

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF IONIA

---

Pitsch Recycling & Disposal, Inc.  
and Pitsch Sanitary Landfill, Inc.,  
Michigan corporations,

Case No. 06-M-24599-CZ

Plaintiffs,

Hon. Suzanne Kreeger

vs.

Ionia County, a Michigan Municipal  
Corporation and the Michigan Department  
Of Environmental Quality,

Defendants,

---

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

Douglas W. VanEssen (P33169)  
Lee T. Silver (P36905)  
Silver & Van Essen, P.C.  
Attorneys for Defendant Ionia County  
300 Ottawa Avenue, N.W., Suite 620  
Grand Rapids, MI 49503  
(616) 988-5600

---

**PITSCH RECYCLING & DISPOSAL, INC.**  
**AND PITSCH SANITARY LANDFILL, INC.'S**  
**POST TRIAL BRIEF**

Andrew C. Vredenburg (P45359)  
FOSTER, SWIFT, COLLINS & SMITH, P.C.  
Attorneys for Plaintiffs  
1700 East Beltline, N.E., Suite 200  
Grand Rapids, MI 49525  
(616) 726-2234

## INTRODUCTION

Ionia County ("Ionia") has decided to manage its future solid waste disposal needs by prohibiting Pitsch Sanitary Landfill from expanding its business operations. Rather than planning for its future needs by implementing the alternatives authorized by the Solid Waste Management Act, Part 115 of the Natural Resources and Environmental Protection Act ("Part 115"), Ionia instead imposed an annual limit of 100,000 tons on the waste that can be accepted for disposal at Pitsch Sanitary Landfill ("Disposal Cap"), the only landfill located in the county.

It is Pitsch's contention that Ionia is not authorized by Part 115 to implement the Disposal Cap in its Solid Waste Management Plan ("the Plan") [Trial Exhibit 1] and that the Disposal Cap is preempted by Part 115. Pitsch asks this Court to declare that the Disposal Cap is not authorized under Part 115 and therefore not enforceable by Ionia or the Michigan Department of Natural Resources and Environment ("DNRE"). It is further requested that a permanent injunction barring the enforcement of the Disposal Cap upon Pitsch and any of its successors and assigns.

## PROCEDURAL HISTORY

Pitsch Recycling & Disposal, Inc. and Pitsch Sanitary Landfill, Inc. ("Pitsch") previously appealed this matter to the Michigan Court of Appeals following dismissal of its case by the trial court. The Court of Appeals reversed the trial court dismissals and remanded the case to this court ordering that the DNRE be added as a "necessary party" and instructed the trial court to hold an evidentiary hearing to consider certain questions raised by the Court of Appeals. Following remand and realignment of the parties, the trial court dismissed the DNRE from the case and entered summary disposition of Counts II and III of Pitsch's amended complaint in favor of Ionia. The remaining issues raised in Count I of Pitsch's amended complaint were

addressed during the evidentiary hearing held by this court on August 19, 2010. Following the hearing, this court requested that post trial briefs be submitted for its consideration. This brief sets forth the factual basis and law supporting Pitsch's request for declaratory judgment and injunctive relief.

### STATEMENT OF FACTS

Pitsch Recycling & Disposal, Inc. and Pitsch Sanitary Landfill, Inc. ("Pitsch") own property in Ionia County that is used as a sanitary landfill known as Pitsch Sanitary Landfill. The landfill facility is licensed by the DNRE. Trial Exhibit 8. Pitsch Sanitary Landfill is the only licensed landfill in Ionia County. Ionia, in its Plan, adopted the Disposal Cap imposed on Pitsch Sanitary Landfill. A complete description of the facts surrounding the adoption of the Plan by Ionia was previously briefed in prior motions filed with this Court and will not be restated herein for purposes of brevity.<sup>1</sup> It is suffice to state that Ionia adopted and the DNRE approved Ionia's Plan which imposed the Disposal Cap on Pitsch.

As part of its decision to remand this case to the trial court, the Court of Appeals asked that the following questions be considered during the evidentiary hearing:

1. Whether Part 115 of the NREPA permits a county to establish an annual cap on the amount of waste that can be accepted for disposal at landfills within its borders;
2. The role of the DNRE in assisting in the formulation of solid waste management plans;
3. Whether DNRE approval of a plan (solid waste plan) necessarily implies DNRE approval of provisions included in the plan that are not authorized by statute;
4. Whether a county can directly regulate the operation of privately owned solid waste landfill if the legislature has delegated authority to regulate landfill operations to the DNRE; and
5. 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.

