

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.	:	

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**REPLY BRIEF OF APPELLANT  
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION**

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TABLE OF CONTENTS

	<u>Page</u>
I. TABLE OF CONTENTS .....	i
II. TABLE OF AUTHORITIES .....	iii
III. ARGUMENT.....	1
(A) <u>PROPOSITION OF LAW NO. 1:</u>	
SINCE THE OHIO EPA DIRECTOR DID NOT ADOPT AND CANNOT ENFORCE STW’S LOCAL SOLID WASTE MANAGEMENT RULES, NEITHER HE NOR THE AGENCY IS A NECESSARY OR INDISPENSABLE PARTY IN THIS CASE.....	1
(B) <u>PROPOSITION OF LAW NO. 2:</u>	
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, SITING AND OPERATION OF SOLID WASTE FACILITIES AFTER ITS PLANNING AUTHORITY HAD EXPIRED OR BEEN TERMINATED BY OPERATION OF LAW.....	1
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 management plan for the Appellee District.....	2
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.....	2
3.     The rule-making power granted solid waste management 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.....	8
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 rules.....	10

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 make compliance impossible. ....	14
IV.	CONCLUSION .....	17
V.	CERTIFICATE OF SERVICE.....	19

## TABLE OF AUTHORITIES

### Cases:

<i>Aultman Hosp. Assn. v. Mutual Insurance Company, F.K.A.</i> (1989), 46 Ohio St.3d 51, 54, 55, 544 N.E. 2d 920 .....	4
<i>Basic Distribution Corp. v. Ohio Department of Transportation</i> , 94 Ohio St.3d 287, 2002-Ohio-794, 762 N.E. 2d 979 .....	16
<i>Bellman v. Am. Int’l Group</i> , 113 Ohio St.3d 323, 865 N.E. 2d 853 2007-Ohio-2071 .....	4
<i>Buckeye Union Insurance Co. v. Consolidated Corp.</i> (1991), 64 Ohio App 3d 19, 587 N.E. 2d 391 .....	5
<i>Burger Brewing Co. v. Liquor Control Commission</i> (1973), 34 Ohio St.3d 93, 256 N.E. 2d 261 .....	11, 13
<i>C.A.A.L.E., et al. and Stark-Tuscarawas-Wayne Joint Solid Waste Management District v. Joseph P. Koncelick, Director of the Ohio Environmental Protection Agency and American Landfill, Inc.</i> , Case No.(s) ERAC 765939-765942; 765943-765946; 795947-795948; 766079-766082; and 766192-666193 (Ohio Environmental Review Appeals Commission).....	13
<i>Dardas v. Board of County Comm.</i> , (7 <sup>th</sup> Dist. 1959), 83 Ohio L. Abs. 107, 168 N.E. 2d 164.....	16, 17
<i>Dworning v. Euclid</i> , 2005-Ohio-3318, 892 N.E. 2d 420.....	16
<i>Jackson v. Ohio Bureau of Worker’s Compensation</i> (4 <sup>th</sup> Dist. App. 1954), 98 Ohio App.3d 579, 649 N.E. 2d 30.....	16
<i>Martin v. Howard</i> (2009), 2009 Ohio App LEXIS 51, 2009-Ohio-67.....	5
<i>Ohio Department of Transportation</i> , 94 Ohio St.3d 287, 2002-Ohio-794, 762 N.E. 2d 979 .....	16
<i>Ohio Edison Co. v. Ohio Department of Transportation</i> , (10 <sup>th</sup> Dist. 1993), 86 Ohio App.3d 189, 620 N.E. 2d 217 .....	16
<i>Olivas v. Cincinnati Pub. Schools</i> , 2007-Ohio-1857, 171 Ohio App. 3d 609, 572 N.E. 2d 962.....	16
<i>Pack v. City of Cleveland</i> (1982), 1 Ohio St.3d 129, 438 N.E. 2d 434 .....	12
<i>Peltz v. City of South Euclid</i> (1967), 11 Ohio St.2d 128, N.E. 2d 320.....	12
<i>Pierron v. Pierron</i> , 2008 Ohio App LEXIS 1105, 2008-Ohio-1786.....	5
<i>Rankin-Collier, Inc. v. Caldwell</i> (1975), 42 Ohio St. 2d 436, 329 N.E. 2d 686.....	16
<i>Redman v. Ohio Department of Industrial Relations</i> (1990) 75 Ohio St.3d 399, 403, 662 N.E. 2d 352.....	7
<i>Schindler Elevator Corp. v. Tracy</i> (1999) 84 Ohio St.3d 496, 705 N.E. 2d 672 .....	6
<i>State ex rel. DD v. Felgey</i> , 116 Ohio St.3d 207, 207-Ohio-877.....	8
<i>State ex rel. Taft v. Franklin County Court of Common Pleas</i> (1991), 63 Ohio St.3d 190, 586 N.E. 2d 114.....	12
<i>State, ex rel. Barbuto v. Ohio Edison Co.</i> , (9 <sup>th</sup> Dist. 1968), 16 Ohio App. 3d 551, 241 N.E. 2d 783, aff’d 16 Ohio St.2d 54, 242 N.E. 2d 562 (1968).....	16, 17
<i>Thomas v. Thomas</i> , Franklin App. 00AP-541, 2001 Ohio App LEXIS 1883 .....	5
<i>United Nuclear Corp. v. Cannon</i> , 553 F. Supp. 1220 (D.R. I 1982).....	14

