House
Legislative
Analysis
Section

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SOLID WASTE; FINANCIAL ASSURANCE

House Bill 5867 with committee amendment
First Analysis (5-23-96)

Sponsor: Rep. Tom Alley
Committee: Conservation, Environment and Great Lakes

THE APPARENT PROBLEM:

Part 115 of the Natural Resources and Environmental Protection Act (NREPA) regulates the state's solid waste disposal areas. (Under Public Act 451 of 1994, which recodified Michigan's natural resources' and environmental statutes, Part 115 replaced provisions contained in Public Act 641 of 1978. However, the solid waste management provisions are still commonly referred to as "Public Act 641.") The provisions have remained virtually unchanged for several years. At present, however, the act's financial assurance requirements are not consistent with the financial assurance provisions of the federal law regulating solid waste -- subtitle D of the federal Solid Waste Disposal Act (42 U.S.C. 6945). The act's financial assurance provisions were established to provide for the long term care of disposal sites, and is of particular importance in the case of "orphan" sites -- leaking landfills for which no responsible party is available to accept the financial responsibility for cleanup. Legislation has been proposed that would make the financial assurance provisions of Michigan's solid waste management regulations consistent with federal law.

THE CONTENT OF THE BILL:

House Bill 5867 would amend Part 115 of the Natural Resources and Environmental Protection Act (NREPA), concerning solid waste management, to specify new financial assurance requirements for an applicant for a license to operate a landfill. Under the bill, "financial assurance" would be defined to mean the mechanisms used to demonstrate that the funds necessary to meet the cost of closure, postclosure maintenance and monitoring, and corrective action, would be available whenever they were needed.

Financial Assurance. Currently, an applicant for an operating license for a disposal area must submit a surety bond (defined under the bill to mean a financial instrument executed on a form approved by the Department of Environmental Quality [DEQ], including a surety bond, certificate of deposit, a cash bond, an irrevocable letter of credit, insurance, a trust fund, an escrow account, or a combination of any of these instruments in favor of the department) to the department to cover the cost of disposal area closing and post-closing monitoring and maintenance. "Insurance" would be defined under the bill to mean insurance that conformed to the requirements of the Code of Federal Regulations, provided by an insurer who had a certificate of authority to sell this line of coverage from the Michigan Commissioner of Insurance. An operating license applicant would be required, under the bill, to submit evidence of the required coverage by submitting a certificate of insurance that used wording approved by the department, and a certified true and complete copy of the insurance policy to the department. The bill would amend the act to modify the bonding requirements, as follows:

**The bond for a landfill must currently be in the amount of $20,000 per acre of licensed landfill, and $50,000 per acre of licensed landfill for a landfill that receives municipal solid waste incinerator ash. The money from the fees covers post-closure maintenance for a period of 30 years after the landfill is completed. The bill would require, instead, that an applicant submit the evidence of financial assurance established for a Type III landfill or a preexisting unit at a Type II landfill. The amount would have to be in the form of a bond in an amount equal to $20,000 per acre of licensed landfill within the solid waste boundary. In addition, a perpetual care fund would have to be maintained. Financial assurance for a Type II landfill that was an existing unit or a new unit would have to be in an amount equal to the cost, in current dollars, of hiring a third party to conduct closure, postclosure maintenance and monitoring, and, if necessary, corrective action. (Note: The bill does not define types I, II, or III landfills. However, the types of landfills are delineated in administrative rules as follows: Type I landfills are for the disposal of industrial waste that has been characterized as "hazardous" under Part 111

of NREPA, which involves hazardous waste management; Type II landfills are municipal solid waste landfills, which receive household waste, some commercial waste, and nonhazardous industrial waste; and Type III landfills are landfills that are not municipal or hazardous waste landfills, and can include those that receive construction waste, demolition waste, and some "low hazard" industrial waste.)

**The bond for a landfill that receives municipal solid waste incinerator ash must currently be in an amount equal to $40,000 per acre of licensed landfill. Each bond must provide assurance for the maintenance of the finished landfill for a period of 30 years after closure. Under the bill, financial assurance would have to be provided in an amount equal to the cost, in current dollars, of hiring a third party to perform closure, postclosure maintenance and monitoring, and if necessary, corrective action. In addition, an application for a Type II existing or new landfill would have to demonstrate financial assurance in accordance with the financial assurance requirements of the bill.

**Currently, a bond is required from a solid waste transfer facility, incinerator, processing plant, or other solid waste handling or disposal facility used in the disposal of solid waste. The bill would specify that a disposal area could be a combination of these facilities.

