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BILL ANALYSIS

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Senate Bill 57 (as enrolled)
Senate Bills 497 through 500 (as enrolled)
Senate Bills 502 and 506 (as enrolled)
Senate Bills 557 and 715 (as enrolled)
House Bills 5234 and 5235 (as enrolled)
Sponsor: Senator Michael D. Bishop (S.B. 57)
Senator Buzz Thomas (S.B. 497)
Senator Patricia L. Birkholz (S.B. 498)
Senator Alan Sanborn (S.B. 499)
Senator Dennis Olshove (S.B. 500)
Senator Nancy Cassis (S.B. 502)
Senator Bruce Patterson (S.B. 506)
Senator Liz Brater (S.B. 557)
Senator Jud Gilbert, II (S.B. 715)
Representative Daniel Acciavatti (H.B. 5234)
Representative David Robertson (H.B. 5235)
Senate Committee: Natural Resources and Environmental Affairs
House Committee: Land Use and Environment

PUBLIC ACT 36 of 2004
PUBLIC ACTS 35, 34, 43 & 41 of 2004
PUBLIC ACTS 37 & 38 of 2004
PUBLIC ACTS 39 & 44 of 2004
PUBLIC ACTS 40 & 42 of 2004

Date Completed: 9-2-04

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 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 impose waste

disposal restrictions that will withstand legal challenges. Since Michigan law limits the materials that may be disposed of in landfills, it was 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 was 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 amended 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 poses a substantial threat to the public or the environment.**
- Require the DEQ to compile a list of countries, states, provinces, and local jurisdictions that prohibit the disposal of items banned from a Michigan landfill or prevent their disposal through enforceable solid waste disposal requirements.**
- Prohibit landfill owners and operators from accepting for disposal out-of-State solid waste unless it comes from a jurisdiction that is on the DEQ list, it comes through a facility that has removed banned items, or it is homogeneous solid waste.**
- Ban more than de minimus numbers of beverage containers and whole tires 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 allow solid waste management plans to provide for counties and municipalities to assist with inspections.**
- Increase the civil fine for repeat violations of Part 115.**

All of the bills took effect on March 29, 2004. The bills are described in detail below.

Senate Bill 57

The bill added Section 11526c to 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 apply:

- The Director, after consultation with appropriate officials, has determined that the transportation or disposal of the solid waste poses a substantial threat to the public health or safety or to the environment.
- The Director determines that the restriction or prohibition is necessary to minimize or eliminate that threat.

At least 30 days before the Director issues such an order, the DEQ must post the proposed order and its effective date on the Department website with information on how a member of the public can comment on the order. Also, at least 30 days before the Director issues the order, the DEQ must 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 must consider comments received on it. The DEQ must post the final order on its website beginning on or before the order's effective date. These requirements do 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, must 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 are given notice of the order and its effective date. The DEQ must post the final order on its website as soon as practicable.

An emergency or nonemergency order will expire 60 days after it takes effect unless the order provides for an earlier expiration date. The Director must rescind an order when he or she determines that the threat upon which it was based no longer exists.

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

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

Senate Bill 497

The bill defines "beverage container" in Part 115 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, contains 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 was tie-barred to Senate Bills 498, 500, and 502, and House Bills 5234 and 5235.

Senate Bill 498

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 amended 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 the landfill of, any of the following:

- Medical waste (as already prohibited).
- More than a de minimis amount of open, empty, or otherwise used beverage containers (subject to provisions regarding green glass).
- More than a de minimis number of whole motor vehicle tires.
- More than a de minimis amount of yard clippings, unless they are diseased or infested.

(The bill defines "de minimis" as incidental disposal of small amounts of these materials that are commingled with other solid waste.)

If the DEQ determines that a safe, sanitary, and feasible alternative for the disposal of any of these items does not exist, the Department must submit a report setting forth that determination and the basis for it to the Senate and House standing committees with primary responsibility for solid waste issues.

The prohibition against disposing of beverage containers does not apply to green glass beverage containers before June 1, 2007. The DEQ must convene a task force to make recommendations to the Legislature on the special recycling problems posed by green glass containers, including a recommendation as to whether the June 1, 2007, date should be changed. The task force must issue its recommendations by December 31, 2004. At a minimum, the task force must include a representative of each of the following:

- The landfill industry.
- A company that manufactures or uses

- green glass beverage containers.
- A recycling company.
- An environmental organization.

The bill also prohibits a person from delivering to a landfill for disposal, and prohibits 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.

The bill requires the State to develop policies and practices that 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 welfare."

