

IN THE SUPREME COURT OF OHIO

Appeal Number **09-0211**

On Appeal from the Stark County Court of Appeals, Fifth Appellate District

National Solid Wastes Management Association

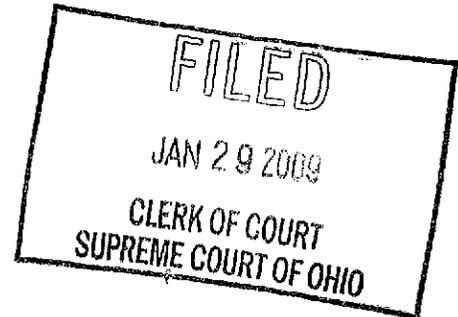
v.

Stark-Tuscarawas-Wayne Joint Solid Waste Management District

**MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-
APPELLANT NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. SUMMARY OF APPELLANT’S POSITION..... 1

II. STATEMENT OF PERTINENT FACTS.....3

III. ARGUMENT.....5

A. Proposition of Law No. 1

The Ohio EPA is not an indispensable party to the determination of whether a waste management district promulgated and attempted to enforce *ultra vires* rules.

B. Proposition of Law No. 2

The rule-making authority of the STW District is limited to only that authority granted to it by the legislature and neither includes (1) the authority to enforce any existing rules after the Ohio EPA issued its own plan for the STW District; nor (2) the authority to enforce any rules that exceed the limited rule-making power granted the STW District by R.C. 343.01(G)

IV. CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

CASES

<i>Kesselring Ford, Inc. v. Cann</i> (1980), 68 Ohio App. 2d 131, 133-134, 427 N.E.2d 785, 787	9
<i>Layne v. Huffman</i> (1975), 42 Ohio St. 2d 287, 290, 327 N.E.2d 767, 770	6
<i>Plumbers & Steamfitters Local Union 83 v. Union Local School District Board of Education</i> (1999), 86 Ohio St. 3d 318, 715 N.E.2d 127	9
<i>State ex rel. Bush v. Spurlock</i> (1989), 42 Ohio St. 3d 77, 537 N.E.2d 641	9

STATUTES

3734.521	9, 11
3734.53	13, 14
3734.54	13
Chapter 119.....	8
R.C. 343.01.....	4, 11, 14
R.C. 343.01(G)	passim
R.C. 3734.02.....	1, 5, 8
R.C. 3734.53(C).....	11, 13
R.C. 3734.55.....	4, 11
R.C. 3734.55(D)	4, 13
R.C. 3734.56.....	4, 9, 12
R.C. 3734.56(A)	4, 12
R.C. 3734.56(A).	14

RULES

Civ.R. 19.....	6, 9
Civ.R. 19(A)	6, 9
Civ.R. 19(A)(1).....	6
Civ.R. 19(B)	6, 7

REGULATIONS

40 C.F.R. 257.3-2	8
40 C.F.R. 257.3-8	8

I. Summary of Appellant's Position

This case is about an Ohio solid waste management district's lack of authority to mandate that other Ohioans meet arbitrary recycling standards in order to gain access to private landfills in the district.

This case raises issues of public and great general interest because it threatens to disrupt the orderly and efficient management of solid waste throughout the State. Three rural Counties—Stark, Tuscarawas and Wayne (“STW District”)—make up one of 52 solid waste districts in Ohio. The STW District has enacted rules that exceed its statutory authority. These *ultra vires* rules order all other districts to either meet arbitrary and onerous recycling standards or divert millions of tons of trash that are currently being sent each year to private landfills located in Stark and Tuscarawas Counties. Recycling programs are costly for local government and businesses to implement and diverting waste to other landfills is expensive and inefficient. Thus, the STW District is obligating other districts and Ohio citizens and businesses to incur unnecessary costs in order to meet the STW District's *ultra vires* rules.

The trial court held that the STW District's rules were enforceable and that decision was appealed. Without reaching the underlying merits, the Appellate Court ruled that R.C. 3734.02 vests the power to enforce the challenged rules with the Director of the Ohio Environmental Protection Agency (“Ohio EPA”). Upon this basis, the Appellate Court reversed and remanded the case for dismissal, holding that the Ohio EPA Director was an indispensable party to the case.

Aside from the dismissal of the case, the Appellate Court did not state definitively whether the STW District can impose the *ultra vires* rules on the other districts, leaving

all parties uncertain as to how to proceed; with the STW District insistent upon enforcement of its rules, and all other parties insistent that the rules are unenforceable.

