

ORIGINAL

IN THE SUPREME COURT OF OHIO

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,	:	CASE NO. 2009-0211
	:	
APPELLANT,	:	On Appeal From The Court of Appeals of Stark County, Ohio
	:	Fifth Appellate District
vs.	:	
	:	
STARK-TUSCARAWAS-WAYNE JOINT SOLID WASTE MANAGEMENT DISTRICT,	:	Court of Appeals Case No.2008 CA 00011
	:	
APPELLEE.	:	

MERITS BRIEF OF APPELLANT
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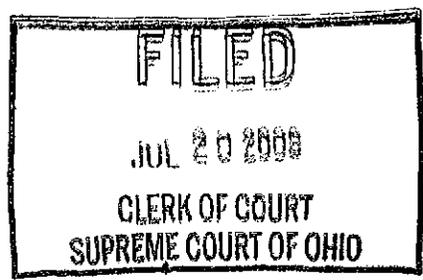


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III. STATEMENT OF THE CASE.

(A) NATURE OF THE CASE.

In this case Appellant National Solid Wastes Management Association (“NSWMA” or the “Association”) brought a declaratory judgment action challenging an attempt by the Appellee Stark-Tuscarawas-Wayne Joint Solid Waste Management District (the “Appellee District” or “STW”) to adopt and enforce local solid waste rules which exceed the rule-making powers granted solid waste districts by the legislature after STW’s power to adopt and enforce local rules had legally expired. The General Assembly provided the districts with the power to adopt and enforce local rules governing narrow aspects of solid waste disposal activities at landfills located within the districts, but only so long as the planning authority of the rule-making district remained in effect. In the case at bar, the Appellee District not only adopted rules far in excess of its statutory authority, it did so after its planning authority terminated.

The trial court postponed the effective date of STW’s recycling rule finding compliance to be “impossible”, and declined to rule on the validity of the remaining rules. The Court of Appeals, relying upon the provision of state law that empowers the Director of the Ohio Environmental Protection Agency (“Ohio EPA” or the “Agency”) to adopt solid waste rules having state-wide application, ruled that the Ohio EPA Director was an indispensable party to NSWMA’s challenge of the STW’s local rules, and ordered that the case be remanded to the trial court for dismissal. The Court below raised this issue *sua sponte*, after oral argument had concluded, and neither party was heard on the issue.

On April 26, 2009, this Court accepted this case for review, and ordered the Clerk of the Court below to certify the record.

(B) STATUTORY SCHEME.

In the 1980s, costly federal and state environmental standards forced many landfills and incinerators in Ohio to close. This created a perceived shortage of “disposal capacity”.¹ In 1988, the General Assembly substantially revised Ohio’s solid waste laws to address this perceived problem by enacting Amended substitute Senate Bill 592.²

According to Ohio EPA³, the legislature’s re-write of Ohio’s solid waste disposal laws in 1988 was “an ambitious piece of legislation that significantly strengthened Ohio’s twenty-year old solid waste law and that set into motion a planning process at both state and local levels [one of] the main goals of this planning process [is] to ensure adequate and environmentally sound management capacity for Ohio’s solid waste...⁴ This is in keeping with the expressed statement of public policy set forth in R.C. 3734.40(A), in which the legislature declared as follows:

The General Assembly hereby finds and declares the following to be the public policy of this state:

(A) That the off-site disposal of solid wastes...are critical components of the economic stature of this state, and when properly controlled and regulated, make substantial contributions to the general welfare, health, and prosperity of the state and its inhabitants....

See, R.C. 3734.40(A)

The General Assembly placed the regulation of technical aspects of landfill design, construction and operation squarely and solely in the hands of Ohio EPA.⁵ This insured a uniform statewide programs would be implemented to protect the environment while providing

¹ August 9, 2007, Trial Transcript, pp. 192-195.

² See, Ohio EPA, Division of Solid and Infectious Waste Management, Solid Waste Management District Clearinghouse, <http://www.epa-state.oh-us/dsiwm/pages/swmcdc.html>.

³ *Id.*

⁴ *Id.*

⁵ See R.C. 3734.02.

clear expectations for landfill developers, including members of the Appellant.⁶ Because boards of health had historically inspected and licensed landfill operations, the General Assembly delegated issuance of annual landfill operating licenses and regular inspections of landfills to local boards of health.⁷ The General Assembly required every county to create – or join other counties in creating – solid waste management districts.⁸ The districts are led by the county commissioners.⁹

The solid waste districts were charged with a planning function – to project waste disposal needs, identify waste disposal capacity and develop programs so that the needs were met for either a 10 or 15 year planning period.¹⁰ Those plans are required to be updated every three or five years depending on the planning period.¹¹ Among other things, the districts' plans must identify opportunities to reduce and recycle waste.¹²

The districts' plans are reviewed and approved by Ohio EPA to, among other things, ensure they meet the goals and objectives in the state solid waste management plan.¹³ The General Assembly considered the local planning function to be so important that it requires Ohio EPA to prepare a plan or amended plan for any district that fails to do so by certain deadlines.¹⁴

The districts were given limited rulemaking authority to enact rules, *inter alia*: (1) reserving local landfill space for the disposal of in-district waste if the plan showed this was necessary to meet the district's domestic needs; (2) for the protection and maintenance of

⁶ *Id.*

⁷ See R.C. 3734.04 and R.C. 3734.05.

⁸ R.C. 3734.52.

⁹ *Id.*

¹⁰ R.C. 3734.54.

¹¹ R.C. 3734.56(A).

¹² R.C. 3734.53.

¹³ R.C. 3734.55.

¹⁴ R.C. 3734.55(D) and 3734.56(A).

existing landfill space (again to assure that local disposal needs were met); and (3) exempting domestic landfills from local zoning requirements that might limit or restrict the availability of landfill space (again, to assure that local disposal needs were met).¹⁵ Mindful that it vested in Ohio EPA and the local boards of health primary responsibility for the regulation of the solid waste industry in R.C. Chapter 3734, the legislature expressly provided that the districts' rulemaking authority did not extend to matters pertaining to landfill design, and that district rules could not conflict with Ohio EPA requirements under R.C. Chapter 3734.¹⁶

Under R.C. 343.01(G), only solid waste districts that obtain the Ohio EPA Director's approval for *the district's* initial and amended solid waste management plans, and include within those plans a provision authorizing rulemaking, may adopt and enforce local rules. Any plan written by Ohio EPA for a district *cannot*, by statute, authorize the district to adopt or enforce local rules.¹⁷

(C) STATEMENT OF PERTINENT FACTS.

(1) The Parties.

