



Senate Fiscal Agency  
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## BILL ANALYSIS



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Senate Bill 57 (Substitute S-3 as passed by the Senate)  
Senate Bill 98 (Substitute S-3 as passed by the Senate)  
Senate Bill 497 (Substitute S-2 as passed by the Senate)  
Senate Bill 498 (Substitute S-6 as passed by the Senate)  
Senate Bill 499 (Substitute S-2 as passed by the Senate)  
Senate Bill 500 (Substitute S-2 as passed by the Senate)  
Senate Bill 502 (Substitute S-3 as passed by the Senate)  
Senate Bill 505 (Substitute S-4 as passed by the Senate)  
Senate Bill 506 (Substitute S-7 as passed by the Senate)  
Senate Bill 557 (Substitute S-2 as passed by the Senate)  
Senate Bill 715 (Substitute S-1 as passed by the Senate)

Sponsor: Senator Michael D. Bishop (Senate Bill 57)  
Senator Liz Brater (Senate Bills 98 & 557)  
Senator Buzz Thomas (Senate Bill 497)  
Senator Patricia L. Birkholz (Senate Bill 498)  
Senator Alan Sanborn (Senate Bill 499)  
Senator Dennis Olshove (Senate Bill 500)  
Senator Nancy Cassis (Senate Bill 502)  
Senator Bruce Patterson (Senate Bills 505 & 506)  
Senator Jud Gilbert, II (Senate Bill 715)

Committee: Natural Resources and Environmental Affairs

Date Completed: 11-10-03

### **RATIONALE**

The potential environmental impact of out-of-State solid waste disposed of in Michigan has been of concern since at least the late 1980s, when the State enacted legislation attempting to restrict waste imports. At that time, the focus was primarily on waste from other states. The issue has received renewed attention since January 2003, when the City of Toronto began to send all of its municipal solid waste--or about 1.1 million tons annually--to Michigan for disposal. Between 1996, when the Michigan Department of Environmental Quality (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.

As the amount of waste grows, so do concerns about potential health and environmental hazards, including groundwater contamination, because out-of-State waste may contain items currently banned from Michigan landfills. People also have pointed out that the

transportation of waste into and through the State can contribute to the deterioration of roadways, as well as increased pollution, noise, and traffic. Many people are worried that the volume of imported waste eventually will lead to the use of natural resources for new landfills. Other concerns involve potential threats to homeland security from trash that crosses the border.

As noted above, Michigan previously attempted to impose restrictions on 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. In 1992, the United States Supreme Court held that this law violated the interstate Commerce Clause of the U.S. Constitution (*Fort Gratiot Sanitary Landfill, Inc. v Michigan Department of Natural Resources*, 504 U.S. 353). The U.S. Supreme Court and U.S. Courts of

Appeals also have found that other states' waste import restrictions, or other trade restrictions, violated the Commerce Clause or international trade agreements to which the United States is a party (described more fully below).

Despite these court decisions, many people believe that Michigan can and should enact waste disposal restrictions that would withstand legal challenges. Since Michigan law limits the materials that may be disposed of in landfills, it has been suggested that out-of-State waste sent to this State for disposal should be subject to the same standards, and that the DEQ should have the authority to restrict or prevent the disposal of either in-State or out-of-State waste that threatens the public or the environment. Other suggested means of protecting the natural resources involve reducing the need for landfill space, and potential contamination, by expanding the list of materials banned from disposal, making the public aware of the banned items as well as other disposal options, and promoting recycling. Also, since the volume of imported waste affects Michigan's disposal capacity, it has been suggested that a moratorium on the construction of new landfills would enable the State to determine the amount of capacity remaining and the need for additional space.

## **CONTENT**

**The bills would amend Part 115 (Solid Waste Management) of the Natural Resources and Environmental Protection Act to do the following:**

- Authorize the DEQ Director to issue an order restricting or prohibiting the transportation or disposal of solid waste originating within or outside this State, if it posed a threat to the public or the environment.**
- Require the DEQ to compile a list of countries, states, provinces, and local jurisdictions that prohibited the disposal of items banned from a landfill or prevented their disposal through enforceable solid waste disposal requirements.**
- Prohibit landfill owners and operators from accepting for disposal out-of-State solid waste unless it came from a jurisdiction that was on the DEQ list, it came through a facility that had removed banned items, or it was homogeneous solid waste.**

- Include beverage containers and whole tires among the items banned from landfill disposal.**
- Require the DEQ and solid waste haulers to give notice of materials banned from landfill disposal and appropriate disposal options.**
- Establish a two-year moratorium on the construction of landfills, subject to certain exceptions.**
- Require landfill owners and operators to report their remaining disposal capacity each year.**
- Require the DEQ, with the State Police, to provide for the inspection of solid waste disposal areas at least four times per year, and require solid waste management plans to provide for counties and municipalities to assist with inspections.**
- Increase the civil fine for violating Part 115 and prescribe civil fines for disposing of banned items in a landfill.**

The bills are described in detail below.

### **Senate Bill 57 (S-3)**

The bill would authorize the DEQ Director to issue an order restricting or prohibiting the transportation or disposal in this State of solid waste originating within or outside of Michigan if both of the following applied:

- The Director, after consultation with appropriate officials, had determined that the transportation or disposal of the solid waste posed a threat to the public health, safety, or welfare or to the environment.
- The Director determined that the restriction or prohibition was necessary to minimize or eliminate that threat.

At least 30 days before the Director issued such an order, the DEQ would have to post the proposed order and its effective date on the Department website with information on how a member of the public could comment on the order. Also, at least 30 days before the Director issued the order, the DEQ would have to give a copy of it to the members of the Senate and House of Representatives standing committees that consider legislation pertaining to public health or the environment. Before issuing the order, the Director would have to consider comments received on it. These requirements would not apply to an order issued in an emergency situation.