**Statutes:**

R.C. 1.51 ..... 6, 10  
R.C. 343.01 ..... 10  
R.C. 343.01(G)(1) ..... 4, 7, 8, 9, 10  
R.C. 343.01(G)(2)..... 9, 10, 11  
R.C. 343.99..... 13  
R.C. 3701 ..... 5  
R.C. 3704 ..... 5  
R.C. 3734..... 5  
R.C. 3734.02..... 11  
R.C. 3734.53 ..... 8  
R.C. 3734.53(A)(6) and (7) ..... 9  
R.C. 3734.53(C)..... 8  
R.C. 3734.55(D) ..... 1, 6  
R.C. 3745.01 ..... 1, 2, 5, 6, 7, 8  
R.C. 3751 ..... 5  
R.C. 3752 ..... 5  
R.C. 5703.37 ..... 7  
R.C. 6109..... 5  
R.C. 6111..... 5

**Constitutional Provisions:**

Ohio Constitution, Article II, Section 5 ..... 8

**Other:**

Local Rule 9.02..... 12, 13  
Local Rule 9.02(A) ..... 12  
Local Rule 9.02(B) ..... 12  
Local Rule 9.02(C) ..... 12  
Local Rule 9.02(E) ..... 12  
Local Rule 9.02(L) ..... 12  
Local Rule 9.02(M) ..... 12  
Local Rule 9.02(U)..... 12  
Local Rule 9.03..... 12, 13  
Local Rule 9.04..... 10, 13, 14, 15, 17  
Memorandum of Understanding ..... 1, 2, 3, 4, 5, 8  
NSWMA Merits Brief, pp. 24-26 ..... 12  
NSWMA Merits Brief, pp. 28-32 ..... 3  
NSWMA Trial Exhibit 11 ..... 9  
State of Ohio Solid Waste Management Plan (2001) p.1 ..... 11

### III. ARGUMENT

#### (A) APPELLANT'S 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 THE AGENCY IS A NECESSARY OR INDISPENSIBLE PARTY IN THIS CASE.**

Appellant and Appellee both agree that neither the Director of the Ohio Environmental Protection Agency ("Ohio EPA" or the "Agency") nor the Agency itself is a necessary or indispensable party in this case.

#### (B) APPELLANT'S 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, SITING AND OPERATION OF SOLID WASTE FACILITIES AFTER ITS PLANNING AUTHORITY HAD EXPIRED OR BEEN TERMINATED BY OPERATION OF LAW.**

In its merits brief, National Solid Wastes Management Association ("NSWMA") argued the plain language of R.C. 343.01(G) requires that the solid waste management plan of a district must authorize the adoption and enforcement of local rules in order for such rules to be enforceable. Since the current plan in place for the Stark-Tuscarawas-Wayne Joint Solid Waste Management District, ("STW" or the "District") which was issued by Ohio EPA in December of 2006, does not and, as a matter of law,<sup>1</sup> cannot authorize either the adoption or enforcement of local rules, the rules challenged by NSWMA in this proceeding are unenforceable. In reply, the District argues that a Memorandum of Understanding entered into between STW and Ohio EPA in November of 2006 (the "MOU"), pursuant to Ohio EPA's general contracting authority set forth in R.C. 3745.01, can be construed to authorize the adoption and continued enforcement of

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<sup>1</sup> See, R.C. 3734.55(D).

STW's local rules and, even if it cannot, the District needs no express statutory authority to enforce its rules because such authorization is implied by or included in the legislative grant of authority to adopt such rules in the first instance. The District is incorrect in both respects.

- (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 management plan for the Appellee District.**

STW argues that, when the legislature fails to provide an administrative agency or unit of state or local government with an express grant of authority to do something which the agency or unit must do in order to fulfill some other requirement imposed upon it by law, a court may find that the legislation imposing the statutory obligation contains within it the implied power to do what must be done to carry it out. That is not the situation in the case at bar. This is not a case where the legislature granted rule making authority to an agency but failed to expressly state that the agency has the power to enforce its rules. Quite the contrary. In this case, the General Assembly made an express grant of authority to the districts to adopt and enforce local rules in R.C. 343.01(G) but conditioned the exercise of that authority upon there being a solid waste management plan in place for the district seeking to adopt and enforce local rules providing for such adoption and enforcement. This Court cannot find implied power to enforce district rules in this case because to do so would require disregarding an express condition or limitation placed upon that enforcement power by the General Assembly.

