

CRS Report for Congress

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Imports of Canadian Waste

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Summary

Private waste haulers and Canadian cities – including the city of Toronto – ship large quantities of waste to the United States. More than four million tons (as many as 400 truckloads a day) were shipped in 2005, according to the Ontario Ministry of the Environment. Three-quarters of this waste goes to two large landfills near Detroit.

The influx of waste has been highly controversial, in part because the ability of state and local governments to restrict it is limited. Under court rulings concerning the U.S. Constitution's Commerce Clause, only Congress can authorize restrictions that discriminate against foreign waste. Thus, for several years, the state of Michigan and the Michigan congressional delegation have pressed Congress for action.

In the summer of 2006, Congress began to focus on this issue. In July, in the Department of Homeland Security appropriations bill (H.R. 5441), the Senate approved the establishment of an inspection program for waste imports that might have added more than \$400 in fees to the cost of importing a truckload of waste. In early September, the House passed H.R. 2491, which would give states limited authority to restrict waste imports. In between these actions, an agreement was reached between Michigan's two Senators and the Ontario Ministry of the Environment, under which Ontario will eliminate shipments of municipally managed waste to Michigan by the end of 2010.

The steps taken by Congress in beginning to move legislation, as well as separate legislation enacted by the state of Michigan, clearly played a role in bringing about the voluntary agreement between Michigan's two Senators and Ontario. But large issues remain. The agreement is not a treaty or an international agreement, so it does not formally bind the United States or Canada or the parties shipping and receiving the waste. Assuming that its provisions are adhered to by Ontario's waste managers, it still would not address two-thirds of the waste being shipped to Michigan (i.e., the waste being managed by private waste management firms), and it would not affect waste shipments to states other than Michigan.

This report provides background information on the history of Canadian waste imports, reviews recent developments, and discusses issues raised by the voluntary agreement and proposed legislation.

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Imports of Canadian Waste

Background

Canada and the United States have open borders for waste shipments, and waste has flowed across the border in both directions for years.¹ The federal government does not report data regarding such shipments, but information is available from Environment Canada, the Ontario Ministry of the Environment, and from some U.S. states. According to these sources, the United States appears to be a net exporter to Canada of hazardous waste²; but, because of plentiful landfill capacity, low-cost disposal options, and existing contractual arrangements, the United States is a much larger net importer from Canada of *non*-hazardous solid waste. The latter category can include municipal solid waste (MSW),³ construction and demolition (C&D) waste, medical waste, and non-hazardous industrial waste.

U.S. Canada Bilateral Agreement. Under a 1986 agreement between the United States and Canada,⁴ shipments of *hazardous* waste require notification to the importing country and that country's consent before waste may be shipped. The notification must include the exporter's identity; a description of the waste; the frequency or rate at which the waste will be imported; the total quantity of the waste; the point of entry; the identity of the transporter, means of transport, and type of containers; the identity of the consignee; a description of the manner in which the

¹ Prior to July 1991, the amount of municipal solid waste shipped to the United States was rather small, because the Animal and Plant Health Inspection Service of the U.S. Department of Agriculture (APHIS) required incineration of all foreign garbage shipped to the United States to prevent foreign pests and diseases from harming U.S. agricultural production. Canadian waste was exempted from this requirement in July 1991 when APHIS decided that it did not have the legal authority to prevent the importation of Canadian garbage or to require its incineration, because there was no biological basis for these restrictions. The amount of Canadian waste shipped to the United States increased at least five-fold following this decision.

² Environment Canada, "Hazardous Waste and Hazardous Recyclable Material Management in Canada, 2004 Statistics on their Exports and Imports," Backgrounder, August 18, 2005, available at [http://www.ec.gc.ca/press/2005/050817_b_e.htm]. According to the Backgrounder, Canada's hazardous waste imports, 98.8% of which come from the United States, totaled 416,000 metric tonnes in 2004 (457,000 tons), while exports totaled 308,357 metric tonnes. Hazardous waste is defined in regulations at 40 CFR Part 261.

³ Municipal solid waste is not defined by statute or regulation, but is generally considered to include paper, metal, plastic, glass, and organic materials generated by households, commercial establishments, and institutions.

⁴ Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste, Ottawa, 1986, TIAS 11099.

waste will be treated, stored, or disposed; and the approximate date of the first shipment. The receiving country is given 30 days from the date it receives notice to indicate its consent (conditional or not) or its objection to the shipment. If no response is received within the 30-day period, the importing country is considered to have no objection. Consent is not irrevocable: whether express, tacit, or conditional, the importing country's consent may be withdrawn or modified for good cause.

The bilateral hazardous waste agreement was amended in 1992 to establish similar requirements for municipal solid waste,⁵ but, for lack of legislative authority, the amendment was never implemented.⁶ It is these unregulated shipments of non-hazardous waste, principally municipal solid waste, that have proven controversial.