**Currently, an applicant for an operating license for a landfill may post a cash bond instead of a surety bond or certificate of deposit. The bill would specify, instead, that the owner or operator of a landfill could post a cash bond instead of other bonding mechanisms to fulfill the financial assurance requirements of the bill. The bill would require that a minimum amount equal to the remaining financial assurance amount, divided by the term of the operating license, would have to be paid to the department prior to licensure, with subsequent payments made annually in an amount equal to the remaining financial assurance, divided by the number of years remaining until the license expired.

**The act currently specifies that an applicant of a disposal area that is not a landfill who has accomplished closure or postclosure monitoring and maintenance may request a 50 percent reduction in the bond. The bill would specify, instead, that the owner or operator of the disposal area could request a 50 percent reduction in the bond during the two-year period after closure; at the end of the two-year period, the owner or operator could request that the department terminate the bond; and termination would be approved within 60 days provided that all waste and waste residues had been removed from the disposal area and that closure was certified.

**The act currently specifies that, if an applicant fails to comply with the closure and postclosure monitoring and maintenance requirements of the act, then the department may use the bond to fulfill those requirements. The bill would add that the bond could be used if the owner or operator, rather than the applicant, failed to comply to the extent necessary to correct such violations, after the DEQ had issued a violation notice or other order, and provided seven days' notice and opportunity for a hearing.

**Currently, the act specifies that a landfill that receives municipal solid waste incinerator ash must provide a bond or a letter of credit in an amount equal to $2 million, in addition to the required bond of $50,000 per acre of licensed landfill, to provide assurance for remedial action for a 30-year period after the landfill is closed. The bill would delete this provision.

The bill would specify that, under the terms of a surety bond, letter of credit, or insurance policy, the issuing institution would have to notify both the DEQ and the owner or operator at least 120 days before the expiration date or any cancellation of the bond. If the owner or operator did not extend the bond's effective date, or establish alternate financial assurance within 90 days after receipt of an expiration or cancellation notice by the issuing institution, the department could draw on the bond. The bill would also permit a person required to provide financial assurance to request a reduction in a bond, based upon the value of the applicant's perpetual care fund. The DEQ would be required to grant such a request within 60 days unless there were sufficient grounds for denial. If the request were granted, the DEQ would require a bond in an amount such that for Type II landfills, and Type II landfills that were preexisting units, the amount of money in the perpetual care fund, plus the amount of the reduced bond, equalled the maximum amount required in a fund, as provided under the bill.

The bill would also require that the DEQ release a bond if the amount in the perpetual care fund exceeded the amount of the financial assurance required for a Type II landfill or a preexisting unit at a Type II landfill. In addition, if money were disbursed from the fund prior to closure of a landfill, then the department could require a corresponding increase in the amount of bonding required, if necessary to meet the requirements of the bill.

Financial Test Using Standardized Costs. The bill would define "financial test" to mean a corporate or local government financial test or guarantee approved for Type II landfills under subtitle D of the federal

Solid Waste Disposal Act. An owner or operator could use a single financial test for more than one facility. Information submitted to the department to document compliance with the test would have to include a list showing the name and address of each facility and the amount of funds assured by the test for each facility. For purposes of the test, the owner or operator would have to aggregate the sum of the closure, postclosure, and corrective action costs it sought to assure with any other environmental obligations assured by a financial test under state or federal law. In addition, an applicant could utilize a financial test for up to, but not exceeding, 70 percent of a closure, postclosure, and corrective action cost estimate.

Effective April 9, 1997, an application for a Type II landfill that was an existing unit or new unit would have to demonstrate that a combination of the perpetual care fund, bonds, and financial capability, as evidenced by a financial test, would provide financial assurance in an amount equal to or greater than the sum of a standard closure cost estimate, a standard postclosure cost estimate, and the corrective action cost estimate, if any, as follows:

-- A standard closure cost estimate would be based upon the sum of a base cost of $20,000 per acre to construct a compacted soil final cover using on-site material; a supplemental cost of $20,000 per acre to install a synthetic cover liner, if required under the act; a supplemental cost of $5,000 per acre, if low permeability soil must be transported from off-site to construct the final cover or if a bentonite geocomposite liner is used in lieu of low permeability soil in a composite cover; and a supplemental cost of $5,000 per acre to construct a passive gas collection system in the final cover, unless an active gas collection system had been installed at the facility.

-- A standard postclosure cost estimate would be based upon the sum of a final cover maintenance cost of $200 per acre per year; a leachate disposal cost of $100 per acre per year; a leachate transportation cost of $1,000 per acre per year, if leachate is required to be transported off-site for treatment; a groundwater monitoring cost of $1,000 per well per year; and a gas monitoring cost of $100 per monitoring point per year, for monitoring points used to detect landfill gas at or beyond the facility property boundary, all adjusted for inflation.

