

IN THE SUPREME COURT OF OHIO

09-0211

Appeal Number _____

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 AMICUS CURIAE
OHIO CHAMBER OF COMMERCE

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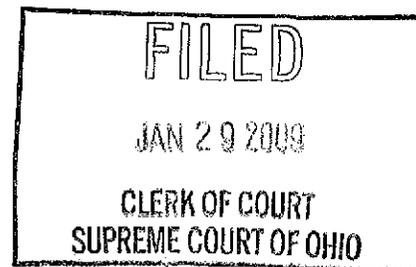


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The rule-making authority of the STW District is limited to only that authority granted to it by the legislature and neither includes (1) the authority to enforce any existing rules after the Ohio EPA issued its own plan for the STW District; nor (2) the authority to enforce any rules that exceed the limited rule-making power granted the STW District by R.C. 343.01(G)..... 5

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I. Summary of Position

This case raises important questions of law regarding the power of one Ohio solid waste management district to impact how solid waste is handled across the State. Now more than ever, Ohio's businesses cannot afford artificially high prices for waste disposal created by protectionist rules of a single solid waste management district.

This case raises important issues of public and great general interest to the Ohio Chamber of Commerce (the "Chamber") because the actions of the Stark-Tuscarawas-Wayne Joint Solid Waste Management District ("STW District") unlawfully drive up the cost of waste disposal for Ohio businesses.

As set forth in the Memorandum in Support of Jurisdiction of Plaintiff-Appellant National Solid Waste Management Association ("NSWMA"), the STW District's recycling rule forces other Ohio counties and businesses to either meet STW's arbitrary recycling standards or have their waste banned from landfills in the STW District. Neither option is acceptable to Ohio businesses.

Recycling is important to the long term sustainability of our environment, communities and businesses. But recycling is heavily dependent on economic conditions. With residential recycling, local communities incur a substantial cost to collect, sort and return recycled materials to end users. Similarly, commercial and industrial recycling has a substantial cost associated with collecting recyclable material and returning it to end users.

Recyclables such as glass, paper, plastics and metals are commodities. The price these recyclables fetch on the open market fluctuates with demand. Today, with demand for all products at record lows and end users such as paper, aluminum and steel mills

flirting with bankruptcy, the sale of recyclables provides little revenue to offset the cost of recycling. Thus, to continue significant recycling as mandated by the STW District, Ohio communities and businesses must heavily subsidize these programs at a time when they can least afford to do so.

The STW District's protectionist recycling rule requires all Ohio communities to meet the STW District's recycling standard for *both* residential/commercial and industrial recycling or stop using landfills in the STW District. Thus, while Cuyahoga, Summit or Holmes County officials might spend public funds to take measures necessary to meet the residential/commercial recycling standards, if industries in those counties cannot meet the industrial recycling standard, the entire community could be barred from using these landfills. The same is true if industry meets the standards but public entities do not. Thus, the STW District's protectionist rule places an unacceptable economic burden on businesses and communities far beyond Stark, Tuscarawas and Wayne Counties.

True, if the waste is barred from the STW District, Ohio businesses can use another landfill. But millions of tons of waste from 51 Ohio counties currently go to the three landfills in the STW District because they offer the most cost effective solution. Other landfills are located further away and transportation costs are unpredictable and prohibitive. Some landfills charge higher fees to cover unique operating expenses. Certain landfills are not authorized to accept special wastes like asbestos that come primarily from commercial and industrial buildings. And Ohio EPA has established tight restrictions on the amount of waste that can be accepted each day by some smaller landfills. Market conditions and statewide regulations, not local protectionist rules, should dictate where waste is disposed in Ohio.

And while the STW District has set out to bar other Ohioans from using these landfills, the Interstate Commerce Clause, U.S. Const. Art I, Sec. 8, Clause 3, precludes the STW District from blocking waste generated in Pennsylvania, New Jersey, New York and other States. Clearly the Ohio General Assembly did not intend such an awkward and harsh result for Ohio businesses.

Like NSWMA, the Chamber believes that if any government entity is to impose such drastic regulation throughout the State it must be an entity with statewide jurisdiction – the General Assembly or Ohio EPA – not Boards of County Commissioners whose actions become protectionist. The General Assembly gave solid waste districts authority to blockade landfills only in the rarest of circumstances when that district absolutely needs the landfill to manage its own waste. That is far from being the case in the STW District where three landfills have decades of operational life remaining under current Ohio EPA permits.

This Court's *de novo* review of the STW District rules is necessary and appropriate to dispose of this case with judicial economy.

