



Michigan Legislature Introduces Beneficial Use Reforms

Charles E. Barbieri

Foster Swift Commercial Litigation News

April 25, 2014

Members of the Michigan House of Representatives introduced House Bills 5400-5402 in March 2014 to amend Part 115 of the amended Natural Resources and Environmental Protection Act (NREPA) in an effort to promote the use of beneficial use byproducts in Michigan. Beneficial use byproducts are materials, such as power plant ash, foundry sand and pulp and paper mill residuals, which can be used to replace or supplement a raw material or competing product. In lieu of the materials being classified and disposed of solid waste, these materials can be used for acceptable purposes.

Michigan businesses recognize that beneficial use standards, if comprehensively designed, can encourage the reuse of materials that would be disposed as waste, reduce disposal costs for manufacturers and provide economical savings over other raw materials that would otherwise be needed, extend the capacity of landfills and conserve resources, assure the safety of the materials for potential use and promote the concept of sustainability.

This reform is necessary as the current provisions of Part 115 of NREPA, as amended, and its 1993 regulations have stringently regulated the reuse of high volume, low hazard materials. As currently defined solid waste includes any commercial or industrial solid waste if not otherwise hazardous, except for a few limited exclusions such certain slag material or scrap metal. The regulations initially adopted by the Michigan Department of Environmental Quality's predecessor (predecessor and current Department will be referred to as "MDEQ") in the early 1990s pursuant to the solid waste statute have allowed limited uses of inert materials or low hazard industrial waste which in many instances require testing to show that material constituents do not exceed cleanup criteria which have since been abandoned in Michigan. In many instances, the petition process has been needed to secure approval of the material's potential use. The current statute and regulatory rules have prevented some materials with limited environmental risk from being reused, stored or disposed more cheaply. Present rules have forced costly testing and retesting of materials further discouraging reuse. Some separated materials have

AUTHORS/ CONTRIBUTORS

Charles E. Barbieri

PRACTICE AREAS

Business & Commercial Litigation

Commercial Litigation



been subjected to another layer of regulation based on exemptions that contain stringent notification and management conditions, even though other statutes and rules already provide regulation over the activities involving reuse. Finally, the liability protections for recycling have not been fully established or recognized.

Past MDEQ reform efforts through regulatory rulemaking have failed. These past efforts insisted on the use of unrealistic criteria and extensive notification, recordkeeping, performance, testing and petition requirements. In addition, past regulatory efforts did not focus on clarifying legal protections for beneficial reuse. Not surprisingly, Gov. Snyder's Office of Regulatory Reform has supported the option of new legislation to reform Part 115 of NREPA, as amended.

The planned reform would build upon experience already achieved in Michigan, as well as the experience of other states where certain materials have been sensibly and safely applied. Beneficial use byproducts will include cement kiln dust, lime kiln dust, coal bottom or ash, wood ash, coal ash, dewatered concrete grinding slurry, flue gas desulfurization material (synthetic gypsum), foundry sand, lime softening residuals, mixed wood ash (ash from combustion of tires, scrap wood, railroad ties), pulp and paper mill ash, pulp and paper mill material, soil washed or removed from sugar beets, spent media from sandblasting and stamp sands.

Under the proposed statute, as revised during House Committee review, five categories of beneficial use byproducts will be created.

- **Beneficial Use 1** will involve the use of the material as aggregate, road material, or building material if it will be bonded or encapsulated by cement, limes or asphalt.
- **Beneficial Use 2** material means use as a construction fill, road base or soil stabilizer, or road shoulder material.
- **Beneficial Use 3** will mean application of material as a fertilizer or soil conditioner under Part 85 of NREPA, as amended, or as a lining material under 1955 PA 162.
- **Beneficial Use 4** involves the use of the material to stabilize, neutralize, solidify or treat waste; to treat wastewater or sludge; to stabilize hazardous substances, or to serve as landfill construction material.
- **Beneficial Use 5** will mean material blended with inert materials or with compost and used to manufacture soil.