In an emergency situation posing an imminent and substantial threat to public health or safety or the environment, the Director, before issuing an order, would have to give a copy of it to the same legislative committees and publicize the proposed order in any manner appropriate to help ensure that interested parties were given notice of the order and its effective date.

In the case of either an emergency or nonemergency order, the DEQ would have to post the final order on its website as soon as practicable. An order would expire within 60 days after it took effect unless the order provided for an earlier expiration date. The Director would have to rescind an order when he or she determined that the threat upon which it was based no longer existed.

The requirements for the DEQ to post an order on its website, give a notice to legislative committees, and consider public comments, would not apply to the reissuance of an order if the reissued order took effect upon the expiration of the identical order it was replacing. The DEQ, however, would have to post the reissued order on its website by the reissued order's effective date.

A person could seek judicial review of an order issued under the bill as provided in Section 631 of the Revised Judicature Act (i.e., the person could appeal to the circuit court of the county where the person resided or to the Ingham County Circuit Court).

### **Senate Bill 98 (S-3)**

The bill would prohibit the owner or operator of a landfill, beginning October 1, 2004, from accepting for disposal in this State solid waste or municipal solid waste incinerator ash that was generated outside of Michigan, unless one or more of the following were met:

- The materials were homogeneous solid waste materials, other than municipal solid waste incinerator ash, that met the requirements for disposal in a landfill under Part 115 and the rules promulgated under it.
- The materials were received through a material recovery facility, a transfer station, or another facility that documented that it had removed from the solid waste being delivered, those items banned from disposal in a landfill under Section 11514 (which Senate Bill 498 (S-6) would

amend).

- The country, state, province, or local jurisdiction in which the solid waste was generated was on the list compiled by the DEQ (under Senate Bill 502 (S-3)).

A landfill owner or operator would be prohibited from accepting waste under these circumstances "...in order to protect the public health, safety, and welfare and the environment of this state from the improper disposal of waste that is prohibited from disposal in a landfill under section 11514, and in recognition that the nature of solid waste collection and transport limits the ability of the state to conduct cost effective inspections to assure compliance with state law".

The bill is tie-barred to Senate Bills 497, 498, 499, 502, and 505.

### **Senate Bill 497 (S-2)**

The bill would define "beverage container" as an airtight metal, glass, paper, or plastic container, or a container composed of a combination of those materials, that, at the time of sale, contained one gallon or less of any of the following:

- A soft drink, soda water, carbonated natural or mineral water, or other nonalcoholic carbonated drink.
- A beer, ale, or other malt drink of whatever alcoholic content.
- A mixed wine drink or a mixed spirit drink.

The bill is tie-barred to Senate Bills 98, 498, 500, 502, and 505.

### **Senate Bill 498 (S-6)**

Section 11514 prohibits a person from knowingly disposing of medical waste in a landfill, and prohibits a landfill owner or operator from knowingly allowing the disposal of medical waste, unless it has been decontaminated or is not required to be decontaminated but is packaged as required under the Public Health Code.

(In addition, R 299.4430 of the Michigan Administrative Code prohibits the disposal of the following in a Type II landfill (a municipal solid waste landfill): regulated hazardous waste; PCBs; bulk or noncontainerized liquid waste or waste that contains free liquids, unless it is household waste other than septic waste or the waste is leachate or gas

condensate approved for recirculation; containers that hold liquid waste, unless a container is household waste or is similar in size to household waste; sewage; materials that would adversely affect a liner or leachate collection and removal system; asbestos waste; empty drums, unless crushed; used lead acid batteries; and yard clippings, as specified in the Act.)

The bill would amend Section 11514 to prohibit a person from knowingly delivering to a landfill for disposal, and to prohibit a landfill owner or operator from knowingly permitting the disposal in a landfill of any of the following:

- Medical waste (as currently prohibited).
- A beverage container.
- A whole motor vehicle tire.
- Yard clippings, unless diseased or infested.

The bill also would prohibit a person from delivering to a landfill for disposal, and prohibit a landfill owner or operator from permitting disposal in the landfill of any of the following:

- Used oil.
- A lead acid battery.
- Low-level radioactive waste as defined in the Low-Level Radioactive Waste Authority Act.
- Regulated hazardous waste.
- Liquid waste as prohibited by R 299.4432(2)(c) of the Michigan Administrative Code (waste that contains free liquids as defined by the paint filter liquids test).
- Sewage.
- PCBs as defined in Federal regulations.
- Asbestos waste unless the landfill complies with Federal regulations.

Section 11521 prohibits the owner or operator of a landfill or municipal solid waste incinerator from accepting solid waste if the owner or operator knows or should know that the solid waste includes yard clippings from any source, unless they are diseased or infested. Under the bill, this provision would apply only to the owner or operator of a municipal solid waste incinerator.

The bill would require the State to develop policies and practices that would promote recycling and reuse of materials and, to the extent practical, minimize the use of landfilling as a method for disposal of its waste. The bill

includes the following legislative declaration: "[T]hat optimizing recycling opportunities and the reuse of materials shall be a principal objective of the state's solid waste management plan and further that recycling and reuse of materials are in the best interest of promoting the public health and safety."

The bill is tie-barred to Senate Bills 98, 497, 500, 502, and 505.

