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BILL



ANALYSIS

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Senate Bill 404 (as introduced 6-4-13)
Sponsor: Senator Jack Brandenburg
Committee: Finance

Date Completed: 9-17-13

CONTENT

The bill would amend Part 115 (Solid Waste Management) of the Natural Resources and Environmental Protection Act to revise financial assurance requirements for a disposal area. Specifically, the bill would do the following:

- Allow a landfill owner or operator to establish a required perpetual care fund as a perpetual care fund bond.
- Eliminate a requirement that a landfill owner or operator pay an amount equal to the required financial assurance over the term of the disposal area license.
- Exempt a perpetual care fund bond from a provision allowing the Department of Environmental Quality (DEQ) to use a bond posted to fulfill financial assurance requirements if the owner or operator fails to comply with Part 115 requirements to correct a violation.
- Include a perpetual care fund bond among the instruments on which the DEQ may draw if the owner or operator does not extend the bond's effective date before it expires or establish alternative financial assurance.
- Require increases to a landfill's perpetual care fund to be made within 30 days after the end of the State fiscal year, rather than semiannually.
- Eliminate a provision allowing the interest and earnings of a perpetual care fund to be used to pay the solid waste management program administration fee or a surcharge assessed on each cubic yard of waste disposed of in a landfill.
- Increase the time that the custodian of a perpetual care fund has to make an accounting to the DEQ from 30 to 60 days after the end of the State fiscal year, and refer to a perpetual care fund established as a trust or escrow account in this provision.
- Allow a trust or escrow account established as a perpetual care fund to be replaced with a perpetual care fund bond, and require the DEQ Director to authorize the fund's custodian to disburse the money in the trust or escrow account to the landfill owner.
- Require a landfill owner or operator who used a perpetual care fund bond also to establish a standby trust for the deposit of all payments made under the terms of the bond.
- Exempt a standby trust from required increases to a perpetual care fund and annual accounting valuations until the trust was funded pursuant to the bill's requirements.

The bill would define "perpetual care fund bond" as a surety bond, an irrevocable letter of credit, or a combination of these instruments in favor of the DEQ by which a perpetual care fund is established.

Financial Assurance: Disposal Area

Section 11523 in Part 115 requires a person to obtain a license from the DEQ in order to conduct, manage, maintain, or operate a disposal area. ("Disposal area" means one or more of the following at a location as defined by the boundary identified in its construction permit or engineering plans approved by the DEQ: a solid waste transfer facility, incinerator, sanitary landfill, processing plant, or other solid waste handling or disposal facility used in the disposal of solid waste.) The DEQ may not issue a license to operate a disposal area unless the applicant has filed, as part of the application, evidence of financial assurance (i.e., mechanisms used to demonstrate that the funds necessary to meet the cost of closure, postclosure maintenance and monitoring, and corrective action will be available whenever they are needed).

For a Type III landfill or a preexisting unit at a Type II landfill, financial assurance must be in the form of a bond in an amount equal to \$20,000 per acre of licensed landfill within the solid waste boundary; however, the amount of the bond may not be less than \$20,000 or more than \$1.0 million. Each bond must provide assurance for the maintenance of the finished landfill site for a period of 30 years after the landfill or any approved portion is completed. Additionally, a perpetual care fund (described below) must be maintained. (A Type II landfill is a municipal landfill that can accept virtually any nonhazardous solid waste for disposal. A Type III landfill can be a construction and demolition landfill or a special use landfill for a particular waste.)

Financial assurance for a Type II landfill that is an existing unit or a new unit must be in an amount equal to the cost of hiring a third party to conduct closure, postclosure maintenance and monitoring, and, if necessary, corrective action (such as the investigation, cleanup, treatment, or monitoring of constituents released into the environment from a disposal area). The application must demonstrate financial assurance in accordance with Section 11523a. (Under that section, an applicant for a Type II landfill license must submit evidence that the applicant has financial assurance for any existing unit or new unit in an amount equal to or greater than the sum of standard closure and postclosure cost estimates, and any corrective action cost estimate.)

Financial assurance established for a solid waste transfer facility, incinerator, processing plant, other solid waste handling or disposal facility, or a combination of these must be in the form of a bond in an amount equal to 0.25% of the facility's construction cost, but not less than \$4,000, and must be continued in effect for two years after the disposal area is closed.

A landfill owner or operator may post a cash bond with the DEQ instead of other bonding mechanisms to fulfill the remaining financial assurance requirements in Section 11523.

A minimum amount equal to the remaining financial assurance requirement divided by the term of the operating license must be paid to the DEQ before the landfill's licensure. Subsequent payments must be made annually in an amount equal to the remaining financial assurance requirement divided by the number of years remaining until the operating license expires, until the required amount is attained. The bill would delete these provisions.

The DEQ may use a required bond for the closure and postclosure monitoring and maintenance of a disposal area if the owner or operator fails to comply with the related requirements of Part 115 and the rules promulgated under it to the extent necessary to correct the violations. At least seven days before using the bond, the Department must

issue a notice of violation or other order alleging the violation and provide an opportunity for a hearing. Under the bill, these provisions would not apply to a perpetual care fund bond.

