

ORIGINAL

IN THE SUPREME COURT OF OHIO

National Solid Wastes Management Association,)
)
)
 Appellant,)
)
 v.)
)
 Stark-Tuscarawas-Wayne Joint Solid Waste Management District,)
)
)
 Appellee.)

Case No. 2009-0211

Appellee's Memorandum in Opposition to Motion for Stay

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Appellee Stark-Tuscarawas-Wayne Joint Solid Waste Management District

"District") opposes appellant National Solid Wastes Management Association (the "Association") motion for stay on the grounds described below.

A. Facts.

On November 3, 2006, the District adopted local rules pursuant to R.C. 343.01(G). On December 13, 2006, the Association filed a complaint seeking declaratory and injunctive relief with respect to the District's rules. The complaint specifically requested a declaration that the rules were void and unenforceable. The complaint did not specify the particular injunctive relief it was seeking and at no point during the trial proceedings did it seek any type of injunctive relief, either temporary or permanent. On December 18, 2007, the trial court entered judgment in favor of the District, with the exception that the effective date for Rule 9.04, the recycling rule, was changed from January 1, 2008 to June 1, 2009. A copy of the trial court's judgment is attached as Exhibit A.

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The trial court's judgment was appealed to the court of appeals, which entered judgment December 15, 2008, reversing the trial court's judgment on the grounds that it lacked jurisdiction. At no point during the appellate proceedings, did the Association request a stay or temporary injunction.

The District's rules provide that they shall apply to existing landfills 180 days from the date of adoption unless otherwise specified in a specific rule. Exhibit A, p. 1. Rule 9.04 specified that it would not be effective until January 1, 2008. After the trial court's judgment changing the effective date for Rule 9.04 to June 1, 2009 was reversed, the District's board determined that it would maintain the June 1, 2009 effective date for Rule 9.04.

The District's rules provide that the board may elect to waive any of its rules. Exhibit A, pp. 1, 13. Rule 9.04 contains a provision providing that nothing in the rule shall impair any third-party contract rights in existence at the time of the adoption of the rule. Exhibit A, p. 14. On June 5, 2009, the District's board granted waivers to the three solid waste facilities located within its jurisdiction, waiving Rule 9.04, through June 1, 2010, due to existing contracts and pending litigation. Exhibit C, ¶12. (These waivers were requested by Countrywide Recycling and Disposal ("Countrywide") and Kimble Sanitary Facility ("Kimble") Facility on May 28, 2009 and by American Landfill on June 1, 2009, Exhibits D, E and F.)

Kimble submitted a waiver request on May 28, 2009, regarding the application of Rule 9.02(E), which requires the landfills to maintain a wheel wash. Exhibit C, ¶13. The District board is considering that waiver request and is expected to rule on it at its next meeting on July 10, 2009. Exhibit C, ¶13.

For purposes of the recycling rule, the District's recycling standard is set on an annual

basis by averaging the District's recycling rate for three prior consecutive calendar years. Exhibit A, p. 14. The recycling rate standard was first set January 1, 2009, based on recycling rates from calendar years 2005, 2006 and 2007. Exhibit C, ¶17. This information was available from the Ohio EPA's website and is based on filings submitted by the solid waste districts within the state. Exhibit C, ¶15.

B. Law and Argument.

The relief being sought by appellant is more properly characterized as a temporary injunction, as opposed to a stay as asserted by appellant. As this court has stated, "A stay merely suspends the time required for the performance of the particular mandates stayed. ..." *Laidlaw Waste Systems, Inc. v. The Consolidated Rail Corporation* (1999), 85 Ohio St.3d 413, 416, quoting *Reed v. Rhodes* (N.D. Ohio 1979), 472 F.Supp. 603, 605. In the present case, there is no court mandate which appellant is seeking to suspend, since the lower courts have ruled against the appellant.

The present case is similar to *Croll v. Village of Franklin* (1880), 36 Ohio St. 316, which held that "... where the relief desired, during the pendency of a proceeding in error, is an order to stay further action in the proceedings, which is the object of the original action to enjoin, such relief should be sought under section 5573 of the Revised Statutes." In *Croll*, this court dismissed appellant's motion for a stay on the grounds that the relief requested should be sought under the statute allowing a temporary injunction during the pendency of an appeal. R.C. 2727.05 is the current version of that statute, and it allows for a temporary injunction as follows:

"When an injunction has been allowed and during the pendency of the action in the court of common pleas has been vacated, ... an injunction may be granted before judgment or final order in the action, by the court of appeals in which it is pending or by a judge thereof, when it appears satisfactorily to such court or judge, by affidavit of the party seeking the injunction or his agent, that such person is entitled thereto. *Upon like proof, an injunction also may be allowed by the supreme court or court of appeals, or by a judge of either, as a temporary*

remedy, during the pendency of a case on appeal in such courts." (Emphasis added.)

This court has authorized the allowance of such temporary injunctions in *Wagner v. Railway Co.* (1882), 38 Ohio St. 32, paragraph two of the syllabus.

"It is within the appellate jurisdiction of the supreme court to allow a temporary injunction where it appears that the defendant is doing or threatens to do acts respecting the subject of an action pending, tending to render the judgment ineffectual. *Yeoman v. Lasley*, 37 Ohio St. 415, followed and approved."

Ohio courts have maintained a distinction between temporary injunctions granted by a trial court and those granted by an appellate court:

"The duty of an appellate court with respect to the determination of whether or not a temporary injunction should be allowed pending determination of an appeal is not the same as the duty of a trial court in determining whether or not a temporary injunction should be allowed before an action is heard on its merits. This is particularly so in actions wherein the trial court has, following hearing on the merits, denied an injunction. As stated in 29 Ohio Jurisprudence (2d), 460, Injunctions, Section 223:

'The granting of injunctive relief during the pendency of the appeal is a matter lying within the discretion of the reviewing court, and is to be determined in accordance with the procedure indicated by statute and in accordance with the general principles pertaining to the issuance of provisional injunctions. The view has been expressed that a reviewing court should not grant a temporary injunction pending a hearing on appeal after the trial court has dissolved a temporary injunction unless the rights of the parties have been quite clearly ascertained, the situation being different from that arising on an application made in the court of original jurisdiction, inasmuch as the trial court has fully considered the matter and determined it adversely to the claim of the plaintiff, and its action should not be reversed until the appellate court has fully considered the questions involved upon the hearing, unless some manifest injury is likely to arise if the restraining order is not issued.'

...

Tested by this rule, a temporary injunction should not be granted pending hearing on the merits of this appeal 'unless the rights of the parties have been quite clearly ascertained.'"

Anderson v. Board of Education of Logan County (1963), 120 Ohio App. 258, 201 N.E.2d 909, 911.

In the present case, appellant has had its declaratory relief claims denied, and has not pursued injunctive relief at any point prior to this motion to stay. Accordingly, appellant's request for injunctive relief must be determined in accordance with the procedures allowed by R.C. 2727.05 and general principles applicable to provisional injunctions and should not be granted until the rights of the parties have been clearly ascertained.

Moreover, this court has stated that courts should take particular caution in granting injunctions affecting a public interest:

"Courts should take "particular caution in granting injunctions, especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government." *Leaseway Distrib. Centers, Inc. v. Dept. of Adm. Serv.* (1988), 49 Ohio App.3d 99, 106, 550 N.E.2d 955, 962; *Dandino v. Hoover* (1994), 70 Ohio St.3d 506, 639 N.E.2d 767."

Danis Clarkco Landfill Company v. Clark County Solid Waste Management District (1995), 73 Ohio St.3d 590, 604.

In *Dandino*, this court emphasized that because great caution should be exercised when a court enjoins the functions of other branches of government, that only those rights which are unequivocally guaranteed shall be enforced through an injunction against governmental entities. *Dandino v. Hoover*, 70 Ohio St.3d at 510. This court's cautious approach towards injunctions against government entities is reflected in its practice of denying such relief unless rights of property or person are affected:

"... It is a matter of no consequence what a city may claim its policy is to be, or what ordinances it may pass, so long as no steps are taken to enforce them. Hence, a proceeding simply to test the validity of an ordinance that as yet in no way affects a right of property or person, nor can until some steps are taken to enforce it, seems not only immature, but wholly unauthorized. ..."

State ex rel. Attorney General v. City of Newark (1898), 57 Ohio St. 430, 432.

This caution was also reflected in the case of *Perkins v. Village of Quaker City* (1956), 165 Ohio St. 120, which upheld the denial of injunctive relief sought by a trucker against a village's enforcement of weight limits, where no enforcement had yet been undertaken:

"There is nothing in the record to indicate that the defendants will interfere with plaintiff's trucks in their use of the state routes passing through the village, and so far plaintiff has made no attempt to use county route No. 7 in the village. If he does so at some future time and should be arrested and prosecuted, he can raise the legality of the village ordinance in the criminal proceeding."