### **Senate Bill 499 (S-2)**

The bill would require the DEQ, in conjunction with the Department of State Police, in order to protect the public health, safety, and welfare and the environment of this State from the illegal disposal of items and substances in landfills in Michigan, to administer Part 115 so as to do all of the following:

- Ensure that all disposal areas were in full compliance with Part 115 and the rules promulgated under it.
- Provide for the inspection, at least four times per year, of each solid waste disposal area for compliance with Part 115 and the rules.
- Ensure that all people disposing of solid waste were doing so in compliance with Part 115 and the rules.

The bill also would permit the DEQ and State Police to conduct regular, random inspections of waste being transported for disposal at disposal areas in Michigan. These inspections could be conducted at disposal areas.

(Part 115 defines "disposal area" as one or more of the following at a location defined by the boundary identified in its construction permit or engineering plans approved by the DEQ: solid waste transfer facility; incinerator; sanitary landfill; processing plant; or other solid waste handling or disposal facility used in the disposal of solid waste.)

Presently, the DEQ, a health officer, or a law enforcement officer may inspect a solid waste transporting unit to determine if it is operated in a manner to prevent littering or to determine if the owner or operator of the unit is performing in compliance with Part 115. The bill would retain this provision.

### **Senate Bill 500 (S-2)**

Under Section 11546, the DEQ or a health

officer may request the Attorney General to bring an action on behalf of the State, and a municipality or county may bring an action based on facts within its jurisdiction, for any appropriate relief, including injunctive relief, for a violation of Part 115 or the rules promulgated under it. In addition to any other relief provided for in this section, the court may impose a civil fine on a person who violates Part 115 or the rules, or fails to comply with any permit, license, or final order issued under Part 115. The maximum amount of the fine is \$10,000 for each day of violation. Under the bill, for a second or subsequent violation, the maximum fine would be \$25,000 per day of violation.

The bill provides that a person who did any of the following would be responsible for a State civil infraction and could be ordered to pay a maximum civil fine of \$5,000 or, for a second or subsequent violation of the same statutory provision or rule promulgated under it, a maximum civil fine of \$10,000:

- Knowingly delivered medical waste, or delivered used oil, a lead acid battery, low-level radioactive waste, regulated hazardous waste, liquid waste, sewage, PCBs, or asbestos, for disposal in violation of Section 11514.
- Knowingly permitted the disposal of medical waste or yard clippings, or permitted the disposal of used oil, a lead acid battery, liquid waste, sewage, or asbestos, in violation of Section 11514.
- Transported or disposed of waste in violation of an order issued by the DEQ Director (as authorized by Senate Bill 57 (S-3)).
- Conducted open burning in violation of Part 115 or related rules.
- Disposed of solid waste in an open dump in violation of Part 115 or related rules.
- Operated a solid waste transport vehicle in violation of Section 11527 or 11528 or related rules.

(Section 11527 requires a solid waste hauler to deliver all waste to a licensed disposal area or transfer facility, and to use a vehicle that conforms to the rules and does not contribute to littering. Section 11528 requires a solid waste transporting unit used for garbage, industrial or domestic sludge, or other moisture-laden waste materials, to be watertight and constructed and operated so as to prevent littering.)

If a person knowingly delivered for disposal, or permitted the disposal of, a beverage container or whole motor vehicle tire in violation of Section 11514, the person would be responsible for a State civil infraction and could be ordered to pay a civil fine of up to \$100 or, for a second or subsequent violation, up to \$500.

The bill is tie-barred to Senate Bills 98, 497, 498, 502, and 505.

### **Senate Bill 502 (S-3)**

The bill would require the DEQ, by October 1, 2004, to compile a list of countries, states, provinces, and local jurisdictions that prohibited from disposal in a landfill the items banned under Section 11514 or that prevented the disposal of those items through enforceable solid waste disposal requirements. The DEQ would have to prepare and give a copy of the list to each landfill in Michigan.

Also, by October 1, 2004, the DEQ would have to notify each state, the country of Canada, and each province in Canada that landfills in Michigan would not accept for disposal solid waste that did not comply with Section 11526a (the section Senate Bill 98 (S-2) would add).

The DEQ would be required to include a country, state, province, or local jurisdiction on its list if the country, state, province, or local jurisdiction gave the Department documentation that it prohibited the disposal in a landfill of the items banned under Section 11514, or prevented their disposal through enforceable solid waste disposal requirements. This documentation could include copies of all pertinent statutes, administrative regulations, and ordinances.

The bill is tie-barred to Senate Bills 98, 497, 498, 500, and 502.

### **Senate Bill 505 (S-4)**

The bill would require the DEQ to post on its website a list of materials banned from disposal in a landfill under Section 11514 and appropriate disposal options for those materials.

A solid waste hauler that disposed of solid waste in a landfill would have to give each of its customers annual notice of the banned materials and appropriate disposal options.

The notice would have to include a copy of the information posted on the DEQ website.

The bill is tie-barred to Senate Bills 98, 497, 498, 500, and 502.

### **Senate Bill 506 (S-7)**

Except as otherwise provided in the bill, and notwithstanding any other provision of Part 115, the bill would prohibit the DEQ from issuing a permit to construct a landfill if the Department received an administratively complete application for a permit after January 1, 2004, and before January 1, 2006.

The bill would allow the DEQ to issue a permit to construct an expansion to an existing landfill if the applicant demonstrated that it had less than three years of remaining disposal capacity, and the applicant otherwise met the requirements of Part 115. The permit could not provide more than a total of 10 years of remaining capacity when added to the capacity remaining before the permit was issued. The amount of time of remaining disposal capacity would have to be calculated based on the average of the three prior years of waste receipt as reported under Section 11507a of the Act (as Senate Bill 557 (S-2) would require). For these purposes, an existing landfill would be one that was licensed under Part 115 to receive waste as of October 1, 2003.

