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JURISDICTIONAL STATEMENT

This court has jurisdiction over this consolidated proceeding. The judgment below was final, allowing this court jurisdiction to hear the appeal under 28 U.S.C. § 1291, which states that "[t]he Court of Appeals ... shall have jurisdiction of appeals from all final decisions of the District Courts of the Unites States." 28 U.S.C. § 1291. As explained in the argument, the lower court had jurisdiction under RCRA § 7002(a)(2) in Civ. 000138-2010. 42 U.S.C. § 6972(a)(2). RCRA § 7006(b) provides jurisdiction for the action filed in the Court of Appeals, C.A. No. 18-2010. 42 U.S.C. § 6976(b).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether RCRA § 7002(a)(2) provides district court jurisdiction to order EPA to act on CARE's petition for revocation where CARE's petition is requesting EPA action on a prospective, quasi-legislative agency rule, not an narrow, quasi-judicial order.

II. Whether 28 U.S.C. § 1331 provides district court jurisdiction to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's RCRA program where the text and structure of RCRA provide an explicit alternative judicial review scheme that precludes federal question jurisdiction in the district court.

III. Whether inaction by EPA on CARE's petition is constructive action of any kind and thus subject to judicial review.

IV. Assuming that EPA's inaction was a constructive denial of CARE's petition, whether the court should lift the stay and proceed with judicial review of EPA's constructive actions or remand to the district court to order EPA to initiate and complete proceedings to consider withdraw of its approval for the program.

V. Whether EPA is required to withdraw its approval of New Union's program because New Union's resources and performance fail to meet RCRA's approval criteria.

VI. Whether EPA is required to withdraw its approval of New Union's program because the New Union's 2000 Environmental Regulatory Adjustment Act effectively withdraws railroad hazardous waste facilities from regulation.

VII. Whether EPA is required to withdraw its approval of New Union's program because New Union's 2000 Environmental Regulatory Adjustment Act renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause.

STATEMENT OF THE CASE

I. Procedural History

Citizen Advocates for Regulation and the Environment, Inc. ("CARE") served a petition on the Administrator of the Environmental Protection Agency ("EPA") on January 5, 2009 regarding EPA's authorization of New Union's hazardous waste program. Before EPA responded to this petition, CARE filed an action in United States District Court for the District of New Union on January 4, 2010 under § 7004 of the Resource Conservation and Recovery Act ("RCRA") and § 553(e) of the Administrative Procedure Act ("APA"). Rec. at 4. New Union was granted an unopposed motion to intervene. *Id.* The facts in this case are uncontested, and the parties filed cross-motions for summary judgment. *Id.* District Court Judge Remus determined that the district court did not have jurisdiction and granted New Union's motion for summary judgment. Rec. at 9. The court found EPA's approval or disapproval of New Union's hazardous waste program was an order, not a rulemaking, and thus was not subject to jurisdiction under RCRA § 7004. Rec. at 7. The court also found no jurisdiction under the APA or 28 U.S.C. § 1331 because jurisdiction is specifically provided for under RCRA. Rec. at 8. The court did not reach the merits of the case.

On the same day, CARE filed a petition in this court under § 7006(b) seeking judicial review of what CARE terms as EPA's constructive denial of the petition. Rec. at 4-5. This court stayed that action pending the decision of the lower court and granted New Union's unopposed motion to intervene. *Id.*

II. Statement of the Facts

EPA authorized New Union's regulatory program in 1986 under § 3006 of RCRA and New Union continues to operate that program. Rec. at 4. CARE petitioned under § 7004,

alleging that New Union's program no longer met the criteria for approval laid out in RCRA § 3006. *Id.* EPA has not yet acted on CARE's petition. *Id.*

Due to New Union's current budget difficulties, the Department of Environmental Protection ("DEP") does not have the same resources to administer and enforce the hazardous waste program as it did upon authorization. Rec. at 10-11. New Union has addressed this by restricting cuts to discretionary programs and programs where state employees perform functions that federal employees would otherwise perform. Rec. doc. 6, June 6, 2009.

Additionally, New Union's RCRA program has been altered by two provisions of the state's Environmental Regulatory Adjustment Act. One provision delegated authority to the New Union Railroad Commission to implement certain provisions of RCRA for railroad hazardous waste and eliminated criminal sanctions for violations for environmental statutes. Rec. at 12. The second provision regulates transportation and storage of Pollutant X, a recognized toxic chemical. Rec. doc.4 for 2000, pp.105-07. The Act restricts the issuance of permits for treatment, disposal, or storage of Pollutant X for more than 120 days, and allows transportation of Pollutant X through New Union, but limits stops to emergencies and refueling. *Id.*

SUMMARY OF THE ARGUMENT

The district court incorrectly held CARE lacked jurisdiction under RCRA § 7002. Instead, the text of RCRA §§ 7002 and 7004 must be construed holistically. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). RCRA § 7004 forces EPA action on petitions and § 7002(a)(2) opens the district court for judicial review of CARE's petition. Therefore, the text and interplay between RCRA provisions provides district court jurisdiction to order EPA action under RCRA.

Furthermore, EPA was correct in defining its authorization of New Union's RCRA program as rulemaking, which allows for RCRA § 7002 review. EPA's authorization of New Union affected the rights of broad classes of individuals, which is a hallmark of rulemaking,

while orders resolve disputes among specific individuals in specific cases. *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 244-45 (1973). Rulemaking is prospective, whereas adjudications have an immediate effect on specific individuals involved in concrete disputes. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988). The form of the proceeding is not dispositive for distinguishing between rulemaking and adjudication: what counts is the action's effect. *FTC v. Brigadier Indust. Corp.*, 613 F.2d 1110, 1117 (D.C. Cir.1979). EPA's authorization fits into a RCRA § 7002 reviewable definition of broad, prospective rulemaking.

The district court correctly held that CARE could not bootstrap federal question jurisdiction under 28 U.S.C. §1331 in combination with APA § 553(e) to secure jurisdiction because the RCRA text and structure of the statutes provide no federal question jurisdiction and the petition fails under APA's presumption of judicial review. Congress spoke clearly in granting jurisdiction in RCRA to the Court of Appeals. 42 U.S.C. § 6976(b). This court must give effect to Congress's language. *United States v. Henning*, 344 U.S. 66, 76 (1952). Thus, CARE's artful federal question jurisdiction pleading fails under the APA.

EPA's current inaction regarding CARE's petition is not subject it to judicial review under RCRA § 7006(b). First, EPA's failure to act is not subject to judicial review unless a specific action was legally required and the statute specified a consequence for failure to act. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993). EPA's non-response to CARE's petition does not meet the elements necessary to establish review for failure to act. Since RCRA provides a lenient timeline for EPA response, the agency's year-long non-response to CARE's petition is not a reviewable action. *See* 42 U.S.C. § 6974(a). Second, EPA's inaction is not a constructive denial of CARE's petition allowing for judicial review. *United States v. Bean*, 537 U.S. 71, 76 (2002). Therefore, there is no § 7006(b) basis for judicial review.