In determining whether to grant temporary injunctive relief, a court must consider whether: (1) the moving party has shown a substantial likelihood that he or she will prevail on the merits of their underlying substantive claim; (2) the moving party will suffer irreparable harm if the injunction is not granted; (3) issuance of the injunction will not harm third parties; and (4) the public interest would be served by issuing the preliminary injunction. *Sinoff v. Ohio Permanente Med. Group, Inc.*, 146 Ohio App.3d 732, 741, 2001-Ohio-4186, ¶40. The party seeking the preliminary injunction must establish each of these elements by clear and convincing evidence. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Commodities Div.* (1996), 109 Ohio App.3d 786, 790.

The District's local rules apply to a broad range of issues, including, operational standards (Rule 9.02), siting for new landfills (Rule 9.03), and the recycling rule (Rule 9.04). In its motion for stay, the Association alleges problems with a small percentage of these rules including Rules 9.02(A) (wheel wash), 9.02(K) (odor control plan), 9.02(L) (airborne particulate control plan), and Rule 9.04 (the recycling rule). The Association argues that impacted landfills are unable to determine what the recycling standard is under Rule 9.04. The Association argues that Rule 9.02(A) regarding the wheel wash should not be applied to one of the landfills in the District, because it is unnecessary. Finally, the Association argues that Rule 9.02(K) and (L) regarding an odor control and airborne particulate control plan are insufficiently defined.

The Association's concerns are premature and speculative because they have not yet been subject to enforcement regarding these matters. At the request of the affected landfills, the District has waived application of the recycling rule until June 1, 2010. Moreover, the landfill complaining about the wheel wash rule has recently submitted a waiver request, which is being duly considered by the District and will be ruled on at the next District board meeting on July 10, 2009. With respect to the odor control and airborne particulate control plans, no waiver request has been submitted by any of the impacted landfills, and no steps have been taken regarding enforcement of such rules.

The Association's request for injunctive relief is unwarranted because there is no necessity or irreparable harm threatened at this point. Moreover, the Association has failed to make a showing that unequivocally guaranteed rights are threatened or that it has a substantial likelihood of success on the merits.

The Association's main argument, that it is not able to determine what the Rule 9.04 recycling standards are, is completely without merit. The recycling standards are determined by calculating the three year average for the various districts' recycling rates, as published on the Ohio EPA's website. Exhibit C, ¶¶14, 15. This information is collated by the District's staff and distributed to interested parties, and may easily be verified by reference to the Ohio EPA website information. Exhibit C, ¶16. The Association's argument that it cannot determine the most recent year's recycling rate is completely irrelevant, because the District has made clear that it utilizes those rates which are available at the time it determines the standard. The districts submit their recycling data to the Ohio EPA by September of each year and the District has this information available for it by November of each year when it calculates the recycling standard for January 1st of the next year. This means that the January 1, 2010 recycling rate will be based on recycling data from the years 2006, 2007 and 2008.

The Association has argued that because the 2009 data is not available by January 1, 2010, the rule is somehow a violation of due process. The District has made clear throughout these proceedings that the recycling rate is based on the data available as described above. There is no lack of clarity, or constitutional infirmity as argued by the Association. Moreover, the issues accepted by this court for review, involve whether the rules are authorized by statute, not whether they are constitutional. The Association should not be allowed temporary injunctive relief based on a claimed right which is not an issue before this court.

The Association also seeks injunctive relief based on an argument that it is not necessary to apply the wheel wash rule to one of the landfills, because dirt is not being tracked from that landfill to the adjacent public roadways. The Association acknowledges, in a supporting affidavit, that there is a problem with most landfills with muddy wheels from landfill trucks: "Such equipment is used at other landfills to prevent dirt from being tracked out onto public roadways from trucks exiting landfills (most landfills have unpaved internal roads, and the wheels of trucks which deliver waste to the landfill operating area, become muddy during wet weather)." Appellant's Memorandum, Exhibit D, ¶5. This evidence demonstrates that muddy wheels are an issue at most landfills, and supports the wisdom of a local rule requiring a wheel wash. Nonetheless, the Association seeks to have this rule, as well as the many other rules contained in the local rules, enjoined for all landfills. As discussed above, the local rules permit the District to grant waivers as appropriate, and the affected landfill has applied for a waiver, which is under consideration. The Association has failed to demonstrate the necessity for a temporary injunction at this point, nor made a showing that an unequivocally guaranteed right is threatened.

Finally, the Association argues that the rules relating to an odor control plan and an airborne particulate control plan are too unclear for them to know how to comply. This is an

allusion to arguments in the lower courts regarding an alleged due process violation. Alleged violations of constitutional rights, which are not before this court for review, should not be the basis of a temporary injunction. Moreover, appellant's claims are otherwise without merit. OAC 3745-27-19(B)(3) provides that odor control is an operational criteria for landfills ("The owner or operator shall operate the facility in such a manner that noise, dust and odors are strictly controlled so as not to cause a nuisance or a health hazard.") Accordingly, this subject falls within the District's local rule authority to regulate the use of landfills. R.C. 343.01(G)(2). The rule regarding an airborne particulate control plan as defined by the Ohio EPA is based on OAC Chapter 3745-15. The submission and evaluation of emission limits information, and any corrective actions or preventive measures necessary to remedy deviations from emission limits, are defined in that chapter. The local rule is designed to ensure that the District is provided a copy of the information required by the Ohio EPA, so that it can ensure that the plan in place is being monitored by the appropriate authority.

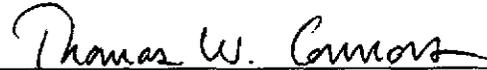
The trial court in this case, presided over a lengthy trial evaluating the extensive evidence submitted by the parties on these and other issues. After due consideration of this voluminous evidence, the trial court denied appellant's claim for declaratory relief, holding that the challenged rules were constitutional and authorized by statute. All local rules, except for the recycling rule, have been in effect since 180 days after the adoption of the local rules on November 3, 2006. Nonetheless, appellant has not seen fit to request injunctive relief, either at the trial court or appellate court level at any point, until the filing of this motion on June 1, 2009. The waiver of the recycling rule through June 1, 2010 precludes appellant's argument that an irreparable or manifest injury is likely to arise, if the restraining order is not issued. Appellant has failed to demonstrate that it is about to be deprived of an unequivocally guaranteed right. Furthermore, appellant has failed to demonstrate that enforcement of these local rules has

actually affected a personal or property right. Therefore, injunctive relief against a government entity, suspending enforcement of its rules, is inappropriate.

C. Conclusion.

For the above reasons, appellant's motion for stay should be denied.

Respectfully submitted,



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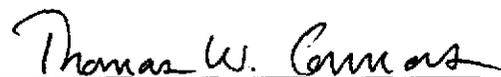
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by regular U.S. Mail this 10th day of June, 2009 to

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FILED
DEC 18 2007
NANCY S. REINBOLD
STARK COUNTY OHIO
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO**

**NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION**)
)
)
 PLAINTIFF)
)
 VS.)
)
 STARK-TUSCARAWAS-WAYNE JOINT)
 SOLID WASTE MANAGEMENT)
 DISTRICT)
)
 DEFENDANT)

CASE NO. 2006CV04842

JUDGE REINBOLD

JUDGMENT ENTRY

This matter is before the Court upon Plaintiff's Complaint for Declaratory and Injunctive Relief, and Defendant's Counterclaim for Declaratory Relief. Both parties filed motions for summary judgment on March 23, 2007; responses were filed on May 15, 2007, and replies were filed on June 19, 2007. A trial to the Court was held on September 4 and 5, 2007. Following the trial, the Court visited the three landfills at issue on September 25, 2007. A follow-up evidentiary hearing was held on October 4, 2007. Finally, Plaintiff filed a post-trial brief on November 2, 2007, and Defendant filed a post-trial brief on November 9, 2007.

I. THE PARTIES

Plaintiff National Solid Wastes Management Association is a trade association which represents the interests of the private sector solid waste industry, including a number of members who operate solid waste management companies and landfills in Stark County, Ohio. Those members include Waste Management of Ohio (American

Landfill), Republic Services of Ohio II, LLC (Countywide Landfill), and Penn-Ohio Coal Co. Inc., d.b.a. Kimble Sanitary Landfill. Defendant Stark-Tuscarawas-Wayne Joint Solid Waste Management District is a political subdivision with jurisdiction over solid waste management in Stark, Tuscarawas, and Wayne Counties.

II. THE DISTRICT'S AUTHORITY TO MAKE RULES AND ITS RELATIONSHIP WITH THE OHIO E.P.A. ARE CONTROLLED BY STATUTE.

Solid waste districts are political subdivisions which are created purely by statute.

R.C. 343.01. The state and local solid waste districts operate according to plans that are developed in conjunction with the Ohio E.P.A. ("O.E.P.A.") and its Director. R.C. 3734.52. R.C. Chapter 3734, which governs the licensing and regulation of solid and hazardous waste facilities throughout the state of Ohio, and R.C. Chapter 3745, which sets forth the authority and duties of the OEPA, are general laws.¹

The required contents of a waste management plan are dictated by statute. R.C. 3734.53(A). Such plans may also provide for the adoption of rules by the local district. R.C. 3734.53(C). Moreover, a statutory timetable dictates when plans must be prepared and submitted to the Director of the O.E.P.A. for approval. R.C. 3734.54. The process by which the Director reviews and approves the plan is described in R.C. 3734.55. If the plan submitted by a local district is not approved, the Director is empowered to create a plan for the local district. R.C. 3734.55(D). If the local district still fails to implement a plan as 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. R.C. 3734.55(E).