If an application otherwise met the requirements of Part 115, the DEQ could issue a permit to construct a Type III landfill that was a captive facility as defined in Section 11525a(10). (That section defines "captive landfill" as a landfill that accepts only nonhazardous industrial waste generated only by the landfill owner, or a nonhazardous industrial waste landfill that accepts only coal or wood ash, cement kiln dust, wastewater treatment sludge, or foundry sand. A Type III landfill is any landfill that is not a municipal solid waste landfill or a hazardous waste landfill.)

The bill would prohibit the DEQ from issuing a permit to construct a landfill, including a permit to construct an expansion to an existing landfill, if the landfill or expansion were or would be financed entirely or partly with money from the Michigan Strategic Fund.

By January 1, 2005, the DEQ would have to submit to the Legislature a report providing

recommendations for amending the solid waste planning and disposal area siting provisions of Part 115. The report would have to include recommendations to foster a regional system of solid waste planning and disposal facility siting. The report also would have to recommend methods for securing reasonable and necessary regional and statewide disposal capacity "...considering the paramount public concern in the conservation of the natural resources of the state". In addition, the report would have to incorporate a consideration by the DEQ of Type II landfill capacity and expansion currently provided for in a county solid waste management plan in which a substantial investment already had been made. The DEQ's recommendations for any landfill expansion would have to be based in part on this consideration. The DEQ would have to prepare the report based on consultation with affected parties.

The bill is tie-barred to Senate Bill 557 and would be repealed on January 1, 2006.

### **Senate Bill 557 (S-2)**

Under Part 115, a landfill owner or operator must submit an annual report to the State and the county and municipality in which the landfill is located. The report must contain information on the amount of solid waste the landfill received during the year, itemized to the extent possible by county, state, or country of origin. Under the bill, the report also would have to contain information on the amount of remaining disposal capacity at the landfill.

Remaining disposal capacity would have to be calculated as the permitted capacity less waste in place for any area that had been constructed and was not yet closed, plus the permitted capacity for each area that had a construction permit under Part 115 but had not yet been constructed.

Under Part 115, the required report must be submitted within 30 days after the end of each State fiscal year. The bill would require the DEQ, by January 31 of each year, to submit to the Legislature a report summarizing the information obtained from landfill owners' and operators' reports.

The bill is tie-barred to Senate Bill 506.

## **Senate Bill 715 (S-1)**

Part 115 requires a solid waste management plan to contain mechanisms for enforcing the plan, and identify the municipalities within the county responsible for enforcement. Under the bill, a solid waste management plan also would have to include a mechanism for the county and those municipalities to assist the DEQ and the State Police in implementing and conducting the inspection program that Senate Bill 499 (S-2) would establish.

Senate Bill 715 (S-1) also would require each solid waste management plan to include an enforceable program and process to assure that only items authorized for disposal in a disposal area under Part 115 and the rules promulgated under it, would be disposed of in the disposal area.

The bill is tie-barred to Senate Bill 499.

Proposed MCL 324.11526c (S.B. 57)  
Proposed MCL 324.11526a (S.B. 98)  
MCL 324.11502 (S.B. 497)  
MCL 324.11514 & 324.11521 (S.B. 498)  
MCL 324.11526 (S.B. 499)  
MCL 324.11546 (S.B. 500)  
Proposed MCL 324.11526b (S.B. 502)  
Proposed MCL 324.11527a (S.B. 505)  
Proposed MCL 324.11511a (S.B. 506)  
MCL 324.11507a (S.B. 557)  
MCL 324.11533 & 324.11538 (S.B. 715)

### **BACKGROUND**

#### **Part 115 of NREPA**

In 1978, Michigan enacted the Solid Waste Management Act, which was re-enacted in 1994 as Part 115 of the Natural Resources and Environmental Protection Act. The 1978 Act required every county to estimate the amount of solid waste that would be generated in the county in the next 20 years, and to adopt a plan providing for disposal of the solid waste at facilities that complied with State health and safety standards. Under Part 115, counties must ensure capacity for 10 years into the future. To do so, each county must either 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 either individually or in cooperation with other counties. County solid waste management plans must be reviewed and updated every

five years, and approved by the Department of Environmental Quality.

Part 115 also requires a person to obtain a construction permit from the DEQ and pay a permit fee before establishing a disposal area; provides for the licensure of disposal areas; requires the payment of an application fee for an operating license; requires license applicants to meet financial assurance requirements; and requires landfill owners to establish and maintain a perpetual care fund.

Part 115 defines "solid waste" as garbage, rubbish, ashes, incinerator ash, incinerator residue, street cleanings, municipal and industrial sludges, solid commercial and solid industrial waste, and animal waste other than organic waste generated in the production of livestock and poultry. Solid waste does not include any of the following:

- Human body waste.
- Medical waste (as defined in the Public Health Code).
- Liquid waste.
- Ferrous or nonferrous scrap directed to a scrap metal processor or to a reuser of ferrous or nonferrous products.
- Slag or slag products directed to a slag processor or to a reuser of slag or slag products.
- Sludges and ashes managed as recycled, or nondetrimental materials appropriate for agricultural or silvicultural use.
- Materials approved for emergency disposal by the DEQ.
- Source separated materials.
- Site separated materials.
- Fly ash or any other ash produced from the combustion of coal, when used in particular instances.
- Other wastes regulated by statute.

#### **Commerce Clause**

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 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; that is, where Congress's power to regulate lies dormant.

The dormant Commerce Clause was the basis of the U.S. Supreme Court's decision in *Fort Gratiot* that Public Act 475 of 1988 was unconstitutional. Because solid waste is considered an article of commerce even if it has no value, the Commerce Clause restricts Michigan's ability to regulate transactions between out-of-State generators of waste and the operators of Michigan disposal sites.

