

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF IONIA

PITSCH RECYCLING & DISPOSAL, INC.  
And PITSCH SANITARY LANDFILL, INC.,  
Michigan corporations,

Plaintiffs,

File No. 06-M-24599-CZ

v

Hon. Suzanne Kreeger

IONIA COUNTY, a Michigan  
municipal corporation,

Defendant.

---

Andrew C. Vredenburg (P45359)  
Foster, Swift, Collins & Smith, P.C.  
Attorney for Plaintiffs  
1700 East Beltline, N.E., Suite 200  
Grand Rapids, MI 49525  
(616) 726-2234

Andrew T. Prins (P70157)  
Assistant Attorney General  
Attorney for Amicus Curiae DNRE  
Environment, Natural Resources,  
and Agriculture Division  
6th Floor, Williams Building  
525 West Ottawa Street  
PO Box 30755  
Lansing, MI 48909  
(517) 373-7540

Douglas W. VanEssen (P33269)  
Lee T. Silver (P36905)  
Silver & Van Essen, P.C.  
Attorneys Defendant Ionia County  
300 Ottawa Avenue, N.W.  
Suite 620  
Grand Rapids, MI 49503  
(616) 988-5600

Jeffrey L. Woolstrum (P45421)  
Honigman Miller Schwartz and Cohn  
Attorney for Amicus Curiae Michigan  
Waste Industry Association  
2290 First National Building  
660 Woodward Avenue  
Detroit, MI 48226  
(313) 465-7612

---

**DEPARTMENT OF NATURAL RESOURCES AND**  
**ENVIRONMENT'S AMICUS CURIAE BRIEF**

## Introduction

The Michigan Department of Natural Resources and Environment (DNRE) (f/k/a the Michigan Department of Environmental Quality)<sup>1</sup>, by its undersigned counsel, submits this amicus curiae brief to address the question of whether a county may include a disposal cap<sup>2</sup> in its solid waste management plan that limits the amount of solid waste allowed to be disposed of at a solid waste landfill within that county. For the reasons outlined below, the DNRE submits that a disposal cap included in a county's solid waste management plan and applied to a solid waste landfill within the county is an authorized method under Part 115 "Solid Waste Management" of the Natural Resources and Environmental Protection Act (NREPA),<sup>3</sup> to ensure that a county meets the capacity requirements mandated by statute.

---

<sup>1</sup> Pursuant to Executive Order 2009-45, dated October 8, 2009, the Michigan Department of Natural Resources and Environment (DNRE) was created and all authorities, duties, functions and responsibilities formerly assigned to the Michigan Department of Environmental Quality (MDEQ) were transferred to the DNRE effective January 17, 2010.

<sup>2</sup> "Disposal cap" means a limit on all solid waste permitted to be disposed of at a landfill without reference to the place of origin.

<sup>3</sup> 1994 PA 451, as amended, MCL 324.11501 *et seq.*

### Statutory Background

Part 115 of the NREPA is the statute that comprehensively regulates solid wastes in the state of Michigan to protect the public health, safety, welfare, and the environment.<sup>4</sup> DNRE is the state agency designated to implement the provisions of Part 115. Part 115 directs DNRE to develop and encourage methods for disposal of solid waste that are environmentally sound, that maximize utilization of valuable resources, and that encourage resource conservation.<sup>5</sup> One of the purposes of Part 115 is to implement the planning aspects necessary to ensure adequate capacity exists for the state to manage solid waste properly in a manner that is protective of the public health and environment.

Part 115 requires that each county in Michigan have a solid waste management plan that includes an enforceable program and process to assure that all solid waste generated within the county is processed and disposed of in accordance with state law.<sup>6</sup> Counties or other local government entities are initially responsible for preparing the solid waste management plans or any updates to solid waste management plans.<sup>7</sup> Counties or the local government entity responsible for preparation of the plan are required to appoint a planning committee to assist the entity responsible for preparing the solid waste management plan.<sup>8</sup> The planning committee is required to consist of representatives of the solid waste management industry, environmental interests groups, county government, city government, and township government, the regional waste planning agency, industrial waste generators, and the general public.<sup>9</sup>

---

<sup>4</sup> See, MCL 324.11501 – MCL 324.11550.

<sup>5</sup> MCL 324.11507.

<sup>6</sup> See, MCL 324.11533(1),(3).

