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DISPOSAL OF SOLID WASTE IN MICHIGAN LANDFILLS:

Imported Waste and Environmental Concerns

by

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INTRODUCTION

Early in 2004, members of the public and policy-makers became highly concerned when Toronto began sending 100% of its municipal solid waste, or about 1.1 million tons annually, to the Carleton Farms landfill in Wayne County, Michigan. The disposal of imported waste in Michigan landfills has been an issue since at least the late 1980s, however, when the State enacted legislation attempting to restrict waste imports. At present, waste imported from other states and Ontario represents approximately 20% of all municipal solid waste disposed of in Michigan landfills.[1]

The volume of this waste raises concerns about potential health and environmental hazards, including groundwater contamination. Waste originating from outside of Michigan is of particular concern because it may contain items that are banned from landfills in this State or are contraband. Nondecontaminated medical waste[2], radioactive medical waste[3], and marijuana[4], for example, have been found in waste shipments from Canada. Also, the transportation of waste into and through the State can contribute to increased pollution, noise, and traffic, as well as the deterioration of roadways. Many people also worry that the volume of waste eventually will lead to the use of natural resources for new landfills. Others fear that imported waste could threaten homeland security, if terrorists used the waste to hide weapons, explosives, other dangerous material, or themselves.

Public Acts 34 through 44 of 2004 were enacted in response to these concerns. Among other things, this legislation makes out-of-State waste subject to the same limitations as imposed on in-State waste disposed of in a landfill; restricts landfills' ability to accept out-of-State waste unless it comes from a particular jurisdiction or through a facility that has removed prohibited items; bans more than a minimal number of beverage containers or whole tires from landfill disposal; and imposes a two-year moratorium on the construction of new landfills. These measures have taken effect, although the legislation is the subject of a pending Federal lawsuit.

Proposals also were introduced in the U.S. Senate and House of Representatives to allow states to enact laws prohibiting or imposing limitations on the receipt and disposal of foreign municipal solid waste; prohibit the importation, transportation, or exportation of municipal solid waste in violation of the Agreement Between the United States and Canada Concerning the Transboundary Movement of Hazardous Waste; and require the U.S. Environmental Protection Agency (EPA) to implement and enforce the Agreement. While none of these bills was enacted, approximately $1 million was budgeted for the EPA to enforce the Agreement. At present, the EPA is negotiating with Canadian officials on this issue, as well as working with the Michigan Department of Environmental Quality (DEQ) to implement the recently enacted State legislation.

This article discusses the disposal of solid waste in Michigan, the legislation enacted in 2004, the lawsuit challenging it, the Federal proposals, local efforts to curb waste imports, and related activities of the EPA and the DEQ.

BACKGROUND

Between 1996, when the DEQ began to collect solid waste import data, and 2002, the amount of waste from other states being disposed of in Michigan rose 61%, while the State saw a 149% increase in the amount of waste from Canada.[5] Michigan now is the second or third largest importer of solid waste in the country. The popularity of Michigan landfills is generally attributed to two factors: the State's relatively large amount of capacity, and the comparatively low cost to dispose of waste in Michigan.[6] The supply of landfill space results from the solid waste management program first enacted in 1978, which is presently codified in Part 115 of the Natural Resources and Environmental Protection Act.[7] This program requires counties to ensure disposal capacity for a number of years into the future--originally 20 years and currently 10.[8] To do so, each county either must secure the ability to use landfill that currently exists, or provide for the siting of new landfill capacity within the county. Counties may meet these requirements individually or in cooperation

with other counties. According to some, the requirements have resulted in an abundance of landfill capacity, which has contributed to the low cost of disposal and the need for landfills to look beyond State lines for clients.

