Waste Management

An Example of Accelerating Regulation

by Arthur H. Siegal

This issue of LACHES demonstrates the increasing number and complexity of laws and regulations that deal with environmental issues. Laws and regulations that address solid waste management and disposal are no exception and, in fact, reflect the overall pattern of ever more complex regulations of all aspects of environmental law. While important in its own right because of its impact on every product we make or buy, the regulation of solid waste management and disposal reflects the degree of intensive government intrusion into all aspects of our daily lives. As recently as 30 years ago, solid waste management was barely regulated, being viewed only as a possible fire threat. Beginning in the late 1970's, the state and federal governments have taken an increasingly active role in regulating all aspects of solid waste management. This regulatory effort has gone well beyond attempts to provide environmental protection and has even crept into market regulation.

Landfill Regulations

In 1978, in response to federal amendments to the Solid Waste Disposal Act, USC §§6901, *et seq.*, Michigan enacted the Solid Waste Management Act, 1978 PA 641, as amended, MCL §§299.401 *et seq.* (Act 641). Act 641 was intended to build on the state's experience with prior laws and to address issues raised by federal legislation and regulations. Act 641, as enacted, provided for the permitting, licensing and regulation of solid waste disposal areas;[1] the regulation of parties transporting solid waste; and the development of county solid waste management plans, expanding concepts begun with earlier laws. Following the adoption of Act 641, the Michigan Department of Natural Resources (DNR) promulgated rules that governed, among other things, the design, construction, operation, closure and post-closure maintenance of sanitary landfills.[2]

This regulatory effort has gone well beyond attempts to provide environmental protection and has even crept into market regulation.

Since 1982, when the first Act 641 rules were adopted, the DNR has taken an increasingly strict view of the rules' design standards. Over the years, the DNR took a stronger position that these design standards are only minimums and that it could require additional engineering and construction work be done before a facility would be licensed. In fact, over the last few years, a large number of Act 641 construction permits were issued requiring that sites have at least two synthetic liners — and in many cases two separate layers of clay in addition to the liners — even though Act 641 rules did not require them.[3]

In 1988, the U.S. Environmental Protection Agency (EPA) proposed adopting national uniform landfill design, construction, operation and closure standards.[4] The 1988 proposal focused on using a complex risk assessment method to evaluate proposed landfill designs. On October 9, 1981, the EPA formally promulgated its so-called Subtitle D Regulations for municipal solid waste landfills, which were scheduled to begin taking effect on October 9, 1993.[5] On July 28, 1993, the EPA extended the effective date of the regulations by six months for certain small landfills and delayed for one year, until April of 1995, the regulations' financial assurance requirements for all landfills.[6]

The federal regulations are complicated but, in many ways, paralleled the 1982 Act 641 rules. Two significant differences between the new Subtitle D Regulations and the former Act 641 rules are that, under the federal regulations, all new landfill units and lateral expansions must be built using a composite liner.[7] If a landfill site has no native clay, this would significantly increase the cost of construction.

The requirements for closing a landfill appear relatively innocuous,[8] however, the EPA has construed the federal requirement that a landfill's cover be as impermeable as its bottom liner to mean that if a landfill has two composite liners, it must have two composite covers.[9] This is a significant change from the types of closures that were permitted in the past and will significantly increase costs.

The EPA provided three mecha-

nisms by which the requirements with which the regulated community must comply are determined, strongly encouraging the states to develop their own regulatory programs.[10] In response to the federal program, the DNR revised the rules under Act 641, which expand on the requirements of the federal Subtitle D Regulations.[11] On March 10, 1994, the EPA approved the new DNR rules, except the one that specifies field-filtering of groundwater samples.[12] Once that approval was given, the EPA surrendered responsibility for enforcing its regulatory program.[13] The EPA told the DNR that all partial approvals would expire in October 1995.

The EPA also noted that the DNR had not proposed rules requiring landfill owners and operators to provide financial assurance that they will be able to close their landfills at the end of their operational lives and then maintain them for 30 years following closure. Act 641 does have two mechanisms by which a landfill is to provide such financial assurance but the DNR views these as inadequate and is preparing proposed amendments to the act that would meet or exceed the Subtitle D Regulations' requirement for financial assurance.

