CA Nos. 18-2010 and 400-2010

IN THE

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.,

Petitioner-Appellant-Cross-Appellee,

v.

LISA JACKSON, ADMINISTRATOR,

U.S. Environmental Protection Agency

Respondent-Appellee-Cross-Appellant,

v.

STATE OF NEW UNION,

Intervenor-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW UNION

BRIEF FOR APPELLANT

TEAM BRIEF

TEAM NO. 38

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases:

Other Cases:

Statutes:

Other Authorities:

JURISDICTIONAL STATEMENT

This is an appeal from the final order of the United States District Court for the District of New Union. (Order 3). The district court correctly held that it lacked jurisdiction under 28 U.S.C. § 1331 (2010), but incorrectly held that it lacked jurisdiction under Resource Conservation and Recovery Act (RCRA) § 7002 pursuant to RCRA § 7004. Citizen Advocates for Regulation and the Environment (CARE) now timely appeals the district court's final order granting New Union's motion for summary judgment. (Order 1). This court has jurisdiction based on 28 U.S.C. § 1291 (2006), which grants jurisdiction over all final decisions of the lower courts.

STATEMENT OF THE ISSUES

I. Whether the district court has jurisdiction under RCRA § 7002 to mandate that the Environmental Protection Agency (EPA) act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program.

II. Whether the district court has jurisdiction under 28 U.S.C. § 1331 to mandate EPA action on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program.

III. Whether the EPA's failure to act constitutes a constructive denial or constructive determination.

IV. Assuming jurisdiction is proper and the EPA's failure to act on CARE's petition constitutes a constructive denial and/or constructive determination, whether this court should remand the case to the court below.

V. Whether New Union's hazardous waste program lacks sufficient resources and performance, and if so, whether the EPA must withdraw its approval of the program.

VI. Whether the EPA must withdraw approval of New Union's entire program if New Union's

regulations are inconsistent with RCRA.

VII. Whether the ERAA invalidates New Union's program or violates the Commerce Clause.

STATEMENT OF THE CASE

CARE, a nonprofit corporation, and the State of New Union served a petition on the Administrator of the EPA on January 5, 2009. (Rec. doc. 5). The petition requested that the EPA withdraw its approval of New Union's hazardous waste regulatory program based upon information in the New Union DEP's annual reports. *Id*. On January 4, 2010, CARE filed an action in the district court for the District of New Union. (Order 4). CARE sought an injunction requiring the EPA to act on the petition. *Id*. Alternatively, they sought judicial review of EPA's constructive denial of the petition and EPA's constructive determination that New Union's hazardous waste program complied with RCRA § 3006(b). *Id*. The court granted New Union's motion to intervene in the case. *Id.* CARE and the EPA filed cross-motions for summary judgment, agreeing that CARE's statement of the facts was accurate and sufficient. *Id*.

Simultaneously with its petition to the district court, CARE filed a petition with the Court of Appeals. (Order 5). The petition sought judicial review on the same grounds as the district court petition. *Id*. The EPA motioned to stay the proceeding, and the Court of Appeals granted EPA's motion pending the outcome of the district court's decision. *Id*.

On June 2, 2010, the district court held that EPA's approval of New Union's program was an order, and jurisdiction is not proper under § 7004 of the Resource Conservation and Recovery Act (RCRA) or the Administrative Procedure Act (APA). (Order 7-8). For this reason, the judge dismissed the cause of action for failure to state a claim. *Id*. The judge dismissed CARE's second claim on the same grounds. *Id*. Finally, the court held that judicial review of EPA's constructive determination lies within the jurisdiction of the Court of Appeals, not with the

district court. (Order 8). For these reasons, the court denied CARE's motion for summary judgment and dismissed their action. (Order 9).

STATEMENT OF THE FACTS

In 1986, the EPA granted New Union authorization to administer its hazardous waste program. (Rec. doc. 3.) At this time, New Union's DEP had adequate resources to fully administer and enforce the program (Rec. doc. 2, p. 1)—namely, 50 full-time employees dedicated entirely to the program. (Rec. doc. 1, p. 73) Since 1986, demand for hazardous waste treatment and disposal has grown while resources for the program have shrunk. (Rec. doc. 4, p. 52) For example, the number of hazardous waste treatment disposal and storage facilities grew from 1,200 to 1,500 between 1986 and 2009. (Rec. doc. 1); (Rec. doc. 4). Meanwhile, the number of full-time program employees dropped from 50 to 30. (Rec. doc. 1); (Rec. doc. 4). The increase in treatment and storage disposal facilities (TSDs) has been gradual over time, where the loss of employees has occurred over the past decade. (Rec. doc. 4 for 2009, p. 50). All of New Union's public health regulatory programs have suffered a reduction in resources; to wit, DEP's hazardous waste resources have not decreased more than 20% compared to other state programs. (Rec. doc. 4 for 2009, p. 51). In 2009, New Union's governor placed a freeze on hiring new state employees, with the exception of certain vacancies deemed critical to civil order. (Rec. doc. 4 for 2009, p. 53). DEP vacancies were not considered critical, and thus did not meet this exception. *Id*. As stated by the governor's Director of Budget, this freeze will likely continue for at least the next two years, and further reduction of state employees may occur. (Rec. doc. 4 for 2009, p. 53).

The ratio of applications to permits indicates that the DEP's shortage of resources has affected its ability to implement and enforce RCRA in New Union. (Rec. doc. 4 for 2009, p. 19).

Due to the DEP's backlog, some of the 900 TSD operational permits expired as long as 20 years ago, but continue by operation of law. (Rec. doc. 4 for 2009, p. 20). In 2009, DEP prioritized inspections to focus on facilities that have reported unpermitted releases or violations of hazardous waste regulations that pose the greatest harm to the public or the environment. *Id*. Further, in 2009, the DEP performed 150 TSD inspections, which it expects to repeat in 2010. (Rec. doc. 4 for 2009, p. 22). The DEP solicited the EPA to assist with inspections due to their limited resources. (Rec. doc. 4 for 2009, p. 23). As requested, the EPA conducted comparable inspections in 2009 and promised to do so in 2010. *Id*. In addition, the DEP pursued four administrative orders and two civil actions. (Rec. doc. 4 for 2009, p. 25). At the same time, the EPA took comparable actions while environmental groups filed six citizen suits for RCRA violations. (Rec. doc. 4 for 2009, p. 26). DEP inspections revealed 22 significant permit violations and hundreds of minor violations. (Rec. doc. for 2009, p. 24).

