

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 019407

WASTE INDUSTRIES USA, INC. and)
BLACK BEAR DISPOSAL, LLC,)
)
 Plaintiffs,)

v.)

STATE OF NORTH CAROLINA and)
NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
RESOURCES,)

Defendants,)

and)

NORTH CAROLINA STATE CONFERENCE)
OF BRANCHES OF THE NAACP and)
ROGERS-EUBANKS NEIGHBORHOOD)
ASSOCIATION,)

Defendant-Intervenors,)

and)

NORTH CAROLINA COASTAL FEDERATION)
AND THE NORTH CAROLINA CHAPTER OF)
SIERRA CLUB,)

Defendant-Intervenors.)

**MEMORANDUM IN SUPPORT
OF MOTION OF DEFENDANT-
INTERVENORS NORTH
CAROLINA STATE
CONFERENCE OF BRANCHES
OF THE NAACP AND THE
ROGERS-EUBANKS
NEIGHBORHOOD
ASSOCIATION FOR SUMMARY
JUDGMENT**

NOW COMES Defendant-Intervenors, the North Carolina State Conference of Branches of the NAACP (“NAACP”) and the Rogers-Eubanks Neighborhood Association (“RENA”), through counsel, and submit this memorandum in support of their motion for summary judgment as to all claims asserted in this action pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

I. INTRODUCTION

Defendant-Intervenors NAACP and RENA intervened in this case because these organizations and their members are vitally concerned about the sustainability of their neighborhoods and communities across the state. Members of the NAACP and RENA, as residents of low-income communities of color in North Carolina, have suffered the burdens of having hazardous facilities such as landfills most frequently sited in their backyards. Members are constantly under threat of further disproportionate placement affecting their health and economic security. As such, Defendant-Intervenors are strongly committed to defending the environmental justice benefits to their members provided by North Carolina Session Laws 2007-550 (hereafter “Senate Bill 1492”) and 2007-543 (hereafter “Senate Bill 6”), the laws being challenged by the Plaintiffs Waste Industries USA, Inc., and Black Bear Disposal LLC (“Plaintiffs”). Defendant-Intervenors’ brief focuses on highlighting the environmental justice justifications for the size caps on new landfills created by Senate Bills 1492 and 6.

The General Assembly has the right and, in fact, a duty to protect the health and well-being of its citizens—especially its most vulnerable citizens. The General Assembly has done so by enacting Senate Bills 1492 and 6, as detailed below. The broad range and depth of benefits to the state of North Carolina and its citizens are undisputed. Thus, Defendant-Intervenors, the State of North Carolina and the North Carolina Department of Environment and Natural Resources (“Defendants”) are entitled to prevail as a matter of law.

II. STATEMENT OF THE CASE

Defendant-Intervenors NAACP and RENA adopt by reference Defendants’ Statement of the Case. N. C. R. Civ. P. 10(c). Defendant-Intervenors further note that on December 19, 2009, this Court granted the Motion to Intervene of the NAACP and RENA. On March 2, 2010, this

Court granted the Motion to Intervene of the North Carolina Coastal Federation and the North Carolina Chapter of the Sierra Club.

III. STATEMENT OF THE FACTS

Defendant-Intervenors NAACP and RENA adopt by reference Defendants' Statement of Facts. N. C. R. Civ. P. 10(c).

IV. ARGUMENT

A. SENATE BILLS 1492 AND 6 ARE CONSTITUTIONAL IN ALL ASPECTS.

1. Senate Bills 1492 and 6 Do Not Violate the State or Federal Equal Protection Guarantees.

Defendant-Intervenors NAACP and RENA adopt the arguments and evidence of Defendants State of North Carolina ("the State") and Department of the Environment and Natural Resources ("DENR") set forth in defense against claims that Senate Bill 1492 and 6 violate state and federal equal protection guarantees.

2. Senate Bills 1492 and 6 Do Not Violate the State or Federal Due Process Guarantees.

Defendant-Intervenors NAACP and RENA adopt the arguments and evidence of the State and DENR set forth in defense against claims that Senate Bill 1492 and 6 violate state and federal due process guarantees.

3. Because of the significant benefits afforded to the State of North Carolina, its citizens and its environment, Senate Bills 1492 and 6 Do Not Violate the Commerce Clause.

In enacting the size limitations on new landfills in Senate Bill 1492, the North Carolina General Assembly acted within the scope of its duty and authority to minimize a very present

threat to its citizens—among them, members of the NAACP and RENA—already incredibly burdened and subjected to the deleterious health and environmental effects from hazardous facilities such as landfills. At the time the General Assembly enacted the one-year moratorium on new landfills, several permit applications were pending for massive landfills in eastern North Carolina, a poor and historically African American part of the state. (Depo. Ex. 234) The threat to impoverished communities of color was real and pressing and the NAACP and RENA were, sadly, well aware of the ramifications of having a toxic facility such as a landfill sited in their neighborhoods. (Campbell Aff., ¶¶ 7-13; Caldwell Aff., ¶¶ 7-13; Barber Aff., ¶¶ 9,11)

In enacting these size caps, the State of North Carolina finally recognized the problems with environmental injustice in the state and took some action to address these issues.