The rules promulgated by the DNR in October 1993 stated that all new general municipal solid waste landfills could be built with either: (a) one composite liner and one leachate collection system if the landfill is to be built over sufficient soils to prevent the percolation of contaminants to the groundwater table for 50 years;[14] or (b) two liners with two systems to collect liquid percolating through the waste.[15] The upper liner must be a composite. The lower liner may be a composite or other soil system.

Any party operating a landfill that does not satisfy the requirements of the Subtitle D Regulations is potentially subject to a citizen's suit.[16]

There are similarly increased requirements for the design of non-hazardous "Type III landfills" that generally accept construction and demolition waste and/or wastes of a similar nature that have a low potential to impact the environment.[17]

New Regulatory Initiatives

In December 1993, the Natural Resources Management and Environmental Code Commission released a 1,600-page proposed Environmental and Natural Resources Code. The Commission's recommendations included a ban on landfilling tires, batteries and major appliances by 1996; creation of a solid waste recycling fund, to be funded by a tipping fee of $1/ton on all solid and hazardous waste deposits made to landfills or incinerators, a $1 per tire surcharge and unredeemed battery deposits to fund a variety of solid waste reduction programs. The Code Commission has since determined not to draft a code, but to make recommendations to the governor that will allow a code to be developed, but these concepts are sure to be raised again.

Recycling

Recycling has been widely lauded as the ultimate solution to the solid waste "problem" but it has been acknowledged that recycling is not yet fully cost effective and, therefore, often requires government subsidization. Act 641 was amended in 1991 to ban from landfills yard waste from municipal sources as of March 1993 and from all sources as of March 1995.[18] While some communities have begun programs to compost these materials, many have not and it is not clear how these materials will be handled. With respect to recycling, the counties and the DNR want: (a) state-mandated recycling; (b) to amend 1988 PA 138[19] to provide "an enforceable means of collection of the surcharge" that act provides for; (c) county authority to license haulers; and (d) subsidization of the use of secondary materials to create markets for those materials.

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During 1992 and 1993, the DNR reviewed the issue of legislation to promote recycling. In January 1994, it recommended to the Natural Resources Commission (NRC) that that federal agency promote legislation: (1) supporting pricing of disposal based on the quantity of waste disposed of; and (2) supporting continuing financial and technical assistance for recycling. Industry groups have challenged the proposal as focusing too much on the supply of recyclables and not enough on the demand for them, as unnecessary given the large increase of recyclable collection programs without any mandating legislation, and as too dramatic a change In the practices of too many municipalities unnecessarily.

Limitations on Markets

Act 641 imposes a requirement that each county develop, either on its own or with other counties, a solid waste management plan to assist in assuring it will have sufficient capacity to dispose of the solid waste it generates over five- and twenty-year periods.[20] In 1988, in response to the then-widely publicized East Coast "solid waste crisis," the Michigan legislature amended Act 641 to also provide that waste could not be moved into or out of a county unless the county's solid waste management plan "explicitly authorizes" it to do so.[21] For waste leaving one Michigan county and entering another, that service had to be explicitly authorized in the solid waste management plans of both.[22] These amendments lead to significant confusion and litigation. Among other things, the DNR has told counties they were obligated to enter into "reciprocal agreements"; and specify locations and quantities of waste before waste could enter or exit a county. The natural effect of this requirement was to create artificial market monopolies and limit competition between disposal options in different counties.[23] A number of counties with available disposal capacity have chosen to hoard it, encouraging their neighbors to develop their own. Of course, such actions ignore the regional patterns of waste management that existed before Act 641 was amended. See e.g., the actions of St. Clair County that led to *Fort Gratiot Sanitary Landfill, Inc. v DNR*, 504 U.S. ___(1992), in which the U.S. Supreme Court invalidated Act 641's limits on the acceptance of out-of-state waste as a violation of the U.S. Constitution's Commerce Clause.[24] That decision crystallized the need for changes to Act 641's planning system.