Ohio EPA actually has no statutory authority to enforce a local solid waste management district's rules and has never done so in the past. Accordingly, the Appellate Court's decision leaves the Plaintiff-Appellant National Solid Wastes Management Association ("NSWMA")—not to mention over 50 Ohio counties—asking a critically important question: can 1.5 million tons of trash from Cuyahoga, Summit and other counties continue to be disposed at landfills in the STW District? Facing astronomical costs and logistical challenges to divert waste to other landfills on the one hand and potential fines for violating the STW District's rules on the other, the NSWMA members must have a definitive answer to this question as soon as possible.

Aside from this very practical problem, the Appellate Court erred in its decision. There exists no statutory basis for its ruling. The Director of Ohio EPA has no authority to enforce the rules of a solid waste management district.

This action was brought by NSWMA to prevent the STW District from enforcing its *ultra vires* rules. It had nothing to do with the Ohio EPA's failure to act or power to act. Thus, the Appellate Court erred in holding the Director was an indispensable party, and erred in failing to reverse the trial court. The Appellate Court should have held these *ultra vires* rules unenforceable by the STW District.

The issues underlying this case can be decided purely as a matter of statutory interpretation and therefore, a *de novo* question of law. A decision in this case is of great general importance to the State, to prevent trash from piling up in the State's most populous counties with nowhere to dump it without incurring substantial additional costs

while in a global economic crisis. Thus, this Court's *de novo* review of the challenged rules is necessary and appropriate to dispose of this case with judicial economy.

II. Statement of Pertinent Facts

Plaintiff-Appellant National Solid Wastes Management Association ("NSWMA") is a Washington D.C. based trade association that advocates the interests of private businesses engaged in solid waste management throughout the United States. Three NSWMA members (Waste Management of Ohio, Inc., Republic Services of Ohio II, LLC and Penn-Ohio Coal Co., Inc. d/b/a Kimble Sanitary Landfill) own and operate landfills in Stark and Tuscarawas Counties pursuant to permits issued by the Ohio EPA.

Based on the most recent data available from Ohio EPA, in 2005, these three landfills accepted 2,762,322 tons of solid waste—12.7% of all solid waste landfilled in Ohio. The waste came from 53 Ohio counties. If the rules at the heart of this case had been enforceable, 1,429,818 tons of that waste and 43 of these Ohio counties would have been barred from the three landfills. NSWMA and its member companies actively opposed the adoption of the STW District's rules due to the devastating impact to their business. In the courts below, 16 Ohio counties joined NSWMA's challenge to the rules as *amicus curiae* due to the substantial adverse impact the rules have in their communities. The executive directors of the Cuyahoga County and Summit County solid waste districts testified on behalf of NSWMA at the bench trial.

The STW District is a political subdivision of the State of Ohio. It is led by a nine-member Board of Directors who—not coincidentally—are the elected County Commissioners of Stark, Tuscarawas and Wayne Counties. The STW District is a

creature of statute under R.C. Chapters 343 and 3734, with narrowly prescribed authority for solid waste management in its three-county territory.¹

The purpose of Ohio solid waste districts is to survey local waste disposal needs in each community and develop a plan to assure those needs are met for years into the future.² The statutes require these plans to be updated every five years, and the initial and amended plans must be approved by the Ohio EPA under R.C. 3734.56(A). If a district fails to meet its planning obligations—to wit: updating and obtaining approval of the updated plan every five years—then Ohio EPA is required to develop a plan for that district under R.C. 3734.55(D) and 3734.56(A) and the district no longer has any authority to develop its own plan.

The STW District submitted an initial solid waste management plan that received approval from Ohio EPA in 1993. However, it failed to obtain Ohio EPA approval of any subsequent amended plans as required every five years, and in the STW District's case, in 1998 and 2003. As such, the Director of Ohio EPA was bound by R.C. 3734.55(D) and 3734.56(A) to prepare a plan for the STW District and did so on December 22, 2006.

But just a few weeks before the Director issued his plan for the STW District, the STW District adopted local rules pursuant to R.C. 343.01(G) that included an onerous so-called "recycling rule." This rule states in part that "No Solid Waste Facility within the STW District shall accept waste originating in another solid waste district or authority within the State, unless such originating district or authority meets or exceeds the STW

¹ See generally, R.C. 343.01, R.C. 3734.55 and R.C. 3734.56 (together they form STW's limited authority).