Judicial review is currently inappropriate. Under RCRA, even if EPA's inaction constituted a denial of CARE's petition, this court should not proceed with judicial review because the petition is time-barred and review under the "arbitrary and capricious" standard of the APA contemplates actual action by an agency. *Am. Rivers v. FERC*, 170 F.3d 896, 897 (9th Cir. 1999). This court should remand to the district court to order EPA to initiate and completed proceedings to consider withdraw of its approval for New Union's hazardous waste program because this will allow EPA to complete the procedural steps required by RCRA, which will create a meaningful record for later review.

The EPA is not required to withdraw New Union's entire hazardous waste program, even if the agency suspects New Union's program fail to meet RCRA's approval criteria. New Union's program must be "equivalent to" and "consistent with" the federal program and must provide adequate enforcement. *See* 42 U.S.C. § 6926 (1988). New Union's hazardous wastes program still meets federal standards, despite New Union's current budget shortfalls, because the state has permissibly relied upon EPA to fill enforcement gaps. Further, prior to withdrawal, federal regulations require EPA to conduct extensive evaluation to determine if the state program is indeed inadequate. *See* 42 U.S.C. § 6926(e); 40 C.F.R. §271.23. Notably, EPA has not initiated this complex process regarding New Union's program. Additionally, EPA retains other enforcement powers to ensure compliant enforcement. 42 U.S.C. § 6928(a). As such, EPA is not statutorily required to withdraw approval of New Union's hazardous waste program.

Additionally, the changes in New Union's railroad hazardous waste regulations do not require EPA withdrawal of New Union's entire RCRA authorization. New Union's 2000 Environmental Regulatory Adjustment Act ("ERAA") does not effectively withdraw railroad hazardous facilities from regulation. RCRA standards are still fully enforced. Assuming

arguendo that ERAA weakened RCRA's equivalency and consistency standards, EPA possesses better options than withdrawal of New Union's entire RCRA hazardous waste regulatory scheme, including issuing notice to New Union detailing the failure to comply and providing "reasonable time" to allow the state to take "appropriate corrective action" before EPA began withdrawal. 42 U.S.C. § 6926(e). Additionally, EPA has the option to initiate a partial withdrawal of only the aspect of the state's program that is not sufficient to meet federal standards. Therefore, complete withdrawal by EPA is not statutorily required or appropriate under RCRA.

Finally, RCRA does not require EPA withdrawal of New Union's hazardous waste program due to the state's Pollutant X regulations. New Union's Pollutant X program does not affect either the equivalence or the consistency of the state's overall program. Furthermore, New Union's Pollutant X does not violate the either the plain language of the Commerce Clause or the Supreme Court's Dormant Commerce Clause jurisprudence. *See Or. Waste Sys. v. Dep't of Envt'l Quality*, 511 U.S. 93, 98 (1994); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Therefore, EPA is not required to withdraw its support of New Union's program.

ARGUMENT

I. The District Court Has Jurisdiction Under RCRA § 7002 to Order EPA Action

To establish jurisdiction under §§ 7002(a)(2) and 7004 of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (2010) ("RCRA"), EPA's authorization of New Union's RCRA program must be a rule, as opposed to an order. EPA's prior authorization was generally applicable, prospective rulemaking under the Administrative Procedure Act, 5 U.S.C. §§ 551, 553-59, 701-06 (2010) ("APA"). The nature of EPA's action, not the mere administrative definition prevails. Thus, the district court erred in holding that EPA's authorization of New Union RCRA program was an order and denying district court jurisdiction for CARE's petition.

The district court's dismissal of a complaint for lack of jurisdiction is a question of law and shall be reviewed de novo. *Benoit v. United States Dep't of Ag.*, 608 F.3d 17, 20 (D.C. Cir. 2010). This court should reverse the lower court and recognize the district court's proper jurisdiction under RCRA §§ 7002(a)(2) and 7004.

A. The text of RCRA §§ 7002 and 7004 demand holistic construction which necessarily requires district court review of CARE's petition.

The proper starting point for statutory interpretation is the text of the statute itself. *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987). A statute affecting federal jurisdiction "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968). As such, the court must make every effort not to interpret a provision in a manner that renders other provisions on the same statute inconsistent or superfluous. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). In this way, statutory construction is a holistic endeavor where a provision may seem ambiguous in isolation, but emerges clarified by the remainder of the statutory scheme. *United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

Read together, RCRA § 7002(a)(2) and § 7004 outline EPA's nondiscretionary duty to act on CARE's petition. Regarding EPA's response to a petition, RCRA § 7004 provides that, "[w]ithin a reasonable time following receipt of such petition, the Administrator *shall* take action with respect to such petition and shall publish notice of such action in the Federal Register." 42 U.S.C. § 6974 (emphasis added). Additionally, RCRA § 7002(a)(2) allows that "any person may commence a civil action on his own behalf… against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. 42 U.S.C. § 6972 (emphasis added). Further, the statute explicitly provides that any such action "*may be brought in the district court for the district in*

which the alleged violation occurred" or in the District Court of the District of Columbia. 42 U.S.C. § 6972 (emphasis added). The interplay between RCRA provisos—RCRA § 7004 forcing EPA action on petitions and § 7002(a)(2) opening the district court for judicial review of EPA's response to CARE's petition—solidifies the proper district court jurisdiction.

Notably, the Supreme Court in *Norton v. Southern Utah Wilderness Area*, stated that "when an agency is compelled by law to act within a certain period of time, but the manner of action is left in the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." 542 U.S. 55, 65 (2004). As such, while the district court may not have the authority to order a specific course of EPA action, pursuant to *Norton*, RCRA authorizes review of citizen suits in federal district court. In this way, both the text and the statutory interplay between RCRA provisions illustrate that EPA's alleged failure to address CARE's petition triggers the operation of § 7002(a)(2) and provides jurisdiction to the district court to review CARE's suit.

B. Further, EPA's action was a prospective, broadly-applicable rulemaking, as opposed to adjudication, thus eligible for district court jurisdiction

By erroneously determining EPA's authorization of New Union's RCRA authorization was an order, the district court erred in drawing a distinction between administrative agency rulemaking and adjudicatory orders. The distinction is critical because RCRA§ 7002(a)(2) provides for judicial review of EPA rules, but not for adjudicatory actions. Since EPA's action was rulemaking, CARE may properly avail the district court jurisdiction for its petition.

1. Case law and the APA indicate that EPA's action was rulemaking, not adjudication

The APA provides definitions for rulemaking and orders. A rule is 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). In contrast, an "order" is any final agency action other than rulemaking, but including licensing. 5 U.S.C. § 551(6). A license as defined by the APA is the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. 5 U.S.C. § 551(8). Licensing by an agency is the process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license. 5 U.S.C. § 551(9).

Under the APA, two principal characteristics distinguish rulemaking from adjudication. First, rulemaking affects the rights of broad classes of individuals, while adjudicative orders resolve disputes among specific individuals in specific cases. *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 244-45 (1973). Second, courts examine the prospective impact of the agency action in distinguishing between rulemaking and adjudication. *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908). Rulemaking is prospective, whereas adjudications have an immediate effect on specific individuals involved in concrete disputes. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988); *Prentis*, 211 U.S. at 226. In this manner, orders reflect a quasi-judicial process where rulemaking reflects a quasi-legislative action. *See Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981). The influential *Attorney General's Manual*, released shortly after the passage of the APA as an interpretative tool for the statute, echoes this distinction. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 50 (1947).