Appellant NSWMA is a nationwide association of solid waste companies. Three of its members own and operate landfills located in the Appellee District. These landfills are the American Landfill, owned and operated by American Landfill, Inc., the Countywide Landfill, owned and operated by Republic Services of Ohio, II, LLC, and the Kimble Sanitary Landfill, owned and operated by the Penn-Ohio Company. The American Landfill and Countywide Landfills are located in Stark County, Ohio and the Kimble Sanitary Landfill is located in Tuscarawas County, Ohio.

¹⁵ R.C. 343.01(G).

¹⁶ R.C. 343.01(G)(2).

¹⁷ R.C. 3734.55(D).

The Appellee District is a joint solid waste management district created in the early 1990's pursuant to R.C. 3734.53. It is comprised of Stark, Tuscarawas and Wayne counties.

(2) The Facts.

In accordance with the requirements of R.C. 3734.53, the Appellee District obtained Ohio EPA approval of its initial solid waste management plan in 1993.¹⁸ However, in clear violation of R.C. 3734.56, STW failed to obtain Ohio EPA's approval of any five year amended plan thereafter.¹⁹ Amended plans were due in 1998 and 2003.²⁰ When STW failed to submit an approvable amended plan to the Ohio EPA Director in 1998, the Director had a non-discretionary statutory duty to prepare a plan for the Appellee District in 1999.²¹ He did not do so.²² Instead, the Agency held off because of numerous broken promises from the Appellee District.²³ Finally, in 2004, when it became clear to Ohio EPA that STW was not going to submit an approvable plan for the Agency's review, Ohio EPA notified STW that it was taking over the planning process.²⁴

Upon receiving this notice, the Appellee District scrambled to regain local control, rushing to prepare its own plan which Ohio EPA again did not approve.²⁵ STW went so far as to put political pressure on Joe Koncelik, then Director of Ohio EPA, to regain control of its plan.²⁶

¹⁸ Director's Final Findings & Orders In the Matter Of: Stark-Tuscarawas-Wayne Solid Waste Management District, December 22, 2006, attached hereto as Appendix D at § IV .2.

¹⁹ *Id.* at §§ VS. through IV.10.

²⁰ R.C. 3734.56(A).

²¹ R.C. 3734.55(D) and R.C. 3734.56(A).

²² *Id.*

²³ *Id.*

²⁴ Appendix D § IV.13.

²⁵ September 5, 2007, Trial Transcript, pp. 138-146.

²⁶ September 5, 2007, Trial Transcript, pp. 147-154.

This political effort was spearheaded by State Senator Kirk Schuring and was ultimately unsuccessful in regaining the District's control of the plan.²⁷

In an attempt to smooth over the differences between STW and Ohio EPA regarding the Appellee District's failure to submit an approvable revised or amended plan to the Director for his approval, then Director Koncelik and Senator Schuring negotiated a "Memorandum of Understanding" ("MOU") that was signed by Director Koncelik and STW on September 26, 2005.²⁸ Among other things, the MOU set forth the process under which Ohio EPA would prepare and issue the Agency's plan for the District.²⁹

In November of 2006, before Ohio EPA could make good on its intent to replace STW's 1993 plan with an Agency plan, the Appellee District adopted four local solid waste rules, which it numbered 9.01 through 9.04. Rule 9.01 is a definitional rule. Rule 9.02 is entitled "Operational Standards". Rule 9.03 is entitled "Solid Waste Facility Siting Rules". Finally, Rule 9.04 prohibits the disposal of solid waste at landfills located within STW generated in other solid waste districts in Ohio that do not recycle as much solid waste as does STW (hereinafter referred to as the "recycling rule").

On December 13, 2006, the NSWMA filed a complaint against STW in the Stark County Court of Common Pleas seeking, *inter alia*, a declaration that the STW's local rules were invalid and unenforceable. Shortly thereafter (on December 26, 2006), the Ohio EPA Director issued an enforcement order which displaced STW's 1993 plan with a solid waste management plan drafted by his staff³⁰.

²⁷ *Id.*

²⁸ *See* Appendix D, pp. 28-32.

²⁹ *Id.*

³⁰ *See* Appendix D, pp. 12-27.

Trial commenced on August 8, 2007. After the close of trial, the trial court *sua sponte* conducted site visits at the three NSWMA member landfills located with the STW District on September 25, 2007. The following day, the trial court faxed a Judgment Entry consisting of three pages of questions to the parties and ordered them to appear for an additional evidentiary hearing on these questions on October 4, 2007.

After the close of the October 4, 2007 hearing, the parties filed post-trial briefs. Seventeen counties (through their solid waste management districts), including Cuyahoga and Summit County, filed Ohio amicus briefs in support of NSWMA's position on the recycling rule.

On December 18, 2007, the trial court issued its Order denying NSWMA's request to declare the STW's local rules void and unenforceable. Noting that compliance with the January 1, 2008, effective date of the recycling rule was "impossible"³¹, the trial court engaged in some rule-making of its own, and *sua sponte* ordered the effective date of that rule to be changed to June 1, 2009.

NSWMA, in January of 2007, filed a Notice of Appeal with the Court of Appeals of Stark County, Ohio, Fifth Appellate District. After the conclusion of briefing and oral argument, that Court *sua sponte* concluded that NSWMA had failed to join an indispensable party, specifically, Ohio EPA, in its litigation in the trial court, and ordered that the case be remanded to the trial court for dismissal without affording either NSWMA or the Appellee District the opportunity to be heard on this issue.

³¹ Presumably because the recycling data necessary to apply local rule 9.04 would not be available on January 1, 2008 (when the rule became effective).

IV. ARGUMENT

(A) PROPOSITION OF LAW NO. 1:

SINCE THE OHIO EPA DIRECTOR DID NOT ADOPT AND CANNOT ENFORCE STW'S LOCAL SOLID WASTE MANAGEMENT RULES, NEITHER HE NOR HIS AGENCY IS A NECESSARY OR INDISPENSIBLE PARTY IN THE CASE.

(1) Neither Ohio EPA nor its Director is a necessary party under Civil Rule 19(A).

Rule 19 of the Ohio Rules of Civil Procedure governs when a person must be joined as a party to a civil action. Ohio Civil Rule 19(A) provides in pertinent part:

A person who is subject to service of process shall be joined as a party in an action if (1) in his absence complete relief cannot be accorded amongst those already parties, or (2) he claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claims interest....