¹ *Clarke v. Warren Cty. Bd. of Commrs.*, Warren App. No. CA2005-04-048, 2006-Ohio-1271, ¶ 25, citing *Village of Sheffield v. Rowland*, 87 Ohio St.3d 9, 11, 1999-Ohio-217,

Plans are to be updated, amended, and approved in accord with a periodic timetable. R.C. 3734.56(A). Again, if the local district fails to comply with the required updates, the Director is required to prepare a plan for the district, but the district still retains the power to prepare, adopt, and submit its own solid waste management plan if the district does so within 180 days of the "triennial anniversary" of the Director's order. R.C. 3734.56(A),(C).

The O.E.P.A. itself is a statutory creation, and its powers are described in R.C. 3745.01. The O.E.P.A. and its Director are specifically enabled to enter into agreements with political subdivisions in order to effectuate their duties under Chapter 3734. R.C. 3745.01(C).

III. THE DISTRICT AND THE O.E.P.A. ATTEMPT TO REACH A COMPROMISE, AND THE DISTRICT WRITES ITS OWN RULES.

In 1988, Stark, Tuscarawas and Wayne Counties formed a Joint Solid Waste Management District (the District). R.C. 3734.52. The District's initial plan was approved on February 24, 1993, by the Director. The District was required to submit an amended plan by February 24, 1998. R.C. 3734.56. In March and again in December of 1999, the District filed an amended plan which was ultimately rejected by the Director on August 7, 2000.

Instead of strictly complying with the statutory stopgap procedures, the Director attempted to negotiate with the District and to allow the District more time to effectuate its own plan. Such efforts were unsuccessful, and on June 1, 2004, the Director advised the District that he intended to initiate the process to prepare a plan under R.C. 3734.55 and 3734.56.

This decision by the Director caused great consternation among the District members, and they turned to their respective state representatives to exert political pressure on the governor to prevent the OEPA from proceeding under R.C. 3734.55/56, thereby depriving the District of the authority to adopt local rules as provided by R.C. 3734.53(C). On September 26, 2005, in one of the great compromises of Ohio Solid Waste history, the O.E.P.A. and the District entered into a Memorandum of Understanding (MOU).

Relying on the apparent authority extended to the District by the Director in Article II of the M.O.U., the District adopted local rules on November 3, 2006. Rule 9.03 was effective immediately upon adoption; 9.02 was to be effective 180 days after adoption, and 9.04 is to become effective January 1, 2008. On December 22, 2006, the Director ordered the District to implement the Director's Amended Plan which incorporated the District's rules referred to above. On December 13, 2006, the lawsuit was initiated, seeking declaratory relief from the Director's plan.

It is noticeable and relevant that there is a significant gap between August 7, 2000 and June 1, 2004 of any "official acts," either by the District or the OEPA. It serves no useful purpose to detail the conduct of the District and the OEPA between August 7, 2000 and June 1, 2004. And, it is most difficult to determine a beginning date for the "eighteen months" under R.C. 3734.55 because of the numerous extensions granted the District by the Director. But it is safe to say that had the Director followed the law, his plan should have been issued long before June 1, 2004 when he "initiated the process".

I do not pass on the wisdom of the delay, but this four-year gap certainly dilutes

the argument that strict compliance with the law is now required. Had the Director returned to the fold on June 1, 2004 and strictly complied with the appropriate statutes, this "strict compliance argument" would have a better chance of survival. But the Director did not return, but rather, entered into a side agreement with the District which further complicated this controversy.

IV. THE DIRECTOR IMBUED THE DISTRICT WITH THE AUTHORITY TO WRITE ITS OWN RULES.

R.C. 3745.01 grants the Director a number of discretionary powers, and the discretion to exercise these powers rests solely with the Director. "The Director *may* do all of the following," including:

- A) Provide such methods of administration...and take such other action as may be necessary to comply with the requirements of the Federal laws and regulations pertaining to...waste disposal and treatment;

- C) Advise, consult, cooperate and enter into contracts or agreements with any other agency of the State, the Federal government, other states, and interstate agencies, and with affected groups, political subdivisions, and industries in furtherance of the purposes of this chapter and chapters R.C. 3704, 3714, 3734, 3751, 3752.

Certainly the District is a "political subdivision" as contemplated under this section,² in addition to being "an affected group."

On September 26, 2005, December 31, 2005, April 26, 2006, and December 22,

2006, the Director exercised his statutory authority by entering into a Memorandum of Understanding between the O.E.P.A. and the District. The agreement is not between Joseph Koncelik, Director, and Richard Regula, Chairperson of the District, but between two governmental entities. (See M.O.U. Art. II Parties - STW and Ohio EPA.) The stated purpose of this M.O.U. was to:

provide a mechanism for the development of a "Joint Solid Waste Management Plan (Plan) that would be drafted **collaboratively** by designees from the both the Ohio Environmental Protection Agencies (O.E.P.A.) and the Stark-Tuscarawas-Wayne Joint Solid Waste Management District (Waste District), to be prepared no later than November 30, 2006. (emphasis added).

To achieve that end, Article IV "Commitments" incredibly allows not only the District the right to adopt local rules, but also the discretion as to whether they will do so. "*If the Waste District elects to adopt local rules, it shall do so no later than November 30, 2006.*" (Article IV Commitments, paragraph 2, emphasis added).

The balance of the M.O.U. is a collection of paragraphs which are self-contradictory, and certainly contradict the applicable Revised Code Statutes. For example, once 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. Yet even acknowledging this contradiction, the Director encourages the District to adopt local rules and then claims that the plan will be "issued in accordance with those very sections (Article 5) - Issuance of Plan..." and reservations of rights. Nonetheless, on December 22, 2006, the Director issued his "Final Findings and Orders", which includes the adoption of the "local rules" promulgated by the District, and then again in the December, 2006 "Solid Waste Management Plan Update".

² R.C. 343.01 *et seq.*

I find that the Director's authority as set forth under R.C. 3745.01(A)(C) supersedes Chapter 3734; I find that the Memorandum of Understanding is a valid agreement between the parties and is enforceable.

I further find that the Director of the Ohio E.P.A., the Executive Branch and the Legislative Branch of the Ohio Government³ agreed to the Memorandum of Understanding such that the District justifiably relied upon their representations and that those representations cannot now retroactively be withdrawn.⁴ The Director has been empowered by the General Assembly to take "any action necessary" to comply with state and federal laws regarding waste disposal and treatment and he exercised that authority through the M.O.U.⁵

The Plaintiffs were well aware of the Director's departure from strict adherence to the law, and they themselves were complicit during this six to eight year hiatus in a joint attempt to compromise the problem. However, the time to seek judicial intervention is at the point of departure, not six to eight years later. This is not a criticism, and I applaud their efforts, but I find it to be fatal to their argument.

I reject the Plaintiff's argument that the M.O.U. only permitted the District to adopt local rules before the Director issued his plan, and therefore left the rules with a lifespan of weeks. This is in clear contradiction to the intent of the Memorandum of Understanding. Further, the final plan specifically adopts the local rules.

I have reviewed the Attorney General's response in E.R.A.C. 776022, and while I

³ Schuring deposition.

⁴ See, *Fairfield Sanitary Landfill, Inc. v. Fairfield Cty. Dist. Bd. of Health* (1990), 68 Ohio App.3d 761, 775, 589 N.E.2d 1334.

⁵ *State ex rel. Northeast Ohio Sewer Dist. v. Ohio Environmental Protection Agency*, Cuyahoga App. No. 87928, 2007-Ohio-834, ¶20, citing R.C. 3745.01.

agree with the legal conclusions, I disagree with their hindsight analysis. This sound legal advice should have been offered in say, 1999.

The Plaintiffs argue that certain rules exceed the District's lawful authority and violate the Constitutional Rights of their respective members. The Plaintiffs urge me to declare null and void all rules promulgated under 9.01., .02, .03 and .04, or at least review each for vagueness and arbitrariness, and then in a sense, rewrite them. Firstly, I find, with one exception, that the Plaintiffs have failed to establish by "the appropriate standard"⁶ that the rules are unconstitutional. "[It is a] universally recognized principle that a court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government. When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power."⁷ In this case, as stated above, the Director and the District did not exceed their lawful authority.

I further find, with one exception, that the Plaintiff's claims are too speculative, and there is no case or controversy existing which would invoke the authority of this Court. I have faith that the parties can reconcile certain passages, but I certainly do not possess the expertise to reconcile those problems,⁸ and the cost of appointing a master is cost prohibitive and certainly premature.

⁶ "The party challenging the statutes bears the burden of proving that the legislation is unconstitutional *beyond a reasonable doubt*." *Harrold v. Collier* (2005), 107 Ohio St.3d 44, 50, 836 N.E.2d 1165, citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 38-39, 616 N.E.2d 163.

⁷ *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.* (1942), 139 Ohio St. 427, 438, 22 O.O. 494, 40 N.E.2d 913.

