

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PITSCH RECYCLING & DISPOSAL, INC.
and PITSCH SANITARY LANDFILL, INC.,
Michigan Corporations,

Court of Appeals No: 302163

Circuit Court No:06-M-24599-CZ

Plaintiff-Appellants,

v

IONIA COUNTY, a Michigan
Municipal Corporation,

Defendant-Appellee.

And

DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Defendant.

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**DEFENDANT-APPELLE IONIA COUNTY'S BRIEF
ON APPEAL**

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL BASIS

This Court does NOT have jurisdiction over this appeal.

On August 6, 2009, this Court held among other things that the Michigan Department of Environmental Quality (“DEQ”) is a “necessary party to this case” and remanded for the DEQ to be added. (COA Opinion, p. 7). That decision is now the law of the case. *Ashker ex rel. Estate of Ashker v. Ford Motor Co.*, 245 Mich App 9, (2001). On September 8, 2009, the Pitsch Companies added the DEQ, which was confirmed in their November 20, 2009 Amended Complaint. On March 23, 2010, the State of Michigan moved to dismiss the Complaint against it on the basis that the Ionia County Circuit Court lacked the subject matter jurisdiction to issue the declaratory and injunctive relief against the State of Michigan that the Pitsch Companies sought in the Amended Complaint, instead directing the Pitsch Companies to file their complaint in the Michigan Court of Claims, where as is that Court’s standard practice, it could have been subsequently consolidated with this Action. Ionia County joined in that Motion. On May 12, 2010, the Circuit Court granted the Motion. The Pitsch Companies chose **not** to file a claim against the DEQ in the Court of Claims **and do not appeal** that part of the Ionia Circuit Court’s decision and, thus a necessary party is not in this case, despite the adjudicated necessity of that party as previously held by this Court. Failure to acquire jurisdiction over a necessary state party is a subject matter jurisdictional defect requiring the

case's dismissal. See e.g. *Davis v. Department of Corrections*, 251 Mich App 372 (2002).

STATEMENT OF QUESTIONS PRESENTED

1. **It is undisputed that the 1999 Waste Management Plan developed by the Ionia County Solid Waste Committee, then approved by the Ionia County Board of Commissioners and 2/3rds of the local units in Ionia County and finally approved by the MDEQ on January 19, 2001, with modifications on the disputed capacity provisions themselves, is now an integrated component of the State of Michigan's Solid Waste Management Plan adopted under Michigan's Solid Waste Management Act, MCL §324.11501 *et seq* ("Part 115"). Accordingly, this Court has already held that the State of Michigan is a "necessary party" to the Pitsch Companies' attempts to enjoin the enforcement of the Ionia portion of the State's Solid Waste Management Plan; It is undisputed that the State of Michigan was added but then dismissed from this case because of subject matter jurisdiction problems and that the Pitsch Companies chose not to perfect a claim against the State of Michigan in the Court of Claims nor appeal the Circuit Court's dismissal of the DEQ in this Case. Does the Court of Appeals have subject matter jurisdiction over this case under such procedural facts?**

The Circuit Court did not rule on this question.

The Pitsch Companies presumably (although they do not address the issue) argue that the answer to this question is, "yes."

Ionia County argues that the answer to this question is, "no."

2. **Part 115 authorizes Ionia County to prepare an enforceable solid waste management plan that addresses waste flow and includes siting criteria to address infrastructure and surrounding community environmental concerns and requires that the Plan ensure multiple year capacity for waste generated in the County. Part 115 does not address the tools that the County may use to develop an enforceable plan on those subjects and preserves local police power that is not inconsistent with and supportive of the Plan. The MDEQ does not regulate landfill capacity and the MDEQ has interpreted Part 115 to authorize annual landfill capacity cap**

as an authorized Part 115 planning tool to preserve landfill capacity certifications, and Plan societal and infrastructure siting and community environmental concerns. Are Plan annual capacity caps as an enforceable measure to protect annual disposal capacity certifications and Plan infrastructure, environmental siting concerns legally authorized under Part 115 and the reserved police powers of the County under MCL §46.11(j)?

The Circuit Court held that the answer to this question is, “yes.”

The DEQ interprets that the answer to this question is, “yes.”

The Pitsch Companies argue that the answer to this question is, “no.”

Ionia County argues that the answer to this question is, “yes.”

- 3. The Pitsch Landfill has never accepted for deposit more than 100,000 annual tons of solid waste and averages 65,000 annual tons per year. At most, Ionia County generates 54,000 annual tons of solid waste. Pitsch asked for a 150,000 annual ton cap and specifically solicited the Ionia County’s necessary approval of its landfill expansion using a 100,000 ton annual usage figure and urging the County to rely on that figure for the requisite Plan certifications. The Pitsch Landfill is located in a neighborhood that is ill suited to the odors and litter of a large landfill and on a hilly, dangerous and seasonal road that cannot handle the trucks necessary to service a larger landfill. Do policy facts exist to support the 100,000 annual tonnage cap on the Pitsch Landfill so as to protect the community’s infrastructure, environmental concerns and landfill capacity concerns, while balancing Pitsch’s operational history and capacity requests for the site in a manner that does not violate Pitsch’s substantive due process rights?**

The Circuit Court held that the answer to this question is, “yes.”

The Pitsch Companies argue that the answer to this question is, “no.”

Ionia County argues that the answer to this question is, “yes.”

- 4. The County’s 100,000 annual tonnage disposal cap applies to in county, intra-state/inter-county Michigan waste and waste from out-of-state without distinction. Does the County’s cap**

discriminate against out-of-state waste in violation of the United States Constitution?

The Circuit Court held that the answer to this question is, “no.”

The Pitsch Companies argue that the answer to this question is, “yes.”

Ionia County argues that the answer to this question is, “no.”

INTRODUCTION

The Pitsch Companies’ “Introduction” is disingenuous in the following ways demonstrated by the following undisputed facts:

1. Contrary to what the Pitsch Companies’ brief infers, the DEQ clearly supports Ionia County’s statutory interpretation that annual disposal caps on a host landfill are a lawful, authorized tool under Part 115 for addressing the capacity certifications that a County must make for the 20 year deposit of its waste, and Part 115 Plan siting criteria, which are necessary to insure that the landfill operations do not grow beyond the capacity of the infrastructure, including access roads and the ability of the surrounding environment, including the neighborhood, to absorb and tolerate the resulting truck traffic, litter, dust and noise. (TR 61-63; 154, 169).¹

2. The Pitsch Companies’ representative admitted under oath at trial that the Pitsch Companies understood in 1999 and have always understood that the 100,000 ton annual limit is a total waste **disposal cap** and **NOT** an **import flow cap** as their Court of Appeals’ Brief erroneously suggests. (TR 219; 228).

¹ Parenthetical numbers preceded by the letters “TR” refer to the transcript page of the trial held on August 19, 2010.

In fact, the Pitsch Companies' representative testified that the Pitsch Companies **asked** for a 150,000 ton capacity cap and they would have voted in favor of a 150,000 ton annual disposal cap with their vote on the County Solid Waste Management Committee. (TR 219).

3. No one testified for the DEQ as to what its interpretation of the disposal cap was in 1999 or 2001, so the representation in the Pitsch Companies Brief that the DEQ thought the cap was an import cap in those years is totally without record support. (See TR 37, Ms. Oyer Zimmerman was not involved in reviewing Ionia portion of the State Plan in 2001). Although there was testimony that in 2004, that after a flawed, partial review of the Plan certain DEQ officials opined that it was an import cap, it is undisputed that this opinion later changed when those same officials reviewed the "plan more as a whole, looking at other sections of the plan and also the approval letter." What is relevant here is that the DEQ and County (and Pitsch Companies) understood in 1999 and understand today that the Plan imposes an annual aggregate disposal cap. (TR 54, 55, 59, 219).

4. The Pitsch companies admit **inducing** the 100,000 ton annual cap limitation in 1999, by touting that it could give the County at least 20 years of capacity during the County's planning process, in order to **induce** the County to approve the landfill expansion in the Solid Waste Management Plan (a requirement). (TR 213). Only after the County approved the expansion and the Pitsch Companies received their DEQ construction permit and years later when

a company called Transload wanted to buy the landfill if the County would increase the annual capacity cap to 600,000 tons, did this dispute arise. (TR 225).

5. Part 115 doesn't expressly mention disposal caps, like it does not expressly mention any other planning tool or device that may be included to meet a Plan's goals; however, the DEQ is unequivocal that Part 115, Section 13 (which pertains to waste flow—TR 61-62), Section 38(2) (which pertains to planning for waste capacity—TR 62-63), Section 33 (enforceable program to ensure capacity-TR 63) and Section 38(1)(a) and (d) and R 299.4711 (infrastructure, traffic, and noise, odor and litter concerns in siting criteria for landfill development and expansion—TR 103) all implicitly authorize disposal caps as an available tool to meet those goals under the Part 115. In fact, many other counties have disposal caps in their portion of the State Solid Waste Management Plan. (TR 103).

6. The Pitsch Companies completely fail to recognize that Part 115 preserves Ionia County's police power to regulate local landfills, as long as it does not conflict with the DEQ's authority in Part 115, the police power is expressed within the Plan, and the police power advances the goals of the Plan as found by this Court in *County of Saginaw v. John Sexton Corporation*, 232 Mich App 202 (1998). As DEQ personnel testified at trial, it is undisputed that the 100,000 ton annual capacity cap regulates areas such as waste flow

capacity and infrastructure and environmental concerns that are **outside** of and **not in conflict** with any MDEQ regulations. (TR 103-104).