If a person meets the test set out in Rule 19(A), he is deemed a “necessary” party who must be joined as a plaintiff or defendant, as appropriate, if feasible. If, for whatever reason,³² a party deemed “necessary” pursuant to Rule 19(A) cannot be joined as a plaintiff or defendant, the trial court must determine in accordance with the provisions of Rule 19(B) whether the case can proceed without him or her. *Layne v. Huffman* (1975), 42 Ohio St.2d 287, 290, 327 N.E.2d 767, 770. If it cannot, the party is deemed “indispensible”, and the entire case must be dismissed. See, e.g. *Malakpa v. Red Cab Company* (1995), 72 Ohio Misc.2d 27, 655 N.E.2d 458.

In the case at bar, it is unnecessary to determine whether NSWMA’s request for declaratory and injunctive relief against STW’s local rules could proceed in the absence of Ohio

³² For example, he or she is not subject to service of process.

EPA or its Director in accordance with Rule 19(B) because Ohio EPA fails the test for necessary party status under Rule 19(A).

Applying the first prong of the test for necessary party status set out in Rule 19(A), it must first be determined whether the absence of Ohio EPA or its Director from these proceedings precludes the issuance of the declaratory judgment sought by NSWMA that STW's local rules are invalid and unenforceable. Clearly, it does not.

The local rules were adopted by STW, not Ohio EPA. The provision of state statute pursuant to which these rules were promulgated³³ grants rule-making authority to the state's solid waste management districts, not to Ohio EPA. That same statute,³⁴ in conjunction with R.C. 343.99, empowers the districts, not Ohio EPA, to enforce local rules issued under R.C. 343.01(G). Nowhere in R.C. Chapter 343 or anywhere else in Ohio law is Ohio EPA empowered to adopt, enforce, modify or overturn local rules promulgated by a solid waste management district. Indeed, nowhere in Ohio law is Ohio EPA even empowered to review or critique local rules. It follows that there is no reason why the trial court could not adjudicate the merits of NSWMA's complaint in the absence of Ohio EPA being a party to the proceeding.

This is not to suggest that Ohio EPA plays no role at all in solid waste management district rule-making under R.C. 343.01(G). It does, but that role is limited, and affords no basis for the conclusion that the relief sought by NSWMA in this case cannot be granted in Ohio EPA's absence. First, in order to adopt and enforce local rules under R.C. 343.01(G), the promulgating district must have a solid waste management plan drafted by the District and approved by Ohio EPA pursuant to R.C. 3734.521, 3734.55 or 3734.56, and the approved plan must authorize the adoption of local rules at the time the district seeks to adopt or enforce them.

³³ R.C. 343.01(G).

³⁴ *Id.*

Second, when a district adopts a rule to exclude out-of-district waste to protect local disposal capacity pursuant to R.C. 343.01(G)(1), the Ohio EPA Director is empowered in that same code section to issue an administrative order modifying the rule to allow out-of-district waste to come into the issuing district notwithstanding the rule if certain conditions are met.³⁵

Thus, whether STW has a solid waste management plan in place, approved by Ohio EPA, authorizing the adoption of the local rules challenged in these proceedings at the time of enforcement is factually and legally relevant to the power of the Appellee District to adopt and enforce its rules. However, that is largely a question of fact, and the Ohio EPA Director does not have to be a party in order for that issue to be determined in this case. Similarly, whether Ohio EPA had issued an order allowing another district to dispose of waste within the STW District pursuant to R.C. 343.01(G)(1) might conceivably be factually or legally relevant to determining whether the Appellee District had the power to adopt and enforce its recycling rule.³⁶ However, that too is largely a question of fact, and Ohio EPA does not have to be a party in these proceedings in order for that issue to be determined either.

Applying the next prong of Rule 19(A), it must be determined whether Ohio EPA has or claims³⁷ an interest in whether the STW rules are valid and enforceable. Again, the answer is

³⁵ The exporting district must demonstrate that (a) it lacks domestic disposal capacity sufficient to dispose of the waste in question; (b) no new disposal facilities will begin operating in the exporting district in time to accept the waste in question for disposal; (c) the exporting district has attempted and failed to find another district willing to accept its waste, (d) a disposal facility located within the importing district is willing to accept the waste; and (e) issuance of the order will be consistent with the state-wide plan adopted by Ohio EPA pursuant to R.C. 3734.50 and receipt of the waste will not limit the capacity of the importing district to dispose of in-district waste to less than 8 years. see, R.C. 343.01(G)(1)(a)-(f).

³⁶ Local Rule 9.04.

³⁷ If it did, Ohio EPA had ample opportunity to assert such a claim in the trial court. For example, the Ohio Attorney General's Office appeared specifically to quash a subpoena the Appellee District had issued to force Ohio EPA's in-house local counsel to testify at trial. Also, NSWMA called an Ohio EPA employee to give testimony on its behalf at trial and the Ohio

clearly no. As already discussed, nowhere in R.C. Chapter 343., or anywhere else in Ohio law, is Ohio EPA given the authority to adopt or enforce, review, modify or overturn rules promulgated by a solid waste management district. In fact, when Ohio EPA is required to adopt a solid waste management plan and order a district to administer it,³⁸ the General Assembly expressly commanded the Ohio EPA Director *not* to provide in his plan any provision regarding local solid waste management local rules.³⁹ Thus, as a matter of law, Ohio EPA has no interest in whether STW's local rules are valid or enforceable.

In *Sciko v. Cleveland Electric Illuminating Company* (1992), 83 Ohio App.3d 660, 615 N.E.2d 674, the Cuyahoga County Court of Appeals was asked to decide whether the U.S. Coast Guard needed to be joined as a party in an action in which a private citizen sued Cleveland's largest electric utility. The utility argued, and the trial court agreed, that the utility's reliance on certain Coast Guard directives constituted a complete defense to the plaintiff's action. On appeal, the plaintiff argued that the trial court should have ordered the joinder of the Coast Guard. The Court of Appeals disagreed, finding that the Coast Guard had no direct interest in the litigation, and, as a consequence suffered no risk of prejudice by not participating as a party in the case.⁴⁰

Similarly, in this case, Ohio EPA has no direct interest in whether STW's local rules are valid and enforceable, and suffers no risk of prejudice by having not been named a party in the

Attorney General's Office appeared specifically as counsel on his behalf. The record is devoid of any suggestion that Ohio EPA claims any interest whatsoever in this matter.

³⁸ Under R.C. 3734.53, 3734.531 and 3734.57, Ohio EPA is required to issue an initial or provisional solid waste management plan for any district that does not do so in a timely fashion.

³⁹ R.C. 3734.55(D).

⁴⁰ See, also, *Obermeyer v. Starship Enterprises, Inc.* Summit App. No. 22948, 2006-Ohio-4081 (signatory to lease not required to be a party in a forcible entry and detainer action under R.C. 1923.01(A) because only occupant had direct interest in the litigation).

case at bar. Therefore, the conclusion should be the same: Ohio EPA does not need to be a party in this case.