⁸ See, *Dudukovich v. Housing Authority* (1979), 58 Ohio St.2d 202, 207, 12 O.O.3d 198, 389 N.E.2d 1113.

Whether a justiciable controversy exists is an issue that has been addressed by the Supreme Court of Ohio in the case of *White Consolidated Industries v. Nichols*, where the appellant was challenging the validity of certain procedural rules promulgated by the Director of the Ohio Environmental Protection Agency.⁹ The appellant's challenge to the rules was not accompanied by any set of facts that established it was actually being affected by the administrative rules. The court quoted with approval from the prior case of *Fortner v. Thomas*:

Courts will not aid in making or revising rules of administrative officers, boards or commissions, being confined to deciding whether such rules are reasonable and lawful as applied to the facts of a particular justiciable case. (citation omitted).

The court went on to give the following guidance as to when a justiciable controversy exists:

Until the parties can come forward with a specific factual setting, without strictly resorting to hypotheticals and speculation, this cause does not present a justiciable controversy. This court is not inclined to decide cases on entirely hypothetical facts and render purely advisory opinions. We therefore hold that the appeal from the EBR to the court of appeals and from the court of appeals to this court presented no justiciable cause.

Id. at 9, 257 N.E.2d 371.

Likewise, in the instant case, I am not inclined to issue an advisory opinion on whether Plaintiffs will be able to comply with the Rules, with the exception of Rule 9.04. Nor am I inclined to issue an advisory opinion with respect to future controversies between the parties that are not now before us. Such would not be a justiciable controversy as the Supreme Court of Ohio has defined it. Moreover, I agree with the Defense argument as to the waiver provision under Article 7, Rule .903.

⁹ *White Consolidated Industries v. Nichols* (1984), 15 Ohio St.3d 7, 8, 471 N.E.2d 1375.

I do find Rule 9.04 to be valid as written. However, I find (and found the first time this issue was presented) that the January 1, 2008 effective date is impossible to meet under existing reporting deadlines. I find in favor of the Plaintiff on the matter.

Therefore, I find as follows:

- 1.) Regarding Plaintiff's request that I declare the District Rules as written void and unenforceable in their entirety because the District effectively has no valid plan authorizing it to adopt and enforce those rules, I find in favor of the Defendants, the Stark-Tuscarawas-Wayne Joint Solid Waste Management District as against the Plaintiffs, The National Solid Waste Management Association;
- 2.) Regarding Plaintiff's section claim that I declare that specific provisions of the District's rules exceed the District's lawful authority and violate the Constitutional Rights of the members as void and unenforceable, I find in favor of the Defendants, the Stark-Tuscarawas-Wayne Joint Solid Waste Management District and against the Plaintiff, National Solid Waste District, as to all rules, with the exception of 9.04.
- 3.) Regarding Rule 9.04, I find the rule to be valid and constitutionally solid. However, I do find that the effective date of January 1, 2008 is impossible to meet, and I therefore set the effective date of Rule 9.04 to June 1, 2009.
- 4.) As to the Plaintiff's request for attorney fees, said request is denied.
- 5.) The Plaintiff, National Solid Waste Management Association, is hereby

Ordered to pay all court costs normally associated with the prosecution of
such matter.



JUDGE RICHARD D. REINBOLD, JR.

cc: Terrence A. Fay, Esq.
Christopher S. Habel, Esq.
Thomas W. Connors, Esq.
Dale T. Vitale, Esq.

Section __: STW District Rules

The following Rules have been adopted by the Board of Directors, as authorized by the Ohio Revised Code, to ensure the implementation of the Solid Waste Management Plan for the STW District.

Any existing Solid Waste Facility in operation as of the adoption date of STW District Rule 9.02, Operational Standards, shall have 180 days to comply with such Rule, unless otherwise stated in the specific Rule, or subpart thereof.

To the extent that the terms of any STW District Rule(s) conflict with the terms of the existing Solid Waste Industry Voluntary Guidelines of July 2003 ("Voluntary Guidelines"), the STW District Rule(s) shall control.

It is the intent of the STW District to enter into Host Agreements with all existing and new Solid Waste Facilities within the STW District. Such Host Agreements may contain certain directives of additional restrictions outside these Rules. All current host agreements shall remain in full force and effect.

The STW District may, by majority vote of the full Board, elect to incorporate into such Host Agreements a waiver of any STW District Rule or subpart thereof if the Board concludes such waiver is in the best interest of the STW District and will assist the STW District in the successful implementation of the Plan and further STW District goals.

If any STW District Rule, or any provision thereof, is held invalid by any court of competent jurisdiction, such ruling shall not affect the validity of any remaining provisions of these Rules.

Rule 9.01 DEFINITIONS

For the purposes of these STW District Rules, the following definitions shall apply:

- A. **Applicant** shall mean a person, firm, entity, municipal corporation, township or other political subdivision that proposes to construct or modify a Solid Waste Facility within the STW District and has submitted an application with regard thereto under Title 3745 of the Ohio Administrative Code, including without limitation an application for a registration certificate, permit-to-install, or alternate infectious waste treatment technology approval in accordance with Chapter 3745-27, 3745-29, or 3745-30 of the Ohio Administrative Code.

- B. **Authorized Maximum Daily Waste Receipts** means the maximum amount of solid waste a solid waste disposal facility may receive or process on any calendar day. The waste receipt limit shall be expressed in tons per day for facilities utilizing scales or cubic yards per day for all other facilities. The tons to cubic yards ratio shall be one ton equals three cubic yards unless the solid waste is baled, in which case the ratio is one ton equals one cubic yard.

- C. **Board** means the Stark-Tuscarawas-Wayne Joint Solid Waste Management District Board.
- D. **General Plans and Specifications** means that information required to be submitted to the Board pursuant to Rule 9.03 Solid Waste Facility Siting Rules, Section III, B.
- E. **Host Agreement** means any agreement between the Solid Waste Management STW District and any Solid Waste Facility within the STW District.
- F. **Host Community** means the unit of local government, such as a city, village or township, in which a Solid Waste Facility is or would be located.
- G. **Modify** shall mean a significant change in the operation of an existing in-District Solid Waste Facility that includes an application to: (1) change the Authorized Maximum Daily Waste Receipt for a solid waste facility; (2) to expand an existing solid waste facility; or (3) to convert a legitimate recycling facility into a transfer station; provided such application was submitted to the Ohio EPA after the effective date of these rules.
- H. **Plan** means the solid waste management plan of the Stark-Tuscarawas-Wayne Joint Solid Waste District, as required in Ohio Revised Code Sections 3734.53 and 3734.54, and any rules promulgated thereunder.
- I. **Person** means any individual, firm, entity, municipal corporation, township or other political subdivision.
- J. **Rule** means the action of the Board in promulgating, adopting and publishing such action as a rule of the STW District authorized by Sections 343.01 (G) and 3734.53 of the Revised Code, as now existing or hereafter amended.
- K. **Siting Rules** shall mean those rules applicable to new or modified Solid Waste Facilities as set forth in Rule 9.03.
- L. **Solid Waste Facility (or Facilities)** shall have the same meaning as defined in Ohio Revised Code 3734.01 (N) to include all solid waste disposal, transfer, recycling, processing, and resource recovery facilities.
- M. **STW District** means the Stark-Tuscarawas-Wayne Joint Solid Waste Management District established by Agreement on November 28, 1988, in accordance with Ohio Revised Code Section 343.01.
- N. **Transfer Facility** has the same meaning as in Ohio Administrative Code §3745-27-01(S)(29).

Rule 9.02 OPERATIONAL STANDARDS

The following standards apply to the operation of Solid Waste Facilities within the STW District:

- A. **Quiet Enjoyment:** Odors, noise, dust and vibration shall be minimized by the proper use of berms, walls, natural planting screens and soundproofed equipment and buildings. Any onsite landfill operational activities shall not exceed 90 dBA based on an average eight hour weighted day when measured from the affected residences. All road surfaces within the property lines of a Solid Waste Facility shall be paved or graveled to minimize mud and dust.
- B. **Security Lighting:** Any security lighting deemed necessary by the Applicant (or by these Rules) shall be aligned so that no portion of the illuminated field extends into any residential property.
- C. **Fire & Emergency Management Plan:** All Solid Waste Facilities shall have in place a written Fire & Emergency Management Plan that has been submitted to the primarily responsible local fire department. The facility shall incorporate any recommendations suggested by the primary responsible local fire department.
- D. **Litter:** All Solid Waste Facilities shall have in place a Litter Collection Plan which addresses the prompt collection and disposal of on and off-site litter generated as a result of the facility activities, including any such litter deposited along the designated hauling routes leading to the Solid Waste Facility. The Solid Waste Facility operator shall be responsible for the removal and disposal of any such litter deposited along the hauling routes leading to the Solid Waste Facility.
- E. **Vehicle/Wheel Wash:** To prevent mud and dirt from being tracked on to local roads, landfill facility operators must install a multi-stage wheel washing unit approved by the local health department. The first part of the unit shall consist of rumble strips and a tire bath. A truck washing station shall follow the wheel washing unit. All vehicle operators, to the extent that it is practical given weather conditions, shall wash any mud or dirt from their vehicles prior to exiting a Solid Waste Facility.
- F. **Street and Highway Access:** Trucks shall not use private drives or private access routes to or from the Solid Waste Facility property which are within one hundred fifty (150) feet of any existing residence. This provision does not apply to any existing private drives or access routes in use as a means of ingress or egress to or from a Solid Waste Facility as of the date of enactment of this Rule.
- G. **Gates:** The entrance to a Solid Waste Facility shall have a gate which shall be closed and locked at all times that the Solid Waste Facility is not open. Keys for admittance to the Solid Waste Facility shall be given to the primarily responsible local fire department.