- (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.**

As a threshold matter, the Director claims the MOU was first executed by the parties in November of 2006, suggesting the parties must have intended that any rules adopted by STW thereafter remain enforceable after issuance of Ohio EPA's plan at the end of December 2006.

This is incorrect as a matter of fact. Actually, Ohio EPA and STW first entered into the MOU on September 26, 2005. Thereafter, the parties agreed to extend the MOU; first, in April of 2006, and then in November of 2006. Had STW adopted its rules immediately after the parties first executed the MOU in September of 2005, these rules would have been in place and enforceable not for less than sixty days, but rather for more than a year. See, Appendix D to NSWMA's merits brief, pp. 28-32.

Moreover, although parole evidence regarding the intent of the parties is insufficient to change the legal effect of the clear language to which the parties actually agreed, this Court need not resort to inferring such intent based upon the timing of the execution of the MOU, the issuance of the District's rules, and the issuance of Ohio EPA's plan because there is direct evidence in the Record regarding the parties' intent. While it may well have been the intent of STW to gain legal authority to enforce its local rules after Ohio EPA issued its plan for the District by entering into the MOU, the former Ohio EPA Director who negotiated the MOU's terms testified that it was Ohio EPA's intent that the MOU neither authorize nor prohibit the adoption or enforcement of local rules after the Ohio EPA plan was issued. (See, September 5, 2007 Transcript, pp. 112-113). These conflicting purposes demonstrate why courts do not resort to parole evidence to interpret contract language when the language of the contract is clear.

Rather than dwell upon irrelevancies such as the conflicting intent of the parties in entering into the MOU, this Court should instead focus upon the legal consequences which flow from the language of the MOU to which the parties actually agreed. The short answer is that there are none, at least none which would allow STW to enforce its local rules after Ohio EPA issued its plan. The MOU contains no provision authorizing the enforcement of STW's rules after issuance of the Ohio EPA plan, cannot be interpreted to do so and, even if it contained such

a provision, could not legally empower the District to enforce its rules absent a provision in the solid waste management plan in effect for the District expressly authorizing rule enforcement.

First of all, the MOU contains no language authorizing the continued enforceability of STW's local rules after Ohio EPA's plan came into effect and the trial court was not free to rewrite the contractual language agreed to by the parties to add the missing language. See, e.g., *Bellman v. Am. Int'l Group*, 113 Ohio St. 3d 323, 865 N.E. 2d 853 2007-Ohio-2071. The only language contained in the MOU remotely on point is its provision stating that the District may adopt local rules until November 30, 2006, after which date Ohio EPA was expected to issue its plan for the District. However, this is merely an acknowledgement that under R.C. 343.01(G)(1) the District had the authority to adopt local rules pursuant to its 1993 plan until the Director's plan issued.

In reply, the District argues that the MOU's silence on the continued enforceability of the STW local rules rendered the MOU ambiguous on this point, thereby allowing the trial court to "interpret" the MOU to allow for the continued enforceability of local rules after Ohio EPA issued its plan for the District. However, this Court has never accepted the argument that the silence of a document on a particular issue renders the document ambiguous and, thus, subject to judicial interpretation. For example, in *Aultman Hosp. Assn. v. Mutual Insurance Company*, F.K.A. (1989), 46 Ohio St. 3d 51, 54, 544 N.E. 2d 920, this Court was asked to interpret an insurance contract to allow for the issuance of service contracts to groups that compensated the insurer other than by premiums because the contract was silent on this point. The insurer argued that the Court could, by interpreting the contract to effectuate the supposed intention of the parties, supply the missing contract term. This Court disagreed, as the following passage from the Court's opinion makes plain:

[i]n the absence of fraud or mistake, the [parties] unexpressed intention cannot be implied in the contract . . . It is not the responsibility or function of this court to rewrite the parties' contract to provide such circumstances. Where a contract is plain and unambiguous as herein, it does not become ambiguous by reason of the fact that in its operation it may cause a hardship on one of the parties.

Id. at 55. See also, *Buckeye Union Insurance Co. v. Consolidated Corp.* (1991), 64 Ohio App 3d 19, 587 N.E. 2d 391, *Pierron v. Pierron*, 2008 Ohio App LEXIS 1105, 2008-Ohio-1786; *Thomas v. Thomas*, Franklin App. 00AP-541, 2001 Ohio App LEXIS 1883; *Martin v. Howard* (2009), 2009 Ohio App LEXIS 51, 2009-Ohio-67.