7. The Pitsch Companies imply that the Ionia portion of the State's Solid Waste Management Plan could have relied on landfills in other counties to meet its capacity certification obligations, ignoring the undisputed fact that the Plan actually chose as a policy matter to rely on the Pitsch landfill (at the suggestion of the Pitsch Companies), which was the County's right, (See Exhibit A, p. 10, 88-90 and TR 99) and the undisputed fact that other alternatives are not as secure because letters from other counties authorizing their host landfills to take Ionia generated waste are not binding on the landfills in those counties (TR 101) and the letters from other landfills saying that they may take Ionia County waste are not a binding commitment to actually take that waste. (TR 101). Only reliance on a host landfill's capacity in the county preparing the plan and a limit on annual disposal assures that if necessary, a County will have capacity for its generated waste under its jurisdiction for eminent domain or public health orders if necessary to compel the host landfill to accept local waste. (TR 236).

8. It is undisputed that the Pitsch Landfill was getting the bulk of Ionia generated waste in 1999 (TR198) and that the drafting Committee wanted to preserve space for Ionia waste to be fair to its task and to be fair to Pitsch, doubled what was needed for all of the County's waste and was a level that the Landfill had never before exceeded. (TR 197). It is also undisputed that that the

cap protects the infrastructure and surrounding environmental concerns because the Landfill is located on a road that is not yet full season, despite Plan requirements (TR 204-205) and is also dangerous because of its hills and many traffic accidents (TR 238) and that neighbors oppose any expansion of historical deposit levels due to noise, odors, birds and litter issues (TR 237).

9. This Court sent this matter back to Circuit Court for the Pitsch Companies to gain jurisdiction over the DEQ as a necessary party, for the DEQ to weigh in on whether the Ionia portion of the State's Solid Waste Plan was legal as to the disposal caps and to find out the legitimate planning and waste infrastructure and environmental purposes for those caps. The matter was remanded and the Pitsch Companies failed to gain Court of Claims jurisdiction over the DEQ.

10. In any event, at trial, the MDEQ clearly weighed in that the disposal cap is lawful for multiple purposes under Part 115, and that the disposal caps are common in other counties as well and in Ionia County serve a legitimate and appropriate waste capacity certification purpose in Ionia County as well as protecting legitimate infrastructure and community concerns relating to traffic, noise, odor, birds and litter.

In conclusion, the Pitsch Companies' appeal lacks jurisdiction for want of a necessary party and should be dismissed for that reason alone, and, in any event, is without legal or factual basis for reversal even if entertained by this Court.

Statement of Facts

The Pitsch Companies have owned and operated the relatively small, 160 total developed acres, Pitsch Sanitary Landfill (“Landfill”), which is located at 7905 Johnson Road, Belding, Michigan in Orleans Township in Ionia County, Michigan since 1972. (TR 193). The Landfill is accessed only through Johnson Road, which has a limited capacity for disposal truck traffic since it only has two lanes, is narrow and hilly, and is not an all season road; meaning truck traffic is subject to seasonal load restrictions. (TR 237).² In fact, a grant has been issued to improve the road because of the high number of accidents on it, although to date, the road has not been improved. *Id.*

Ionia County has had a County Plan since the 1980’s, first under Act 641 and then later, its successor, Part 115. Since at least the 1990’s Ionia County has had an overall maximum disposal cap in its Plan governing the total amount of solid waste from all sources that Pitsch can accept in the Landfill. Until the 1999, that cap was 54,240 tons per year, when it was increased to 100,000 annual tons. (TR 233).

In 1999, the Landfill was nearing capacity on its original 80 acres and the Pitsch Companies sought the County’s approval for a 41.28 acre expansion and a total tonnage capacity of approximately 2.3 million tons. The Pitsch Companies proposed a disposal cap of 100,000 tons per year and to increase that figure by three quarters of one percent, each year thereafter. Based on that

rate of annual use, Pitsch estimated that the capacity or useful life of the Landfill would be 20.82 years, using the Plan's conversion rate of 2 yards per ton. [Ionia portion of State Solid Waste Plan ("Plan" or "State/Ionia Plan"), Exhibit A p. 88]. The Pitsch Companies expressly marketed the expansion to the County on the premise that this would enable the County to certify 20 year capacity and avoid a mandate that the Plan contain a siting criteria for another landfill in its 1999 Plan Update. (See p. 86 of Exhibit A, State/Ionia Plan).

The Pitsch Companies concluded their "sales pitch" seeking the County's approval of its expansion plans by stating that "Pitsch Companies is dedicated to providing a safe and economical means of disposal waste for Ionia County, and to conforming to the Ionia County Solid Waste Management Plan in addition to the Act 451 rules. As the disposal capacity is needed and the siting criteria met, we request that this proposal be found consistent with the Ionia County Solid Waste Management Plan." (See p. 90 of Exhibit A, State/Ionia Plan). At trial, Gary Pitsch admitted that the Pitsch Companies were touting the 100,000 annual cap figure so that Ionia County would have 20 years capacity and, therefore, approve the expansion. (TR 213).

Based on these representations, the County worked the proposal into the 1999/2000 State Solid Waste Management Plan for Ionia County, authorizing and approving the expansion in the Plan itself (see Exhibit A, pp 88-90) and, therefore, enabling the Pitsch Companies to obtain DEQ construction permit

² Parenthetical expressions preceded by the letters "TR" refer to the page number of the

approval. Thus, the State/County Plan increased the aggregate landfill disposal cap, which had been 54,240 for over ten years, to 100,000 tons. (State/Ionia Plan, Exhibit A and excerpts from prior plan, Exhibit C).

The State/Ionia Plan identifies specific counties from which waste may be imported, limits volume that may be accepted in the Landfill and contained a 100,000 ton cap that ensured that the residents of Ionia County would have 20 years capacity. See Page III-2 of the Plan, Exhibit A. The Plan Update contained an explanatory “note” that indicated that the 100,000 cap was designed to ensure that the County had 20 years of capacity for its own waste:

NOTE: The 100,000 tons per year cap is for the Pitsch Sanitary Landfill. This cap is to ensure the County of Ionia of 20 + years of capacity. This cap is negotiable with Ionia County and Pitsch Sanitary Landfill. This Cap is in no way to limit the business of Pitsch Sanitary Landfill and any revenue due to the Landfill.

(Exhibit A, Plan, p. 67).

On Page 271 of the Plan, Exhibit A, the State/County made clear that the 100,000 tons was an overall disposal cap, consistent with its earlier Plan provisions, when it noted:

The plan establishes limits on the amounts and origins of waste authorized for disposal in Ionia County, including a controlling overall maximum amount of 100,000 tons annually.

Gary Pitsch testified that he was a member of the SWMC and that he understood the 100,000 ton annual cap to be a **disposal cap** on all solid waste deposited in the family landfill, including waste generated from within Ionia

County, rather than as a cap only regulating the amount of waste that could be brought into the County from other counties in Michigan, other states in the United States or foreign locations. (TR 219). Mr. Pitsch further testified that while he voted against the 100,000 ton annual cap, he proposed 150,000 tons and that the Pitsch Companies would have been satisfied a 150,000 annual ton cap had been installed. (TR 219).

After local governmental approval, however, the DEQ on August 23, 2000 asked the County to modify the State/County Plan to establish a fixed cap of 100,000 tons per year:

On page III-2, the Note attached to this page states the cap for Pitsch Sanitary Landfill is negotiable between Ionia County (County) and Pitsch Sanitary Landfill. **Annual caps must be established in the Plan and may not be changed except by a Plan amendment.** This note should be deleted from the Plan and the annual cap of 100,000 tons per year shall be the only annual cap authorized in the Plan unless amended.

(See DEQ's August 3, 2000 letter attached to Exhibit A, Plan, p. 314).

The County agreed to the modification through a Board of Commissioners' resolution, communicated on September 1, 2000. Exhibit A, Plan, p. 322. On January 19, 2001, the DEQ officially modified the Plan, codifying the language above, and then finally and formally approved the Plan. Exhibit A, Plan, p. 326.

Pitsch has never exceeded 100,000 tons of disposal in a particular year and averages approximately 65,000 tons deposited each year. (TR 240; Exhibit I). Pitsch didn't complain about the cap until 2004 when it wanted to sell the landfill to Transload, which only wanted the landfill if it could deposit up to

600,000 tons of waste per year apparently from the Eastern seaboard. (TR. 221).

Ionia County refused to amend the cap six-fold as requested, because it would have consumed the Landfill's licensed capacity in 2 or 3 years, as well as put a burden on the infrastructure of Johnson Road and increased the noise, litter and dust in the neighboring areas. (TR 238).

Many other Michigan Counties impose annual, aggregate disposal caps on the landfills located therein through their Solid Waste Management Plans, including Ottawa, Clinton, St. Joseph and Washtenaw Counties. (TR 103; Exhibits D-G). While some of those Counties may have entered into host agreements with their local landfills addressing the disposal cap, such agreements only involve the County and do not commit the local units of government or State of Michigan, which must also approve those solid waste management plans. (TR 186-187). Moreover, as the DEQ's 2001 correspondence regarding the 2000 State/Ionia Plan Update demonstrates, the DEQ requires that all landfill disposal caps be established in and through the county solid waste management planning process and that they may not be imposed or modified through a contract with the host landfill.