-- The corrective action cost estimate would be a detailed written estimate, in current dollars, of the cost of hiring a third party to perform corrective action in accordance with the act. In addition, in lieu of using some or all of the standardized costs specified, an applicant could estimate the site specific costs of closure or postclosure maintenance and monitoring.

Financial Test Using Estimate of Costs. In lieu of using standardized costs, an applicant could estimate the site specific costs of closure or postclosure maintenance and monitoring, using a written estimate, in current dollars, of the cost of hiring a third party to perform the activity. Site specific cost estimates would be based on the following:

-- For closure, the cost to close (excluding salvage value) the largest area of the landfill ever requiring a final cover at any time during the active life, if the extent and manner of its operation would make closure the most expensive, in accordance with the approved closure plan.
-- For postclosure, the cost to conduct postclosure maintenance and monitoring, in accordance with the approved postclosure plan for the entire postclosure period.

Adjustment for Inflation. The owner or operator of a landfill would be required, during the active life of the landfill, and during the postclosure care period, to annually adjust the financial assurance cost estimates and corresponding amount of financial assurance for inflation, by multiplying the cost estimate by an inflation factor derived from the most recent Bureau of Reclamation composite index published by the U.S. Department of Commerce, or another index that is more representative of the costs of closure and postclosure monitoring and maintenance. The adjustment would have to be documented and placed in a facility's operating record.

Reduction in Financial Assurance. An application for a reduction in the approved cost estimates and corresponding financial assurance for a landfill would have to include certification that the following had been completed:

-- Partial closure of the landfill, which would include certification under the seal of a licensed professional engineer certifying that a portion of the licensed landfill unit has reached final grades and has had a final cover installed in compliance with the approved closure plan and rules promulgated under the act, and the maximum slope of waste in the active portion of the landfill unit at the time of partial closure.

-- Final closure of the landfill, including certification under the seal of a licensed professional engineer certifying that closure of the landfill unit has been fully completed in accordance with the landfill's approved closure plan.

-- Postclosure maintenance and monitoring. A reduction in the postclosure cost estimate and corresponding financial assurance for one year could be requested if the landfill had been monitored and maintained in accordance with the approved postclosure plan.

The owner or operator of a landfill could request a reduction in the amount of one or more of the financial assurance mechanisms in place. If the combined value of the remaining financial assurance mechanisms equalled the required amount due, the department would have to approve the request. In addition, an owner or operator who requested that the department approve a financial assurance reduction for performance of the activities would be required to do so on a department-prepared form and the department would have to grant written approval, or, within 30 days of receiving a request, issue a written denial stating the reason.

Trust Fund or Escrow Account. The owner or operator of a landfill could establish a trust fund or escrow account to fulfill the financial assurance requirements specified in the bill. Payments into a trust fund or escrow account would have to be made annually over the term of the first operating license issued after the effective date of the bill. The first payment would have to be made prior to licensure, in an amount equal to at least the required portion of the financial assurance that was to be covered by the fund or account, divided by the term of the operating license. Subsequent payments would have to be in an amount equal to the remaining financial assurance requirement, divided by the number of years remaining until the license expired. In addition, if the owner or operator established a fund or account after having used one or more alternate forms of financial assurance, the initial payment would have to be at least the amount that the fund would contain if established initially and annual payments were made. The department could authorize the release of funds from a trust fund or escrow account -- including all interest or earnings -- if it were demonstrated that the value of the fund or account exceeded the owner's or operator's financial assurance obligation.

Perpetual Care Fund. Currently, the owner or operator of a landfill must maintain a perpetual care fund for the closure, monitoring, maintenance, and response activity at a landfill. The fund is maintained by a tipping fee of 75 cents per ton of solid waste disposed of after June 17, 1990. The bill would add that a fund could be used to demonstrate financial assurance for Type II landfills. Under the bill, deposits would have to be made twice a year until a fund reached the maximum required amount of $1,156,000. The maximum amount would be adjusted annually for inflation by multiplying the amount by an inflation factor derived from the most recent Bureau of Reclamation composite index, published by the U.S. Department of Commerce, or another index that the department considered more representative of closure, postclosure monitoring, and maintenance costs. The bill would also establish new limits, below which the amount of money in a perpetual care fund could not fall. The amounts would be as follows: for those landfills containing only the materials specified under the act, an amount equal to 1/2 of the maximum required fund amount, or $578,000; and for all other landfills, an amount equal to the maximum required fund amount, or $1,156,000.