Environmental justice is a growing field which addresses the tendency for environmental and health hazards to be placed in low-income communities and communities of color. (Wing Aff., ¶ 4) These communities are also frequently excluded from fully participating in decisions on where to site hazard-producing facilities, such as landfills, incinerators, chemical plants, and industrial agricultural facilities. (Id.) The General Assembly acted to protect these already disproportionately burdened communities, and acted in recognition of the state’s history of environmental injustice, when it placed size limits on new landfills.

North Carolina is widely considered to be the birthplace of the modern environmental justice movement. (Barber Aff., ¶ 10) Egregious racial and environmental injustices in the state, including the placement of many large noxious and toxic facilities in communities of color in the 1970s and early 1980s, spurred the formation of the environmental justice cause. (Id., ¶ 10-11) The state and private industry were responsible for the racially discriminatory placement, siting, zoning and planning decisions that disproportionately exposed communities of color and

indigent citizens to hazardous materials. (Id., ¶ 11) These same burdened North Carolina communities also suffered from a disproportionate lack of access to environmental protection enforcement and remedial services. (Id., ¶ 9) In fact, the poverty and lack of political power in these communities—and the resulting lack of opposition—is the very reason that private companies target these communities for landfills. (Runkle Aff., ¶ 11) Given the historical entanglement between North Carolina and the environmental justice movement, it is especially appropriate that the State has recognized the environmental injustice resulting from the siting of landfills and has acted to create some protections that address those injustices.

Affidavits from representatives of the Defendant-Intervenor RENA reveal precisely why the State needed to take action to afford at least some protection to its citizens from environmental injustice, and those affidavits highlight the benefits of a size cap on new landfills. (Campbell Aff., ¶¶ 7-13, 18; Caldwell Aff., ¶¶ 7-13, 17-18; Barber Aff., ¶¶ 16-18). Living near a landfill exposes residents to a host of hazards, including: water and air contamination, rancid-smelling odors, dangerous traffic in and out of the landfill, damaging birds scavenging at the site, dangerous foraging animals, and more. (Campbell Aff., ¶¶ 7-13; Caldwell Aff., ¶¶ 7-13) Even modern landfill technologies cannot control these problems. (Caldwell Aff., ¶ 7) In addition to dealing with these hazards, residents of the politically disempowered communities must also deal with a lack of remediation when problems do arise. (Wing Aff., ¶¶ 11-12) They lack the political power to seek redress for problems or enforce environmental and health standards. (Caldwell Aff., ¶ 16) Furthermore, vulnerable communities are enticed into accepting landfills with promises of additional services and amenities, and those promises are easily ignored and left unfulfilled. (Id., ¶¶ 14-15) Instead, these communities then find themselves unable to attract

desirable facilities such as supermarkets, medical facilities, and industries offering appealing employment opportunities. (Wing Aff., ¶ 4)

In response to the horrible burdens borne by its members, the NAACP has forcefully advocated for state action to address environmental injustice in the state. (Barber Aff., ¶ 13) The NAACP, along with other partners in the environmental justice movement, successfully lobbied for a moratorium on new landfills in North Carolina. (Id., ¶14) Additionally, the legislation that created that moratorium also created the Joint Select Committee on Environmental Justice. (Id.) That committee was tasked with studying the environmental justice implications of landfill siting in North Carolina and the committee was to report its findings to the General Assembly. (McGinnis Aff., ¶ 5) The Joint Select Committee on Environmental Justice met numerous times in 2006 and heard from a number of speakers knowledgeable about the relationship between landfills and environmental injustice. (Id., ¶ 6) Sharon Campbell, a representative of the North Carolina Environmental Justice Network, specifically discussed the environmental justice implications of the size of landfills. (Id., ¶ 6[d]) Through this process, the General Assembly was presented with an overwhelming amount of evidence on the need for action to protect poor and minority communities across the state from environmental injustice from landfills of unprecedented size. (Id., ¶ 6[a]-[d])

The State of North Carolina is justified in imposing across-the-board limitations on the size of new landfills built in the state because the Department of the Environment and Natural Resources does not have a record of commitment to minimizing environmental justice impacts on minority communities. (Barber Aff., ¶¶ 16-18; Campbell Aff., ¶ 17) The NAACP supported the insertion in Senate Bill 1492 of a provision that required DENR to conduct a review to determine the impacts of new landfills on low-income or minority communities and mandated

denial of permits to new landfills that would disproportionately impact those communities. (Barber Aff., ¶ 15; N.C.G.S. § 130A-294(a)(4)(c)(9)) That provision states, “The Department shall deny an application for a permit for a solid waste management facility if the Department finds that ...[t]he cumulative impact of the proposed facility, when considered in relation to other similar impacts of facilities located or proposed in the community, would have a disproportionate adverse impact on a minority or low-income community...” (Id.) This provision, of course, authorizes the denial of a permit only in communities in which there is already a landfill or a proposed landfill. As such, this provision is only a first step and, in isolation, is inadequate to protect the interests of low-income communities of color.