The County amended the Plan in 2003 to impose a solid waste tipping fee surcharge to fund the implementation of Ionia County's Solid Waste Plan, including recycling. In 2005, the Pitsch Companies sued Ionia County in federal

court and stopped paying the surcharge. However, the Pitsch Companies did not challenge the disposal cap.

In September of 2005, the federal suit was dismissed, as the Court found there was no impairment of contract related to the surcharge, deferring the issue of whether there was a breach of contract regarding the surcharge to the state courts.³ On February 13, 2006, the County filed a two-count Complaint—the present case—in Ionia Circuit Court, seeking to compel in Count I, the payment of the Surcharge pursuant to the County Plan, and in Count II, to compel compliance with the provisions of the Plan requiring the Landfill to submit monthly waste deposit information.

On March 28, 2006, the Pitsch Companies responded with an answer and counterclaim. Counts I, II and VII of the Counterclaim, challenge the authority of the County to enforce the Surcharge. Count III (Equal Protection), Count IV (Due Process), Count V (Takings) and Count VI (Part 115 Authorization) and Count VII (Commerce Clause) of the Counterclaim all pertain to the Plan's 100,000 ton annual limit on total waste that may be deposited in the Landfill.

On December 10, 2006, the Ionia County Circuit Court granted the County's First Motion for Partial Summary Disposition regarding the two counts in its Complaint. On February 22, 2007, the Court granted the County's Second Partial Summary Disposition Motion against all but Counts I, II and VII of the Counterclaim, finding that the Plan's Surcharge and 100,000 ton annual waste

³ *Pitsch Recycling & Disposal, Inc. v. County of Ionia*, 386 F.Supp.2d 938 (W.D.Mich., 2005).

limit did not violate the Commerce Clause of the United States Constitution and were authorized under state law. On May 29, 2007, the Circuit Court granted Judgment on Counts I, II, and VII of the Counterclaim.

The Pitsch Companies filed a Delayed Application for Leave to Appeal on March 3, 2008, seeking review of **only** of the questions of whether the 100,000 ton annual cap on waste deposited at the Pitsch Landfill is authorized by Michigan law discriminates against out of state waste or violates Pitsch's substantive due process rights. On August 8, 2008, the Court granted delayed application for leave to appeal, limited to those issues. On August 6, 2009, the Court of Appeals, reversed and remanded this Court's ruling on the Counterclaim, directing that the DEQ be added as a necessary party on the statutory interpretation question and for possible relief.

On September 25, 2009, the Pitsch Companies filed an Amended Counterclaim, asserting that the due process and commerce clause claims in addition to the statutory authority count. On October 9, 2009, the County moved to dismiss the Commerce Clause claim in the Amended Counterclaim. At a hearing on November 11, 2009, the Circuit Court granted the County's motion.

The DEQ was then added as a party and the Court issued a scheduling order on or about November 10, 2009 that reorganized the caption, and authorized the Pitsch Companies to file an Amended Complaint, asserting its three Amended Counterclaim counts in a Complaint form, recognizing that

Count III on the Counterclaim was being dismissed. An order dismissing Count III was entered by the Court on December 23, 2009.

On March 23, 2010, the DEQ moved for summary disposition on jurisdictional grounds. The County joined in that motion. The Court granted those motions at the hearing on April 27, 2010 and entered an order to that effect on May 10, 2010, leaving only the statutory interpretation count, Count I of the Amended Complaint in question against Ionia County.

The Court heard testimony from the DEQ and Pitsch and County Officials on Thursday, August 19, 2010. The DEQ officials both testified that the 100,000 ton annual disposal cap in the Plan, which the DEQ expressly approved, is authorized under Part 115, as an available provision in an enforceable solid waste plan. (TR 61-63; 94-96; Exhibit H).

The disposal cap serves several important purposes, including:

A. Assures that Ionia County can meet the Part 115 mandate of certifying at least 10 years of capacity and in the process insuring that Ionia County has a local landfill that can admit all of the solid waste that the County generates for at least its 20 years, since the landfill after the 1999 expansion had capacity for 2.3 million tons, roughly 23 years at 100,000 tons per year. (TR. 99; 163-167; 235).

B. Enables the County to avoid an obligation to site additional landfills, which if it could not certify at least 10 years of capacity, it would

have to site, permanently consuming additional tracks of Ionia County, undeveloped land. (TR 164).

C. Assures that the infrastructure surrounding the landfill, including Johnson Road, will not be overwhelmed by exponentially increasing truck traffic, noise, odors, and litter. (TR 167-168; 237). This is particularly important to the Pitsch Landfill since Johnson Road, as noted above, is not all season, and is otherwise narrow, hilly and dangerous. (TR 102-103; 237).

Page 10 of the Plan clearly indicates that the State/County are relying on the Pitsch Sanitary Landfill for Ionia County's disposal capacity certification and planning. (Exhibit A, p. 10). While the Plan may have attempted to rely on capacity available in other Michigan Counties, statements by such landfills that they may accept Ionia County generated waste do not commit them to actually take Ionia generated waste and the Pitsch Landfill would be the only landfill over which Ionia County might have legal jurisdiction in the event that it had to compel a landfill to accept Ionia County generated waste. (TR 165).

DEQ witnesses acknowledged that the State of Michigan—outside of its approval of county solid waste management plans--does not regulate or impose neither annual landfill disposal caps nor siting or operational concerns affecting the landfill outside of the actual cell construction which would be impaired by the County's Disposal Cap. (TR 103).

The Pitsch Companies did not file a claim against the DEQ in the Court of Claims nor on appeal do they challenge the Circuit Court's May 10, 2010 Order dismissing the DEQ from this Action.

ARGUMENT

- 1. This Court lacks subject matter to entertain an appeal from a case where the Appellant failed to perfect a claim over a necessary state party.**

Standard of Review: Whether the courts have subject matter jurisdiction over a claim presents a question of law that is reviewed de novo. *Ryan v. Ryan*, 260 Mich.App 315, 331 (2004).

A Michigan county may or may not have a role in assisting the State of Michigan in developing the portion of the State's Solid Waste Management Plan. MCL §324.11541. While most Michigan counties choose to participate in the process, the fact of the matter is what eventually legally emerges is the "State of Michigan's Solid Waste Management Plan," not a separate and distinct county plan:

- (1) The state solid waste management plan shall consist of the state solid waste plan and all county plans approved or prepared by the department.

MCL §324.11541.

It is undisputed fact that 7 counties (TR 134) refused to undertake any solid waste management plan and the state had to prepare them pursuant to MCL §324.11534(6).

In effect, each solid waste management plan “segment,” once approved by 2/3rds local government, the county and the state becomes incorporated into and then a part of the State of Michigan’s one Solid Waste Management Plan:

Q. You would agree with me would you not, that the solid waste planning process, as it’s generally outlined in part 115 and implemented, is a cooperative venture of the counties, the state and at least two-thirds of the local units in the county?

A. [MDEQ’s Rhonda Oyer-Zimmerman] That’s correct.

Q. And the state has a solid waste management plan for the overall State of Michigan is that correct?

A. That’s correct.

Q. And it is made up of the individually approved solid waste management plans for each county?

A. Yes, it would be all 83 counties’ plans.

Q. I’ve used the analogy to quilt that in effect, the state’s plan is a quilt composed of each individual county’s plan after they’ve been approved by the state, would that be a fair description?

A. Yes it would.

(TR 95).

In its original Opinion in this Case, this Court expressly held that the “DEQ” is a “necessary party to this case.” (COA Opinion, p. 7). That decision is now the law of the case. See *Ashker ex rel. Estate of Ashker v. Ford Motor Co.*, 245 Mich App 9, (2001). On September 8, 2009, the Pitsch Companies added the DEQ, which was confirmed in their November 20, 2009 Amended Complaint. On March 23, 2010, the State of Michigan moved to dismiss the Complaint

against it on the basis that the Ionia County Circuit Court lacked the subject matter jurisdiction to issue the declaratory and injunctive relief against the State of Michigan that the Pitsch Companies sought in the Amended Complaint, effectively steering the Pitsch Companies to the Michigan Court of Claims, where by its practice, the matter could have been reconsolidated in the Ionia County Circuit Court. Ionia County joined in that Motion. On May 12, 2010, the Circuit Court granted the Joint Motion. See Exhibit B to Pitsch's Brief.

The Pitsch Companies do not appeal that decision and thus it is waived. Failure to acquire jurisdiction over a necessary state party is a subject matter jurisdictional defect requiring a case's dismissal. See *Davis v. Department of Corrections*, 251 Mich.App. 372 (2002). This case is like *Davis* in that the plaintiff was given an opportunity to perfect a claim against the right State agency. While the Pitsch Companies did add the DEQ, they failed to do it in a manner appropriate under the Court Rules and Michigan Revised Judicature Act; namely, suing in the Michigan Court of Claims and then moving for consolidation. As in *Davis*, they then failed to correct the problem after the jurisdiction defect was pointed out—in this case by the Circuit Court's dismissal order. Then the Pitsch Companies chose not to appeal the Circuit Court's ruling by raising any alleged error on the subject in its statement of the questions or otherwise in their brief on appeal, meaning that issue is now waived. See *Caldwell v. Chapman*, 240 Mich App 124, 132 (2000). Having failed to *effectively* add the party that this Court has already concluded is necessary, the Pitsch

Companies' appeal falls squarely within the rule in *Davis*, and the matter must be dismissed.