House Bill 5867 would also delete current provisions requiring that the custodian of a perpetual care fund invest its money in certain federally insured obligations. Instead, the bill would specify that, until a fund reached the maximum required amount, the custodian would have to credit the interest and earnings of a fund to the fund itself, after which earnings would be distributed as directed by the owner or operator. The bill would also specify that the owner or operator could request disbursement of funds when the maximum amount was reached, and that the DEQ would approve the disbursement provided that the total amount of financial assurance maintained met the financial assurance requirements provided under the bill. In addition, the bill would delete the current requirement that the accounts of a fund be kept on a calendar year basis, and would require that an accounting be made to the DEQ within 30 days following the close of the state fiscal year.

Currently, the act provides that, 30 years after a landfill is closed, 50 percent of any money in its perpetual care fund must be deposited in the Environmental Response Fund, and 50 percent must be returned to the owner of the disposal area, unless a contract with the landfill operator provides otherwise. The bill would specify, instead, that, upon department approval of a request to terminate financial assurance for a landfill, the money in the fund would be disbursed only to the owner of the disposal area, with the same conditions. The bill would also delete the current requirement that money remaining in a fund must be disbursed to the landfill owner, except in situations where the department has denied a request for disbursement of the money in a fund, and has instead deposited all the money into the Environmental Response Fund because a landfill owner or operator has failed to conduct closure, monitoring, maintenance or response activities.

Other Provisions. The bill would delete a current provision which defines "enforceable mechanism" to mean a legal method (including contracts,

intergovernmental agreements, laws, ordinances, rules, and regulations) whereby the state, a county, a municipality, or a person is authorized to take action to guarantee compliance with an approved county solid waste management plan.

Municipal Solid Waste Incinerators. Under the act, municipal solid waste incinerator ash may only be disposed of in landfills that meet certain requirements. The bill would amend certain landfill design specifications to require that they, instead, conform to requirements specified under the Administrative Code. The bill would also amend current requirements concerning the capping of landfills following their closure to specify only that they be capped either by a design approved by the DEQ, or by six inches of top soil with a vegetative cover; two feet of soil to protect against animal burrowing, temperature, erosion, and rooted vegetation; an infiltration collection system; a synthetic liner at least 30 mils thick; and two feet of compacted clay with a maximum hydraulic conductivity of 1 x 10 -7 centimeters per second. The bill would also specify that municipal solid waste incinerator ash may be disposed of in a municipal solid waste landfill, as defined by the Administrative Code, rather than in a Type II landfill, as defined by the code.

Tie-bar. House Bill 5867 is tie-barred to Senate Bill 941, which would amend the act to increase current application fees for construction permits and operating licenses.

MCL 324. 11502 et. al.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The financial assurance provisions of the bill would guarantee that funds are set aside to meet the closing costs for each landfill in the state. The provisions are of particular importance as a means of providing corrective actions at facilities, including "orphan" sites, or landfills at which those who created environmental contamination cannot be found. The provisions of the bill would provide for monitoring costs for cleanup and maintenance for 30 years after each landfill is closed. The bill would also assure that the financial assurance provisions of the state's solid waste management regulations are consistent with the financial assurance provisions of subtitle D of the federal Solid Waste Disposal Act.

Response:

Some concern has been expressed by environmentalists that the amounts required under the bill will prove to be inadequate to fund long term monitoring and closure costs. If these concerns prove to be accurate, then, according to those who pose this position, monitoring of landfills could not be conducted over a long enough period of time to ensure public safety and environmental protection. To assure that a stable, long-term source of funding is provided for orphan share cleanups, it is suggested that the 75 cent tipping fees required under the bill for solid waste disposal be increased.

POSITIONS:

The Department of Environmental Quality (DEQ) supports the bill. (5-21-96)

The Michigan Association of Counties supports the bill. (5-21-96)

The Michigan Recycling Coalition supports the bill. (5-22-96)

The Detroit Resource Recovery Authority supports the bill. (5-21-96)

The Kent County Commission and Board of Public Works supports the bill. (5-21-96)

Saginaw County supports the bill. (5-22-96)

The Ottawa County Board of Commissioners has no position on the bill. (5-21-96)

The Oakland County Executive has no position on the bill. (5-21-96)

The Michigan Townships Association has no position on the bill. (5-21-96)

The Michigan United Conservation Clubs (MUCC) does not oppose the bill. However, the organization has concerns that the tipping fees provided for under the bill should be increased to assure that funding is available for future monitoring and closure costs. (5-23-96)

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.