² Transcript testimony of Ohio EPA Solid Waste Management District Unit Supervisor Andrew Booker, pp. 192-195.

District's Recycling Standards." Thus, the rule establishes a highly restrictive prohibition on the NSWMA member landfills that can only be satisfied by the other districts in Ohio meeting the STW District's recycling standards. So NSWMA members, other Ohio districts and Ohio businesses are heavily impacted by the rule.

Ohio law prohibits the STW District from enforcing any local rules after the Director issues a plan for the district. Furthermore, R.C. 343.01(G) only gives districts such as the STW District very limited rule-making power—certainly not the power to enforce its "recycling rule." So even if this Court somehow found that the STW District had authority to enforce its rules notwithstanding the Director having issued a plan, the rules are unlawful as they exceed the statutory restrictions on the STW District's rulemaking power in R.C. 343.01(G).

NSWMA sought declaratory judgment that the rules were invalid and unenforceable. NSWMA now seeks propositions of law that (1) holds the Ohio EPA is not an indispensable party to the determination of whether a waste management district promulgated and attempted to enforce *ultra vires* rules; and (2) limits the rule-making authority of the STW District to only that authority granted to it by the legislature.

III. Argument

A. Proposition of Law No. 1

The Ohio EPA is not an indispensable party to the determination of whether a waste management district promulgated and attempted to enforce *ultra vires* rules.

Without either party identifying it as error in their merit briefs or discussing it at trial, the Appeals Court held:

R.C. Section 3734.02 vests the power of enforcement of [the STW District] rules with the Director of the Ohio EPA. Upon review of the record, NSWMA filed the case sub judice naming only the Stark-

Tuscarawas-Wayne Joint Solid Waste Management District as a party. The complaint does not name the Director of the Ohio EPA. As the Director of the Ohio EPA has the power of enforcement of the rules under dispute, the Director is a necessary party to this declaratory judgment action.

See attached Opinion at ¶11.

Given that Ohio EPA actually has no statutory authority to enforce a local solid waste management district's rules and has never done so in the past, the Appeals Court decision leaves NSWMA and numerous Ohio counties asking whether they can continue to access the landfills in the STW District.

1. What makes a party indispensable to a case?

Civ.R. 19 provides, in part, that “[a] person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded amongst those already parties * * * .” Civ.R. 19(A)(1). In determining whether a person is an “indispensable party” under Civ.R. 19(A), a court must follow Civ.R. 19(B). See, e.g., *Layne v. Huffman* (1975), 42 Ohio St. 2d 287, 290, 327 N.E.2d 767, 770. A court must exercise “equity and good conscience” and evaluate the following factors:

- (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties;
- (2) the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided;
- (3) whether a judgment rendered in the person's absence will be adequate;
- (4) whether the plaintiff will have an adequate remedy if the action is dismissed.

Civ.R. 19(B). The Appellate Court did not evaluate these factors in the opinion, nor give the parties an opportunity to be heard on these factors.

2. Ohio EPA was not indispensable to this case.

First, a declaratory judgment stating whether or not the STW District has the authority to promulgate and enforce its rules without the Ohio EPA being a party to the case does not prejudice the Ohio EPA—or either party—in the least, because the case is strictly about whether the STW District exceeded its statutory authority in promulgating and enforcing *ultra vires* rules. The case is not about the Ohio EPA.

Second, a declaratory judgment stating whether or not the STW District has the authority to promulgate and enforce its rules can be drafted to protect the Ohio EPA's statutory authority when it comes to the landfills in question within the STW District, and thereby eliminate any perceived prejudice.

Third, a declaratory judgment stating whether or not the STW District has the authority to promulgate and enforce its rules can stand alone, independent and without harming the Ohio EPA's statutory authority. Therefore, a judgment rendered without joining the Ohio EPA as a party will be more than adequate.

Fourth, and quite importantly, the NSWMA members will have no adequate remedy if the action is dismissed. The NSWMA members will need to decide whether to follow the STW District's rules or ignore them and face potential fines. Other districts will need to decide whether to work to meet the STW District's arbitrary recycling standards, weighing the cost/benefit to compliance versus noncompliance.

In reality, no districts, nor the NSWMA members nor Ohio EPA—who have all operated together under the statutory scheme since it was amended by H.B. 592 in

1988—ever believed Ohio EPA had authority to enforce district rules. The Appellate Court decision truly came “out of the blue.”

