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BILL ANALYSIS



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Senate Bill 783 (Substitute S-2 as passed by the Senate)
House Bill 5176 (Substitute S-2 as passed by the Senate)
House Bills 5177 and 5178 (as passed by the Senate)

Sponsor: Senator Michael D. Bishop (S.B. 783)
Representative Daniel Accavatti (H.B. 5176)
Representative Phil Pavlov (H.B. 5177)
Representative David Palsrok (H.B. 5178)

Senate Committee: Natural Resources and Environmental Affairs

House Committee: Natural Resources, Great Lakes, Land Use, and Environment (H.B. 5176-5178)

Date Completed: 11-8-05

RATIONALE

Michigan has struggled with the issue of out-of-State waste since at least the late 1980s, when the State enacted legislation attempting to restrict waste imports. Public Act 475 of 1988 was overturned by the United States Supreme Court in 1992 on the ground that the law violated the Commerce Clause of the U.S. Constitution, which empowers Congress to regulate commerce between the states and with other nations (*Fort Gratiot Sanitary Landfill, Inc. v Michigan Department of Natural Resources*, 504 U.S. 353). In 2004, after the City of Toronto began shipping 100% of its municipal solid waste to Michigan, the State again enacted legislation addressing imported waste, as well as other issues related to the disposal of solid waste in landfills. Among other things, Public Acts 34 through 44 of 2004 make out-of-State waste subject to the same limitations as imposed on in-State waste disposed of in a landfill, and restrict landfills' ability to accept out-of-State waste unless it comes from a particular jurisdiction or through a facility that has removed items banned from landfill disposal in Michigan.

Despite this legislation, many people's concerns about imported waste have not abated. In particular, the volume of waste from Canada is considered problematic. According to the Department of Environmental Quality's Report of Solid Waste Landfilled in Michigan for the period

of October 1, 2003, to September 30, 2004 (the latest data available), the amount of imported Canadian waste was about 23% above the quantity in the previous reporting period, compared with an increase of approximately 8% in waste imported from other states. The report also indicated that Canadian waste equaled about 18% of all waste disposed of in Michigan landfills during the 2003-04 period.

Although the measures enacted in 2004 attempted to address the waste import issue and environmental concerns without conflicting with the U.S. or Michigan Constitution, many people believe that Michigan should implement an outright ban on foreign waste. It generally is acknowledged, however, that the State cannot do so constitutionally without authorization from Congress. Proposals have been introduced in the U.S. Senate and House of Representatives to authorize states to enact laws restricting the receipt and disposal of waste generated outside of the United States. In the event that Congress passes such a measure, it has been suggested the Michigan should have a statutory ban on foreign waste in place.

CONTENT

Senate Bill 783 (S-2) and House Bills 5176 (S-2) and 5177 would amend Part 115 (Solid Waste Management) of the

Natural Resources and Environmental Protection Act (NREPA) to do the following:

- **Prohibit a person from delivering for disposal in a landfill or incinerator municipal solid waste (MSW) that was generated outside of the United States.**
- **Prohibit a landfill or incinerator owner or operator from accepting for disposal MSW that was generated outside of the United States.**
- **Provide that the prohibitions would not apply unless Congress enacted legislation authorizing them.**
- **Establish a felony penalty for a person who knowingly committed a violation.**
- **Require a court to order a violator to return, or pay to the State the cost of returning, the solid waste that was the subject of the violation.**

House Bill 5178 would amend the Code of Criminal Procedure to include the proposed felony in the sentencing guidelines.

Senate Bill 783 (S-2) and House Bill 5177 are tie-barred to House Bill 5176. House Bill 5178 is tie-barred to House Bill 5177.

House Bill 5176 (S-2)

The bill would add Section 11526e to NREPA to prohibit a person from delivering for disposal in a landfill or incinerator in this State, municipal solid waste, including MSW incinerator ash, that was generated outside of the United States. The bill also would prohibit the owner or operator of a landfill or incinerator in Michigan from accepting for disposal MSW, including MSW incinerator ash, that was generated outside of the United States. The prohibitions would apply notwithstanding any other provisions of Part 115.

The prohibitions would not apply, however, unless Congress enacted legislation under Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause) authorizing the prohibitions. The prohibitions also would not apply if the delivery and acceptance of the waste were pursuant to a contract entered into before the bill's effective date.

