULATION OF RAILROAD HAZARDOUS WASTE FACILITIES TO THE COMMISSION DOES NOT REQUIRE EPA TO WITHDRAW ITS APPROVAL OF NEW UNION'S PROGRAM

A. It Is Permissible for New Union to Transfer the Regulation of Railroad Hazardous Waste To the Commission

EPA regulations allow a state to transfer any part of its hazardous waste program from one state agency to another. *See* 40 C.F.R. § 271.21(h). In order to do so, the transfer must be approved by the EPA. *Id.* Such a transfer is permitted under the regulations and is therefore not a basis for withdrawal. *See id.* The only restriction as to the eligibility of multiple state agencies is that "if more than one agency is responsible for administration of a program, each agency must have statewide jurisdiction over a class of activities." 40 C.F.R. § 271.6(b).

In 2000, the New Union legislature passed ERAA, which, among other things, transferred "all standard setting, permitting, inspection, and enforcement authorities" for railroad hazardous waste facilities from the DEP to the New Union Railroad Commission (the "Commission"). (Rec. doc. 4 for 2000, pp. 103-105). The Commission is a state agency, and has statewide jurisdiction over intrastate railroads. *Id.* Therefore, assuming that EPA approves the Commission to regulate railroad hazardous waste facilities, such a transfer is permissible under RCRA.

B. New Union's Removal of Criminal Sanctions for Railroad Hazardous Waste Facilities Does Not Require the EPA to Withdraw Approval of New Union's Program

States with hazardous waste programs must have "adequate enforcement" mechanisms, including the ability to pursue criminal penalties for permit violations. 42 U.S.C. § 6926(b); 40 C.F.R. § 271.16. However, as discussed above, a state's failure to comply with such a requirement does not mandate the EPA to withdraw authorization of its program. *See* 40 C.F.R. § 271.22 (if a program is no longer in compliance, the EPA "*may* withdraw program approval" (emphasis added)). Rather than withdrawing approval, the EPA can choose to take other action,

such as bringing independent enforcement actions. *U.S. v. Power Eng'g Co.*, 303 F.3d 1232, 1239 (allowing the EPA to enforce permit violations in place of withdrawing authorization for inadequate enforcement). *See also United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001) (holding that where a state's enforcement is inadequate, the EPA has the authority to pursue violations).

In addition to transferring the regulation of railroad hazardous waste facilities to the Commission, New Union removed the Commission's authority to pursue criminal sanctions for permit violations. (Rec. doc. 4 for 2000, pp. 103-105). This renders New Union's program noncompliant, but withdrawal of its authorization is not necessary. It is well within the EPA's authority to pursue criminal sanctions against New Union TSDFs, and to leave New Union's program in place.

VII. NEW UNION'S TREATMENT OF POLLUTANT X DOES NOT ADVERSELY AFFECT THE EQUIVALENCY OF THE STATE PROGRAM WITH THE FEDERAL PROGRAM, IS NOT INCONSISTENT WITH THE FEDERAL OR OTHER APPROVED STATE PROGRAMS, AND DOES NOT VIOLATE THE COMMERCE CLAUSE

A. New Union's Program is Still Equivalent to the Federal Program

Under RCRA, state hazardous waste programs must be equivalent to the federal program. 42 U.S.C. § 6926(b). "This does not mean that [s]tates have to implement their programs in exactly the same way that EPA does." *Draft State Consolidated RCRA Authorization Manual*, 1986 WL 797187, 11 (OSWER). Rather, state programs can differ from the federal program as long as they fulfill the requirements in 40 C.F.R. §§ 271.9-.13. *Id.* These sections specify that a state program must: control all the hazardous wastes controlled by the federal program; cover all generators, transporters and TSDFs covered by the federal program and require that they perform similar compliance tasks; and require permits from the same class of TSDFs required to obtain permits under the federal program. 40 C.F.R. §§ 271.9-.13. As long as a state program fulfills

these requirements, it will be deemed equivalent to the federal program despite differences in implementation. In addition, RCRA explicitly permits state programs to be more stringent than the federal program. 42 U.S.C. § 6929.

New Union's hazardous waste program was deemed equivalent to the federal program when it was approved in 1986. (Rec. doc. 2, p. 1). In 2000, the New Union legislature enacted legislation that changed the program's treatment of Pollutant X. (Rec. doc. 4 for 2000, pp. 105-107). First, generators are required to reduce the generation of Pollutant X "until such generation entirely ceases." *Id.* Second, DEP will no longer issue permits allowing TSDFs to treat or dispose of Pollutant X, and the storage of Pollutant X is limited to periods of less than 120 days while awaiting transport to a facility outside the state. *Id.* Lastly, transport of Pollutant X must be "as direct and fast as is reasonably possible, with no stops within the state except for emergencies and necessary refueling." *Id.*

Despite these changes, New Union's hazardous waste program remains equivalent to the federal program. DEP still controls Pollutant X, albeit in a much more stringent manner. The legislation does not remove any generators, transporters or TSDFs from New Union's program, nor does it eliminate any of their obligations or duties. In addition, the legislation does not excuse any TSDFs from the requirement to obtain a permit; it simply makes the substance of the permits more restrictive. Although New Union's treatment of Pollutant X has become more stringent, as explicitly permitted by RCRA, its program is allowed to differ from the federal program. New Union's hazardous waste program continues to fulfill the equivalency requirements set forth in 40 C.F.R. §§ 271.9-.13, and is therefore equivalent to the federal program.