Indeed, what the Pitsch Companies are doing—as this Court originally found—is trying to extract the Ionia County portion of the State's Solid Waste Management Plan quilt and then enjoin Ionia County and/or the State from enforcing it. That is wrong legally, and should not be permitted.

2. An Annual Solid Waste Deposit Limitation is a Common, Authorized Component of a Solid Waste Management Plan, under both Part 115 AND the County's general police power in MCL §46.11(j).

The fundamental problem with the Pitsch Companies' legal authorization analysis is two-fold: (1) it misunderstands the **generalized** nature of the solid waste planning process authorized and directed by Part 115 **and** (2) fails to appreciate that the underlying police power of the county remains an authority if combined within the and consistent with the Part 115 planning process.

Part 115 directs that a state solid waste plan be developed and prescribes the general subjects that must be addressed in that plan, including the protection of sufficient waste capacity for each county and that any landfill sited be located in appropriate areas with appropriate siting criteria relative to the protections of the environment and infrastructure and the surrounding community. Other than to order the planning process, Part 115 does **not** specify the exact regulatory tools that the counties and DEQ may or should use in achieving those goals. Part 115 also pre-empts local police power that is inconsistent with the Part 115 planning process and through those provisions

clearly reflects a preference that local police power be deployed through the Part 115 State/County Plan. Thus, Part 115 **AND** the County's general police power as found in MCL §46.11(j) serve as joint authority for planning tools such as the Ionia County landfill surcharge and the 100,000 ton annual landfill capacity cap.

The Pitsch Companies and—candidly, the original panel of the Court of Appeals to consider this case--misunderstand or flatly ignore this Court's published opinion in *County of Saginaw v. John Sexton Corp. of Michigan*, 232 Mich App 202, 221-222, 591 N.W.2d 52, 61 (1998) on these key points; namely that express authority for a Part 115 planning tool is **not** necessary and that the counties' police powers at least applied through the planning process **remain available**. While *John Sexton* dealt with a county's authority to impose a county landfill surcharge fee and this case involves the county's authority to impose a landfill annual capacity cap, the legal context is exactly the same. In each instance, there is no express provision in Part 115 that authorizes the tool and the landfill was claiming that this fact alone meant the tool was not authorized.

In published precedent, this Court rejected the landfill company's "no authorization" argument—which is exactly the same as the Pitsch Companies' argument here, instead **endorsing the county's argument—which is exactly the same as Ionia County's here**; namely that a local regulation that advances

the county's solid waste management plan's goals and objectives is authorized under Part 115 **and** MCL § 46.11(j):

“The county's statutorily granted authority should be liberally construed in plaintiff's [Saginaw County] and includes those powers ‘fairly implied and prohibited by th[e] constitution.” Const. 1963, art 7, § 34...Construing MCL § 46.11(j) liberally, we conclude that plaintiff possessed authority to enact the landfill surcharge. The surcharged was intended to fund the enforcement of the county's solid waste management plan, and therefore, it related to county affairs. Defendants no not allege that the surcharge in any way interfered with the local affairs of a city, township, or village. Therefore, we conclude that MCL § 46.11(m) [sic—(j)] constituted at least one basis for plaintiff's passage of the surcharge ordinance.

Furthermore, we believe plaintiff possessed authority to pass the surcharge ordinance under the solid waste management act. As we previously mentioned, subsection 11538(8) of the act, M.C.L. § 324.11538(8); MSA 13A.11538(8), declares that, after approval of a countywide solid waste management plan by the Department of Environmental Quality, only a county ordinance that affects landfill location or development and is not part of or is inconsistent with the county's approved plan is prohibited. Because the surcharge does not fall into the category of ordinances explicitly prohibited by subsection 11538(8), it is valid. The surcharge also comports with the most recent, state-approved update to plaintiff's solid waste management plan. The update requires that the county board of commissioners establish an enforcement agency to carry out the plan and provides for enforcement agency funding “by surcharges, tipping fees and/or other appropriate means of financing.”

County of Saginaw v. John Sexton Corp. of Michigan, 232 Mich App 202, 221-222, 591 N.W.2d 52, 61 (Mich.App.,1998).

In addition, the present case—as a result of this Court's initial panel's directive, contains something *John Sexton* did not; namely, the State of Michigan's express interpretive endorsement of the County's interpretation of

Part 115 and its regulations, its specific opinion that they legally authorize the annual landfill disposal cap on Pitsch Landfill.

As this Court knows, statutes and their delegated administrative regulations are subject to the same principle of construction, including the principle that the work's plain meaning be used to ascertain the cardinal principle that legislative purpose and intent controls. *City of Romulus v. Michigan Dept. of Environmental Quality*, 260 Mich App 54 (2003). An administrative agency's interpretation of a statute is to be given **great deference** and if pertaining to rules, which are involved here, **complete deference** unless it is obviously wrong. *Id.*

Both Rhonda Oyer-Zimmerman, Chief of the DEQ Solid Waste Unit (TR 28) and James Sygo, Deputy Director of the DEQ for Environmental Protection, (TR 110) unequivocally testified that the DEQ has concluded that a disposal cap is a legally authorized tool for counties and the State of Michigan to include in the State Solid Waste Management Plan:

- Q. Just so the record is clear, it's the Department's position at this point in time that the 100,000 ton limitation in the Ionia County plan update that's currently in effect, which is still the 2000 update correct?
- A. [Ms. Oyer-Zimmerman] Yes.
- Q. Is an overall disposal cap not just an import cap as Counsel's described it, is that correct?
- A. Yes.
- Q. And it's also the Department's position in response to the Court of Appeals request for the Department's input that such a disposal

cap, as long as it's included in the solid waste management plan, is an available tool to Michigan counties?

A. Yes.

(TR 94).

Q. And it's your understanding that the Department's position is that an annual cap is an authorized tool under part 115 for use by Michigan Counties in a solid waste management plan?

A. [Mr. Sygo] That is our understanding, yes.

(TR 169).

In light of *John Sexton* and the DEQ's supportive interpretation, the only thing left for this Court to do is to evaluate whether there are generalized duties, goals and objectives in Part 115 for a county solid waste management plan that are legitimately implemented, advanced, and enforced by an annual disposal cap. In this regard, Ionia County and the state witnesses at trial in this case, direct the Court to the following provisions in Part 115 and its regulations:

A. Part 115 states that a central purpose of the a county solid waste management plan is to ensure that there is sufficient disposal capacity for at least ten years for all solid waste generated within the County. MCL §324.11533(1);

B. Part 115's Section 11538 and the Rules promulgated by the DEQ require the all counties to develop specific siting criteria for landfills and to evaluate, among other things, the "goals and objectives" for the "prevention of adverse effects" on the environment resulting from solid

waste disposal and to inventory and describe the characteristics, including deficiencies, of all disposal facilities serving the county. See MCL §324.11538(1)(a) and (d) and R 299.4711.

C. Part 115 obligated the DEQ to develop for a legislative committee, a standardized plan format. MCL §324.11539a. The format developed by the DEQ expressly authorizes a county to place **daily** and **annual** waste quantity limits on waste deposited.

D. Part 115 also requires the County Board of Commissioners to each year certify landfill capacity available to the County and if it cannot certify at least 5 and ½ years capacity, it is obligated to site any newly proposed landfill or landfill expansion that otherwise meets the objective siting criteria of the Plan. See MCL §324.11537a and MCL §324.11538(4).

Applying this legal context, the DEQ, County and even Pitsch witnesses testified—without refute—and in detail to the important Ionia/State Plan policy and factual objectives served by the 100,000 ton annual capacity cap.

First, it is worth noting that at the time the Plan Update was put together, the Pitsch Companies themselves advanced the 100,000 annual tonnage capacity figure and were instrumental in its placement into the Plan. At the time, the Pitsch Companies needed to get a letter of consistency with the Plan from Ionia County before they could obtain the DEQ's approval for a construction permit for this expansion, which is the only part of its landfill still operating today. To get that letter and establish that consistency, the Pitsch

Companies' strategy was to have the Plan's 20 year capacity certification **rely** on the landfill expansion. Gary Pitsch at trial admitted that this was the Pitsch Companies' strategy in getting past the County's authorization for their expansion:

Q. And so Leo [Pitsch's engineer] or Pitsch was basically proposing that with 100,000 tons per year, growing at .5%, you would have against that overall cubic yard capacity of the cells, approximately 20 years at that pace for the useful expected life of the landfill?

A. [Gary Pitsch] Yes.

Q. And you knew that number was significant to the County because the County was looking to certify 20 years capacity as part of that planning process, right?

A. Right.

Q. So essentially what the company was proposing to the County was, if you endorse or approve this expansion and we use the landfill at that rate, 100,000 tons per year approximately, you will meet that **20 year capacity in your planning process with our landfill?** Isn't that in a nutshell what they're proposing here?

A. **I believe it is.** (TR 213)(Emphasis Added).

Pages 10 and 88-90 of Exhibit A demonstrates that Pitsch's strategy worked.

