IN THE SUPREME COURT OF OHIO

09-0211

National Solid Waste Management Association,	:	Case No. _____
Plaintiff-Appellant,	:	On Appeal from the Stark County Court of Appeals, Fifth Appellate District Case No. 2008 CA 00011
v.	:	
Stark-Tuscarawas-Wayne Joint Solid Waste Management District,	:	
Defendant-Appellee.	:	

MEMORANDUM OF AMICUS CURIAE, OHIO MANUFACTURERS' ASSOCIATION, IN SUPPORT OF JURISDICTION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Manufacturers' Association ("OMA") is comprised of approximately 1,700 manufacturing companies which collectively employ just under 800,000 men and women who work in manufacturing in the State of Ohio. The OMA works to retain a statewide environment in which manufacturing businesses can survive with laws that support, not hinder, Ohio manufacturers who are competing in a global economy. The OMA and its members have a vital interest in ensuring that Ohio remains a desirable place for manufacturers to do business.

The laws enacted by the Ohio General Assembly have a direct impact on whether Ohio is viewed as a desirable venue for manufacturing and other industries. Accordingly, the OMA has a strong interest in the laws passed by the Ohio General Assembly that affect manufacturers.

The Ohio law at issue in this case – House Bill 592 – impacts hundreds of Ohio manufacturers who are required to lawfully dispose of solid waste. When the Ohio General Assembly adopted House Bill 592 in 1988, it was viewed as "a landmark legislative package that dramatically changed Ohio's solid waste management program"[1] in a much-needed and positive way. Prior to the enactment of H.B. 592, Ohio was facing a solid waste crisis. Smaller, community-based landfills and incinerators were closing rather than spending capital to meet then-new federal EPA environmental requirements. Twenty years later, Ohio has ample, safe, Ohio EPA-permitted landfill capacity to meet its needs well into the future. Because of the foresight of the General Assembly, Ohio now enjoys a stable solid waste management system with adequate capacity to handle efficiently and economically the disposal needs of all Ohioans, including Ohio businesses and manufacturers. If allowed to stand, the rules at issue disrupt this efficient and economical system, adding unnecessary costs to all Ohioans and further degrading our

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

environment for no legitimate local purpose. To prevent this costly disruption to a current efficient and economical system, the OMA urges the Court to accept this discretionary appeal.[2]

WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

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 and manufacturers 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 OMA 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 and manufacturers. 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 garner 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) teetering on bankruptcy, the sale of recyclables provides little revenue to offset the cost of recycling. Thus,

[2] This Memorandum in Support of Jurisdiction focuses on Proposition of Law No. 2.

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 cease using landfills in the STW District. Thus, while Cuyahoga, Summit or Holmes County officials might spend public funds to implement 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 landfills in the STW District. 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.

While the STW District has set up a system, in effect, to prohibit out-of-district Ohioans from using these landfills, the Interstate Commerce Clause, U.S. Const. Art I, Sec. 8, Clause 3, precludes the STW District from similarly regulating waste generated out-of-state, such as in Pennsylvania, New Jersey and New York. Clearly the Ohio General Assembly did not intend such an awkward and harsh result for Ohio businesses and taxpayers. 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 local county governments.

The General Assembly gave solid waste districts authority to blockade landfill use only in the rarest of circumstances when that district absolutely needs the landfill space to manage its own waste. That is far from being the case in the STW District where the landfills in this district have decades of operational life remaining on their current Ohio EPA permits.

Market conditions and statewide regulations, not local protectionist rules, should dictate where waste is disposed in Ohio. Most solid waste is directed to landfills based on two general factors: 1) disposal costs or tipping fees charged by the landfill; and 2) location of the landfill. In order to save money on transportation costs, most businesses choose disposal options nearest to the point of generation of the solid waste. Under the STW District rules, such waste will now more than likely be directed to landfills further from the point of generation. This redirection of waste increases the overall disposal costs to the generator, such as businesses and manufacturers, because it costs more to transport the waste to a facility farther away that can accept the waste. These added costs further jeopardize and restrict Ohio manufacturers in competing with like industries in neighboring states and in the global economy.

Moreover, the increase in truck traffic and transportation further exacerbates harmful air emissions in a region of the state that can least afford such air quality degradation. Diesel fuel emissions and mobile source emissions contribute to the formulation of material that impacts the ozone. Northeast Ohio is already designated as a "nonattainment area" under the Federal Clean Air Act for ozone and particulate matter. Requiring solid waste to be transported further from the point of generation increases mobile source emissions and, therefore, actually harms the environment. This practice also increases the "carbon footprint" of the businesses and manufacturers that are required to conduct such long-haul disposal. While currently the size of a business' "carbon footprint" is not a significant factor, businesses and manufacturers are facing growing demands from the government and consumers to reduce their "carbon footprint." In the future a company's "carbon footprint" or total carbon emissions will take on greater economic significance, and requiring companies to transport their solid waste greater distances will expand the "carbon footprint" for such companies, making it more difficult to compete in a global

market. Because of the unnecessary added transportation cost and the increase in unnecessary air emissions created by this rule, the OMA urges this Court to accept this discretionary appeal and invalidate STW District's so-called "recycling rule."

STATEMENT OF FACTS AND OF THE CASE

The OMA adopts by reference the Statement of Facts and Statement of the Case as set forth in the Memorandum in Support of Jurisdiction of Plaintiff-Appellant National Solid Waste Management Association ("NSWMA").

ARGUMENT

Proposition of Law No. 2: The rule-making authority of a joint solid waste management district is limited to the specific authority granted by the General Assembly and does not include the authority to enforce any rules that exceed the limited rule-making power granted by R.C. 343.01(G).

1. R.C. 343.01 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.

Protectionist rules, like the one at issue in this case, threaten Ohio's current, efficient and economical solid waste management system. Without obtaining additional Ohio EPA permits, the three landfills in the STW District can continue to accept 13 percent of Ohio's waste for decades to come.[3] The STW District's recycling rule sets out to disrupt the current solid waste management system in Ohio while promoting no legitimate, lawful local interest.

As detailed in the NSWMA's Memorandum in Support of Jurisdiction, 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 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).

[3] 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.

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 STW District failed to do this. Having failed to meet its fundamental statutory duty, the STW District is in violation of law. As such, it should not be permitted to dictate 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 the limited statutory authority to enforce rules set forth under by R.C. 343.01(G)(1).

The Board of Directors of STW District is a creature of statute and "has only those powers expressly provided by statute or as may exist by necessary implication."[4] 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 . . .[5]

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

[4] 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*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696 (1993)).

[5] 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.

> 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 that will be disposed of within the district. 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.

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 its landfills 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 and the STW District has never advanced such an argument to support its protectionist rules.

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 from both within the district and outside the district 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. Thus, the rates charged to businesses that use these landfills cannot be locked in for extended terms. If/when diesel fuel spikes to $5 per gallon again and the landfills are blocked by the STW District, a manufacturer's waste may need to be transported an additional 50, 100 or more miles. This added transportation

cost will be passed through to the manufacturer and impact its bottom line while furthering no legitimate, lawful local interest or purpose.

CONCLUSION

Ohio's manufacturers and 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum of Amicus Curiae, Ohio Manufacturers' Association, in Support of Jurisdiction has been sent by ordinary United States mail, postage prepaid on this 29th day of January, 2009 to:

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