In 2000, New Union modified its hazardous waste program with the Environmental Regulatory Adjustment Act (ERAA). (Rec. doc. 11). First, the Act transferred "all standard, setting, permitting, inspection and enforcement authorities of the DEP under any and all state environmental statutes" to the Commission established by the Railroad Regulation Act (RRA). (Rec. doc. 4 for 2000, p. 103-105). In addition, the ERAA removed criminal sanctions for facilities that violate environmental statutes that had previously fallen under the jurisdiction of the Commission. *Id*. The ERAA also created reporting requirements to the DEP for facilities that generate Pollutant X waste; for example, these facilities must submit a plan to minimize the generation of Pollutant X-containing waste every year. (Rec. doc 4 for 2000, pg. 105-107). Facilities must also submit an annual report of both the previous year's reduction in the generation of Pollutant X, and plans to reduce Pollutant X the following. *Id*. Moreover, the Act

prohibits the DEP from issuing permits allowing treatment, storage, or disposal of Pollutant X (with exceptions for temporary storage prior to transportation). *Id*. Finally, the amendment allows any person to transport Pollutant X through or out of the state as long as the destination is a facility designed and permitted to dispose of Pollutant X. *Id*. Such transport, however, must be as direct and fast as reasonably possible, with stops only for emergencies and necessary refueling. *Id*.

ARGUMENT

I. The district court has jurisdiction to hear the case under RCRA § 7002, but not to mandate EPA action.

The district court has jurisdiction to hear this suit because the EPA's initial approval of New Union's hazardous waste program was a rulemaking. RCRA § 7002(a)(2) authorizes jurisdiction for EPA's non-action pursuant to RCRA § 7004. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(2) (1976). Even though § 7004 applies because EPA's approval was a rule, however, it does not mandate EPA action on petitions. 42 U.S.C. § 6974(a)(2). The district court may not mandate EPA action for two reasons. First, the word "shall" does not confer a duty to act on the EPA. Second, CARE's petition is time-barred because the statute of limitations has run.

A. Jurisdiction under RCRA § 7002 is appropriate because the EPA's approval of New Union's hazardous waste program was a rulemaking.

The district court has jurisdiction over CARE's claim under RCRA § 7002. This section allows citizen suits against the Administrator of the EPA where there is alleged a failure of the Administrator to perform a non-discretionary act or duty. 42 U.S.C. § 6972(a)(2). RCRA § 7004 authorizes citizen petitions to make, amend, or repeal rules. 42 U.S.C. § 6974.

A rule is a statement "of general or particular applicability and future effect designed to

implement…law or policy". Administrative Procedure Act ("APA"), 5 U.S.C. § 551(4) (2006). Conversely, an order is "a final disposition…of an agency in a matter other than rule making." 5 U.S.C. § 551(6). In other words, anything that is not a rule is an order.

In determining what is a rule, courts consider an agency's characterization of its own action, whether the action is subject to certain procedures, and whether the action declares law or policy. Courts give significant weight to an agency's characterization of its own action. *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 797-98 (5th Cir. 2000) (citing *British Caledonian Airways, Ltd. v. C.A.B*, 584 F.2d 982, 992 (1978)). Additionally, rules are typically subject to procedures such as notice-and-comment and publication in the federal register. 5 U.S.C. § 553. Finally, in contrast to orders, which apply existing law to a specific set of facts, rules "declar[e] law or policy." *Trans Shuttle, Inc. v. Public Utils. Co*., 89 P.3d 398, 408 (Colo. 2004).

Rules are usually of general applicability. 5 § U.S.C. 551(4). For example, changes in statewide policy are usually considered rules. *NME Hosps., Inc. v. Dep't of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. 1993). In *NME Hospitals*, a change in state Medicaid policy was deemed a rule because it applied equally to all participants in the state's Medicaid program. *Id.* In other words, approval of a state standard is a rule because it applies to all members of a class rather than a single party. *Failor's Pharm. v. Dep't of Soc. & Health Servs,*, 886 P.2d 147, 151-52 (Wash. 1994). There, the court ruled that a state water quality standard constituted a rule because it applied to all dischargers of water within the state. *Id.* at 152.

In this case, the court should rule that EPA's approval of New Union's hazardous waste program is a rule. Though this particular approval is not entitled to *Chevron* deference, in keeping with *American Airlines*, this court should give significant deference to EPA's

characterization of its action as a rule. The EPA backed up this characterization by using rulemaking procedures in its approval of New Union's program; it used a notice and comment procedure, and incorporated the result in 40 CFR 272. (Order 6). Moreover, unlike the situation in *Trans Shuttle*, the approval set a new policy for the state rather than holding up a party's conduct to an already-existing law.

CARE may argue that EPA's determination is an order because it applies only to New Union. However, the EPA's approval of New Union's hazardous waste program is an approval of state policy. Like the water quality standard in *Failor's* and the Medicaid policy in *NME Hospitals,* EPA's approval of New Union's program binds all members of a class (in this case, hazardous waste generators in New Union) rather than a single party.

B. Even though the court has jurisdiction, the court cannot order the EPA to act because the use of the word "shall" in RCRA §7004 does not impose a duty to act on the EPA.

While jurisdiction is proper, the court cannot order the EPA to act because the word "shall" in RCRA § 7004 does not impose a duty to act. According to RCRA's citizen suit provision, if a citizen suit is filed the EPA "shall take action with respect to such petition." 42 U.S.C. § 6974(a). Courts have ruled that "shall" does not always imply a command. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432-33 n. 9 (1995). The *Lamagno* court explained that while "shall" generally means "must" in plain English, in a legal context "shall" has a looser meaning. *Id.* The court noted that sources as diverse as legal dictionaries, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal procedure have all upheld the looser interpretation. *Id.* Still other courts have ruled that "shall" bespeaks a mandatory action unless the context of the statute indicates otherwise. *State ex rel. Reimann v. Circuit Court for Dane County*, 571 N.W.2d 385, 387-88 (Wis. 1997). If a clear legislative intent runs contrary to the mandatory interpretation of "shall", then the court may interpret "shall" more broadly. *Id.* at

388. A legislature's intent can be inferred through the plain language of the statute, or "inferred on grounds of policy or reasonableness." *Summers v. Dooley*, 481 P.2d 318, 320 (Idaho 1971). When there is a conflict between two constructions, the legislature's intent governs. *Borough of Pleasant Hills v. Carroll*, 125 A.2d 466, 468 (Pa. Super. Ct. 1956) (citing *In re Baldwin's Appeal*, 33 A.2d 773 (1943)). To determine the legislature's intent, one should analyze the nature of the act, its objects, and the consequences of each construction. *Id.* at 469.