In 1991, the DNR convened groups to review, and consider revisions to, Act 641's planning provisions. The DNR met with representatives of Michigan's counties and then with representatives from environmental groups and the solid waste industry. In March 1993 a task force composed of representatives from each group issued

a report on a number of changes that should be made to Act 641's planning program. Stating that it was relying on the task force's report, the DNR drafted a comprehensive set of amendments to Act 641 that would affect many of the positions the agency has taken in the past. The DNR presented its proposed draft at the NRC's February 9, 1994 meeting, signalling the next round of significant changes to Act 641. While some of these changes will streamline and improve the planning process, many are market regulations unrelated either to environmental protection or planning for solid waste disposal and will unnecessarily complicate matters, increase government bureaucracy, expand government power into new areas and provide no appreciable environmental benefit. If adopted as drafted, the proposed amendments would, among other things:

1. Provide for both county and the DNR to analyze the consistency of a proposed facility with the county solid waste plan;
2. Allow "captive" industrial waste monofills to exempt themselves from Act 641's requirement of plan consistency **and** from the DNR's ban on waste movement between counties, if such landfills comply with applicable local zoning and land use regulations;
3. Require counties to provide more specific limits on cross-county movement of waste, specifying volumes and sources of waste to be imported for disposal;
4. Provide new powers to new undefined local enforcement agencies;
5. Have plans last for 10 and not 20 years;
6. Permit plans to have alternative amendment procedures and "fast track" amendment processes and allow a planning unit to recertify its plan as its update, if it still satisfies the statutory requirements;
7. Permit the DNR to approve a plan with conditions or modifications and the DNR may also prepare **part** of a plan, at its discretion; and
8. Replace the former State-funded grant program to support planning with a surcharge to be paid by landfills and MSW incinerator ash landfills (except captive landfills).

The DNR's requirement that plans explicitly authorize the inter-county movement of waste by quantity and county of origin has been one of the DNR's unofficial policies since at least 1988 and was not approved by the work group. Despite the fact that there has never been a solid waste disposal capacity "crisis" in Michigan[25] and that disposal facilities have been sited in Michigan as needed, the DNR continues to insist on counting where each bag of waste is generated and disposed of to somehow ensure that there will be sufficient disposal capacity In the future.

The DNR's proposal to allow a county to designate new enforcement agencies other than the county's health department, which Act 641 allows the DNR to certify to administer parts of the program, is a prescription for disaster when possibly politically biased, untrained local solid waste committees may be transformed into government enforcement agencies with broad undefined powers.

Both the task force and the DNR agreed that regional planning should be encouraged because of the economies of scale inherent in larger landfills serving larger markets. An early DNR draft of the Act 641 amendments proposed to suggest to each county others with which it could jointly plan. A county not preparing a regional plan would have been required to explain why. Despite the recognition of the importance of regional planning, the DNR subsequently deleted the requirement that each county explain its reasons for not joining a regional planning effort.

Incentives to support regional planning, such as providing more funds for regional planning or only funding regional planning, were ignored.

By effectively granting the DNR a "line-item veto" over each and every element of a county's plan, the proposal would rob the counties of their local autonomy. If the DNR is going to step in and write a county's plan, that effort is rulemaking and should be accorded the appropriate level of public input.

An attempt to respond to the state's elimination of the program of matching grants to support solid waste planning, the DNR proposal does not clearly define the specific uses of monies collected or even how much would be collected through its "surcharge." Nor does it bar other local charges that might duplicate the state charge. This "blank check" is clearly inappropriate.

A House subcommittee began hearings in March to review Act 641, a proposed amendment to shorten the planning period to 10 years, and make explicit when a county must activate its siting mechanism.[26] Perhaps the DNR will explain why it is proposing changes to Act 641's planning program that have not been approved by both the counties **and** the regulated industry. Otherwise, the DNR should explain why its proposal is reasonable, environmentally protective and effective and what alternatives it reviewed that might obtain the same results more effectively.

Two recent U.S. Supreme Court decisions, *Oregon Waste Systems, Inc. v Department of Envt'l Quality*, No. 93-70 (April 4, 1994), and *C & A Carbone* v *Clarkstown*, (May 16, 1994), invalidating charges imposed on out-of-state waste, and invalidating municipalities keeping waste from leaving a local disposal facility, reflect growing judicial frustration with government attempts to exert controls over the solid waste market that would not be tolerated with any other article of commerce.

Conclusion

As noted, the heavy regulatory burden on landfill owners and operators is increasing and may be expected to increase further as the State of Michigan imposes new rules and adopts new legislation. It is not clear how much environmental protection will be gained through adherence to these new regulations. At the same time that the cost of constructing, operating, closing and maintaining a landfill is increasing, the state continues to try to curtail the markets available to landfill operators. The result of the combination of these two factors appears to be increased costs to the residents of the State of Michigan.