As applied to EPA's authorization of New Union's RCRA program, this adjudicatory versus rulemaking precedent places the challenged EPA actions firmly within the rulemaking category. This is because of the prospective nature of such actions; EPA's authorization created broad, forward-looking responsibilities for New Union and all the potential RCRA permittees

within the state, rather than resolving a dispute among individuals. The agency's action was implementation of the substantive RCRA scheme. *See* 40 C.F.R. 271 (2010). Therefore, EPA's action was not the determination of a specific, individualized order, but rather a broad, general authorization for future RCRA activity within New Union. This falls clearly within the APA's definition of rulemaking, rather than adjudication. As such, the district court has RCRA jurisdiction to review EPA's initial rulemaking authorization for New Union's hazardous waste programs.

Notably, the fact that EPA's authorization solely involved New Union does not move the EPA's action into the realm of an order. For example, in *Anaconda Co. v. Ruckelshaus*, a company challenged an EPA regulation regarding sulfur oxide was adjudication and required due process because the company was the only source of emissions within the region. 482 F.2d 1301, 1306 (10th Cir. 1973). The Tenth Circuit held that the exclusive effect on the company did not make EPA's action individualized or adjudicatory. *Id.* Instead, the general nature and applicability of EPA's regulation placed it within rulemaking authority. The District of Columbia Court of Appeals and the Second Circuit follow this distinction. *See Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 144 (2d Cir. 1994); *Hercules, Inc. v. EPA*, 598 F.2d 91, 118 (D.C. Cir. 1978). Therefore, EPA's was correct in arguing that authorizing New Union's hazardous waste program properly falls under the generally applicable rulemaking category.

2. The Supreme Court's precedent regarding the constitutional dimension of distinguishing rules from orders supports EPA's rulemaking position

The Supreme Court's treatment of the rulemaking versus adjudication distinction in the constitutional context provides persuasive support for EPA's definition of their New Union authorization as rulemaking. While the Court was considering due process as opposed to the APA definition, the framework for separating rules from orders illuminates the distinction. In

Londoner v. Denver, the Court held that assessing taxes on a small group of property-owners was adjudicatory. 210 U.S. 373, 385-86 (1908). Conversely, in *Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, the Court concluded that a city-wide property tax increase was rulemaking. 239 U.S. 441, 445-46 (1915).

Through these cases, the Court outlined three factors for consideration when determining whether agency action was a rule or an order. First, the Court examined the individualized versus general nature of the decision, finding that a more individualized decision indicated an order, whereas a more general decision indicated rulemaking. *Londoner*, 210 U.S. at 385; *Bi-Metallic*, 239 U.S. at 443. Next, the Court factored the number of individuals affected. The Court compared *Londoner's* "relatively small number of persons," indicating an order, to the county-wide impact of the property tax in *Bi-Metallic*, indicating rulemaking. *Id.* at 445-46. Third, the Court looked to the nature of the effects of the action. In his *Bi-Metallic* opinion, Justice Holmes distinguished between the exceptionally-affected small number of property owners in *Londoner*, indicating an order, and the more equally-affected large swath of property owners in *Bi-Metallic*, indicating rulemaking. *Bi-Metallic*, 239 U.S. at 446.

The Court's exposition on the rulemaking versus adjudication treatment in *Bi-Metallic* strengthens EPA's position. In *Bi-Metallic*, the agency was acting quasi-legislatively in issuing a "rule of conduct" that establishes rights and duties on "general" grounds to all individuals. *Id.* at 46. New Union's authorization under RCRA acts as a legislative function. EPA issued rules of conduct and established standards for the implementation of New Union's hazardous waste program. EPA's action falls well within the *Bi-Metallic* line of quasi-legislative, generalized rulemaking and points towards classification as a rule.

EPA's original delegation under RCRA again follows both the Court's APA and *Bi-Metallic*'s rulemaking structure. Delegation of the RCRA hazardous waste program extends to all generators, transporters, and storage, treatment, and disposal facilities in New Union. The regulated parties in New Union will be equally affected by the program, as opposed to uniquely targeted. The EPA's action was broad, prospective quasi-legislative policymaking as opposed to fact specific and immediate adjudication. EPA was correct in labeling their action as rulemaking, which is reviewable under RCRA § 7002(a)(2). Thus, the district court has proper jurisdiction to consider CARE's petition for revocation of EPA approval of New Union's RCRA program.

C. Additionally, the nature of the EPA's action, not the definition of a "permit," provides the proper definition of an action under the APA

The form of the proceeding is not dispositive for distinguishing between rulemaking and adjudication: what counts is the action's effect. *FTC v. Brigadier Indust. Corp.*, 613 F.2d 1110, 1117 (D.C. Cir.1979). The determining factor "turns on the nature of the decision to be reached in the proceeding." *Id; accord Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994). EPA's action in authorizing New Union's program extended beyond solely the state as an entity, but to a broad class of potential permittees under a delegated New Union RCRA program. This court should not place determinative emphasis on the "permit" or "license" label. The effect of EPA's action was prospective and broad, thus properly construed as rulemaking and inapplicable as an individualized order.

As such, EPA's action regarding New Union's hazardous waste program must be defined as rulemaking regulation. Therefore, because rulemakings are eligible for review by a district court, the lower court erred in holding §§ 7002(a)(2) and 7004 did not provide district court jurisdiction for CARE's §7004 petition regarding the repeal of a regulation.

II. The District Court Does Not Possess 28 U.S.C. § 1331 Federal Question Jurisdiction for Appellant CARE's Petition Under the APA 5 U.S.C. § 553(e)

The district court correctly held that CARE could not bootstrap federal question jurisdiction under 28 U.S.C. §1331 in combination with APA § 553(e) to secure jurisdiction because the RCRA text and structure of the statutes provide no federal question jurisdiction and the petition fails under APA's presumption of judicial review. This court should affirm the district court's denial of CARE's motion for summary judgment and uphold the lower court's holding that no federal question jurisdiction is present.

A. The text and structure of 28 U.S.C. § 1331 and APA 5 U.S.C. § 553(e) provide no federal question jurisdiction for RCRA challenges

In determining Congress's intent in assigning jurisdiction, the court must begin with the language of the statute. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 735 (1985). A statute affecting federal jurisdiction "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok*, 392 U.S. 206, 212 (1968). Court must give effect to the expressed intent of Congress. When Congress has spoken clearly, the courts are "not at liberty to displace, or to improve upon, the jurisdictional choices of Congress." *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1441 (D.C. Cir. 1998).

CARE attempts to artfully plead its way into court on an imaginary federal question. CARE argues that 553(e) of the APA, stating **"**each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule," coupled with the federal question jurisdictional grant that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States" provides jurisdiction. 28 U.S.C. § 1331 (2010). However, RCRA § 7006 provides for the review final EPA regulations and certain petitions, including CARE's petition. Notably, § 7006(b) requires that "review of the Administrator's action…in granting, denying, or withdrawing authorization

or interim authorization under section 6926 of this title, *may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business*." 42 U.S.C. § 6976(b) (emphasis added).

