

**IN THE SUPREME COURT OF OHIO**

National Solid Wastes Management Association, : Case No. 2009-0211  
Appellant, : Appeal from the Stark County  
Court of Appeals, Fifth  
-vs- : Appellate District  
Stark-Tuscarawas-Wayne Solid Waste : Stark County Court of Appeal  
Management District, : Case No. 2008-CA-00011  
Appellee. :

---

**MEMORANDUM IN SUPPORT OF JURISDICTION OF CUYAHOGA COUNTY  
SOLID WASTE MANAGEMENT DISTRICT, COSHOCTON–FAIRFIELD–  
LICKING–PERRY JOINT SOLID WASTE MANAGEMENT DISTRICT, CARROLL–  
COLUMBIANA–HARRISON JOINT SOLID WASTE MANAGEMENT DISTRICT,  
HOLMES COUNTY SOLID WASTE JOINT MANAGEMENT DISTRICT AND  
SOUTHEASTERN OHIO JOINT SOLID WASTE MANAGEMENT DISTRICT**

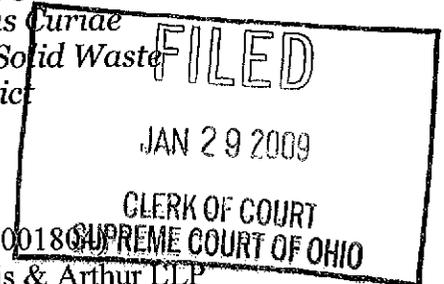
---

Terrence M. Fay (0022935)  
Christopher S. Habel (0064931)  
FROST BROWN TODD LLC  
One Columbus, Suite 2300  
10 West Broad Street  
Columbus, Ohio 43215-3467  
Phone: (614) 464-1211  
Fax: (614) 464-1737  
[tfay@fbtlaw.com](mailto:tfay@fbtlaw.com)  
[chabel@fbtlaw.com](mailto:chabel@fbtlaw.com)  
*Attorneys for Plaintiff-Appellant  
National Solid Wastes Management  
Association*

Thomas W. Connors (0007226)  
Victor R. Marsh (0015812)  
Kristin R. Zemis (0062182)  
220 Market Avenue South, Ste. 100  
Canton, Ohio 44702  
Phone: (330) 456-8341  
Fax: (330) 456-5756  
[tconnors@bmsa.com](mailto:tconnors@bmsa.com)  
[vmars@bmsa.com](mailto:vmars@bmsa.com)  
[kzemis@bmsa.com](mailto:kzemis@bmsa.com)  
*Attorneys for Defendant-Appellee  
Stark–Tuscarawas–Wayne Counties  
Solid Waste Management District*

Charles E. Hannan (0037153)  
Assistant County Prosecutor  
Cuyahoga County Prosecutor's Office  
Justice Center, Courts Tower, 8<sup>th</sup> Fl.  
1200 Ontario Street  
Cleveland, Ohio 44113  
Phone: (216) 445-7758  
*Attorney for Amicus Curiae  
Cuyahoga County Solid Waste  
Management District*

David E. Northrop (0001800)  
Porter, Wright, Morris & Arthur LLP  
41 S. High Street, Suite 2900  
Columbus, Ohio 43215  
Phone: (614) 227-2072  
*Attorney for Amicus Curiae  
Coshocton-Fairfield-Licking-Perry Counties  
Joint Solid Waste Management District and  
Southeastern Ohio Joint Solid Waste  
Management District*



William Host, Chairman  
Carroll-Columbiana-Harrison Joint Solid  
Waste Management District  
618 B Canton Road  
Carrollton, Ohio 44615  
Phone: (330) 627-7311

Joseph Miller, Chairman  
Holmes County Solid Waste  
Management District  
2 Court Street, Suite 22  
Millersburg, Ohio 44654  
Phone: (330) 674-8104

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**.....iii

**I. THIS CASE POSES QUESTIONS OF PUBLIC OR GREAT GENERAL INTEREST**..... 1

**A. If allowed to stand, the decision of the Court below will deprive solid waste management districts throughout the State of the power to enforce local rules enacted by the districts governing the maintenance, protection and use of local solid waste facilities, and reserving local disposal capacity for local needs.**..... 1

**B. If allowed to stand, the decision of the Court below will enable three northeast Ohio counties to exclude from their borders solid waste generated by nearly a quarter of the state’s residents and businesses.** ..... 1

**C. If allowed to stand, the decision of the Court below will interfere with the ability of solid waste management districts other than the Appellee to carry out their statutory mandated solid waste planning function.**..... 2