The Fifth District Court of Appeals based its conclusion that Ohio EPA had an interest in this case which mandated making it a party exclusively upon the provisions of R.C. 3734.02, which confers broad rule-making powers upon the Ohio EPA Director. But nowhere in R.C. 3734.02 or anywhere else in Ohio law, is the Director granted the authority to adopt, approve, disapprove or enforce local solid waste rules adopted by a solid waste managing district pursuant to R.C. 343.01(G). Rather, R.C. 3734.02 grants the Ohio EPA Director the power to adopt rules having a uniform application throughout the entire state to govern solid waste generation, transportation and disposal in all of Ohio's eighty-eight counties, not just in Stark, Tuscarawas and Wayne counties. Plainly, R.C. 3734.02 affords no basis for holding that Ohio EPA or its Director should have been joined as a party in the trial court.

Other than the Court of Appeals, no one -- not NSWMA, not Ohio EPA⁴¹, not the trial court, not even the Appellee District, believe that Ohio EPA is a necessary party in this case. The Court of Appeals committed reversible error in so ruling and must be reversed.

(2) By failing to assert the defense of failure to join a party needed for a just adjudication of the case in the trial court, STW waived the issue, and the court of appeals was not free to resurrect that issue *sua sponte* on appeal.

Civil Rule 19(A) provides in pertinent part:

If the defense [failure to join a party] is not timely asserted, waiver is applicable as provided in Rule 12 (G) and (H).

In the Staff Notes to Rule 19, the issue of waiver is discussed as follows:

⁴¹ Ohio EPA had ample opportunity to do so, but did not. For example, the Ohio Attorney General's Office appeared specially to quash a subpoena issued to Ohio EPA's in-house counsel to give testimony at trial, as well as to represent Ohio EPA employee Andrew Booker when he gave testimony on NSWMA's behalf.

“...If defendant fails to raise the matter of joinder under Rule 12(B)(7) and Rule 19(A), *he waives the possible joinder under ... Rule 12(H).*”

(Emphasis Added)

Civil Rule 12(H) provides in pertinent part:

Waiver of Defenses and Objections.

- (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process or insufficiency of service of process is waived (a) if omitted from a [Rule 12(B) motion asserting other defenses] or (b) if it is neither made by motion under this rule nor included in a responsive pleading...
- (2) A defense of ... failure to join a party indispensable under Rule 19 ... may be made in any pleading permitted or ordered under Rule 7(A) or by motion for judgment in the pleadings, or at the trial on the merits.

The Staff Notes to Rule 12 explain that Rule 12(H)(1) identifies those Rule 12 defenses which are waived if not asserted in an answer or Rule 12 motion, and Rule 12(H)(2) identifies which Rule 12 defenses may be made after the close of the pleadings (i.e., at or before trial). Although Rule 12(H)(2) allows the defense of failure to join a party be made as late as trial, failure to raise the issue before the close of trial waives the defense. *Sonkin & Melena Co., LPA v. Zaransky* (1982), 83 Ohio App.3d 169, 614 N.E.2d 807; *Foremost Insurance Co. v. Walters* (1975), 45 Ohio Misc.51, 345 N.E.2d 93; *Motorists Mut. Ins. Co. v. Bates* (1972), 34 Ohio Misc.1, 295 N.E.2d 445.

STW did not raise, and does not claim to have raised, the defense of failure to join a party either in a Rule 12 motion, in its Answer, or before the close of trial. Therefore, even if Ohio EPA were a necessary party to NSWMA’s action in the trial court, STW waived that defense, and the Court below should not have resurrected it on STW’s behalf on appeal.

(3) Even if Ohio EPA were a necessary party for purposes of Rule 19(A), it was not an indispensable party pursuant to Rule 19(B).

Rule 19(B) provides in pertinent part:

If a person [deemed a necessary party pursuant to Rule 19(A)] cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Even if Ohio EPA is a person whose joinder would have been appropriate under Rule 19(A), and STW did not waive the nonjoinder issue by having not raised it before the trial court, Ohio EPA does not meet the requirements for indispensable party status set out in Rule 19(B). First, had the trial court declared in Ohio EPA's absence that STW's rules are invalid and enjoined the Appellate District from enforcing them as requested by NSWMA, neither Ohio EPA nor STW would have been prejudiced in any way. Since Ohio EPA was not given the power to enforce local district rules, a ruling in Ohio EPA's absence that STW's rules precluded were invalid and could not be enforced by STW would have in no way prejudiced Ohio EPA – without the power to enforce those rules, such a ruling would not have impacted Ohio EPA in any way whatsoever.

Nor would such a ruling in Ohio EPA's absence have prejudiced the Appellee District. Ordinarily, the main concern with nonjoinder is that one or more of the persons already parties to the proceeding will be subjected to the risk of subsequent or simultaneous lawsuits filed by the non-joined party. See, *Nationwide Ins. Co. v. Steigerwalt* (1970), 21 Ohio St.2d 87, 255 N.E.2d 570. That clearly is not the case here. STW could not conceivably be at risk of being sued by Ohio EPA.

Second, the trial court could have fashioned its judgment in such a way so as to have avoided or minimized any prejudice to Ohio EPA or STW. For example, the trial court could

have made it clear that it was enjoining only STW, and that nothing in its judgment precluded Ohio EPA from seeking to enforce the local rules at a later date.

Third, Ohio EPA's absence as a party would have had no practical effect on the adequacy of any judgment the trial court may have rendered on NSWMA's behalf. Since Ohio EPA has no power to enforce local rules adopted by a district, any trial court ruling which determined the validity and enforceability of STW rules, even one which expressly provided that it did not preclude a later action by Ohio EPA, would have sufficed for NSWMA.

Finally, dismissal of NSWMA's action because of Ohio EPA's non-joinder would, as a practical matter, have significantly prejudiced NSWMA. Such a dismissal would have deprived NSWMA's members of the protection their lawsuit afforded against any action STW might have chosen to undertake to enforce its local rules.

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

Since Ohio EPA has no interest in the validity and enforceability of STW's local solid waste rules, and since the trial court could have fashioned any judgment it rendered on

NSWMA's behalf in such a way so as to avoid or minimize any prejudices such a judgment would have caused for STW or Ohio EPA, the Court of Appeals' decision to order the dismissal of NSWMA's action is unduly harsh and unsupportable, and should be reversed by this Court.