Moreover, even if the MOU had expressly provided for the continued enforceability of STW's rules after issuance of Ohio EPA's plan, for a number of reasons, such a provision would be legally ineffective to empower the District to enforce its rules after Ohio EPA's plan for the District came into effect. First, nothing in the statute that grants general contracting authority to Ohio EPA allows the Agency by contract to repeal or suspend the provision of R.C. 343.01(G) requiring that, for local district rules to be enforceable, the solid waste management plan in effect for the district expressly authorize such enforcement.

The legislative grant of general contractual authority to Ohio EPA is contained in R.C. 3745.01. That section provides in pertinent part:

There is hereby created the Environmental Protection Agency, headed by the Director of Environmental Protection . . . The Director may do all of the following:

\*\*\*\*\*

(C) advise, consult, corporate and enter into contracts or agreements with any other agencies of the State. . . [and] political subdivisions. . . in furtherance of the purpose of this Chapter and Chapters 3701., 3704., 3734., 3751., 3752., 6109., and 6111. of the Revised Code.

Nowhere in this language is the Ohio EPA Director expressly granted the authority to authorize by contract a solid waste district to either adopt or enforce local rules after Ohio EPA has issued a plan for the district which contains no such authorization.

Nor should this statutory language be interpreted to confer upon the Ohio EPA Director such authority for at least three reasons. First, the Director is supposed to use his contracting authority to assist him in carrying out his statutory obligations under the chapters of the Revised Code over which he has oversight responsibility, including Ohio's solid waste laws which are codified in R.C. Chapter 3734. Since the General Assembly specifically prohibited Ohio EPA from including a provision in an Agency-drafted solid waste plan authorizing the affected district to adopt or enforce local rules, see R.C. 3734.55(D), R.C. 3745.01 should not be construed to allow the Director to do by contract what the legislature expressly provided he not do when he displaces a district plan with one drafted by his staff. To construe R.C. 3745.01 to allow the Director to circumvent by contract a restriction upon his authority (and that of the solid waste districts) contained in other statutory provisions can hardly be characterized as assisting the Director in carrying out his regulatory responsibilities under R.C. Chapter 3734.

Second, to interpret the general provisions of R.C. 3745.01 to allow the Ohio EPA Director by contract to empower a solid waste district to enforce local rules without a solid waste plan authorizing such enforcement would violate R.C. 1.51, which provides in pertinent part:

If a general provision [of statutory law] conflicts with a special or local provision, they shall be construed, if possible, so effect is given to both. If the conflict is irreconcilable, the special or local provision prevails is an exception to the general provision, unless the general provision is the later adopted and the manifest intent is that the general provision prevail.

See also, *Schindler Elevator Corp. v. Tracy*, (1999), 84 Ohio St.3d 496, 705 N.E. 2d 672. (Holding that R.C. 5739.13, which contains provisions governing notice of sales or use tax

assessments on corporations, is a special provision which governs the notice requirements pertaining to such assessments, rather than R.C. 5703.37, which generally provides for the manner in which orders or notices of the Commissioner are served). R.C. 3745.01, first enacted in 1972, provides general authority to the Ohio EPA Director to enter into contracts and agreements to assist him in the performance of his statutory duties. In contrast, R.C. 343.01(G) which, in its present form, dates back to 1988, is a specific provision which sets out in detail the scope of and limitations upon solid waste district rule making.

There is no facial conflict between these two provisions: R.C. 3745.01 says nothing about district rule making and R.C. 343.01(G) says nothing about Ohio EPA contracting. Effect can be given to both unless R.C. 3745.01 is construed to allow the Ohio EPA Director to exempt a solid waste district from complying with the provisions of R.C. 343.01(G)(1) by contract as advocated by STW. Moreover, if there were a facial conflict between these two provisions, the provisions of the current version of R.C. 343.01(G), including its requirement that the plan in effect for the district authorize the adoption and enforcement of local rules, being the later adopted, would control over the general contracting provisions of R.C. 3745.01.

Third, it is hornbook law that the General Assembly may not delegate its legislative power to an agency of the executive branch. See, e.g. *Redman v. Ohio Department of Industrial Relations* (1990), 75 Ohio St.3d 399, 403, 662 N.E. 2d 352. To interpret R.C. 3745.01 to confer upon the Ohio EPA Director the authority to exempt by contract a solid waste district from the requirements of R.C. 343.01(G)(1) would do just that, unlawfully vest in the Ohio EPA Director the legislative authority to suspend or rewrite statutory provisions, in this instance, R.C. 343.01(G). It is the law of this state as determined by this Court that statutes should not be construed in such a manner as to lead to illegal or irrational results. See, e.g.: *State ex rel. DD v.*

*Felgey*, 116 Ohio St.3d 207, 2007-Ohio-877. To adopt the District's interpretation of R.C. 3745.01 would do both.