- H. **Hours of Operation:** The hours of operation, when a Solid Waste Facility is open to accept waste, other than the maintenance of equipment within a fully enclosed building, shall be conducted only between the hours of 7:00 a.m. and 6:00 p.m. Monday through Friday, and 7:00 a.m. and 3:00 p.m. on Saturdays and legal holidays, except Sunday, unless alternative hours of operation are otherwise authorized by the local Board of Health and approved by the STW District. In times of natural disaster or emergency that necessitate additional hours for waste disposal, the local Board of Health may authorize additional hours to accommodate the STW District's resulting short-term waste disposal needs without prior approval from the STW District. In lieu of complying with this provision, existing Solid Waste Facilities may continue to operate under their respective hours of operation in place at the time of the adoption of these rules.

A sign stating the hours of operation and prohibiting unauthorized dumping (e.g., during non-operating hours or unacceptable waste) shall be placed in a conspicuous location at the entrance to the facility. Solid Waste Facilities shall have qualified personnel on duty at all times during operational hours to direct the operations of the Solid Waste Facility.

- I. **Liability Insurance:** Current copies of any and all policies of liability insurance maintained by a Solid Waste Facility shall be filed with the STW District, including documentation of the approval of the financial assurance mechanism required by Ohio Administrative Code Section 3745-27-16. A Solid Waste Facility shall promptly inform the STW District in writing of the subsequent cancellation or modification of any of the above referenced policies of insurance.
- J. **Ground Water Monitoring:** Each Solid Waste Facility that is required to perform semi-annual ground water monitoring pursuant to Ohio Admin. Code Sec. 3745-27-10 shall comply with this section. Each covered Facility will provide the STW District with thirty (30) days advance written notice of its semi-annual ground water monitoring, and allow for split sampling with the local Board of Health as requested by the STW District. The STW District will bear the costs for any split sample testing by the Board of Health. The covered Facilities shall provide the STW District with copies of any reports regarding the monitoring well testing within thirty (30) days of receipt.

The STW District may request additional ground water testing, the costs for such tests to be borne by the STW District.

- K. **Odor Control Plan:** Each Solid Waste Facility within the STW District shall submit to the STW District a written Odor Control Plan that has been approved by the local certified Board of Health. The Plan shall contain the means by which the Facility will respond to and control odors and airborne particulate matter.
- L. **Airbourne Particulate Control Plan.** The Airbourne Particulate Control Plan as defined by the Ohio EPA shall be submitted to the STW District and monitored by the local air permitting authority.

M. **Overweight Truck Deterrence Plan:** Each Solid Waste Facility within the STW District shall adopt and submit to the STW District a written policy designed to deter the use of the Facility by any truck with a total weight, including truck and load, in excess of the applicable total federal vehicle limit. The policy shall include a procedure incorporating a deterrence system subjecting any landfill bound vehicle weighing over the applicable federal weight limit to deterrents, which shall include, but are not limited to, at least two of the following :

- 1) allowing a local law enforcement officer to monitor infractions on site and issue citations; and
- 2) issuing a written warning to the violating company;
- 3) directing the vehicle to wait for one hour in a staging area prior to unloading;
- 4) for multiple offenses per driver or business within a six-month period, the Facility management may deny the offender(s) access to the landfill.

Each Solid Waste Facility shall annually submit to the STW District a report demonstrating the extent to which its written policy has effectively deterred the use of the Facility by any vehicle with a weight, including truck and load, in excess of the applicable federal limits.

N. **Certified Board of Health Inspection and Testing:** All Solid Waste Facilities within the STW District shall grant Health Department employees access to the Facility at reasonable times in order for the Certified Board of Health to conduct random and/or scheduled inspections. Such inspections may include random testing of the waste materials as requested by the STW District, and/or inspection of the daily operational records of the Facility.

O. **Waste Acceptance Procedures and Notification:** All Solid Waste Facilities within the STW District shall provide to the STW District a copy of the written program for PCB and hazardous waste prevention and detection, which it is required to implement pursuant to Ohio Administrative Code 3745-27-19(L). In addition, each Facility shall provide notice to the STW District upon receipt of a NOV (notice of violation) arising from the acceptance of hazardous waste or PCB regulated wastes. Further, such Facility shall submit any information on detection of PCB's or hazardous wastes to the STW District in the same manner as it is required to give to the EPA or Board of Health under the Ohio Revised Code or Administrative Code.

P. **Separated Recyclables:** Solid Waste Facilities that also operate solid waste collection vehicles within the STW District shall not:

- (1) knowingly incinerate or landfill separated recyclable material without the prior written consent of the STW District; or
- (2) knowingly combine separated recyclable materials with solid waste that is intended for landfilling without the prior written consent of the STW District.

Rule 9.03 SOLID WASTE FACILITY SITING RULES

I. PRECONSTRUCTION APPROVAL REQUIREMENT

No Person shall construct or modify any Solid Waste Facility until the General Plans and Specifications for the proposed Solid Waste Facility have been submitted to and approved by the Board as complying with the Plan or a variance or waiver from these Siting Rules has been granted by a majority vote of the full Board.

II. GENERAL STANDARDS

Unless a variance or waiver has been granted pursuant to Section I, the Board shall not approve the General Plans and Specifications for any proposed Solid Waste Facility, or for the modification of any existing Solid Waste Facility, where the construction and operation of the proposed Solid Waste Facility or modification thereof has not been found to comply with the Plan, including such matters as a determination that the proposed construction or modification will have adverse impacts upon the Board's ability to implement the Plan, will interfere with the Board's obligation to provide for the maximum feasible utilization of existing Solid Waste Facilities within the Solid Waste Management District ("STW District"), will adversely affect the quality of life of residents or will have adverse impacts upon the local community and its resources that cannot be eliminated.

III. PROCEDURES AND STANDARDS FOR EVALUATION

Unless a variance or waiver has been granted by the Board, the following process shall govern proposals for the construction of a new Solid Waste Facility or the modification of an existing Solid Waste Facility within the STW District:

A. Timing of the Submission of Plans and Specifications for Review

Any Person proposing to construct a new Solid Waste Facility or modify an existing Solid Waste Facility within the STW District shall submit to the Board the required information, listed in subsection B below, after the conditional permit to install has been issued by the applicable regional office of the Ohio Environmental Protection Agency ("Ohio EPA").

Permits for the installation or modification of a Solid Waste Facility require a lengthy and considerable technical review by the Ohio EPA to assure compliance with Ohio EPA standards. The time required and the scope of the review may result in significant modifications to the proposed Solid Waste Facility. Those modifications may affect such matters as the size of the Solid Waste Facility, the surface dimensions (or "footprint") of any Solid Waste disposal or transfer areas, the volume of Solid Waste accepted at the Solid Waste Facility on a daily basis, the number and size of vehicles delivering Solid Waste to the Solid Waste Facility, the volume of leachate generated (if the proposed Solid Waste Facility would be a landfill), and other aspects of the Solid Waste Facility that potentially

impact the STW District and its residents. Similar considerations exist with respect to any required zoning permits from the Host Community. Any changes made to the Plans or Specifications, including such changes required by the Director of the Ohio EPA in the application for a permit to install a Solid Waste Facility or by the Host Community, may require that the Applicant's proposal for the Solid Waste Facility be revised by the Applicant and re-evaluated by the Board.

Any subsequent changes to the Plans and Specifications shall be submitted to the Board. If the Board, in its discretion, determines that such changes warrant further review and approval, the Board shall notify the Applicant. Such additional review will be limited to the changes submitted.

B. **Required Information**

Any Person proposing to construct a new Solid Waste Facility or modify an existing Solid Waste Facility within the STW District shall submit General Plans and Specifications to the Board. The General Plans and Specifications required herein shall be prepared by professional engineers, architects, surveyors, geologists and/or other professionals as required by these rules or as requested by the Board. Such General Plans and Specifications shall include, but are not limited to, the following documents and information:

1. **Type of Solid Waste Facility:** A description of the type of Solid Waste Facility (disposal, transfer, processing, resource recovery, and legitimate recycling facility as defined by Ohio Administrative Code) proposed to be constructed, including, but not limited to: the equipment and technology to be used (such as automated systems, mixed waste processing, or unseparated recyclable materials combined by the generator in a single collection container ("single stream")); and the materials to be accepted at the Solid Waste Facility.
2. **Zoning Approval Documentation:** Documentation from the appropriate local zoning authority evidencing that the Facility conforms to any and all applicable zoning regulations. If the Facility is located in a jurisdiction which has not adopted zoning regulations, the Applicant shall provide an affirmation to that effect.
3. **Site Plan Map:** A site plan showing the placement, height, and size of all natural and manmade features and buildings to be constructed or modified at the proposed site; all proposed means of vehicle ingress and egress to and traffic within the proposed site; the location and dimensions of proposed parking areas, location of abutting public streets, arterial streets, County and township roads, if any, to be constructed; and the location and nature of adjoining development.
4. **Drawings:** Architectural drawings or artist's renderings of the proposed Solid Waste Facility with sufficient detail to depict the appearance of the

proposed Solid Waste Facility upon completion of construction, and in the case of a landfill, surface contours (gradients) both at the start of operation and upon final closure.