Lacking notification or consent requirements for MSW, many state governments do require the operators of solid waste management facilities to report the origin of waste they have received for disposal after the fact, on a quarterly or an annual basis. According to these data, entities in the Canadian province of Ontario have shipped major quantities of waste (principally MSW and C&D waste) to the United States in recent years.

Waste Import Data. State waste reporting requirements are not uniform: the reporting periods vary, as do the methods used by states to collect the data, and some states don't collect data at all, although one can often find a knowledgeable official willing to provide an estimate. Using these sources, CRS has from time to time compiled the existing state data, in an attempt to provide comprehensive and comparable estimates. Our latest survey, published in September 2004, indicated that Michigan received 2,789,650 tons⁷ of municipal solid waste from Ontario in FY2003 (October 2002-September 2003). New York, the second largest recipient, received 132,823 tons from Ontario in calendar year 2003. The only other recipient we identified was the state of Washington, which received 82,557 tons from the Canadian province of British Columbia in 2002.⁸ The proportions are consistent with amounts reported in earlier years. Thus, it appears that more than 90% of the solid waste that Canada ships to the United States has gone to Michigan. The remainder has generally gone to the states of New York and Washington.

While somewhat controversial throughout the 1990s, Canadian waste imports have received much greater attention since late 2002, when the city of Toronto – Canada's largest city – announced that it would close its last landfill and begin

⁵ Amendment to the Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Wastes, Washington, 1992, copy of text provided by the U.S. Department of State. See note 2 above regarding the definition of municipal solid waste.

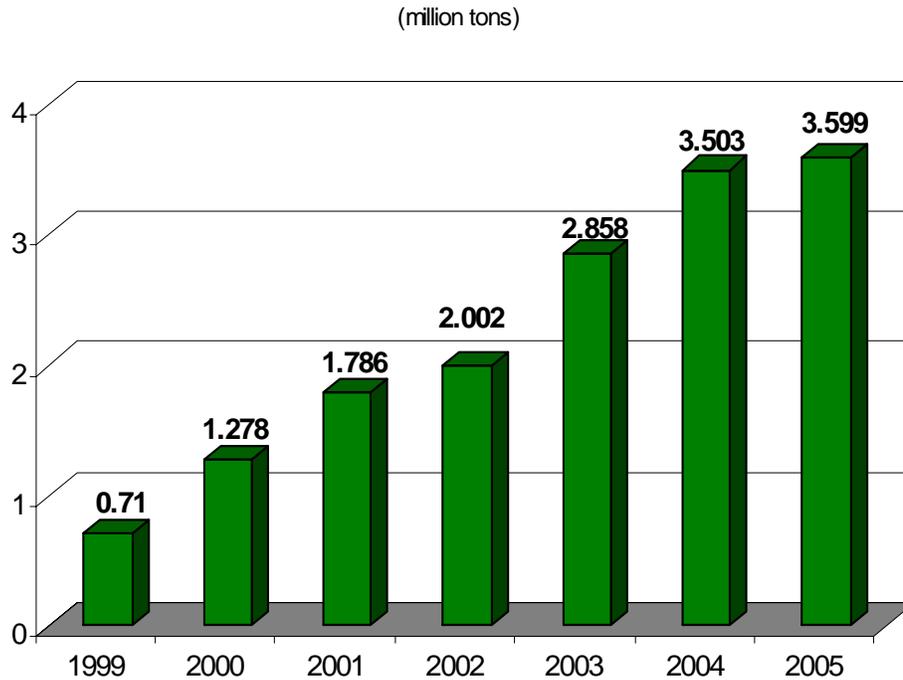
⁶ Section 3017 of the Solid Waste Disposal Act (42 U.S.C. 6938) provides authority for the bilateral agreement on hazardous waste, but not for non-hazardous wastes.

⁷ Converted by CRS from state data expressed in cubic yards, using 3.3 cubic yards=1 ton.

⁸ CRS Report RL32570, *Interstate Shipment of Municipal Solid Waste: 2004 Update*, September 9, 2004.

shipping all of its waste to Michigan. Canada's shipments of waste to Michigan have increased 80% since then. In FY2005, Michigan reported that it received 11,878,091 cubic yards (an estimated 3.6 million tons) of non-hazardous waste from Canada. Canada accounted for 18.6% of all the waste disposed in Michigan landfills in that year.⁹

Figure 1. Canadian Waste Disposed in Michigan



Source: CRS, based on data provided by Michigan Department of Environmental Quality. Data is for fiscal years.