According to the Court, "A state statute that clearly discriminates against interstate commerce is...unconstitutional 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'" Although the defendants argued that Public Act 475 constituted a comprehensive health and safety regulation rather than economic protectionism of the State's limited landfill capacity, the Court stated, "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 the county.

Further, although Public Act 475 provided for counties to treat waste from other counties the same as out-of-State waste, the Court held that "...a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."

### International Trade Agreements

The United States is a party to several international trade agreements that may have a bearing on waste import restrictions. The agreements in question are the General Agreement on Tariffs and Trade (GATT), the World Trade Agreement, the North American Free Trade Agreement (NAFTA), and the Agreement Between the United States and Canada Concerning the Transboundary Movement of Hazardous Waste (the Transboundary Agreement).

The General Agreement on Tariffs and Trade, which ruled from 1948 to 1994, established the basic principals for trade, focusing primarily on the elimination of tariff trade barriers. This agreement was considered a guideline for trade policy, and did not include enforcement provisions.

In 1994, negotiations on GATT addressed nontariff domestic trade barriers, including laws supporting domestic industry. The negotiations led to the World Trade Agreement, which established the World Trade Organization (WTO). This agreement requires members to ensure that their subnational governments (e.g., states) comply with the agreement.

The WTO Agreement also permits governments, including subnationals, to adopt their own rules regarding health, safety, and the environment, including levels of protection that are higher or different than international standards. Generally, the WTO requires members to opt for less trade-restrictive measures when they can and avoid discriminating against foreign interests in favor of domestic products. If a government's law is found to violate the WTO, a trade penalty may be imposed on the member if it does not amend the law.

Also in 1994, the United States, Canada, and Mexico entered into the North American Free Trade Agreement, which limits what the parties may do in regulating and taxing international commerce. These limitations also apply to state and local governments, since they are subject to Federal law. This agreement gives the three countries, and investors from those countries, the ability to challenge Federal, state, and local laws or policies that they consider to be a barrier to trade. Laws are considered to violate NAFTA if they give domestic industries an advantage over foreign ones or are harsher in their application on foreign businesses than they are on domestic companies. Rather than requiring the legislation to be repealed, NAFTA provides for compensation in the form of tariff relief or direct payment to offset the costs the offending policy has on trade.

Although GATT is said to have been replaced by the WTO, part of GATT is incorporated in NAFTA. Under Article 309 of NAFTA, "[N]o Party may adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation...of any



good destined for the territory of another Party, except in accordance with Article XI of the GATT...". Article XI of GATT provides, "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation...of any product destined for the territory of any other contracting party."

Chapter 21 of NAFTA contains general exceptions, including GATT Article XX, which allows a contracting party to adopt measures "necessary to protect human, animal or plant life or health", as well as measures "relating to the conservation of exhaustible natural resources". The party taking advantage of an exception may not apply it "...in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...".

The United States and Canada entered into the Transboundary Agreement in 1986. This agreement originally applied only to hazardous waste but in 1992 it was extended to solid waste. 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. The exporting country must give the importing country written notice of a proposed shipment; the notice may cover a single shipment or a series of shipments over a 12-month period. The importing country's designated authority (the Environmental Protection Agency, in the U.S.) may "consent" or "object" to the proposed shipment (but is not required to give its affirmative approval). It is said that the Transboundary Agreement will not be in effect until Congress enacts enabling legislation pursuant to the Basel Convention.

## **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**

Michigan is now the third largest importer of solid waste in the country. According to DEQ figures, out-of-State imports presently represent 20% of all solid waste disposed of in

Michigan landfills. While any solid waste can pose a threat to the environment, the potential for harm is greater when the waste comes from jurisdictions that do not meet Michigan's standards for disposal. This waste also can jeopardize public health and safety when it contains hazardous materials that are not appropriate for landfill disposal, such as untreated medical waste, or contraband, such as illegal drugs. Both of these types of items have been found in shipments of waste from Canada intended for disposal in Michigan.

In order to protect this State's natural resources and public welfare, it is necessary to ensure that trash not meeting Michigan's standards is not accepted for disposal. The proposed legislation would accomplish this in several ways. First, Senate Bill 502 (S-3) would require the DEQ to compile a list of jurisdictions that documented that they prohibited or prevented the disposal of materials not allowed in Michigan landfills. Under Senate Bill 98 (S-2), if a state, province, or country were not on this list, a landfill could not accept waste generated there unless the materials were homogeneous solid waste materials or received through a facility that documented that it had removed banned items.

While those two proposals specifically would address out-of-State waste, to ensure that it met Michigan's landfill criteria, other measures would help to reduce the need for disposal space and keep harmful materials out of landfills through regulations applicable to both in- and out-of-State waste. State statute and administrative rules already prohibit the disposal of a number of items in landfills. Senate Bill 498 (S-2) would consolidate these prohibitions into one statutory provision, add beverage containers and whole tires to the list, and require the State to develop policies and practices that promoted recycling and reuse. Since public awareness and compliance are important components of reducing landfill disposal, Senate Bill 505 (S-4) would ensure that information about banned items and alternative disposal options was available on the DEQ's website, as well as given to waste haulers' customers.