In sum, R.C. 343.01(G) clearly requires the solid waste management plan in place for a district authorize such district to adopt and enforce local solid waste rules. Since the MOU does not contain any language exempting STW from this requirement, the trial court was not free to interpret the MOU to do so and, even if it were, such a provision would be unlawful.

- (3) **The rule-making power granted solid waste management 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.**

In its merits brief, NSWMA argued that while the General Assembly did grant the districts the power to prevent out-of-district waste from being disposed of in-district, it limited that authority to a single situation: where the importing district needed to reserve in-district disposal capacity to satisfy local disposal needs. The statutory basis for this argument is contained in R.C. 343.01(G)(1),<sup>2</sup> which provides in pertinent part as follows:

To the extent authorized by the solid waste management plan of the district approved. . . [by Ohio EPA]. . . or subsequent amended plans of the district approved. . . [by Ohio EPA],. . . a joint district may adopt, publish, and enforce rules doing any of the following:

- (1) Prohibiting or limiting the receipt of solid wastes generated outside of the district. . . *consistent with the projections contained in the plan* or amended plan under Divisions (A)(6) and (7), Section 3734.53 of the Revised Code.

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<sup>2</sup> NSWMA's argument is based upon the text of R.C. 343.01(G)(1) as of June 20, 2009, when NSWMA's merits brief was filed. Since then, the General Assembly amended R.C. 343.01(G)(1) and 3734.53(C) to more clearly articulate its intent that the rule-making powers it granted the districts does not include the power to ban the importation of out-of-district waste unless necessary to satisfy local disposal needs. In its answer brief, STW argues that these amendments violate the one subject rule contained in Article II, Section 5 of the Ohio Constitution. Even if that were so, as NSWMA explained in its merits brief, the District's so-called recycling rule would fail under the former language of RC. 343.01(G)(1). If the District wishes to challenge the recent amendments to R.C. 343.01(G) and 3734.53(C), it should do so by filing a declaratory judgment action in a trial court of competent jurisdiction, rather than for the first time in an answer brief to which NSWMA is allowed only a limited response.

(Emphasis Added).

The “projections” referred to in R.C. 3734.53(A)(6) are for anticipated volumes of solid waste that will be generated within a district over the planning period covered by the district’s solid waste management plan. R.C. 3734.53(A)(7) requires that the plan identify any *additional* solid waste management facilities and the amount of *additional* capacity needed to dispose of those projected volumes of solid waste.

Plainly, by tying the power to exclude out-of-district waste to the projections each district must make regarding whether there will be sufficient disposal capacity within each district to dispose of domestic waste for the planning period provided for by the various district plans, the legislature clearly signaled its intent to limit the grant of rule-making power to the districts to exclude out-of-district waste to the single instance where a district’s projections demonstrated that it would need its domestic disposal capacity to take care of local disposal needs. The Record is clear that STW will have more than enough solid waste disposal capacity to dispose of in-district waste during the planning period governed by the plan currently in effect for the District.<sup>3</sup>

In reply, STW does not contest NSWMA’s interpretation of the restrictions imposed by R.C. 343.01(G)(1) upon the power granted solid waste districts to exclude out-of-district waste, nor that it will have more than enough waste disposal capacity to meet local need for the foreseeable future. Instead, STW argues that in another provision of the state’s solid waste laws, the districts were given broad authority to adopt rules for the maintenance, protection and use of solid waste facilities; see, R.C. 343.01(G)(2), and that such broad authority includes the authority to exclude waste generated out-of-district.

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<sup>3</sup> In Section VI (B) of Ohio EPA’s plan for the District, the Agency evaluated STW’s disposal needs and concluded that the District will have ample domestic disposal capacity to service the disposal needs of the District for decades beyond the planning period covered by the 2006 plan. See, NSWMA Trial Exhibit 11.

This argument, however, runs directly afoul of R.C. 1.51, which provides that specific and general statutes should not be construed to be in conflict but if such a conflict is unavoidable, a court should give effect to the provisions of the specific statute rather than the general one. There is no facial conflict between R.C. 343.01(G)(1) and (2). R.C. 343.01(G)(1) is a special grant of rule-making power to exclude out-of-district waste under limited circumstances, while R.C. 343.01(G)(2) is a more general grant of rule-making authority which does not even mention the exclusion of out-of-district waste. A conflict materializes only if the general language of R.C. 343.01(G)(2) is interpreted to allow a solid waste district to adopt rules to exclude out-of-district wastes under circumstances not allowed by the specific provisions of Subdivision (G)(1).

It follows that the proper interpretation of these two provisions of R.C. 343.01 is that the general rule-making powers conferred by the General Assembly in R.C. 343.01(G)(2) do not include the power to adopt a rule which excludes solid waste generated out-of-district waste except when authorized by R.C. 343.01(G)(1). Since the Record clearly establishes that the District has more than sufficient disposal capacity to take care of domestic disposal needs for multiple decades, it follows that Local Rule 9.04 violates R.C. 343.01(G)(1).

