

purpose of treatment, storage, and disposal. The plaintiff challenged the constitutionality of the Louisiana statutes on the grounds that they were inconsistent with the federal statutory provisions under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992 (1988), and were in violation of the Commerce Clause of the United States Constitution, art. I, section 8, cl. 3.

The court failed to reach a determination of the Louisiana statutes' constitutionality under RCRA, because it found that La. R.S. 30:2190 and 30:2191 violated both the Interstate and Foreign Commerce Clauses of the United States Constitution.

LDEQ argued that the absolute prohibition of foreign generated hazardous wastes was a valid health and safety measure, as the state could not adequately account for unknown or unauthorized pollutants in foreign hazardous wastes. The court rejected this proposition, however, finding that both the Mexican companies and the plaintiff's facility were required to comply with United States' environmental laws.

The court determined that the foreign generated hazardous waste which the plaintiff sought to import into Louisiana was an object of commerce and therefore merited constitutional Commerce Clause protection. The court rejected LDEQ's contention that an absolute ban on foreign generated hazardous waste was a valid exercise of the state's "quarantine power." The court reasoned that an absolute ban on an object of commerce based solely on its origin, without regard to factors such as the type of waste generated or the environmental laws of the foreign country involved, was an act of economic protectionism and per se discriminatory. The court declared La. R.S. 30:2190 and 30:2191 unconstitutional and issued a permanent injunction enjoining LDEQ from administering or enforcing these Louisiana statutes.

JED FERDINAND

*Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991)

The city of Burlington, Vermont, appealed from a lower court decision which held that under Resource Conservation and Recovery Act (RCRA) and Clean Water Act (CWA) citizen suit provisions (42 U.S.C. § 6972 and 33 U.S.C. § 1365 respectively), notice and delay requirements did not apply where alle-

gations of non-subchapter III violations under RCRA were combined with subchapter III (hazardous waste violations) claims in a single "hybrid" complaint. Additionally, because the plaintiffs had substantially prevailed in their action, the district court awarded them attorneys' fees, including a twenty-five percent enhancement for contingency risk.

Plaintiffs were land-owners adjacent to the Burlington Municipal Disposal Grounds. They claimed the landfill was harming the environment and damaging their properties by emitting methane gas, wind-blown debris, and hazardous waste. The city claimed that the proper notice and time delays listed in 42 U.S.C. § 6972(b) were not followed by the plaintiffs and thus the case should be dismissed. The city also argued that the landfill was incorrectly classified as an imminent and substantial danger to health and the environment according to RCRA, 42 U.S.C. § 6972(a)(1)(B). Last, the city claimed the plaintiffs' attorney's fees were erroneously awarded. The Court of Appeals determined that according to RCRA, 42 U.S.C. § 6972(b) and CWA, 33 U.S.C. § 1365(b), plaintiffs' hazardous waste claims, could be brought *immediately* after proper notice was distributed to EPA, the state, and the alleged violator. The court indicated that when non-subchapter III violations are combined with subchapter III violations in one claim, policy reasons behind the delay and notice requirements listed in RCRA and CWA for non-subchapter III provisions, were outweighed by the danger that hazardous waste violations posed. Because immediate court action results from hazardous waste claims, when non-hazardous waste claims are brought in "hybrid" with these claims, there is no opportunity for nonlitigious solvency, thus rendering notice and delay requirements useless.

Section 6972 (2)(1)(B) provides citizens a means to sue a facility which has previously, or is currently, disposing hazardous wastes presenting an "imminent and substantial endangerment to health or the environment." The court determined that "imminency" does not mean that harm will occur immediately, but rather a *risk* of harm is present. The court concluded that because the leachate escaping from the landfill contained chemicals found on EPA's toxic list, imminent and substantial endangerment to health and the environment was occurring.

Lastly, the court affirmed the district court's award of attorneys' fees to the property-owners as permitted under both the RCRA and the CWA. To qualify for a fee award, the plaintiffs

must prevail on any significant issue in the litigation which brings about some degree of success. Because the plaintiffs succeeded in proving that the city was in violation of RCRA and CWA provisions, which resulted in the closing of the landfill, the court held that the plaintiffs had achieved adequate success and deserved compensation. Additionally, because plaintiffs' attorneys faced the risk of nonpayment unless they prevailed in the lawsuit, the court awarded a twenty-five percent fee enhancement for contingency risk.

JULIE HARMS

*Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991)

The Resource Conservation and Recovery Act (RCRA), Solid Waste Disposal Act, section 3006, as amended, 42 U.S.C. § 6926, provides a comprehensive federal program aimed at the management of hazardous wastes. Under RCRA, a state is permitted to administer its own program with the authorization of the Environmental Protection Agency (EPA). Hazardous Waste Treatment Council, a company which proposed to develop a waste treatment facility in North Carolina, petitioned EPA to withdraw approval of North Carolina's hazardous waste treatment management program.

EPA may withdraw approval of a state program where that program is found: (1) Not equivalent to the federal program, (2) the program is inconsistent with the federal program or the federally approved programs of other states, or (3) the program does not provide adequate enforcement with RCRA. Petitioners argued, under category (2), that the North Carolina program was indeed inconsistent with federally approved programs, because that program required the thousand-fold dilution of discharges from commercial hazardous waste treatment facilities in the surface waters above public drinking water intakes. This acted as a ban on the treatment of hazardous wastes on the proposed site.

The circuit court ruled that state law is inconsistent with RCRA where it effects a total ban on a particular waste treatment technology within that state. The court found, however, that the North Carolina treatment program was not inconsistent with RCRA since it allowed location of the facility in the areas