**II. THIS CASE POSES A SUBSTANTIAL CONSTITUTIONAL QUESTION** ..... 2

**III. STATEMENT OF THE CASE** ..... 3

**A. Nature of the Case**..... 3

**B. Statement of Facts** ..... 4

**IV. Argument**..... 5

**Proposition of Law I**

**Only the solid waste management districts have the power and responsibility to enforce local solid waste district rules.**..... 5

**Proposition of Law II**

**When the Ohio EPA Director is compelled by statute to adopt a solid waste management plan for a district, that district loses its statutory authority to adopt or enforce local rules.**..... 6

**Proposition of Law III**

**In order to be legally valid, a governmental enactment, such as an administrative rule, must be drafted in such a way as to clearly inform persons subject to the rule what they must do to comply with the rule’s requirements.** ..... 10

**IV. Conclusion** ..... 14

**CERTIFICATE OF SERVICE..... 15**

## TABLE OF AUTHORITIES

### CASES

<i>Akron v. Rowland</i> (1993), 67 Ohio St. 3d 374.....	11
<i>Belding v. State</i> (1929), 121 Ohio St. 393, 169 N.E. 301 .....	10
<i>Bellman v. American International Group</i> (2007), 113 Ohio St. 3d 323, 2007-Ohio-2071 .....	8
<i>Buckeye Community Hope Foundation, et al. v. City of Cuyahoga Falls, et al.</i> (6C.A., 2001), 263 F.3d 627 .....	10
<i>Cincinnati v. Bossort Machine Co., et al.</i> (1968), 14 Ohio App. 2d 35, 236 N.E.2d 216 .....	10
<i>City of Akron v. Chapman</i> (1953), 160 Ohio St. 382, 116 N.E. 2d 697.....	11
<i>Geauga Cty. Bd. Of Comm'rs v. Munn Road Sand &amp; Gravel</i> (1993), 67 Ohio St. 3d 579 .....	5
<i>Grayned v. Rockford</i> (1972), 408 U.S. 104.....	11
<i>Maharg, Inc. v. Van Wert County Solid Waste Management District</i> (6C.A., 2001), 249 F. 3d 544.....	10
<i>Mayer v. Bristow</i> (2000), 91 Ohio St. 3d 3, 740 N.E.2d 656.....	10
<i>Ohio Consumers Counsel v. Public Utilities Commission of Ohio</i> (1979), 58 Ohio St. 2d 108 .....	8
<i>Ohio Consumers Counsel v. Public Utilities Commission of Ohio</i> , 2008-Ohio-860 .....	8
<i>Peebles, et al. v. Clement, et al.</i> (1980), 63 Ohio St. 2d 314, 408 N.E. 2d 689 .....	11
<i>Pope v. Trotwood-Madison City School Dist. Board of Education, et al.</i> (2000), 162 F. Supp.2d 803 .....	10
<i>State ex rel Attorney General v. Gilbert</i> (1897), 56 Ohio St. 575, 47 N.E. 551 .....	10
<i>State of West Virginia v. Ohio Hazardous Waste Facility Approval Board</i> (1986), 28 Ohio St. 3d 83 .....	8
<i>State v. Schwab</i> (1997), 119 Ohio App. 3d 463, 695 N.E.2d 801 .....	10,11
<i>State v. Snyder</i> , 155 Ohio App. 3d 453, 2003-Ohio-6399, 801 N.E. 2d. 876 .....	11

<i>State v. Woodbridge</i> , 153 Ohio App. 3d 121, 2003-Ohio-2931, 791 N.E. 2d 1035 .....	11
<i>Staton Pros. Atty. v. State Tax Commission, et al.</i> (1926), 114 Ohio St. 658, 151 N.E. 760 .....	10
<i>Walsh v. Erie County Department of Job and Family Services</i> (N.D. Ohio 2003), 240 F. Supp. 2d 731 .....	11
<i>Yajnik, et al. v. Akron Department of Health</i> , 101 Ohio St. 3d 106, 2004-Ohio-357, 802 N.E. 2d 632 .....	10

**OHIO REVISED CODE**

R.C. 1.51 .....	9
R.C. 343 .....	2,6,7,9
R.C. 343.01 .....	1,4, 5, 6, 7, 8, 9, 10
R.C. 343.99 .....	12
R.C. 3734 .....	2,6,7,9
R.C. 3734.02 .....	5
R.C. 3734.52 .....	4
R.C. 3743.53 .....	4,6
R.C. 3734.53(C) .....	7
R.C. 3743.54 .....	4
R.C. 3743.55 .....	4,6
R.C. 3743.56 .....	4,6
R.C. 3734.56(D) .....	9, 10
R.C. 3745.01 (A) (C) (D) .....	9,10
R.C. 6111.04 .....	10