In this case, the court should rule that the presence of "shall" in the relevant portion of the statute does not imply a mandatory action. As the word "shall" did not confer a mandatory duty on the parties in *Lamagno*, neither should it here. Rather, this court should employ the *Summers* and *Reimann* courts' analysis by balancing the statute's plain meaning with the legislative intent behind the statute. Here, the legislative intent behind the statute is inconsistent with a mandatory reading of "shall." As a policy matter, Congress could not have intended to force the EPA to squander precious resources by reacting to thousands upon thousands of citizen petitions, many of them frivolous. The consequences of a mandatory construction could cause the EPA to squander large amounts of time and money for relatively little gain. Thus, as in *Pleasant Hills*, a more permissive reading of "shall" is appropriate. Such a reading in the broader context is more consistent with Congress's intent that EPA's actions under RCRA § 7004 be discretionary rather than mandatory. Thus, this court should rule that the word "shall" does not force action.

C. The petition is time-barred because the statute of limitations has run.

This court should rule that CARE's petition is time-barred. According to RCRA § 7006, the statute of limitations for review of agency action regarding authorization of state programs is ninety days "from the date of such issuance, denial, modification, revocation, grant, or withdrawal." 42 U.S.C. § 6976(b). The EPA has enforced this rule strictly in the past, denying

jurisdiction over petitions for review if suit was not filed within the ninety-day window. *Waste Mgmt. of Ill., Inc. v. EPA,* 945 F.2d 419, 421-22 (D.C. Cir. 1991). On the other hand, certain courts' opinions have stated in dicta that each day that an agency does not enforce provisions "refreshes" the timer on the cause of action. *Wilderness Soc'y v. Norton*, 434 F.3d 584, 588 (D.C. Cir. 2006). The rationale behind such a policy is that continued nonfeasance should not excuse noncompliance. *Natural Res. Def. Council, Inc. v. Fox*, 909 F. Supp. 153, 159 (S.D. N.Y. 1995). In *Irwin*, the court established a rebuttable presumption of equitable tolling for suits against the government. *Irwin v. Dep't of Veterans' Affairs*, 498 U.S. 89, 95-96 (1990). The *Chung* court modified the *Irwin* rationale, stating if the suit is of a type that is "peculiarly governmental" then equitable tolling principles do not apply. *Chung v. U.S. Dep't of Justice,* 333 F.3d 273, 277 (D.C. Cir. 2003). The court elaborated that review of agency decisions would probably be so "peculiarly governmental" that they would not merit equitable tolling. *Id.* at 277-78.

In this case, the court should rule that the statute of limitations has run. As in *Waste Management*, the ninety-day window to contest the EPA's approval of New Union's hazardous waste program has long since passed. CARE may argue that the *Irwin* model of equitable tolling applies because each day that the EPA does not withdraw approval for the program furnishes new grounds for suit. However, the relief sought here is almost identical to the relief sought in *Chung*, where the court ruled that a petition to compel government action is not sufficiently similar to private action to allow equitable tolling. Moreover, the EPA's duty to act is discretionary, and the equitable tolling argument applies only to mandatory action. As a result, this court should rule that CARE's petition is time-barred.

II. The district court lacks jurisdiction under 28 U.S.C. § 1331 to order the EPA to act on CARE's petition for revocation of New Union's hazardous waste program.

The district court correctly granted summary judgment to New Union because jurisdiction was improper under 28 U.S.C. §1331. CARE wrongfully asserts that EPA's failure to act on CARE's petition violates the APA's requirement that every federal agency "shall give an interested person the right to petition for the issuance, amendment or repeal of a rule." Administrative Procedure Act ("APA"), 5 U.S.C. § 553(e) (1946). However, the district court does not have jurisdiction to hear CARE's claim under § 553(e). First, violating § 553(e) would grant federal question jurisdiction in the district court under 28 U.S.C. § 1331 only if there was not a more specific statute on point. Because RCRA provides a specific citizen suit provision, RCRA, not the APA, is the proper statutory authority to review CARE's petition. Second, even if the APA did apply, nothing in § 553(e) requires the EPA to act on CARE's petition.

A. RCRA, not the APA, is the proper statutory authority to review CARE's petition.

The APA is not the proper statutory authority to review CARE's petition. A plaintiff can only bring a claim under the APA if he has been injured by a final agency action and there is no other claim for relief. 5 U.S.C. § 704. If a plaintiff can bring suit under a citizen suit provision, that citizen suit provision precludes an additional suit under the APA. *Brem-Air Disposal v. Cohen*, 156 F.3d 1002, 1006 (9th Cir. 1998). In *Brem-Air*, a garbage contractor seeking to serve a naval base sued the United States, alleging that the navy disregarded the contractor's exclusive waste-disposal rights granted by the local municipality. *Id.* at 1002. The garbage contractor asserted that he had standing to sue under the APA. *Id*. The Ninth Circuit held that because the garbage contractor could have brought suit under RCRA, he could not bring suit under the APA. *Id*. at 1004. The court stated "federal courts lack jurisdiction over APA challenges whenever Congress has provided another 'adequate remedy,'" and pointed to RCRA's broad statutory

language to show that RCRA would have provided an adequate remedy for the garbage contractor. *Id*.

In this case, RCRA clearly provides an adequate remedy for CARE. In contrast to the APA, which states that a plaintiff can only bring a claim under the APA if he has been injured by a final agency action and there is no other claim for relief, 5 U.S.C. § 704, RCRA § 7004 states "any person may petition the Administrator for the promulgation, amendment, or repeal of any regulation under this Act [42 § U.S.C. 6901 et seq]." 42 U.S.C. § 6974(a). As the court in *Brem-Air* noted, this statutory language is remarkably broad; RCRA grants the right to petition to *any* person for *any* violation of *any* of the statute's requirements. Just as the garbage contractor in *Brem-Air* was precluded from bringing an APA claim because a RCRA claim was available, CARE should be precluded from bringing an APA claim when a RCRA claim is available.