The prohibitions would apply 90 days after the effective date of the Federal legislation or 90 days after the bill's effective date, whichever was later.

House Bills 5177 and 5178

Under House Bill 5177, a person who knowingly violated proposed Section 11526e would be guilty of a felony punishable by imprisonment for up to two years and/or a fine of up to \$5,000.

Under House Bill 5178, the felony would be a Class G offense against public safety with a statutory maximum sentence of two years.

Senate Bill 783 (S-1)

Under Section 11546 of NREPA, the Department of Environmental Quality or a health official may request the Attorney General to bring an action, or a municipality or county may bring an action, for any appropriate relief, including injunctive relief, for a violation of Part 115 or rules promulgated under it. In addition to any other relief provided by the section, the court may order a violator to pay a civil fine of up to \$10,000 per day of violation, or up to \$25,000 per day for repeat violations. The court also may order a violator to restore, or pay to the State the cost of restoring, the natural resources affected by the violation, and to pay the State's cost of surveillance and enforcement.

Under the bill, in addition to any other relief provided by this section, the court would have to order a person who violated Section 11546e to return, or pay to the State an amount equal to the cost of returning, the solid waste that was the subject of the violation, to the country where it was generated.

MCL 324.11546 (S.B. 783)
Proposed MCL 324.11526e (H.B. 5176)
MCL 324.11549 (H.B. 5177)
MCL 777.13c (H.B. 5178)

BACKGROUND

Public Acts 34 through 44 of 2004

Public Acts 34 through 44 of 2004 amended Part 115 of the Natural Resources and Environmental Protection Act. A brief overview of the legislation follows.

Public Act 34 expanded the list of items that are banned from landfills, and incorporated restrictions that previously had been found only in administrative rules. In addition to the items that already were prohibited, Public Act 34 bans more than a de minimus number of used beverage containers and whole tires. Public Act 35 added a definition of "beverage container".

Under Public Act 36, the Department of Environmental Quality (DEQ) Director may issue an order restricting or prohibiting the transportation or disposal of solid waste originating within or outside of Michigan, if it poses a substantial threat to the public health or safety or to the environment, and the restriction is necessary to minimize or eliminate the threat.

Public Act 37 required the DEQ to compile a list of countries, states, provinces, and local jurisdictions that either prohibit the landfill disposal of the items banned from landfills in Michigan, or prevent the disposal of those items through enforceable solid waste requirements.

Public Act 38 prohibits the DEQ from issuing a permit to construct a landfill if the Department received an administratively complete application for a permit during 2004 or 2005, subject to various exceptions. Under Public Act 39, a landfill owner or operator must report annually to the State, and the county and municipality where the landfill is located, on the amount of remaining disposal capacity, and the DEQ must report the information to the Legislature.

Public Act 40 prohibits a landfill owner or operator from accepting for disposal solid waste generated outside of Michigan unless 1) the country, state, province, or local jurisdiction where the waste was generated is on the DEQ's list of approved jurisdictions; 2) the solid waste was received through a transfer station or other facility that removed the items banned from disposal; or 3) the waste consists of a uniform type of items, material, or substance that meets the requirements for landfill disposal under Part 115.

Public Act 41 set a maximum fine of \$25,000 per day of violation for a second or subsequent violation of Part 115 or failure to comply with a permit, license, or final order issued under that part.

Under Public Act 42, the DEQ must post on its website a list of materials banned from landfills and appropriate disposal options, and solid waste haulers must notify their customers of those items and options.

Public Act 43 requires the DEQ to provide for the inspection of each solid waste disposal area at least four times per year, and permits the DEQ and the State Police to conduct regular, random inspections of waste being transported for disposal. Public Act 44 provides that a solid waste management plan may include a mechanism for a county, and municipalities within the county responsible for enforcement, to assist the DEQ and the State Police with inspections.

All of the Acts took effect on March 29, 2004, although the implementation of certain provisions was delayed from October 1 until November 2004 due to litigation. (A lawsuit challenging the legislation was filed in April 2004 in the U.S. District Court for the Eastern District of Michigan, contending that the legislation violates the Commerce Clause as well as the Foreign Affairs Power (which refers to the Federal government's right under the U.S. Constitution to regulate foreign relations) (*National Solid Wastes Management Association v Jennifer Granholm, et al.*, Case No. 04-71271). To date, a trial has not been scheduled.)

