

TESTIMONY OF
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NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
BEFORE THE MICHIGAN HOUSE LAND USE AND ENVIRONMENT
COMMITTEE
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Madame Chairwoman, members of the Land Use and Environment Committee, my name is Bruce Parker, and I am the President and CEO of the National Solid Wastes Management Association (NSWMA). NSWMA represents private sector companies that collect and process recyclables, own and operate compost facilities and collect and dispose of municipal solid waste. NSWMA members operate in all fifty states. I appreciate the opportunity to testify today on the Michigan solid waste bills discussed today at this hearing.

The solid waste industry is a \$43 billion industry that employs more than 350,000 workers. We are proud of the job we do and the contributions our companies and their employees make in protecting the public health and the environment. The United States of America has a solid waste management system that is the envy of the world because of our ability to guarantee quick and efficient collection and disposal of trash in a manner that fully conforms with state and federal waste management laws and regulations.

NSWMA and its members are aware of increasing opposition to out-of-state waste being disposed in Michigan landfills. We also recognize that the closure of Toronto's landfills and their decision to send more of their solid waste into Michigan is a concern. Although NSWMA opposes the Michigan solid waste bills, for reasons I will identify in a moment, we are sensitive to the issues addressed by the proposed legislation. The solid waste industry, both here in Michigan and throughout the United States, wants to work with legislators, regulators and citizens to minimize any adverse impacts of imported solid waste. We continue to work to ensure that unsafe vehicles are not traveling on our highways. We want enforcement of existing solid waste regulations. Our members work and live in many of the communities impacted by the movement of solid waste, and want to work with the local governments and the state government here in Lansing to assure safe roads, a clean environment, and good solid waste management throughout Michigan.

Solid Waste Moves in Interstate Commerce

Some of you may be wondering why solid waste increasingly crosses state and international borders and moves in interstate commerce. The reason is that the old municipal dumps of the 1960s and 1970s have been replaced by larger, state-of-the-art disposal facilities that are more protective of health and the environment. Small, local landfills have closed throughout the U.S. in response to the increased costs of construction and operation under the Resource Conservation and Recovery Act (RCRA) Subtitle D and state requirements for more stringent environmental protection and financial assurance. The number of landfills in the early 1990s was nearly 10,000 while today there are about 2,600, and the number continues to decline as small landfills close, and communities turn to regional landfills that provide safe, environmentally protective, and affordable disposal.

Construction and operation of such facilities, of course, requires a substantial financial investment. By necessity, regional landfills have been designed in anticipation of receiving a sufficient volume of waste from the watershed, both within and outside the host state, to generate revenues to recoup those costs and provide a reasonable return on investment. The development of regional landfills was not only entirely consistent with all applicable law, it was viewed and promoted by federal and state officials as the best solution to the need for economic and environmentally protective disposal of solid waste. These regional landfills provide safe and affordable disposal as well as significant contributions to the local economy through host fees, jobs, property taxes, and business license fees. For example, one Michigan community receives over half its annual revenue from the landfill host fee. This revenue enables this community to maintain basic infrastructure and public services, such as police and fire protection, which might otherwise not be possible without a tax increase.

As a result, nearly every state in the nation exports and imports solid waste. Forty-six states and the District of Columbia export some of their solid waste. According to a recent congressional report, Michigan exported solid waste in 2000 to Ohio and Indiana. These states, and others, export solid waste to Michigan. The reality is that solid waste moves across state lines as a normal and necessary part of our environmentally protective and cost effective solid waste management system. Like recyclables, raw materials and finished products, solid waste does not recognize state lines as it moves through commerce.

It is also important to put the amount of Canadian solid waste transported into Michigan in proper perspective. According to the Michigan Department of Environmental Quality's most recent data, Canadian solid waste accounts for less than ten percent of the waste disposed in Michigan landfills. It is untrue to characterize Michigan as being "flooded by Canadian solid waste," as has been repeatedly alleged, and that such waste threatens landfill capacity in Michigan.

The Michigan Solid Waste Bills Are Unlawful

NSWMA believes that each of the six Michigan solid waste bills, HB 4317, 5561, 5573, 5598, 5599 and 5602, are either: (1) unconstitutional; (2) violate the North American Free Trade Agreement (NAFTA); or (3) violate the 1986 treaty between the United States and Canada governing the Transboundary Movement of Hazardous Waste, which also applies to solid waste, and are bad public policy in every instance.