II. Statement of Pertinent Facts

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization, representing every industry sector from manufacturing to commercial, utilities to services, and universities to small entrepreneurs. The Chamber works to promote and protect the interests of its more than 5,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

Through its member-driven standing committees and the Ohio Small Business Council, the Chamber formulates policy positions on issues as diverse as education funding, taxation, public finance, health care, environmental regulation, workers' compensation and campaign finance. The advocacy efforts of the Chamber are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

The Chamber adopts by reference the statement of facts set forth in the Plaintiff-Appellant NSWMA's Memorandum in Support of Jurisdiction.

III. Argument

A. Proposition of Law No. 1

The Ohio EPA is not an indispensable party to this action.

The Chamber adopts by reference the arguments set forth in Proposition of Law No. 1 of Plaintiff-Appellant NSWMA's Memorandum in Support of Jurisdiction.

Further, the Chamber observes that NSWMA member businesses have incurred substantial costs prosecuting this case and the STW District has defended it with public funds. To avoid further legal expense by both parties, we strongly urge this Court to address the merits of the challenge to the STW District rules.

De novo review is highly appropriate in this case. The record is fully developed. The parties conducted no discovery because the case can be decided as a matter of law. The parties filed comprehensive cross motions for summary judgment on the statutory authority of the STW District. The trial court declined to rule on the motions and instead ordered a costly five-day bench trial that spanned over two months in the fall of 2007.

The trial court focused not on the issue before it – the STW District’s statutory authority to adopt and enforce protectionist rules – but on how Ohio EPA treated the STW District after the District failed to meet its most basic statutory duty to prepare an amended solid waste plan in 1998.

The Court of Appeals review was less searching. The Director of Ohio EPA has no authority to enforce the STW District’s rules. NSWMA, the STW District and Ohio EPA have been operating under this legislative scheme for over 20 years. Neither party thought twice about the need to name the Director as a party because Ohio EPA has no statutory authority to enforce local district rules and has never attempted to do so. Two senior Ohio EPA officials testified at trial and two Assistant Ohio Attorneys General appeared at the trial. None of them raised concern that the Director was not named a party. The necessity of Ohio EPA as a party to the case was not briefed at the Court of Appeals.

The issues in this case are of great importance to the NSWMA, the Chamber’s members and numerous other Ohio solid waste management districts. It presents a significant distraction to their core business. The case most likely will not be resolved until this Court renders a definitive decision on the authority of the STW District to adopt and enforce these protectionist rules. For judicial economy, we strongly urge the Court to decide the case on the merits given the record is more than sufficient for thorough *de novo* review.

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 solid waste management districts—but only to the extent authorized by an Ohio approved initial or amended prepared by that district.**

The first sentence of Ohio’s State Solid Waste Management Plan states “[i]n 1988, Ohio’s General Assembly passed House Bill 592, a landmark legislative package that dramatically changed Ohio’s solid waste management program.”¹ When H.B. 592 was enacted, Ohio was facing a perceived solid waste crisis. Smaller, community-based landfills and incinerators were closing rather than spending capital to meet then-new U.S. EPA environmental requirements.

Twenty years later, Ohio has ample Ohio EPA-permitted landfill capacity to meet its needs well into the future. But protectionist rules like the one at issue in this case threaten that situation. The three landfills in the STW District can continue to accept nearly 13 percent of Ohio’s waste for decades to come without obtaining additional Ohio EPA permits for expansions.² The STW District’s recycling rule sets out to prohibit other Ohioans from accessing these resources while preserving them for the District’s own citizens.

As detailed in the NSWMA’s Memorandum in Support of Jurisdiction and the other *amicus curiae* memoranda, the STW District violated its statutory obligations to develop and implement its own Ohio EPA approved solid waste plan after 1998. Finally, in 2006, Ohio EPA ordered the STW District to implement a plan that Ohio EPA had

¹ *State Solid Waste Management Plan 2001*, Ohio EPA, Executive Summary, p. ix

² According to the Ohio EPA *2005 Facility Data Report*, the most recent report released by the Agency, landfills in the STW District accepted nearly 13 percent of Ohio’s solid waste in 2005.

prepared. The clear statutory effect of that action by Ohio EPA was to strip the STW District of all rulemaking authority it may have had under R.C. 343.01(G).

The District claims it entered an agreement – the so called Memorandum of Understanding or MOU – whereby Ohio EPA supplanted the statute with a “contract” allowing the District to continue enforcing its rules after Ohio EPA issued its plan for the District. That is not what the MOU says on its face. And the past Director of Ohio EPA who signed the MOU testified that was not his intent.

The trial court became lost in this 8-year delay of the District. In the opinion, Ohio EPA is chastised for not acting sooner, as if that somehow overrides the District’s ineptitude and the statutory conclusion that the district loses its rulemaking power when Ohio EPA is forced to issue a district plan.

The introductory language of R.C. 343.01(G) is clear and unambiguous. Only a district that has satisfied its statutory obligation to prepare its own plan and obtain the Ohio EPA’s approval of that plan has the authority to “adopt, publish and enforce” local rules. The MOU could not and did not change this outcome.