CARE may argue that RCRA does not provide an adequate remedy because it requires plaintiffs to provide the Administrator of the EPA with sixty days' notice prior to initiating the suit. However, providing sixty days' notice is not unreasonable and cannot be used as an excuse to use the APA. Indeed, courts have held that plaintiffs may not resort to the APA to circumvent the notice requirement of citizen suits. *Brem-Air,* 156 F.3d at 1004*; Allegheny Cnty. Sanitary Auth. v. U.S. EPA*, 732 F.2d 1167, 1177 (3d Cir.1984); *Or. Natural Res. Council v. U.S. Forest Serv*., 834 F.2d 842, 851 (9th Cir. 1987). Because RCRA provides jurisdiction for courts to rule on CARE's petition for revocation of the EPA's approval of New Union's hazardous waste program, CARE's claim under the APA is improper.

B. Even if the APA did apply, it would not require the EPA to act.

Even if CARE's petition could be reviewed under the APA, the EPA would not be required to revoke its approval of New Union's hazardous waste program. The APA allows the filing of

rule-making petitions, but does not contain a mechanism for enforcement. 5 U.S.C. § 553(e). The APA does not apply to CARE's petition, but even if it did, nothing in the statute would require the EPA to act on the petition. 5 U.S.C. § 553(e). As a result, asserting jurisdiction under APA is not a useful step for CARE.

III. The EPA's failure to initiate withdrawal proceedings of New Union's hazardous waste program does not constitute a constructive denial or a constructive determination.

This court should rule that the EPA's inaction is neither a constructive determination nor a constructive denial. A constructive determination is roughly equivalent to an actual determination. *Highsmith v. Commonwealth*, 489 S.E.2d 239, 241-42 (Va. Ct. App. 1997). For example, inaction becomes a constructive determination when a state does not act in the face of a statutory duty. *Scott v. City of Hammond*, 741 F.2d 992, 996-97 (7th Cir. 1984). In *Scott*, the court ruled that a state's failure to submit total maximum daily loads (TMDLs) over a period of years constituted a constructive submission that there were no TMDLs. *Id*. at 997. In *Scott*, the agency at issue did not act for years before the court ruled that there had been a constructive determination that there were no TMDLs. *Id.* at 996. There is no *per se* length of time considered unreasonable before inaction becomes a constructive determination. In *American Rivers*, the court ruled that six years was too long to wait. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). However, "a year or two" is not an unreasonable amount of time to wait for an agency action. *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) (quoting *MCI Telecomm. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980).

In this case, a court should rule that the EPA's inaction constitutes neither a constructive determination nor a constructive denial. Unlike the situation in *Scott*, there is no statutory duty to act. *See infra* Part I(B). Second, the fact that the EPA has not yet responded to CARE's petition

after a year does not constitute a constructive denial. As a large government agency with limited time and resources, the EPA can take years to respond to such petitions. The EPA simply may not have had time to properly assess CARE's petition. For example, a year, the time that has elapsed here is within the timeframe that *Midwest* established as a reasonable length of time to wait for an agency response, and well below the deadline established in *American Rivers*. Thus, there has been no constructive determination at all regarding New Union's hazardous waste program.

Because the EPA has not withdrawn its approval for far longer than the *American Rivers* six-year deadline, despite being aware of the program's diminished resources, CARE may argue that the EPA has made a constructive determination that New Union's program is consistent with RCRA. However, the fact that the program's resources and enforcement have dropped and the EPA did not file withdrawal proceedings does not mean that the EPA determined that the state program was in compliance. As relevant regulations indicate, there is no duty to withdraw if the EPA deems its resources inadequate. *See infra* Part V(C). Moreover, as withdrawal is not the only avenue available to an agency that determines its program is inadequate, failure to withdraw is not proof of a constructive determination that the program complied with RCRA either. *See infra* Part V(D). The EPA may decide to combat the inadequacy by taking an action other than withdrawal. Thus, this court should rule that EPA's inaction is neither a constructive determination nor a constructive denial.

IV. Assuming that CARE has jurisdiction and the EPA's failure to act on CARE's petition constitutes a constructive determination that New Union's program continues to meet the criteria for approval, the court should not proceed with judicial review.

Even if this court has jurisdiction over this action and the EPA constructively determined that New Union's program complies with RCRA, this court should remand this suit to the court

below. Lifting the stay and proceeding with judicial review is inappropriate for several reasons. First, even if the court determines that the EPA acted constructively, judicial review is only available under RCRA §7006(b). Secondly, judicial review is not available at all in this case because EPA's decision not to withdraw approval of New Union's hazardous waste program was a discretionary action. Finally, even if EPA's decision was a nondiscretionary action, determinations under RCRA are not reviewable.

A. Even if the court determines that the EPA acted constructively and thus EPA's action is subject to judicial review, judicial review is only available under RCRA § 7006(b).

Even if judicial review is available, review under RCRA § 7006(b) displaces review under 28 USC § 1331. Under 28 U.S.C. § 1331, district courts have jurisdiction of all civil actions arising from laws of the United States. 28 U.S.C. § 1331. Under RCRA § 7006(b)(2), anyone is allowed to petition for "granting, denying, or withdrawing authorization" in the Court of Appeals. 42 U.S.C. § 6976(b)(2). In cases where an agency has unlawfully delayed nondiscretionary action, APA review takes precedence over RCRA review. 5 U.S.C. § 706(1). If a plaintiff files suit on the grounds of unlawful delay, he must prove that the duty the agency failed to perform was a mandatory duty. *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124-25 (6th Cir. 1996).

In certain cases, a refusal to repeal a regulation is equivalent to a decision not to repeal, as they both involve different decisions about the same issue. *U.S. Brewers Ass'n, Inc. v. EPA,* 600 F.2d 974, 978 (D.C. Cir. 1974). Moreover, when two forms of litigation are substantively identical, bifurcated jurisdiction between the district court and the court of appeals is not favored. *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 660-61 (D.C. Cir. 1975).