**OTHER AUTHORITIES**

Ohio Attorney General Opinion No. 2003-012.....	5
---	---

**I. THIS CASE POSES QUESTIONS OF PUBLIC OR GREAT GENERAL INTEREST**

- A. If allowed to stand, the decision of the Court below will deprive solid waste management districts throughout the State of the power to enforce local rules enacted by the districts governing the maintenance, protection and use of local solid waste facilities, and reserving local disposal capacity for local needs.**

In R.C. 343.01(G), the Ohio General Assembly conferred upon the state's solid waste management districts the authority to adopt and enforce local rules, *inter alia*: (a) governing the maintenance, protection and use of local solid waste facilities; and (b) reserving local disposal capacity for local need. The Fifth District Court of Appeals has ruled that, notwithstanding the plain language of R.C. 343.01(G), only the Ohio EPA Director has the power to enforce local rules. This rule-making power provides crucial support to the districts in their efforts to fulfill their statutory responsibilities. If allowed to stand, the decision of the Court below will divest the districts of the power to enforce such local rules, to the detriment of local businesses and residents.

- B. If allowed to stand, the decision of the Court below will enable three northeast Ohio counties to exclude from their borders solid waste generated by nearly a quarter of the state's residents and businesses.**

The effect of the decision of the Court below, if allowed to stand, will be to allow three counties in northeast Ohio, Stark County, Tuscarawas County and Wayne County, to exclude from their borders solid waste generated throughout the State, including the twelve counties, Cuyahoga, Coshocton, Fairfield, Licking, Perry, Guernsey, Monroe, Morgan, Muskingum, Noble, Washington, and Holmes (hereinafter the "Amicus Counties") who, together with Summit County, are urging this Court to accept the instant case for review. Currently, large volumes of solid waste from these thirteen counties, which collectively represent approximately 2,660,000 Ohioans according to the last U.S. census (almost a quarter of Ohio's population) is disposed of in three sanitary landfills located within Appellee

Stark-Tuscarawas-Wayne Solid Waste Management District (hereinafter, “Appellee”, the “Appellee District” or the “STW District”). If this Court declines review, these thirteen counties, as well as others, may be forced to find other landfills located much farther away from the originating county to dispose of their solid waste. This would have the effect of substantially increasing the ultimate cost of transporting and disposing of such waste, which increased costs would inevitably have to be borne by individuals and businesses that reside or are located in these counties. In light of the problems the State’s economy is currently facing, there could hardly be a more inauspicious time to add additional costs to Ohio’s residents and businesses.

**C. If allowed to stand, the decision of the Court below will interfere with the ability of solid waste management districts other than the Appellee to carry out their statutorily mandated solid waste planning function.**

Under Chapters 343 and 3734 of the Ohio Revised Code, solid waste management districts are charged with the responsibility for planning for the disposal of all solid waste generated within their borders over the next ten to fifteen years. Among other things, the plans the various districts promulgate (and periodically update) must identify where their waste will be disposed of. If the decision of the Court below is allowed to stand, none of the solid waste districts urging this Court to accept this case for review will be able to fulfill that statutory obligation because they will have no way of knowing whether the Appellee District will forbid the disposal within the STW District a solid waster generated in their counties in any given future year.

**II. THIS CASE POSES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

As is explained in the text of this Memorandum accompanying Proposition of Law III, at issue in this case is a rule adopted by the Appellee District which (a) cannot be applied as written because the information required for application of the rule (the recycling rates

achieved by the Appellee District and the districts that export solid waste to the Appellee District) can never be available at the time when the rule must be applied; and (b) carries a maximum monetary penalty of \$5,000 under R.C. 343.99. Such a rule offends both the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the Due Course of Law Clause of Article I of the Ohio Constitution.

### **III. STATEMENT OF THE CASE**

#### **A. Nature of the Case**

This case concerns the validity of local solid waste rules adopted by the Stark-Tuscarawas-Wayne Counties Solid Waste Management District in November of 2006, and who the Ohio General Assembly chose to administer those rules, the Ohio EPA Director or the Appellee District.<sup>1</sup> One of these rules, Rule 9.04, prohibits the disposal of solid waste at any of the three privately owned and operated sanitary landfills located within the Appellee District if the county in which the waste was generated fails to achieve or exceed residential/commercial or industrial solid waste recycling rates achieved by the Appellee District as approved Ohio EPA.<sup>2</sup> Historically, and in some instances currently, the thirteen counties urging this Court to review the decision of the Court below have failed to achieve or exceed the residential or commercial/industrial recycling rates achieved by the Appellee District, depending upon the year.<sup>3</sup> Although the trial court stayed the effective date of the Appellee District's recycling rule until June 1, 2009, the Court below vacated the trial court's decision and judgment, thereby allowing the Appellee District's recycling rule to become effective immediately. In order to fulfill their statutory obligations, the thirteen counties urging this Court to accept this case for review must know, and know *now*, whether they have

---

<sup>1</sup> See, Appendix D to Appellant National Solid Waste Management Associations' Merit Brief filed in the Court below on March 17, 2005.