(For a detailed description and analysis of these Acts, please see the Senate Fiscal Agency (SFA) Enrolled Analysis of Senate Bill 57 et al. of 2003-2004, dated 9-2-04. Additional information is contained in the SFA Issue Paper entitled, "Disposal of Solid Waste in Michigan Landfills: Imported Waste and Environmental Concerns" (January 2005). Both documents are available on the Senate Fiscal Agency's website: www.senate.michigan.gov/sfa.)

Federal Proposals

H.R. 2491 would create the "International Solid Waste Importation and Management Act of 2005" to allow states to enact laws or issue regulations or orders restricting the receipt and disposal of foreign municipal solid waste (MSW generated outside of the United States) within their borders, until the Administrator of the Environmental Protection Agency (EPA) issued regulations implementing and enforcing the Agreement Concerning the Transboundary Movement of

Hazardous Waste between the United States and Canada. (This "Transboundary Agreement" is described below.) Laws, regulations, and orders enacted or issued before that date could continue in effect.

The proposal specifies that state action authorized under it would not be considered to impose an undue burden on interstate and foreign commerce or otherwise impair, restrain, or discriminate against interstate and foreign commerce.

H.R. 2491 also would require the EPA Administrator to perform the functions of the designated agency under the Transboundary Agreement with respect to the importation and exportation of municipal solid waste under the Agreement; and implement and enforce the notice and consent and other provisions of the Agreement. In considering whether to consent to the importation of MSW under the Agreement, the Administrator would have to give substantial weight to the views of the state into which the waste would be imported and consider the views of the local government; consider the impact of the importation on continued public support for and adherence to state and local recycling programs, landfill capacity, and air emissions and road deterioration from increased vehicular traffic; and consider the impact on homeland security, public health, and the environment.

In addition, the proposal would make it unlawful to import, transport, or export municipal solid waste for final disposal or for incineration in violation of the Agreement, and would authorize the Administrator to assess civil penalties for violations of the Act or bring a civil action in the U.S. district court.

On September 27, 2005, H.R. 2491 was reported from House Committee on Energy and Commerce to the full House of Representatives.

S. 1198 was introduced in the U.S. Senate on June 8, 2005, and referred to the Senate Committee on Environment and Public Works. The content of this proposal is very similar to that of H.R. 2491.

H.R. 593 would allow states to enact laws imposing limitations on the receipt and disposal of municipal solid waste generated outside of the United States. This bill was introduced on February 25, 2005, and

referred to the House Subcommittee on Environment and Hazardous Materials.

Transboundary Agreement & EPA Activity

The United States and Canada entered into the Transboundary Agreement in 1986. Originally the Agreement applied only to hazardous waste but it was extended to municipal solid waste in 1992. The Agreement imposes a general obligation on both countries to permit the import, export, and transit of waste across the common border for treatment, storage, or disposal; contains notice requirements; and permits a country to consent to or object to a shipment.

To date, the Agreement has not been implemented with respect to MSW. It is the position of the EPA that the Agency does not have the statutory authority to enforce this aspect of the Agreement, and will not have the authority unless Congress passes enabling legislation.

Earlier in 2005, the EPA and Environment Canada engaged in a pilot project designed to assist both countries to prepare for eventual full implementation of the Agreement. A total of 14 transfer stations in Ontario voluntarily gave the EPA notices of their waste shipments to Michigan. The EPA reviewed the notices and found that everything was in order.

In activity unrelated to the Transboundary Agreement, the EPA and the DEQ have undertaken a project to monitor the disposal of Canadian waste in Michigan landfills for compliance with environmental laws and regulations. According to preliminary results of the inspections, the frequency of prohibited items in Michigan and Canadian municipal solid waste loads is relatively unchanged; the principal banned items found in loads from both jurisdictions are yard clippings, whole tires, and appliances containing Freon; a lack of consistent truck screening has been observed at all landfills involved in the project; and nothing problematic has been found from Canadian industrial, commercial, and institutional waste loads (i.e., those managed by Ontario's provincial government). A final report on the project is not anticipated until the end of the year.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