The law requires landfill owners to pay the State an administrative fee based on the amount of waste received. [9] While the landfill owners may pass this fee on to their customers, the State imposes no direct "tipping fee" on those who dispose of waste in landfills. At the local level, a municipality in which a landfill is located may impose an impact fee based on the amount of solid waste, which the landfill owner or operator must collect. [10] A municipality levying this fee may use the revenue for any purpose that promotes the public health, safety, or welfare of its residents.[11]

As noted above, Michigan previously attempted to restrict the importation of out-of-State waste. Public Act 475 of 1988 prohibited a person from accepting for disposal solid waste that was not generated in the county where the disposal area was located, unless the acceptance of such waste was authorized in the approved county solid waste management plan. [12] In 1992, the United States Supreme Court held that waste is an article of commerce even if it has no value, and found that Public Act 475 violated the Commerce Clause of the U.S. Constitution (*Fort Gratiot Sanitary Landfill, Inc.* v *Michigan Department of Natural Resources*, 504 U.S. 353).[13] The Court stated, in part, "Because those provisions unambiguously discriminate against interstate commerce, the State bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives." The Court found that Michigan had not identified any reason, apart from the waste's origin, why solid waste coming from outside a county should be treated differently from solid waste within a county. Although the statute addressed out-of-county waste, the Court pointed out that a state may not avoid violating the Commerce Clause by restricting the movement of articles of commerce through subdivisions of the state, rather than through the state itself.

At the Federal level, in 1986, the United States and Canada entered into the Agreement Between the United States and Canada Concerning the Transboundary Movement of Hazardous Waste (the "Transboundary Agreement"). The Agreement originally applied only to hazardous waste but it was extended to 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 or object to a shipment. To date, the Transboundary Agreement has not been implemented.

PUBLIC ACTS 34 THROUGH 44

Overview

Public Acts 34 through 44 of 2004 amended Part 115 (Solid Waste Management) of the Natural Resources and Environmental Protection Act. All of the Acts took effect on March 29, 2004, although the implementation of certain provisions was delayed from October 1 until November due to the lawsuit challenging the amendments. The following is an overview of the legislation.[14]

Public Act 34 (Senate Bill 498) 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 banned (such as medical waste, sewage, lead acid batteries, and yard clippings), Public Act 34 bans more than a de minimus number of used beverage containers and more than a de minimus number of whole motor vehicle tires. The Act makes an exception for green glass until June 1, 2007, and instructed the DEQ to convene a green glass task force, which was required to issue its recommendations by December 31, 2004.

Public Act 35 (Senate Bill 497) added a definition of "beverage container" (which is virtually the same as the definition found in the beverage container deposit law, i.e., the "Initiated Law of 1976").

Public Act 36 (Senate Bill 57) authorizes the DEQ Director to 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 or prohibition is necessary to minimize or eliminate that threat. The DEQ must comply with certain posting and notification requirements, which vary if an order is issued in an emergency situation.

Under Public Act 37 (Senate Bill 502), the DEQ must compile a list of countries, states, provinces, and local jurisdictions that either prohibit from landfill disposal the items banned from disposal in a landfill in Michigan, or prevent the disposal of those items through enforceable solid waste disposal requirements. The DEQ also must give a copy of the list to each landfill in Michigan. The Act required the DEQ to meet these requirements by October 1, 2004.

Public Act 38 (Senate Bill 506) prohibits the DEQ from issuing a permit to construct a landfill, if the Department received or receives an administratively complete application for a permit during 2004 or 2005. The Act contains various exceptions to this moratorium, including an exception for the expansion of an existing landfill with less than five years of disposal capacity.

Under Public Act 39 (Senate Bill 557), 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. The Act also requires the DEQ to report a summary of the information to the Legislature by January 31 each year.

Public Act 40 (House Bill 5234) prohibits a landfill owner or operator, beginning October 1, 2004, from accepting for disposal solid waste that was generated outside of Michigan, unless one of the following applies:

-- The country, state, province, or local jurisdiction where the waste was generated is on the DEQ list of approved jurisdictions (required by Public Act 37).
-- The solid waste was received through a transfer station or another facility that removed the items banned from disposal in a landfill.
-- The waste consists of a uniform type of items, material, or substance that meets the requirements for landfill disposal under Part 115.

Also, Public Act 40 provides that a county is not required to identify a site for a new landfill in its solid waste management plan if there is sufficient disposal capacity for the county's needs in or within 150 miles of the county.