Because Congress has spoken unmistakably that the sole jurisdictional grant for RCRA review is the corresponding Court of Appeals, CARE's artful pleading into district court fails. When Congress speaks with clear intent, the court must "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). This court must give effect to Congress's language. *United States v. Henning*, 344 U.S. 66, 76 (1952); *accord Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 789 (1952). Courts are "not at liberty to displace, or to improve upon, the jurisdictional choices of Congress," thus CARE's attempt at artfully pleading federal question jurisdiction where Congress plainly provided none must fail. *Five Flags Pipe Line Co.*, 854 F.2d at 1441. Congress explicitly placed jurisdiction for review of Administrator's action within the Courts of Appeals. 42 U.S.C. § 6976. The district court was correct in holding that coupling § 553(e) and § 1331 provided no district court jurisdiction for CARE's petition.

B. CARE's petition fails under the APA's presumption of judicial review

The APA's general presumption in favor of judicial review provides no safe jurisdictional harbor for CARE's invalid attempt to bootstrap into the district court because RCRA specifically provides for judicial review and there is no law to apply to allow review under the APA.

First, courts assume that Congress intended to provide a right of judicial review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967), *accord INS v. St. Cyr*, 553 U.S. 289, 298 (2001). However, when Congress has spoken clearly, the courts are "not at liberty to displace, or to improve upon, the jurisdictional choices of Congress." *Five Flags Pipe Line Co.*, 854 F.2d at

1441. In addition, the specific delegation prevails over the general. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-25 (1989).

Congress spoke regarding RCRA judicial review in § 7006(b), clearly placing jurisdiction with the courts of appeal. By establishing judicial review provisions within RCRA, Congress superseded the previous general delegation under the APA. Following the expressed intent of Congress regarding RCRA judicial review, the court must give effect to the apportionment of jurisdiction solely with the specific appeals court. *Green*, 490 U.S. at 524-25; *accord Henning*, 344 U.S. at 76; *Isbrandtsen Co.*, 343 U.S. at 789.

Thus, while the Court recognizes a "strong presumption" towards judicial review of administrative action, CARE's attempt to claim APA § 553(e) provides a jurisdictional avenue fails due to the APA's judicial review restrictions. The text of APA's judicial review proviso states that judicial review is unavailable to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law. 5 U.S.C. §§ 701(a)(1)-(2). As such, CARE's petition for federal question review under the APA fails due to RCRA's expressed statutory preclusion and Congress's delegation of discretion to EPA.

Second, where there is "no law to apply" under the APA, courts have recognized complete agency discretion. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). Expanding on that position, courts recognize a lack of applicable law where the enabling statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Without "judicially manageable standards," courts are unable to review under the APA. *Id.* at 830. The court stated that this presumption against APA judicial review shall be overcome by reference to a statute or legislative rule requiring agency action in specified cases. *Id.* at 833. Examining the text of the

APA and EPA's legislative rules regarding RCRA reveals that both fail to provide the requisite standards for judicial review in the district court, thus there is no APA jurisdiction at the district court. Instead, RCRA specifically provides for review of actions regarding authorization of state programs to the Circuit Court of Appeals. 42 U.S.C. § 6976(b). Therefore, the district court was correct in denying CARE's petition for judicial review under APA §553(e).

III. EPA's Current Inaction Regarding CARE's Petition is Not Agency Action, and is Therefore Not Subject to Judicial Review Under RCRA § 7006(b)

Although RCRA § 7006(b) provides jurisdiction for judicial review to the appropriate circuit court of appeals, EPA's current inaction regarding CARE's petition is not subject to judicial review. RCRA specifically imposes the standards of the APA on judicial review of action by EPA. 42 U.S.C. § 6976(b). Judicial review under the APA is predicated upon a dispositive decision the agency, as "the 'arbitrary and capricious' test in its nature contemplates review of some action by another entity, rather than initial judgment of the court itself." *United States v. Bean*, 537 U.S. 71, 77 (2002). As such, if the agency has not acted, "there is no agency action for a court to review." *Consol. Coal Co. v. Donovan*, 656 F.2d 910, 916 (3d Cir. 1981).

EPA's current non-response is not considered "agency action" for two reasons. First, EPA's failure to act is not subject to judicial review unless a specific action was legally required, which was not in the case at hand. Second, current inaction by EPA is also not agency action because it is not a constructive denial of CARE's petition.

A. Because EPA was not statutorily required to take action on CARE's petition, the agency did not fail to take a specific action that was legally required

EPA's year-long non-response to CARE's petition is not a reviewable agency action because it does not meet the elements necessary to establish an action for failure to act.

The U.S. Supreme Court has established two conditions for a party to challenge failure to act by an agency. In *Norton v. Southern Utah Wilderness Alliance*, the Court held that, first, the

challenger must assert a failure to take a specific action and, second, the agency must be required to take that action. 542 U.S. 55, 62-63 (2004). Thus, claims "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64 (emphasis in original). The challenger must also show that the specific agency action at issue is legally required. *Id.* Put another way, the statute must both expressly require an agency to act within a particular time, and specify a consequence for failure to act. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993).

These elements are not met in the case at hand. Though RCRA itself as well as EPA's own regulations require a written response to CARE's petition, they do not require a response within a specified time. For example, RCRA § 7004 requires that "following receipt of such petition, 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 therefor." 42 U.S.C. § 6974(a); *see also* 40 C.F.R. § 271.23(b)(1). However, the statute qualifies EPA's duty to respond with the explicit modifier "[w]ithin a reasonable time." 42 U.S.C. § 6974(a).

As such, the statute explicitly grants EPA a much more lenient time frame for response than advocated by CARE. CARE filed the petition at issue on January 5, 2009 and commenced proceedings in this court less than a year later on January 4, 2010. Rec. at 4. A year is not enough time for EPA to adequately consider all of CARE's allegations. The D.C. Circuit has explained that "[a]bsent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of a rulemaking proceeding is entitled to *considerable deference*." *Sierra Club v. Gorsuch*, 715 F.2d 653, 658-59 (D.C. Cir. 1983) (internal citations omitted, emphasis added). The court reasoned that an agency is entitled to the "discretion to set its own priorities," taking into account that these priorities "may reflect a variety of factors

outside the focus of a rulemaking." *Id.* The court ultimately concluded that judicial review of delayed action in rulemaking is "of necessity limited to examining an agency's reasons for deferred action and determining whether that delay is inconsistent with the agency's discretion under the applicable statutory scheme." *Id.* (internal citations omitted). In fact, courts have only reviewed and ordered an agency to act in the rare situation where the agency inaction continues for an unreasonable length of time. For example, in *In re Am. Rivers & Idaho Rivers United*, only after petition had gone unanswered for six years did the District of Columbia Circuit compel the agency to respond to the petition. 372 F.3d 413, 414 (D.C. Cir. 2004).

Because there are no statutory timeline requirements or allegations of improper agency reasoning, this court should not review EPA action, thereby imposing CARE's unreasonably short, year-long timeline on EPA's petition responses. It is not necessary for this court to compel EPA to act; such a drastic remedy should not be required unless EPA has not considered the petition after a clearly unreasonable amount of time.