5. **Survey**: A survey by a registered surveyor showing: the location of the principal Solid Waste Facility; all proposed Solid Waste management units and supporting or ancillary buildings or structures; the distance from each such unit or improvement to the property lines of the site; and a contour map of the site including existing elevations of the Solid Waste Facility and the approximate final grade and elevations to be established following completion of the disposal areas, if disposal is the proposed use, and the grade and elevation of any proposed buildings or structures to be constructed at the Solid Waste Facility. The survey shall indicate the property uses and the names of property owners for all real property located within one mile of the property lines of the Solid Waste Facility.
6. **Size and Capacity**: The projected size (daily and annual volumes, Authorized Maximum Daily Waste Receipts or processing capacity) of the proposed Solid Waste Facility including, in the case of a landfill, the proposed phases for development (construction) of disposal capacity and the corresponding acreage for each such phase.
7. **Landscaping**: A landscaping plan showing all proposed temporary and permanent landscaping, fencing, berms, and buffers at the Solid Waste Facility.
8. **Lighting**: A lighting plan showing all proposed exterior lighting for structures, onsite roadways, gates and fencing, and identifying the lighting type, height, intensity, and shielding.
9. **Utility Plan**: A plan outlining the necessary public utility services for the proposed Solid Waste Facility including the proposed vendor or public entity provider of such necessary public utility services.
10. **Traffic or Transportation Plan**: A plan showing the proposed routes to and from the proposed Solid Waste Facility and the types and anticipated number and weight of transfer and direct haul vehicles utilizing the proposed Solid Waste Facility, including identification of the main access routes to be used when transfer vehicles, direct haul vehicles, rail cars or other modes of transportation either enter the STW District to deliver Solid Waste or transport Solid Waste generated within the STW District to the Solid Waste Facility.
11. **Hours of Operation**: Identification of the proposed Solid Waste Facility's hours of operation including the projected date for commencement of operation.

12. **Anticipated Source of Solid Waste and Recyclable Materials:** (a) identification of the types of commercial, industrial, agricultural, residential and institutional generators of Solid Waste that are expected to use the Solid Waste Facility and an estimate of the ratio of in District Solid Waste to the total volume of Solid Waste that will be disposed, received, treated, stored or processed at the proposed Solid Waste Facility; and (b) if recycling activities will be conducted at the proposed Solid Waste Facility, a detailed description of such recycling activity, including all materials to be recycled, technology to be utilized and anticipated percentage of Solid Waste reduction and recyclable materials to be recovered as a result of the operation of the proposed Solid Waste Facility.
13. **Control of Onsite Debris:** A description of Applicant's proposed management and control procedures to minimize the potential for debris from the Solid Waste Facility being deposited on arterial streets and County and township roads, and adjacent property.
14. **Other Relevant Information:** Any other information the Applicant or the Board considers necessary for the Board to evaluate in determining whether the proposed Solid Waste Facility complies with each of the criteria specified in these rules.
15. **Applicant's Report:** When the Applicant submits its General Plans and Specifications and provides all other information required by these rules, the Applicant shall, in addition, submit a written report to the Board explaining why, in the Applicant's opinion, the proposal complies with the Plan.

C. Funding of Board Expenses

Pursuant to ORC § 343.0 1(G)(2), the Applicant shall reimburse the Board all reasonable costs and expenses incurred by the Board to review the General Plans and Specifications as provided herein. The Board will submit to the Applicant, a quarterly invoice for the costs and expenses incurred by the Board in its review of the General Plans and Specifications.

Within thirty (30) business days of receiving the Board's invoice, the Applicant will submit a check to the Board (payable to the STW District Treasurer) for the costs and expenses incurred. In the event the Applicant fails to submit payment to the Board within thirty (30) business days of receiving an invoice from the Board, the Board reserves the right to suspend the review of the Applicant's General Plans and Specification until such payment is received by the Board.

D. Evaluation Criteria:

1. The Applicant must demonstrate to the Board, by clear and convincing evidence, that the proposed Solid Waste Facility:

- a. is consistent with the goals, objectives, projections and strategies contained in the Plan and will be operated in compliance with all STW District rules;
- b. will not have an adverse impact on the quality of life within the affected community;
- c. is consistent with the proposed land use of the area in which the Solid Waste Facility would be sited, as determined by the applicable Comprehensive Development Plan or any other applicable planning standards, including but not limited to the planning standards of any other political subdivision that has developed land use and/or zoning plans, and which would be affected by the proposed Solid Waste Facility;
- d. will be constructed, installed, operated and maintained to be harmonious and appropriate in appearance with the existing or intended character of the area;
- e. will be adequately served by, and will not impose excessive additional requirements at public cost for public services, including but not limited to the following: delivery of water; wastewater treatment; maintenance, improvement and reconstruction of arterial streets used by the vehicles delivering Solid Waste to the Solid Waste Facility; emergency services including police and fire protection; and state and local regulatory personnel responsible for enforcement of vehicle weight limitations, security of solid waste transportation regulations (e.g., verification of the use of enclosed Solid Waste containers or tarps on open top vehicles), and the licensing and inspection of Solid Waste Facilities;
- f. will not require converting any County or township road to an arterial street for purposes of truck access to the Solid Waste Facility or, if otherwise, will fully offset the public cost of converting a County or township road to an arterial street and thereafter maintaining such arterial street;
- g. will not be detrimental to the economic welfare of the affected community, when taking into consideration the resulting revenues to and expenditures by the Host Community, job creation, additional tax revenues generated by the Solid Waste Facility, and the effect of the proposed Solid Waste Facility on property values including the impact such valuation will have on the generation of tax revenues for public schools;
- h. will have vehicular approaches, which include but are but not limited to the construction of turn lanes, traffic lights, street signage and on-

site roads to manage traffic, designed to minimize interference with traffic on public streets and highways;

- i. will not result in the material destruction, loss or damage of cultural, natural, scenic, or historic features of the STW District or the affected community, cause or contribute to the taking of any endangered or threatened species of plants, fish or wildlife, or result in the destruction or adverse modification of critical habitat of endangered or threatened species as identified in 50 CFR part 17 ("endangered or threatened species" means any species listed pursuant to Section 4 of the Endangered Species Act, 16 U.S.C. § 1533; "destruction or adverse modification" means a direct or indirect alteration of critical habitat which appreciably diminishes the likelihood of the survival and recovery of threatened or endangered species using such habitat; and "taking" means harassing, harming, pursuing, hunting, wounding, killing, trapping, capturing or collecting or attempting to engage in such conduct).

IV. FACILITY SITING REQUIREMENTS:

A proposed new Solid Waste Facility or proposed modification to an existing Solid Waste Facility must meet the following siting requirements, such that:

- A. the Solid Waste Facility shall be located adjacent to a federal, state or county highway such that ingress and egress for the facility does not create traffic through an area developed primarily for residential purposes;
- B. the Solid Waste Facility shall not be located within 2,500 feet (measured from any property line of the Solid Waste Facility) of a historical site identified in a municipal, County or state historic preservation plan, the National Register of Historic Places or the Ohio Registry of Archaeological Landmarks, and shall not cause or contribute to the destruction or loss of any such historic or archaeological site;
- C. any temporary, moveable or permanent building or structure including, without limitation, any landfill cells or other solid waste management units, shall not be located closer than two hundred fifty (250) feet from the property lines of the facility, and, if located within one thousand (1,000) feet of a residence, such building, structure, landfill cell or other solid waste management unit shall be obscured by a suitable barrier not less than ten (10) feet high;
- D. the Solid Waste Facility will include designed sight barriers within the setback area of any portion of the Solid Waste Facility that otherwise lack natural screening. Such sight barriers shall consist of berms parallel to the property lines of the property at least ten (10) feet in height with plantings of evergreen trees (sufficiently spaced two-year transplants or older at the time

of planting which will grow to not less than ten (10) feet in height) or evergreen shrubbery planted in staggered rows on the berms. (Trees or shrubs that comprise a sight barrier must be replaced if they die.);

- E. the Solid Waste Facility shall not be proposed for any location that is within one mile of a school, hospital, or place of worship, County, municipal or township park, licensed child day care facility, public library or, to the extent not included in the preceding list, any other improved parcel where the public gathers, and the construction and operation of a Solid Waste Facility would adversely effect the use and enjoyment of the improved parcel. The requirements of this subsection do not preclude the landfill from providing any of the above referenced public services;
- F. the Solid Waste Facility must comply with all required setbacks from the property lines of the parcel; and
- G. the height of any landfill cells or other waste management units shall conform to the existing topography of the surrounding area, such that the maximum elevation of any cell or unit when closed shall not be more than fifty (50) feet above the highest naturally occurring point within 1000 feet of the Solid Waste Facility boundary.