According to the United States Supreme Court, waste is an article of "commerce" even if it has no value. Therefore, only Congress has the power to regulate the movement of waste between states or between a state and a foreign country. Congress may, however, authorize states to engage in activities that otherwise would violate the Commerce Clause. As described above, H.R. 2491, S. 1198, and H.R. 593 would give states the necessary authority to enact laws restricting the delivery and disposal of municipal solid waste generated outside of the United States. Therefore, Senate Bill 783 (S-2) and House Bills 5176 (S-2), 5177, and 5178 would position Michigan to ban foreign waste from this State's landfills, without further action, if one of these Federal proposals or similar legislation becomes law. Having the prohibition on the books also could help build momentum in Congress to enact authorizing legislation.

Supporting Argument

Public Acts 34 through 44 of 2004 took steps to address environmental concerns about imported waste, particularly by subjecting it to Michigan landfill disposal standards, allowing landfills to accept out-of-State waste only from approved jurisdictions or sources, and authorizing the DEQ to limit or prohibit the transportation or disposal of waste (from any source) that poses a threat to the public health or safety or to the environment. Nevertheless, in recognition of the Commerce Clause, these measures did not impose an outright ban on foreign waste, and they will do little, if anything, to reduce the actual volume of waste disposed of in Michigan landfills. The proposed legislation would go beyond the 2004 amendments by directly prohibiting the disposal in Michigan landfills of waste generated outside of the United States. The bills also recognize the constraints imposed by the Commerce Clause, by providing that the prohibition would not take effect until authorized by Congress.

Response: In addition to a ban on foreign waste, Michigan needs a comprehensive approach to solid waste management. According to the DEQ's

Report to the Legislature, "The state's current solid waste management planning program has consistently been regarded as a means of providing disposal capacity in the state, rather than developing an integrated waste management system...[F]urther encouragement of waste reduction for the protection of Michigan's environmental resources through decreased reliance on land disposal and incineration is necessary" (Recommendations for Changes to the Solid Waste Planning and Disposal Area Siting Provisions of Part 115...", 2-22-05). The report includes various recommendations to update Michigan's solid waste policy, which include establishing incentives to encourage recycling, source reduction, and reuse; making efforts to incorporate cost-effective programs into county solid waste management plans; encouraging counties to plan on a regional basis; and establishing funding mechanisms such as a surcharge, unit-based garbage fee structures, or host county or host community agreements to help support planning and program implementation at the State and local levels.

Supporting Argument

In addition to prohibiting the acceptance and delivery of foreign waste, the House bills would create a felony penalty for violations committed knowingly. Although a person who violates Part 115 already may be subject to a stiff civil fine, the bills would add the possibility of imprisonment and a criminal record. Senate Bill 783 (S-2) also would ensure that waste imported illegally did not stay in the State, since a person violating the foreign waste prohibition would have to return the waste or pay the State the cost of returning it.

Opposing Argument

The bills are largely symbolic because they would accomplish nothing unless Congress enacts legislation allowing states to prohibit or restrict foreign waste. Proposals on this subject were introduced in the U.S. Senate and House in previous sessions, and received little action. Whether any of the current proposals will be more successful cannot be predicted. Rather than waiting for Congress to act, the State can take affirmative steps now to address the volume of waste disposed of in Michigan landfills. In particular, the two-year moratorium on new landfill construction should be extended, and a surcharge should be imposed on waste deposited in landfills. The State's relative abundance of landfill capacity and low

disposal cost have been largely blamed for Michigan's consistent ranking as the second- or third-highest importer of solid waste in the country.

Although Public Act 38 of 2004 imposed a two-year moratorium on the issuance of permits for landfill construction, the moratorium is set to expire, and the State imposes no "tipping fee" on those who dispose of solid waste in landfills. Reportedly, increased fees have helped to reduce the volume of waste disposed of in Pennsylvania and Wisconsin. In addition to discouraging overreliance on Michigan landfills by both in- and out-of-State waste generators, a surcharge would provide revenue to support community recycling efforts. According to the DEQ, Michigan's recycling rate of 20% is the lowest of the Great Lakes region and one of the lowest in the nation. At the State level, Michigan annually allots \$200,000 to support recycling efforts—a level of program support that ranks 41st out of the 48 states reporting and last among the Great Lakes region states. As noted above, the DEQ included a surcharge among its suggested funding mechanisms.