(B) PROPOSITION OF LAW NO. 2:

THE APPELLEE DISTRICT VASTLY EXCEEDED THE POWER TO ADOPT AND ENFORCE RULES CONFERRED UPON IT BY THE GENERAL ASSEMBLY BY ENACTING AND SEEKING TO ENFORCE RULES WHICH EXTENSIVELY REGULATE THE DESIGN, ITS SITING AND OPERATION OF SOLID WASTE FACILITIES AFTER ITS PLANNING AUTHORITY HAD EXPIRED OR BEEN TERMINATED BY OPERATION OF LAW.

(1) Under the clear language of R.C. 343.01(G), STW's power to adopt and enforce local solid waste rules ended when Ohio EPA issued its solid waste managing plan for the Appellee District.

As a creature of state law, the Appellee District has only those powers conferred upon it by the Ohio General Assembly.⁴² This basic rule has been extended to Ohio's solid waste management districts. See, *Ohio Atty. Gen. Opinion* No. 2003-012, 2003 Ohio Atty. Gen Ops. No. 2003-012 (citing *Geauga County Board of Commissions*, supra). The powers, duties and responsibilities of Ohio's solid waste districts are set out in various provisions of the Ohio Revised Code. R.C. 343.01(G) contains the legislative grant of rule-making authority to the state's solid waste districts. It provides in pertinent part:

⁴² See, e.g.: *D.A.B.E., Inc., et al. v. Toldeo-Lucas County Board of Heath, et al.*, 96 Ohio St.3d 250, 2002-Ohio-4172, p.38, 773 N.E.2d 536 (quoting *Burger Brewing Co. v. Thomas, et al.* (1975), 42 Ohio St.2d 377, 329 N.E.2d 693), *Geauga County Board of Commissions v. Nunn Road Sand & Gravel* (1997), 67 Ohio St.3d 579, 582, 1993-Ohio-55, 621 N.E.2d 696. See also, *Neinast v. Board of Trustees of the Columbus Metropolitan Library*, 165 App.3d 211, 2006-Ohio-257, 845 N.E.2d 570 ; *In Re: Spangler*, Geauga App. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978; *Sullivan v. Hamilton County Board of Health*, 155 Ohio App.3d 609, 2003-Ohio-6916, 802 N.E.2d 298 ("Authority that is conferred by the General Assembly cannot be extended by the administrative agency," quoting *Burger*, 42 Ohio St.2d at 379.

To the extent authorized by the [initial or amended] solid waste management plan of the district approved by [Ohio EPA]...the board of directors of a joint district may adopt, publish, and enforce rules...

(Emphasis added).

Therefore, pursuant to the plain language of R.C. 343.01(G), in order to adopt and enforce the rules which NSWMA challenges in this case, STW has to have in place a solid waste management plan written by the District and approved by Ohio EPA authorizing the adoption and enforcement of local rules. However, as is explained below, the last Ohio EPA approved plan written by the District expired in 1998, and Ohio EPA wrote its own plan for STW and ordered STW to implement it on December 22, 2006.

STW submitted its initial plan to Ohio EPA in December 1992, and that plan was approved by the Ohio EPA in February 1993 for a five-year period ending in 1998⁴³. However, it *never* submitted an amended plan that received Ohio EPA approval thereafter.⁴⁴ Eight years elapsed after the date that STW was required to submit to Ohio EPA for its approval an amended plan before Ohio EPA issued its own plan for the District in December of 2006.⁴⁵

R.C. 3734.56(A) requires that “the district *shall* submit an amended plan and certification to the Director [of the Ohio EPA] every five years on or before the anniversary date of the approval of the initial plan of the district.” R.C. 3734.56(A) deals with a failure of a district to comply with this directive: “If a county or joint district fails to submit an amended plan in accordance with this division or fails to obtain approval of the amended plan within eighteen months after the required date for its submission under this division, the director shall proceed in accordance with division (D) of Section 3734.55 of the Revised Code.”

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

R.C. 3734.55(D) states:

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

(Emphasis added). Finally, R.C. 3734.53(C) allows a district to include an authorization for local rule-making in solid waste management plans written by districts' amended solid waste management plan written by districts.

Putting all of this together, because of STW's continued failure to gain Ohio EPA's approval of an amended solid waste management plan, Ohio EPA was required to prepare a solid waste management plan for the Appellee District by August 1999.⁴⁶ Ohio EPA's plan *was not permitted to contain* any of the provisions authorized by R.C. 3734.53 (B), (C) or (E). After many failed attempts to work with STW to obtain an approvable plan authorized by the Appellee District, in December of 2006, Ohio EPA finally issued a solid waste management plan for STW and ordered the Appellee District to implement it, more than seven years after STW's 1993 plan had expired. As required by R.C. 3734.55(D), Ohio EPA's plan does not contain any authorization for district rule-making.

In sum, R.C. 343.01(G) only allows a district to adopt and enforce local rules if its solid waste management plan so provides, STW's initial plan provided the Appellee District with such authority, but that plan expired in 1998. Ultimately,⁴⁷ Ohio EPA wrote a plan for STW and

⁴⁶ Eighteen months after STW's initial plan expired in February of 1998.

⁴⁷ On December 26, 2006.

ordered the District to implement it. Ohio EPA's plan did not and, by express command of the General Assembly, could not empower STW to adopt or enforce rules. Therefore, STW's local rules became unenforceable on December 22, 2006, the date Ohio EPA issued its plan, if not before, and the Court of Appeals committed reversible error in not so holding.

(2) The Ohio EPA Director's contracting authority under R.C. 3745.01 did not provide the Director with the power to confer upon STW the authority to promulgate or enforce local rules after Ohio EPA displaced STW's solid waste management plan with a plan issued by the Director.

The trial court found that, through the MOU, Ohio EPA entered a contract that authorized the Appellee District to enforce its rules after the Agency's plan was issued. The trial court concluded the Director's authority to enter the MOU "supersedes Chapter 3734."