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Footnotes

1 The term waste "disposal area" is defined to include landfills, transfer facilities, processing plants (including resource recovery facilities and certain incinerators), or other solid waste handling or disposal facilities utilized in the disposal of solid waste, MCL §299.404(4). Although the other types of facilities are relevant and are touched on in this article, this article primarily focuses on landfills because they have been, and will likely continue to be, the primary method by which solid waste in Michigan has been disposed of.

2 1982 AACS R 299.4101-299.4807.

3 A so-called "composite" liner is made up of more than one type of material. *E.g.*, a synthetic liner combined with or laid on top of a clay layer that is either naturally occurring or constructed. *See e.g.*, 40 CFR §258.40(b). Under the new Act 641 rules discussed *infra*, a composite liner is to be made up of a synthetic liner at least 30 mils thick (and if high density polyethylene, at least 60 mils thick) and either at least two feet of compacted soils, a manufactured bentonite geocomposite or other soils approved by DNR. 1993 Mich. Reg. 9, R 299.4102(c).

4 53 Fed. Reg. 33314-33422 (Aug. 30,1988).

5 40 CFR §§257, 258.

6 58 Fed. Reg. 40568 (July 28,1993).

7 40 CF §258.40(5).

8 40 CFR §258.60.

9 57 Fed. Reg. 28626 (June 26, 1992). The new Act 641 rules discussed *infra* parallel this requirement.

10 56 Fed. Reg. 50995 (1991).

11 1993 Mich. Reg. 9 (1993). Under both Act 641 and Subtitle D regulations, landfills are required to sample groundwater downgradient of the landfill. 1993 Mich. Reg. 9 R 299.4440; 40 CFR §258 Subpart E. Under Act 641, DNR has directed landfills to report their groundwater monitoring results with respect to the dissolved portion of the sample, as opposed to the total sample (which includes any solid in the sample). Under the Subtitle D regulations, however, the landfill is required to report its groundwater monitoring results of the total sample. This conflict subjects the landfill operator to a double expense of sampling and analyzing its wells of the same parameters twice, when once would clearly suffice. This is just one example of the many possible conflicts between the Act 641 rules and the Subtitle D regulations.

12 59 Fed Reg. 11268 (Mar. 10, 1994).

13 51 Fed. Reg. 50995.

14 The Act 641 rules provide three options by which a landfill may satisfy this requirement. The most objectively verifiable option to demonstrate this degree of protection is to show that there is a continuous soil barrier with a maximum demonstrated permeability of 10^{-7} centimeters per second. This means that water moving through the clay would take at least one second to move .0000001 centimeters, or about 116 days to move 3.3 feet. 1993 Mich. Reg. 9 R 299.4422(2).

15 1993 Mich. Reg. 9 R 299.4422(3).

16 56 Fed. Reg. 50995.

17 1993 Mich. Reg. 9 R 299.4301 - 299.4319. The federal regulations, which addressed only those landfills that accept municipal refuse, did not address these types of landfills at all.

18 MCL 299.418a.

19 Codified at MCL §124.508a.

20 MCL §299 .425(1) .

21 MCL §299.431a; 299.430(2).

22 *Id.*

23 This is particularly curious in light of DNR's approach regarding encouraging recycling, discussed above, that relies on market forces to divert waste from landfills.

24 Interestingly, in some places, counties and cities have fought to keep waste generated within their boundaries, usually to support an inefficient municipally owned disposal facility. *See* Jeff Bailey, "Fighting City Hall - In a Tussle Over Trash, 2 Haulers Could Win Ruling Costly to Towns," *The Wall Street Journal*, Feb. 28,1994. This approach was ruled unconstitutional by the U.S. Supreme Court in May. *C & A Carbone, Inc.*, v *Town of Clarkstown, New York*, No. 92-1402, (May 16, 1994) 1994 WL 183594.

25 *See* Mike Williams, "Trash Threat Now Rubbish," *Detroit Free Press*, April 8, 1993, at 1, 12.

26 S.B. 1135.

LACHES 1994 Topical Schedule

Month	Issue Topic	Ad Deadline	Editorial Deadline
July	Solo Practitioner	June 1	May 1
August	Criminal Law	July 1	June 1
September	Entertainment Law	August 1	July 1
October	Intellectual Property Law	September 1	August 1
November	Employment Law	October 1	September 1
December	Children and the Law	November 1	October 1