Furthermore, the NAACP finds that the added protection of size caps is necessary because DENR, the agency performing that review, has not, in the past, been responsive to environmental injustices suffered by minority and low-income North Carolina citizens. (Barber Aff., ¶ 17) The NAACP, in its advocacy work, has repeatedly found that DENR sides with corporate interests rather than the interests of the indigent and persons of color. (Id., ¶ 18) Without the size limitations, site-by-site consideration by DENR in the permitting process will not alleviate the worst of the burdens borne by poor and minority communities because of disproportionate siting of landfills in their communities. (Campbell Aff., ¶ 7)

Above all, the record speaks for itself—the past efforts of DENR have been clearly inadequate to prevent the disproportionate siting of new landfills in poor communities and communities of color. (Depo. Ex. 228, p. 105) The Division of Waste Management of DENR is responsible for issuing permits for new landfills in North Carolina. (Mussler Aff., ¶ 1; Depo. Ex. 228, p. 105) A dissertation prepared by Dr. Jennifer Norton and supervised by Dr. Steve Wing revealed disturbing statistics on the disproportionate placement of solid waste facilities in poor

communities of color. (Wing Aff., ¶ 18) Dr. Norton reviewed solid waste facilities issued a permit to operate from the Division of Waste Management, a subdivision of DENR, through the end of 2003 and found that the odds were 2.1 times higher that the facility was in a community with more than 10% persons of color, as opposed to a community comprised of less than 10% persons of color. (Id.) Looking at those same permit issuances, a facility was 1.4 times more likely to be sited in an area with average home values of less than \$100,000, rather than in an area with average home values of more than \$100,000. (Id.) Furthermore, examining the 207 permits issued between 1990 and 2003 for new solid waste facilities in communities that did not previously house such a facility, Dr. Norton's dissertation revealed that new facilities were permitted 2.2 times more frequently in communities with more than 10% persons of color, in comparison to communities with less than 10% persons of color less than 10%. (Id.)

Thus, examination of recent history of DENR permitting practices reveals that DENR is not addressing the disproportionate placement of dangerous facilities in poor and minority communities. The fact, then, that DENR is charged with conducting an environmental justice study prior to issuing permits is not sufficient to guarantee protective results the way an across-the-board limitation on the size of new landfills is.

Minority and low-income communities across the state, including members of the NAACP and RENA, will benefit from the size limitations on new landfills set forth in Senate Bill 1492. These communities will be protected from the largest and most dangerous of so-called "mega-landfills." (Anderson Aff., ¶¶ 11-12, 14-15) Larger landfills lead to higher risks of site failure, more serious ramifications of such failure, and enormous hurdles in remediation after such failure. (Id., ¶ 11) With some limits, modest as they are, to the size of new landfills in the

state will come some limit to the effects that new landfills have on the residents in the neighborhoods in which they are sited.

Members of the Rogers-Eubanks Neighborhood Association have documented the fact that bigger landfills lead to bigger problems for adjacent residents. (Caldwell Aff., ¶ 17; Campbell Aff., ¶ 15) When the Orange County Landfill was expanded, residents in the adjacent Rogers-Eubanks neighborhood noticed the effects. (Id.) With added size, the number of nuisance-causing birds increased, the number of foraging animals increased, traffic increased, noxious smells increased, and water and air quality worsened. (Id.) Limits on the size of new landfills will limit the burdens borne by the communities historically and statistically most likely to house new landfills—low-income communities of color.

The law as applied to these facts makes clear that the state acted validly to protect its defenseless citizens. The environmental justice justifications for the size limitations on new landfills set forth in Senate Bill 1492 are significant and beyond dispute, and immunize the legislation from invalidation under the Commerce Clause. The Supreme Court first used the dormant Commerce Clause to address the issue of the interstate movement of waste in Philadelphia v. New Jersey, 437 U.S. 617 (1978). In that case, the Court struck down a New Jersey statute that prohibited the importation of any waste that originated or was collected outside of New Jersey. Id. at 618-19. Key to this invalidation was that the New Jersey statute, on its face, discriminated against waste, an article of commerce, that originated from outside of the state. Id. at 628.