Public Act 41 (Senate Bill 500) 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 Part 115. (The maximum fine for a first violation remains $10,000 per day.)

Under Public Act 42 (House Bill 5235), the DEQ must post on its website a list of materials banned from disposal in a landfill, and appropriate disposal options for them. The Act also requires solid waste haulers that dispose of waste in a landfill to give their customers annual notice of the banned materials, the appropriate disposal methods, and the DEQ's website address.

Public Act 43 (Senate Bill 499) requires the DEQ to provide for the inspection of each solid waste disposal area at least four times per year. The Act also permits the DEQ and the State Police to conduct regular, random inspections of waste being transported for disposal at disposal areas in Michigan.

Public Act 44 (Senate Bill 715) provides that a solid waste management plan may include a mechanism for the county, and municipalities within the county responsible for enforcement, to assist the DEQ and the State Police in implementing and conducting the inspection program. The Act also permits solid waste management plans to include an enforceable program and process to assure that only items authorized for disposal in a disposal area are disposed of there.

Lawsuit

On April 5, 2004, the National Solid Wastes Management Association (NSWMA) filed a complaint in the United States District Court for the Eastern District of Michigan, challenging the constitutionality of the legislation (*National Solid Wastes Management Association* v *Jennifer Granholm, et al.*, Case No. 04-71271). The NSWMA claimed, in part, that three of the 11 laws in the package--Public Acts 34, 37, and 40--closed Michigan's borders to out-of-State waste in violation of the dormant Commerce Clause, the foreign Commerce Clause, and the Foreign Affairs Power.[15] The plaintiff sought a preliminary injunction preventing the State from implementing and enforcing the legislation.

At the time the lawsuit was brought, the DEQ had not yet put in place the procedures and forms detailing enforcement, particularly the procedures for out-of-State jurisdictions to apply for inclusion on the DEQ list, or for the Department to determine which jurisdictions have comparable landfill prohibitions to ensure that solid waste disposed of in Michigan does not contain banned items. After a hearing on September 24, 2004, the District Court delayed the implementation of the legislative package until November 1, 2004.

The Court held another hearing on October 29, 2004, after the DEQ had prepared its implementation procedures and forms. The Court denied the plaintiff's motion for a preliminary injunction. In its opinion of November 2, 2004, the Court found that the legislation, on its face, did not unconstitutionally discriminate against out-of-State commerce. The Court also said that it was not persuaded that the laws were enacted with a discriminatory purpose. Whether the laws have a discriminatory impact "remains an open question". The Court stated, in part:

> What can be said is that the package does not impose its will on jurisdictions outside of Michigan. No jurisdiction outside of Michigan is required to conform to Michigan law in order to transport its solid waste to Michigan. What is required – because of the difficulties associated with inspecting solid waste at the entrance to a Michigan landfill to assure that it does not contain prohibited items – is an assurance that the originating jurisdiction has comparable limitations or that the solid waste has been inspected and prohibited items have been removed. *This is a non-discriminatory health and safety measure and there appears to be no reasonable alternative.* [Emphasis added.]

The NSWMA did not appeal the Court's denial of its motion for a preliminary injunction. The case is proceeding toward trial on the plaintiff's claims that the laws are unconstitutional, and its request for a permanent injunction. In December, the NSWMA filed an amended complaint.[16] At this time, a trial date has not been set.

Implementation

As required by the legislation, the DEQ has created a list of jurisdictions whose solid waste may be disposed of in Michigan landfills. As of October 28, 2004, the list contained six jurisdictions: the State of Wisconsin, the City of Toronto, and four other municipalities in Ontario. All are certified for the disposal of household waste, and Toronto is certified for commercial and industrial waste as well. (The DEQ also accepts solid waste from other states, which may qualify under the criteria of Public Act 40 that allow homogeneous waste and waste received through a facility that removed items banned from landfill disposal.) The list is posted on the Department's website (www.michigan.gov/DEQ).

