



**REPORT OF THE
MICHIGAN
SOLID WASTE IMPORTATION TASK FORCE
TO GOVERNOR JOHN ENGLER
AND
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIRECTOR RUSSELL J. HARDING**

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PREPARED BY DEPARTMENT OF ENVIRONMENTAL QUALITY
WASTE MANAGEMENT DIVISION



INTRODUCTION

In 1992 the United States Supreme Court ruled, in the matter of *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, that provisions of the Michigan Solid Waste Management Act, which allowed counties to impose restrictions on the importation of solid waste from other states and countries through their Solid Waste Management Plans, violated the United States Constitution and were not enforceable. The United States Constitution Commerce Clause reserves to the United States Congress the authority to regulate commerce between the states and with foreign countries. The Courts have long recognized the so-called “dormant” nature of the Commerce Clause as prohibiting states from such areas of regulation unless authorized by Congress. Since 1992, Michigan and other states have worked with Congress to seek federal legislation that would authorize states to regulate imports of waste from other states and countries. However, primarily as a result of the concerted resistance by some Congressional Members, including key committee chairmen, compromise legislation to address this issue has not been advanced for final passage. As a result, while movement of waste between Michigan counties is still regulated by state law, there are no restrictions on imports of waste from outside of the state.

Despite several years of efforts by Michigan and other states to seek solutions to this problem through both state level and Congressional efforts, constitutional legislation to grant reasonable authority to states and communities to control waste imports has not come to fruition. To assist in efforts to address this issue, on May 28, 1999, Governor John Engler established, by Executive Order 1999-3, the Michigan Solid Waste Importation Task Force (Task Force). The Task Force consisted of six people appointed by the Governor representing specific areas of interest involved with the issue of waste imports and four additional members appointed (two each) by the Senate majority Leader and the Speaker of the House of Representatives.

Executive Order 1999-3 established three specific charges for the Task Force:

1. Identify trends, causes, and consequences of the importation of solid waste;
2. Meet with members of the Michigan Congressional Delegation and other members of Congress to encourage passage of federal legislation to allow Michigan to control the importation of solid waste; and
3. Provide recommendations to the Governor and the Director of the Michigan Department of Environmental Quality (MDEQ) concerning the control of interstate and international waste imports.

The Task Force was also charged to complete and submit a report with its final recommendations to the Governor and the Director of the MDEQ by December 1, 1999. This date was extended to December 1, 2000, by Executive Order 1999-14.

Members of the Task Force are:

Business Community:

Mr. Terry Guerin - Granger Companies and the Michigan Waste Industry Association
Mr. Jeffrey Hartlund – Ford Motor Company

Local Government:

Mr. Gary Schocke, Supervisor of Bruce Township, Macomb County
Mr. Richard Hawks, Chair, Clinton County Board of Commissioners and Chair of the Task Force

Environmental Organizations:

Mr. Dennis Fox, Michigan United Conservation Clubs
Ms. Frances Schonenberg, East Michigan Environmental Action Council

Appointed by the Speaker of the House:

Representative William R. Byl
Representative Larry Julian

Appointed by the Senate Majority Leader:

Senator Kenneth R. Sikkema
Mr. Joseph Shannon, Attorney with the firm of Jaffe, Raitt, Heuer and Weiss

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I. Background

Michigan and many other states are recipients of large volumes of solid waste imported from other states and from Canada for disposal. These imports can adversely impact disposal capacity developed as part of local planning activities, can undermine support for local recycling activities, and because of differences in regulatory definitions between United States and Canadian law, can result in inadvertent disposal of wastes in Michigan disposal areas that are not permitted. As noted in the Introduction to this Report, Michigan no longer has legal authority to restrict these unwelcome imports despite several years of efforts coordinated with other importing states to seek legislative remedies.

Michigan Governor John Engler established the Michigan Solid Waste Importation Task Force (Task Force) to examine trends, causes, and consequences of these imports and to develop recommendations to address this issue. The Task Force was also charged with assisting in efforts to encourage passage of federal legislation to address the import issue. This Report describes the efforts and outcomes of the Task Force to examine available information on solid waste import volumes and causes and provides recommendations to address this issue.

II. History

Part 115, Solid Waste Management, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (formerly known as 1978 PA 641, as amended, the Solid Waste Management Act), provides in part as follows:

Section 11513. A person shall not accept for disposal solid waste or municipal solid waste incinerator ash that is not generated in the county in which the disposal area is located unless the acceptance of solid waste or municipal solid waste incinerator ash that is not generated in the county is explicitly authorized in the approved county solid waste management plan. The department shall take action to enforce this section within 30 days of obtaining knowledge of a violation of this section.

Section 11538(6) In order for a disposal area to serve the disposal needs of another county, state, or country, the service, including the disposal of municipal solid waste incinerator ash, must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan.

In 1992, the United States Supreme Court ruled in the matter of *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources* that the above provisions, to the extent they restrict imports of solid waste from outside of the state of Michigan, are unconstitutional. Since that time, Michigan, in coordinated efforts with other states, has worked with members of Congress to craft legislation which would give states the ability to impose reasonable regulation of waste imports while recognizing existing waste management relationships and the needs of the waste disposal industry and waste generators to operate effectively. To date, states' efforts to secure such authority have been unsuccessful.

