

## Office of Policy and Legal Analysis

Date: May 5, 2021

To: Joint Standing Committee on Environment and Natural Resources

From: Dan Tartakoff, Legislative Analyst

Re: LD 911, An Act To Prohibit the Reception of Foreign Waste Plastic in Maine Ports  
(Faulkingham)

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### **Summary of bill**

This bill prohibits a port on navigable waters in the State from receiving from a vessel plastic waste originating from another jurisdiction or country.

### **List of individuals/entities that submitted written testimony and/or spoke at the hearing**

**Proponents** – Representative Faulkingham, Mark Chasse, Linda Reardon, Michael Reddy.

**Opponents** – Alexander Forsley.

**Neither for nor against** – Department of Environmental Protection, Maine Municipal Association.

### **Additional background – December 2020 spill**

As stated by the sponsor, the impetus for this bill was an accidental spill of roughly 5,000 pounds of shredded plastic waste during the unloading of a vessel in Searsport that had transported the waste from Northern Ireland. The waste was destined for the Penobscot Energy Recovery Company (PERC) in Orrington, a waste-to-energy incinerator, to be used as fuel for energy generation.

Although required by law to notify the Department of Environmental Protection of the spill, the terminal operator failed to do so. According to the DEP, it has since initiated an enforcement action against the terminal operator and, to its knowledge, PERC at this time is not planning to import from a foreign country additional plastic waste for fuel.

### **Notes, issues and proposed amendments**

1. *Commerce clause issues* – as noted by DEP, the proposal could raise issues under the Commerce Clause of the U.S. Constitution. Although a court's evaluation of any state law under the Commerce Clause would be fact-specific, with respect to the regulation of solid waste, the Supreme Court has generally found that:
  - A state may not prohibit the importation of solid waste unless that prohibition is the only means to advance a legitimate local purpose (e.g., *Maine v. Taylor*, 477 U.S. 131 (1986)); and
  - A state may restrict the acceptance of certain wastes when acting as a market participant, i.e., in the case of a publicly-owned waste facility (e.g., *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007)).

The latter so-called market participant exception does not appear applicable to the law proposed in the bill and the law may otherwise encounter difficulties if subject to a Commerce Clause challenge.

2. *International law* – as noted by DEP, certain international treaties or agreements may apply to the activity that is the impetus for the bill (e.g., the Basel Convention and the OECD). According to a December 2020 BDN article on the Searsport spill, some individuals argued that the shipping of such plastic waste violates the Basel Convention, which the UK (which includes Northern Ireland) is a party to but the US is not. That argument was disputed in the article by the manager of the PERC facility, who stated that the shipment was lawful.
3. *“Plastic waste”* – as noted by DEP, the term “plastic waste” as used in the bill is undefined. This could be problematic for two reasons: (1) as noted by DEP, the “waste” spilled in Searsport that was the impetus for the bill was intended for use as fuel and depending on its characterization might not be considered “waste”; and (2) as noted by one individual and echoed by Representative Zeigler, the phrase could be interpreted to prevent a ship from disposing of certain wastes generated by the crew or through the operation of the ship during a voyage.
4. *“Another jurisdiction”* – as noted by DEP, the term “another jurisdiction” as used in the bill is undefined, noting that it could mean another state, county, municipality or other jurisdictional division, which could prove problematic.

**Fiscal information**

Not yet available from OFPR.