All of this weighs heavily against holding Ohio EPA is an indispensable party to this litigation, and that is before considering that the Ohio EPA has no statutory authority to enforce rules promulgated by a waste management district.

3. Ohio EPA does not have authority to enforce STW District’s rules.

The Appeals Court failed to understand the statutory division of responsibilities between the Ohio EPA and the STW District when it comes to solid waste management.

The first sentence of R.C. 3734.02 states that:

The director of environmental protection, in accordance with Chapter 119. of the Revised Code, shall adopt and may amend, suspend, or rescind rules having uniform application throughout the state governing solid waste facilities and the inspections of and issuance of permits and licenses for all solid waste facilities in order to ensure that the facilities will be located, maintained, and operated, and will undergo closure and post-closure care, in a sanitary manner so as not to create a nuisance, cause or contribute to water pollution, create a health hazard, or violate 40 C.F.R. 257.3-2 or 40 C.F.R. 257.3-8, as amended.

Yet the rules at issue in this case governing solid waste facilities were adopted by the STW District, not the Director. Indeed, the first phrase of the challenged recycling rule is “No Solid Waste Facility *within the STW District . . .*” Clearly the rule is not one “having uniform application throughout the state.”

The Appellate Court did not cite any specific passage of R.C. 3734.02 “vesting power of enforcement” of the STW District rules in the Director. Indeed, no such vesting of power exists in R.C. 3734.02, or any other provision of the Revised Code.

By contrast, R.C. 343.01(G) states:

To the extent authorized by the solid waste management plan of the district approved [by the Director of Ohio EPA] under section 3734.521 or

3734.55 of the Revised Code or subsequent amended plans of the district approved under section 3734.521 or 3734.56 of the Revised Code, the board of county commissioners of a county district or *board of directors of a joint district may adopt, publish, and enforce rules* doing any of the following * * * .”

The STW District’s rules state that they were adopted pursuant to R.C. 343.01(G).

Under the clear language of R.C. 343.01(G), the only party that can enforce solid waste management plan rules (to the extent that they are enforceable at all) is the district that promulgated them. The STW District is the only party that needed to be named a defendant in the case.

Given that Ohio EPA actually has no statutory authority to enforce the STW District’s rules and has never done so in the past, this Court should reverse the Appellate Court’s ruling and resolve this case on its merits.

4. Even if Ohio EPA were indispensable to this case, it does not dictate dismissal of the entire action.

This Court has had the occasion to review dismissals under Civ.R. 19 and has held such a practice harsh and unwarranted, except in extreme circumstances. In *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St. 3d 77, 537 N.E.2d 641 this Court stated: “Ohio courts have eschewed the harsh result of dismissing an action because an indispensable party was not joined, electing instead to order that the party be joined pursuant to Civ.R. 19(A) * * *,” citing *Kesselring Ford, Inc. v. Cann* (1980), 68 Ohio App. 2d 131, 133-134, 427 N.E.2d 785, 787. “ * * * [D]ismissal, due to a party’s failure to join a necessary party is warranted only where the defect cannot be cured.” *State ex rel. Bush v. Spurlock*, (1989), 42 Ohio St. 3d 77, 81, 537 N.E.2d 641, 645. *See, also, Plumbers & Steamfitters Local Union 83 v. Union Local School District Board of Education* (1999), 86 Ohio St. 3d 318, 715 N.E.2d 127.

Here, a declaratory judgment stating whether or not the STW District has the authority to promulgate and enforce its rules can be drafted to protect the Ohio EPA's statutory authority when it comes to the landfills in question within the STW District, and thereby eliminate any perceived prejudice and prevent the draconian dismissal of the case without resolving the issues on the merits.

Remanding the merits to the Appellate Court is very problematic. As written, the recycling rule had an effective date of January 1, 2008. The trial court found this deadline could not be satisfied and extended it to June 1, 2009 *sua sponte*. That extension has presumably been erased by the Appellate Court decision. The timely, final resolution of the merits by this Court is essential.

5. Appellate Courts raising error *sua sponte* must find sufficient basis in the record; the Appellate Court in this case did not do so.

The Appellate Court *sua sponte* raised the issue of whether Ohio EPA was an indispensable party. It was not raised by the STW District, and Ohio EPA never sought to intervene, even though Ohio EPA was heavily involved in this case.