The Fort Gratiot Case. Since the late 1980s, Michigan has attempted to restrict imports of waste. In 1992, however, in *Fort Gratiot Sanitary Landfill v. Michigan DNR*, waste import restrictions authorized by the state were held

⁹ Michigan Department of Environmental Quality, *Report of Solid Waste Landfilled in Michigan, October 1, 2004 – September 30, 2005*, Lansing, Michigan, January 31, 2006, at [<http://www.deq.state.mi.us/documents/deq-whm-stsw-ReportSolidWasteLandfilledFY2005.pdf>]. In addition to the 18.6% received from Canada, waste from other U.S. states accounted for another 10% of the waste disposed in the state. Note: Most states report waste disposal and waste import in tons, rather than cubic yards; for purposes of comparison, CRS converted the Michigan data to tons, using a standard industry conversion rate of 3.3 cubic yards equals one ton. Among U.S. states, Michigan is, by far, the largest recipient of foreign waste. Pennsylvania and Virginia, however, receive more interstate shipments of waste. For additional information, see CRS Report RL32570, *Interstate Shipment of Municipal Solid Waste: 2004 Update*.

unconstitutional by the U.S. Supreme Court.¹⁰ Under Article I, Section 8 of the U.S. Constitution, Congress is given power to regulate interstate and foreign commerce; in a long series of cases beginning in the 1800s the Court has held that this grant of authority to Congress implies a prohibition of state actions to discriminate against interstate and foreign commerce, absent the consent of Congress.

Recent Developments

Providing congressional consent is the goal of numerous bills that have been introduced in Congress.

H.R. 2491. In the 109th Congress, the most prominent of these bills has been H.R. 2491 (Gillmor), which was reported by the House Energy and Commerce Committee on September 27, 2005, and passed the House by voice vote, September 6, 2006. The bill would implement the bilateral U.S.-Canada waste trade agreement, as amended in 1992 to deal with municipal solid waste shipments between the two countries. It would require the EPA Administrator to perform the functions of the Designated Authority under the agreement and require him to implement and enforce the agreement's notice and consent requirements. In considering whether to consent to waste importation, the EPA Administrator would be required, in the words of the bill, to "give substantial weight to the views of the State or States into which the municipal solid waste is to be imported, and consider the views of the local government with jurisdiction over the location where the waste is to be disposed." The Administrator would also be required to consider the impact of the importation on continued public support for and adherence to state and local recycling programs, landfill capacity, and air emissions and road deterioration from increased vehicular traffic, and to consider the impact of the importation on homeland security, public health, and the environment.

The bill would also authorize states to restrict imports of foreign MSW, provided they do so prior to the bilateral agreement's implementation. Under the latter provision, states would have a window of up to 24 months after the bill's enactment to impose restrictions of their choosing on the receipt of foreign MSW, and those regulations could remain in effect as long as the state desires.

Michigan H.B. 5176. Michigan has already enacted legislation that would go into effect if this provision of H.R. 2491 were enacted. On March 9, 2006, the Governor signed H.B. 5176, which prohibits the delivery and acceptance for disposal in Michigan of MSW generated outside of the United States, once Congress authorizes such prohibitions.¹¹

DHS Appropriations Bill. H.R. 5441, the Department of Homeland Security (DHS) FY2007 Appropriations bill, as amended by the Senate July 13, 2006, also contained provisions that would have discouraged Canadian waste imports. An amendment submitted by Senator Stabenow (for herself, Senator Levin, and Senator

¹⁰ Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources, 504 U.S. 353 (1992). The restrictions at issue were at the county level, but were authorized by the state.

¹¹ Act No. 57, Public Acts of 2006, State of Michigan.

Baucus) provided for inspections of international shipments of MSW, and required the Secretary of Homeland Security to levy a fee to cover the approximate cost of such inspections.¹² In a floor statement, Senator Stabenow explained the effect of the amendment as follows:

Based on information provided by the inspector general [of the Department of Homeland Security], we know that it will take four Customs agents about 4 hours for each trash truck inspection. Based on personnel and administrative costs, we estimate that the fee for each trash truck will be approximately \$420.¹³

A separate amendment, introduced by Senator Levin (with the co-sponsorship of Senators Stabenow and Voinovich) and also approved in the Senate by unanimous consent, would have required that the Secretary of Homeland Security deny entry into the United States to trucks carrying MSW unless he certifies to Congress that the methodologies and technologies used by the Bureau of Customs and Border Protection to detect the presence of chemical, nuclear, biological, and radiological weapons in municipal solid waste are as effective as those used to screen for such materials in other items of commerce entering the United States in commercial motor vehicles.¹⁴

Exchange of Letters with Ontario. Following passage of the Stabenow and Levin amendments, on August 30, 2006, the Ontario Ministry of the Environment reached an agreement with the two Senators, under which Ontario will eliminate shipments of municipally managed waste to Michigan by the end of 2010. In return, the Senators agreed not to pursue passage of the inspection fee and certification provisions in the Homeland Security Appropriations bill or to “pursue similar current or future measures.”¹⁵ The inspection fee and certification provisions were deleted in conference,¹⁶ and the bill was signed by the President October 4. On September 19, Toronto’s City Council approved a letter of intent to purchase a landfill near London, Ontario, where it is expected to ship its waste as it phases out shipments to Michigan.¹⁷

The steps taken by Congress in beginning to move legislation, as well as the separate legislation enacted by the state of Michigan, clearly played a role in bringing about the exchange of letters with Ontario. But large issues remain.