V. **BOARD REVIEW**

After the Applicant has provided all of the required information as set forth in Section III, subsection B, the Board will proceed to determine whether the Applicant has adequately demonstrated that the proposed Solid Waste Facility will be constructed or modified and operated in compliance with the standards established herein.

The Board shall appoint a Siting Committee to assist in the review of the General Plans and Specifications. The Board, upon recommendation of the Siting Committee, may request the assistance of the host county Health Department and/or host county Sanitary Engineer to perform or to supervise the review of the General Plans and Specifications for the proposed construction or modification as the same relates to these siting rules. The Board may employ such engineers, consultants and advisors as it deems necessary to assist in the review of the General Plans and Specifications as they relate to these siting rules. The Siting Committee may include, but is not limited to, the following representatives:

- a member of the Board;
- a representative of the host county Board of Health;
- the host county Sanitary Engineer;
- a representative of the host County's Regional Planning Commission;
- a representative of the STW District's Policy Committee;
- if the location proposed for the facility is within a township, at least one township trustee from the proposed host township;
- if the location proposed for the facility is within a municipality, at least one elected officer of that municipality; and

- a representative citizen of the host county as recommended by the Commissioners of the host County.

Within 60 days of the Applicant's submission of the General Plans and Specifications the Board shall determine whether the General Plans and Specifications submitted by the Applicant contain sufficient information for the Board to complete its review of the proposal. In the event it is determined that more information is necessary to complete its review of the proposal, the Board shall notify the Applicant of such request in writing.

The Board will proceed to determine whether the Applicant has demonstrated that the proposed Solid Waste Facility will be constructed or modified and operated in compliance with the standards established herein. The Sanitary Engineer and/or the Siting Committee, if requested by the Board, shall prepare a report summarizing the review. This report shall include a recommendation to the Board as to whether the General Plans and Specifications comply with the Plan and satisfy all other criteria stated herein. The final determination of whether the General Plans and Specifications for the proposed construction or modification demonstrates compliance with the standards herein is the sole discretion of the Board.

VI. DEVELOPMENT AGREEMENT

In the event the Board determines that the proposed construction or modification and operation of a Solid Waste Facility, as set forth in the Applicant's General Plans and Specifications with respect thereto, comply with the Plan and the other requirements and criteria set forth in these rules, the Applicant and the Board shall enter into a development agreement memorializing the terms and conditions that are the basis of the above mentioned determination by the Board. The Applicant and any successor in interest shall have an ongoing obligation to comply with the development agreement, the Plan, and the General Plans and Specifications as submitted and approved by the Board.

VII. WAIVER

The Board may waive, by majority vote of the full Board, the requirement for submission and Board approval of General Plans and Specifications or otherwise grant waivers to these rules if the Board concludes such waiver is in the best interest of the STW District and will assist the Board in the successful implementation of the Plan and further STW District goals with respect to Solid Waste management and Solid Waste reduction activities.

VIII. SEVERABILITY

If any provision hereof is ruled invalid by any court of competent jurisdiction, such decision shall not affect the validity of any other provision hereof. Additionally, in the event any provision hereof is determined to be a design standard within the meaning of ORC §343.01(G)(2), such provision shall not be considered in the Board's review of any proposed Solid Waste Facility under these regulations.

Rule 9.04 Prohibition or Limitation of Out-of-District Wastes

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 District's Recycling Standards. Each originating district or authority's recycling standard is either: (1) the percentage of waste recycled in both (a) the residential/commercial and (b) industrial waste streams; or (2) the access percentage; as is set forth in each respective district or authority's Ohio EPA approved report. For the purpose of this Rule, the STW District Recycling Standards shall be the percentage of waste recycled within the STW District in each category (residential/commercial and industrial), or the access percentage, as established by an average of the STW District's Ohio EPA approved reports for the previous three (3) consecutive calendar years, beginning with the baseline year of 2005. The STW District Recycling Standards will be adjusted accordingly on an annual basis. This Rule 9.04 will be effective January 1, 2008. Nothing in this Rule shall impair any third party's contract rights in existence at the time of the adoption of Rule 9.04.

Rule 9.04 will cease to have effect on December 31, 2010, unless the Board affirmatively acts to renew the Rule, provided that the Board has the written authority from the Ohio EPA to amend, rescind, or adopt rules governing the STW District as of December 1, 2010. If the District is not so authorized as of December 1, 2010, Rule 9.04 shall remain in effect.

IN THE SUPREME COURT OF OHIO

National Solid Wastes Management Association,

Appellant,

v.

Stark-Tuscarawas-Wayne Joint Solid Waste Management District,

Appellee.

Case No. 09-0211

**Affidavit in Support of Memorandum
in Opposition to Motion for Stay**

STATE OF OHIO)

) SS:

COUNTY OF STARK)

David Held, being duly sworn, deposes and states:

1. I am the executive director of the Stark-Tuscarawas-Wayne Joint Solid Waste Management District (the "District") and have served in that capacity from 2004 to present.
2. I am familiar with the District's local rules, which were adopted by the District's board of directors on November 3, 2006, and which are attached as Exhibit B.
3. I have attended all of the meetings of the District's board from the date that the rules were adopted in November 2006 to present.
4. I am familiar with the waiver provisions of the District's local rules, which are set forth in the preamble to the rules and Rule 9.03 (VII).

5. The District's local rules provide that existing solid waste facilities within the District shall have 180 days to comply after the date of adoption of the rules, unless otherwise stated in a specific rule.

6. The recycling rule, contained in Rule 9.04, provides that it is effective January 1, 2008.

7. The National Solid Waste Management Association (the "Association") sought declaratory relief regarding the local rules, which was denied by the trial court on December 18, 2007, with the exception that the effective date of the recycling rule, Rule 9.04, was changed from January 1, 2008 to June 1, 2009.

8. The trial court's judgment was appealed to the court of appeals, which entered judgment on December 15, 2008, reversing the trial court's judgment on the grounds that it lacks jurisdiction. After this ruling, the District's board determined that it would maintain the June 1, 2009 effective date for Rule 9.04.

9. Prior to May 28, 2009, no request to the District for waiver of the provisions of the District's local rules had ever been made by anyone.

10. There are three operational solid waste facilities located within the jurisdiction of the District: the Countywide Recycling & Disposal facility ("Countywide"), the American Landfill ("American") and the Kimble Sanitary Landfill ("Kimble").

11. On May 28, 2009, the District received waiver requests regarding the application of Rule 9.04 from Kimble and Countywide. A request for a waiver from the application of Rule 9.04 was received by the District from American on June 2, 2009. Copies of the waiver requests (without attachments) are attached as Exhibits D, E and F.

12. These waiver requests were granted by the District's board on June 5, 2009 for the period from June 1, 2009 through June 1, 2010.

13. On May 28, 2009, the District also received a waiver request from Kimble regarding the application of Rule 9.02(E), the wheel wash rule. This waiver request is presently under consideration by the District, and is expected to be ruled on by the District's board on July 10, 2009. A copy of the waiver request is attached as Exhibit G.

14. The recycling rate standards set forth in the recycling rule, Rule 9.04, are set by the District on an annual basis by averaging the recycling rates for the various districts in the state of Ohio for the last three calendar years.

15. The recycling rates are determined from documents filed by each solid waste district with the Ohio EPA. This recycling rate information is then made available by the Ohio EPA on its website, by September of the year after the calendar year in which the recycling information is collected. For example, recycling rate information for 2008 is available on the Ohio EPA's website by September 2009.

16. It is the District's procedure, to collate the recycling rate information from applicant solid waste districts and the Ohio EPA's website in November of each year, and advise interested parties of districts in compliance with the recycling rate standards applicable for the next calendar year commencing January 1.

17. The recycling rate standards, set for the June 1, 2009 commencement date of the recycling rule, were calculated from recycling rates for calendar years 2005, 2006 and 2007. This information formed the basis for the waiver requests by American, Countrywide and Kimble, attached as Exhibits D, E and F. The interested parties, including American, Countrywide and Kimble, were informed of those districts in compliance with the standards by a

posting of the information on the District's website on January 2, 2009, and by personal meetings with each of the affected landfills by April, 2009.

18. Prior to May 28, 2009, Kimble had not submitted a waiver request regarding the application of rule 9.02(E), the wheel wash rule.

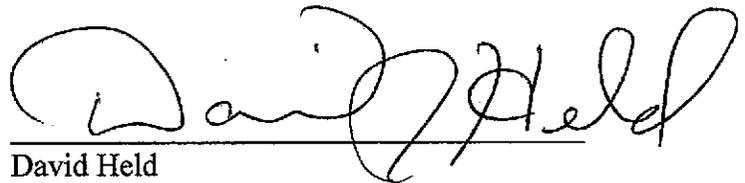
19. The wheel wash rule addresses problems with landfill trucks tracking mud and dirt from the landfill onto adjacent public roadways. This problem is alleviated by equipment which cleans off landfill truck wheels prior to them leaving the landfills. Kimble has claimed in its waiver request that its landfill has paved internal roads and that there is no need to wash wheels to prevent mud or dirt from being tracked on to adjacent public roadways. This waiver request will be considered and determined by the District's board on July 10, 2009.

