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STATEMENT OF THE CASE AND FACTS

This case arises from the adoption of local rules by Appellee, Stark Tuscarawas Wayne Solid Waste Management District (“STW”). STW is a joint solid waste management district formed under R.C. §§343.01 and 3734.52. (December 22, 2006 Final Findings & Orders issued by the Director of Ohio EPA, which is set forth at Appx. D2.) As such, STW is charged with the legal obligation to provide for solid waste management planning within its jurisdiction. (Appx. D2.) STW’s initial solid waste plan was approved by the Director of Ohio EPA (“Director”) on February 24, 1993. (Appx. D2.) Pursuant to R.C. §3734.56, STW was required to prepare an amendment to its solid waste management plan, and obtain the Director’s approval of the same by no later than August 24, 1999. (Appx. D2.) STW failed to obtain the Ohio EPA’s approval of an amendment to its solid waste management plan by the required deadline. (Appx. D2.) When a district does not adhere to its planning obligations and fails to provide the Director with an approvable plan or amended plan, the Director is required to prepare the plan or amended plan and issue an order requiring the district to implement and comply with the plan or amended plan. R.C. §§3734.55(D) and 3734.56(A). (Appx. D2.)

On December 20, 2006, the Ohio EPA prepared the necessary plan for STW (the “Ohio EPA Plan”) and issued an order requiring STW to implement and comply with the Ohio EPA Plan. (Appx. D2.) Importantly, the Ohio EPA Plan provides that STW does not have the authority to adopt local rules, and the Ohio EPA Plan does not authorize STW to enforce previously adopted rules. (Appx. D2.)

In November 2006, several years after the expiration of STW’s prior plan, and shortly before the issuance of the Ohio EPA Plan, STW adopted local rules (“STW’s Rules”). (Appx. D2.) Rule 9.04 of the STW Rules prohibits a solid waste facility within STW’s boundaries from

accepting waste that originates in another solid waste management district, to the extent that the other district does not exceed certain recycling standards (“Rule 9.04”). (Appx. D2.)

Appellant, National Solid Wastes Management Association (“NSWMA”) filed a complaint in the Stark County Court of Common Pleas (the “Trial Court”) on December 13, 2006 against STW challenging the validity and enforceability of the STW Rules. On December 18, 2007, the Trial Court issued an order denying NSWMA’s request to declare STW’s rules void and unenforceable. NSWMA filed a timely notice of appeal with the Fifth District Court of Appeals (“Court of Appeals”) challenging the Trial Court’s December 18, 2007 order.

On December 15, 2008, the Court of Appeals ruled that the Director was the party with the authority to enforce the STW’s rules, and that the Director was a necessary party. Since the Director was not a party, the Court of Appeals held that the Trial Court lacked jurisdiction, dismissed the Trial Court’s December 18, 2007 order and remanded the case to the Trial Court for further proceedings.

On January 29, 2009, NSWMA filed a notice of appeal of the Court of Appeal decision. This Court granted jurisdiction over the appeal on May 6, 2009.

The Court of Appeals erred in ruling that the Director was a necessary party and not ruling that the STW Rules were invalid and unenforceable. In support of its position on these issues, *Amicus Curiae*, Summit/Akron Solid Waste Management Authority presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The Director of Environmental Protection does not have the authority to enforce local rules adopted by a solid waste management district under R.C. § 343.01(G).

R.C. Chapters 343 and 3734 establish a statutory scheme for solid waste management planning in Ohio. In summary, local districts are charged with the responsibility and duty to

prepare, adopt, amend and implement a solid waste management plan that has been approved by the Director. R.C. §§3734.54 through 3734.56. As a result, local solid waste districts must plan for disposal capacity for the solid waste generated within its jurisdictional boundaries as well as provide for recycling goals for such waste. R.C. §3734.53. The Director is charged with the responsibility of reviewing and approving plans submitted by local solid waste management districts. R.C. §3734.55. In addition, when a district fails to submit a plan or a plan amendment the Director is then required to prepare the plan and issue an order requiring the district to implement the plan. R.C. §§3734.55(D) and 3734.56(A).

The Court of Appeals held that R.C. §3734.02 vests the power of enforcement of a solid waste management district's local rules with the Director. However, R.C. §3734.02 does not provide the Director with any such authority. In fact, R.C. §3734.02 does not even pertain to solid waste management districts or solid waste management planning. R.C. §3734.02 does provide the Director with the authority to regulate solid waste facilities, including the following authority:

The director of environmental protection, in accordance with Chapter 119. of the Revised Code, shall adopt and may amend, suspend, or rescind rules having uniform application throughout the state governing solid waste facilities and the inspections of and issuance of permits and licenses for all solid waste facilities 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.

The authority to regulate the operation, licensing, closure, etc. of solid waste facilities is not the same as the authority to enforce local rules pertaining to solid waste management planning. Moreover, the rules adopted under R.C. §3734.02(A) must be of "uniform application

throughout the state”. Local rules only apply in the jurisdictional boundaries of the district that adopts the rules.

STW’s rule-making authority is set forth in R.C. §343.01 (G). That section does not provide the Director with the authority to adopt or enforce local rules. R.C. 3734.50 provides the Director with the authority to prepare a statewide solid waste management plan. However, nowhere in that section does it provide the Director with the authority to adopt or enforce local rules. In fact, no where within the Revised Code does it provide the Director such authority.

While the Revised Code does not provide the Director with the authority to adopt or enforce local rules, Ohio’s statutory scheme for solid waste management planning expressly places the authority of implementing plans and enforcing local rules into the hands of solid waste management districts. A local solid waste management district, and not the Director, is charged with the implementation of a solid waste management plan for the district. R.C. §3734.55(C)(4). Moreover, R.C. §343.01(G) provides that a solid waste management district has the authority to adopt and enforce local rules, but only to the extent authorized in its plan. Thus, the implementation and enforcement of local rules is tied to the district’s plan, and it is the responsibility of the district, and not the Director, to implement the plan.