<sup>7</sup> See, MCL 324.11533(3)-(5).

<sup>8</sup> See, MCL 324.11534(1).

<sup>9</sup> See, MCL 324.11534(2).

Before a county adopts a solid waste management plan, Part 115 requires the county to submit a copy for review and comment to the DNRE, each municipality within the affected county, and adjacent counties and municipalities that may be affected by the proposed plan or have requested an opportunity to review the plan.<sup>10</sup> Thereafter, a county may formally adopt a proposed plan after a public hearing.<sup>11</sup> An approved county plan must then be approved by the governing bodies of at least 67% of the municipalities within the county.<sup>12</sup> After approval of 67% of the municipalities, approved solid waste management plans are submitted to DNRE. Part 115 mandates that the DNRE approve or disapprove a solid waste management plan or updates to a solid waste management plans submitted for approval.<sup>13</sup> All approved county solid waste management plans and county solid waste plans prepared by DNRE become part of the state solid waste management plan.<sup>14</sup> Part 115 also provides that no person shall conduct, manage, maintain, or operate a sanitary landfill contrary to an approved solid waste management plan.<sup>15</sup>

---

<sup>10</sup> See, MCL 324.11535(d).

<sup>11</sup> MCL 324.11535(f).

<sup>12</sup> MCL 324.11534(4).

<sup>13</sup> MCL 324.11537(1).

<sup>14</sup> See, MCL 324.11541(1).

<sup>15</sup> MCL 324.11512(2); Section 301(h) of the NREPA, MCL 324.301(h), defines person as "an individual, partnership, corporation, association, governmental entity, or other legal entity."

### Questions on Remand

Plaintiffs Pitsch Recycling and Disposal, Inc., and Pitsch Sanitary Landfill, Inc. (Pitsch) appealed this Court's March 21, 2007 and September 4, 2007 orders granting summary disposition and declaratory judgment in favor of the Defendant Ionia County. Pitsch claims that a 100,000 ton per year disposal cap imposed on the Pitsch Sanitary Landfill in Ionia County's January 19, 2001 update to its solid waste management plan was unauthorized by Part 115, is preempted by the terms of Part 115, violated the dormant commerce clause of the U.S. Constitution, and violated Pitsch's federal and state substantive due process rights. On August 6, 2009, the Court of Appeals vacated this Court's order and remanded this case for an evidentiary hearing.<sup>16</sup> On remand the Court of Appeals directed this Court to determine:

- Whether Part 115 permits a county to establish an annual cap on the amount of solid waste that can be accepted for disposal at landfills within its borders;
- Whether an annual cap on the amount of solid waste that can be accepted for disposal is a "minimum requirement" for inclusion within a county's solid waste management plan;
- If an annual cap is a "minimum requirement" under Part 115 determine what section of Part 115 or the DNRE regulations requires such a cap; and
- Whether a county can directly regulate the operation of a privately owned solid waste landfill if the Legislature has delegated the authority to regulate landfills to DNRE.<sup>17</sup>

---

<sup>16</sup> *Ionia County v Pitsch Recycling & Disposal, Inc. and Pitsch Sanitary Landfill, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 2009 (Docket No. 282230).

<sup>17</sup> *Ionia County v Pitsch Recycling & Disposal, Inc. and Pitsch Sanitary Landfill, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 2009 (Docket No. 282230) p 7.

## ARGUMENT

- I. Disposal caps included in solid waste management plans are an authorized method to assure that a county meets the capacity requirements mandated by Part 115.**
- A. A disposal cap applied to a solid waste landfill in a county's solid waste management plan is authorized method under Part 115 to assure that a county meets the ten year capacity requirements of the statute.

Currently, and at the time the Ionia County's update to its solid waste management plan was approved on January 19, 2001, proposed solid waste management plans were required to demonstrate capacity to effectively manage disposal of solid waste generated within the county for a minimum period of ten years. At that time, MCL 324.11533(1) required each solid waste management plan to include an enforceable program and process to assure that solid waste generated or to be generated in the planning area for a period of 10 years or more is collected and recovered, processed, or disposed of at disposal areas which comply with state law and rules promulgated by the department governing the location, design, and operation of the disposal areas. This section was amended by 2004 PA 44, however, the essential requirements remain.