Ohio EPA appeared throughout the five-day bench trial in this case. The STW District subpoenaed an Ohio EPA attorney to testify. The Chief of the Environmental Enforcement Section and of the Attorney General's Office appeared to quash the subpoena. The supervisor responsible for the Ohio EPA unit that manages the solid waste district programs testified for several hours as a witness called by NSWMA. The past Director and former Chief of the Office of Legal Services for Ohio EPA testified as a witness called by the STW District. Not once did anyone suggest Ohio EPA was an indispensable party to this action.

There is no basis in the record for the Appellate Court to decide *sua sponte* to raise and apply a waivable defense that the STW District did not itself raise, that Ohio EPA never raised during its appearance at trial and that no party briefed. A declaratory judgment in this case can be narrowly tailored to state the limits of STW District's authority to promulgate and enforce its rules.

Accordingly, the Appellate Court got it wrong. The Ohio EPA is not an indispensable party to the determination of whether a waste management district promulgated and attempted to enforce *ultra vires* rules.

B. Proposition of Law No. 2.

The rule-making authority of the STW District is limited to only that authority granted to it by the legislature and neither includes (1) the authority to enforce any existing rules after the Ohio EPA issued its own plan for the STW District; nor (2) the authority to enforce any rules that exceed the limited rule-making power granted the STW District by R.C. 343.01(G)

- 1. R.C. 343.01(G) and R.C. 3734.53(C) provide limited rule-making power for waste management districts—but only to the extent authorized by an approved plan or an approved subsequent amended plan of that district.**

R.C. 343.01 establishes the authority of waste management districts, such as the STW District. R.C. 3734.53(C) and R.C. 343.01(G) provide the authority through which waste management districts, such as the STW District may adopt, publish and enforce rules. R.C. 3734.53(C) states in pertinent part: "The solid waste management plan of a county or joint district may provide for the adoption of rules under division (G) of section 343.01 of the Revised Code after approval of the plan under section 3734.521 or 3734.55 of the Revised Code * * *." R.C. 343.01(G) states:

To the extent authorized by the solid waste management plan of the district approved under section 3734.521 [Change in District Composition] or 3734.55 [Preliminary Review of Draft Plan] of the

Revised Code or subsequent amended plans of the district approved under section 3734.521 or 3734.56 [Submission of Amended Plan and Certification] of the Revised Code, the board of county commissioners of a county district or board of directors of a joint district may adopt, publish, and enforce rules doing any of the following:

* * *

R.C. 343.01(G). [Emphasis added].

Thus, a district can only adopt rules to the extent authorized by an initial or amended plan of that district that is approved by Ohio EPA. There is no authority elsewhere in the Revised Code for a waste management district to adopt or enforce rules.

2. **A district can only adopt rules to the extent authorized by its own timely drafting of an initial or amended plan approved by Ohio EPA and Ohio EPA is prevented from permitting district rules when Ohio EPA is forced to draft a plan for that district.**

The STW District did not have either an Ohio EPA approved initial or amended plan after 1998. The STW District submitted its initial plan to Ohio EPA in December 1992 and that plan was approved by the Ohio EPA in February 1993³ for a five-year period ending in 1998. But subsequent to that plan, the STW District never submitted an amended plan that received Ohio EPA approval.⁴ Eight years elapsed between the date that the STW District was required to submit and obtain Ohio EPA approval of its own amended plan in 1998, and Ohio EPA's issuance of a plan for the district in 2006.⁵

R.C. 3734.56(A) requires that "the district shall submit an amended plan and certification to the director [of the Ohio EPA] every five years on or before the anniversary date of the approval of the initial plan of the district." R.C. 3734.56(A) deals with a failure on a district's part to comply with this directive: "If a county or joint

³ Director's Final Findings & Orders *In the Matter of Stark Tuscarawas Wayne Solid Waste Management District*, admitted into evidence as Defendant's Exhibit D at trial.

⁴ *Id.*

district fails to submit an amended plan in accordance with this division or fails to obtain approval of the amended plan within eighteen months after the required date for its submission under this division, the director [of the Ohio EPA] shall proceed in accordance with division (D) of section 3734.55 of the Revised Code.”

R.C. 3734.55(D) clearly states:

If the director [of the Ohio EPA] finds that a county or joint solid waste management district has failed to obtain approval of its solid waste management plan within eighteen months after the applicable date prescribed for submission of its plan under division (A) of section 3734.54 of the Revised Code or within twenty-four months after that date if the date for submission was extended under that division, the director shall prepare a solid waste management plan for the county or joint district that complies with divisions (A) and (D) of section 3734.53 of the Revised Code. The plan shall not contain any of the provisions required or authorized to be included in plans submitted by districts under division (B), (C), or (E) of that section [R.C. 3734.53].