---

<sup>1</sup> Pitsch incorporates by reference herein those factual summaries and briefs previously filed with this Court.

In response to the Court of Appeals questions, Mr. Jim Sygo, Deputy Director of the DNRE and Ms. Rhonda Oyer-Zimmerman, Chief of the Solid Waste Unit for the DNRE, were called to testify during the evidentiary hearing. Ms. Oyer-Zimmerman testified that an overall disposal cap was not expressly authorized under the terms of Part 115 or the regulations promulgated there under, however, it was her opinion that authorization was implied from various sections of Part 115 including Sections 11513, 11533, and 11538. Transcript, pgs. 46-48 and 61-67. Mr. Sygo testified that he could not specifically identify a section of Part 115 authorizing a disposal cap. Tr. pgs. 127, 151. He did state that following the US Supreme Court decision of *Fort Gratiot Sanitary Landfill, Inc. v Michigan Dept. of Natural Resources*, 504 US 353, 358; 112 S Ct 2019; 119 L Ed2nd 139 (1992), lawyers from Washington and other regulators discussed possible legislation authorizing disposal caps as a means to avoid the impact of the *Fort Gratiot* decision which held that a state could not expressly restrict the flow of interstate waste into Michigan. Tr. pgs. 169-171. Mr. Sygo confirmed that specific legislation has not been adopted authorizing disposal caps.

Ms. Oyer-Zimmerman also testified that the DNRE originally interpreted the annual cap in Ionia's Plan as an "import cap" and not a "disposal cap" as proclaimed by Ionia. Tr. pg. 54. In 2004, Ionia requested the DNRE to review the Plan and interpret the scope of the cap. Following such, the DNRE issued the opinion letter admitted as Trial Exhibit 2. According to Ms. Oyer-Zimmerman, an "import cap" only restricts waste imported from other Michigan counties into Ionia and does not restrict or prevent the import of waste from other states or foreign countries. Tr. pgs. 47-54. In December of 2009, however, after the Court of Appeals remanded this case back to the trial court, Ms. Oyer-Zimmerman and other individuals from the Department met with representatives from Ionia County and following that meeting, the Department changed its

opinion about the cap and decided it was an overall "disposal cap" restricting the disposal of waste in Ionia County from any location whether it came from out-of-state, foreign lands, other Michigan counties, or waste generated by Ionia County. Tr. pgs. 54-61. This change of opinion came about even though there was no change in the terms and content of the Plan.

Ms. Oyer-Zimmerman admitted that the Disposal Cap in Ionia's Plan was ambiguous and that there was no express reference in the Plan stating that the 100,000 ton cap was an overall disposal cap as opposed to an import cap. Tr. pgs. 74, 84. She agreed that the cap language in the Plan could be interpreted to mean that Pitsch could not accept more than 100,000 tons of waste from the Michigan counties identified in the Plan, having no impact on the amount of foreign or interstate waste Pitsch could accept at its landfill. Tr. pg. 78.

When reviewing the Department's Guide to Preparing The Solid Waste Management Plan Update Format (Trial Exhibit 4), Ms. Oyer-Zimmerman testified that the import tables therein, referencing Table 1-A, may be interpreted to apply to waste imported into Michigan from other states and not just Michigan counties. Tr. pgs. 67, 83. Mr. Sygo, however, contradicted Ms. Oyer-Zimmerman's testimony and stated that in accordance with the *Fort Gratiot* decision from the US Supreme Court, a county solid waste plan cannot expressly restrict the import of interstate or foreign waste into Michigan and therefore Table 1-A in the guidance document and in the Ionia Plan must only be used to reference the importation of waste from other Michigan counties. Tr. pgs. 119, 151-152. See also, Trial Exhibit 3, the Department's "General Guidance for Preparation of Solid Waste Management Plan Updates" dated June 13, 1997.

Ms. Oyer-Zimmerman also testified about the DNRE's role in assisting in the formulation of a county solid waste plan which her Unit is responsible to oversee. She stated that when the Department receives a plan update, such as Trial Exhibit 1, her Unit personnel check the plan to

make sure that key components exist in the plan and that all appropriate processes and approvals as required in Part 115 have been met. Tr. pg. 37. This includes confirming that the public comment period has been complied with and that the appropriate local municipality approvals are included in the Plan. Tr. pgs. 37. The Department also reviews the plan to make sure the "minimum requirements" in Section 11538 have been included in the plan. Tr. pg. 38. A disposal cap such as the one included in Ionia's Plan is not a minimum requirement in Section 11538 subject to the Department's review.