- (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 rules.**

In its merits brief, NSWMA argues that various of the local rules adopted by STW are invalid because they invade the exclusive regulatory jurisdiction of Ohio EPA, such as the power to regulate the design of sanitary landfills, or are inconsistent with Ohio EPA's landfill rules. In reply, STW argues the power granted it to adopt rules governing the protection, maintenance, and use of landfills contained in the first several lines of R.C. 343.01(G)(2) is broad enough to

encompass its local rules and, in any event, the trial court was correct in ruling that the validity of these rules was not ripe for adjudication until the District actually sought to enforce them.

Regarding the former, NSWMA argued that the phrase “protection, maintenance and use” as it appears in R.C. 343.01(G)(2) must be construed with the legislative purpose in mind – the protection of the solid waste industry in Ohio<sup>4</sup> – and in pari materia with the much more extensive grant of authority to Ohio EPA to regulate all aspects of solid waste disposal in Ohio contained in R.C. 3734.02, as well as the legislative grant of authority to regulate land use planning made by the General Assembly to local zoning authorities. When so construed, it is apparent that the legislature did not intend to allow the districts to create their own regulatory or land use planning schemes in competition with Ohio EPA or county or township zoning boards.

In reply, the District insists that the power granted it to adopt rules governing the maintenance, jurisdiction and use of landfills should be interpreted broadly, because its interpretation of its rule-making statute is entitled to deference. Conceding for the sake of argument that a court might ordinarily defer to the interpretation of an agency of its own rule-making statute, it ought not to do so when, as here, the agency’s interpretation is manifestly inconsistent with the statutory scheme.

Regarding STW’s argument that the validity of the District’s rules will not be ripe for adjudication until the District actually enforces one of them, this Court rejected a virtually identical argument in *Burger Brewing Co. v. Liquor Control Commission* (1973), 34 Ohio St.3d 93, 256 N.E. 2d 261. In that case, nine breweries sought a declaration that administrative regulations adopted by the then Ohio Department of Liquor Control pertaining to the price the breweries could charge for their product were unlawful. This Court held that it is not necessary

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<sup>4</sup> See, State of Ohio Solid Waste Management Plan (2001) p1, attached as Exhibit B to NSWMA’s trial court motion for summary judgment (Trial Record Item 19).

for the party seeking declaratory relief to have actually had the regulations it challenges applied to it so long as there is a controversy between the parties having adverse interests of sufficient immediacy to warrant declaratory relief.<sup>5</sup>

In the case at bar, all of the District's challenged rules have gone into effect. The STW's so-called Operational Standards Rule, 9.02, imposes requirements upon NSWMA member landfills located within the District which have been in effect for several years. This rule requires, among other things, that landfill operators install berms, walls and/or barriers to minimize odors, dust, or noise that might leave the landfill, see Local Rule 9.02(A); that landfill roadways be paved or graveled, *Id.*; that landfills have a truck wheel wash, see Rule 9.02(E); that landfills prevent light from their light fixtures from extending onto any residential property, see Rule 9.02(B); that landfills have a Fire and Emergency Plan, see Rule 9.02(C); an Odor Control Plan, see Rule 9.02(U); an Airborne Particulate Control Plan, see Rule 9.02(L); and an Overweight Truck Plan, see, Rule 9.02(M), to name a few provisions now applicable. See also, pp. 24-26 of NSWMA merits brief. Keith Kimble, the operator of one of the NSWMA member landfills located within STW, testified that his landfill did not have a truck wheel wash, and that it would cost him many tens or even hundreds of thousands of dollars to install one. (See, October 4, 2007 Transcript, pp. 41-42). Tim Vandersal, the operator of another of NSWMA member landfills located within STW, testified that he did not even know what went into the various plans required by Local Rule 9.02 listed above. (See, August 8, 2007 Transcript, pp. 114-115).

Rule 9.03, another of the rules being challenged in this litigation, purports to regulate the siting of landfills and landfill expansions located within the STW District. Although no

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<sup>5</sup> See also, *State ex rel. Taft v. Franklin County Court of Common Pleas* (1991), 63 Ohio St.3d 190, 586 N.E.2d 114; *Peltz v. City of South Euclid* (1967), 11 Ohio St.2d 128, 228 N.E.2d 320; *Pack v. City of Cleveland* (1982), 1 Ohio St.3d 129, 438 N.E.2d 434.

NSWMA member testified that any one of them had applied to Ohio EPA for a permit authorizing the construction of a new landfill or the expansion of an existing one, there is evidence in the Record indicating that it takes many years to prepare the necessary plans for such a new or expanded landfill. (See, October 4, 2007 Transcript, p. 46). This Court may take judicial notice of the fact that Appellant's permit regulations that are the subject of this litigation between Appellant and Appellee referenced below were pending for seven years before Ohio EPA took final action, which caused Appellant to amend its application to satisfy changing regulatory requirements. Because of this extended planning period, the landfill operators impacted by STW's local rules need to know now what requirements will apply so that they can plan for them.