<sup>2</sup> See, NSWMA Trial Court Exhibit 3.

<sup>3</sup> See, NSWMA Trial Court Exhibits 8-10.

the power to enforce their own rules and whether the Appellee District has the power to prohibit the disposal of their waste at landfills located within its borders.

**B. Statement of Facts**

In 1988, the Ohio General Assembly enacted H.B. 592, which extensively revamped Ohio's solid waste laws by, among other things, creating a system of solid waste management districts comprised of one or more of the state's counties, and charging those districts with the responsibility of researching, drafting, implementing, and periodically updating solid waste management plans. The purpose of these plans is to ensure that solid waste generated within the districts would be properly disposed of during a planning period of ten to fifteen years. By statute, the districts' initial plans were due to be submitted to the Director of Ohio EPA for his approval in the early 1990's (depending upon the size of the district), and updated plans were to be submitted to the Director every five to seven years thereafter.<sup>4</sup> Although the Appellee District submitted and gained the Director's approval of a solid waste management plan in 1993, it failed thereafter to obtain approval of any subsequent updated plan.<sup>5</sup>

In November of 2006, pursuant to R.C. 343.01(G), Appellee Stark-Tuscarawas-Wayne Counties Solid Waste Management District adopted local rules<sup>6</sup> governing the three landfills located within the District's borders: the American Landfill, owned and operated by a subsidiary of Waste Management; Countywide Landfill, owned and operated by a subsidiary of Republic Services; and the Kimbel Landfill, owned and operated by a family business, Penn-Ohio Coal Corporation.

Currently, as well as historically, solid waste generated in all thirteen of the counties urging this Court to accept this case for review is and has been disposed of at one or more of

---

<sup>4</sup> See, R.C. 3734.52-3734.56.

<sup>5</sup> See, December 22, 2006, Ohio EPA Director's Final Findings and Order in the Matter of: Stark-Tuscarawas-Wayne Solid Waste Management District, attached as Exhibit B to NSWMA's Merits Brief below. IV.2.

<sup>6</sup> See, Footnote 1, supra.

these landfills.<sup>7</sup> On December 13, 2006, Appellant NSWMA filed suit on behalf of its members who own and operate the STW District's three landfills against the Appellee District in the Stark County Court of Common Pleas seeking a declaration that the Appellee District's rules are invalid and unenforceable, and an injunction against their enforcement.<sup>8</sup> After two evidentiary hearings, on December 18, 2006, the Stark County Court of Common Pleas issued its decision and judgment (per Reinbold, J.) denying NSWMA's requests for relief, but staying the effective date of the Appellee District's recycling rule (Rule 9.04) until June 1, 2009.<sup>9</sup> Appellant NSWMA timely appealed Judge Reinbold's decision and entry to the Stark County Court of Appeals, and on December 15, 2008, that Court, in an opinion authored by Judge Hoffman, overturned the trial court's decision, incorrectly ruling that, since the Ohio EPA Director was the person charged by statute with responsibility for enforcing local rules adopted by solid waste management districts, the Director was an indispensable party to the NSWMA's complaint against the Appellee District.

#### IV. ARGUMENT

##### PROPOSITION OF LAW I:

**Only the solid waste management districts have the power and responsibility to enforce local solid waste district rules.**

It is axiomatic that governmental agencies and instrumentalities of the state only have those powers expressly provided by statute.<sup>10</sup> R.C. 343.01(G) specifically and unequivocally grants the solid waste districts authority to "adopt, publish and *enforce* rules..." Therefore, without question, the Appellee District was a proper party to the NSWMA's action in the trial court.

---

<sup>7</sup> See, NSWMA Trial Court Exhibits 8-10.

<sup>8</sup> See, NSWMA Trial Court Complaint.

<sup>9</sup> See, Exhibit A to NSWMA Merits Brief below.

<sup>10</sup> Ohio Atty. Gen. Opinion No. 2003-012 (citing *Geauga Cty. Bd. Of Comm'rs v. Munn Road Sand & Gravel* (1993), 67 Ohio St. 3d 579,582).