* * *

[Emphasis added]. Thus, the Ohio EPA was required to prepare a solid waste management plan for the STW District within 18 months after February 1998, (by August 1999) and that plan was not permitted to contain any of the provisions authorized by R.C. 3734.53(B), (C) or (E).

As seen above, R.C. 3734.53(C) authorized districts to adopt rules under division (G) of section 343.01. Thus, a district can only adopt rules to the extent authorized by its own timely drafting of an initial or amended plan approved by Ohio EPA, and in fact, the Ohio EPA is prevented from permitting district rules when that district's failures force the Ohio EPA to draft a plan for that district under R.C. 3734.55(D).

⁵ *Id.*

That is exactly what happened here. Faced with the STW District's failure, the Ohio EPA wrote a plan in December 2006 for the STW District and issued final Findings & Orders ordering the STW District to implement the Ohio EPA plan.⁶

To reiterate the statutory scheme: failure by the STW District to obtain Ohio EPA approval for its plan obligated the Ohio EPA to draft a plan for the District.⁷ The fact that Ohio EPA had to draft a plan for the STW District prevents the Ohio EPA from granting rulemaking authority to that district—*by statute*.⁸

3. The statutory scheme only allows a waste management district to block waste from other districts when necessary to provide waste disposal capacity for the district.

Even assuming *arguendo* the STW District had the power and authority to enforce its recycling rule, the rule exceeds the STW District's rule-making authority under R.C. 343.01(G). R.C. 343.01(G)(1) allows the STW District to prohibit or limit the receipt of solid wastes generated outside the district “*consistent with* the [future waste generation and available disposal capacity] projections contained in the plan or amended plan under divisions (A)(6) and (7) of section 3734.53 of the Revised Code.”

In short, if the projections in a district's plan demonstrate its identified landfill capacity is insufficient to meet its own waste disposal needs during the planning period, then *and only then* can it erect a blockade against waste from other Ohio districts. Ample evidence at trial showed the STW District has abundant landfill capacity with each of the NSWMA member landfills projecting they have decades of currently permitted disposal capacity. The STW District clearly is not in a desperate situation that calls for the

⁶ *Id.*

⁷ R.C. 3734.56(A).

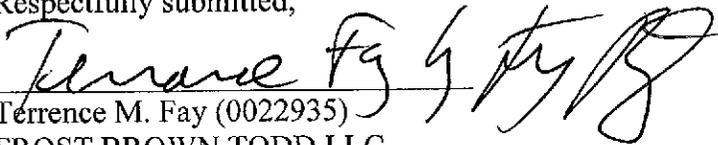
⁸ R.C. 3734.56(A).

draconian measure of hording private landfill space from use by millions of Ohioans beyond its three-county boundary. Thus, the recycling rule itself is unlawful on its face.

IV. Conclusion

The NSWMA members are not sure whether they are to be turning trucks away from their landfills or not. This obviously has substantial consequences for the residents and businesses of Cuyahoga, Summit and many other counties. A final answer from this Court to the underlying question of the STW District's authority is absolutely necessary and serves the interests of judicial economy. A timely and final decision in this case is of great general importance to the State, to prevent trash from piling up in, and unnecessary costs being imposed upon, some of the most populous counties in Ohio.

Respectfully submitted,


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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION

Plaintiff-Appellant

-vs-

STARK-TUSCARAWAS-WAYNE
JOINT SOLID WASTE
MANAGEMENT DISTRICT

Defendant-Appellee

JUDGES:

Hon. William B. Hoffman, P.J.
Hon. Julie A. Edwards, J.
Hon. Patricia A. Delaney, J.

Case No. 2008CA00011

OPINION

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CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Civil Case No.
2006CV04842

2

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

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BY _____
DATE 12-15-08

11

2008

Hoffman, P.J.

{¶1} Plaintiff-Appellant National Solid Wastes Management Association appeals the December 18, 2007 Judgment Entry of the Stark County Court of Common Pleas in favor of Defendant-appellee Wayne Joint Solid Waste Management District. The Cuyahoga Solid Waste Management District filed an amicus brief.

STATEMENT OF THE CASE

{¶2} Appellant National Solid Wastes Management Association (hereinafter "NSWMA") is a nationwide association of solid waste companies. Three of its members own and operate landfills located in the Stark-Tuscarawas-Wayne District (hereinafter "STW District"). These landfills are the American Landfill, owned and operated by American Landfill, Inc., the Countywide Landfill, owned and operated by Republic Services of Ohio II, LLC, and the Kimble Sanitary Landfill, owned and operated by the Penn-Ohio Company.