It is a violation of law and an insult to Ohio’s businesses that the STW District that failed to uphold its most basic statutory duty is now dictating what other law-abiding solid waste districts and businesses must do with their wastes in order to access private landfills.

- 2. The STW District’s protectionist recycling rule clearly exceeds its limited statutory authority to enforce rules under R.C. 343.01(G)(1).**

The STW District is a creature of statute and “has only those powers expressly provided by statute or as may exist by necessary implication.”³ The only provision of law allowing an Ohio solid waste district to isolate itself from other Ohioans is R.C. 343.01(G)(1) which states that a district that has an Ohio EPA approved plan may:

adopt, publish, and enforce rules doing any of the following:

(1) Prohibiting or limiting the receipt of solid wastes generated outside the district or outside a service area prescribed in the solid waste management plan or amended plan, at facilities covered by the plan, *consistent with the projections contained in the plan or amended plan under divisions (A)(6) and (7) of section 3734.53* of the Revised Code . . .⁴

R.C. 3734.53(A)(6) and (A)(7) set forth required elements in every solid waste district plan. R.C. 3734.53(A)(6) requires:

projections of the amounts and composition of solid wastes that will be generated within the district, the amounts of solid wastes originating outside the district that will be brought into the district for disposal or resource recovery, the nature of industrial activities within the district, and the effect of newly regulated waste streams, solid waste minimization activities, and solid waste recycling and reuse activities on solid waste generation rates.

In laymen’s terms, the district must project the total volume of solid waste it will be required to properly dispose of. Then R.C. 3734.53 (A)(7) requires:

An identification of the additional solid waste management facilities and the amount of additional capacity needed to dispose of the quantities of wastes projected in division (A)(6) of this section

³ 2003 Op. Att’y Gen. No. 2003-012 (referring expressly to the STW District and *citing Geauga County Bd. of Comm’rs v. Munn Road Sand & Gravel* (1993), 67 Ohio St. 3d 579, 582, 621 N.E.2d 696).

⁴ The balance of the statutory language in R.C. 343.01(G)(1) sets forth conditions under which the Director of Ohio EPA can override such a protectionist rule when necessary to provide waste disposal for other Ohio counties.

Simply put – each district must assess how much trash must be disposed and where it will be disposed.

The only statutory interpretation that imparts any meaning to the “consistent with the projections” phrase in R.C. 343.01(G)(1) is that a district can only prohibit other districts from using landfills in its jurisdiction when the amount of waste it must handle exceeds the amount of disposal capacity it has identified. That condition does not exist in the STW District. The STW District has never acknowledged this restriction on its authority to block waste from other districts.

The plan that Ohio EPA prepared for the District in December 2006 projects that the STW District has ample capacity at the three landfills to handle all waste it expects to generate and receive during the entire planning period. Thus, it is not “consistent with” these projections to block other Ohioans from the landfills in the STW District.

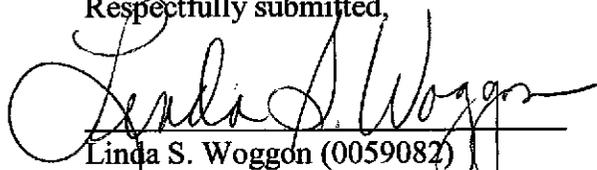
Like the districts, businesses make projections. In doing so, businesses demand and deserve a level of certainty in the law. The STW District plans to undertake an annual assessment of other districts’ compliance with its recycling standards. So, for example, businesses in Cuyahoga County might have access to landfills in the STW District one year, be denied the next, and have access the next and so on. Thus, the waste disposal rates charged to businesses that use these landfills cannot be locked in for extended terms. These fluctuating and unnecessary cost increases will go directly to the bottom line of Ohio’s businesses.

IV. Conclusion

Ohio’s businesses cannot afford artificially high waste disposal costs as a result of protectionist local rules. Upholding the rules at issue in this case would grant power to a

solid waste district that the Ohio General Assembly clearly never intended. This Court should accept this case and decide it on the merits in favor of the NSWMA.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Linda S. Woggon", written over a horizontal line.

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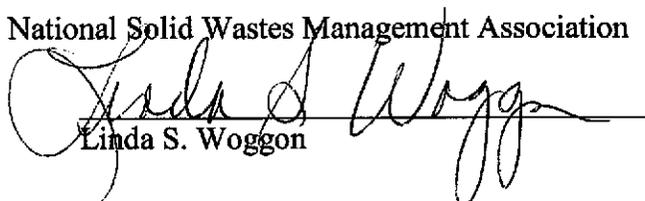
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal has been sent by ordinary United States mail, postage prepaid on this 29th day of January, 2009 to:

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