Based on these different uses, the beneficial use byproducts will receive the following designations in the amended statutory provisions:

The materials will be subject to more reasonable and realistic standards. Testing of materials will only be needed for Beneficial Use 2 involving fill applications and Beneficial Use 3 for agricultural and silvicultural land applications. As long as processes and materials do not change, further testing will not be required. In addition, use standards will be imposed in a case of fill and land application to eliminate the amount of the material used, and its use in proximity to groundwater. Regardless of beneficial use category, materials must be stored and transported to prevent speculative accumulation, to prevent fugitive releases, and to avoid air, surface water and groundwater releases. Furthermore, regular licensing and registration of land applied



materials will be determined by the Michigan Department Agricultural and Rural Development ("MDARD"). Furthermore, simple reporting requirements and notifications will be imposed on the use of Beneficial Use 1, 2, and 4 materials.

As designed, the use of beneficial materials must still meet applicable engineering specifications for use. While the reforms streamline the ability to use materials and allow them to compete in the marketplace with limited environmental risk, the material still must be satisfactory for the intended use. In addition, the proposed statutory reforms contain clear statements that no department, such as the Michigan Department of Transportation, or other person, is required to use the recyclable material and that use of such material is discretionary.

In light of concerns as to whether persons engaged in past reuse have been protected from liability, the proposed reforms will provide explicit protection against certain claims that may be brought under Michigan's environmental remediation statute, Part 201 of NREPA, as amended. The lack of clear liability protection has discouraged reuse.

The proposed legislation, if enacted, will also reform the use of inert, source separated and low hazard industrial waste materials. Current requirements have stifled meaningful recycling and other low cost disposal options.

The MDEQ has recognized inert materials, such as rock, trees, stumps; and vegetative debris; excavated soil that is not contaminated with hazardous substances; construction brick, masonry, pavement and broken concrete without exposed rebar if reused for fill, riprap, slope stabilization, or construction; Portland cement clinker produced by a cement kiln dust using solid waste as fuel or feedstock; and certain low hazard industrial wastes as inert materials. Unfortunately, these relatively innocuous materials are not specifically excluded as solid waste even though their usage is allowed by current regulation. In some cases, stringent testing standards using old abandoned B cleanup criteria and in other cases notification requirements have applied to inert materials. In addition, soil, which otherwise meets current Part 201 cleanup criteria, has arguably been viewed as a waste. The proposed statutory amendments should alleviate these flaws and weaknesses. First, inert materials will be expressly excluded from the definition of solid waste. Second, the old cleanup criteria will no longer determine what constitutes uncontaminated soil. Third, materials defined and used as inert material will receive protections against claims under Michigan's remediation act, Part 201 of NREPA, as amended.

The current statutory definition of source separated material includes glass, metal, wood, paper products, plastics, rubber, textiles and other materials deemed such by the Department. The intended amendment will codify several source separated categories which the Department has come to recognize or has not yet recognized. They include scrap wood, railroad ties, recovered paint solids and/or chipped tires used to fuel industrial boilers, kilns, power plants or furnaces subject to Part 55; gypsum drywall generated from production and returned to the production process; flue gas desulfurization gypsum used for cement or wallboard production; asphalt shingles which do not contain asbestos, rolled roofing or tar paper if used as component in cement or as fuel in an industrial boiler, kiln, power plant or furnace subject to Part 55;



municipal incinerator ash used as daily cover at a licensed disposal facility; utility poles; or railroad ties reused in landscaping, embankments or similar uses. While source separated materials will be excluded from the definition of solid waste, they can still be subject as applicable to air, storm water or other legal requirements not found in Part 115. The draft legislation will preclude speculative accumulation of those materials and require limited annual reporting.

The draft legislation additionally will codify the designation of several materials as low hazard industrial waste and will in some cases eliminate unnecessary testing requirements for the designation of some of those materials. This reform should eliminate uncertainty as to the designation of some materials and allow for the use of cheaper and more efficient disposal options.

Finally, the draft legislation will provide standards and procedures for designating new materials for beneficial use, source separated designation or low hazard industrial waste designation.

Charles (Chuck) Barbieri has assisted in the drafting and pursuit of this legislation. He recently testified on behalf of various industries in support of this legislation. If you have questions on the legislation, you may contact him at 517-371-8155 or cbarbieri@fosterswift.com