B. Further, EPA's current inaction on CARE's petition is not a constructive denial

Additionally, inaction by EPA is not a constructive denial of CARE's petition. The Supreme Court has held that agency inaction does not constitute a "denial" for the purpose of seeking judicial review. *United States v. Bean*, 537 U.S. 71, 76 (2002). In that case the Bureau of Alcohol, Tabaco, and Firearms (ATF) refused to consider a petition because Congress had denied funds for consideration of this type of petition. The court explained that "mere inaction by ATF does not invest a district court with independent jurisdiction to act on an application." *Id.*

Similarly, in *Am. Rivers v. FERC*, American Rivers, a citizen's group, demanded action before the agency had opportunity to act on its petition. 170 F.3d 896 (9th Cir. 1999). The Ninth Circuit dismissed the suit, stating that "[m]ere inaction by the [agency] cannot be transmuted by

petitioners into an order rejecting their petition." *Id.* at 897. In this way, CARE's argument that EPA's inaction in the case constitutes a constructive denial is without merit.

Further, CARE's reliance on *Scott v. City of Hammond* is misplaced. *Scott* involved an exception to this general rule when the statute imposed a mandatory duty. 741 F.2d 992, 997 (7th Cir. 1984). In *Scott*, the court concluded that EPA's acquiesce to state water quality permit requirements amounted to a constructive determination that the standards were in compliance with the Clean Water Act because EPA had a *mandatory* duty to issue its own permit requirements if the agency did not approve of the standards set by the state. *Id*. The constructive determination was implied by the nondiscretionary duties imposed by the Clean Water Act. *Id.*

In contrast, RCRA does not impose mandatory duties on EPA. In the present action, CARE petitioned regarding withdraw of authorization of New Union's hazardous waste program and the process for withdraw is covered by § 3006(e). 42 U.S.C. § 6926(e). This statute does not require EPA to make any determinations about withdraw of state authorization, it simply outlines the procedure EPA must comply with to withdraw authorization. *Id.* Without a mandatory duty, CARE has no ground to plead that this court adopt the Third Circuit's *Scott* exception to the pervasive general rule that inaction is not a constructive denial. In these ways, CARE shows no action on EPA's part that is subject to judicial review by this court.

IV. As Judicial Review is Not Appropriate at this Time, the Court Should Remand to Order EPA to Initiate Proceedings to Evaluate Withdrawal

While RCRA grants jurisdiction for review of agency action by this court, judicial review is not appropriate at this time. Judicial review by this court should proceed under RCRA § 7006(b), which provides jurisdiction for review of EPA action in this type of case to the Circuit Court of Appeals for the judicial district in which the plaintiff resides. 42 U.S.C. § 6976(b). The statute specifies that the court should apply the standard of review forth in the APA, specifically

in this case the "arbitrary, capricious, [or] abuse of discretion" standard. 42 U.S.C. § 6976(b); 5 U.S.C. § 706(2)(a).

According to RCRA, even if EPA's inaction constituted a denial of CARE's petition, this court should not proceed with judicial review because the petition is time-barred and review under the "arbitrary and capricious" standard of the APA contemplates actual action by an agency. Because judicial review is premature at this time, this court should remand to the district court to order EPA to initiate and completed proceedings to consider withdraw of its approval for New Union's hazardous waste program because this will allow EPA to complete the procedural steps required by RCRA which will create a meaningful record for later review.

A. Judicial review is not appropriate because the petition is time-barred

RCRA § 7006(b) requires a petitioner to request judicial review within 90 days of the Administrator's action. 42 U.S.C. § 6976(b). The statute allows an exception to this time limit "only if such application is based solely on grounds which arose after such ninetieth day." *Id.* If we assume that CARE request judicial review of EPA's constructive determination about New Union's hazardous waste program, the date when that determination happened is not clear. While the facts cited by CARE point to violations of RCRA over a period of several years, the record indicates that these alleged violations occurred more than 90 days before CARE filed the petition. Rec. at 7, 10-12. Therefore, under RCRA § 7006(b), CARE's petition is time-barred.

B. This court cannot review inaction by EPA because the "arbitrary and capricious" standard of judicial review contemplates review of an action by an agency

RCRA specifically imposes the standards of the APA on judicial review of action by EPA. 42 U.S.C. § 6976(b). Judicial review under the APA is predicated upon a dispositive decision as "the 'arbitrary and capricious' test in its nature contemplates review of some action by another entity, rather than initial judgment of the court itself." *United States v. Bean*, 537 U.S.

71, 77 (2002). If the agency has not acted, "there is no agency action for a court to review." *Consol. Coal Co. v. Donovan*, 656 F.2d 910, 916 (3d Cir. 1981). "Administrative action is not reviewable as an order unless and until it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process." *Am. Rivers v. FERC*, 170 F.3d 896, 897 (9th Cir. 1999) (internal quotations omitted). EPA, by not acting on CARE's petition, has not imposed any obligation, denied any rights, or taken any action that a court may determine as "arbitrary and capricious." Thus, EPA's inaction is not reviewable.

C. Judicial review is premature at this time because EPA has not yet created a meaningful record for review

Judicial review is premature without a meaningful record of agency action for review. In situations in which an agency has not yet acted on a petition, courts have found that the record was unable to support judicial review. For example, in *Consolidation Coal v. Donovan*, the Third Circuit refused to undertake judicial review when an agency had failed to act because the agency had shown it needed further information to make a meaningful decision. 656 F.2d at 916. Notably, courts have distinguished between judicial review and compelling the EPA to act on a petition. When EPA had not yet acted on a petition by an environmental group, the District of Columbia Circuit said "judicial review would be premature" but indicated an action to compel agency action might be allowable. *United Tech. Corp. v. EPA*, 821 F.2d 714, 721 (D.C. Cir. 1987).

This court should not undertake judicial review at this time because there is not yet a meaningful record of decision to review. Instead, this could should remand to the lower court to order EPA to make a determination on CARE's petition. As part of that determination, EPA will "publish notice of such action… together with the reasons therefor." 42 U.S.C. § 6926(e). This

published notice will create the record this court needs before it can commence meaningful review of EPA's actions.

V. EPA Is Not Required to Withdraw New Union's Program If the Agency Suspects State Resources and Performance Fail to Meet RCRA's Approval Criteria

RCRA provides a comprehensive federal program for the management of hazardous waste, but permits states to administer their own programs with the authorization of the EPA. *See* 42 U.S.C. § 6926 (1988). In order to attain approval, a state program must be "equivalent to" and "consistent with" the federal program. *Id.* § 6926(b). Additionally, the state must provide adequate enforcement of the state program. *Id.*

When EPA suspects a state with an approved program has failed to meet these conditions, EPA has two options under RCRA. First, EPA may begin an extensive study process through which the agency may ultimately determine the state program is inadequate and, as a result, withdraw its approval of the program. Second, EPA may pursue its own enforcement action. Because EPA has not determined New Union's program is inadequate, and because EPA retains other enforcement powers, EPA is not statutorily required to withdraw its approval of New Union's program.

