

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

NATIONAL SOLID WASTES  
MANAGEMENT ASSOCIATION

Plaintiff-Appellant

-vs-

STARK-TUSCARAWAS-WAYNE  
JOINT SOLID WASTE  
MANAGEMENT DISTRICT

Defendant-Appellee

JUDGES:

Hon. William B. Hoffman, P.J.  
Hon. Julie A. Edwards, J.  
Hon. Patricia A. Delaney, J.

Case No. 2008CA00011

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of  
Common Pleas, Civil Case No.  
2006CV04842

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

January 25, 2010

APPEARANCES:

For Defendant-Appellee

For Plaintiff-Appellant

THOMAS W. CONNORS  
VICTOR R. MARSH  
KRISTIN R. ZEMIS  
Black McCuskey Souers & Arbaugh  
220 Market Avenue S., Suite 100  
Canton, Ohio 44702

TERRENCE M. FAY  
Frost Brown Todd LLC  
One Columbus, Suite 2300  
10 West Broad Street  
Columbus, Ohio 43215-3467

And

CHRISTOPHER S. HABEL  
Frost Brown Todd LLC  
2200 PNC Center  
201 East Fifth Street  
Cincinnati, Ohio 45202

*Hoffman, P.J.*

{¶1} Plaintiff-Appellant National Solid Wastes Management Association appeals the December 18, 2007 Judgment Entry of the Stark County Court of Common Pleas in favor of Defendant-appellee Stark-Tuscarawas-Wayne Joint Solid Waste Management District. The Cuyahoga Solid Waste Management District filed an amicus brief.

### **STATEMENT OF FACTS AND CASE**

{¶2} This matter comes on for our consideration following remand from the Ohio Supreme Court.

{¶3} Appellant National Solid Wastes Management Association (hereinafter “NSWMA”) is a nationwide association of solid waste companies. Three of its members own and operate landfills located in the Stark-Tuscarawas-Wayne District (hereinafter “the 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.

{¶4} The district is a joint solid-waste-management district for Stark, Tuscarawas, and Wayne counties with responsibility for preparing, obtaining OEPA approval of, and implementing a solid-waste-management plan for disposal of solid wastes.

{¶5} On February 24, 1993, the director of the OEPA approved the district’s original plan. On December 9, 1999, when the district filed an amended waste-management plan, the director disapproved it and on June 1, 2004 notified the district of

his intention to prepare an amended plan on its behalf. On September 26, 2005, the district entered into a Memorandum of Understanding (“hereinafter “MOU”) with the director in which it was agreed the district could adopt local rules prior to November 30, 2006, the date by which an amended plan would be issued by the director.

{¶6} On November 3, 2006, the district adopted four local rules, including a recycling rule specifying after January 1, 2008, landfills within the district would no longer be permitted to accept waste from outside the district unless the originating district met or exceeded the district’s recycling standards.

{¶7} On December 13, 2006, NSWMA, acting on behalf of its member landfill operators, filed a complaint in the Stark County Court of Common Pleas against the district seeking a declaration that the district’s local rules were invalid and unenforceable. On December 22, 2006, the director of the Ohio EPA issued an amended plan prepared by the OEPA and ordered the district to implement the plan.

{¶8} The NSWMA lawsuit proceeded to a bench trial. On December 18, 2007, the trial court, via Judgment Entry, found the MOU was a valid, enforceable agreement between the parties, and it provided for the local rules to survive the amended plan issued by the director. The court further ruled the recycling rule is valid, but held it would be impossible for the effected landfills to implement the recycling rule by January 1, 2008; as a result, it ordered a delay in the effective date of that rule. The court further ruled in favor of the district with respect to the validity of the other three rules, finding no justiciable controversy existed because the NSWMA failed to demonstrate its members would not be able to comply with the rules.

{¶9} On December 15, 2008 this Court reversed the decision of the trial court and remanded for further proceedings finding the director of the Ohio EPA was a necessary party to the action; thereby depriving the trial court of jurisdiction.