In this case, the text of § 7006(b)(2) makes it clear that Congress wanted review of state hazardous waste programs to lie squarely in the Court of Appeals rather than the district court.

CARE will argue that § 7006(b) authorizes review only when there has been a decision to withdraw authorization of a state hazardous waste program, and thus that the decision *not* to withdraw authorization is not within the purview of the statute. However, as *U.S. Brewers* said, the decision to withdraw and the decision not to withdraw are two sides of the same coin. Moreover, were the court to adopt CARE's interpretation, only decisions not to withdraw authorization would lie with the district court—an odd exception, given that review of almost every other decision in the same category lies squarely with the Court of Appeals. This would produce the highly undesirable result contemplated in *Oljato*—bifurcation of jurisdiction between the district court and the Court of Appeals. As a result, if judicial review is available, the court should rule it is only available under RCRA § 7006.

B. Discretionary actions are not subject to judicial review.

The court need not look to the judicial review provision in RCRA §7006 because EPA's action is discretionary, and discretionary actions are never subject to judicial review. Discretionary actions are not subject to judicial review. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Case law and legislative history interpreting the word "shall" indicate that the EPA has the discretion to act on petitions. *See supra* Part I(B). Moreover, a decision not to commence withdrawal proceedings of a state hazardous waste program is a discretionary decision, and thus not reviewable. *TX Disposal Sys. Landfill Inc. v. U.S. EPA*, 377 Fed. Appx. 406, 407-08 (5th Cir. 2010).

In *Norton*, an environmental group sought to compel the Bureau of Land Management to protect wilderness study areas from off-road vehicle damage. *Norton,* 542 U.S. at 60-61. The court held that because § 706(1) of the APA authorizes review only for agency action that is "unlawfully withheld", courts can only review nondiscretionary duties. *Id.* at 65. A decision not

to commence withdrawal proceedings of a state hazardous waste program is discretionary. *TX Disposal,* 377 Fed. Appx. at 407-08. In *Texas Disposal*, a landfill petitioned the court to compel the EPA to commence withdrawal proceedings of Texas's state hazardous waste program. *Id*. at 407-408. The EPA issued a determination that found no cause to commence withdrawal proceedings, and Texas Disposal Systems filed suit challenging the EPA's Determination. *Id*. The court reasoned that there was no standard by which could be judged, because the statute said that the EPA "may order" the commencement of withdrawal proceedings. *Id.* at 408. Had the EPA made a finding that the state RCRA program was not in compliance it would have triggered a reviewable duty to act. *Id.* However, as the EPA in that case had made no such finding, judicial review was unavailable. *Id.*

Here, the court should rule that judicial review is improper. The situation here is strikingly similar to the one in *Texas Disposal*—both cases involve efforts by private parties to compel a state to withdraw approval of the state's hazardous waste program. In keeping with the *Texas Disposal* precedent, EPA's decision not to withdraw approval of New Union's hazardous waste program is a discretionary duty rather than a mandatory one. The *Reimann* court's interpretation of "shall" further supports the holding in *Texas Disposal* that the EPA's act is discretionary. The court should follow the *Texas Disposal* and hold that because EPA's determination was discretionary, it is not subject to judicial review.

C. Judicial review is not available for RCRA determinations.

Even if the court finds that the EPA's acted constructively and without discretion, judicial review is still not available for EPA's constructive determination that New Union's program continues to meet the criteria for approval. Determinations under RCRA are not subject to judicial review. *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 775-776 (D.C. Cir. 1996).

RCRA § 7006 is not designed to allow for judicial review of RCRA determinations. *Id.* at 775. In *Portland Cement Alliance* , environmental groups and a cement company challenged the EPA's determination that cement kiln dust does not warrant full hazardous waste regulations under RCRA. *Id.* at 772. The court held that RCRA did not allow for judicial review of RCRA determinations. *Id*. In reaching its decision, the court considered the plain language of RCRA § 7006 and Congress' intent. *Id.* at 775. The court noted that the Clean Water Act and the Clean Air Act both have a provision for judicial review of EPA determinations, but RCRA does not. *Id.* Because "Congress clearly knows how to provide the court with jurisdiction," the court reasoned that the lack of a judicial review provision of EPA determinations in RCRA was intentional. *Id.* at 776.

Just as judicial review was not intended for the EPA's determination on kiln dust in *American Cement,* it is not intended for EPA's constructive determination that New Union's program meets RCRA's standards. RCRA § 7006(b)(2) confers jurisdiction on the Court of Appeals for judicial review of EPA's actions in "granting, denying or withdrawing authorization," not on determinations not to withdraw authorization. 42 U.S.C. § 6976(b)(2). If Congress had intended judicial review of determinations not to withdraw in addition to judicial review of grants of authorization, it would have provided for such in statute. Thus, judicial review is inappropriate.

V. The court cannot require the EPA to withdraw approval of New Union's program based on allegations that the program's resources and performance fail to meet RCRA approval.

The court may not require the EPA to withdraw approval because the determination of adequacy and whether to withdraw approval is discretionary. Further, a court-ordered withdrawal would violate the criteria for withdrawal proceedings laid out in RCRA §3006 and

the EPA's regulations in 40 CFR § 239.13. Accordingly, the court should find it lacks authority to force the EPA to perform a discretionary act.

A. RCRA § 3006 grants the EPA discretion to withdraw.

RCRA's withdrawal provision is discretionary because the language of § 3006 and a broader reading of RCRA both indicate discretion. Where a court interprets statutory language it will first determine if the language is clear and unambiguous. *E.g. Robinson v. Shell Oil Co*., 519 U.S. 337, 340 (1997). Failure to include a "readily-ascertained deadline" indicates agency discretion. *Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987). For example, the language in § 3006 does not contain a provision requiring withdrawal for inadequate enforcement or poor performance. Neither does the statute language begin with mandatory action or give a "readily-ascertained deadline." Instead, it allows the EPA to instigate a procedural process to withdraw authorization "*whenever* the Administrator *determines* after public hearing" (emphasis added). 42 U.S.C. § 6926(e). The use of "whenever" instead of a specific time frame clearly and unambiguously displays Congressional intent that the withdrawal provision is discretionary.