But, what about Ohio EPA? The Court below ruled that, because the Ohio General Assembly granted solid waste rule making authority to the Ohio EPA Director in R.C. 3734.02, the Ohio EPA Director was an indispensable party to the NSWMA's action in the trial court. But that statute vests in the Ohio EPA Director the power to adopt and enforce solid waste rules "*having a uniform application throughout the state*", not local rules adopted by a solid waste district and applicable in only three of Ohio's eighty-eight counties. Nowhere in that statute, or, indeed anywhere else in Ohio law, did the Ohio General Assembly confer upon the Ohio EPA Director the responsibility or authority to enforce local solid waste rules adopted by a solid waste management district.

In short, as the promulgating authority, the Appellee District, and not the Ohio EPA Director, was the proper defendant in the NSWMA's trial court action. If anyone had (or has) the authority to enforce the rules which are the subject of this appeal, pursuant to the plain language of R.C. 343.01(G), it is the Appellee District and not the Ohio EPA Director. It necessarily follows that the Ohio EPA Director was not an indispensable party to NSWMA's action against the STW District, the Court of Appeals' decision to the contrary notwithstanding.

## **PROPOSITION OF LAW II**

**When the Ohio EPA Director is compelled by statute to adopt a solid waste management plan for a district, that district loses its statutory authority to adopt or enforce local rules.**

Appellee Stark-Tuscarawas-Wayne Counties Joint Solid Waste Management District is a creature of state law, and has only those powers expressly provided by statute.<sup>11</sup> The powers, duties and responsibilities of Ohio's solid waste management districts are set forth in various provisions within R.C. Chapters 343 and 3734. Those statutes authorize solid waste

---

<sup>11</sup> Id.

districts to adopt local rules, but only when authorized to do so in a solid waste management plan authored by the district. However, the law is clear that a district may not adopt local rules when the plan for the district is authored by the Ohio EPA Director. The trial court acknowledged this, stating, Decision, at page 6, “[O]nce the Director is forced to develop a plan, the District forfeits their right to promulgate local rules under R.C. 3734.56, .55, and R.C. 3734.53.”

With regard to the district rulemaking, Chapter 343 provides, in relevant part:

To the extent *authorized* by the solid waste management plan *of the district* approved under . . . [section] 3734.55 of the Revised Code or subsequent amended plans *of the district* approved under . . . [section] 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 . . .

(emphasis added)<sup>12</sup>

Similarly, Chapter 3734 provides, in relevant 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 [local] plan. . .

(emphasis added)<sup>13</sup>

From the plain language of R.C. 343.01(G), it is clear that the Appellee District may adopt and enforce Rule 9.04 only if authorized by the solid waste management plan in effect for the Appellee at the time such enforcement is sought. However, the solid waste management plan currently in effect for the Appellee District is the plan issued by the Ohio EPA Director on December 22, 2006, and nowhere in that plan does it state that the Appellee District may adopt, publish, or, most importantly, enforce local solid waste rules. Quite the

---

<sup>12</sup> R.C. 343.01(G).

<sup>13</sup> R.C. § 3734.53(C).

contrary, in Section 9, Page 9.1 of Ohio EPA's plan, NSWMA's Trial Court Exhibit 11, Ohio EPA unequivocally states that the Agency's plan does not authorize the adoption of local rules. And, as regards enforcement: (1) nowhere in Ohio EPA's plan is the Appellee District authorized to enforce rule 9.04; (2) nowhere in R.C. Chapter 3734, or anywhere else in Ohio law, is Ohio EPA empowered to enforce local rules in place before Ohio EPA's plan became effective; and (3) nowhere in R.C. Chapter 3734, or anywhere else in Ohio law is Ohio EPA granted the authority to authorize the Appellee District to enforce rules adopted by that district before Ohio EPA's plan came into effect.

Therefore, Ohio EPA's plan for the Appellee District did not and could not authorize the Appellee to enforce its November 2006, rules. It in turn follows that, since Ohio EPA's December 22, 2006, plan for the Appellee District does not authorize the Appellee to either issue or enforce local rules, Rule 9.04 became unenforceable when Ohio EPA's plan became effective on December 22, 2006. This is Ohio EPA's construction of the referenced statutes,<sup>14</sup> which construction is entitled to deference<sup>15</sup>

In order to avoid concluding that the issuance of Ohio EPA's plan in December, 2006, rendered Appellee's rules unenforceable as mandated by the plain language of rule 343.01(G), the trial court ruled that Ohio EPA had entered into a contract called a Memorandum of Understanding ("MOU") with the Appellee District which provided for the continued validity and enforceability of the District rules after the issuance of the Ohio EPA's plan. However, nowhere in the MOU is there any language that says anything about the validity or enforceability of the local rules after the issuance of Ohio EPA's plan. The only language remotely relevant in the MOU states that the STW District may adopt rules until the Ohio

---

<sup>14</sup> See, August 9, 2007 trial transcript, pp. 204-205.