Mr. Sygo testified that as part of the Department's review of a Plan, personnel do not necessarily look at disposal caps included in a plan, but simply look to make sure that the plan has provided for sufficient capacity for the disposal of a county's solid waste. Tr. pgs. 136-137. The Department reviews the plan for the minimum threshold of 5 years of "placed capacity" and 10 years of "planning capacity." *Id.* He stated that the only time the Department might look at a disposal cap is if other counties have identified the county as one with a reciprocal agreement involving the import and export of waste between the counties. Tr. pgs. 137-138.

Mr. Sygo also insinuated that disposal caps were not likely needed to preserve landfill capacity for a county because Michigan has an abundance of unused landfill capacity. Tr. pg. 136. He stated that Michigan has approximately 23 years of landfill capacity available for use. Tr. pg. 139. He also stated that disposal caps can cause solid waste planning problems for the state and that an involuntary disposal cap, such as the one included in Ionia's Plan, is not common. Tr. pgs. 143-144, 146. He also admitted that a purpose for a disposal cap was to restrict interstate waste flow into Michigan. Tr. pg. 147.

Mr. Sygo also testified that Ionia's Disposal Cap was an operational restriction on Pitsch's landfill and that a county does not have the right under Part 115 to regulate the operation and

infrastructure of a landfill site. Tr. pgs. 154-156. Contrary to Mr. Sygo's testimony, Ms. Oyer-Zimmerman testified that it was her understanding that Part 115 authorized counties to regulate the operation of a landfill through the use of an ordinance. Tr. pg. 91. She specifically relied upon Section 11538(8) for this authority. Tr. pg. 92. Section 11538(8), however, only provides that an ordinance, law, rule, regulation, policy or practice of a municipality, county or governmental authority created by statute which prohibits or regulates the location or development of a solid waste disposal area, and which is not part of or not consistent with the approved solid waste management plan for the county, shall be considered in conflict with Part 115 and shall not be enforceable. MCL 324.11538(8). Section 11538(8). It does not expressly authorize a county to implement an ordinance to control the operation of a landfill. Section 11538(8) only applies to the locating and development of a landfill, not its operation. Ms. Oyer-Zimmerman also agreed that the Disposal Cap was an operational regulation because it could limit the amount of waste the facility can receive impacting Pitsch's revenues and ability to operate and expand. Tr. pg. 93. She also agreed that the Disposal Cap could impact Pitsch's ability to make improvements to the landfill's infrastructure both on site and off, including access roads by limiting the landfill's business. Tr. pg. 93.

In respect to the Department's approval of a county plan, Ms. Oyer-Zimmerman testified that the Department's approval does not necessarily mean that all of the plan provisions are authorized by the Department. Tr. pg. 88. This testimony was in reference to the language included in the Department's approval letter sent to Ionia following its review of the Plan which states that the DNRE approval does not extend to provisions neither required or expressly authorized for inclusion in the Plan. Trial Exhibit 7.

Gary Pitsch, President of Pitsch Sanitary Landfill, testified that the Disposal Cap has impacted Pitsch's landfill operations by limiting the amount of waste it can accept and has prevented his company from expanding and selling the business to another party. Tr. pgs. 200, 204. Pitsch previously lost the opportunities to sell the landfill to either Waste Management or Transload of America, both companies interested in purchasing the landfill, because Ionia refused to increase the Disposal Cap to an amount which would make the sale feasible so a buyer could operate and maintain the landfill in compliance with Part 115 while still making a profit. Tr. pg. 200. He further stated that the Disposal Cap can impact Pitsch's ability to maintain and improve the infrastructure for the landfill. It can limit company revenues making it more difficult to make improvements at the landfill both on site and off site, such as to Johnson Road, the road accessing the landfill which Ionia has required Pitsch to improve. Tr. pgs. 204-205.