Even if the term "whenever" was ambiguous, EPA's discretion is evidenced throughout RCRA. Courts may look to the "broader context of the statute as a whole," *Robinson*, 519 U.S. at 341.Where the language is unclear in one subsection, courts may look to other parts of the section at issue. *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1238 (10th Cir. 2002). First looking to the other subsections in § 6926, the EPA has the *right* to withdraw state authorization where there is inadequate enforcement. *Id.* at 1238; 42 U.S.C. §6926(b). In *Power*, the court examined § 6926(b) when analyzing § 6926(e) and found the EPA has the *right* to withdraw state authorization where there is inadequate enforcement. Second, looking outside this section, courts

have found the language "from time to time" in § 6947 is similar to its use of "whenever" in § 6926(e) and evidences the Administrator's discretion under RCRA. 42 U.S.C. § 6947; *see also Sierra Club,* 828 F.2d at 792. In *Sierra*, the language "from time to time" in § 6947 evidenced EPA's discretion. *Id.* Finally, EPA's regulations state the Administrator "may initiate withdrawal" of a state's program, but only where it has reasonable evidence of the program's inadequacy, 40 CFR § 239.13 (a)-(b). The fact that the regulations state the "Administrator *may*...commence withdrawal proceedings" unambiguously displays the Administrator's discretion. *TX Disposal*, 377 Fed. Appx. at 408. For example, *Texas Disposal* found the language the "Administrator *may*...commence withdrawal proceedings" unambiguously displays the Administrator's discretion. *Id*

Additionally, the presence of the word "shall" does not create a mandate for all actions in the provision. Determinations do not involve a mandatory duty to investigate, make a finding, or even take an enforcement action, a holding that has been confirmed by other courts. *Amigos Bravos v. EPA,* 324 F.3d 1166, 1171 (10th Cir. 2003) (citing *Dubois v. Thomas,* 820 F.2d 943, 947, 951 (8th Cir.1987)); *Sierra Club v. Train,* 557 F.2d 485, 488-91 (5th Cir.1977); *City of Olmstead Falls v. EPA*, 233 F. Supp. 2d 890, 901-04 (N.D. Ohio 2002)). The Tenth Circuit has examined the issue of agency discretion to make a determination under a language structure similar to the case at hand. *Amigos* involved a section of the Clean Water Act which reads, "[w]henever on the basis of any information available to him the Administrator finds that any person is in violation of [effluent limitations] ..., he shall issue an order." *See Amigos Bravos,* 324 F.3d at 1171.

In this case, the Administrator is mandated to issue an order, but only after the Administrator has made a finding. The language structure of the statute in *Amigos* is much like

that at issue in § 6926(e). For example, in §6926(e), "shall" refers only to the actions it modifies, i.e. those actions following the word "shall." 42 U.S.C. §6926(e). In other words, mandatory actions are conditioned on the making of a determination; if no determination has been made, the mandatory provisions haven't been triggered. Thus, the mandatory language in §6926(e) refers only to the procedural requirements *after* the EPA has exercised the discretion it is given in the plain language of the statute to make a determination.

The statute and the regulations unambiguously display the Administrator's discretion in withdrawing approval. As stated in *Power*, it is clear that the statute and regulations have granted the Administrator the *right* to withdraw approval. However, the *right* to withdraw is entirely different from a *duty* to withdraw as a right implies permission, not mandatory direction. In addition, Congress intentional used the term "whenever" as it did "from time to time" to grant the EPA leeway in determining when it was appropriate to make a determination. Finally, the use of the permissive word "may" in the regulations is consistent with the discretionary interpretation of the statute.

B. The EPA's discretion to withdraw authorization is limited by RCRA § 3006 and 40 CFR 239.

A court-ordered withdrawal of approval would violate the criteria for withdrawal proceedings under RCRA § 3006. 42 U.S.C. § 6926(e). The criteria for withdrawal under RCRA § 3006(b) only apply within "ninety days following submission of the application." 42 U.S.C. § 6926(b). After ninety days, the EPA is restricted from withdrawing authorization before it satisfies four elements in RCRA § 3006(e). 42 U.S.C. §6926(e). First, the EPA must hold a public hearing. 42 U.S.C. § 6926(e); *see also Friends of Earth v. Reilly*, 966 F.2d 690, 693 (D.C. Cir. 1992). Second, the EPA must *determine* the state is not "administering and enforcing a program...in accordance with requirements of this section." 42 U.S.C. § 6926(e): *TX*

Disposal, 377 Fed. Appx. at 408. Third, if the Administrator determines the program fails to adequately administer or enforce the provisions of RCRA, the EPA "shall so notify the State." *Id*. Fourth, in the event of non-compliance, the Administrator is to notify the state again and make public, in writing, the reasons for withdrawal. *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1115 (W.D. Wis. 2001).

None of the criteria above have been met in this case. The first criterion has not been met because a public hearing has not been held. The second requirement has also not been met. For example, in order to make a determination under the second element of RCRA § 3006(e) in the regulations, the EPA must have reason to believe, based upon "substantive information", that the state's permit program or authority to enforce is no longer adequate. 40 CFR § 239.13 (a)-(b). A cut in funding that affects New Union's resources is not "substantive information" of inadequacy. Additionally, the Administrator has not delivered the third requirement of notification to New Union. Without such notification it can hardly be said that New Union has failed to take corrective action in response and therefore the Administrator is not directed to withdraw authorization under the fourth requirement.

Thus, where there is information to cause the EPA to use its discretionary authority to consider withdrawing a state's program, the EPA must first hold a public meeting, make a determination of non-compliance, notify the state, allow ninety days for correction, and then in the event of non-compliance to notify the State again and make public, in writing, the reasons for withdrawal. Because none of these steps have occurred, it is improper for the court to order the EPA to withdraw approval.

C. Even if the court were to order the Administrator to begin withdrawal proceedings, the proceedings will fail to satisfy the requirements for a determination under RCRA § 3006(e).

New Union's resources are not so inadequate as to justify a withdrawal determination. Adequate enforcement is a prerequisite to gaining and maintaining approval within ninety days of submission of the state's application. 42 U.S.C. § 6926(b). The standards for maintaining approval after these ninety days are different. After ninety days, if the Administrator has reason to believe the diminished resources affect the program's adequacy, it must follow the procedural criteria outlined in § 239.13, which do not require mandatory withdrawal for inadequate enforcement. *See* 40 CFR § 239.13. The same is true under the withdrawal provision in the statute. 42 U.S.C. § 6926(e). Finally, expired permits are not evidence of inadequate resources or reason to withdraw authorization as they can receive interim status treatment. 42 U.S.C. § 6925(e). Without proof that the program is so inadequate to justify the removal of its approval, the Administrator is under no duty to determine otherwise.