A. EPA's exercise of its *discretionary* withdrawal power is inappropriate at this stage, as EPA has not determined that New Union's program is insufficient

RCRA regulations outline a process through which EPA must conduct a detailed analysis before concluding that a state's authorized program is not meeting federal standards. Because EPA has yet to engage in this detailed analysis with regard to New Union's program, it is inappropriate for the court to issue a withdrawal mandate.

Even if EPA had made a preliminary determination that New Union's program might be insufficient for continued approval, the requirements of RCRA necessitate a long and detailed process through which EPA must determine that the state program is indeed insufficient. Under

RCRA § 3006(e), the EPA Administrator must first conduct a public hearing concerning whether the state program meets federal requirements. 42 U.S.C. § 6926(e); 40 C.F.R. §271.23. This procedure is "quite involved," as the requirement has evolved such that EPA is required to prepare written findings and hold an adjudicatory hearing. Clifford Rechtschaffen & David L. Markell, REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP 330 (Environmental Law Institute, 2003).

EPA's review of an Ohio citizen group petition demonstrates the length of such proceedings. *Id.* at 330. Following a three-year period in which the citizen group submitted and amended a petition alleging problems with one aspect of Ohio's program, EPA spent approximately a year investigating the group's allegations. *Id.* This investigation resulted in a draft-report well over 200 pages, followed by a series of public hearings. *Id.* These meetings were succeeded by a six-month public comment period before EPA could even begin work on the final report. *Id.* Notably, all this activity had to occur before EPA could begin the formal hearing required under RCRA. *Id.*

After this arduous public hearing process, if the Administrator determines that the state program does not meet federal requirements, the Administrator "*shall*" notify the state and provide "reasonable time" to allow the state to take "appropriate corrective action" before EPA may begin withdrawal. 42 U.S.C.A. § 6926(e). Additionally, the Administrator is explicitly required to make public the reasons for withdrawal. *Id.* As such, EPA's decision to withdraw is only non-discretionary *after* it is both determined that the state is not in compliance and given the state the opportunity to comply. RECHTSCHAFFEN & MARKELL, at 330; *see, e.g.*, *Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 Fed.Appx. 406, 408 (5th Cir. 2010); *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 452 (5th Cir. 2003). Arguably, this extensive process is necessary in order to ensure

that EPA does not take the drastic step to withdraw a state program without first ensuring that the program is indeed beyond repair by the state. RECHTSCHAFFEN & MARKELL, at 330.

Further, even if EPA determined that New Union's program fell below federal standards, RCRA's implementing regulations do not affirmatively require EPA to withdraw its authorization of that state program. Instead, the regulations allow that "the Administrator *may* withdraw program approval when a State program no longer complies with the requirements of this subpart, and the State fails to take corrective action." 40 C.F.R. § 271.22(a) (emphasis added). This section outlines that this discretionary duty applies when any of the "state's legal authority," "operation of the State program," or the "State's enforcement program" fail to meet the requirements of RCRA. *Id.*

B. Further, EPA has discretion to take enforcement action other than withdrawing its approval of a state program

Additionally, RCRA grants EPA the authority to pursue a less intrusive and resources-intensive form of intervention that wholesale program withdrawal. EPA may also take independent enforcement action by filing its own action independently of the authorized state's enforcement. 42 U.S.C. § 6928(a). This power comes from § 3008(a)(2) of the statute, which allows federal enforcement action in authorized state, conditioned only upon the provision of prior notice to the authorized state.

Section 3008(a) is widely read to mean that, though the primary enforcement responsibility of RCRA rests with each authorized state, EPA retains the power to act where state enforcement falls short. For example, in *Wyckoff Co. v. EPA* the Ninth Circuit upheld EPA's power to issue RCRA § 3013 orders in an authorized state, observing that the notification provision in § 3008(a)(2) made it clear that Congress did not intend, by authorizing a state program "in lieu of the Federal program," to preempt federal *regulation* entirely. 796 F.2d 1197,

1200 (9th Cir. 1986). In fact, the Federal Circuit Courts of Appeal have universally granted deference to the EPA's construction of RCRA § 3008 as providing the basis for independent filing. *See* Thomas A. Benson, *Perfect Harmony: The Federal Courts Have Quarantined Harmon And Preserved EPA's Power To Overfile*. 28 WM. & MARY ENV. L. & POL'Y REV. 885, 885 (2004).

The federal courts have also found that EPA has maintained its independent enforcement power in relation to criminal violations. While § 3008(a) explicitly grants EPA authority to issue only civil compliance orders, courts have interpreted § 3998(d) to provide a federal enforcement power, even in authorized states. This is because § 3008(d), which details criminal penalties under RCRA, is entirely silent on EPA's role in prosecuting criminal cases in federal court. As such, the federal courts considering the question have universally concluded that EPA retains its enforcement power for criminal violations as well. *See, e.g.*, *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001); *United States v. Flanagan*, 126 F.Supp.2d 1284 (C.D. Cal. 2000); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 43-44 (1st Cir. 1991). In this way, EPA retains the ability to enforce RCRA in authorized state, notwithstanding the state's inaction.

Because of this variety of alternative enforcement mechanisms, EPA should not take the drastic, resource-intensive step of full withdrawal in order to address New Union's minor resource shortcomings.

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

New Union's hazardous wastes program still meets federal standards, despite New Union's current state-wide budget gaps, because the state has permissibly relied upon EPA to fill enforcement gaps. Due to the deterioration of the state's finances, the resources available to New Union's Department of Environmental Protection (DEP) have decreased over the last several

years, as have the resources available to all of New Union's public health regulatory programs. Rec. doc. 4 for 2009, p. 50. This has resulted in a "less than robust" implementation and enforcement of RCRA by the state. Rec. doc. 4 for 2009, p. 19. However, New Union has addressed this state-wide budget deficit by concentrating resource cuts on discretionary programs (i.e. those not necessary to maintain state authorization) and programs in which state employees performed functions that federal employees would otherwise perform. Rec. doc. 6, June 6, 2009.

Through reliance on the federal program to supplement state enforcement during New Union's difficult financial period, New Union has permissibly relied upon EPA to fill enforcement gaps. The RCRA system directly establishes the groundwork for such gap filling. For example, under the Hazardous and Solid Waste Amendments of 1984 (HSWA), EPA is empowered to develop major new regulatory initiatives to supplement the existing RCRA regime that make go into effect simultaneously in both authorized and non-authorized states. 40 C.F.R. § 271. To enforce this, EPA carries out the so-called HSWA-driven regulations in each state until the state gained authorization to do so. Marcie R. Horowitz & Michael Scanlon, *The Federal-State Relationship Under RCRA*, *in* RCRA PRACTICE MANUAL 443, 447-48 (Theodore L. Garrett ed., ABA Publishing 2004). The HSWA program demonstrates that it is not uncommon, and is in fact Congressionally-mandated, that states rely on federal enforcement in many areas that are otherwise not fully up to federal standards. *Id.* at 448.