The bill repealed Section 11521, which prohibited the owner or operator of a landfill or municipal solid waste incinerator from accepting solid waste if the owner or operator knew or should have known that the solid waste included yard clippings from any source, unless they were diseased or infested.

The bill was tie-barred to Senate Bills 497, 500, and 502, and House Bills 5234 and 5235.

Senate Bill 499

The bill amended Section 11526 to 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 are 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 are doing so in compliance with Part 115 and the rules.

The bill also permits the DEQ and State Police to conduct regular, random inspections of waste being transported for disposal at disposal areas in Michigan. These inspections may be conducted at the end original destination.

(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.)

The bill retains a provision allowing the DEQ, a health officer, or a law enforcement officer to 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.

Senate Bill 500

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 is \$25,000 per day of violation.

The bill was tie-barred to Senate Bills 497, 498, and 502, and House Bills 5234 and 5235.

Senate Bill 502

The bill added Section 11526b to require the DEQ, by October 1, 2004, to compile a list of countries, states, provinces, and local jurisdictions that prohibit from disposal in a landfill the items banned from disposal in a landfill located in this State, or that prevent the disposal of those items, through enforceable solid waste disposal requirements that are comparable to Part 115. The DEQ must prepare and give a copy of the list to each landfill in Michigan.

The DEQ must include a country, state, province, or local jurisdiction on its list if the country, state, province, or local jurisdiction, or another person gives the Department documentation that that jurisdiction prohibits the disposal in a landfill the items banned from disposal in a landfill located in this State, or prevents their disposal through enforceable solid waste disposal requirements comparable to Part 115. This documentation must include all pertinent statutes, administrative regulations, and ordinances.

Also, by October 1, 2004, the DEQ must notify each state, the country of Canada, and each province in Canada that landfills in Michigan will not accept for disposal solid waste that does not comply with Section 11526a (added by House Bill 5234).

The bill was tie-barred to House Bill 5234.

Senate Bill 506

The bill added Section 11511a to prohibit the DEQ from issuing a permit to construct a landfill if the Department receives an administratively complete application for a permit after January 1, 2004, and before January 1, 2006, except as otherwise provided in the bill, and notwithstanding any other provision of Part 115.

The bill allows the DEQ to issue a permit for a design modification to an existing landfill if the modification does not result in a net increase in remaining disposal capacity as calculated under Section 11507a (pursuant to Senate Bill 557).

The bill also allows the DEQ to issue a permit to construct an expansion to an existing landfill if the applicant demonstrates that it has less than five years of remaining disposal capacity, and the application otherwise meets the requirements of Part 115. The permit

may not provide more than a total of 10 years of remaining disposal capacity when added to the remaining capacity existing before the permit is issued. The amount of time of remaining disposal capacity must be calculated based on the average of the three prior years of waste receipt as reported under Section 11507a.

In addition, the DEQ may issue a permit to construct an expansion of an existing landfill if the expansion is authorized pursuant to a host community agreement in existence on the bill's effective date.

(The bill defines "existing landfill" as a landfill that was licensed under Part 115 to receive waste as of October 1, 2003. "Host community agreement" means a written, legally binding agreement between the owner or operator of a landfill and the county or municipality where an expansion of that landfill will be located, governing the operation, location, or development of the landfill in that county or municipality.)

If an application otherwise meets the requirements of Part 115, the DEQ may issue a permit to construct a Type III landfill that is 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 requires the DEQ, by January 1, 2005, 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 also must 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". The DEQ must prepare the report based on consultation with affected parties.

Section 11511a will be repealed on January 1, 2006.

The bill was tie-barred to Senate Bill 557.

Senate Bill 557

Under Section 11507a, 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 must contain information on the amount of remaining disposal capacity at the landfill.

The bill requires remaining disposal capacity to be calculated as the permitted capacity less waste in place for any area that has been constructed and is not yet closed, plus the permitted capacity for each area that has a construction permit under Part 115 but has not yet been constructed.

Previously, the required report had to be submitted within 30 days after the end of each State fiscal year. The bill increased that period to 45 days.

The bill also requires 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 was tie-barred to Senate Bill 506.

Senate Bill 715

Under Section 11533, each solid waste management plan must include an enforceable program and process to assure that the nonhazardous solid waste generated in the planning area for 10 years or more is collected, recovered, processed, or disposed of at disposal areas that comply with State law and rules governing location, operation, and design. Under the bill, each solid waste management plan also may 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, are disposed of in the disposal area.

Section 11533 also 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 may include a mechanism for the county and those municipalities to assist the DEQ and the State Police in implementing and conducting the

inspection program established in Section 11526 (under Senate Bill 499).

The bill was tie-barred to Senate Bill 499.