Michigan has collected waste disposal and import data since 1996. While these data indicate that as a percentage of total waste disposed in landfills, out-of-state waste imports have remained relatively

stable at 11-13 percent, the actual volume of waste imports has continued to rise. The impending closure of the world's largest landfill, Fresh Kills in New York City, has already brought about significant increases in export of New York waste to other states for disposal. Replacement disposal capacity for Fresh Kills Landfill has not been developed. When Fresh Kills Landfill ultimately closes, significant increases in waste exports from New York are expected. Michigan is certainly vulnerable to receiving some of these wastes. In addition, the Metro Toronto government is currently reviewing bids for disposal of all the solid waste from that large metropolitan area as available local disposal capacity will soon be gone. Some of the bids under consideration propose disposal of from 500,000 tons per year to all of Metro Toronto waste (expected to exceed one million tons per year) in Michigan landfills.

The Task Force held an initial meeting on March 17, 2000, with subsequent meetings on May 1, 2000, June 19, 2000, July 24, 2000, and September 18, 2000. During these meetings the Task Force examined the volume of solid waste disposed in Michigan landfills; the volume and sources of waste imports and exports into and out of Michigan; the trend of waste disposal and imports and its potential impact on disposal capacity; and disposal costs, processes for creating new disposal capacity, and recycling programs in other states and Canada and their potential relationship to waste imports to Michigan.

The Task Force also examined relevant court cases, efforts at the state level to address control of imports and federal legislative initiatives, and prospects for legislative remedies.

III. Findings and Recommendations

1. *Current levels of solid waste imports are manageable without immediate impacts on disposal capacity for Michigan citizens.*

Discussion

The Michigan Department of Environmental Quality (MDEQ) estimates that Michigan currently has approximately 15-17 years of landfill disposal capacity available. Based on reported annual disposal volumes times 15 years, this equates to an estimated 634,236,045 cubic yards of disposal capacity. Some additional expansion potential is also provided by county solid waste management plans for some existing landfills. Current imports are reported at slightly more than 6,000,000 cubic yards per year. If imports were to remain at this level, their impact on available disposal capacity would continue to be minimal.

2. *Solid waste imports show a continuing trend to increase. Current events suggest a potential for significant increases in waste imports to Michigan and other importing states. If such increases occur, significant negative impacts on Michigan disposal capacity may result.*

Discussion

While out-of-state waste imports to Michigan have remained at 11-13 percent of the total waste disposed, actual volumes of waste imports have been increasing. In Fiscal Year 1995-96, the first year for which this data was collected, waste imports totaled approximately 5.7 million cubic yards. In Fiscal Year 1998-99, imports were nearly 6.5 million cubic yards, an increase of over 14 percent. The impending closure of New York City's Fresh Kills Landfill and the current contracting activities

for disposal of Metro Toronto waste, which includes proposals for disposal in Michigan, suggests strong potential for even more significant increases in waste imports. If significant increases in waste imports occur, Michigan solid waste disposal capacity will diminish at a much faster rate than planned. Current Michigan disposal capacity was developed as part of county solid waste management plans to meet long-term disposal needs of Michigan communities. Losing this capacity at significantly increased rates undermines the long-term planning done by these communities and will result in the need to establish new disposal capacity or find capacity in other locales.

3. *Significant increases in waste imports will undermine local efforts to maintain and expand waste reduction and recycling efforts.*

Discussion

Development of local disposal capacity as part of county planning activities was done as part of integrated waste management strategies intended to include waste recycling and composting activities. Preservation of long-term disposal space was one of the principal motives for these integrated approaches. Loss of capacity because of significant imports of waste from jurisdictions, which have not made provisions equivalent to Michigan's to manage their own waste, undermines local commitment to waste planning and will hinder growth of recycling in Michigan.

4. *State legislative options to control imports of solid waste from out-of-state are limited. State legislation that will actually limit waste imports will likely not withstand constitutional challenge. Legislative approaches that will withstand constitutional challenge are not likely to be effective at limiting imports.*

Discussion

Many importing states have enacted legislation to restrict waste imports. Approaches have included imposition of special fees on out-of-state wastes, additional documentation and certification requirements on out-of-state wastes that are not required on in-state wastes, limitations on transportation options for imports, limitations on the amount of out-of-state waste allowed into private in-state disposal areas over time, and denial of disposal area permits where facilities will serve out-of-state waste sources. In every case to date, courts have found these state efforts unconstitutional in the absence of federal legislative authority. Court decisions to date in other states have made clear that measures that will limit imports will not withstand challenge if they discriminate in how they regulate out-of-state waste sources versus in-state sources. Several such legislative proposals have been developed in Michigan since 1992. Those measures, which would actually be effective at limiting waste imports, all contain discriminatory defects that are not believed able to withstand legal challenge.