{¶3} On December 13, 2006, NSWMA filed a complaint in the Stark County Court of Common Pleas against the STW District seeking a declaration that the STW District local rules were invalid and unenforceable. The matter proceeded to a bench trial. Via Judgment Entry of December 18, 2007, the trial court denied NSWMA's request to declare the STW District's rules void and unenforceable. However, the trial court agreed immediate compliance was "impossible" and extended the effective date of the recycling rule until June 1, 2009.

{¶4} Appellant now appeals, assigning as error:

{¶5} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING JUDGMENT TO THE STW DISTRICT UPHOLDING THE DISTRICT'S

RULES BECAUSE AS A MATTER OF LAW THOSE RULES BECAME UNENFORCEABLE AFTER OHIO EPA ISSUED ITS SOLID WASTE MANAGEMENT PLAN FOR THE DISTRICT IN DECEMBER 2006.

{¶6} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN UPHOLDING THE STW DISTRICT'S RECYCLING RULE BECAUSE THAT RULE EXCEEDS THE DISTRICT'S LIMITED RULEMAKING AUTHORITY AND VIOLATES PLAINTIFF'S DUE PROCESS RIGHTS.

{¶7} "III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT TO THE STW DISTRICT BECAUSE RULES 9.02 AND 9.03 INVADE THE EXCLUSIVE JURISDICTION OF THE OHIO EPA TO REGULATE THE OPERATION AND DESIGN OF LANDFILLS IN OHIO."

{¶8} In its complaint filed with the Stark County Court of Common Pleas Appellant questions the authority of the STW District to adopt and enforce local rules 9.02, 9.03 or 9.04 restricting the use and operation of landfills in the three-county area.

{¶9} Solid waste districts are political subdivisions created purely by statute. They operate according to plans developed in conjunction with the Ohio EPA. The required contents of a waste management plan are dictated by statute. Such plans may provide for the adoption of rules by the local district. A statutory timetable dictates when plans must be prepared and submitted to the Director of the Ohio EPA for approval. If the plan is not approved by the Director, the Director is empowered to create a plan for the local district. If the local district fails to implement a plan formulated by the Director, the Director shall issue an enforcement order requiring certain action by the district until an amended plan is put into place.

{¶10} The STW District obtained Ohio EPA approval of its initial solid waste management plan in 1993. However, the District failed to obtain approval of any subsequent 5-year amended plan. Amended plans were due in 1998 and 2003 (the submitted plans were rejected). The Ohio EPA eventually notified the District it was taking over the planning process. Eventually, the STW District and the Director negotiated a "Memorandum of Understanding" (MOU) on September 26, 2005. The MOU set forth the process under which the Ohio EPA would prepare and issue its plan for the District. Over the objections of Appellant NSWMA, the STW District adopted the rules under dispute on November 3, 2006.

{¶11} R.C. Section 3734.02 vests the power of enforcement of said rules with the Director of the Ohio EPA. Upon review of the record, NSWMA filed the case sub judice naming only the Stark-Tuscarawas-Wayne Joint Solid Waste Management District as a party. The complaint does not name the Director of the Ohio EPA. As the Director of the Ohio EPA has the power of enforcement of the rules under dispute, the Director is a necessary party to this declaratory judgment action.

{¶12} As duly pointed out to me by my colleague Judge Edwards, the requirement for joining all necessary parties is jurisdictional and cannot be waived. *Plumbers & Steamfitters Local Union 83 v. Union Local School District Board of Education* (1999), 86 Ohio St.3d 318. A party's failure to join an interested and necessary party constitutes a jurisdictional defect precluding the court from rendering a declaratory judgment. *Id.*; *Portage County Board of Commissioners v. City of Akron* (2006), 109 Ohio St.3d 106.

{¶13} In *Cincinnati v. Whitman* (1975), 44 Ohio St.2d 58, 73 O.O.2d 283, 337 N.E.2d 773, the Ohio Supreme Court examined whether a litigant needed to join the director of the EPA as a party to a suit concerning the condition of Cincinnati's drinking water. The Court held "when declaratory relief is sought which involves the validity or construction of a statute and affects the powers and duties of public officers, such officers should be made parties to the action or proceeding in which the relief is sought." *Id.* at 61, 73 O.O.2d 283, 337 N.E.2d 773. In that case, the director of the EPA had the exclusive duty to investigate and enforce compliance with statutory water quality standards and, therefore, failure to join the EPA, a necessary party, deprived the trial court of jurisdiction.