B. <u>New Union's Program is Still Consistent with the Federal Program</u>

Under RCRA, state hazardous waste programs must be consistent with the federal program or other state programs. 42 U.S.C. § 6926(b). A state program is consistent if it complies with the requirements contained in 40 C.F.R. § 271.4. *SCRAM*, 1986 WL 797187, 11 (OSWER). This section contains two separate provisions: one addressing the interstate transport of hazardous waste, and the other addressing prohibitions on the treatment, storage and disposal of hazardous waste. 40 C.F.R. § 271.4.

1. The Interstate Transport of Hazardous Waste

A state program is inconsistent if any aspect of it "unreasonably restricts, impedes, or operates as a ban on the free movement" of hazardous waste being transported across state borders. 40 C.F.R. § 271.4. Under this provision, any ban on the free movement of hazardous waste is "automatically inconsistent." *Hazardous Waste Treatment Council v. State of S.C.*, 945 F.2d 781, 793 (1991). Restrictions and impediments, however, are only prohibited if they are unreasonable. *Id. at 794*. According to the EPA, restrictions and impediments are unreasonable if they are "likely to have a significant adverse effect on the follow (sic) of hazardous waste into or out of the [s]tate." 50 Fed. Reg. 46437, 46439. EPA applied this analysis to a South Carolina program that charged higher fees for the disposal of wastes generated outside the state than it was charging for the disposal of waste generated within the state. *Id.* at 46438. EPA concluded that the disparate fees were reasonable because they would not significantly decrease the flow of hazardous waste into or out of the state. *Id.* at 46439. The program was therefore consistent with the federal program. *Id.*

New Union requires all transport of Pollutant X through or out of the state to be conducted "as direct and as 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). This is not an

outright ban on the free movement of Pollutant X. It does restrict the free movement of Pollutant X, but the restriction is not unreasonable. There is no indication here that a requirement of expediency and a constraint on unnecessary stops would decrease the flow of Pollutant X into or out of the state. Therefore, New Union's restrictions on the transport of Pollutant X do not render New Union's hazardous waste program inconsistent.

2. Prohibition on the Treatment, Storage and Disposal of Hazardous Waste

A state program that prohibits the treatment, storage, or disposal of hazardous waste is inconsistent if it "has no basis in human health or environmental protection." 40 § C.F.R. 271.4. In *LaFarge Corp. v. Campbell*, 813 F.Supp. 501 (1993), Texas enacted a regulation that prohibited new commercial hazardous waste facilities from receiving permits if they were sited within one-half mile of certain structures. 813 F.Supp. 501, 503. The regulation was enacted to protect "human health and safety from fugitive emissions . . or other unanticipated events . . ." Id. The court held that the prohibition was consistent with the federal program because it had "some basis in human health." *Id.* at 512.

In 2000, New Union passed legislation that prohibited the treatment and disposal of Pollutant X. (Rec. doc. 4 for 2000, pp. 105-107). In addition, the legislation only permits the storage of Pollutant X for less than 120 days while awaiting transportation to a facility outside the state that is permitted and designed to treat or dispose of Pollutant X. *Id.* New Union enacted this legislation because Pollutant X is "among the most potent and toxic chemicals to public health and the environment." *Id.* Furthermore, there are presently no TSDFs in New Union capable of preventing exposure of persons or the environment to releases of Pollutant X. *Id.* Because New Union's prohibition on the treatment, disposal and storage of Pollutant X is based

in the protection of human health and the environment, New Union's program is consistent with the federal program.

C. New Union's Treatment of Pollutant X Does Not Violate the Commerce Clause

The commerce clause grants Congress the power to regulate interstate commerce. *U.S. Const. Art. I, § 8(3)*. Courts have interpreted the commerce clause as a limitation on the authority of the states to burden or discriminate against interstate commerce. *Maine v. Taylor*, 477 U.S. 131, 137 (1986). This limitation, however, "is by no means absolute." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (2009). States are permitted to "regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Id.* Furthermore, the Supreme Court has recognized that "incidental burdens 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, 623-24 (1978). Therefore, if a state statute is based on a legitimate public interest and does not discriminate against interstate commerce, it will be upheld unless the burden on commerce is excessive compared to the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Pollutant X is "among the most potent and toxic chemicals to public health and the environment," and the prevention of such releases serves a legitimate public interest. *See* 477 U.S. at 150 (finding that Maine's protection of public health and natural resources is a legitimate public interest). New Union requires all transport of Pollutant X through or out of the state to be conducted "as direct and as 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). The statute applies uniformly to both in-state and out-of-state transporters, and therefore does not discriminate against interstate commerce. Moreover, the only restriction on the free movement of

Pollutant X is the requirement that its transport be expeditious. The burden on interstate commerce, if any, is slight, and far outweighed by the local benefit of preventing releases of Pollutant X. Therefore, New Union's treatment of Pollutant X is valid in light of legitimate public interests and does not violate the commerce clause.

CONCLUSION

For the foregoing reasons, the EPA respectfully requests that this Court reverse the district court's finding that it lacks jurisdiction over CARE's claims. The EPA also respectfully request that this Court not lift the stay on C.A. No. 18-2010. Moreover, if this Court proceeds to the merits of CARE's challenge, the EPA respectfully requests that this Court find that withdrawal of New Union's hazardous waste program is not mandated.

Respectfully Submitted

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Counsel for Lisa Jackson, Administrator