The trial court's finding to the contrary notwithstanding, the MOU is silent regarding the enforceability of STW's rules after the issuance of Ohio EPA's plan. The only language in the MOU regarding the Appellee District's rulemaking states that "[I]f the Waste District elects to adopt rules, it shall do so no later than November 30, 2006" when Ohio EPA expected it would issue its plan.⁴⁸

This language is merely an acknowledgment that R. C. 343.01(G) allowed STW to adopt rules until its plan was displaced by Ohio EPA's plan. The MOU 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 "After Ohio EPA issues its plan, any rules adopted by STW before then remain valid and enforceable by STW." That sentence does not exist in the MOU and former Ohio EPA Director Koncelik's trial testimony does not support the trial court adding it.⁴⁹ Obviously, the trial court did not have the

⁴⁸ *Id.*

⁴⁹ September 5, 2007, Trial Transcript, p. 260.

power to add new language to the MOU addressing an issue not addressed by the language the parties agreed to.⁵⁰

As a matter of law, the trial court's reliance upon the MOU fails to uphold the STW rules because the general contracting authority granted the Ohio EPA Director in R.C. 3745.01 cannot be used to trump the result mandated by the specific statutes found at R.C. 343.01(G), 3734.55(C) and 3734.56(D). 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), 3734.55(C) and 3734.56(D) are specific provisions which address the contents of solid waste management plans and the specific role Ohio EPA must play in preparing plans for a district that does not do so itself. It follows that the general provisions of R.C. 3745.01 must give way to the specific provisions of R.C. 343.01(G), 3734.55(C) and 3734.56(D) per R. C. 1.51.

⁵⁰ *Bellman v. Am. International Group*, 113 Ohio St. 3d 323, 325-26, 2007-Ohio-2071, 865 N.E.2d 853 (“a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing”); *Layne v. Progressive Preferred Ins. Co.*, 104 Ohio St.3d 509, 51, 2004-Ohio-6597, 820 N.E.2d 867 (“When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.”); *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 2000-Ohio-7, 734 N.E.2d 782 (“absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.”).

Even if the language that the trial court added were in the MOU, it would be unlawful. The General Assembly has not granted the Director of Ohio EPA any express or implied power to modify the operation of specific provisions of the Revised Code through contract or otherwise.⁵¹

(3) The rule-making power granted solid waste districts by the General Assembly does not include the power to adopt or enforce rules which have the effect of excluding solid waste generated in other districts except when necessary to preserve local disposal capacity to meet local disposal needs.

STW's recycling rule will have the effect of excluding solid waste generated in districts that do not recycle as much solid waste as does STW. However, the General Assembly did not confer upon STW the power to adopt rules which have the effect of excluding waste generated in other districts except when necessary to preserve local disposal capacity to satisfy local disposal needs.

R.C. 3734.01(G)(1) provides that a district may only adopt rules:

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

(Emphasis added). The "projections" in R.C. 3734.53(A)(6) are for anticipated waste volumes that must be disposed of by a district over the 15 year period covered by the plan. R.C. 3734.53(A)(7) requires the plan identify "*additional* solid waste management facilities and the amount of *additional* capacity needed" to dispose of those projected waste volumes. Thus, if

⁵¹ *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 259, 2002-Ohio-4172, 773 N.E.2d 536 ("It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly. . . . In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it.").

STW's projected landfill disposal capacity exceeds the projected volume of waste to be disposed of in the Appellee District over the planning period, there is no reason and no statutory authority to restrict the disposal within STW of waste generated in other counties.

In Section VI.B of Ohio EPA's plan for the Appellee District, the Agency concluded that the landfills in the District have ample capacity to service the disposal needs of the District for decades beyond the 15-year planning period.⁵² Thus, the STW's recycling rule exceeds its narrowly prescribed rule-making authority set forth in R.C. 343.01(G)(1) because the Appellee District has ample disposal capacity to meet its projected needs and the Court of Appeals committed reversible error in not so holding.

(4) The rule-making power granted solid waste management districts by the General Assembly does not include the power to adopt or enforce rules which invade the exclusive regulatory domain of Ohio EPA or which conflict with Ohio EPA's rules.

The Ohio General Assembly conferred upon Ohio EPA comprehensive authority over the regulation of the solid waste industry in Ohio. The legislative grant of solid waste rule-making authority to Ohio EPA reads as follows:

The director of environmental protection, in accordance with Chapter 119. of the Revised Code, shall adopt...rules having uniform application throughout the state governing solid waste facilities and the inspections of and to issuance of permits and licenses in order to ensure that the facilities will be located, maintained, and operated, and will undergo closure and post-closure care, in a sanitary manner so as not to create a nuisance, cause or contribute to water pollution, create a health hazard, or violate 40 C.F.R 257.3-2 or 40 C.F.R. 257.3-8, as amended.⁵³ The rules may include, without limitation, financial assurance requirements...and requirements for taking corrective action in the event of the surface or subsurface discharge or migration of explosive gas or leachate from a solid waste facility, or of ground water contamination resulting from the transfer or disposal of solid wastes at a facility...

⁵² Plaintiff's Trial Exhibit 11.

⁵³ 40 CFR 257. 3-2 and 3-8 set forth regulations adopted by the United States Environmental Protection Agency which pertain to the protection of endangered species (40 CFR 257. 3-2) and safety (40 CFR 257. 3-8).

R.C. 3734.02(A) Pursuant to this broad grant of rule-making authority, Ohio EPA has promulgated comprehensive regulations governing the solid waste industry. These rules deal with every conceivable facet of solid waste regulation, including the design and construction of solid waste facilities, (OAC 3745-27-08), ground water protection and monitoring, (OAC 3745-27-10), requirements governing the location and permitting a new solid waste facilities, (OAC 3745-27-06 and 3745-27-07), landfill closure and post-closure care, (OAC 3745-27-11, 3745-27-14 and 3745-27-17), explosive gas monitoring at landfills, (OAC 3745-27-12), operational criteria for landfills, (OAC 3745-27-19), and required record keeping (OAC 3745-27-09).

In contrast, when the General Assembly extensively revised Ohio's solid waste laws in 1988, it made a very limited grant of regulatory authority to solid waste districts that preserved Ohio EPA's primacy in the area, as the following language from R.C. 343.01(G) makes plain:

To the extent authorized by the solid waste management plan of the district approved [by Ohio EPA], the ... district may adopt, publish, and enforce rules governing the maintenance, protection, and use of solid waste in facilities located within its district. the rules adopted under division (g)(2) of this section shall not establish design standards and shall be consistent with the solid waste provisions of chapter 3734 of the revised code and the rules adopted under those provisions.

(Emphasis added)

Given the comprehensive regulatory authority granted by the legislature to Ohio EPA in R.C. 3734.02 and the narrow regulatory authority granted the districts in R.C. 34301.(G), the General Assembly's intent to vest in Ohio EPA primary responsibility for the regulation of the siting, design, construction and operation of sanitary landfills in Ohio is clear. In light of that intent, the clear legislative purpose behind H.B. 592 to ensure that there would always be a place to dispose of Ohio's solid waste, the express legislative acknowledgement of the importance of the solid waste disposal industry in Ohio contained in R.C. 3734.40(A), and the express

legislative requirement⁵⁴ that district rules be “consistent with Ohio EPA’s rules”, the phrase “protection, maintenance and use” as it appears in R.C. 343.01(G)(2) must be construed to confer upon the solid waste districts the power to adopt rules that preserve and protect landfills located within their borders, and not to adopt restrictive regulations that hamper the design, siting, construction or operation of landfills, or which add another layer of requirements beyond those imposed by Ohio EPA. This construction is buttressed by the language of R.C. 341.02(G)(4). That section grants districts the authority to adopt rules exempting the owner or operator of any existing or proposed solid waste facility from compliance with local land use restrictions to ensure that local land use authorities would not hamper the construction or operation of needed solid waste disposal capacity.