House Bill 5234

The bill added Section 11526a to prohibit the owner or operator of a landfill, beginning October 1, 2004, from accepting for disposal in this State solid waste, including municipal solid waste incinerator ash, that was generated outside of Michigan, unless one or more of the following are met:

- The solid waste is composed of a uniform type of item, material, or substance, other than municipal solid waste incinerator ash, that meets the requirements for disposal in a landfill under Part 115 and the rules promulgated under it.
- The solid waste was received through a material recovery facility, a transfer station, or another facility that has documented that it removed from the waste being delivered to the landfill those items prohibited from disposal in a landfill.
- The country, state, province, or local jurisdiction in which the solid waste was generated is approved by the DEQ for inclusion on the list compiled by the Department under Section 11526b (added by Senate Bill 502).

House Bill 5234 enacts this prohibition "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, and in recognition that the nature of solid waste collection and transport limits the ability of the state to conduct cost effective inspections to ensure compliance with state law".

The bill provides that, notwithstanding any provision of Part 115, if there is sufficient disposal capacity for a county's disposal needs in or within 150 miles of the county, all of the following apply:

- The county is not required to identify a site for a new landfill in its solid waste management plan.
- An interim siting mechanism will not become operative in the county unless the county board of commissioners determines otherwise.
- The DEQ is not required to issue a construction permit for a new landfill in the county.

The bill was tie-barred to Senate Bill 502.

House Bill 5235

The bill added Section 11527a to require the DEQ to post on its website a list of materials prohibited from disposal in a landfill under Section 11514, and appropriate disposal options for those materials.

The bill requires solid waste haulers that dispose of solid waste in a landfill, to give their customers annual notice of the following:

- The materials prohibited from landfill disposal under Section 11514.
- The appropriate disposal options for those materials as described on the DEQ's website.
- The DEQ's website address where the disposal options are described.

The bill was tie-barred to House Bill 5234 and Senate Bills 497, 498, 500, and 502.

MCL 324.11526c (S.B. 57)
324.11502 (S.B. 497)
324.11514 (S.B. 498)
324.11526 (S.B. 499)
324.11546 (S.B. 500)
324.11526b (S.B. 502)
324.11511a (S.B. 506)
324.11507a (S.B. 557)
324.11533 & 324.11538 (S.B. 715)
324.11526a (H.B. 5234)
324.11527a (H.B. 5235)

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 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; 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 than or different from 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 licenses 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 second or 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 health, it is necessary to ensure that trash not meeting Michigan's standards is not accepted for disposal. The legislation will accomplish this in several ways. First, Senate Bill 502 requires the DEQ to compile a list of jurisdictions that document that they prohibit or prevent the disposal of materials not allowed in Michigan landfills. Under House Bill 5234, if a state, province, or country is not on this list, a landfill may not accept waste generated there unless the materials are homogeneous solid waste materials or received through a facility that documents that it has removed banned items.

While those two proposals specifically address out-of-State waste, to ensure that it meets Michigan's landfill criteria, other measures will 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 prohibited the disposal of a number of items in landfills. Senate Bill 498 consolidates these prohibitions into one statutory provision, adds beverage containers and whole tires to the list, and requires the State to develop policies and practices that promote recycling and reuse. Since public awareness and compliance are important components of reducing landfill disposal, House Bill 5235 ensures that information about banned items and alternative disposal options is available on the DEQ's website, as well as given to waste haulers' customers.

Additional measures promote the enforcement of the regulations, and give the State more tools to keep unsafe waste out of landfills, regardless of whether it originates within or outside of Michigan. In particular, Senate Bill 57 authorizes the DEQ Director to restrict or prohibit the transportation or disposal of waste that poses a threat to the environment or the public health or safety. Senate Bill 499 requires the State to inspect each solid waste disposal area at least four times a year, and Senate Bill 715 allows local assistance with these inspections. In addition, Senate Bill 500 establishes enhanced fines for repeated

violations of Part 115.

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

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 requires landfill owners and operators to report each year on their remaining capacity. Senate Bill 506 imposes a two-year moratorium on new landfill construction, unless a landfill has less than five years of remaining capacity or another exception applies, and requires the DEQ to report to the Legislature after the moratorium. These measures give the State an opportunity to collect information about capacity both now and in the future, and will enable policy-makers to take an informed approach to addressing siting and capacity needs.

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 infringes 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 bills appear neutral but will have the impact of interfering with interstate or foreign commerce, and several of the bills clearly impose separate restrictions out-of-State waste. While Senate Bill 502 and House Bill 5234 aim to ensure that out-of-State waste meets 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 prohibited 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 must demonstrate that there are no available nondiscriminatory means of ensuring that out-of-State trash shipments do not contain items banned from Michigan landfills.