During this case, the Pitsch Companies now repeatedly argue—including in their present brief--that Ionia County could have certified 20 year capacity by entering into contractual commitments with other landfills in other counties as an alternative to using the Pitsch Landfill and the 100,000 capacity cap to cement the certification. There are at least two flaws with that argument: (1)

just because Ionia County had other tools available to establish capacity doesn't mean the tool it selected was unauthorized and (2) the Pitsch Companies should be estopped from making this argument because they were the party which induced Ionia County into relying on the 100,000 disposal rate and 20 year capacity certification in the Plan in order to obtain the County's necessary approval of the Pitsch Companies landfill expansion. Indeed, if the Pitsch Companies had argued in 1999 that the expansion of their landfill was not necessary for the County to meet its solid waste disposal needs and to rely on other landfills for its 20 year certification of capacity, Ionia County could have denied the letter of consistency and the Pitsch Landfill would have **no** capacity in 2011. Having achieved their goals in 1999, the Pitsch Companies are engaged in a classic "bait and switch" in 2011.

There can be no doubt that when a county relies on a particular landfill's capacity for its 20 year certification—as Ionia County did here, that such a certification is vulnerable ***without a landfill disposal cap such as in the current Plan.*** In fact, this case involves a real life example of where the cap served as the only reason that 20 years of capacity did not shrink to 3 years when Transload, a prospective buyer of the Landfill, appeared and wanted to fill the landfill up at rate of 600,000 tons per year. Mr. Sygo explained how the disposal cap is the key component—much more effective than an import cap which the Pitsch Companies suggest would have been sufficient—in preserving the capacity certification within the Plan and without such a cap, the Planning

Process would have been disrupted and Ionia County would have had to re-engage the entire process by the Transload proposal:

Q. So we had approximately 2.3 million tons of capacity in that proposed expansion. Then under paragraph two, the County in order to estimate and certify its capacity, would have to do some calculations regarding the rate at which the capacity is going to be consumed and you see there that they have 100,000 tons per year?

A. [DEQ's Mr. James Sygo] Yes.

Q. So as a county is evaluating available capacity to make these certifications, it really needs to make some assumptions about the rate of annual usage that's going to occur in the landfill in order to equate that capacity into useful years, is that correct?

A. That's correct.

Q. Okay. So based on assumptions that are in this part of the plan which frankly I think we can all agree, came from Pitsch and was part of its analysis that it was asking the County to include in the plan, there was an estimated life expectancy, if you will, or capacity for the license to -constructed permit capacity of the landfill of approximately 20.82 years. Do you see that?

A. Yes.

Q. Then that becomes useful to the County in making its overall planning certifications and capacity assumptions in its plan relative to the 20 year or 10 year and 5 year capacities that you just testified about, correct?

A. I would agree.

...

Q. Now a flow or an import cap might be useful to a county in trying to protect that 100,000 expectation that it build into its planning process but you would agree with me that a disposal cap is more relevant and more useful in the sense that it pertains to directly what you're doing which is measuring that capacity?

A. Generally, **I would say yes, that's true.**

...

Q. Okay. I'm going to ask you to assume that happened in 2004 and we'll have other witnesses who can attest to it but that Transload proposed to buy the Pitsch Landfill. It intended to bring 600,000 tons a year from out of state and consume the capacity with that out of state waste if it could get this cap increased to 600,000 tons per year. Now if that happened, you would agree with me that would dramatically alter the expectations that were inherent in this plan as to the availability of that landfill for Ionia County's waste needs over that 20 year period?

A. **Sure would, yes.**

Q. In fact, if that happened, the County might have to also trigger its siting criteria and might be obligated to site a new landfill if 600,000 tons were coming in and according to my math that might mean less—that would certainly be less than 5 ½ years of capacity and then under the statute, they would have to site a new landfill, right?

A. that would be my understanding as well, **yes.**

Q. Okay. So certainly **that would have a disruptive effect on the planning that Ionia County had been counting on**, is that correct?

A. Well, from what you're anticipating to have some duration of capacity, **it certainly would....**

Q So in the hypothetical that I have given you, the disposal cap served a purpose because Transload went away and that didn't happen, in protecting and preserving the expectations that were inherent this planning document [the Plan]?

A. **That would be true, yes.**

(TR. 163-164)(Emphasis added).

In their brief on appeal, the Pitsch Companies completely ignore the other legitimate "county" interests served by the 100,000 ton capacity cap, which are

independent from and in addition to capacity certification. MCL §324.11538(1)(a) and (d) and R 299.4711 expressly delegate to the counties the responsibility to develop plan provisions that will abate the “adverse effects” to the surrounding community of the landfill. The DEQ acknowledged that the neighbors’ concerns about noise, odor, and truck traffic—all subjects it doesn’t regulate could be addressed by this tool, which are the only tool to hold the landfill developer’s representations about size of the landfill in place after the siting phase is over:

Q. Would you agree with me that having a landfill disposal cap would be an important component, potentially for a county to try to address some of the neighboring residents’ concerns that the landfill did not exceed their understanding or expectations in those features like noise, odor, litter and truck traffic?

A. [DEQ’s Oyer-Zimmerman] That’s one tool a county could use, yes.

Q. So among the purposes for a disposal cap would be to try to assure the local residents that the infrastructure that’s in place and that the **representations of the landfill operator about the size and expected flow are actually held?**

A. **That could be one purpose, yes.** (TR 102-103)

* * *

Q. You also mentioned other concerns, social concerns related to the volume of waste that might be put in a facility and its impact on the neighborhood, correct?

A. [DEQ’s Sygo) Yes.

Q. **And certainly if Transload had bought the landfill and increased by six-fold, the amount of waste that ‘s being loaded into that landfill on a daily and annual basis, that would have a major impact on the odors and the noise and the dust that’s emanating from the landfill itself, correct?**

A. **It likely would, yes.**

Q. Yes, and that's going to have a negative impact on the neighborhood and the community, at least in the perception of the neighbors, in all likelihood?

A. I would agree, yes.

Q. And litter is a substantial problem with landfills with wind blowing the litter off the site, increasing the waste activity in the landfill by six-fold, could have a dramatic impact in the amount of litter that might be escaping from the facility?

A. Potentially, yes.

Q. And these all might be important components that could also motivate the County, independent of infrastructure, independent of capacity, in establishing a disposal cap?

A. Yes, it could. ITR 167-168)(Emphasis added).

Finally, the surrounding infrastructure is an expressly delegated issue by Part 115 to the County in the Plan, because like capacity certification, Part 115 expressly delegates that the county develop siting criteria to address such issues. See MCL §324.11538(1)(a) and (d) and R 299.4711. The ability of the roadway to handle the truck traffic is directly related to the kind of surrounding infrastructure needs that the Plan siting criteria are obligated to take into account and the size of the landfill's annual intake is directly related to the ability of such infrastructure to handle the landfill:

Q. Now you mentioned some of the other purposes that might be independent of capacity that might be useful—that **a disposal cap might have some use in attaining as a goal for a county and I think you mentioned the infrastructure of the surrounding are that is serving that landfill such as roads, correct?**

A. [DEQ's Sygo] **That's correct.**

Q. So if Johnson Road is not an all season road, you can see where Ionia County has a legitimate planning concern about the amount of truck traffic that will be crossing Johnson Road to get into the landfill?

A. **Understood and it's not only as much whether it's all season or not, it's the capacity of the road itself.** We have some sites where truck traffic is substantial because of the volumes that are being brought in.

Q. So the fact that it's a two lane road, not a four lane road, has implications on the safety and other legitimate local concerns?

A. Correct.

Q. **And if it's in a hilly area or a curvy road, that's also a legitimate local planning concern in the planning process that might justify a disposal cap to try to mitigate or limit the amount of truck flow into that facility?**

A. **Yes.** [TR 166-167](Emphasis added).

No one in this case disputes that the Pitsch Companies' landfill is accessed only through Johnson Road or that this road has a limited capacity for disposal truck traffic since it only has two lanes, is narrow and hilly, and is not an all season road; meaning truck traffic is subject to seasonal load restrictions. (TR 237). In fact, a grant has been issued to improve the road because of the high number of accidents on it, although to date, the road has not been improved. *Id.* This infrastructure reason alone, justifies the imposition of a landfill disposal capacity to protect against dangerous road traffic, which a six fold increased proposed by Transload may have entailed.

The Pitsch Companies offer no provisions in Part 115 to suggest that the MDEQ regulates or otherwise addresses these host infrastructure and

surrounding environmental concerns in approving construction and operating permits to landfills. The truth is that the MDEQ only regulates the content parameters of the liner and other fixtures, not the size or location of the landfill. Moreover, Ionia County pro-offered undisputed testimony that the 100,000 ton annual capacity and its affects on infrastructure, capacity certification and mitigation of adverse effects on the surrounding environment were in no way inconsistent with or covered by MDEQ regulations:

Q. Would you also agree with me that there's nothing about the Ionia 100,000 ton annual disposal cap that interferes with any particular regulation or activity that the state itself has in regulating the Pitsch Sanitary Landfill?

A. [DEQ's Oyer-Zimmerman] I believe that's a true statement. (TR 103-104).

This is an important point because as this Court recognized in *John Sexton*, MCL §46.11(j) and Part 115 are structured to enable and preserve police power in Michigan counties where there is no express inconsistency in state law or regulations and the police power goals have become a county concern with the plan's provisions. Clearly serving express statutory goals and objectives as stated in Part 115 and its regulations and protecting siting and capacity certification considerations that are expressly "county concerns" under Part 115, a Plan annual capacity limitation presents a far stronger authorization case for Ionia County than a county surcharge did for the Saginaw County portion of the State Solid Waste Management Pan in *John Sexton*. Indeed, the goals served by

that capacity cap are far more direct to the goals of Part 115 than that of a county landfill surcharge. Certainly, then the *John Sexton* precedent strongly supports if not mandates Ionia County's position and the Circuit Court's ruling in the present case.