MCL 324.11533(1) currently states:

Each solid waste management plan shall include an enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a period of 10 years or more is collected and recovered, processed, or disposed of at disposal areas that comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas. Each solid waste management plan may include an enforceable program and process to assure that only items authorized for disposal in a disposal area under this part and the rules promulgated under this part are disposed of in the disposal area. (emphasis added.)

Disposal caps applied to solid waste landfills are an authorized method to ensure that counties meet the capacity requirements mandated by the statute, however, they are not required by Part

115. The 100,000 ton annual disposal cap limiting the disposal of solid waste at Pitsch Sanitary Landfill included in the Plan is an authorized provision under Part 115.

Ionia County drafted and adopted a solid waste management plan that included a cap in order to effectively manage long-term disposal of waste in the county as is required by Part 115. Thereafter, the Plan, including the cap, was approved by MDEQ in accordance with Part 115. The drafting of the Plan and its subsequent approval was accomplished through the planning process laid out by Part 115. Most importantly, disposal caps on solid waste are authorized provisions in solid waste management plans.

- B. The Legislature sought to address the problems of lack of cooperation between different levels of government and inadequate planning in the area of solid waste management by mandating significant local input and planning along with agency guidance and approval of solid waste management plans.

Part 115 was originally enacted in 1978 as Act 641 the "Michigan Solid Waste Management Act."<sup>18</sup> The Legislature repealed Act 641 in 1995 and recodified it as Part 115 of the NREPA.<sup>19</sup> The House Legislative Analysis for the bill that would become Act 641 stated:

It is widely thought that a new statute is necessary to regulate the transportation and disposal of solid waste in Michigan. Current efforts are hampered, it is said, by a lack of uniform standards and procedures, a lack of consistent requirements, a lack of cooperation between different levels of government, and by inadequate planning and enforcement. Some of the inadequacies of present efforts could be remedied by an increase in funds and personnel for planning and enforcement. Other inadequacies need to be addressed by establishing in statute and by rule a more comprehensive approach to solid waste management.<sup>20</sup>

Among the problems in the solid waste management area sought to be addressed in Act 641 were the lack of uniform standards and procedures, a lack of consistent requirements, a lack of cooperation between different levels of government, and inadequate planning and enforcement.

---

<sup>18</sup> 1978 PA 641.

<sup>19</sup> 1994 PA 451.

<sup>20</sup> House Legislative Analysis, HB 6314, January 11, 1979.

"When courts construe statutes, their primary goal is to ascertain and give effect to legislative intent."<sup>21</sup> Part 115 comprehensively regulates solid waste through, among other methods, sanitary landfill construction permits, sanitary landfill licensing, solid waste management plans, and enforcement actions. In regards to solid waste management plans, the Legislature intended that counties plan for the long-term disposal of solid waste generated in their respective planning areas.<sup>22</sup> Solid waste management plans are required to evaluate the existing solid waste collection, management, processing, treatment, transportation, and disposal problems by type and volume, including commercial and residential solid waste.<sup>23</sup> Plans are also required to identify an enforceable program and process to assure that solid waste generated within the planning area is properly disposed of for a period of ten years.<sup>24</sup> The Legislature intended that counties evaluate and identify solid waste problems each county would encounter over the long term and plan effectively for the disposal of that waste.

C. DNRE's interpretation of Part 115 is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons.

The interpretation of the agency charged with the duty of executing a statute "is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons."<sup>25</sup> Michigan Courts have defined the term "cogent" as, ". . . convincing or believable by virtue of forcible, clear, or incisive presentation . . . to the point; relevant."<sup>26</sup> When a law is doubtful or obscure, the agency's interpretation can be helpful for discerning the intent of the Legislature.<sup>27</sup>

---

<sup>21</sup> *Pendzue v Beazer East, Inc.*, 219 Mich App 405, 408; 557 NW2d 127 (1996).

<sup>22</sup> *See*, MCL 324.11531(1).

<sup>23</sup> MAC R 299.4711(c)(ii).

<sup>24</sup> MCL 324.11533(1).

<sup>25</sup> *SBC Michigan v Public Service Comm'n (In re Rovas)*, 482 Mich 90, 108; 754 NW2d 259 (2008).

<sup>26</sup> *McQueen v Black*, 168 Mich App 641, 645; 425 NW2d 203 (1988) (citing, *The Random House College Dictionary: Revised Edition* (1984)).