<sup>15</sup> See, *Ohio Consumers Counsel v. Public Utilities Commission of Ohio* (2008), 2008-Ohio-860; *State of West Virginia v. Ohio Hazardous Waste Facility Approval Board* (1986), 28 Ohio St. 3d 83; *Ohio Consumers Counsel v. Public Utilities Commission of Ohio* (1979), 58 Ohio St. 2d 108.

EPA plan issues. This language is merely an acknowledgment that, under R.C. 343.01(G), the STW District had the power to adopt rules under its 1993 plan<sup>16</sup> until Ohio EPA issued a plan for the Appellee District. It says nothing whatsoever about the fate of those rules after Ohio EPA issued its plan. In effect, the trial court added a new sentence to the MOU which states that, after Ohio EPA issues its plan, any rules adopted by the STW District remain valid and enforceable. Obviously, the trial court did not have the power to add new language to the MOU addressing an issue not addressed by the language to which the parties to the MOU had agreed.<sup>17</sup>

Moreover, even if the trial court could go beyond the four corners of the MOU to add a sentence regarding the continued validation and enforceability of the Appellee's rules after issuance of Ohio EPA's plan, as a matter of law, the trial court's judicial amendment of the MOU would have to fail because Ohio EPA could not by a contract entered into pursuant to Ohio EPA's general contracting authority contained in R.C. 3745.01 change the result mandated by the clear language of R.C. 343.01(G) and 3734.56(D). To begin with, nothing in R.C. 3745.01 allows the Ohio EPA Director to, in effect, repeal or disregard statutes of the General Assembly when entering into agreements with political subdivisions such as the STW District. To the contrary, R.C. 3745.01(A) refers to taking action "as may be necessary to comply with the requirements of the Federal laws and regulations", and R.C. Section 3745.01(C) allows the Director to enter into agreements with political subdivisions "in furtherance of the purposes of . . . chapters R.C. . . . 3734." (Emphasis added.) Thus, both paragraphs plainly state that the Director may act in compliance with or in furtherance of law, not contrary to it. There is no suggestion whatsoever that the Director is afforded power by

---

<sup>16</sup> Because Appellee's 1993 plan authorized the adoption of such rules

<sup>17</sup> See, e.g., *Bellman v. American International Group* (2007), 113 Ohio St. 3d 323, 325-326, 2007-Ohio-2071 (A writing intended by the parties to be a final embodiment of their agreement cannot be later modified to add, vary or contradict the writing).

these statutory provisions to override other provisions of law. The trial court clearly erred in holding to the contrary.

Moreover, as a general, as opposed to a specific, provision, R.C. 3745.01 must give way to the specific provisions of R.C. 343.01 and 3734.56. R.C. 1.51 provides:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

R.C. 3745.01 is a general provision broadly discussing the powers of the Ohio EPA Director. In contrast, R.C. 343.01(G) and 3734.56(D) are specific provisions that address the contents of solid waste management plans, the process by which solid waste districts adopt and enforce them, and Ohio EPA's role. It therefore follows that, under R. C. 1.51, the general provisions of R.C. 3745.01 must give way to the specific provisions of R.C. 343.01(G) and 3734.56(D).

Under the trial court's reasoning, the Ohio EPA Director could change a result mandated by the legislature by entering into a contract pursuant to R.C. 3745.01. For example, although the legislature has prohibited landfills from polluting the state's surface waters, see R.C. 6111.04, under the trial court's reasoning, the Ohio EPA Director could shield one of the three landfills located in the STW District from this prohibition by entering into a contract with the landfill saying: "Go right ahead." That cannot be the law.

### **PROPOSITION OF LAW III**

**In order to be legally valid, a governmental enactment, such as an administrative rule, must be drafted in such a way as to clearly inform persons subject to the rule what they must do to comply with the rule's requirements.**

The Fourteenth Amendment to the United States Constitution precludes governmental actions that deprive any person of life, liberty or property without the due process of law.

