HOUSE DOCKET, NO. 1925 FILED ON: 1/20/2011

HOUSE . . . . . No. 1130

The Commonwealth of Massachusetts

PRESENTED BY:

Michael A. Costello

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to protect citizens of the Commonwealth from unsafe and injurious landfills.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
Michael A. Costello	*1st Essex*	*1/20/2011*
Steven A. Baddour		*2/4/2011*

HOUSE DOCKET, NO. 1925 FILED ON: 1/20/2011

HOUSE . . . . . No. 1130

By Mr. Costello of Newburyport, a petition (accompanied by bill, House, No. 1130) of Michael A. Costello and Steven A. Baddour relative to protecting citizens of the Commonwealth from unsafe and injurious landfills. Environment, Natural Resources and Agriculture.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. *4639* OF 2009-2010.]

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act to protect citizens of the Commonwealth from unsafe and injurious landfills.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 2 of Chapter 21H, as appearing in the 2008 Official Edition, is hereby amended in lines 3 through 8, inclusive, by striking the definition of "Assessment" in its entirety and inserting in place thereof the following definition:--

"Assessment," a project to investigate, monitor, survey, test and gather information to identify the existence, source, nature and extent of pollution, a threat of pollution or public nuisance and the extent of risk posed to the public health, safety or welfare, or to the environment. The term shall also include without limitation studies, services, or investigations to plan, manage and direct assessment, containment, closure and clean up.

SECTION 2. Said section 2, as so appearing, is hereby amended in lines 25 through 29, inclusive, by striking the definition of “Clean up” in its entirety and inserting in place thereof the following definition:--

“Clean up”, a project for the treatment, removal or disposal of pollution from or at any existing or closed facility or any location to which such pollution has come to be located, which cleanup actions shall include, without limitation, actions which restore potability to a drinking water supply or which prevent the contamination of said supply, including without limitation the planning, design, and implementation of appropriate means of assessment and remediation of the contamination problem. Clean up shall also include any appropriate means to prevent or abate a public nuisance, including, without limitation, any planning, design or implementation of such abatement or prevention measures.

SECTION 3. Said section 2, as so appearing, is hereby amended in lines 30 through 34, inclusive, by striking the definition of “Closure” in its entirety and inserting in place thereof the following definition:--

“Closure”, a project for the deactivation and completion of a facility, including without limitation planning, design and implementation of capping, containment, completion and any other activity necessary or incidental to minimize or prevent damage, or threats of damage, to the public health, safety or welfare, or to the environment including from public nuisance. Closure also includes the post-closure maintenance and monitoring of a facility to ensure the integrity of closure, cleanup, and containment measures and to detect and prevent any adverse impacts, including but not limited to adverse impacts from public nuisance, on public health, safety or welfare, or the environment.

SECTION 4. Said section 2, as so appearing, is hereby amended in lines 42 through 46, inclusive, by striking the definition of "Containment" in its entirety and inserting in place thereof the following definition:--

"Containment", a project for the prevention of leachate, landfill gas or vapor generation and/or migration from a facility, including without limitation planning, design and implementation of surface sealing, grading, drainage control, lining, slurry trenching, grout curtain sheeting, landfill gas collection, landfill gas treatment and other activities necessary or incidental to control of leachate, landfill gas or vapor generation or migration. Containment shall also include all means to prevent pollution, threat of pollution or public nuisance conditions from adversely affecting public health, safety or welfare, or the environment.

SECTION 5. Said section 2, as so appearing, is hereby amended in lines 60 through 64, inclusive, by striking the definition of "Facility" in its entirety and inserting in place thereof the following definition:--

"Facility", any place or site where solid waste has been or will be deposited, dumped, stored, transferred or treated, including any landfill, refuse transfer station, refuse incinerator rated by the department at more than one ton of refuse per hour, refuse composting plant, or other work for treating or disposing of solid waste, including existing and closed facilities.

SECTION 6. Said section 2, as so appearing, is hereby amended in line 126 by inserting after the definition of "Motor vehicle" the following definition:--

"Owner", or "Operator", and person who alone or in conjunction with others has legal ownership, a leasehold interest, or effective control over a facility or any person, including

without limitation, an agent, lessee of the owner or an independent contractor, who has care, charge or control of such facility.

SECTION 7. Said section 2, as so appearing, is hereby amended in lines 131 through 136, inclusive, by striking the definition of "Pollution" in its entirety and inserting in place thereof the following definition:--

"Pollution", any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of any solid, liquid or gaseous material which, because of its quantity, concentration or other characteristics, is or may be injurious to human, plant or animal life or to property, or may unreasonably interfere with the comfortable enjoyment of life or property.