As a general rule, state or local laws that are intended to deter out-of-state waste materials, or have the effect of deterring such materials, violate what is known as the dormant Commerce Clause of the United States Constitution. The Michigan solid waste bills suffer from both of these flaws, as they are intended to keep other states and Canadian solid waste out of Michigan, and, if enacted, would have precisely that effect. The U.S. Supreme Court ruled, in its seminal 1978 decision in Philadelphia v. New Jersey, that solid waste is an article of commerce subject to the protection of the Commerce Clause. Over the past decade, the Supreme Court and other federal courts have expanded on that decision and repeatedly struck down state laws that sought to limit the movement of solid waste across state lines. Preserving landfill capacity for Michigan residents and businesses is not permitted under the U.S. Constitution.

An illuminating example is our industry's recent experience in Virginia. In 1999, responding to concerns that the closing of a New York City landfill would increase the amount of New York solid waste disposed in Virginia landfills, the Virginia legislature passed a series of bills that restricted the movement of solid waste into Virginia. All of the Virginia bills were facially non-discriminatory, but each bill had the practical effect of making Virginia a less likely recipient of New York solid waste. Despite repeated warnings about the illegality of these bills, Virginia's Governor signed them into law in the Spring of 1999. Two months later, a federal judge issued an injunction blocking the laws from going into effect, finding them to be unconstitutional under the Commerce Clause. Virginia has litigated the case all the way up to the U.S. Supreme Court, losing every step of the way (Waste Management Holdings v. Gilmore). Just last month, the Supreme Court refused to overturn the federal court decisions declaring the Virginia solid waste laws unconstitutional. Virginia spent three years and a lot of taxpayers' money defending blatantly unconstitutional solid waste laws. The six bills at issue here fail the Commerce Clause test for exactly the same reasons as Virginia. I hope that Michigan does not proceed down that path.

Let me briefly review each of the bills and explain why they are unlawful.

HB 4317

H.B. 4317 would allow other states and Canada to dispose their solid waste in Michigan only if the Department of Environmental Quality (DEQ)

certifies that those locations have “a solid waste disposal regulatory system that is at least as stringent and protective of the public health, safety and welfare, and the environment, in terms of what waste is allowed in the waste stream, as is in existence in this state.” Basically, DEQ would be authorized to determine whether Ohio, Indiana and Canada have a solid waste program equivalent to Michigan’s. The State of Wisconsin tried this approach in the 1990’s, passing a law that required generators of solid waste in other states to pass legislation that met Wisconsin’s recycling specifications. Twice, the federal appeals court in NSWMA v. Meyer declared Wisconsin’s laws to be unconstitutional under the Commerce Clause. Let me quote one statement from the 1999 decision on this subject: “No state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders.” HB 4317 forces other states and Canada to satisfy Michigan’s solid waste requirements in order to have the privilege of using landfills in Michigan. This violates the U.S. Constitution.

NSWMA is also concerned about the vague, subjective, and open-ended nature of some of the language in HB 4317. DEQ would be authorized to determine whether Canada’s or another state’s solid waste regulations are “as stringent and protective” as Michigan’s. What objective criteria will DEQ use to make this determination? HB 4317 doesn’t give DEQ any guidance in this regard nor does it require DEQ to make these determinations within a specified time period. Should a load of trash be forced to sit in a truck at a landfill while DEQ evaluates whether the originating state or country’s laws are adequate? What are the chances that Canada or another state is going to get a fair hearing before the DEQ? HB 4317 is too vague and invites arbitrary application by the DEQ.

HB 5561

HB 5561 would authorize any county in Michigan to prohibit the disposal of solid waste generated in another county, either in Michigan, another state or Canada, if the generating county does not have a recycling rate “comparable” to the recycling rate in the county where the disposal takes place. This bill suffers from the same constitutional flaws as HB 4317, and for the same reasons. Indeed, that Michigan would be considering this bill is ironic since the U.S. Supreme Court struck down almost exactly the same prohibition in the Ft. Gratiot case, when Michigan’s previous effort to keep out other states’ solid waste was declared unconstitutional. Further, this bill is even more obviously unconstitutional because it is specifically directed against other states and Canada, to the extent that those states do not have the recycling rates of the counties that receive out-of-state solid waste. Also, as I mentioned earlier, according to the federal courts, preserving landfill capacity for in-state residents is not a lawful ground for enacting protective legislation such as HB 5561.

In addition, HB 5561 is unlawful because it is too vague. The originating county would need to have a recycling rate “comparable” to the disposal county. What does that mean? If the originating county’s rate is one percent lower, is

that comparable? What about three percent? What if the rates are calculated differently because different states and countries include different materials in their recycling calculations?

HB 5573

HB 5573 flatly prohibits out-of-state waste from being disposed in Michigan. Obviously, such a prohibition is unconstitutional, as precisely the same type of prohibition was struck down by the U.S. Supreme Court in the Philadelphia v. New Jersey case I mentioned earlier. So the sponsors of HB 5573 included a provision declaring that the prohibition against out-of-state solid waste does not take effect unless Congress passes a law authorizing states to “regulate the transportation and disposal of solid waste.”