¹² The amendment, S.Amdt. 4657, was agreed to by unanimous consent, July 13, 2006.

¹³ *Congressional Record*, July 13, 2006, p. S7476.

¹⁴ S.Amdt. 4617. For consideration, see *Congressional Record*, July 13, 2006, pp. S7470-7471.

¹⁵ Letter of Senators Stabenow and Levin to Hon. Laurel C. Broten, Ontario Minister of the Environment, August 30, 2006.

¹⁶ See H.Rept. 109-699, p. 181.

¹⁷ City of Toronto, “Toronto Approves Landfill Purchase as Part of Solid Waste Management Plan,” press release, September 19, 2006, at [<http://wx.toronto.ca/inter/it/newsrel.nsf/0/3ad17f7066b0e39985257108006a7003?OpenDocument>].

Remaining Issues

Issues remaining to be addressed include some posed by the exchange of letters and others posed by H.R. 2491.

Issues Posed by the Exchange of Letters. The agreement reached by the two Michigan Senators in their exchange of letters with Ontario's Minister of the Environment would address a portion of the waste shipped from Ontario to Michigan, but it would not eliminate the majority of it. The letters refer to "municipally managed waste," and specifically use a 2005 baseline amount of 1.34 million tonnes¹⁸ of municipal waste shipped.¹⁹ Accompanying materials from the Ministry of the Environment, however, note that in 2005, "4 million tonnes of waste were exported to the U.S., with 90% of this waste being sent to Michigan landfills."²⁰ Thus, Ontario's commitment appears to cover only one-third of the waste shipped from the province to the United States, or 37% of the waste it shipped to Michigan.

The reason for excluding the majority of the waste is that it is not "municipally managed" – it is waste collected by private haulers and shipped to Michigan landfills under private contracts. These wastes are shipped to Michigan either because it provides lower cost disposal options or because the landfills in Michigan are controlled by the same company that collects the waste in Canada. The provincial government and the local governments within the province have no authority to prevent these private waste shipments from leaving Ontario. Thus, the province has committed to eliminate what it can, i.e., that portion of the waste that is municipally managed.

Second, the exchange of letters addresses the shipment of these wastes to Michigan, but not to other U.S. states. Given the subsequent action by the Toronto City Council, it would appear that when the waste is diverted from Michigan, it will be shipped to a site in Ontario; but nothing in the letters would prevent the waste being shipped to other U.S. landfills instead of those in Michigan.

Third, the exchange of letters represents voluntary, good faith commitments by the parties. It is not a treaty or an international agreement and does not provide the enforcement provisions or penalties that legislation might offer.

To summarize, those who continue to be concerned about Canadian waste shipments are likely to note that the exchange of letters does not address two-thirds of the waste being shipped, does not protect states other than Michigan, and contains no enforcement provisions. Addressing these issues would require congressional action.

¹⁸ Tonnes are metric tons, which are equivalent to 1.1 short tons.

¹⁹ Letter of Laurel C. Broten, Ontario Minister of the Environment, to Senators Stabenow and Levin, August 30, 2006.

²⁰ Ontario Ministry of the Environment, "How Ontario Manages Its Waste: the Basic Facts and Figures," Fact Sheet, August 31, 2006.

Issues Posed by H.R. 2491. H.R. 2491, by contrast, would apply to private contracts, would apply to all 50 states, and would provide for enforcement. The bill would clarify that actions taken under its authority shall not be considered to impose an undue burden on interstate or foreign commerce, and thus would be immune to challenge under the Commerce Clause of the Constitution.

But there is an ambiguity in the bill. In Section 4011(a)(3), it states, “Nothing in this section affects, replaces, or amends prior law relating to the need for consistency with international trade obligations.” The bill, thus, appears to recognize that U.S. trade agreements would have a role to play in defining the scope of the states’ authority to act pursuant to the legislation. It is not clear how these obligations and the bill’s grant of authority to the states to restrict waste imports would ultimately be reconciled. Opponents of the bill, including the National Solid Wastes Management Association (which represents the U.S. waste management industry), have already made clear their intention to challenge its provisions in court if it is enacted; this issue would presumably be among the provisions litigated.