{¶14} Based upon the above, Appellant's failure to join the Director of the EPA deprived the court of jurisdiction.

{¶15} Neither does Appellant affirmatively demonstrate in the record the Director, as opposed to the STW District, will or intends to enforce the rules as adopted. Therefore, Appellant has not demonstrated an actual controversy exists between the parties. Actions are moot when they involve no actual genuine controversy which can definitely affect the parties' existing legal relationship, *Lingo v. Ohio Central Railroad, Inc.*, Franklin App. No. 05AP2006, 2006-Ohio-2268, at paragraph 20, citations deleted. Ohio courts have long recognized a court should not entertain jurisdiction over cases without actual controversies, *Tschantz v. Ferguson* (1991), 57 Ohio St.3d 131. NSWMA merely speculates as to the damages members may incur should the Director exercise his power of enforcement. Therefore, any opinion issued by this Court would be advisory in nature.

{¶16} Based on the above, the judgment of the Stark County Court of Common Pleas is reversed and the matter remanded to that court for further proceedings according to law.

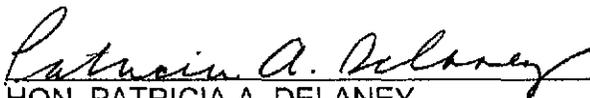
By: Hoffman, P.J. and

Delaney, J. concur,

Edwards, J. concurs separately


HON. WILLIAM B. HOFFMAN

HON. JULIE A. EDWARDS

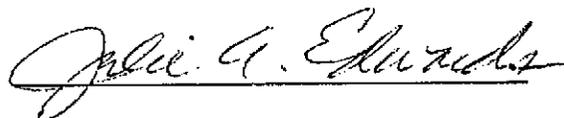

HON. PATRICIA A. DELANEY

EDWARDS, J., CONCURRING OPINION

{¶17} I concur with the majority's disposition of appellant's appeal, but do so based solely on the analysis that a necessary party was not named in this action.

{¶18} The majority, in its opinion, holds that appellant's appeal is moot because appellant has not demonstrated an actual controversy between the parties. On such basis, the majority dismisses the appeal. However, my concern is that the Director of the Ohio EPA was not named in the complaint. As the majority states in its opinion, the Director of the Ohio EPA has the power of enforcement of the rules under dispute. Because appellant is challenging the enforceability of such rules, I believe that the Director of the Ohio EPA was a necessary party to this declaratory judgment action.

{¶19} "A party's failure to join an interested and necessary party constitutes a jurisdictional defect that precludes the court from rendering a declaratory judgment." *Portage Cty. Bd. Of Commrs. v. Akron*, 109 Ohio St.3d 106, 125, 2006-Ohio-954, 846 N.E.2d 478, citing, *Plumbers & Steamfitters Local Union 83 v. Union Local School Dist. Bd. of Edn.* (1999), 86 Ohio St.3d 318, 321, 715 N.E.2d 127. Such defect cannot be waived. *Id.* On such basis, I would reverse the judgment of the trial court and remand the matter for further proceedings.



Judge Julie A. Edwards

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION

Plaintiff-Appellant

-vs-

STARK-TUSCARAWAS-WAYNE
JOINT SOLID WASTE
MANAGEMENT DISTRICT

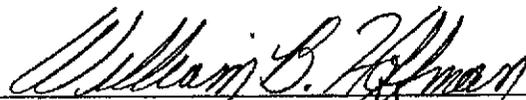
Defendant-Appellee

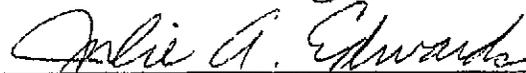
JUDGMENT ENTRY

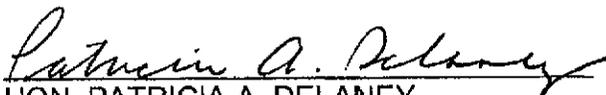
Case No. 2008CA00011

CLERK OF COURT OF APPEALS
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For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is reversed and the matter remanded to that court for further proceedings according to law. Costs assessed to Appellant.


HON. WILLIAM B. HOFFMAN


HON. JULIE A. EDWARDS


HON. PATRICIA A. DELANEY