Generally speaking, the Fourteenth Amendment's guarantee of due process was intended as security against arbitrary governmental action. The purpose was to exclude arbitrary power from every branch of government.<sup>18</sup> The Due Process Clause protects against arbitrary governmental action of whatever stripe, whether by legislative or administrative action.<sup>19</sup>

Another facet of the protections afforded by the Due Process Clause is the protection against vague and overly broad governmental enactments:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we must assume that man is able to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly...Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.<sup>20</sup>

The Ohio Constitution has its own due process guarantee, which is found in Article I, Section 16. Although framed in terms of the due course of law, rather than the due process of law, it has long been recognized by this Court that these two constitutional provisions, one state and one federal, provide equivalent protections.<sup>21</sup>

Rule 9.04 is unconstitutionally vague, arbitrary and capricious because, as written, it is impossible to determine whether any particular load of garbage can be disposed of at a landfill located within the STW District consistent with the rule. As currently written, Rule 9.04 calls

---

<sup>18</sup> *Pope v. Trotwood-Madison City School Dist. Board of Education, et al.* (2000), 162 F. Supp.2d 803; *Yajnik, et al. v. Akron Department of Health*, 101 Ohio St. 3d 106, 2004-Ohio-357, 802 N.E. 2d 632; *Mayer v. Bristow* (2000), 91 Ohio St. 3d 3, 740 N.E.2d 656; *Belding v. State* (1929), 121 Ohio St. 393, 169 N.E. 301; *Staton Pros. Atty. v. State Tax Commission, et al.* (1926), 114 Ohio St. 658, 151 N.E. 760; *State ex rel Attorney General v. Gilbert* (1897), 56 Ohio St. 575, 47 N.E. 551; *State v. Schwab* (1997), 119 Ohio App. 3d 463, 695 N.E.2d 801; *Cincinnati v. Bossort Machine Co., et al.* (1968), 14 Ohio App. 2d 35, 236 N.E.2d 216.

<sup>19</sup> *Buckeye Community Hope Foundation, et al. v. City of Cuyahoga Falls, et al.* (6C.A., 2001), 263 F.3d 627; *Maharg, Inc. v. Van Wert County Solid Waste Management District* (6C.A., 2001), 249 F. 3d 544.

<sup>20</sup> *Akron v. Rowland* (1993), 67 Ohio St. 3d 374, 381 quoting *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109, and see, *State v. Snyder*, 155 Ohio App. 3d 453, 2003-Ohio-6399, 801 N.E. 2d. 876; *State v. Woodbridge*, 153 Ohio App. 3d 121, 2003-Ohio-2931, 791 N.E. 2d 1035; *State v. Schwab* (1997), 119 Ohio App. 3d 463, 695 N.E.2d 801.

<sup>21</sup> See, *Walsh v. Erie County Department of Job and Family Services* (N.D. Ohio 2003), 240 F. Supp. 2d 731; *Peebles, et al. v. Clement, et al.* (1980), 63 Ohio St. 2d 314, 408 N.E. 2d 689; *City of Akron v. Chapman* (1953), 160 Ohio St. 382, 116 N.E. 2d 697.

for a comparison of the average STW Ohio EPA-approved recycling rate(s) for the three prior years with the waste-generating district's Ohio EPA-approved recycling rate(s) for the year in which the garbage is generated. The problem is that the information needed to make the required comparison is not available until long after the waste has been accepted for disposal.

The various solid waste districts, including the STW District, do not collect recycling data to determine what recycling rates they achieve in any given year until the first six months of the next calendar year, whereupon, they report to Ohio EPA what recycling rates they were able to achieve during the prior calendar year<sup>22</sup>. At an indeterminate date sometime thereafter, Ohio EPA publishes a report containing the approved district rates. As of the trial in this matter, the last official Ohio EPA publication approving district recycling rates only approved district recycling rates for calendar year 2005 and before. Therefore, when waste arrives for disposal at one of the landfills located within the Appellee District, neither the originating district's Ohio EPA approved recycling rate(s) for the year in which the waste arrived is available, nor is the Ohio EPA approved recycling rate(s) achieved by the STW District for the prior three years

The fundamental problem in the way in which Rule 9.04 was drafted might best illustrated by way of a hypothetical.<sup>23</sup> Suppose that it is January 29, 2009 (the date of this filing). A truck hauling garbage from Lisbon, Columbiana County, Ohio, arrives at a landfill located in the Appellee District. Can the waste be lawfully disposed of consistent with Rule 9.04?

The answer to this question is that, as Rule 9.04 is currently written, there is no way to tell. In order for the landfill to accept the waste from Lisbon for disposal, the person manning the landfill gate on the day the waste arrives must compare the average of the recycling rate(s)

---

<sup>22</sup> On or before June 30 of the following year.