The DEQ's website also contains a September 30, 2004, memorandum to solid waste landfill owners and operators, informing them of the list of out-of-State jurisdictions whose solid waste disposal requirements are comparable to Michigan's restrictions. According to the memo, the DEQ will update the list to add or delete countries, states, provinces, and local jurisdictions, as necessary. In addition, the memo describes the items prohibited from disposal in Michigan landfills. Also, as

required, the DEQ sent a letter to waste haulers about items banned from landfills and disposal alternatives, and the DEQ's website contains information about appropriate disposal options.

In compliance with the laws, a green glass task force was convened, landfills submitted their first reports on their disposal capacity, and the DEQ is using this information to prepare its report to the Legislature.[17]

FEDERAL PROPOSALS

Various proposals addressing the importation of municipal solid waste were introduced in the United States Senate and House of Representatives during the 108th Congress (2003 and 2004). The Senate bills, S. 199 and S. 383, were referred to the Committee on Environment and Public Works, which did not act on the bills. Three of the House proposals, H.R. 382, H.R. 411, and H.R. 1730, were the subject of hearings on July 23, 2003, by the Subcommittee on Environment and Hazardous Waste of the Committee on Energy and Commerce. The bills received no further action. A fourth proposal referred to the same subcommittee, H.R. 4940, was reported to the full committee on September 23, 2004, but saw no additional action. The bills are described briefly below.

H.R. 382 proposed to allow states to enact laws prohibiting or imposing limitations on the receipt and disposal of foreign municipal solid waste (MSW). The bill specified that such state action would not discriminate against interstate and foreign commerce.

H.R. 411 and S. 199 would have prohibited the importation, transportation, or exportation of MSW in violation of the Agreement Between the United States and Canada Concerning the Transboundary Movement of Hazardous Waste. The bills also would have required the EPA Administrator to implement and enforce the notice and consent provisions of the Agreement. The bills specified criteria for the Administrator to consider in determining whether to allow the importation of MSW, and proposed penalties for violations.

H.R. 1730 would have prohibited a landfill or incinerator from receiving out-of-state MSW for disposal or incineration unless it were received pursuant to a host community agreement or an exemption from this prohibition. The bill would have authorized states to: limit the quantity or the percentage of out-of-state MSW received at each landfill or incinerator; limit the amount of out-of-state MSW received if the state enacted a comprehensive, statewide recycling program; and impose a cost recovery surcharge. State restrictions could not discriminate against the receipt of out-of-state MSW on the basis of state of origin.

H.R. 4940 proposed to prohibit a landfill or incinerator from receiving out-of-state MSW unless the facility owner or operator obtained explicit authorization from the affected local government. The bill also would have authorized states to: limit the amount of out-of-state MSW received annually by facilities; impose cost recovery surcharges on the combustion or disposal of such waste; and enact laws imposing limitations on the receipt and disposal of foreign MSW. In addition, the bill would have prohibited a person from importing, transporting, or exporting MSW for final disposal in violation of the Transboundary Agreement.

S. 383 proposed a ban on the importation or acceptance of MSW from Canada until the EPA Administrator promulgated regulations to implement and enforce the Transboundary Agreement, although a state could have opted out of the ban.

Proposals that would authorize states to limit imported waste are designed to overcome Commerce Clause challenges, since Congress may authorize states to take actions that otherwise would violate the Clause, if the Congressional intent to do so is clearly expressed.[18] In the House subcommittee hearings, however, a number of speakers raised concerns about some of the bills' potential to violate international trade agreements to which the United States is a party, particularly the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade

(GATT).[19] Others voiced concerns about the implications of any effort of the United States to reinterpret or enforce the Transboundary Agreement in a way that Canada might find objectionable.[20]

While not limiting the importation of MSW, an amendment to an omnibus Federal appropriations act required U.S. Customs agents to inspect all municipal solid waste trucks that cross the Ambassador Bridge (between Detroit and Windsor) and the Blue Water Bridge (between Port Huron and Sarnia), and required the installation of radiation inspection equipment at these ports. The inspections began in May 2003.[21]

In addition, as noted above, approximately $1 million was budgeted for the EPA to enforce the Transboundary Agreement.[22]