Additional measures would promote the enforcement of the regulations, and give the State additional tools to keep unsafe waste out of landfills, regardless of whether it originated within or outside of Michigan. In particular, Senate Bill 57 (S-3) would

authorize the DEQ Director to restrict or prohibit the transportation or disposal of waste that posed a threat to the environment or the public health, safety, or welfare. Senate Bill 499 (S-2) would require the State to inspect each solid waste disposal area at least four times a year, and Senate Bill 715 (S-1) would require local assistance with these inspections. The DEQ budget for fiscal year 2003-04 already appropriates funds for the Department to conduct periodic inspections of imported solid waste at disposal facilities in order to mitigate the unpermitted disposal of waste, and funds to train law enforcement personnel to combat illegal dumping at the local level. In addition, Senate Bill 500 (S-2) would establish separate civil fines for violations involving the disposal of banned items in landfills.

Taken together, these proposals represent a comprehensive approach to protecting the environment and the public health, safety, and welfare, by ensuring that all landfilled waste complied with Michigan's standards, keeping prohibited items out of landfills, and reducing the reliance on landfills throughout the State.

**Response:** In addition to including beverage containers and whole tires on the list of banned materials, the legislation should add electronic devices and political yard signs.

#### **Supporting Argument**

The popularity of Michigan landfills is generally attributed to two factors: the State's relatively large amount of capacity, and the relatively low cost to dispose of waste in Michigan. The supply of landfill space results from the solid waste management program first enacted in 1978, which originally required counties to ensure disposal capacity for 20 years into the future. According to some, there is now an overabundance of capacity, which can be blamed for the low cost of disposal and the need for landfills to look beyond state lines for clients. The influx of imported waste, however, makes it difficult to predict future needs and has raised concerns about the adequacy of capacity down the road.

To address this situation, Senate Bill 557 (S-2) would require landfill owners and operators to report each year on their remaining capacity. Senate Bill 506 (S-2) would impose a two-year moratorium on new landfill construction, unless a landfill had less than three years of remaining capacity or another exception applied, and would require the DEQ to report

to the Legislature after the moratorium, as well as make recommendations to foster a regional system of solid waste planning and disposal facility siting. These measures would give the State an opportunity to collect information about capacity both now and in the future, and would enable policy-makers to take an informed approach to addressing siting and capacity needs. In addition, Senate Bill 506 (S-2) would help curb the proliferation of landfills by prohibiting the DEQ from issuing a permit for a landfill that would be financed by the Michigan Strategic Fund.

**Response:** As noted above, low disposal costs also are responsible for the volume of waste being landfilled in Michigan. Although landfill owners are required to pay the State a surcharge, which they may pass on to their customers, it is considerably lower than other states' charges, and Michigan imposes no direct "tipping fee" on those who dispose of solid waste in landfills. Creating such a fee and/or raising the surcharge would discourage overreliance on Michigan landfills by both in- and out-of-State waste generators. According to the DEQ's Report on Waste Inspections at Michigan Landfills, issued on September 22, 2003, a significant amount of recyclable material and prohibited waste, including yard waste, is entering the State's landfills. Higher disposal costs would encourage people to be more vigilant about keeping this material out of the waste stream. This appears to be the case in Wisconsin, which raised its tipping fee from 30 cents per ton to \$3 per ton on January 1, 2002. The amount of out-of-state waste disposed of in Wisconsin then dropped for the first time since 1995, which many attribute to the fee increase.

#### **Opposing Argument**

The legislation would infringe on the rights of private waste firms to engage in free trade, in violation of the Commerce Clause. As the U.S. Supreme Court made clear in *Fort Gratiot*, waste is an article of commerce and the State may not constitutionally interfere with interstate or foreign commerce. Some of the proposals appear neutral but would have the impact of interfering with interstate or foreign commerce, and several of the bills clearly would impose separate restrictions out-of-State waste. While Senate Bills 98 (S-2) and 502 (S-3) aim to ensure that out-of-State waste met Michigan's disposal criteria, this type of legislation has been struck down by Federal courts.

A Wisconsin statute, for example, had required out-of-state local governments to implement an effective recycling program in order to dispose of solid waste in that state. The U.S. Court of Appeals for the Seventh Circuit found that this law controlled the conduct of those engaged in commerce occurring wholly outside Wisconsin, and violated the Commerce Clause, even though the commerce had effects within the state (*National Solid Wastes Management Assc., et al. v George Meyer*, 63 F3d 653 (1995)). The state amended the statute in 1997 to make an exception for local units that prohibited the disposal of materials separated for recycling and managed unseparated waste in compliance with Wisconsin's recycling policy (and to remove other unconstitutional provisions). Nevertheless, the U.S. District Court for the Western District of Wisconsin again struck down the law, finding that it violated the Commerce Clause, the Due Process Clause, and principles of state sovereignty (W.D. Wis, 6-1-98), and the U.S. Court of Appeals upheld that decision (165 F.3d 1151).

In Michigan, on October 16, 2003, the U.S. District Court for the Eastern District of Michigan granted a preliminary injunction against the enforcement of a Wayne County ordinance that prohibits a landfill owner or operator from accepting solid waste from a municipality, county, state, country, or other generator that is not regulated by a beverage container deposit law comparable to the State law. The Court found that the ordinance "...may be facially discriminatory in that it may purposefully interfere with the free movement of out-of-state and Canadian waste into Wayne County, and may, therefore, be unconstitutional" (*The National Solid Wastes Management Association, et al. v Charter County of Wayne, et al.*, No. 03-60188, 10-16-03).

Other courts have characterized this type of "reciprocity" legislation as facially discriminatory regulation that is subject to a strong presumption of invalidity. In order to overcome that presumption, the State would have to demonstrate that there were no available nondiscriminatory means of ensuring that out-of-state trash shipments did not contain items banned from Michigan landfills.

Furthermore, if these proposals were enacted and challenged, courts would examine the legislation against the backdrop of the

Canadian waste situation and the ardent desire of many to curtail waste shipments from Canada. This would lend support to claims of discriminatory economic protectionism of the sort struck down in *Fort Gratiot*.