The records show that New Union is still performing its duties. Specifically, permits are still being issued while inspections and enforcement actions are still being administered. (Rec. doc. 5). EPA's recognition in 1986 that fewer resources *may* affect the program's adequacy does not translate to a finding of inadequacy now. (*See* Rec. doc. 4, p. 16). Although a reduction in the workforce here seems significant, there is no evidence that the enforcement is "inadequate" when supplemented by EPA's inspections and enforcement actions. (Rec. doc. 5). For example, with the EPA's assistance, 20% of the TSDs were inspected in 2009. *Id.* Moreover, expired permits are not analogous to environmental harm; it is possible that a facility may be in compliance with RCRA and receive interim status. The EPA has reviewed the information and determined that New Union's resources and performances, though not ideal, are sufficient for

EPA's approval of the program. Thus a court ordered injunction would be inappropriate and futile.

D. Even if the Administrator determines New Union's resources are insufficient, she may pursue actions other than withdrawal.

The Administrator may encourage New Union to make necessary changes in order to come into compliance rather than withdraw her approval of the state's program. Withdrawal is not a prerequisite to EPA enforcement, nor is it "the only remedy for inadequate enforcement." *Power Eng'g Co.*, 303 F.3d at 1239. Instead, regulations require a "reasonable time" for a State to correct its deficiencies. 40 CFR § 239.13(d). This section also provides three separate opportunities for the state to prove or come into compliance, for which the EPA will take no further action. § 239.13 (c), (f), & (h). This allows the EPA to avoid an "extreme" and "drastic" step, which would require the EPA to replace the state program with a federal program. *Waste Mgmt., Inc. v. EPA,* 714 F. Supp. 340, 341 (N.D. Ill. 1989). Further, Congress encourages alternatives to withdrawal by directing the EPA to "give a high priority to assisting and cooperating with States in obtaining full authorization of State programs." 42 U.S.C § 6902(a)(7). Congress did not intend for the EPA to withdraw approval from state programs and establish federal control once compliance waivered, but to work with the states to identify noncompliance and pursue enforcement actions only where necessary. 42 U.S.C. § 6928. Therefore, the EPA may choose to initiate a withdrawal, but it may also choose a different route in assisting the state instead.

VI. The court cannot require the EPA to withdraw approval of New Union's entire program even if New Union's regulations are inconsistent with RCRA.

A state may modify regulations that affect its hazardous waste program under certain conditions to maintain consistency with RCRA and EPA's approval. In the event these modifications are inconsistent with RCRA, the Administrator is not required to withdraw approval for the entire program.

A. A state may modify regulations without forcing the Administrator to withdraw approval of the hazardous waste program.

The modifications by the Environmental Regulatory Adjustment Act (hereinafter "ERAA") to New Union's program are allowed under EPA's regulations. Modifications are only allowed where the state reports them to the EPA. 40 CFR § 239.12. Modifications that require reporting include changes to statutory or regulatory authority or shifts in responsibility to a new or different agency. 40 CFR § 239.12 (c). Here, New Union must report the statutory changes it has made because the passage of the ERAA involved changes in authority and responsibility. For example, the ERAA removed criminal sanctions for violations from the New Union Railroad Commission's (hereinafter "Commission) authority, and modified permitting requirements. (Rec. doc. 4 for 2000, pp 103-105). It also shifted DEP's responsibility to the Commission. *Id.* With this information, the EPA can begin to work with New Union to ensure compliance under 40 CFR § 239.13, as described above. The fact that the modifications were not reported does not preclude the EPA from initiating this process now. Further, the failure to notify the EPA of these modifications do not override the procedural process EPA must follow when considering a withdrawal of approval.

B. The inconsistencies of New Union's regulations do not justify the removal of the Administrator's discretion to remedy the situation.

EPA's authority to withdraw approval is discretionary. This discretion is limited by the procedural process, which determines if withdrawal is necessary and allows the state an opportunity to come into compliance. *See Power Eng'g Co.*, 303 F.3d at 1239: 40 CFR § 239.13 (d). The Administrator is not limited from partially withdrawing approval in the statute or in the regulations. In fact, the Administrator has the authority to partially withdraw approval, so it can be inferred the same is true for partial withdrawal. *See* 40 CFR § 239.11. Even if the Administrator doesn't have the authority to partially withdraw approval, removing New Union's program for the inconsistency between the ERAA and RCRA is a disproportional remedy.

The modifications the ERAA made to New Union's program are minor and do not warrant the withdrawal of approval for the entire state. Here, the ERAA does not remove railroad hazardous waste facilities completely from regulation, but it does remove criminal sanctions and may modify transportation requirements. (Rec. doc. 4 for 2000, pp. 103-105). The removal of criminal sanctions for railroad hazardous waste facilities subjects New Union's program to a withdrawal proceeding, but not an automatic determination of withdrawal. *See Friends of Earth*, 966 F.2d at 691-92. Once the EPA begins the mandated procedures of a withdrawal it will notify New Union of the ERAA's inconsistency with RCRA, and may require New Union to make the necessary legislative amendments to come back into compliance under § 239.13. Communicating with New Union about how it can come into compliance while protecting the health and safety of its citizens is a much more proportional and effective remedy than complete withdrawal of the entire hazardous waste program.

VII. The ERAA does not invalidate New Union's program or violate the Commerce Clause.

The ERAA, New Union's regulation of Pollutant X, does not adversely affect the equivalency of the state program and does not violate the Commerce Clause.