TRANSBOUNDARY AGREEMENT; EPA ACTIVITY

Many people believe that the importation of solid waste from Canada could be curtailed if the EPA simply would enforce the Agreement Between the United States and Canada Concerning the Transboundary Movement of Hazardous Waste. It is the position of the Environmental Protection Agency and others, however, that the Agency does not have the statutory authority to enforce the Agreement, and will not have the authority unless Congress passes enabling legislation, which it has not done.[23]

In addition, there seems to be confusion about what enforcing the Agreement actually would accomplish. The Agreement states that the parties "*shall permit* the export, import, and transit of hazardous waste and other waste across their common border for treatment, storage, or disposal…" (emphasis added), pursuant to their own laws and the terms of the Agreement. The Agreement requires either country to notify the other of a proposed shipment of waste or a series of shipments (which can cover up to a 12-month period). The receiving country then has 30 days to respond by indicating its consent (with or without conditions) or its objection. The Agreement, however, neither requires the receiving country to give its affirmative approval before the waste can be shipped, nor spells out the consequences of a party's objection. In addition, the Agreement specifies no grounds for a receiving country to object. Arguably, the EPA could not object to a proposed shipment of waste unless it would violate state or Federal law.[24]

(In regard to the shipment of *hazardous* waste under the Transboundary Agreement, an exporter may proceed with a shipment only after the importing country has granted consent, which typically covers multiple shipments for a one-year period, according to Congressional testimony. Further, the primary role for the environmental agencies is to ensure that the waste will be properly managed. When Canada exports hazardous waste to the United States, the EPA will consult directly with the appropriate state agency or review previously submitted state information to confirm that the receiving facility is permitted to manage all of the specific types of waste identified in the notice, and that the state believes the waste will be handled consistently with Federal and state requirements. If this were not the case, the U.S. would deny entry of the waste. "It is this same notice and consent scheme that the U.S. and Canada intend to use for municipal solid waste shipments once both countries have the necessary legal authorities."[25])

In light of numerous calls for the EPA to act,[26] and the appropriation of nearly $1 million to enforce the Agreement, the Agency formally proposed a pilot project between the governments of the United States and Canada to test implementation of the Agreement. According to an August 24, 2004, letter from the EPA to Environment Canada, "This proposed project is intended to assist both our countries to prepare for eventual full implementation of the Agreement with respect to MSW shipments." The pilot project would involve the development of procedures and infrastructure for a nonbinding notice and consent process for MSW exports from Canada to the United States (specifically from Ontario to Michigan), based on the existing hazardous waste import and consent process. In its August letter, the EPA proposed a starting date of February 2005, a six-month term

for the pilot, and evaluation by September 30, 2005. At present, the EPA is in the final stages of negotiations with Canada.[27]

In addition, the Agency has been working with the Department of Environmental Quality on a project to monitor the disposal of Canadian MSW in landfills for compliance with environmental laws and regulations. According to a DEQ description of the project ("Transboundary Waste Movements Demonstration Project"), it will build on inspections completed in 2003 at several Michigan landfills. Over the course of 2005, inspectors will characterize and document incoming waste to ensure that it is not violating State or Federal law or endangering human health or the environment. Based on the findings, the DEQ and the EPA will provide technical assistance to landfill facilities and State inspectors regarding improved methods of screening for prohibited materials and management of imported waste.

LOCAL ACTIVITY

Various activities have been undertaken at the local level--by individual public officials and local units of government--to curb the importation of solid waste. These efforts perhaps are significant more for the frustration they reflect, than for what they have accomplished. In March 2003, for example, the Macomb County Board of Commissioners adopted Resolution 2003-24 to create a solid waste planning committee responsible, in part, for securing the voluntary reduction of the acceptance of out-of-State waste by the owner of the county's only landfill. At the same time but less officially, a Genesee County Commissioner called for a boycott of Toronto.[28] In October 2003, a State legislator from Farmington Hills launched an anti-trash yard sign campaign.[29]

Perhaps most prominent was Wayne County's failed attempt to prohibit a landfill owner or operator from accepting solid waste from a jurisdiction or generator "…that is not regulated by a beverage container deposit law that provides regulation of beverage and has bottle return rates comparable to those reported by the Michigan Department of Treasury…" (Enrolled Ordinance No. 2003-532). The ordinance was challenged as unconstitutional in the U.S. District Court for the Eastern District of Michigan, which granted a preliminary injunction against it on October 16, 2003.[30]