Mr. Pitsch also testified that the cap discussed during the Solid Waste Planning Committee meetings was imposed simply to preserve Ionia's landfill capacity and no other purpose was discussed. Tr. pg. 199. See also, Trial Exhibit 1, pgs. 154-176. Ironically, Ionia now claims that the purpose of the cap is to prevent Pitsch from expanding and selling its landfill as demanded by the local residents. Ms. Elizabeth Robbins, the Resource Recovery Manager for Ionia County, testified that although the cap's primary purpose is to preserve capacity (which arguably is not needed according to Mr. Sygo), the cap is also in place to control landfill operations and expansion. She testified that by limiting the amount of waste Pitsch can accept, the County is able to control the amount of truck traffic on Johnson Road and the nuisance of having a landfill in the community. Tr. pgs. 236-238. She stated residents have complained about noise, birds, odor and litter at the landfill and the County, by restricting the amount of waste Pitsch can accept at the landfill, reduces the landfill nuisance that impacts the local

citizens. *Id.* She also admitted that the County did not agree to increase the Disposal Cap as requested by Pitsch and Transload of America when Pitsch was attempting to sell the landfill for no other reason than the public outcry and opposition to the sale and expansion of the landfill. Tr. pgs. 238, 251. Further, Mr. Pitsch and Ms. Robbins both agreed that Pitsch Sanitary Landfill only receives approximately 5% of the waste generated within Ionia County. Tr. pgs. 208, 253. Substantially all of Ionia's waste is exported out to other landfills located in other counties. *Id.* Ironically, Ionia fights this case to prevent waste from being disposed of at Pitsch's landfill, but is more than willing to allow its waste to be exported out of the county to other Michigan counties requiring those counties to deal with the same landfill nuisance and infrastructure issues Ionia seeks to avoid by imposing the Disposal Cap on Pitsch's landfill.

### ARGUMENT

#### A. **The Solid Waste Management Act (Part 115) does not authorize Ionia to limit the volume of solid waste disposal at Pitsch Sanitary Landfill.**

A municipal corporation such as Ionia has no inherent powers. *Bivens v Grand Rapids*, 443 Mich 391, 397; 505 NW2d 239 (1993); *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). The scope of a local government's authority is determined by Const 1963, art 7 and by statute. *City of Taylor v Detroit Edison Co*, 475 Mich 109; 715 NW2d 28 (2006).

Article 7 of the Constitution of 1963 enumerates the general authority and limits on the authority of local governments, such as counties, townships, cities, and villages. Subject to authority specifically granted in the Constitution, local governments derive their authority from the Legislature. We have held that:

“[local governments] have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant.” *Id.* at 115.

“A power is ‘necessarily implied’ if it is essential to the exercise of authority that is expressly granted.” *Conlin v Scio Tp*, 262 Mich App 379, 385-386; 686 NW2d 16 (2004) (quoting *Michigan Municipal Liability & Property Pool v Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App 183, 191; 597 NW2d 187 (1999)). Because Ionia does not have express authority in Part 115 to impose the Disposal Cap on Pitsch, its authority must be ‘necessarily implied’. To be necessarily implied, it must be found that implementing the Disposal Cap is essential to Ionia's authority to draft its Plan. A Disposal Cap is not essential to drafting the Plan and it is not a minimum requirement for the Plan, and therefore Ionia does not have the necessary implied authority to impose the Disposal Cap on Pitsch.

Part 115 implements “Michigan’s comprehensive program of regulating the collection, transportation, and disposal of solid waste.” *Fort Gratiot Sanitary Landfill, Inc v Mich Dept of Natural Resources*, 504 US 353, 358; 112 S Ct 2019; 119 L Ed 2d 139 (1992). Although the act “contemplate[s] significant local input in the development of county plans,” the management and disposal of solid waste are subject to “a cohesive scheme of centralized and uniform controls” exclusively regulated by MDEQ [now DNRE]. *Southeastern Oakland County Incineration Authority v Avon Township*, 144 Mich App 39; 372 NW2d 678 (1985). As part of the regulatory framework governing solid waste management under Part 115, the Legislature has imposed specific responsibilities and granted limited authority to counties and other municipalities. The key component involves submission of an initial solid waste management plan to identify future disposal needs, select appropriate alternatives for meeting those needs, and adopt an enforceable program to carry out the plan. Because Ionia chose to prepare a solid waste management plan under Part 115, it is governed by the planning process and substantive requirements established in Part 115. MCL 324.11533(1) & (2); 324.11534-324.11539.

The substantive requirements for developing and submitting a plan are governed by statute and a detailed set of administrative rules promulgated by DNRE. MCL 324.11538(1) requires DNRE to promulgate rules for the development, form and submission of plans. The statute establishes a lengthy list of requirements described at the evidentiary hearing as the "minimum requirements" to be covered by DNRE's rules, non of which authorize or require disposal caps. The manner of calculating a counties future disposal needs and identifying available disposal areas with sufficient capacity is described in MCL 324.11538(2).