Response: Michigan residents and businesses produce almost 75% of the waste disposed of in the State's landfills and therefore would pay the lion's share of the suggested tipping fee. During these financially challenging times, any additional charge would strain individuals and municipalities, as well as businesses, which no doubt would pass on the charge to their customers. While the State is struggling to improve its economic climate, a tipping fee would add to the cost of living and doing business in Michigan. Furthermore, Canada's largest exporters of municipal solid waste, Toronto and the Region of York, evidently would be unaffected by a surcharge, since their contracts reportedly make any new taxes or fees the responsibility of the landfill owner with which they contracted (MIRS Capitol Capsule, "Canada: We Won't Pay Garbage Fees", 2-23-05).

In addition, an assessment that raised revenue for a recycling program that served the general public would be an illegal tax, rather than a user fee (which would provide a particular benefit to the person paying it). A surcharge also would violate the Commerce Clause, since out-of-State waste generators paying the charge would receive

no benefit from it, while their Michigan counterparts would experience a benefit. Moreover, imposing a surcharge on foreign waste generators would violate international trade agreements.

Opposing Argument

The bills could be economically devastating to the communities receiving tax revenue from landfills that accept Canadian waste. Reportedly, Sumpster Township would lose close to \$2.2 million per year—or approximately half of its budget—from the foreign waste that is deposited at the Carleton Farms Landfill; Van Buren Township would lose the \$1.50-per-ton it receives from the 300,000 to 500,000 tons of Canadian waste that come to township landfills; and Wayne County's Department of Environment would lose over \$800,000 annually from just one of the landfill facilities located in the county. In addition to depriving communities of badly needed revenue, the bills would cost hundreds of workers their jobs.

Response: Under House Bill 5176 (S-2), the prohibition against foreign waste would not apply to the acceptance and delivery of waste that was the subject of a contract entered into before the bill's effective date. This would protect the revenue received under existing contracts. Since the contracts with Toronto reportedly will not expire until 2010, the affected communities would have time to prepare for the loss of this source of income.

Opposing Argument

Although the bills would not violate the Commerce Clause, since the foreign waste prohibition could not take effect without Congressional authorization, the legislation still could run afoul of international trade agreements. In particular, the World Trade Organization agreement and the North American Free Trade Agreement generally require the United States to treat products from another country no less favorably than domestically produced goods are treated. A principal thrust of these agreements is to eliminate nontariff barriers to trade. The legislation, however, would create such barriers by restricting the solid waste trade between Michigan and Canada.

Opposing Argument

House Bill 5176 (S-2) would undermine the package by exempting waste imported under existing contracts. Since a great deal of Canadian waste is imported under

contracts that do not expire until 2010, the bills would accomplish very little for five years--assuming that Congress authorized states to restrict or prohibit foreign waste imports.

Fiscal Analyst: Mike Hansen
Jessica Runnels

Response: The exemption is necessary to ensure that the legislation would not violate Article I, Section 10 of the State Constitution, which prohibits laws that impair contractual obligations.

Opposing Argument

Waste disposal is a two-way street. In addition to receiving municipal solid waste from Canada, Michigan sends tons of hazardous waste across the border. If Michigan banned MSW shipments from Canada, it is possible that Canada would do the same. This could limit Michigan companies' access to reasonably priced hazardous waste disposal, resulting in higher costs to businesses and consumers. Another consequence could be more hazardous waste disposal sites in this State--a poor tradeoff for banning municipal solid waste.

Response: Michigan receives hazardous waste from Canada as well, and exports it to other states in addition to Canada.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

House Bill 5176 (S-2)

The bill would have no fiscal impact on State or local government.

House Bills 5177 and 5178

The bills would have an indeterminate fiscal impact on State and local government. There are no data to indicate how many offenders would be convicted of knowingly importing solid waste from a foreign country. Local governments would incur the cost of incarceration in local facilities, which varies by county. The State would incur the cost of felony probation at an annual average cost of \$2,000, as well as the cost of incarceration in a State facility at an average annual cost of \$30,000.

Senate Bill 783 (S-2)

The bill would be revenue-neutral for the State unless the liable party did not pay the State a sufficient amount to cover the full expense for removal of the waste.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.