Further, even if New Union's hazardous waste program enforcement is not as robust as it was upon initial authorization, such a decline is not an unambiguous call for withdrawal. Importantly, in authorizing New Union's hazardous wastes program in 1986, EPA noted that with less resources, the program *might* not be adequate. Rec. doc. 3, p. 16 (emphasis added). The federal government's uncertain language, in addition to the changes in costs and technologies of

waste management inherent in the passage of more than 25 years, demonstrates the very real likelihood that New Union's program might still meet federal standards despite its current budget decrease. These factors caution against immediate withdrawal of the New Union's hazardous wastes program.

VI. EPA Is Not Required to Withdraw New Union's Entire Program as a Result of a Weakness of the State's Railroad Hazardous Waste Regulation

Withdrawal of New Union's entire hazardous wastes program is a draconian measure to address the perceived shortcomings of New Union's railroad hazardous wastes program. Under New Union's 2000 Environmental Regulatory Adjustment Act ("ERAA"), two provisions altered the enforcement of RCRA as it applies to railroads.

A. The ERAA does not effectively withdraw railroad hazardous waste facilities from regulation

Notably, New Union has maintained substantial regulation of railroad hazardous waste facilities as required under RCRA. Though one recent amendment to New Union's Railroad Regulation Act ("RRA"), delegated RCRA duties to an agency other than the New Union's DEP, the standards are still fully enforced. Under the RRA, New Union delegated all standard setting, permitting, inspection, and enforcement authorities of the DEP to the New Union Railroad Commission. Notably, the record does not indicate that this delegation will alter the level of enforcement of New Union's railroad waste program. As such, though DEP no longer implements these aspects of the state RCRA program, these aspects of the program are still implemented by New Union.

Nothing in RCRA denies a state the ability to implement a program differently than it did upon authorization, other than the requirement that the implementation be equivalent and consistent. 42 U.S.C. § 6926 (1988). As such, this delegation does not necessitate EPA's withdrawal of New Union's entire state hazardous waste program.

B. Even if an aspect of New Union's program does not meet federal standards, EPA has more favorable options than withdrawal of the *entire* program

New Union's removal of criminal sanctions for violations of environmental statutes by facilities falling under the jurisdiction of the Commission likely does not meet RCRA's equivalency and consistency requirements. Nevertheless, present potential failure to regulate railroad hazardous waste facilities does not require EPA to withdraw approval of *entire* program. Instead, EPA has several other options to ensure New Union's program ultimately meets federal standards.

As detailed in section V.B of this brief, EPA has the option of issuing the state a notice detailing a failure to comply with federal standards under RCRA and provide "reasonable time" to allow the state to take "appropriate corrective action" before the Administrator may begin withdrawal. 42 U.S.C.A. § 6926(e). Additionally, rather than complete withdrawal of the entire state program, EPA has the option to initiate a partial withdrawal of only the aspect of the state's program that is not sufficient to meet federal standards.

Notably, EPA has never fully withdrawn a state program, causing commentators to consider the power "more theoretical than real." Clifford Rechtschaffen & David L. Markell, REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP 330, 331 (Environmental Law Institute, 2003). Notably, complete withdrawal is an incredibly expensive endeavor, as it results in the EPA accepting the duty of enforcement of the entire program within the state. *Id.* As the Tenth Circuit explained in *United States v. Power Engineering Co.*, withdrawal of authorization for a state program was an "extreme" and "drastic" step that required the EPA to establish a federal program to replace the cancelled state program, and that nothing in the text of the statute suggested that such a step was a prerequisite to EPA enforcement or that it was the only remedy for inadequate enforcement. 303 F.3d 1232, 1239

(10th Cir. 2002). Additionally, total withdrawal is arguably likely to ultimately result in less enforcement, as EPA simply does not have the resources to the entire state program. RECHTSCHAFFEN & MARKELL, at 331. As such, full withdraw is not the appropriate remedy to address New Union's potential shortcomings.

VII. EPA Is Not Statutorily Required to Withdraw its Support of New Union's Program Due to the State's Pollutant X Regulations

Because New Union's Pollutant X program does not affect either the equivalence or the consistency of the state's overall program, and further, does not violate the Commerce Clause, EPA is not required to withdraw its support of New Union's program.

A. New Union's treatment of Pollutant X does not adversely affect the equivalency of the state program with the federal program

RCRA requires that a state program be "equivalent to" and "consistent with" the federal program. 42 U.S.C. § 6926(b). However, RCRA does not define the term "equivalent", nor has it been defined in the federal regulations. Nevertheless, equivalency does not necessitate that a state's program be exactly identical to the federal program. Instead, the implementing regulations explicitly allow a state program to be broader in scope or more stringent than federal regulations. 40 C.F.R. 271.1(i).

Because New Union's additional regulation of Pollutant X expands the scope of New Union's regulation of hazardous wastes by expanding the size of the regulated community to include facilities generating Pollutant X, as well as those entities intending to transport, treat, store, or dispose of Pollutant X within New Union, these regulations do not vary impermissibly from federal regulations.

B. New Union's treatment of Pollutant X does not violate the Commerce Clause

New Union's new regulations strictly limit the DEP's ability to issue permits regarding the treatment, storage, or disposal of Pollutant X within the state. These regulations allow DEP to

issue permits only for storage for periods less than 120 days while the wastes await transportation to a facility located out of the state. Rec. doc. 4 for 200, pp.105-07. Additionally, the Act allows transportation of Pollutant X through or out of the state, provided that the transportation is as direct and fast as reasonably possible with no stops except for emergencies and necessary refueling. *Id.* This does not violate the Commerce Clause for several reasons.

1. New Union's regulation of Pollutant X does not violate the plain language of the Commerce Clause

First, New Union's Pollutant X legislation does not violate the plain language of the Commerce Clause. The Commerce Clause, U.S. CONST. art. I, § 8, prohibits states from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987) (citing *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1852)). However, while waste management may be an area of overriding national importance, in legislating in this field Congress has set only a floor, rather than a ceiling, below which states may not fall in their regulation of the treatment, storage, and disposal of solid and hazardous wastes. 42 U.S.C. § 6929.

As such, this provision of RCRA demonstrates a congressional intent that hazardous waste is not an area of such particular federal importance to require a single uniform national system or plan of regulation. *See, e.g.*, *Old Bridge Chems., Inc. v. N.J. Dep't of Envtl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992). In fact, although Congress recognized the need for federal regulation, the statute provides that "the collection and disposal of solid wastes should continue to be primarily the function of the State." 42 U.S.C. § 6901(a)(4). Because RCRA expressly allows states to adopt more stringent requirements than those imposed by the EPA regulations, New Union's Pollutant X regulations do not overstep the state's authority to regulate in an area otherwise preempted by Congress.

2. New Union's regulation of Pollutant X does not violate the Dormant Commerce Clause under the *Oregon Waste* test

Additionally, New Union's regulation of Pollutant X does not implicate or in any way violate the Commerce Clause's "dormant" or "negative" aspect, which restrains the ability of the states to discriminate against or impose substantial burdens on interstate commerce. *Or. Waste Sys. v. Dep't of Envt'l Quality*, 511 U.S. 93, 98 (1994). Because "waste" is considered an article of commerce, any state law restriction on its flow could arguably invoke the dormant Commerce Clause. *Philadelphia v. N.J.*, 437 U.S. 617, 622-23 (1978).