A. The ERAA's treatment of Pollutant X is consistent with the federal program.

New Union's hazardous waste program is not adversely affected by the treatment of Pollutant X and is consistent with the federal program. As explained above, modifications to the state's program are allowed. There is no mandate to pursue criminal penalties for a state authorized program. 42 U.S.C. § 6926. In respect to state authorized programs, § 6926 addresses permits, not enforcement actions. *See Power Eng'g Co.*, 303 F.3d at 1239. However, criminal penalties are available where the EPA believes it can show the defendant "knowingly" violated the regulations. 42 U.S.C. at 6928(d). Further, this section is titled "Federal Enforcement" and therefore is a reservation of authority for the EPA when it believes appropriate action has not been taken. 42 U.S.C.§ 6928. Where there is evidence that § 6928(d) has been violated, the EPA may pursue an enforcement action in New Union regardless of whether there are criminal penalties in state law. *See Power Eng'g Co*., 303 F.3d at 1239. For example, in *Power* the EPA requested the state of Colorado to enforce the financial assurances section of RCRA against the defendant. *Id.* at 1236. When the state chose not to do so, the EPA filed its own suit against the defendant. *Id.* Thus the EPA's authority to pursue an enforcement action is not precluded by an authorized state program or it's enforcement provisions and does not render the state program inconsistent.

RCRA requires permits for the treatment and storage of hazardous waste. 42 U.S.C. § 6925. It also requires transporters to meet certain recordkeeping requirements. 42 U.S.C. § 6923. In passing the ERAA the legislature recognized that the technology to properly treat and dispose of

Pollutant X is limited. (Rec. doc. 4 for 2000, pp. 105-107). As there are only no facilities in New Union seeking to treat or dispose of Pollutant X, the prohibition on issuing permits for such treatment and disposal is not a violation of RCRA because treatment and storage will not take place. Instead, storage will only be allowed in preparation for transport to a permitted facility out of state. (Rec. doc. 4 for 2000, pp. 105-107). Further the act to limit the generation of Pollutant is in line with general pollution prevention principles and waste minimization under 6925(h). As a result, the ERAA's treatment of Pollutant X is consistent with the corresponding federal program because it does not prevent EPA enforcement or violate permitting and transportation requirements

B. New Union's regulation does not violate the Commerce Clause and therefore does not require the EPA to withdraw authorization.

The regulation of Pollutant X does not violate the Commerce Clause. The Commerce Clause grants Congress the power "to regulate Commerce....among the several States". U.S. CONST. art. I, § 8, cl. 3; *Gibbons v. Ogden*, 22 U.S. 1, 15 (1824). This authority also applies to items that may have a substantial economic effect on interstate commerce, even when the items remain in their local state. *See Wickard v. Filburn*, 317 U.S. 111, 124 (1942). Waste is a part of commerce and its regulation may implicate the Commerce Clause. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978). New Union's regulation of Pollutant X does not attempt to regulate commerce or transportation. Further, its regulation is not inconsistent with the federal transportation requirements. For example, RCRA § 6923 requires generators and transporters of hazardous waste to use a manifest and proper labels. New Union's regulation maintains these regulatory requirements and does not attempt to otherwise interfere with the authority of Congress under the Commerce Clause.

New Union's regulation does not violate the Dormant Commerce Clause. While the Commerce Clause grants Congress the power to affirmatively regulate commerce, it also impliedly denies states the power to discriminate or otherwise burden interstate commerce. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2003); *Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). This denial of state authority is known as the Dormant Commerce Clause. The general concern with a Dormant Commerce Clause violation is that a state's regulation is "simple economic protectionism." *City of Philadelphia*, 437 U.S. at 624. Under the Dormant Commerce Clause, a regulation designed for economic protectionism is per se invalid. *Id.* at 622-23. Thus, where a state attempts to regulate a part of commerce it may only do so if the regulation is not discriminatory on its face or in its effect. *E.g., Oltra, Inc. v. Pataki*, 273 F. Supp. 2d 265, 272 (W.D. N.Y. 2003). Here, there is no need to worry about protectionist measures because New Union's program simply involves shipping waste from New Union to another state where it can be properly treated. New Union's regulation is neither discriminatory on its face nor in its effect. Unlike the *City of Philadelphia* case above, it does not prohibit the transportation of Pollutant X into or out of New Union.

Even if New Union's regulations were discriminatory in their effect on interstate commerce, they would not be unconstitutional. Discriminatory burdens on interstate commerce are invalid only if they fail the *Pike* balancing test and there are no other alternatives. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Maine v. Taylor*, 477 U.S. 131 (1986). The *Pike* balancing test requires states to show that the regulation concerns a legitimate state interest; that the means for the enforcing the regulation is rationally related to the state interest; and that the burden imposed on commerce does not outweigh this interest. *Pike,* 397 U.S. at 137. The protection of human health and welfare is a legitimate state interest recognized by the Supreme

Court. *See City of Philadelphia*, 437 U.S. at 622-23. New Union's regulations were promulgated to encourage a reduction in the generation of Pollutant X and to safely transport the waste to facilities that are permitted to treat and dispose of it to protect human health and welfare. Denying permits for the storage of Pollutant X except for in preparation of transport is rationally related to this interest. Finally, there is no claim that this regulation has imposed a burden on commerce, let alone a burden that outweighs New Union's legitimate interest.

Nonetheless, even if the regulation were seen as a burden on commerce, it still would not violate the Dormant Commerce Clause. Discrimination that may otherwise violate the Dormant Commerce Clause is valid where there is a legitimate state purpose and no available nondiscriminatory means to meet that purpose. *Maine*, 477 U.S. at 131. Unlike *Maine*, New Union did not establish a ban on the importation of Pollutant X into New Union. Instead, this case only involves transporting waste out of a state that does not possess the ability to properly and safely treat and dispose of it. Further, the absence of facilities permitted to treat Pollutant X demonstrates that there are no alternative means available to New Union. Thus, a claim that New Union's regulations violate the Commerce Clause is unfounded and lacks any sort of rational basis.

CONCLUSION

While this court has jurisdiction under RCRA § 3006 to hear CARE's claim, it cannot mandate that the EPA act on CARE's petition. Not only is CARE's claim time-barred, RCRA allows the EPA the discretion to act on petitions. The EPA's failure to act on CARE's petition is neither a constructive determination nor a denial, but even if it is, judicial review is improper. Even under judicial review, CARE's claim would fail. New Union's resources and program for its hazardous waste program are sufficient, and even if they are judged insufficient, the EPA has the discretion to pursue actions other than complete withdrawal. The withdrawal of railroad hazardous waste facilities from regulation does not require the EPA to withdraw its approval of the entire hazardous waste program. The ERAA does not invalidate New Union's program or violate the Commerce Clause. For the foregoing reasons, the EPA respectfully requests the Court to find judicial review is unavailable.