Indeed, under the Pitsch Companies contrary view, *John Sexton* was wrongly decided and a county is powerless to utilize any planning tool not expressly authorized in Part 115, leaving the County powerless to control its waste capacity or regulate the amount of waste traffic or dust, odor and noise emanating from the site of the landfill—nor even to preclude in its siting criteria, as Ionia County has done, that landfills not be located in a flood plain—thus, defeating central purposes of the Part 115 Plan.

3. The Plan Does Not Violate Substantive Due Process because it is Supportable with Policy Facts.

Standard of Review: The Court of Appeals reviews declaratory judgments *de novo*, but the findings of the trial court will not be disturbed unless the Court of Appeals is convinced it would have arrived at different result had it been in the position of the trial court. *Cahalan v. Wayne County Bd. of Com'rs*, 93 Mich App 114 (1979).

In *Norman Corp. v. City Of East Tawas*, 263 Mich App 194, 201 (2004), this Court recognized that a municipal regulation has a rational basis and therefore survives a substantive due process challenge under the federal and

state constitutions, if it can be supported by **any** policy facts, even if the facts are debatable or the court would come to a different conclusion:

An ordinance's classification is constitutional under rational basis review if it can be “supported by any set of facts, either known or which could reasonably be assumed, even if such facts [are] debatable.” *Crego v. Coleman*, 463 Mich. 248, 260, 615 N.W.2d 218 (2000). Moreover, rational basis review is satisfied even though some unequal treatment results from the application of an ordinance classification. *Wysocki v. Felt*, 248 Mich App 346, 353, 639 N.W.2d 572 (2001).

As noted above, there are many rational reasons for an annual cap relative to necessary county capacity certifications, infrastructure protections and in abating adverse effects on the surrounding environment, including the human neighbors of the landfill. Those purposes will not be repeated here. Moreover, it is worth noting that 2 of Ionia County’s neighboring counties—Clinton and Ottawa also impose them. See Exhibits 2 and 3. The Pitsch Companies suggest that the fact that the landfills in those counties also may have agreed to those caps in host landfill agreements only demonstrates that those landfills thought that the caps imposed were reasonable.⁴ In this case, as noted above, the Pitsch Companies **suggested the 100,000 ton cap** in their inducing argument for landfill expansion, which was accepted by the County through inclusion of the disposal cap in the Plan and certification therein of the expansion in the inventory of its Plan. See Exhibit A, p. 88. Moreover, as noted

⁴ As the DEQ approval letter (Exhibit A , p 371) notes, host landfill/county contracts are only legal if their provisions are mirrored in the Plan and any amendments to those contracts must be made through the Plan amendment process. ***The Pitsch Company arguments regarding the authority of these contracts is, therefore, backwards. It is not the contracts in those counties that authorize the caps in the county/state plans, it is the caps in the plans that authorize the county/landfill contracts.***

above, the Pitsch Companies admitted that they would have voted in favor of a 150,000 ton annual cap:

Q. You understood they were talking about 100,00 ton cap on your landfill, correct?

A. [Gary Pitsch] I believe it. That's what I thought.

Q. And you understood that would be on all waste that you could deposit in your landfill as the County has interpreted it since the, is that right?

A. Yes.

Q. And what you were suggesting is, you wanted to see 150,000 tons be then umber and then you would support?

A. Yes.

Q. And because the County didn't—or the other members of the committee would not go along with that, you voted no?

A. Right.

Q. Had they agreed on 150,000 ton cap, you would have supported it at that point in time?

A. I believe I would have, yes. (TR 219).

The Pitsch Companies offer no explanation as to why the difference between 150,000 annual tons and 100,000 annual tons should trigger substantive due process concerns. After all, Ionia County residents and businesses generate about 54,000 tons per year in solid Waste. See Exhibit A, Page III-54 of Plan. It is certainly **not** ultra conservative for Ionia County to give its only landfill the capacity to take almost 100% per year **more** waste than the County generates in total, especially when considering that in the most recent

year on record, Pitsch only took in 62,574, annual tons. Even Mr. Pitsch conceded the logic, testifying that at the time the discussions took place his Companies' landfill was getting most of the Ionia County generated waste (TR 198) and had not yet hit the cap (TR 196) and the citizens decided to give the Pitsch companies "double" the County's total annual waste generation as a compromise policy approach being fair to the County and the Pitsch Companies:

- A. [Gary Pitsch]...I was arguing that we needed to have a bigger cap for growth and it was some of the sentiments of the other people on the committee who were citizens, that they wanted to conserve the landfill space. Ionia generated about 50,000 tons a year and they thought they would **give us double that**. We could go up to 100 and I said we needed more room than that. We debated the issue and took a vote and I was the only one who voted against it? (TR 197)[Emphasis added].

As the Plan notes, if Pitsch takes in 84,000 tons per year—the County is guaranteed 20 years of capacity. (See Exhibit A, Page III-54 of the Plan). This is the essence of what substantive due process requires. These numbers give good government/industry balance—and enable Pitsch to grow its business, while ensuring that it will be there if the County needs it for its citizens. It also ensures that the local transportation system and neighborhoods surrounding the landfill are not overly burdened with waste truck transportation, beyond the then unexpected doubling of the landfill's annual capacity.

In short, a cap that is only at 62% of the landfill's usage last state fiscal year, and that is set at 54% of the entire County's annual waste generation is

imminently reasonable and supportable with policy facts. Pitsch's substantive due process claim is specious.

In fact, the Pitsch Companies' entire substantive due process argument is based—not on the argument that there are no policy reasons to support the 100,000 ton cap—but rather on the argument that Ionia County could have supported at least one of its county concerns—capacity certification (although not infrastructure or environmental concerns) by relying on landfills in other counties. As effectively noted in the *Norman* case, this is a *non sequitur*. The fact that there are alternative policy means that could also have been supported under the constitution does not make a public body's particular policy course unconstitutional, even if the members of the judiciary believe the public body should have pursued a different policy course. If under such circumstances a due process claim could be made, every time there was more than one policy alternative—which is almost always the case—a public body would violate the constitution if it chose one directive but not the other.

Moreover, the undisputed testimony of the DEQ officials is that using one's own, local landfill for certification is preferable from a policy standpoint for at least 3 reasons: (1) even if other counties authorize the flow of waste from your county to theirs in their plan and the landfills' located in their county indicate that they have the capacity to accept your county's waste is not a guarantee or commitment that the out of county landfill will actually take your waste. (TR 101). (2) Second, the state prefers that landfill capacity be reached

in closer proximity to the waste generation to avoid the dangerous and expensive transportation of solid waste (TR 165). And, finally, using a host landfill for certification is the only way that a county can gain eminent domain jurisdiction over the landfill to compel the landfill to accept the waste generated within the county, if all other avenues prove unavailable. (TR 166).

Thus, the path that Ionia County selected, using the Pitsch Landfill and the capacity cap as enforcement for its certification was the most expedient path, the one that advanced the most public policy advantages and the one requested by the Pitsch Companies. Those undisputed facts will not support a substantive due process attack.

4. The Plan's waste limitation applies uniformly to all waste deposited, regardless of origin. Accordingly, it is clearly constitutional under the Commerce Clause.

Standard of Review: The Court of Appeals reviews declaratory judgments *de novo*, but the findings of the trial court will not be disturbed unless the Court of Appeals is convinced it would have arrived at different result had it been in the position of the trial court. *Cahalan v. Wayne County Bd. of Com'rs*, 93 Mich App 114 (1979).

Pitsch's Commerce Clause argument in its Brief is disingenuous and specious. It is disingenuous because the **only** "evidence" that it cites for its assertion that the County had a discriminatory motive against out of state waste, is an argument of legal counsel in "one" brief in this case that Pitsch takes completely out of context. It is specious in light of one critical fact that

Pitsch cannot and doesn't deny—***the Plan's annual waste deposit limitation treats all waste equally regardless of origination within or outside Ionia County, Michigan, or the United States.*** Thus, in no way does it discriminate against the flow of inter-state commerce. Despite this fact, this is the only Commerce Clause challenge asserted by the Pitsch Companies.⁵

The Pitsch Companies rely on the United States Supreme Court's opinion in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992). In *Fort Gratiot*, the United States Supreme Court struck down the provisions in Part 115's predecessor statute, Act 641, which prohibited waste originating from other counties, states, or countries from being imported into any Michigan County for disposal unless the county, state or country was identified in the county's solid waste management plan. The Supreme Court found that this provision, which clearly treated waste that originated out-of-state differently than waste generated from within the host county, unconstitutional.

Michigan reacted to the Supreme Court by revising its regulations under Part 115. Now, only inter-county, intra-state originated waste is subject to the plan identification process, effectively favoring waste generated from within the Michigan county as well of out-of-state and out-of-country originated waste. See

⁵ Few things could be more dangerous to a community's health and safety than running out of solid waste disposal capacity. Arguably the most important component to a solid waste management plan is the certification of 5 and 20 year disposal capacity, required by MCL §324.11538. R. 299.4711(e)(iii)(A) & (B). The Plan's hard disposal cap is clearly designed to achieve this purpose. In fact, as Pitsch concedes, it is the stated purpose. See Pitsch's Brief, p. 3.