Moreover, this Court may take judicial notice of the fact that STW is actively engaged in litigation seeking to overturn Ohio EPA's 2006 decision to allow American Landfill, Inc., an NSWMA member, to greatly expand its American Landfill, which is located in Stark County, Ohio. See, *C.A.A.L.E., et al. and Stark-Tuscarawas-Wayne Joint Solid Waste Management District v. Joseph P. Koncick, Director of the Ohio Environmental Protection Agency and American Landfill, Inc.* Case No.(s) ERAC 765939-765942; 765943-765946; 795947-795948; 766079-766082; and 766192-666193 (Ohio Environmental Review Appeals Commission). If this litigation is successful, American Landfill, Inc. may have to comply with both Local Rules 9.02 and 9.03 when it seeks to revise its application to survive administrative and judicial review.

R.C. 343.99 allows STW to seek a monetary penalty every time one of the NSWMA member landfills located within STW violates any one of the numerous requirements imposed by Local Rules 9.02, 9.03 or 9.04. Under *Burger Brewing* and its progeny, the impacted NSWMA

members need not wait to be sued before seeking a declaration of the validity of these requirements.

**(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 make compliance impossible.**

In its merit brief, NSWMA argues that, as written, Local Rule 9.04 is impossible to apply constitutionally. NSWMA explained the comparison of prior year recycling statistics of the STW District with current year recycling statistics being achieved by a district seeking to export solid waste to STW cannot be made because the information required (i.e., historical recycling statistics for STW and current recycling statistics for the exporting district) is not available in the year in which the decision must be made whether a load of waste generated in another district can be disposed of within STW consistent with Rule 9.04. In reply, STW argues that: (a) the specificity required of criminal statutes by due process is not required of administrative regulations such as Rule 9.04; (b) having failed to ask the District for a waiver from Rule 9.04, the impacted NSWMA members were barred from seeking judicial review of that rule; (c) NSWMA has not proven that Rule 9.04 cannot be applied as it is written; (d) there is self-serving testimony in the Record from the District's executive director and one of the commissioners who participated in the drafting of Rule 9.04 to the effect that the rule calls for a comparison of historical recycling data for both the importing and exporting district; and (e) the rule contemplated an "administrative process" whereby the missing historical data would be determined.

As for the District's apparent argument that civil fines may be imposed for violating a statute or regulation which is impossible to comply with as written without offending due process, the District is incorrect as a matter of law. See, e.g.: *United Nuclear Corp. v. Cannon*,

553 F. Supp. 1220 (D.R. I 1982). How could it possibly be the case that the government could fine an individual or company but avoid due process scrutiny by characterizing the sanction as “civil” rather than “criminal?” Moreover, even under “relaxed” due process scrutiny, this Court should not uphold a rule which is impossible to apply as written.

As far as the waiver provision is concerned, it cannot be the law that the District could successfully insulate its rules from judicial review by allowing impacted landfills to apply for waivers which, even if granted, could be snatched away at any time by STW. Were this the law, the District could play an endless cat and mouse game with the impacted landfills, granting them waivers when threatened with litigation, removing those waivers when the risk of litigation seemed past, reinstating them if litigation subsequently ensued, and revoking them once again after gaining dismissal of the litigation based upon the exhaustion doctrine.

If one of the District’s rules declared that no minority-owned landfill company could do business within STW, would anyone seriously argue that a court could not declare such a provision unconstitutional because the company could seek a waiver? Would not the burden of being forced to seek a waiver, even if ultimately granted, by itself be sufficient to justify judicial review? Of course, the answer is yes.

Equally important, the waiver process does not allow for long-term planning. As discussed above, landfill planning is a lengthy, expensive, and complicated process. Landfill operators cannot conduct the necessary planning if they cannot know in advance whether a district rule waiver that affects the landfill’s design or siting is permanent or merely temporary.