**Response:** The majority in *Fort Gratiot* stated, "Of course, our conclusion would be different if the imported waste raised health or other concerns not presented by Michigan waste." Michigan already prohibits the landfilling of material that can threaten the environment, natural resources, or the public health or safety. Waste coming from jurisdictions without the same regulations can and does contain prohibited material, and therefore does raise a concern not presented by Michigan waste.

Although lower Federal courts have invalidated the type of laws proposed by Senate Bills 98 (S-2) and 502 (S-3), the United States Supreme Court itself has not yet ruled on a state reciprocity requirement. The Court could uphold this legislation if the State proved that that there was no available nondiscriminatory way to keep banned material out of landfills.

Furthermore, while the increased shipments of solid waste from Canada focused attention on the issue, it is the waste itself--not its source--that poses risks to the environment and the public, and it is those risks that the bills aim to reduce. Senate Bills 98 (S-2) and 502 (S-3) would attempt to ensure that all waste, regardless of origin, met Michigan disposal criteria, and the remainder of the bills make no distinction between in- and out-of-State waste. In fact, the bill that would authorize the DEQ to restrict or prohibit transportation or disposal of waste that posed a threat, Senate Bill 57 (S-3), expressly would apply to solid waste originating *within or outside* of this State.

### **Opposing Argument**

Some of the proposals would run afoul of the WTO agreement, NAFTA, and the Transboundary Agreement between the United States and Canada, which 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 proposed legislation, however, would create such barriers by restricting the solid waste trade between Michigan and Canada.

The proposals also would violate the portion of the Commerce Clause that reserves to Congress the authority to regulate commerce with foreign nations. The U.S. Supreme Court has held that a state law violates this clause when it impedes the ability of the Federal government to "speak with one voice" in foreign affairs (*Crosby v National Foreign Trade Council*, 530 U.S. 363 (2000)).

**Response:** If a state law were challenged as violating an international trade agreement, the challenge would be brought against the United States, not the state. The countries themselves would be required to negotiate and resolve the conflict. The Federal government could request the state to change or repeal its law, and Congress has established a process for the United States Trade Representative to work with states to avoid disputes. The North American Free Trade Agreement specifies that no state law may be declared invalid on the ground that it is inconsistent with the agreement except in an action brought by the United States. In addition, the trade agreements contain environmental exceptions that could be held to apply. It is far from certain whether any of the Senate bills actually would contravene a trade agreement or what the consequences would be if they did.

### **Opposing Argument**

The bills would violate the Contract Clause contained in Article I, Section 10 of the Michigan Constitution, which states, "No...law impairing the obligation of contract shall be enacted." Article I, Section 10 of the U.S. Constitution similarly prohibits states from enacting laws impairing contractual obligations. State laws that target the current flow of solid waste must respect existing contracts between waste generators and landfill owners.

**Response:** Both State and Federal courts take a balancing approach to adjudicating Contract Clause claims. The analysis weighs the degree of impairment against the State's power to regulate in the public interest; in examining the severity of impairment, the court considers whether the industry in question had been regulated in the past. If the impairment is substantial, there must be a significant and legitimate public purpose behind the law, and the means adopted to implement it must be reasonably related to that purpose (*Blue Cross and Blue Shield of Michigan v Milliken*, 422 Mich 1 (1985)). Whether a law violates the Contract Clause ultimately is a question for the courts.

### **Opposing Argument**

Banning whole tires and beverage containers from landfills would be unenforceable at the consumer level, and would punish landfill operators and haulers for the actions of others. There currently is substantial illegal dumping of whole tires in Michigan despite existing laws, and many beverage containers are thrown out notwithstanding the bottle deposit law and recycling opportunities. Also, many soft drink containers are left behind by visitors from other states. To avoid being penalized, waste haulers would be forced to cease waste collection at a number of sites, such as public parks, shopping centers, and tourist destinations, and no longer would be willing to contract with the State to collect waste from highway rest areas. The legislation at least should include language allowing a minimal amount of these items to be disposed of in landfills, before the penalties would apply, as well as language prohibiting anyone who generates waste or arranges for its delivery from placing beverage containers or whole tires in trash destined for landfill disposal.

### **Opposing Argument**

Senate Bill 506 (S-7) would impose a moratorium on landfill construction without giving due consideration to work in progress. A facility that is part of a current solid waste plan, and that is in the process of preparing a construction permit application, would not be able to make the January 1, 2004, deadline. The facility will have spend many dollars to prepare the application, only to be denied a permit.

**Response:** Under the bill, a permit application would not necessarily be denied, but could simply be delayed for two years. The bill would enable the DEQ to make a better-informed decision on the application, and the DEQ's report to the Legislature would have to consider existing plans for expansion in which a substantial investment already had been made.

### **Opposing Argument**

Waste disposal is a two-way street. In addition to receiving out-of-State waste, Michigan exports to other states and Canada tons of solid waste, low-level nuclear material, and other hazardous items. Reportedly, Sarnia, Ontario, alone received 53,000 tons of hazardous waste from Michigan in 2001. If this State were to impose new restrictions on waste imports, it is possible that Canada or Ontario would do the same. This would limit

Michigan companies' access to reasonably priced hazardous waste disposal, resulting in higher costs to do business and higher prices to consumers. Moreover, if Michigan's waste could not be shipped to Canada or elsewhere, it is possible that more hazardous waste disposal areas would have to be sited in this State--a poor tradeoff for restrictions on nonhazardous solid waste.