<sup>23</sup> The same hypothetical was posed to many of the witnesses at trial.

achieved by the STW District, as approved by Ohio EPA, in calendar years 2008, 2007, and 2006 with recycling rate(s) achieved by the Carroll-Columbiana-Harrison District for calendar year 2009. If this comparison is favorable to the Carroll-Columbiana-Harrison District, the gate-keeper may allow the waste to be disposed of without violating Rule 9.04. If it is not, the gate-keeper must reject the load or his landfill may be fined \$5,000 pursuant to R.C. 343.99. The problem is that the data necessary to make the required comparison will not be available on January 29, 2009, or for many months thereafter, because, as was explained above, none of the districts , including the Carroll-Columbiana-Harrison District, will gather and report to Ohio EPA 2009 recycling statistics until June of 2010, and Ohio EPA will not approve that data until many months thereafter, if at all. Moreover, it is a matter of public record (of which this Court may take judicial notice) that, as of the date of this filing, Ohio EPA has yet to approve the STW District's (or any other district's) reported recycling statistics for either calendar year 2007 or calendar year 2008.

In short, because of the way that the districts collect and submit recycling data to Ohio EPA for its approval, and because of the length of time Ohio EPA takes to review the data before approving it, it will **never** be possible to determine whether a load of garbage generated outside of the STW District can be accepted for disposal within it without offending Local Rule 9.04.

Recognizing this problem in its decision, the trial court decided to engage in a little rule-making of its own to fix this problem by judicially amending Rule 9.04 to postpone the rule's effective date until June 1, 2009. The problem with this approach is that: (1) nowhere in the relevant statutes is a common pleas court granted the authority to re-write local rules adopted by a solid waste district; and (2) the trial court's "fix" does not fix the underlying problem – the recycling data required to make the comparison of recycling statistics called

for by Local Rule 9.04 will not be available after June 1, 2009; indeed, it will never be available when needed.

In order to survive constitutional scrutiny, a governmental enactment which has the force of law, such as Rule 9.04, must be drafted in such a way that persons subject to it are able to conform their conduct to what is required by the enactment. Since there is no way that anyone subject to Rule 9.04 can determine whether it is lawful to dispose of solid waste generated outside of STW at a landfill located within STW until long after such disposal occurs, that rule is constitutionally defective, and must fail.

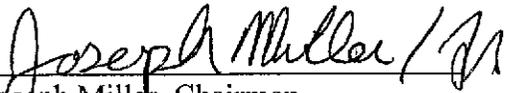
#### IV. CONCLUSION.

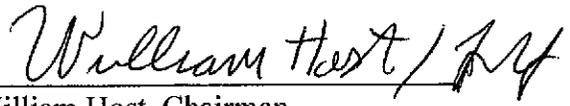
For the foregoing reasons, the Amicus Counties urge this Court to accept the instant case for review, reverse the decision of the Court below, and remand with instructions that the Court of Appeals direct the Stark County Court of Common Pleas to declare the STW District's local solid waste management rules invalid and unenforceable, and enjoin any further enforcement of such rules.

Respectfully submitted,

  
Charles E. Hannan (0037153)  
Cuyahoga County Prosecutor's Office  
Justice Center, Courts Tower, 8<sup>th</sup> Fl.  
1200 Ontario Street  
Cleveland, Ohio 44113  
Phone: (216) 445-7755  
*Attorney for Amicus Curiae  
Cuyahoga County Solid Waste  
Management District*

  
David E. Northrop (0001804)  
Porter, Wright, Morris & Arthur LLP  
41 S. High Street, Suite 2900  
Columbus, Ohio 43215  
Phone: (614) 227-2072  
*Attorneys for Amicus Curiae  
Coshocton-Fairfield-Licking-Perry  
Counties Joint Solid Waste Management  
District and Southeastern Ohio Joint  
Waste Management District*

  
Joseph Miller, Chairman  
Holmes County Solid Waste  
Management District  
2 Court Street, Suite 22  
Millersburg, Ohio 44654  
Phone: (330) 674-8104

  
William Host, Chairman  
Carroll-Columbiana-Harrison Joint Solid  
Waste Management District  
618 B Canton Road  
Carrollton, Ohio 44615  
Phone: (330) 627-7311

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the forgoing was served via regular  
U.S. mail this 29 day of January, 2009 upon:

Thomas W. Connors, Esq.  
Victor R. Marsh, Esq.  
Kristin R. Zemis, Esq.  
220 Market Avenue South, Suite 1000  
Canton, Ohio 44702

Terrence M. Fay, Esq.  
Christopher S. Habel, Es.  
FROST BROWN TODD LLC  
One Columbus, Suite 2300  
10 West Broad Street  
Columbus, Ohio 43215-3467

  
David E. Northrop (0001804)  
*Attorney for Amicus Curiae  
Coshocton-Fairfield-Licking-Perry Counties  
Joint Solid Waste Management District and  
Southeastern Ohio Joint Solid Waste  
Management District*