R. 299.4711(e)(iii)(c). Thus, consistent with these requirements, the Plan here in does not discriminates against out-of-state or out-of-country waste originated waste. The only areas that need designation, are areas outside of the County but within Michigan. Indeed, nothing in the Plan prohibits the Pitsch Companies from accepting any or all of its waste from any other state or country.

It is undisputed that the Plan's annual aggregate waste deposit limitation treats all waste equally regardless of origination within or outside Ionia County, Michigan, or the United States.⁶ Thus, in no way does it discriminate against the flow of inter-state commerce. Despite this fact, this is the only Commerce Clause challenge asserted by Pitsch Companies on appeal.⁷

The United States Supreme Court has directed lower courts to employ a two-step process in evaluating a Commerce Clause challenge, commanding : (1) first an analysis as to whether the regulation discriminates against out of state commerce or merely regulates even handedly with only incidental effects upon interstate commerce; and (2) second, analysis as to whether any burden on interstate commerce clearly outweighs any benefit to the public interest:

Current Supreme Court authority provides a two-step method for analyzing a law that is subject to judicial scrutiny under the dormant

⁶ Pitsch's October 6, 2006 Brief, p. 8 conceded that the Ionia Plan does not discriminate against inter-state or foreign waste.

⁷ Few things could be more dangerous to a community's health and safety than running out of solid waste disposal capacity. Arguably the most important component to a solid waste management plan is the certification of 5 and 20 year disposal capacity, required by MCL §324.11538. R. 299.4711(e)(iii)(A) & (B). The Plan's hard disposal cap is clearly designed to achieve this purpose. In fact, as Pitsch concedes, it is the stated purpose. See Pitsch's Brief, p. 3.

Commerce Clause. The first step involves a determination of whether the law discriminates against interstate commerce or merely regulates evenhandedly with only incidental effects upon interstate commerce. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 340, 112 S.Ct. 2009, 2013, 119 L.Ed.2d 121 (1992); *Philadelphia*, 437 U.S. at 624, 98 S.Ct. at 2535-36. If a restriction on commerce is found to be discriminatory, it is subject to strict scrutiny and is virtually *per se* invalid.^{FN8} *Chemical Waste*, 504 U.S. at 344, n. 6, 112 S.Ct. at 2015, n. 6; *Philadelphia*, 437 U.S. at 624, 98 S.Ct. at 2535-36. If a regulation is found to be nondiscriminatory, the second step of the analysis becomes operative. This step requires the Court to balance the burden on interstate commerce and the local public interest. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

Waste Management of Michigan v. Ingham County, 941 F.Supp. 656, 662 (W.D.Mich.,1996).

Courts in Michigan have specifically held that counties acting under the authority of Part 115 do **not** discriminate in violation of the *Ft. Gratiot* decision nor the United States Constitution's Commerce Clause as long as the waste disposal limitation is uniformly applied to host and out-of-state solid waste. See *National Solid Waste Management Ass'n v. Granholm*, 344 F. Supp 2d. 559 (E.D.Mich.2004).⁸ *National Solid Waste* expressly found that Michigan limits on waste flow which do not discriminate against out of state waste are perfectly lawful under the Commerce Clause:

Also, the record as it now stands, plaintiffs are relying on allegations of unconstitutional discrimination which are not supported by the relevant facts as the Court understands them. Michigan has the constitutional right to limit the composition of solid waste disposed in a Michigan landfill so long as the limitations are uniformly applied to in-state and out-of-state solid waste. Michigan also has the right to enforce these limitations by a regulatory scheme that does not unconstitutionally discriminate against

⁸ See also, *Citizens for Logical Alternatives & Responsible Environment, Inc. v. Clare County Bd. of Comm'r*, 211 Mich.App. 494, 536 N.W.2d 286 (1995); *Waste Management of Michigan v. Ingham County*, 941 F.Supp. 656, 666 (W.D.Mich.,1996).

out-of-state solid waste. The requirement that jurisdictions outside of Michigan have limitations on solid waste disposal in landfills comparable to those in Michigan does not discriminate against them. Nor is the requirement that out-of-state solid waste be inspected before being deposited in a Michigan landfill, a procedure specifically endorsed in by the Court of Appeals for the Seventh Circuit in *NSWMA v. Meyer*, 63 F.3d 652, 656 (7th Cir.1995):

Wisconsin could realize its goals of conserving landfill space and protecting the environment by mandating that all waste entering the State first be treated at a material recovery facility with the capacity to effect this separation.

National Solid Wastes Management Ass'n v. Granholm, 344 F.Supp.2d 559, 67 (E.D.Mich.,2004).

The 100,000 annual aggregate waste cap involved here is obviously, facially neutral and, as the Affidavit of Elizabeth Robins attested below when this issue was decided by the Trial Court, is implemented with complete neutrality as to “local” versus interstate or international waste. See Exhibit 1 attached to this Brief. The Pitsch Companies never pled nor produced any evidence otherwise.

Likewise, the Pitsch Companies completely failed to plead that the cap has a disparate impact or effect with good reason—the Pitsch companies have never exceeded the cap and there has only been one incident where an out of state waste company was proposing to buy the property if the waste cap were raised to 600,000 tons per year so it could apparently import more than 100,000 tons of solid waste from out of state sources.

That one incident, however, cannot establish Commerce Clause discrimination for several reasons. First, the evidence in disparate impact cases

focuses on disparities if they are statistically significant and competing explanations for such discrepancies, rather than one or two specific incidents:

The evidence in these “disparate impact” cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.

Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 987, 108 S.Ct. 2777, 2785 (U.S.Tex.,1988).

Secondly, a sample of 24 has been found to be statistically inadequate to support a disparate impact analysis as a matter of law. See *Fudge v. City of Providence Fire Dept.*, 766 F.2d 650 (1st Cir. 1985), quoted with approval by the United States Supreme Court in *Watson v. Fort Worth Bank and Trust*, 487 U.S. at 997. A sample of 1, as we have here, could never be viewed as anything more than a potential product of mere chance that is legally insufficient from which to draw any discriminatory impact conclusions. Indeed, the next potential buyer of the Pitsch Landfill who wants cap relief could just as easily be from Detroit or Grand Rapids seeking to import Michigan waste in amounts greater than 100,000 tons and, in fact, that chance is more likely than that the landfill suitor would be from out of state. Thus, the Pitsch Companies’ discrimination argument fails on the first prong.

Even if the judiciary were to find some burden on interstate commerce, the Pitsch Companies cannot surmount the second prong of the Commerce Clause analysis. “A facially neutral statute that has only indirect or incidental effects on interstate commerce and regulates evenhandedly should be upheld

unless the burden imposed on interstate commerce is clearly excessive when compared to local benefits. “ *Waste Management, supra*, 941 F. Supp at 667, quoting with approval from *Pike v. Bruce Church, Inc.*, 3967 U.S. 137, 142 (1970).

Michigan courts have specifically found that Part 115 flow control in a Michigan county plan serves a significant local function to protect the 5, 10 and 20 year planning capacity that is at the root of the Part 115 Plan formation process, which is the issue involved in this case as well:

The waste transportation restrictions and the Ingham County Plan are an integral part of a comprehensive plan for long-term management of solid waste. The goal of long-term planning for solid waste management in order to protect public health and safety and the environment is a legitimate local purpose. *Sporhase v. Nebraska*, 458 U.S. 941, 956, 102 S.Ct. 3456, 3464, 73 L.Ed.2d 1254 (1981); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Supp. 1566, 1581 (M.D.Ga.1993). The burden imposed by the intercounty waste transportation restrictions is minor and amounts only to an unspecified amount of recycled materials which do not end up in interstate commerce.

Waste Management, supra, 941 F.Supp. 656, 668 (W.D.Mich.,1996).

In this case, the Pitsch Companies acknowledge that the County’s express, stated purpose for the 100,000 annual aggregate cap is to preserve 20 years capacity, which clearly facilitates a waste planning objective. See Brief, p. 40. Indeed, since the County is almost 10 years into the current plan, it only has approximately 5 years left before it cannot meet its statutory certification of a minimum 5 years capacity under MCL §324.11538(2) and (4). Thus, as Mr. Sygo testified at trial as noted above, had the cap not been in place the County’s

certification would have been blown apart forcing it to start the Planning process over. See certification requirements in R 299.4711(e)(iii) quote *supra* at 30.

Indeed, what the Pitsch Companies' unrequited suitor wanted to do—which prompted the Commerce Clause challenge--was to consume the landfill capacity at a 600,000 annual ton rate, which would have consumed 20 years of capacity in 3.3. years. Thus, had the Pitsch Companies been successful in selling their landfill to Transload and Transload been able to implement its 600,000 per ton annual deposit, Ionia would have had to have reopened the planning process two yeas ago and without other resources, it would have been unable to certify local landfill capacity for the statutorily required 5 year period, much less the 20 year certification inherent in the regulation. (TR 164-166).

As noted in the *Waste Management* quote above, where the burden on interstate commerce is slight—and here it is nonexistent by any relevant pleading or proof—the challenger must prove by clear and convincing proofs that the burden is “clearly excessive in relation to the legitimate goal of long-term solid waste disposal planning.” *Waste Management, supra*, 941 F. Supp at 668. The Pitsch Companies didn't even plead such excessive burden, much less is it able to proffer clear and convincing proof to defeat Ionia County's legitimate planning purpose in waste flow control and preserving landfill capacity as recognized by Michigan law.