REACTION TO LAWS; OTHER PROPOSALS

It is not uncommon to see headlines such as "Laws Haven't Stopped Trash"[31] and "New Trash Laws Don't Perform as Advertised"[32]. According to the first article, "The waste disposal industry sees no barrier to their Canadian trash imports despite the state statutes… [T]he laws simply have resulted in more paperwork or a rise in costs." The article claims that the only change has come at transfer stations in Ontario, where workers sift through piles of trash and machinery removes materials not allowed in Michigan landfills. The latter article contends, "We were had. We are no closer to shutting off that flow [of Canadian trash] than we were a year ago…". This article concludes, "Michigan has to catch up with the rest of the Midwest and toughen its laws."

Regardless of the sentiment these pieces express, Michigan cannot constitutionally impose restrictions that would discriminate against out-of-State waste, unless Congress explicitly authorizes states to do so. Many people believe, however, that the State could discourage waste disposal here by raising the cost of landfill disposal. Although landfill owners must pay an administrative fee to the State, evidently it is considerably lower than other states' charges.[33] In addition, although the fee may be passed on to landfills' customers, Michigan imposes no "tipping fee" on those who dispose of solid waste in landfills. Some people point out that the amount of out-of-state waste disposed of in Wisconsin dropped after that state raised its tipping fee from 30 cents to $3 per ton, but no direct correlation was found.[34] Furthermore, the impact fee assessed by municipalities does not appear to have deterred shipments from Toronto to the Carleton Farms landfill in Sumpter Township, which reportedly earns 45% of its revenue from the waste disposal.[35]

Many people also believe that Michigan could reduce the reliance on landfills by encouraging its own residents to recycle more. Although a surcharge might not directly reduce the amount of waste deposited in landfills, it has been suggested that it could provide a revenue stream to support recycling efforts. This approach was recommended by the Michigan Beverage Container and Recycling Task Force in its 2003 Final Report. A tipping fee dedicated to recycling programs also was proposed unsuccessfully by a bill introduced during the 2003-04 session (Senate Bill 721). Other recycling-related measures that were introduced but not enacted include bills to expand the items subject to the beverage container deposit law (Senate Bills 174 and 190); bills to establish a recycling advisory council and a statewide recycling coordinator (Senate Bills 790 and 834); a bill to establish a statewide recycling goal (Senate Bill 861); and proposals to establish a single business tax credit for the purchase of recycling equipment (e.g., House Bills 4035 and 4036).

CONCLUSION

Those who assert that the new laws are ineffective might be correct *if* the legislation simply had been designed to reduce the importation of trash from Canada. What many seem to be overlooking is the environmental protection aspect of the amendments, the need to keep harmful materials out of landfills regardless of where the waste originates, and the desire to prevent more natural resources from being turned into landfills. The enacted legislation addresses these issues in various ways, such as subjecting imported waste to Michigan landfill disposal requirements; expanding the items banned from landfills; and imposing a two-year moratorium on new landfill construction. The amendments also instituted landfill capacity reporting requirements that should produce the data needed by policy-makers to determine whether the capacity is, in fact, adequate, overabundant, or in jeopardy, and decide how to tweak or overhaul landfill siting requirements, as appropriate.

Despite claims that the new laws are "essentially useless"[36], it can be said that they took a significant step to address Michigan's landfill disposal issues while attempting to avoid constitutional transgressions. It remains to be seen whether the laws will be effective--at either reducing the flow of imported waste or protecting the environment--or whether they ultimately will be upheld by the courts.

At the Federal level, it remains to be seen whether Congress will empower states to impose restrictions on imported waste, or effectively authorize the Environmental Protection Agency to implement and enforce the Transboundary Agreement with Canada. It also is not known whether the EPA will successfully implement its proposed pilot project--which already has been criticized for its voluntary nature and lack of penalties.[37] Moreover, if the EPA is given the statutory authority to engage in a binding process, implementation of the Agreement is unlikely to be the panacea that many seem to believe or hope it will be.