5. *Federal legislation to grant to states reasonable authority to control waste imports is necessary.*

Discussion

As discussed above, to date, all state level efforts attempted in other states to control waste imports have been found unconstitutional because Congress has not enacted laws to grant states

authority to regulate this area of commerce. It is clear that the only remedy sure to withstand legal challenge is one based on authority granted to states by Congress. Most court decisions have made clear that Congress has the authority to enact such authority.

- 6. Federal legislation should balance the needs for communities to effectively plan for integrated waste management programs for their long-term needs and the needs of the disposal industry to operate effectively.*

Discussion

Throughout the effort of the last eight years to seek federal legislation to address out-of-state waste imports, the competing needs of communities to plan for their long-term needs and be able to ensure the substance of those plans and the needs of private waste disposal firms to operate profitably, to compete fairly with each other, and to honor existing contractual relationships have been apparent. Michigan and the other importing states have long advocated that federal legislation must strike a balance between these needs. States have also recognized the need to maintain regional waste management relationships. States have supported legislation that would also allow local communities to authorize additional waste imports if locally acceptable to do so as well as to ensure the ability of private parties to make decisions necessary to address disposal liability concerns of special risk wastes.

The Task Force supports the development of federal legislation that will seek this balance. Reasonable controls on waste imports are needed to ensure the viability of local, long-term integrated waste planning. Any legislation needs to take into account existing practices and relationships and fully recognize the legitimate needs of the private market place.

- 7. It is unlikely that the 106th Congress will consider legislation to address this issue before the end of 2000.*

Discussion

No bills are currently scheduled for hearings in either the U.S. House or Senate committees with jurisdiction over this issue. Primary consideration of legislation on this issue has been in the House Committee on Commerce and the Senate Committee on Environment and Public Works. The Chairman of the House Commerce Committee has been unwilling to consider interstate waste legislation due to the lack of agreement between importing and exporting states on the structure and content of proposed bills. Negotiations between importing and exporting states over the past year ended without resolution. Given that the 106th Congress intends to adjourn in early or mid-October for the entire year, consideration of waste legislation in the few remaining workdays of the session is unlikely.

- 8. The Task Force should develop a strategy to work with the Michigan Congressional delegation and with the Task Force members' respective national organizations to urge enactment of legislation by the 107th Congress to address this issue. Michigan should continue its efforts to coordinate with other states to develop and promote enactment of needed legislation. The Task Force's strategy should coordinate with these efforts.*

Discussion

Next year, we will witness the advent of a new Administration and changes in the make-up of the 107th Congress, including a new chairman of the House Commerce Committee. These changes, coupled with the growing public awareness and increasing waste imports throughout the Mid-Atlantic region of the country due to the closure of the Fresh Kills Landfill in New York City, may reinvigorate the debate on interstate legislation at the federal level.

The Task Force should work in conjunction with MDEQ staff and the Governor's Washington, D.C. office to meet with members of the Michigan delegation and other key Congressional members early in the 107th Congress to advocate action on interstate waste legislation. In addition, Task Force members should also work with their respective national organizations and forge partnerships with colleagues from other importing states in a collaborative effort to promote congressional action.

MDEQ staff and the Governor's Washington, D.C. staff have coordinated with other importing and exporting states since the 1992 Fort Gratiot decision to develop potential legislative solutions to this issue and to develop efforts to move such legislation forward. These efforts should continue. Strategies developed by the Task Force to assist in development and support for federal legislation should coordinate with these continuing state level efforts.

IV. Summary of Comments From Interests Represented on Task Force

Members of the Task Force representing different perspectives requested that the report include discussion of their respective interest areas' points of view on the issues discussed in this report. A summary of these various viewpoints as provided by Task Force members who chose to do so follows.

Local Government

County and local government interest indicated that, as discussed in the body of the report, the ability to mitigate the effect of waste imports is essential to making local planning for integrated waste management successful. Public acceptance of disposal activities and participation in waste reduction, reuse, and recycling programs, which help preserve planned-for disposal capacity, cannot be maintained when large volumes of waste for which communities did not plan are imported. Local commitment to programs that preserve landfill space is weakened when that distant communities use space with no stake in local programs or plans. These local governments strongly support the need for federal legislation to restore reasonable controls to waste imports from other states and countries.

Disposal Industry

Representatives of the commercial solid waste industry do not support enactment of controls over out-of-state waste imports. As a result of the transition over the last few years from mostly publicly owned landfills to primarily private, commercial landfill operations, the landfill industry suggests that waste management should be governed more by free market forces and a larger open market environment rather than by local government regulation. Given the significant

investment required to construct and operate modern landfills, the industry is concerned about how such regulation might hinder competition and profitability. They suggest that such market restrictions would bring about higher local disposal costs and less service options and could result in reductions in available service to some communities.

Environmental Interests

While environmental interests do not support the continued growth in waste imports to Michigan from other states and countries, they would also like to see an overall reduction in our long-term reliance on landfill disposal. To achieve this, policies should be encouraged that will increase waste reduction, reuse, and recycling along with improvements in recycling-friendly production and marketing practices. In order to improve our ability to design more effective policies, establishment of comprehensive data collection programs on waste generation, disposal, and recycling activities is needed.