Under the Pitsch Companies' contrary view, the County could not restrict its deposit of out-of-state or out-of-country waste even if the waste deposit

restriction was 1,000,000 or 10,000,000 tons per year. This is a fatally flawed view. It confuses “impact” on commerce with “discrimination” against interstate commerce. This distinction separates the present case from all of the cases that Pitsch cites. In all of the cases upon which Pitsch relies, the state law regulation at issue was discriminatory.

The Pitsch Companies rely on *Waste Management Holdings v. Gilmore*, 252 F.3d. 343 (4th Cir 2001), but that case involved a **variety of regulations** designed to keep New York City’s waste out of Virginia, including a medical solid waste provision that discriminated against all medical solid waste and container *barges*, a feature that only impacted out-of-state waste and was clearly designed to have a discriminatory effect on New York City’s waste. In fact, the *sine qua non* finding in *Waste Management Holdings* was that no reasonable jury could reach any conclusion but that the waste restrictions were designed to discriminate against the flow of interstate commerce. 252 F. 3. at 355.

In the present case, there is no dispute that that the waste restrictions apply evenly to waste within and without the County or the State. Unlike in *Waste Management Holdings*, the County doesn’t discriminate against the method of transportation, nor does it contain any other provision that one could say makes out-of-state was the target of the cap, which as noted above, is set at levels much higher than what the County needs and higher than Pitsch’s historical annual flows.

As this Court knows, The Pitsch Companies had an obligation to meet the County's summary disposition motion with evidence of discrimination.⁹ It had none and produced none. Glossing over that fatal defect, on appeal, it attempts to manufacture "evidence" by twisting an "argument" that counsel made in briefing before the Circuit Court before this issue went to the Court of Appeals' the first time. The totality of the Pitsch Companies alleged evidence that Ionia County discriminates against out-of-state waste is contained in the following argument:

"The county's hostility to out-of-state and foreign waste was explicitly acknowledged in the trial court. As a justification for the disposal cap, the county asserted that 'under Pitsch's apparent view, Pitsch could sell its landfill to the City of New York or City of Toronto, Ontario, or contract with those communities and fill up its landfill in one or two years...' Thus, by its own admission, the county imposed the annual disposal limit on Pitsch for two express purposes—hoarding Pitsch's landfill capacity for its own uses and excluding waste from other states and nations."

Pitsch's Brief, pp. 39-40.

This argument is completely unfair to the County's Counsel and is legally inappropriate. First, the argument of counsel is not evidence. See M.Civ.JI 3.04. Second, counsel's argument in the quote wasn't based on any facts and thus may not be used against the County as an admission. See *Dalm v. Bryant Paper Company*, 157 Mich 550 (1909). Finally, Pitsch is completely distorting the context of Counsel's argument. The point that was being made in the argument is **not** that the County is intent on discriminating against foreign or out-of-state waste, but rather that without an annual cap, the Pitsch Companies

⁹ *Etter v. Michigan Bell Telephone*, 179 Mich App 551 (1989).

could sell its landfill to a large generator of solid waste who could fill it up in a short time, thus destroying the fundamental purpose of the solid waste management plan; namely, for the county to ensure that there is a local facility available to handle its generated waste. Indeed, in its proposed findings of fact

The County's Counsel was only citing New York City and Toronto as communities that could almost immediately fill up the small Pitsch landfill, thus defeating Ionia County's solid waste planning. Toronto and New York were used in the argument as examples, because they are two largest cities in Canada and the United States respectively and are widely known to be constantly in search of new locations for the disposal of the massive amounts of solid waste that they generate each year. The County's Counsel could have as easily mentioned Detroit or Grand Rapids or General Motors (as he has since done) to make the point that there are entities that might want to purchase a small landfill and fill it up quickly, which is why a total annual disposal cap is necessary to protect the only local source for solid waste disposal.

For Pitsch's counsel to suggest that "his brother in the bar" was "admitting" that his client is predisposed against foreign or out-of-state waste in this comment is beyond the pale and outside of acceptable argumentative license.

When the Pitsch Companies attempt to analyze the true evidence in the record, their argument falls apart. The Pitsch Companies recognize that residents of the County only generate on average 40,000 tons per year and that

the County has agreed to accept up to 182,000 tons from other Counties in Michigan, when one totals the individual county import authorizations for neighboring counties [Pitsch's Brief, p. 41]. Those facts, conclusively demonstrate that the County is **not** hoarding the landfill for its own purposes, nor impermissibly violating the *Fort Gratiot* decision or unduly regulating Pitsch's business. Indeed, Pitsch could take the full 100,000 tons per year from other Michigan counties, Toronto or New York—without violating the County's Plan. As such, there is no discrimination whatsoever and the Circuit Court's grant of Summary Judgment to the County on this issue should be affirmed.

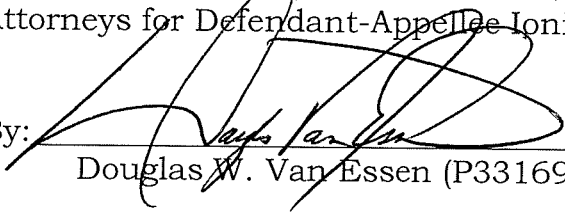
CONCLUSION

This Court lacks subject matter jurisdiction over the appeal, because the Pitsch Companies chose not to perfect a Court of Claims lawsuit against the DEQ despite the express finding by this Court that the DEQ was a necessary part. The County's 100,000 annual landfill deposit cap was developed using the DEQ's standardized county solid waste management plan format after the Pitsch Companies themselves requested it. The Cap serves useful Plan purposes in protecting the necessary Ionia County waste certifications, protecting the surrounding road infrastructure and protecting expected waste flows developed and advanced by the Pitsch Companies, thereby ensuring that the neighbors' environmental concerns about dust, litter, and noise are protected. The Cap has been expressly endorsed by the DEQ, which actually crafted and approved the final Pitsch disputed language, which is now part of the State's Solid Waste

Management Plan. The Cap permits Pitsch to grow its business by average business by 40% and in no way discriminates against out-of-state or out-of-county waste. The Cap is a lawful planning tool under Part 115 and MCL §46.11(j) and in no way violates the United States Constitution's Commerce or Due Process Clauses, as the Circuit Court properly declared. The Circuit Court's judgment should be affirmed and the Pitsch Companies' appeal dismissed without relief.

Dated: July 27, 2011

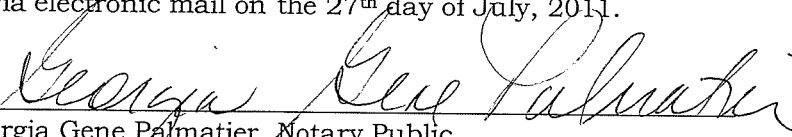
Respectfully submitted,
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PROOF OF SERVICE

As provided by MCR 2.107(D) and MCR 2.114(A), the undersigned certifies that a copy of the foregoing document(s) was served upon the attorneys of record or parties appearing in pro per in the above cause by mailing the same to them at their respective address(es) via United States Mail with postage prepaid thereon, via hand delivery, or via electronic mail on the 27th day of July, 2011.


Georgia Gene Palmatier, Notary Public
Kent County acting in Kent County, Michigan
My Commission Expires: 09/26/12

Exhibit

'1'

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF IONIA

IONIA COUNTY, a Michigan municipal corporation,

Plaintiff-Counter Defendant,

Honorable Susan Kreeger

v

Case No. 06-M-24599-CZ

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

Defendants-Counter Plaintiffs.

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AFFIDAVIT OF ELIZABETH ROBINS

State of Michigan)
) ss
County of Ionia)

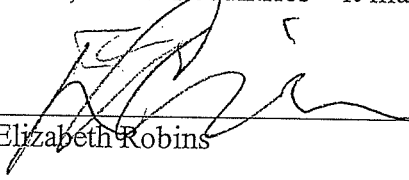
Elizabeth Robins, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts below and if sworn could competently testify thereon.
2. I am the Resource Recovery Coordinator for Ionia County ("County") and as part of my job duties, I am responsible for assisting in the development and implementation of the

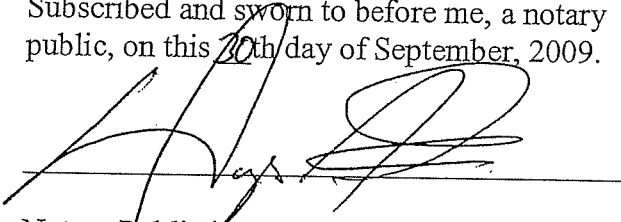
Solid Waste Management Plan Updates applicable to Ionia County pursuant to Part 115 of Michigan's Solid Waste Management Act, MCL §324.11501 *et seq* ("Part 115")("Plan").

3. I assumed my job duties related to the Solid Waste Management Plan in May of 2002.

4. The 100,000 annual aggregate cap in the Plan for the Pitsch Landfill is applied to all solid waste deposited, regardless of the source of generation, whether that source is in Ionia County, other Michigan counties, other states in the United States or even international countries. In other words, all or any portion of the waste could be generated from within Ionia County, other designated counties in Michigan, other states, or other countries—it makes no difference.


Elizabeth Robins

Subscribed and sworn to before me, a notary public, on this 20th day of September, 2009.



Notary Public in Muskegon County,
acting in Ionia County, Michigan
My commission expires: 6-20-12