SECTION 8. Section 4 of said chapter 21H, as so appearing, is hereby amended by striking the section in its entirety and inserting in place thereof the following section:--

Section 4. The department is hereby authorized and directed to establish a program for (i) the discovery and assessment of pollution, threats of pollution or public nuisance, caused by existing or closed facilities, (ii) the containment and clean up of such pollution, threats of pollution or public nuisance, and (iii) the closure of existing facilities causing such pollution, threats of pollution or public nuisance.

(a) In implementing assessment under said program, the department either may take or arrange for such assessments or may award grants to public bodies, in accordance with rules and regulations adopted by the department pursuant to chapter thirty A after public hearing, for up to one hundred per cent of the costs for such assessments. Such assessments may include without limitation studies, surveys, monitoring, testing and other investigations to identify the existence,

source, nature and extent of such pollution and to assess the extent to which such pollution presents an existing or potential danger to the public health, safety or welfare, or the environment, and studies, services and investigations to plan, manage and direct necessary containment, clean up or closure activities.

(b) After the discovery of pollution, a threat of pollution or public nuisance, caused by an existing or closed facility, the department, in accordance with enforcement authority set forth in applicable statutes and regulations, shall notify the owner and/or operator of the facility of (i) any requirements to correct such pollution, threat of pollution or public nuisance, and to bring the facility into conformance with applicable statutes and regulations, and of the steps which must be taken to do so; (ii) the need for any assessment, or if adequate assessment has been made, the need for containment, closure or clean up activities to eliminate, minimize or prevent such pollution or threat of pollution or to abate, contain or clean up a public nuisance; (iii) any funding available for such assessment, containment, closure or clean up activities under section three; (iv) the department's authority to take or arrange for any such projects under subsection (c); and (v) the liability provisions of subsections (e) to (h), inclusive, for the costs incurred by the department in taking or arranging for such activities.

(c) Subject to the provisions of subsections (b) and (d), the department is authorized (i) to take or arrange for assessment of such pollution, threats of pollution or public nuisance, (ii) to take or arrange for containment activities in response to such pollution, threats of pollution or public nuisance, which will prevent or minimize pollution or threat of pollution so that it does not migrate or otherwise cause or threaten substantial present or future danger to the public health, safety or welfare, or the environment, or, which will prevent or minimize public nuisance conditions, and (iii) to take or arrange for such closure or clean up activities as may be necessary

to prevent, minimize or mitigate damage to the public health, safety or welfare, or the environment, which may result from such pollution, threats of pollution, or to prevent, minimize or mitigate public nuisance conditions.

(d) Prior to taking or arranging for any assessment or any containment, closure or clean up activities under subsection (c), the department shall have informed the owner or operator of the facility or other legally responsible person as set forth in subsection (b) and the department shall have notified said owner and/or operator of its intent to take or arrange for such activities; provided that, if the department determines that an imminent threat exists to the public health, safety or welfare, or to the environment, or that significant public nuisance conditions exist that warrant immediate action, then the department shall not be required to provide notice or conduct assessment prior to implementing containment or cleanup activities to abate or minimize such imminent threat or significant public nuisance conditions. Notice under subsection (b) and (c) shall also not be required when the department is unable to determine the identity or location of the owner or operator of the facility or of any other legally responsible person, or when because of an emergency or other circumstances, the giving of such notice would be impractical.

(e) Except as otherwise provided in this section, the owner or operator of an existing or closed solid waste facility which causes pollution, threat of pollution or public nuisance, and any person who is otherwise legally responsible for such pollution, threat of pollution or public nuisance, shall be liable to the commonwealth for all costs of any further assessment and any containment, closure and clean up incurred by the department relative to such pollution, threat of pollution or public nuisance pursuant to subsection (c). Except as provided in subsection (f), such liability shall be joint and several.

(f) Any person otherwise liable for any costs as set forth in subsection (e) who establishes by a preponderance of the evidence that only a portion of such costs is attributable to pollution, threat of pollution or public nuisance for which he is included in said subsection (e) shall be required to pay only such portion.

(g) All persons liable under this section who are liable for pollution, a threat of pollution or public nuisance, caused by an existing or closed solid waste facility, for which the department has incurred costs for assessment, containment, closure or clean up under subsection (c), shall be liable, jointly and severally, to the commonwealth in an amount up to three times their liability as set forth in this section; provided, however, that if any person establishes by a preponderance of the evidence that only a portion of such costs is attributable to pollution, threat of pollution or public nuisance for which he is included in said subsection (c), in which case they shall be required to pay up to three times such portion.

(h) Where the person liable for such pollution, threat of pollution or public nuisance is a city or town, there shall be no liability for the costs of assessment taken or arranged by the department, and the provision of subsection (g) relating to treble liability for costs incurred by the department for containment, closure or clean up shall not apply to such public body, and any liability to the commonwealth under this section, in the case of a city or town shall not be included in the debt of such city or town for the purpose of ascertaining its legal borrowing capacity, if after receiving notice under subsection (b), and prior to any action by the department under subsection (c), such city or town has taken action to obtain financial resources to support any necessary containment, closure or clean up projects, including without limitation issuing revenue bonds under section twenty-eight C of chapter forty-four or applying in good faith for financial assistance pursuant to section three.