If a county is unable to identify available disposal areas as required in Part 115, it is not authorized to implement disposal caps but must follow the requirements for an interim siting mechanism and annual certification process detailed in MCL 324.11538(3) & (4). These sections effectively force a county to approve new disposal areas in the county if sufficient capacity does not exist. A county's plan must include "both a process and a set of minimum siting criteria, both of which are not subject to interpretation or discretionary acts by the planning entity, and which if met by an applicant submitting a disposal area proposal, will guarantee a finding of consistency with the plan." An interim siting mechanism remains operative until more than 66 months of disposal capacity is once again available. See also, MCL 324.11537a.

Further, specific restrictions on the acceptance of and export of solid waste to other counties are set forth in MCL 324.11538(6):

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

This comprehensive statutory framework for solid waste management plans is implemented through an even lengthier and more detailed volume of regulations. The rules

governing plans, 1999 AC, R 299.4701-299.4712, similarly impose specific responsibilities and grant limited authority to counties and other municipalities. The procedure for preparation and approval of plans is set forth in Rule 299.4703-299.4708.

Rule 299.4711 establishes a plan format and content that must be followed to comply with Part 115 and to be eligible for state funding. A county is required to evaluate and rank proposed alternative systems for meeting projected disposal needs. Rule 299.4711(e)(i). It must identify and explain its selected alternatives based on specific criteria. Rule 299.4711(e)(ii) The comprehensive set of rules and regulations do not include any express or implied authority to include a disposal cap in a plan as a mechanism to preserve landfill capacity or as part of the planning process.

Through this detailed and comprehensive statutory and regulatory scheme, Part 115 defines a county's responsibilities and authority for ensuring sufficient solid waste disposal capacity for the period covered by the solid waste management plan and updates. Part 115 requires a county to either (1) ensure the availability of disposal capacity at specific in-county sites through projected volume reductions using specified source reduction devices; (2) ensure the availability of disposal capacity through reciprocal agreements allowing disposal at specific sites located in other counties; or (3) adopt an interim siting mechanism process that will ensure capacity by approval of new disposal areas. A county does not have authority to ensure future capacity by prohibiting a local landfill from engaging in licensed disposal operations. Ionia County was not empowered to meet its planning responsibilities under Part 115 by taking away Pitsch's right to engage in its licensed business. Instead, Ionia county was required to select one or more of the specific alternatives provided by Part 115 and its regulations.

**B. Ionia County imposed the annual waste disposal limit on Pitsch's operations as an unauthorized method to satisfy its statutory responsibility to plan for disposal of waste generated in the county.**

The original sole purpose for Ionia's annual disposal limit was clearly expressed in the initial proposed plan:

Note: The 100,000 ton per year cap is for the Pitsch Sanitary Landfill. **The cap is to ensure the County of Ionia 20 + years of capacity....** Trial Exhibit 1, pg. 67 (emphasis added).

After the proposal was submitted for review and approval, DNRE objected to including a negotiable disposal cap in a solid waste management plan. Trial Exhibit 1, pg. 314. In response, Ionia made the requested change, informing DNRE that the note would be removed and provided that "the annual cap of 100,000 tons per year for Pitsch Sanitary Landfill is the only annual cap in the Plan unless amended." Trial Exhibit 1, pg. 320. Although the note and its reference to the county's purpose was removed, the final plan continued to demonstrate the county's intention to expropriate Pitsch's available capacity for its future planning disposal needs. As evidenced in the Plans "Executive Summary," the County states that Pitsch's landfill is the "main landfill utilized by Ionia County" which we now know is not accurate because approximately 95% of Ionia's waste is exported out of the county for disposal. Trial Exhibit 1, pg 010 and Tr. pgs. 208 and 253.

In the section identifying the "SELECTED ALTERNATIVES," Ionia states that the "following strategies and methods will be utilized by the County to handle its solid waste for the next five and ten year planning periods."

- Landfilling – continued reliance for the waste disposal at the Pitsch Sanitary Landfill for the five and ten year planning period. [*Id.*]

The note in the original plan stated that "[t]his cap is in no way to limit the business of Pitsch Sanitary Landfill and any revenue due to the Landfill." Trial Exhibit 1, pg. 010. That

statement is implausible on its face (as testified to by all of the witnesses at the evidentiary hearing)— a restriction on the volume of waste that Pitsch could accept at its landfill directly and unavoidably limited its business and revenues. Contrary to the originally articulated purpose, Ionia has admitted, through the testimony of Ms. Robbins, that Ionia's current purpose for the annual Disposal Cap is to limit and restrict Pitsch's business operations including its use to restrict the sale of the landfill and its expansion.