Generally speaking, the exhaustion doctrine is a court-made rule of judicial economy to prevent premature judicial interference with agency processes so that the agency can utilize its special expertise without judicial intrusion; it is not a jurisdictional prerequisite to judicial

review. *Dworning v. Euclid*, 2005-Ohio-3318, 892 N.E. 2d 420; *Basic Distribution Corp. v. Ohio Department of Transportation*, 94 Ohio St.3d 287, 2002-Ohio-794, 762 N.E. 2d 979; *Jackson v. Ohio Bureau of Worker's Compensation* (4<sup>th</sup> Dist. 1954), 98 Ohio App.3d 579, 649 N.E. 2d 30. Its operation is confined to those cases where an administrative agency has the authority to pass on every question raised by a party requesting judicial relief and enables the judiciary to withhold its aid until the administrative remedies have been exhausted. *Rankin-Collier, Inc. v. Caldwell* (1975), 42 Ohio St.2d 436, 329 N.E. 2d 686. In particular, it does not apply when a party is seeking relief from a constitutional deprivation which cannot be addressed by administrative action, *Olivas v. Cincinnati Pub Schools*; 2007-Ohio-1857, 171 Ohio App.3d 609, 572 N.E. 2d 962, when the administrative remedy is either inadequate or futile, *Id.*; *Ohio Edison Co. v. Ohio Department of Transportation* (10<sup>th</sup> Dist. 1993), 86 Ohio App.3d 189, 620 N.E. 2d 217; or when the power or authority of an agency to act in any aspect is being challenged. *State, ex rel. Barbuto v. Ohio Edison Co.*, (9<sup>th</sup> Dist. 1968), 16 Ohio App.3d 551, 241 N.E. 2d 783, *aff'd* 16 Ohio St.2d 54, 242 N.E.2d 562 (1968), *Dardas v. Board of County Comm.* (7<sup>th</sup> Dist. 1959), 83 Ohio L. Abs. 107, 168 N.E.2d 164.

Since, as has already been discussed, the General Assembly did not intend that the solid waste districts involve themselves in the import and export of solid wastes,<sup>6</sup> or the design, location and operation of sanitary landfills, it cannot be said that STW has or should have any special expertise on these subjects which the courts should allow to be applied before taking up NSWMA's challenges to the District's local rules. Moreover, the District's claim that Rule 9.04 can be applied as written is not one which the District can resolve; since STW lost its power to rewrite, revise or extend its rules when Ohio EPA issued its plan for the District, STW is not now in a position where it can amend its rules to avoid the problems NSWMA has pointed out,

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<sup>6</sup> Except when necessary to preserve local disposal capacity for local disposal need, see discussion above.

especially NSWMA's constitutional challenge over which STW has no jurisdiction. Finally, since NSWMA is challenging the authority of the District to enforce its rules, the exhaustion doctrine has no application in the case at bar. *State, ex rel. Barbuto, supra; Dardas, supra.*

STW rejected all of NSWMA's informal attempts to resolve the issues raised by NSWMA with respect to its rules, rejected the trial court's mediation attempts, and has fought hard to defend its rules from NSWMA's challenges at all three levels of the judiciary. Given this record, it should not be heard now to attempt to side-step judicial review by claiming that had the impacted NSWMA members merely asked, it would have waived all of the requirements of its rules.

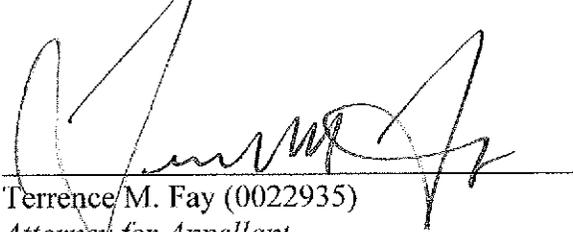
Finally, as far as NSWMA's argument that Rule 9.04 cannot be applied as written is concerned, Rule 9.04 facially requires that the three year average of STW's recycling statistics be determined. As has already been discussed, such data is unavailable. Contrary to the cited testimony of STW's witnesses, the rule, on its face, does not limit the calculation of this average to calendar years 2005, 2006 and 2007 or 2006, 2007, and 2008 or any other specific three-year period and, having lost its authority to write rules after Ohio EPA issued its plan in 2006, these witnesses could not rewrite the rule from the witness stand to address the problems posed by the language of the Rule in its current form. Nor, having lost its rule-making authority, can the District now promulgate additional rules establishing and administrative procedure to fix the problems with Rule 9.04 identified by NSWMA.

#### **IV. CONCLUSION**

For the foregoing reasons, this Court should uphold NSWMA's challenges to STW's local solid waste management rules, declare them invalid and unenforceable, and remand this

case to the Court below with instructions to require the trial court to issue a permanent injunction barring STW from enforcing its rules.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Terrence M. Fay', is written over a horizontal line. The signature is stylized and cursive.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Brief of Appellant National Solid Wastes Management Association have served upon the following via regular U.S. Mail, this 15th day of October, 2009.

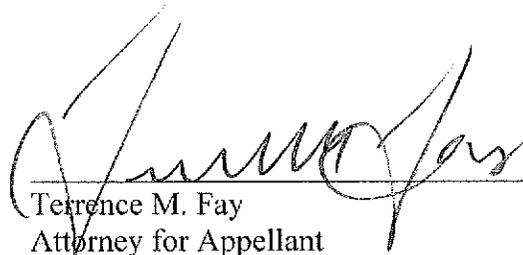
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