(i) No indemnification, hold harmless or similar agreement or conveyance shall be effective to transfer the liability imposed under this section from the owner or operator of any existing or closed solid waste facility or from any other person who may be liable for pollution, threat of pollution or public nuisance under this section to any other person. Nothing in this paragraph shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(j) The department, as necessary to carry out the provisions of subsections (a) and (c) may enter into contracts for consultant services, including but not limited to engineering, technical, legal, administrative, accounting, community information, financial, management and investigatory function, and may acquire personal property and interests in real estate by leases, purchases or eminent domain under the provisions of chapter seventy-nine and may pay any relocation benefits required by law.

(k) For the purpose of the administration and enforcement of this chapter and chapter 111, section 150A, and for the protection of public health, safety, or welfare, or the environment, authorized personnel, agents and contractors of the department may enter any facility at reasonable times and upon reasonable notice, to investigate, sample and inspect any records, conditions, equipment, practice or property. Where necessary to ascertain facts relevant to, or not available at, such facility, any person shall, upon request by any officer, employee or duly authorized representative of the department, furnish information relating to said facility or to pollution, threat of pollution or public nuisance therefrom and shall permit said officers, employees or authorized representatives to have access to, and to copy, all records relating to said facility or to pollution, threat of pollution or public nuisance therefrom. In the event that the department reasonably determines as a result of such investigation, sampling or inspection that

there has been pollution, threat of pollution or public nuisance from or at such facility, the department and its authorized personnel, agents, representatives or contractors may enter such facility and areas proximate thereto and undertake such actions pursuant to this chapter and regulations promulgated hereunder relative to the assessment, containment, closure or clean up of pollution, threat of pollution or public nuisance as it reasonably deems necessary. During the course of any assessment, containment, closure and clean up activities, the department may restrict or deny entry to the facility and proximate property to protect the public health, safety or welfare, or the environment, and to provide for the efficient, expeditious and safe conduct of such actions; such restriction and denial shall not preclude access by an owner or operator of such facility; provided, however, that such owner or operator complies with all safety and operational protocols and requirements imposed by and to the satisfaction of the department; and provided, further, that such owner or operator does not interfere with the efficient, expeditious and safe conduct of the department's assessment, containment, closure or cleanup activities. The department may access and utilize funds from the financial assurance mechanisms for a facility at which there has been pollution, threat of pollution or a public nuisance to address such pollution, threat of pollution or public nuisance where the owner or operator has failed to adequately address, as determined by the department, such pollution, threat of pollution or public nuisance after having an opportunity to do so pursuant to subsection (b) and (d) herein.

(l) Nothing in this section shall preclude the department from acting to address pollution or threats of pollution caused by facilities under the authority of section four of chapter twenty-one E.

(m) Notwithstanding any other general or special law to the contrary, civil actions brought by the attorney general pursuant to this chapter to recover costs incurred by the

commonwealth, and actions brought by the attorney general to enforce action by owners or operators, shall be commenced within five years from the date the commonwealth incurs all such costs or five years from the date the commonwealth discovers that the person against whom the action is being brought is a person liable pursuant to this chapter for pollution, threat of pollution or public nuisance on account of which the commonwealth has incurred such costs, whichever is later.

(n) The department may establish an administrative record upon which the department shall base the selection of assessment, containment, closure and cleanup activities in those cases where the department itself, or acting through its agents or contractors, carries out an assessment, containment, closure or cleanup activities. The administrative record shall be available to the public at the department office most convenient to the facility in question. The department may also place duplicates of the administrative record at any other location.

The department shall promulgate regulations establishing standards for the content of the administrative record. Until such regulations take effect, the administrative record shall consist of all items developed and received pursuant to procedures used by the department for selection of the assessment, containment, closure and cleanup activities, including procedures, if any, for the participation of interested parties and the public, on the date this section first takes effect.

The development of an administrative record, the selection of assessment, containment, closure or cleanup activities pursuant to this chapter, and the issuance of a notice by the department to any owner or operator of a facility or to any other legally responsible person asking that such person undertake assessment, containment, closure or cleanup actions shall not

be adjudicatory proceedings and shall not be subject to those provisions of chapter thirty A, or of any other law, governing adjudicatory proceedings.

(o) Nothing in this section shall be construed as a defense to liability.

SECTION 9: Notwithstanding any special or general law to the contrary, the provisions of Chapter 21H of the General Laws shall apply to the site known as the Crow Lane landfill, located in Newburyport, Massachusetts, upon passage of this act.