<sup>27</sup> *SBC Michigan*, 482 Mich at 103.

However, an agency's interpretation is not binding and cannot conflict with the Legislature's intent as expressed in the language of the statute in question.<sup>28</sup>

The DNRE is the state agency mandated to implement the provisions of Part 115. Part 115 mandates that DNRE take a significant role in the development of solid waste management plans for all 83 counties in the Michigan. DNRE is required to consult and assist in the preparation and implementation of county solid waste management plans.<sup>29</sup> Moreover, Part 115 requires DNRE to approve or disapprove all proposed solid waste management plan or updates to a solid waste management plan submitted for approval.<sup>30</sup> The DNRE's interpretation of the statutory provisions that govern the solid waste management planning process is entitled to respectful consideration, and if persuasive, should not be overruled without convincing reasons.

DNRE's approval of the update to the Ionia County's solid waste management plan is confirmation of DNRE's interpretation that a disposal cap is a legitimate planning mechanism under Part 115.

D. Disposal caps are not "minimum requirements" under Part 115 for inclusion in a solid waste management plan.

Part 115 and its corresponding administrative rules relating to what must be included in a county plan speak in terms of minimum requirements. These are inclusive requirements rather than exclusive requirements.

Specifically, as stated in Argument I.A, solid waste management plans are required to include an enforceable program and process to assure that solid waste generated within the planning area is disposed of over a period of ten years in accordance with state law. A solid

---

<sup>28</sup> *SBC Michigan*, 482 Mich at 103.

<sup>29</sup> MCL 324.11541(2).

<sup>30</sup> MCL 324.11537(1).

waste management plan is also required to comply with sections 11537a and 11538 of Part 115.<sup>31</sup> Section 11537a relates to requirements for plans to include siting mechanisms for disposal areas.<sup>32</sup> Section 11538(1) directs the director to promulgate rules for the development, form, and submission of initial solid waste management plans and specifies information to be required by the rules.<sup>33</sup> MAC R 299.4711 provides a general format that plans are to follow and requires plans to contain certain information. Section 11538(2) requires each plan to identify specific solid waste disposal sites for a 5 year period after approval of a plan or update to a plan.<sup>34</sup> Section 11538(3) requires an interim siting mechanism for proposed solid waste disposal sites.<sup>35</sup>

Solid waste management plan updates are also required to contain an analysis or evaluation of a recycling or composting program for waste generated from within the county.<sup>36</sup> Updates to solid waste management plans must either provide for recycling and composting programs or establish that the programs are unnecessary.<sup>37</sup>

Neither Part 115 nor the applicable administrative rules require the inclusion of a disposal cap in a solid waste management plan. Disposal caps are not "minimum requirements" under Part 115.

E. Disposal caps included as part of an approved solid waste management plan are not preempted by Part 115.

Pitsch alleges that the disposal cap included in Ionia County's update to its solid waste management plan is preempted by Part 115 because Part 115 prevents local regulation of operation of a landfill. Pitsch's argument lacks merit.

---

<sup>31</sup> MCL 324.11533(2).

<sup>32</sup> See, MCL 324.11537a.

<sup>33</sup> See, MCL 324.11538(1).

<sup>34</sup> See, MCL 324.11538(2).

<sup>35</sup> See, MCL 324.11538(3).

<sup>36</sup> See, MCL 324.11539(1)(a).

<sup>37</sup> MCL 324.11539(1)(b).

In making its argument, Pitsch relies upon *Southeastern Oakland County Incinerator Authority v Township of Avon*, in which the Court of Appeals reviewed a challenge to a local ordinance that regulated landfill operations.<sup>38</sup> Municipal ordinances are preempted by state law if 1) the statute completely occupies the field that the ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute.<sup>39</sup> There is no direct conflict in this case. Michigan Courts consider four factors for determining whether a statute has preempted municipal ordinances by completely occupying the field, including:

First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.

Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.

Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption.

Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.<sup>40</sup>

In *Southeastern*, the Court of Appeals reasoned that Act 641, Part 115's predecessor, was pervasive. The court stated, "[t]he Legislature contemplated significant local input in the development of county plans. However, once these plans are approved a cohesive scheme of centralized and uniform controls emerge."<sup>41</sup> The *Southeastern* court held that while pervasiveness alone was not sufficient for a determination of preemption, the disposal of solid

---

<sup>38</sup> *Southeastern Oakland County Incinerator Authority v Township of Avon*, 144 Mich App 39; 372 NW2d 678 (1985).