Even the most cursory reading of STW’s local rules reveals that the Appellee District’s rules impose additional requirements and restrictions upon the siting, design, construction and operation of sanitary landfills far beyond those imposed by Ohio EPA. For example, notwithstanding the clear legislative prohibition against local rules which purport to regulate how landfills are designed set forth in R.C. 343.01(G)(2), the Appellee District’s rules require that landfills located within STW be designed to include numerous and extensive design elements not required by Ohio EPA, including but not limited to, the following:

- Landfills must be designed to include berms, walls and/or plantings to minimize odors, dust, noise or vibration leaving the landfill, landfill buildings and equipment must be soundproofed, and roadways must be paved or graveled (see, Rule 9.02(A); 9.03(IV)(D));
- Landfills must be designed so that the highest point of the landfill is no higher than 50 feet above the highest naturally occurring point within 1,000 feet of the landfill (see, Rule 9.03(G));
- The design of the landfill must include a truck wheel wash (see, Rule 9.02(E));

⁵⁴ See, R.C. 343.01(G)(2).

- Landfill lighting must be designed so that no portion of the illuminated field extends into any residential property (see, Rule 9.02(B));
- Landfills must be designed so that access routes to the landfill are more than 150 feet from neighboring private drives (see, Rule 9.02(F));
- The design of the landfill must include a lockable gate (see, Rule 9.02(G));
- Landfills must be designed to minimize interferences with traffic on public streets (see, Rule 9.03 (III) (H));
- The landfill design must include barriers to obscure views from residences located within 1000 feet (see, Rule 9.03 (IV)(C));
- The landfill must be designed so that no structures, permanent or temporary, are located within 250 feet of the landfill's property lines (see, Rule 9.03 (IV)(C)).

In addition, STW's local rules impose siting requirements which appear nowhere in Ohio EPA's landfill siting rules (OAC 3745-27-06(D)) or applicable provisions of the Ohio Revised Code (R.C. 3734.02), including the following:

- A landfill may not be located within one mile of a public school or structure (see, Rule 9.03 (IV)(E));
- A landfill may not be located within one mile of a hospital, public or private (see, Rule 9.03 (IV)(E));
- A landfill may not be located within one mile of a place of worship (see, Rule 9.03 (IV)(E));
- A landfill may not be located within one mile of a federal, state or county park (see, Rule 9.03 (IV)(E));
- A landfill may not be located within one mile of a public library (see, Rule 9.03 (IV)(E));
- A landfill may not be located within one mile of an improved public gathering place (see, Rule 9.03 (IV)(E));
- A landfill may not be located adjacent to a federal, state or local highway such that trucks entering and leaving the landfill must traverse a residential area (see, Rule 9.03 (IV)(A));
- A landfill may not be located within 2,500 feet of a historic site (see, Rule 9.03 (IV)(B)).

Also, the Appellee District's rules require landfills to prepare and submit to the Appellee District for its approval various plans and technical documents beyond those required to be prepared and submitted to Ohio EPA, such as the submittal of a Fire and Emergency Plan (see, Rule 9.02 (C)), a Litter Collection Plan (see, Rule 9.02 (D)), an Odor Control Plan (see, Rule 9.02 (K)), an Airborne Particulate Control Plan (see, Rule 9.02 (L)) and an Overweight Truck Deterrence Plan (see, Rule 9.02 (M)).

Finally, the Appellee District's rules impose other requirements far beyond those necessary to preserve and protect in-district landfill capacity, requirements reminiscent of land use planning regulations imposed by county and township zoning boards (even though STW is neither), including the following:

- Landfills may not adversely effect the quality of life of STW residents (see, Rule 9.03 (II) and 9.03 (III)(D)(17));
- Landfills may not adversely impact local and county resources (see, Rule 9.03 (II));
- Landfills must be consistent with local land uses (see, Rule 9.03 (III)(D)(1)(e))⁵⁵;
- Landfills must be harmonious and consistent with the existing or intended character or the area in which they are located (see, Rule 9.03 (III)(D)(1)(d));
- Landfills must not impose excessive additional demands upon public roads and services (see, Rule 9.03 (III)(D)(1)(e));
- Landfills must not detrimentally impact the economic welfare of the community (see, Rule 9.03 (III)(D)(1)(g));
- Landfills must not cause loss or destruction of, or damage to, cultural, historic, natural or scenic features of the community (see, Rule 9.03 (III)(D)(1)(i)); and

⁵⁵ Since the predominant land use throughout the Appellee District is agricultural and/or residential, with only a smattering of manufacturing thrown in (mostly in or near the district's major cities), Rule 9.03(III)(D)(1)(e) could be construed to authorize STW to prohibit the construction of any new solid waste facility or the expansion of any existing one throughout the three county area making up STW.

- Landfills must not harm endangered species or their required habitat(s) (see, Rule 9.03 (III)(D)(1)(i)).

All of this goes far beyond the limited rule-making power conferred upon the solid waste districts by the General Assembly in R.C. 343.01(G). Therefore, the Appellee District's local rules are ultra vires and, as such are invalid and unenforceable.

(5) The rule-making power granted solid waste management districts by the General Assembly does not include the power to adopt or enforce local rules which are impossible to comply with.

It is a well-settled maxim of statutory interpretation that a legislative enactment should not be construed in such a manner so as to reach an unconstitutional result.⁵⁶ Therefore, the statute granting the districts the power to promulgate rules governing the protection, maintenance and use of sanitary landfills⁵⁷ cannot be construed to provide authorization to promulgate a rule compliance with which is impossible to determine, because such a rule would be constitutionally defective under the Due Process Clause of the Fourteenth Amendment to the United States Constitution⁵⁸ and the Due Course of Laws Clause of the Ohio Constitution.⁵⁹ From the

⁵⁶ See, e.g. *City of Willoughby v. Taylor*, 180 Ohio App.3d 606, 2009-Ohio-183, 906 N.E.2d 511. ([C]ourts have an obligation to liberally construe statutes to avoid constitutional infirmities", citing *State ex rel. Taft v. Franklin County Court of Common Pleas, et al.*, (1998), 81 Ohio St.3d 480, 481, 1998-Ohio-333, 692 N.E.2d 560); *Blancett v. Nationwide Care, Inc.* (Dec. 16, 1988), Guernsey App. No. 98 CA 4, Ohio App.LEXIS 6504, at 13 ("We must, to the extent reasonably possible, construe a statute so as to uphold [it] if at all possible.").