Furthermore, in a legal challenge to this legislation, the courts will examine it against the backdrop of the Canadian waste situation and the ardent desire of many to curtail waste shipments from Canada. This will 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 enacted by Senate Bill 502 and House Bill 5234, 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 Bill 502 and House Bill 5234

attempt to ensure that all waste, regardless of origin, meets Michigan disposal criteria, and the remainder of the bills make no distinction between in- and out-of-State waste. In fact, the bill that authorizes the DEQ to restrict or prohibit transportation or disposal of waste that poses a threat, Senate Bill 57, expressly applies to solid waste originating *within or outside* of this State.

Opposing Argument

Some of the bills 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 legislation, however, creates such barriers by restricting the solid waste trade between Michigan and Canada.

The bills also 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 enacted bills actually contravenes a trade agreement or what the consequences will be if they do.

Opposing Argument

The bills 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 will be unenforceable at the consumer level, and will punish landfill operators and waste haulers for the actions of others. There 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 may be forced to cease waste collection at a number of sites, such as public parks, shopping centers, and tourist destinations, and might not be willing to contract with the State to collect waste from highway rest areas. The law at least should prohibit anyone who generates waste or arranges for its delivery from placing beverage containers or whole tires in trash destined for landfill disposal.

Response: Senate Bill 498 bans "more than a de minimis" number of beverage containers and whole tires. Thus, landfill operators and waste haulers will not be penalized if a few of these items are present in landfilled waste.

Opposing Argument

Senate Bill 506 imposes 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 was in the process of preparing a construction permit application, will have spent many dollars to prepare the application, only to be denied a permit.

Response: Under the bill, a permit application will not necessarily be denied, but simply might be delayed for two years. The bill enables the DEQ to make a better-informed decision on the application, and the DEQ's report to the Legislature will have to consider existing plans for expansion in which a substantial investment already has 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. Since this State is imposing new restrictions on waste imports, it is possible that Canada or Ontario will do the same. This could 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 cannot be shipped to Canada or elsewhere, it is possible that more hazardous waste disposal areas will have to be sited in this State--a poor tradeoff for restrictions on nonhazardous solid waste.

Opposing Argument

Restricting out-of-State waste shipments may 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 *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 will not be easily replaced.

Opposing Argument

Various aspects of the bills are vague, unnecessary, and/or duplicative. Under Senate Bill 57, the DEQ Director may restrict or prohibit the transportation or disposal of solid waste if he or she determined that it "poses a substantial threat to the public health or safety or to the environment". The bill does not define what will constitute such a threat, however. Under House Bill 5234, a landfill may accept imported solid waste if the materials are "homogeneous solid waste materials", but what that means is unclear.

Senate Bill 499 requires 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. By allowing solid waste plans to provide for local enforcement, Senate Bill 715 creates the opportunity for duplication of agencies' responsibilities and confusion regarding the chain of command.

Opposing Argument

The bills are an overreaction to the increased shipment of waste from Toronto. The year 2003 was 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 may 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 does not impose restrictions on imported waste that do not already apply to in-State waste, nor does it preclude a collaborative approach.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

Senate Bill 57

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

Senate Bills 497 and 498

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

Senate Bill 499

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), this bill will require more complex inspections conducted more frequently. The DEQ will 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 will be held by the Department of Environmental Quality. The Department of State Police will be involved at the request of the DEQ for certain enforcement activities under the bill.

Senate Bill 500

As a result of the bill, an indeterminate amount of fine revenue will 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

The bill will cost the State an indeterminate amount. It adds administrative responsibilities for the Department of Environmental Quality. Qualified staff will need to process documentation from jurisdictions for inclusion on the list of eligible 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 may be accepted.

Senate Bill 506

The bill will 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 will result in less revenue to the Solid Waste Management Fund since fewer permit applications will be approved for two years. The bill also may have a long-term impact on the disposal capacity in the State since no new landfills will be constructed in the State for two years.

Senate Bill 557

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

Senate Bill 715

Counties and municipalities might 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 under Senate Bill 499. The costs will vary by municipality depending on the existing solid waste management plan in each county.

House Bill 5234

Landfill owners pay a construction permit fee ranging from \$250 to \$1,500 for new or expansion projects. The new limitations on such landfill projects will result in less revenue to the Solid Waste Management Fund since fewer permit applications will be approved. The bill also might have a long-term impact on the disposal capacity in the State. The other provisions of the bill will have no direct fiscal impact on State or local government.

House Bill 5235

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

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.