Discrimination is judicially-defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste*, 511 U.S. at 99. The test applied in cases considering such violations of the Commerce Clause depends on whether the regulation at issue is either (1) facially discriminatory, or discriminatory in its purpose or effect, or (2) does not discriminate against interstate commerce, but regulates evenhandedly to effectuate a legitimate local interest. New Union's regulation of Pollutant X is permissible under either standard.

Regulations that are either facially discriminatory or discriminatory in purpose or effect are subject to a strict scrutiny test. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 392 (1994). Under this test, discrimination against interstate commerce "is *per se* invalid, save in a narrow class of cases in which the [state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* Regulations that are facially discriminatory are those that apply different rules to wastes or waste treatment depending on origin. For example, in *Oregon Waste*, the Court found an Oregon law which imposed a greater surcharge on waste generated out-of-state as opposed to in-state to be facially discriminatory. 511 U.S. at 93-94.

Similarly, in *Environmental Technology Council v. Sierra Club*, the Fourth Circuit invalidated several South Carolina regulations under this standard. 98 F.3d 774 (4th Cir. 1996).

Additionally, courts have found regulations to be discriminatory in effect even when those regulations were not explicitly discriminatory. For example, the Court has invalidated state statutes where a state has "projected" its legislation into other states and thereby directly regulated commerce within those other states, either forcing individuals to abandon commerce in other states or forcing other states to alter their regulations to conform with the conflicting legislation. *See, e.g.*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583-84 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982). Similarly, the Court has rejected state statutes that have resulted in contradictory and inconsistent state regulation of vehicles, which as a result burdened interstate transportation. *See, e.g.*, *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 671 (1981).

The Court has explained that if a state law purporting to promote environmental purposes is in reality "simple protectionism," the court will apply a "virtually *per se* rule" of invalidity. *Philadelphia*, 437 U.S. at 624. In *Philadelphia*, the Court struck down as protectionist a New Jersey environmental statute that banned the importation into the state's landfills of most solid or liquid waste originating outside of the state. Notably, the Court stated that the statute would not have violated the Commerce Clause, even if the statute incidentally had affected interstate commerce, if New Jersey had chosen to "slow the flow of *all* waste into the State's remaining landfills." *Id.* at 626. *See also CTS Corp. v. Dynamics*, 481 U.S. at 88 (rejecting discrimination claim where state statute imposed same burden on in-state and out-of-state security tender offerors); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981) (rejecting

discrimination claim where burden based on amount consumed, rather than any distinction between in-state and out-of-state consumers).

New Union's Pollutant X regulations do not pose such problems so as to violate the Commerce Clause. Instead, the regulations operate evenhandedly, as they do not distinguish between Pollutant X waste generated within the state and such waste generated outside the state. Its transportation restrictions apply equally, regardless of origin, and it confers no advantages on in-state entities seeking to store, treat, recycle, or dispose of Pollutant X as against out-of-state firms, in keeping with the Court's suggestion in *Philadelphia*. Further, New Union's regulations do not impose any requirements that would necessarily alter the course of business in other states, as the statute allows continued transportation of affected wastes through the state. In this way, New Union's Pollutant X regulations do not erect, either explicitly or in effect, the "barrier" prohibited by *Oregon Waste* or its progeny.

3. New Union's regulation of Pollutant X does not violate the Dormant Commerce Clause under the *Pike* test

Accordingly, the court should consider New Union's regulations under the more deferential standard applied to regulations that do not discriminate against interstate commerce, but instead regulate evenhandedly to effectuate a legitimate local interest. The dormant Commerce Clause prohibits such a regulation if it imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under the *Pike* test, "[i]f a legitimate local purpose is found, then the question becomes one of degree." *Id.* The extent of the burden on interstate commerce that will be tolerated depends on the "nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

For example, in *Old Bridge Chemicals, Inc. v. New Jersey Department of Environmental Protection*, the Third Circuit applied the *Pike* test to and upheld a set of New Jersey regulations regarding the transportation and labeling of certain recyclable hazardous wastes. 965 F.2d 1287 (3d Cir. 1992). New Jersey's regulatory scheme at issue required recyclable hazardous wastes be labeled and identified for record keeping purposes by their characteristic EPA hazardous waste code, even if they originate from out-of-state sources. Additionally, though federal standards did not require shipments of such recyclable hazardous wastes to be "under manifest," New Jersey required that shipments of these wastes to and from the state be made pursuant to the State's manifest system, modeled after RCRA's, in order to provide a "cradle to grave" means for tracking these hazardous wastes. *Id.* at 189. The Third Circuit found that because these regulations applied evenhandedly to in-state and out-of-state companies, they merited application of the *Pike* balancing test analysis. *See also*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-474 (1981); *Coach Dev. v. Tanzman*, 881 F.2d 1227, 1231 (3d Cir. 1989) (*Pike* test applicable where statute is facially neutral and does not have a discriminatory purpose).

For a state statute to violate the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce. *See, e.g.*, *Gary D. Peake Excavating Inc. v. Town Bd. of Town of Hancock*, 93 F.3d 68, 75 (2nd Cir. 1996) (*Pike* applied when town-wide dumping ban enacted for purpose preventing all dumping in town, rather than discriminating against out-of-state waste); *see also*, *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir.1994); *Old Bridge Chems., Inc. v. N.J. Dep't of Envtl. Prot.*, 965 F.2d 1287, 1295 (3d Cir.1992); *K-S Pharm., Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 731 (7th Cir. 1992). Under *Pike*, if no such unequal burden is shown, a reviewing court need not proceed further. 397 U.S. at 142.

New Union has recognized, as has EPA and the World Health Organization, that Pollutant X is among the most potent and toxic chemicals to public health and the environment. Rec. doc. 4 for 2000, pp. 105-07. As such, New Union specifically designed its Pollutant X regulations to reduce the chemical's threat to public health. *Id.* Notably, legislation pertaining to public safety has long been recognized as an important local interest. *Pike*, 397 U.S. at 143. Additionally, New Union still allows the transport and short-term storage of Pollutant X-containing wastes within the state. Rec. doc. 4 for 2000, pp. 105-07. Further, as there are presently no treatment or disposal facilities in New Union designed to or capable of safely processing Pollutant X, New Union's regulations have not limited the options for treatment or disposal of the toxin. *Id.* Most importantly, any burden imposed by these regulations applies equally to those in-state as to those out-of-state; as such there is not a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce. In this way, the court should find that New Union's Pollutant X regulations survive the *Pike* balancing test.

CONCLUSION

The district court possessed jurisdiction to order EPA to act on CARE's petition under RCRA § 7002(a), but properly held that federal question jurisdiction through APA § 553(e) was unavailable at the district court. The EPA's year-long non-action was not constructive denial of CARE's petition. Furthermore, EPA does not have a statutory duty under RCRA to withdraw New Union's program due to budgetary constraints or New Union's unique, hazardous waste regulatory scheme. Thus, this court should remand to the district court to order EPA to initiate proceedings under RCRA §§ 3006(e) and 7004. This court should recognize EPA's discretion under RCRA in considering options short of complete withdrawal of New Union's hazardous waste program.