⁵⁷ R.C. 343.01(G)(2).

⁵⁸ The Fourteenth Amendment's guarantee of due process was intended as security against arbitrary governmental action, *Pope v. Trotwood-Madison County School Dist. Bd. of Educ.* (2000), 162 F.Supp.2d 803; *Yajnik v. Akron Department of Health*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, *Buckeye Community Hope Foundation, et al. v. City of Cuyahoga Falls, et al.* (6th Cir. 2001) 263 F.3d 627; *Maharg, Inc. v. VanWert Solid Waste Management District* (6th Cir. 2001), 249 F.3d 544.

⁵⁹ Ohio Const. Article I, Section 16. It has long been recognized that the protections afforded by these two constitutional provisions are coextensive. See *Peebles, et al. v. Clement, et al.* (1960), 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.

foregoing, it follows that Rule 9.04, STW's recycling rule, is *ultra vires*, because, as written, there is no way to determine whether the rule has been violated.

The Appellee District's recycling rule (Rule 9.04) provides in pertinent part:

No [NSWMA member landfill] 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) the industrial waste streams; or (2) the access percentage; as 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 years, beginning with the baseline year of 2005.⁶⁰

Thus, under the plain language of the rule, solid waste generated outside the Appellee District cannot be disposed of in a landfill located within STW unless the exporting district "meets or exceeds the STW District's recycling standards." The rule goes on to require a comparison of the average recycling rate achieved by STW (as approved by Ohio EPA) for the three year period prior to the year in which the waste is trucked to a landfill located within STW with the recycling rate achieved by the exporting district (as approved by Ohio EPA) for the year in which the truck arrives at the gates of the landfill.

The problem is that there is no way to make the required comparison until long after the waste has been disposed at the landfill. As was explained at length during trial,⁶¹ the districts do not collect recycling data for a given calendar year until the following year, and must report this

⁶⁰ Appendix E, pp. 129-161.

⁶¹ See August 8, 2007, Trial Transcript, pp.71-79 and 144-145; August 8, 2007, Trial Transcript, pp. 12-13, 58-62, 78, 105-107, and 157-158.

data to Ohio EPA by June 30th. Typically about one year later, Ohio EPA issues a report containing the “approved” district recycling rates for all Ohio districts. As of this filing, the most recent Ohio EPA report contains data from 2006 and before.⁶² Since little, if any, of the Ohio EPA-approved recycling data necessary for application of Rule 9.04 can be available when a shipment of solid waste arrives at a landfill located within the Appellee District, it will never be possible to determine whether waste originating outside of STW can be disposed of at an STW landfill consistent with the rule.

The fundamental problem with the drafting of the recycling rule is best illustrated with a hypothetical.⁶³ It is March 17, 2009, and a truck hauling garbage from Lisbon, Columbiana County, Ohio, arrives at the American Landfill in Stark County. In order for the landfill to determine whether it can accept this waste for disposal consistent with Rule 9.04, the landfill operator must compare the average of the Ohio EPA approved recycling rates achieved by STW in calendar years 2008, 2007 and 2006 with recycling rates achieved by the Carroll-Columbiana-Harrison Joint District for calendar year 2009. However, without access to Ohio EPA approved recycling statistics for years 2009, 2008 and 2007, neither the landfill operator in the above hypothetical nor the exporting district has any way of determining whether the shipment of waste from Columbiana County can be disposed of at the landfill without violating Rule 9.04.

Since Rule 9.04 cannot be applied as written, R.C. 343.01(G) cannot be construed to provide STW the authority to promulgate it. Therefore, this Court should find that the Appellee District’s recycling rule is *ultra vires*, and strike it down.

⁶² The Court can take judicial notice that Defendant’s Trial Exhibit J, 2005 *Summary of Solid Waste Management in Ohio* dated May 8, 2007 is Ohio EPA’s most recent publication containing the recycling rates of Ohio’s solid waste districts.

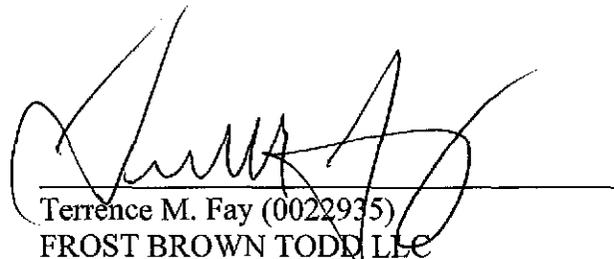
⁶³ The same hypothetical was posed to many of the witnesses on trial, whether they were for the NSWMA or for the Appellee District.

V. CONCLUSION

In enacting its local rules, the Appellee District demonstrated a fundamental misunderstanding of its statutory mission. Its job is not to adopt and enforce environmental regulations pertaining to landfill siting, design construction or operation – the General Assembly gave that job to Ohio EPA. Nor is its job to adopt and enforce land use planning regulations to assure that landfills would blend into the surrounding land uses – the General Assembly gave that job to local zoning boards. STW’s job, the job of all of the state’s solid waste management districts, is to adopt a plan that guarantees that the solid waste disposal needs of its citizens would be met; no more, and no less. The Districts were granted limited rule-making authority to aid them in accomplishing its statutory mission – not to usurp powers granted to Ohio EPA and local zoning boards.

For the foregoing reasons, this Court should reverse the decision of the Court below, declare STW’s rules invalid and unenforceable, and remand this case with instructions that the trial court issue the order requested by NSWMA enjoining enforcement of STW local solid waste management rules 9.01, 9.02, 9.03 and 9.04

Respectfully submitted,



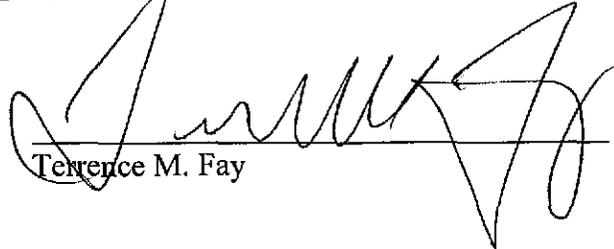
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CERTIFICATE OF SERVICE

(and appendix)

This will certify that a true and accurate copy of Appellant Brief was forwarded to the following via regular U.S. Mail, this 23rd day of July, 2009.



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