The decision to impose an annual volume disposal limit on Pitsch's operations was unnecessary as well as unauthorized. Ionia County elected to accept waste from and to export waste to other counties. MCL 324.11513 & 324.11538(6). Having opened its county to waste from other communities, and also having chosen to obtain capacity for its future needs at landfills in other counties, Ionia County cannot argue that it must meet its planning responsibilities by preserving the capacity of the only local landfill for its own needs. The solid waste management plan contains proposals from several waste disposal facilities outside the county who have agreed to provide Ionia with all of the capacity necessary to meet Ionia's solid waste needs as required under Part 115. Trial Exhibit 1, pgs. 180-213.

Ionia plainly lacks any valid reason to be concerned about the availability of landfill capacity. Michigan has an abundance of landfill capacity available for Ionia's use. But, even if Ionia had a valid concern about capacity, Part 115 only authorized certain measures to deal with such concerns. The statute provides that if landfill capacity falls below a certain level, “applications for a finding of consistency from the proposers of disposal area capacity will be received by the planning agency commencing on January 1...” Once an interim siting mechanism is operative, it remains in effect for at least 90 days or until more than 66 months of disposal capacity is once again available. MCL 324.11538(3). Thus, the express statutory

provisions for dealing with potential shortfalls in landfill capacity prohibit any claim of implied authority for Ionia County to limit Pitsch's operations as a means to maintain sufficient disposal capacity. Instead, Part 115 requires Ionia County to authorize the development of additional landfill capacity and space. MCL 324.11538(3). Part 115 does not authorize a county to restrict the lawful operations of a licensed landfill with unused capacity. Instead, Part 115 mandates that assuring future disposal capacity must be accomplished by identifying available sites, coordinating with other local governments, implementing source reduction devices, and establishing an interim siting mechanism for approval of new landfills.

**C. Ionia County's imposition of an annual waste disposal limit is preempted by DNRE's exclusive regulatory authority over operations by licensed landfills. The annual disposal limit improperly restricts Pitsch's licensed operations.**

Ionia's lack of authority is further confirmed by DNRE's exclusive regulatory authority over landfill operations under Part 115. The annual disposal limit imposed by the county directly regulates the day-to-day operations of the landfill. The county's effort, as admitted by Ms. Robbins, to regulate the landfill operations and expansion through its Plan and the Disposal Cap is preempted by Part 115.

The preemptive scope of DNRE's regulatory authority and the limited responsibilities given to municipalities under Part 115 were discussed in *Southeastern Oakland County Incineration Authority, supra*, 144 Mich App 39 (1985). A county incinerator authority sought a declaratory judgment that its landfill operations were not subject to regulation by the township.

The Court of Appeals applied the preemption test from *People v Llewellyn*, 401 Mich 314, 322-324, 257 NW2d 902 (1977). Under that test, a local government "may not enact an ordinance if (1) the ordinance directly conflicts with the state statutory scheme, or (2) the state statutory scheme preempts the ordinance by occupying the field of regulation that the

municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation.”

In making the determination that the state has thus pre-empted the field of regulation which the city seeks to enter in this case, we look to certain guidelines.

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. *Id.* 144 Mich App at 43 (quoting *Llewellyn*)

The Court began by finding that Part 115 is not “expressly preemptive,” *i.e.*, it has “no provision that provides for exclusive state control.” However, the pervasiveness of the statutory scheme to regulate solid waste disposal strictly limited the role of local governments. The Court stated:

The director of the DNR is responsible for issuing construction permits, for issuing licenses to operate, and may revoke licenses or condition licensing. We believe from the comprehensiveness of this statutory scheme that the Legislature intended to preempt this field. *Id.* at 44.

Concluding that “the management and disposal of solid wastes is clearly an area which demands uniform statewide treatment,” *id.* at 45, this Court held that:

Accordingly, we find that the statutory scheme prevents local regulation concerning the operation of a landfill. Plaintiff is permitted to conduct its affairs without complying with local regulations as long as it complies with the statewide uniform regulations. *Id.* at 46.