Part 115 provides that under the terms of a surety bond, letter of credit, or insurance policy, the issuing institution must notify the DEQ and the owner or operator at least 120 days before the bond expires or is cancelled. If the owner or operator does not extend the bond's effective date or establish alternative financial assurance within 90 days after receiving the notice, the DEQ may draw on the bond. The bill would extend these provisions to a perpetual care fund bond.

Under the bill, if an owner or operator of a disposal area fulfilled the financial assurance requirements by obtaining a bond, including a perpetual care fund bond, and the surety company, insurer, trustee, bank, or financial or other institution that issued or held the bond became the subject of a bankruptcy action or had its authority to issue or hold the bond or to act as an escrow agent or trustee suspended or revoked, within 60 days after receiving notice of that event, the owner or operator would have to establish alternative financial assurance.

Perpetual Care Fund

Under Part 115, a landfill owner or operator must establish and maintain a perpetual care fund for a period of 30 years after final closure of the landfill. The fund may be established as a trust or an escrow account, and may be used to demonstrate financial assurance for Type II landfills. Under the bill, a perpetual care fund also could be established as a perpetual care fund bond.

Except as otherwise provided, a landfill owner or operator must increase the amount of his or her perpetual care fund by 75 cents for each ton or portion of a ton or 25 cents for each cubic yard or portion of a cubic yard of solid waste that is disposed of in the landfill. The deposits must be made at least semiannually until the fund reaches the prescribed maximum required amount. The bill would eliminate the requirement that the deposits be made at least semiannually. Instead, increases to the amount of a fund would have to be calculated based on solid waste disposed of in the landfill as of the end of the State fiscal year and be made within 30 days after the end of each State fiscal year.

Until the perpetual care fund reaches the maximum required amount, the fund's custodian (a bank or other financial institution) must credit to the fund any of its interest and earnings. ("Custodian" means the trustee or escrow agent of a perpetual care fund. The bill would refer to a perpetual care fund established as a trust or escrow account. The bill also would include in the definition the issuing institution of a perpetual care fund bond.)

The bill would delete a provision that allows the custodian, upon the owner's or operator's direction, to use the interest and earnings to pay the solid waste management program administration fee or the surcharge required by Section 11525a for the landfill. (Section 11525a requires a landfill owner or operator to pay a surcharge of 12 cents for each cubic yard or portion of a cubic yard of solid waste or municipal solid waste incinerator ash that is disposed of in the landfill before October 1, 2015. The owner or operator must collect the surcharge from any person who generated the solid waste or who arranged for its delivery to the solid waste hauler or transfer facility. The surcharge must be forwarded to the State Treasurer for deposit in the Solid Waste Staff Account of the Solid Waste Management Fund.)

Currently, the custodian of a perpetual care fund annually must make an accounting to the DEQ within 30 days following the close of the State fiscal year. The bill would increase the

time frame to 60 days after the end of the fiscal year, and would refer to the custodian of a perpetual care fund established as a trust or escrow account.

Under the bill, a trust or escrow account established as a perpetual care fund could be replaced with a perpetual care fund bond that complied with all applicable requirements. Upon the replacement, the DEQ Director would have to authorize the custodian to disburse the money in the trust or escrow account to the landfill owner unless a contract between the owner and operator specified otherwise.

A landfill owner or operator who used a perpetual care fund bond to satisfy the requirements of Part 115 also would have to establish a standby trust. The custodian would have to deposit all payments made under the terms of the bond directly into the standby trust in accordance with the DEQ Director's instructions. The standby trust would have to meet the requirements of Part 115 for a trust established as a perpetual care fund, except that until the standby trust was funded pursuant to these requirements, the required 75-cent or 25-cent payments into the standby trust and the annual accounting valuations would not be required.

Termination of Financial Assurance

Part 115 requires the owner or operator of a disposal area to provide continuous financial assurance coverage until released from the requirement to do so by the DEQ. A landfill owner or operator who has completed postclosure maintenance and monitoring of the landfill in accordance with Part 115, rules promulgated under it, and an approved postclosure plan may request that the required financial assurance be terminated. A person requesting termination must submit to the DEQ a statement that the landfill has been monitored and maintained as required for the prescribed 30-year postclosure period, and certify that the landfill is not subject to corrective action. Within 60 days of receiving the statement, the DEQ must perform a consistency review of it and disapprove or approve the statement.

If the statement is approved, the DEQ must notify the custodian of the perpetual care fund that money from the fund will be disbursed as provided in Section 11525(10). (Under that section, upon the DEQ's approval of a request to terminate financial assurance for a landfill, any money in the perpetual care fund must be disbursed by the custodian to the owner, unless a contract between the owner and the operator provides otherwise.)

Under the bill, the requirement to notify the custodian of the disbursement of fund money would apply if the fund were established as a trust or escrow account.

MCL 324.11504 et al.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.