However, the Supreme Court has held that laws that do not facially discriminate against articles of interstate commerce will be reviewed under a “much more flexible” test. Philadelphia, 437 U.S. at 624. Under this flexible test, “evenhanded” regulations that do not

facially discriminate against interstate commerce will survive challenge “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits” of the regulations. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Furthermore, the Court in Philadelphia noted that the in the process of protecting the health and welfare of its citizens, states may sometimes be justifiably required to burden interstate commerce. Philadelphia, 437 U.S. at 624. In Minnesota v. Clover Leaf Creamery Co. et. al., 449 U.S. 456 (1981), the United States Supreme Court held that a Minnesota law that banned the sale of milk in plastic non-refillable, non-returnable containers did not violate the Commerce Clause. Id. at 470. As in the present case, the Minnesota law in question did not facially discriminate against out-of-state commerce. Id. at 471-72. The Court noted that the state had a substantial state interest in conserving natural resources and reducing trash in landfills, and that such local benefits were ample enough to justify the law under the Commerce Clause. Id. at 473. Furthermore, as it frequently does, the Court cautioned that deciding on the necessity and utility of legislation is within the realm of legislative, not judicial, authority. Id. at 465-70.

In this case, the local benefits—the benefits to the State of North Carolina derived from Senate Bill 1492—are overwhelming in scope and variety. Acting well within its authority, the North Carolina General Assembly acted to protect the North Carolina environment, wildlife, tourism industry, financial resources, and the health and safety of its most marginalized citizens—poor communities of color. Because of this legislation, the North Carolina tourism industry will continue to thrive. (Minges Aff., ¶¶ 5-6) The delicate North Carolina environment, particularly its fragile coastal region, will be protected from modified hydrology patterns, reduced habitat quality, reduced potential for public enjoyment, groundwater contamination, air pollution from methane gas emissions, and heavy industrial traffic. (Ward Aff., ¶¶ 9-12; Tingley

Aff., ¶ 14) North Carolina wildlife will be protected from the danger of landfill attractants luring wildlife away from safe habitats and into busy human zones of activity. (Olfenbuttel Aff., ¶¶9-13) North Carolina will be protected against the enormous potential financial risks created by extraordinarily large landfills. (Anderson Aff., ¶ 11) Most importantly to Defendant-Intervenors NAACP and RENA, and as discussed in detail above, the size restrictions in Senate Bill 1492 will benefit impoverished and minority communities across the state. These facts—the enormous and varied benefits accrued by the state because of this legislation—cannot be disputed, and provide ample counterbalance to the minimal burdens imposed on interstate commerce. Thus the State and the Defendant-Intervenors are entitled to judgment as a matter of law.

States must have the freedom to enact effective and creative laws guaranteeing the welfare of their citizens. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (Brandeis, J., dissenting). The idea that states must allow, without any limit, the construction and operation of landfills of unprecedented size in the backyards of their most vulnerable and powerless citizens is precisely what the Plaintiffs here maintain but is certainly not supported by commerce clause jurisprudence. Large landfills can still be constructed and operated in North Carolina, and those landfills can accept waste from any state. By putting very modest size limitations on the size of new landfills, the State has justifiably ensured that low-income and minority communities will not be burdened with the unimaginable and unbearable health and environmental hazards that will accompany the disproportionate placement of mega-landfills in these communities' backyards.

B. SENATE BILLS 1492 AND 6 DO NOT CONSTITUTE A COMPENSABLE TAKING OF PLAINTIFFS' PROPERTY.

Defendant-Intervenors NAACP and RENA adopt the arguments and evidence of the State and DENR set forth in defense against claims that a compensable taking of Plaintiff's property has occurred.

C. PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY HAVE A VESTED RIGHT IN THE BLACK BEAR PROJECT.

Defendant-Intervenors NAACP and RENA adopt the arguments and evidence of the State and DENR set forth in defense against claims that Plaintiffs have a vested right to be free from the restrictions contained in Senate Bill 1492 and Senate Bill 6.

D. SENATE BILLS 1492 AND 6 HAVE NOT IMPAIRED THE OBLIGATIONS OF PLAINTIFFS' CONTRACT.

Defendant-Intervenors NAACP and RENA adopt the arguments and evidence of the State and DENR set forth in defense against claims that Senate Bills 1492 and 6 have impaired the obligations of Plaintiffs' contract.

V. CONCLUSION

WHEREFORE, for all the reasons set forth herein, Defendant-Intervenors NAACP and RENA respectfully submit that their Motion for Summary Judgment be granted.

Respectfully submitted, this the 15th day of June, 2010.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **DEFENDANT-INTERVENORS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via electronic mail; or
- Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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This the 15th day of June, 2010.

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