“[L]ocal concerns are taken into account and given consideration” through the solid waste management planning process. *Id.* Imposing an involuntary annual disposal cap on a

landfill, which is not authorized under Part 115, exceeds the regulatory authority a local municipality has over a privately owned landfill which is subject to the statewide uniform regulations of Part 115. This conclusion was followed in *Weber v Orion Township Building Inspector*, 149 Mich App 660; 386 NW2d 635 (1986) where the Court of Appeals affirmed a determination that a township could not enforce its ordinances to prevent operation of a licensed landfill. “Moreover, all local regulations concerning the operation of a landfill are preempted by the Solid Waste Management Act.” *Id.* at 663 (citing *Southeastern Oakland*).

The “exclusive state regulation regarding location, development, and operation of solid waste disposal areas” was again recognized in *County of Saginaw v John Sexton Corp of Michigan*, 232 Mich App 202, 216; 591 NW2d 52 (1998). Local surcharges on waste disposal were held to be permissible because the fees did not “interfere with the state’s uniform scheme regulating landfill location, development, and operation.” As these cases hold, any attempt to regulate landfill operations is preempted by DNRE’s exclusive authority over solid waste management and disposal.

The annual disposal limit imposed by Ionia County directly regulates Pitsch’s waste disposal operations. Pitsch has a validly licensed landfill. Trial Exhibit 8. Despite having available capacity to accept more than 100,000 tons of waste annually as authorized under its state issued license, Pitsch cannot fully operate its business under the county’s plan. Instead, it can only accept a limited amount of business. According to Gary Pitsch, once the 100,000 ton limit is reached, Pitsch would be required to cease its operations and refuse any additional waste disposal business despite having the capacity and license. Further, the testimony of Ms. Robbins, establishes that Ionia County is using the disposal cap as a means to control the operation, sale and expansion of the Pitsch Sanitary Landfill and not to preserve its capacity

concerns. The direct and financially crushing impact of the county's restriction is confirmed by Pitsch's lost opportunity to sell its landfill operations. The testimony of all of the witnesses in this case establishes that the Disposal Cap restricts Pitsch's business operations and its ability to expand. Ionia freely admits it now uses the cap, not to preserve capacity, but to restrict Pitsch's solid waste business purpose which violates the scope and intent of the Plan and Part 115. Such operational control by Ionia is preempted by Part 115.

**D. Ionia County has not demonstrated any authority for imposing the annual solid waste disposal limit on Pitsch Sanitary Landfill.**

Ionia County attempts to justify its unilateral decision to restrict Pitsch's licensed operations on several grounds. First, Ionia County has argued that Part 115 authorized counties to impose daily and annual limits on disposal at landfills. No statutory citation is offered to support that contention because as is evident from the testimony of Ms. Oyer-Zimmerman, no express authority exists. Absent any statutory reference, the county has asserted that DNRE's plan format (Table 1-A in Trial Exhibit 1, pg. 069) authorized the cap. However, the plan format and the table headings, as confirmed by Mr. Sygo, apply only to waste imports between Michigan counties, not interstate and foreign waste, or waste generated by Ionia itself.

Second, the County has argued that the disposal limit is necessary due to the condition of roads used by trucks going to Pitsch's landfill. However, the adequacy of access roads and other infrastructure is reviewed and determined as part of the licensing and construction permitting process. A landfill construction permit application must include an environmental assessment that contains information about the public roads used for access and the anticipated waste disposal volume. 1999 AC, R 299.4902(1)(c) & R 299.4903(2). DNRE has the sole regulatory authority to make decisions on construction permitting and landfill licensing. A county cannot

use a solid waste management plan to override DNRE's decision that access roads are adequate for landfill construction and operation.

Third, the County's belief that Pitsch doesn't have enough customers or business to require more than 100,000 tons in a year is both speculative, incorrect and irrelevant. As indicated by the lost business opportunities with Waste Management and Transload of America, there was a very real possibility for disposal operations requiring more than the county's unilaterally imposed limit. The relevant question is not whether Pitsch would have more than 100,000 tons a year in disposal business, but whether Ionia has the statutory authority to prohibit Pitsch's landfill operations from exceeding that level.

Fourth, the existence of disposal limits in other communities is also not relevant to Ionia County's lack of statutory authority. Moreover, as shown during the evidentiary hearing through admitted Trial Exhibits 9, 10, 11, 12, 13 and 14, those limits were negotiated and agreed upon by the landfill operators and communities. None involved the type of unilateral restriction imposed on Pitsch by Ionia County.