### **Opposing Argument**

Restricting out-of-State waste shipments could jeopardize a significant source of revenue for communities in at least a half-dozen counties, where landfills accept Canadian waste. For example, Sumpter Township earns 45% of its tax revenue from the Carleton Farms landfill, which receives Toronto's solid waste, according to a column in *The Detroit News* (4-2-03). A recent *Detroit News* article (10-17-03) also reported that Canton Township built a \$13 million community center with revenue from its Sauk Hills Trail landfill. While the trash itself might not be welcome, the revenue is, and would not be easily replaced.

### **Opposing Argument**

Various aspects of the bills are vague, unnecessary, and/or duplicative. Under Senate Bill 57 (S-3), the DEQ Director could restrict or prohibit the transportation or disposal of solid waste if he or she determined that it "poses a threat to the public health, safety, or welfare or to the environment". The bill does not define what would constitute such a threat, however, or even require the threat to be serious. Under Senate Bill 98 (S-3), a landfill could accept imported solid waste if the materials were "homogeneous solid waste materials", but what that means is unclear. Senate Bill 499 (S-2) would require the DEQ and the State Police to inspect disposal areas at least four times a year, but the DEQ already does so, according to the Department. The bill also would allow random inspections of "waste being transported for disposal", i.e., vehicle inspections. The bill states that the inspections "may" be conducted at disposal areas, but it is not clear where the inspections actually would take place. By requiring solid waste plans to provide for local enforcement, Senate Bill 715 (S-1) would duplicate the responsibilities of other agencies, confuse what is now a clear chain of command, and add costs to local units of government.

### **Opposing Argument**

The bills are an overreaction to the increased shipment of waste from Toronto. The year

2003 is expected to be the peak of Toronto's waste shipments, and the city plans to eliminate them altogether by 2010 through an aggressive program of recycling and diversion, as well as the use of emerging technology. Toronto already has extensive curb-side pickup of recyclables, and has strict controls on what may be disposed of in landfills. While Toronto's current problem may be the most acute, many other North American cities will soon be facing a similar situation. Rather than blaming Toronto and imposing restrictions that could effectively ban waste imports, perhaps State and local policy-makers and those within the waste disposal industry should collaborate with their counterparts in Canada and other states to devise a more global solution.

**Response:** Much of the waste imported from Canada is not from Toronto and thus is not subject to the city's rigorous requirements. Also, the few bills that do distinguish between in- and out-of-State waste do not single out Toronto, or even Canada. Requiring waste to meet Michigan's disposal standards would not impose restrictions on imported waste that do not already apply to in-State waste, nor would it preclude a collaborative approach.

Legislative Analyst: Suzanne Lowe

## **FISCAL IMPACT**

### **Senate Bill 57 (S-3)**

The bill would result in an indeterminate cost to the State. After the DEQ Director issued an order restricting or prohibiting the transportation and disposal of solid waste, the Department would need to dedicate staff and resources to enforcing the order and resolving the situation. The costs would depend on the frequency, severity, and scope of the threats posed.

### **Senate Bill 98 (S-3)**

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

### **Senate Bills 497 (S-2) and 498 (S-6)**

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

### **Senate Bill 499 (S-2)**

The DEQ currently inspects landfills and disposal areas up to four times a year.

Combined with the additional items prohibited from landfills (under Senate Bill 498 (S-6)), this bill would require more complex inspections conducted more frequently. The DEQ would require additional funding for inspection staff, support staff, and travel expenses. In fiscal year (FY) 2003-04, the solid waste program received an appropriation of \$3,846,800 and 51.0 full-time equated positions (FTEs) for all permit and license application reviews, development of solid waste management plans, reporting, conducting inspections, and compliance activities. Some investigative and law enforcement processes are carried out in the Criminal Investigation unit. The primary responsibility for the inspection program would be held by the Department of Environmental Quality. The Department of State Police would be involved at the request of the DEQ for certain enforcement activities under the bill.

#### **Senate Bill 500 (S-2)**

As a result of the bill, an indeterminate amount of fine revenue would be deposited into the DEQ's Settlement Funds account. It is unknown how many fines are imposed annually; however, less than \$400,000 is collected in civil fines for violations of Part 115 on an annual basis. In some cases, the individual or facility is ordered to restore the natural resources disturbed in lieu of paying a civil fine.

#### **Senate Bill 502 (S-3)**

The bill would cost the State an indeterminate amount. It would add administrative responsibilities for the Department of Environmental Quality. Qualified staff would need to process documentation from jurisdictions for inclusion on the list of qualified solid waste origins, as well as research and verify the solid waste disposal requirements of out-of-State jurisdictions in order to include them on the list of jurisdictions from which solid waste could be accepted.

#### **Senate Bill 505 (S-4)**

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

#### **Senate Bill 506 (S-7)**

The bill would result in a two-year moratorium on the new construction or expansion of

landfills, subject to certain exceptions. Landfill owners pay a construction permit fee ranging from \$250 to \$1,500 for new or expansion projects. The temporary moratorium would result in less revenue to the Solid Waste Management Fund since fewer permit applications would be approved for two years. The bill also could have a long-term impact on the disposal capacity in the State since no new landfills would be constructed in the State for two years.

#### **Senate Bill 557 (S-2)**

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

#### **Senate Bill 715 (S-1)**

The bill would place solid waste enforcement responsibility on local units of government as part of the countywide solid waste management plan. Counties and municipalities could incur incremental expenses related to enforcement of solid waste regulations while assisting the Departments of Environmental Quality and State Police in implementing the inspection program proposed by Senate Bill 499 (S-2). The costs would vary by municipality depending on the current solid waste management plan in each county.

Fiscal Analyst: Jessica Runnels

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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.