20. However, the local rule requiring a wheel wash has broader application than the Kimble Sanitary Facility, since it applies to all landfills within the jurisdiction of the district. The local rule is necessary to alleviate the problem of mud and dirt being tracked by landfill trucks from other landfills onto adjacent public roadways.

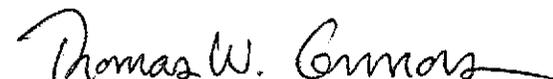
21. The odor control plan rule addresses the serious problem being experienced by neighbors of landfills in the District relating to persistent and offensive odors rising to the level of nuisance. Ohio's regulations, OAC 3745-27-19(B)(3), provide that landfill operators must operate their facility in a manner so that odors are strictly controlled so as not to cause a nuisance or a health hazard. While precise quantification of odor levels are difficult because of the subjective nature of odors, some limits are necessary to ensure that landfills neighbors are not subjected to a nuisance. No steps have been taken to date by the District regarding enforcement of the odor control plan rule.

22. The airborne particulate control plan rule, Rule 9.02(L), is related to requirements set forth in OAC Chapter 3745-15 regarding emission limits. The rule is designed to ensure that the district is provided a copy of the emission limit information and plan required by the Ohio EPA, so that the district can ensure that the plan in place is being monitored by the appropriate authority. The District has not yet taken any steps to date regarding enforcement of this rule.

FURTHER AFFIANT SAYETH NAUGHT.


David Held

Sworn to before me, and subscribed in my presence this 10th day of June, 2009.


Notary Public

THOMAS W. CONNORS, Attorney at Law
Notary Public, State of Ohio
My commission has no expiration date
sec. 147.03 R.C.

WAIVER REQUEST APPLICATION

Please print or type.

Date: MAY 28, 2009

Facility/District Name: KIMBLE SANITARY LANDFILL

Address: 3596 STATE ROUTE 39NW, DOVER OHIO 44622

Telephone Number: 330-343-1226 Fax Number: 330-343-7560

Name of Person Completing Waiver Application: KEITH E. KIMBLE

Title: PRESIDENT

E-mail: EKIMBLE@KIMBLECLAY.COM

District Rule From Which Your Facility is Seeking a Waiver: 9.04 PROHIBITION OR LIMITATION OF OUT-OF-DISTRICT WASTES FROM THE FOLLOWING DISTRICTS: BELMONT-JEFFERSON, GEAUGA-TRUMBULL, MAHONING, DELEWARE-MARION-MORROW-KNOX, MEDINA, RICHLAND, AND LORAIN

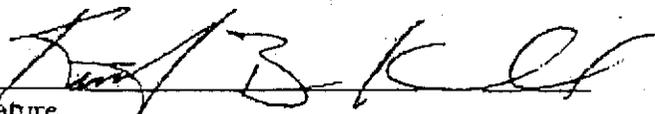
Detailed explanation stating the reason(s) your facility/district is seeking a waiver: *(Please attach a detailed explanation)*

ATTACHED

Statement as to why this request is in the best interest of the District and how the waiver, if granted, will assist the District in the successful implementation of the District Plan: *(Please attach a detailed explanation)*

ATTACHED

If this waiver is requested due to a pre-existing contract (prior to November 6, 2006) between facility and a third party, attach a copy of the contract to this application: *(Please attach any comments)*


Signature

MAY 28, 2009

Date

Please return the completed *Waiver Application* along with the \$250.00 application fee to:
Stark-Tuscarawas-Wayne Joint Solid Waste Management District
9918 Wilkshire Blvd NE
Bolivar, Ohio 44612
Attention David J. Held, Executive Director

RECEIVED
MAY 28 2009
efw
STARK-TUSCARAWAS-WAYNE
JOINT SOLID WASTE DISTRICT

if you have any questions, please contact Mr. Held at 800-678-9839 or by e-mail at david@timetorecycle.org.

STARK-TUSCARAWAS-WAYNE JOINT SOLID WASTE MANAGEMENT DISTRICT

WAIVER REQUEST APPLICATION

RECEIVED
MAY 28 2009

Please print or type.

Date: 5/29/08

Facility/District Name: County Recycling and Disposal Facility

STARK-TUSCARAWAS-WAYNE
JOINT SOLID WASTE DISTRICT

Address: 3619 Gracemont Street, SW, East Sparta, Ohio 44626

Telephone Number: 330-874-3855

Fax Number: 330-874-2426

Name of Person Completing Waiver Application: Tim Vandersall

Title: General Manager

E-Mail: Tvandersall@republicservices.com

District Rule From Which Your Facility is Seeking a Waiver: 9.04

Detailed explanation stating the reason(s) your facility/district is seeking a waiver: *(Please attach a detailed explanation)*

Statement as to why this request is in the best interest of the District and how the waiver, if granted, will assist the District in the successful implementation of the District Plan: *(Please attach a detailed explanation)*

If this waiver is request due to a pre-existing contract (prior to November 6, 2006) between facility and a third party, attach a copy of the contract to this application: *(Please attach any comments)*

An example contract is attached. Contracts may be viewed by the STW JSWD Director upon request.

Signature

5/28/09

Date

Please return the completed *Waiver Application* along with the \$250.00 application fee to:

Stark-Tuscarawas-Wayne Joint Solid Waste Management District
9918 Wilksire Blvd NE
Bolivar, Ohio 44612
Attention: David J. Held, Executive Director

If you have any questions, please contact Mr. Held at 800-678-9839 or by e-mail at david@timetorecycle.org.

Print Form

STARK-TUSCARAWAS-WAYNE JOINT SOLID WASTE MANAGEMENT DISTRICT

WAIVER REQUEST APPLICATION

RECEIVED
JUN 12 2009

Please print or type.

Date: 6/1/2009

STARK-TUSCARAWAS-WAYNE
JOINT SOLID WASTE DISTRICT

Facility/District Name: American Landfill, Inc.

Address: 7916 Chapel Street SE., Waynesburg, OH 44688

Telephone Number: 330.866.3265

Fax Number: 330.866.3709

Name of Person Completing Waiver Application: Chad A. Abell

Title: District Manager

E-Mail: cabell@wm.com

District Rule From Which Your Facility is Seeking a Waiver: 9.04

Detailed explanation stating the reason(s) your facility/district is seeking a waiver: *(Please attach a detailed explanation)*

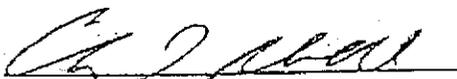
See Attachment 1

Statement as to why this request is in the best interest of the District and how the waiver, if granted, will assist the District in the successful implementation of the District Plan: *(Please attach a detailed explanation)*

See Attachment 1

If this waiver is request due to a pre-existing contract (prior to November 6, 2006) between facility and a third party, attach a copy of the contract to this application: *(Please attach any comments)*

See Attachment 2


Signature

6-1-2009
Date

Please return the completed *Waiver Application* along with the \$250.00 application fee to:

Stark-Tuscarawas-Wayne Joint Solid Waste Management District
9918 Wilksire Blvd NE
Bolivar, Ohio 44612
Attention: David J. Held, Executive Director

DEPOSITED
6/1/09 CA
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If you have any questions, please contact Mr. Held at 800-678-9839 or by e-mail at david@timetorecycle.org.

Print Form

WAIVER REQUEST APPLICATION

Please print or type.

Date: 5/28/09

Facility/District Name: KIMBLE SANITARY LANDFILL

Address: 3596 STATE ROUTE 39 NW

Telephone Number: 330-343-1226 Fax Number: 330-343-7560

Name of Person Completing Waiver Application: KEITH KIMBLE

Title: PRESIDENT

E-mail: KKIMBLE@KIMBLECLAY.COM

District Rule From Which Your Facility is Seeking a Waiver: 9.02 E VEHICLE/WHEEL WASH

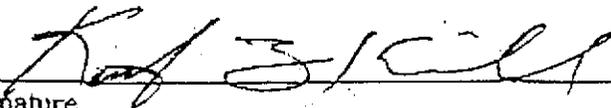
Detailed explanation stating the reason(s) your facility/district is seeking a waiver: *(Please attach a detailed explanation)*

ATTACHED

Statement as to why this request is in the best interest of the District and how the waiver, if granted, will assist the District in the successful implementation of the District Plan: *(Please attach a detailed explanation)*

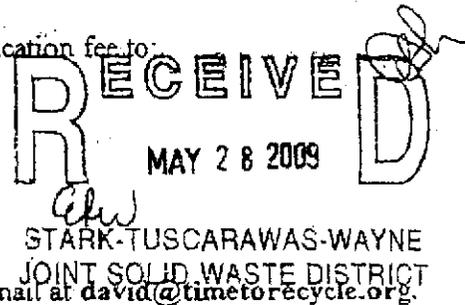
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Signature

MAY 28, 2009
Date

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9918 Wilkshire Blvd NE
Bolivar, Ohio 44612
Attention David J. Held, Executive Director


STARK-TUSCARAWAS-WAYNE
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