Fifth, Ionia's argument that the Disposal Cap can be used to prevent the sale of the landfill to a company who wanted to import waste from New Jersey based on public outcry is the reason why the Disposal Cap should be found to be preempted by Part 115. This is the type of "Not In My Backyard" argument requiring a finding that the Disposal Cap is not authorized by Part 115. As admitted by Ms. Robbins, the cap was enforced and not amended because of public outcry about the possible sale and expansion of the landfill. Pitsch has the constitutional right to offer its landfill services for the disposal of waste generated in other states and countries. Additionally, if a county is allowed to control how much solid waste is handled within its borders and is allowed to limit expansion of landfills through the use of disposal caps, the state

will end up with 83 different county disposal caps, which may prevent the disposal of any waste generated in Michigan in any county. Such a scheme will have a substantial impact on the state's ability to control and manage the solid waste generated by its citizens. Such a problem requires a finding that Ionia's Disposal Cap is not authorized and is preempted by Part 115.

Finally, Ionia's argument that the annual disposal limit has been actually imposed by DNRE since the plan was subject to that agency's approval is not supported by the evidence in this case. As stated by Ms. Oyer-Zimmerman, the DNRE admits that simply approving a plan does not mean that it approves all of the plan's terms. The DNRE merely reviews a plan for the minimum requirements and not for disposal caps. Nothing in the DNRE approval letter indicates that the Department was aware that the 100,000 ton cap was unilaterally imposed as opposed to being a negotiated term like those employed in other counties. The county's effort to shift responsibility to DNRE is not supported by the terms of the approval letter which states that the Plan may contain provisions not authorized for inclusion in a solid waste plan and the DNRE approval does not extend to those provisions. Trial Exhibit 1 pg. 328.

Ionia may also argue that this Court should defer to the DNRE's supposed interpretation of Part 115 for approval of a disposal cap, however, this is contrary to the standard recently announced by the Supreme Court. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90; 754 NW2d 259 (2008). "[A]n agency's interpretation of a statute is entitled to 'respectful consideration,' but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation." Instead, "courts must respect legislative decisions and interpret statutes according to their plain language." *Id.* at 93. Nothing in Part 115 authorizes DNRE to impose disposal volume limitations on a licensed landfill. To the contrary, "[i]ssuance of an operating license by the department authorizes the licensee to

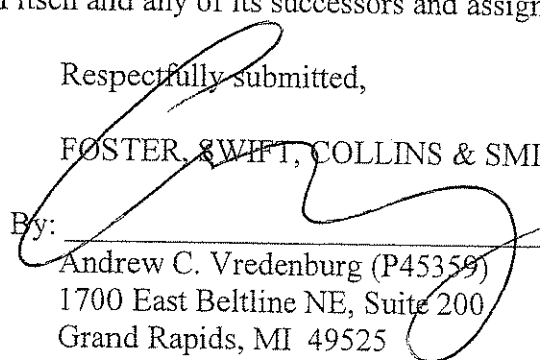
accept waste for disposal in certified portions of the disposal area” covered by required bonding and financial assurances. MCL 324.11516(5). Thus, the only volume limitation is derived from the physical capacity of the “certified portions of the disposal area.” Indeed, a license application only requires an applicant to submit information about “the type of disposal area proposed,” “the type of waste proposed for disposal,” and “an estimate of remaining permitted capacity.” 1999 AC, R 299.4922(1). The rule does not require an applicant to submit any information about proposed annual disposal volumes. More directly, DNRE did not seek to impose and did not impose any annual limitations on disposal volume when it licensed Pitsch to operate its landfill facility. The operating licenses authorize Pitsch to dispose of waste in specified areas within the landfill, *i.e.*, licensed landfill cell constructed in accordance with approved landfill construction plans. The DNRE licenses do not restrict the volume of waste that Pitsch can accept on an annual basis. Further, the DNRE has never done a legal analysis to determine whether disposal caps are implicitly authorized under Part 115.

**CONCLUSION**

Based on the foregoing argument, law, and testimony presented and exhibits admitted during the evidentiary hearing, it is requested that this Court enter judgment in favor of Pitsch on Count I of its amended complaint and declare that the 100,000 ton annual disposal cap in Ionia's Plan violates Part 115 and is preempted thereby and enter a permanent injunction barring the enforcement of the disposal cap against Pitsch and any of its successors and assigns.

Respectfully submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

By:   
Andrew C. Vredenburg (P45359)  
1700 East Beltline NE, Suite 200  
Grand Rapids, MI 49525

Dated: September 29, 2010