<sup>39</sup> *Rental Property Owners Association of Kent County v City of Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997).

<sup>40</sup> *Rental Property Owners*, 455 Mich at 257. (quoting, *People v Llewellyn*, 401 Mich 314, 323-324; 257 NW2d 902 (1977)). (citations omitted.)

<sup>41</sup> *Southeastern*, 144 Mich App at 44.

waste was clearly an area that demanded statewide uniform treatment.<sup>42</sup> Finally, the court found that Act 641 prevented local regulation concerning operation of a landfill.<sup>43</sup>

The facts of this case and *Southeastern* are distinguishable. In *Southeastern*, the township sought to regulate the operation of a landfill through a local ordinance. In this case we are not dealing with a local ordinance that seeks to regulate the operation of a landfill. In this case, Ionia County drafted and adopted an update to a solid waste management plan that included a disposal cap. Thereafter, the update to the plan was approved by MDEQ in accordance with Part 115. The drafting of the update to the plan and its subsequent approval was accomplished through the planning process laid out by Part 115. The court in *Southeastern* recognized that the Legislature intended that local governments have significant involvement in the development of county plans. Only after the adoption of those plans would a cohesive scheme of centralized and uniform controls emerge.<sup>44</sup>

Disposal caps included in solid waste management plans are not local ordinances and they are not preempted by Part 115. Moreover, disposal caps do not regulate the operation of a solid waste landfill. Disposal caps are authorized methods to ensure a county's planning capacity and are adopted through a process laid out by Part 115. The disposal cap included in the update to Ionia County's solid waste is not preempted by Part 115.

---

<sup>42</sup> *Southeastern*, 144 Mich App at 44-45.

<sup>43</sup> *Southeastern*, 144 Mich App at 46.

<sup>44</sup> *See, Southeastern*, 144 Mich App at 44.

Conclusion

Disposal caps included in solid waste management plans are authorized methods to assure a county's long-term solid waste disposal capacity. Pitsch has no offered cogent reasons for a different interpretation of Part 115.

Respectfully submitted,

Michael A. Cox  
Attorney General



Andrew T. Prins (P70157)  
Assistant Attorney General  
Environment, Natural Resources,  
and Agriculture Division  
6<sup>th</sup> Floor, Williams Building  
525 West Ottawa Street  
P.O. Box 30755  
Lansing, MI 48909  
(517) 373-7540

Dated: September 28, 2010  
LF:Pitsch/20090027688B/amicus brief

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF IONIA

PITSCH RECYCLING & DISPOSAL, INC.  
And PITSCH SANITARY LANDFILL, INC.,  
Michigan corporations,

Plaintiffs,

File No. 06-M-24599-CZ

v

Hon. Suzanne Kreeger

IONIA COUNTY, a Michigan  
municipal corporation,

Defendant.

---

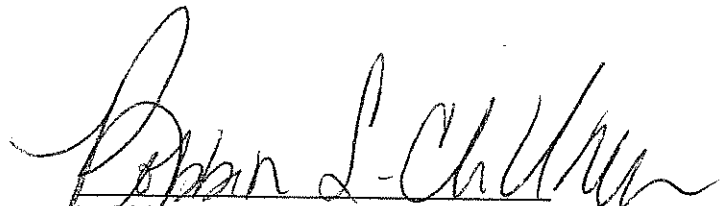
**PROOF OF SERVICE**

The undersigned says that on September 28, 2010, she served by first class mail a copy of the Department of Natural Resources and Environment's Amicus Curiae Brief, by depositing the same in a U.S. Mail receptacle in Lansing, Michigan, addressed as follows:

Douglas W. Van Essen/Lee T. Silver  
Silver & Van Essen, P.C.  
300 Ottawa Avenue, N.W.  
Suite 620  
Grand Rapids, MI 49503

Andrew C. Vredenburg  
Foster, Swift, Collins & Smith, P.C.  
1700 East Beltline, N.E., Suite 200  
Grand Rapids, MI 49525

Jeffrey L. Woolstrum  
Honigman Miller Schwartz and Cohn  
2290 First National Building  
660 Woodward Avenue  
Detroit, MI 48226

  
Robbin S. Clickner