In addition, not only does the Director lack authority to enforce local rules, local rule authority is extinguished when the Director prepares a plan, as in the case at hand. If a district prepares and obtains approval of its own plan, R.C. §3734.53(C) provides that the plan may provide for the adoption of local rules under R.C. §343.01(G). However, R.C. §§3734.55(D) and 3734.56(A) provide that if the Director prepares the district’s plan, the plan shall not contain any of the provisions required or authorized to be included in the plan under R.C. §3734.53(C). As a result, when the Director prepares a plan, the plan cannot provide for local rule authority under

R.C. §343.01(G). Therefore, when the Director prepared the Ohio EPA Plan in the instant case, any authority to adopt and enforce new local rules, and any authority to enforce prior local rules, including the STW Rules, was extinguished.

Proposition of Law No. II: Local rules adopted under R.C. §343.01 (G) are no longer valid and enforceable when the Director of Environmental Protection prepares a district's plan pursuant to R.C. §§3734.55(D) and 3734.56(A).

STW is a joint solid waste district and, as such, is a creature of statute that only possesses those powers authorized by the General Assembly in accordance with R.C. §343.01. See e.g., *Geauga County Board of Commissioners, et al. v. Munn Road Sand & Gravel, et al.* (1993), 67 Ohio St. 3d 579, 582-583, 621 N.E. 2d 696; See also *Valley Greyhound Lines, Inc. v. Public Utilities Commission* (1947), 148 Ohio St. 603, 605, 76 N.E. 2d 608. The powers, duties and responsibilities of STW are set forth in R.C. Chapters 343 and 3734. STW's rule-making authority is set forth in R.C. §343.01(G). In pertinent part, R.C. §343.01(G) provides as follows:

To the extent authorized by the solid waste management plan of the district approved under section 3734.521 or 3734.55 of the Revised Code or subsequent amended plans of the district approved under section 3734.521 or 3734.56 of the Revised Code, the . . . board of directors of a joint district may adopt, publish and enforce rules doing any of the following (Emphasis added).

Thus, R.C. §343.01(G) provides that a solid waste management district only has authority to adopt and enforce local rules to the extent authorized in its plan or, if applicable, amended plan. If a *district* prepares and obtains approval of its own amended plan, R.C. §3734.53(C) provides that the plan may provide for the adoption of local rules under R.C. §343.01 (G). However, R.C. §§3734.55(D) and 3734.56(A) provide that if the Director prepares the amended plan, the amended plan shall not contain any of the provisions required or authorized to be included in the amendment under R.C. §3734.53(C). Therefore, when the Director prepares and issues a plan or amended plan for a district, that district is no longer permitted to take advantage

of the rule authority under R.C. §343.01(G) and is no longer authorized to adopt new rules or enforce previously adopted rules.

There is a sound public policy reason behind prohibiting a solid waste management district from adopting or enforcing local rules in such situations. Simply put, the possibility of losing the authority to adopt and enforce local rules serves as a strong incentive for a solid waste management district to comply with its obligations and prepare an amended plan, opposed to placing the burden onto the Director.

As stated above, R.C. §3734.56 of the Revised Code mandated STW to obtain approval of an amended solid waste management plan by August 1999. Because STW failed to comply with its statutory obligation, the Director was required to prepare and issue the Ohio EPA Plan, and issue an order requiring STW to implement the Ohio EPA Plan pursuant to R.C. §§3734.55(D) and 3734.56(A). Once the Ohio EPA Plan was issued, STW lost its rule authority; i.e. the authority to adopt rules and the authority to enforce any previously adopted rules. Therefore, to the extent the STW Rules were valid at the time of adoption, the STW Rules became invalid and unenforceable when Ohio EPA issued the plan because STW lost the authority to enforce those rules.¹

In addition, it is also important to note that nowhere in the Ohio EPA Plan does it provide STW with the authority to adopt, publish, or, most importantly, enforce local rules. R.C. §343.01(G) provides that a solid waste management district's authority to enforce local rules must be set forth in the solid waste management plan. Therefore, in addition to the statutory prohibitions on STW's authority to adopt and enforce rules because the Director prepared the

¹ Since STW adopted the STW Rules several years after its solid waste plan had expired, STW also lacked the authority to adopt the STW Rules because it did not have a valid plan at the time the rules were adopted.

plan, STW is also prohibited from enforcing the previously adopted rules because that authority is not expressly set forth in the Ohio EPA Plan.

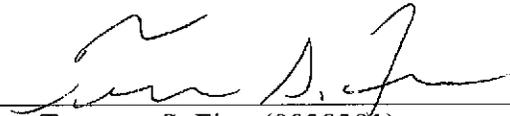
Ohio EPA notified STW that if STW adopted local rules prior to the issuance of the Ohio EPA Plan, Ohio would not defend the legality or enforceability of those rules. (Transcript of Joseph Koncelik Pg. 112). Therefore, the Court of Appeals erred by failing to rule that the STW Rules are unenforceable.

CONCLUSION

For the reasons set forth above, since the Director lacks authority to enforce local rules, the Director is not a necessary party. Moreover, the STW Rules are unenforceable and invalid. Therefore, *Amicus Curiae S/ASWMA* requests this Court to reverse the Court of Appeals and issue an order that the STW Rules are invalid and unenforceable.

Respectfully submitted,

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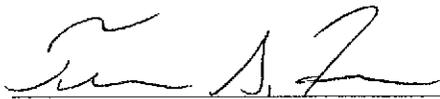
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing was served via regular U.S.

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