However, were Congress to pass such legislation, and Michigan were to enact HB 5573, such a law would violate the U.S.-Canada Transboundary Agreement. In 1986, the United States and Canada signed an agreement governing the movement of hazardous waste between the two countries. In 1992, this Agreement was amended to apply to solid waste. Article 2 of the Transboundary Agreement expressly states that each country “shall permit the export, import and transit” of waste materials between the two countries. A ban on Canadian solid waste would violate the Transboundary Agreement, and the U.S. State Department issued a report specifically stating the U.S. is obligated to permit Canadian solid waste to enter the United States under the Transboundary Agreement.

Michigan’s desire to seal its borders from Canadian solid waste is particularly ironic given the state’s continued export of hazardous waste to Canada. In 1998, Michigan exported more than twice as much hazwaste to Ontario than any other state – over 87,000 tons. If Michigan tries to close its border to Ontario solid waste, isn’t it logical that Ontario will retaliate and close its border to Michigan hazwaste? What will Michigan generators of hazwaste be forced to do? Probably pay more to dispose of their hazwaste, either in Michigan or other states’ hazwaste facilities. In these difficult economic times, forcing Michigan companies to incur unnecessary costs simply makes no sense.

HB 5598, 5599 & 5602

HB 5598, 5599 and 5602 are related bills that would: (1) require the inspection of Canadian solid waste transported by truck, at the Michigan border; (2) require such solid waste to be in “hermetically sealed containers; (3) establish an inspection fee charged to the generators of such waste; and (4) impose criminal liability on a hauler who transports such waste into Michigan without an inspection. These bills violate NAFTA, the North American Free Trade Agreement. Under NAFTA, the United States and its political subdivisions are not permitted to impose requirements on Canadian goods if domestic goods are not subject to the same requirements. In each of these three bills, only solid

waste originating from Canada is targeted. Under Article 201 of NAFTA and the General Agreement on Tariffs and Trade (GATT), which generally governs international trade, waste is considered a “good” subject to the protection of NAFTA. State and local governments are not permitted to enact laws inconsistent with NAFTA’s obligations.

For much the same reasons, these bills violate the 1986 Transboundary Agreement. Conditioning the importation of solid waste from Canada upon using hermetically sealed containers violates Article 2 of the Transboundary Agreement, which requires that the U.S. permit the import of Canadian solid waste. Requiring the inspection of every truckload of Canadian solid waste violates Article 5 of the Transboundary Agreement, which states that the U.S. and Canada will cooperate in “spot-checking transboundary shipments.”

Incidentally, I have read that one of the motivations for these particular bills is a concern that a terrorist might sneak a weapon of mass destruction into Michigan in a garbage truck. This could happen with any sort of truck or rail car, carrying any sort of good or commodity, and singling out trash vehicles for this reason is unfair, unwarranted, and arbitrary and capricious under the law.

Further, these bills are impractical. It is not practical for the State of Michigan to hire an army of inspectors to inspect every single truck carrying Canadian solid waste into Michigan. Such inspections will disrupt the cost-effective transport of such waste, and could increase public health and safety risks if solid waste is delayed during the summer at the border, and if traffic congestion increases during the ensuing long lines. It also may not be practical to charge Canadian municipalities a fee for such inspections, as a single truckload of Canadian solid waste could contain material from more than one Canadian municipality. How will an inspector know how to allocate the fee among multiple Canadian municipalities?

Finally, NSWMA is not alone in opposing restrictions on interstate waste. The Solid Waste Association of North America (SWANA), which represents solid waste professionals, also opposes these restrictions. At its mid-year meeting last summer, SWANA’s International Board of Directors voted unanimously to approve a policy statement that supports “the free transboundary movement of solid waste”.

Public sector waste managers and private sector waste management companies agree that they can’t do their job and protect the public health and the environment while having their hands tied by artificial restrictions based on state lines.

Conclusion

Solid waste may not be everyone’s favorite commodity, but it is protected by the same free trade provisions that protect paper and cars and television sets. It is protected by the same U.S. Constitution that prohibits a state with a car

manufacturing plant from protecting that plant from Michigan-produced cars. Our federal system was set up precisely to avoid these types of bills. They are unlawful, bad policy, and make little economic sense. The solid waste industry wants to work with state and local officials to address legitimate concerns, but if these proposals were enacted it would inevitably result in needless litigation with significant costs that would be better spent on more pressing priorities like fire and rescue equipment, economic development, and job training.

Thank you, Madame Chairwoman. I would be pleased to answer any questions from you or other members of the Committee.