What is clear is that a number of issues remain unresolved and concerns about imported waste persist. These concerns recently have been heightened, in fact, by reports that up to 1,000 tons of demolition debris are being shipped by rail daily from New Jersey to a landfill in Rockwood, Michigan.[38] As the Michigan Legislature and the United States Congress begin new sessions in January, it is likely that some proposals will represent renewed attempts to address the issues of imported waste and the reliance on landfills for waste disposal.

END NOTES

1. Ruswick, Frank, Jr., Michigan Department of Environmental Quality, Testimony Before the Senate Natural Resources and Environmental Affairs Committee, 9-23-03.

2. Capeloto, Alexa, "Canadian garbage hauler is charged", *Detroit Free Press*, 10-1-03.

3. Egan, Paul, "Trash triggers border alerts", *The Detroit News*, 9-8-03.

4. Shepardson, David, "Canada trash truck yields a ton of pot", *The Detroit News*, 9-25-03.

5. Ruswick, *supra*.

6. Kurth, Joel, "Toronto might stop dumping in Michigan", *The Detroit News*, 2-16-03.

7. The Solid Waste Management Act enacted in 1978 was repealed and recodified as Part 115 of the Natural Resources and Environmental Protection Act (MCL 324.11501 et seq.) by Public Act 451 of 1994.

8. MCL 324.11533.

9. MCL 324.11525a.

10. MCL 324.11532.

11. Canton Township, for example, built a $13 million community center with revenue from its Sauk Hills Trail landfill. "Banning Trash Imports Would Cost Michigan", *The Detroit News*, 10-17-03.

12. Though unenforceable, the language of Public Act 475 of 1988 remains in the Natural Resources and Environmental Protection Act (MCL 324.11513).

13. The Commerce Clause is found in Article I, Section 8 of the United States Constitution, which states, "The Congress shall have Power...To regulate Commerce with foreign Nations, and among the several States...". This language affirmatively grants power to Congress, and the United States Supreme Court has long interpreted it to contain a "dormant" Commerce Clause, as well. This means that states may not unduly burden, or discriminate against, interstate or foreign commerce even where Congress has not enacted Federal legislation.

14. See the Senate Fiscal Agency's (SFA's) Enrolled Analysis of Senate Bill 57 et al. for a detailed description of the legislation, an analysis of its fiscal impact, background information, and supporting and opposing arguments. The analysis is available on the SFA's website, www.michigan.gov/sfa.

15. The foreign Commerce Clause is that portion of the Commerce Clause that reserves to Congress the authority to regulate commerce with foreign nations. The Foreign Affairs Power refers to the Federal government's right under the U.S. Constitution to regulate foreign relations. Also called the "Dormant Foreign Affairs Power", this power is not specifically enumerated in the Constitution but is said to derive from the structure of the Constitution itself.

16. In its First Amended Complaint, dated December 22, 2004, the NSWMA claims that Senate Bills 497, 498, 500, and 502, and House Bills 5234 and 5235 together "…establish a comprehensive legislative scheme to burden out-of-state and Canadian solid waste in a manner in which in-state waste is not burdened". The complaint alleges that the legislation violates the Commerce Clause and the Foreign Affairs Power, as well as NAFTA and GATT.

17. Lee, Lonnie, Storage Tank and Solid Waste Section Chief, Department of Environmental Quality, telephone conversation, 12-21-04.

18. *Hillside Dairy, Inc.* v *Lyons*, 123 S.Ct. 2142 (2003).

19. Huenemann, Jon E., Senior Vice President and Group Leader, FH/GPC – A Fleishman-Hilliard International Communications Company, Prepared Witness Testimony, House Committee on Energy and Commerce, 7-23-03.

20. Esty, Daniel, Yale Law School, Prepared Witness Testimony, House Committee on Energy and Commerce, 7-23-03.

21. Stabenow, Debbie, United States Senator, "Stop Canadian Trash NOW: Progress Report", www.stabenow.senate.gov.

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