{¶10} On December 30, 2009, the Ohio Supreme Court reversed this Court's December 15, 2008 Judgment Entry concluding the director of the Ohio EPA was a not a necessary party who must be joined in a suit challenging the validity of local rules adopted by a solid-waste-management district. The Ohio Supreme Court remanded the matter to this Court for consideration of the pending assignments of error as to whether the rules are valid and enforceable.

{¶11} Accordingly, we now address the following assignments of error on appeal:

{¶12} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING JUDGMENT TO THE STW DISTRICT UPHOLDING THE DISTRICT'S RULES BECAUSE AS A MATTER OF LAW THOSE RULES BECAME UNENFORCEABLE AFTER OHIO EPA ISSUED ITS SOLID WASTE MANAGEMENT PLAN FOR THE DISTRICT IN DECEMBER 2006.

{¶13} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN UPHOLDING THE STW DISTRICT'S RECYCLING RULE BECAUSE THAT RULE EXCEEDS THE DISTRICT'S LIMITED RULEMAKING AUTHORITY AND VIOLATES PLAINTIFF'S DUE PROCESS RIGHTS.

{¶14} "III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT TO THE STW DISTRICT BECAUSE RULES 9.02 AND 9.03 INVADE THE EXCLUSIVE

JURISDICTION OF THE OHIO EPA TO REGULATE THE OPERATION AND DESIGN OF LANDFILLS IN OHIO.”

I, II, and III

{¶15} The three errors assigned on appeal raise common and interrelated issues; therefore, we will address the arguments together.

{¶16} R.C. 3734.54(A) requires each joint-solid-waste management district to prepare and implement a solid-waste-management plan that must be submitted to and approved by the director. Periodically, districts must review and revise their initial plans and submit an amended plan to the director for approval; if a district fails to submit, or fails to secure approval of an amended plan, the director is required by statute to prepare and issue an amended plan for the district.

{¶17} The district obtained Ohio EPA approval of its initial solid waste management plan in 1993. However, the district failed to obtain approval of any of its subsequent 5-year amended plan(s). Amended plans were due in 1998 and 2003 (the submitted plans were rejected). The Ohio EPA eventually notified the district it was taking over the planning process. Eventually, the district and the director negotiated a “Memorandum of Understanding” (MOU) on September 26, 2005. The MOU set forth the process under which the Ohio EPA would prepare and issue its plan for the district. Over the objections of Appellant NSWMA, the district adopted the rules under dispute on November 3, 2006.

{¶18} R.C. 343.01(G) provides:

{¶19} “(G) 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 county commissioners of a county district or board of directors of a joint district may adopt, publish, and enforce rules doing any of the following: \* \* \*

**{¶20}** The district is a creature of state law, and has only those powers expressly provided by statute. R.C. 3734.53(C) states:

**{¶21}** “(C) The solid waste management plan of a county or joint district may provide for the adoption of rules under division (G) of section 343.01 of the Revised Code after approval of the plan under section 3734.521 or 3734.55 of the Revised Code doing any or all of the following:\*\*\* (emphasis added.)”

**{¶22}** Thus, pursuant to the statute, only solid waste districts that obtain Ohio EPA 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 the Ohio EPA for a district cannot by statute adopt, authorize or enforce local rules.

**{¶23}** RC. 3734.56(A) provides that when a district fails to submit an amended plan the Ohio EPA approves, the director must issue an amended plan for that district, and “the amended plan shall not incorporate any of the elements required or authorized under division (B) or (C) of [3734.53].”

**{¶24}** Accordingly, only a plan of the district may authorize rulemaking, and no plan of the director can authorize district rulemaking. Here, the plan in effect for the district is the Ohio EPA Director’s December 22, 2006 plan. Section 9, Page 9.1 of that plan states the district is not authorized to adopt local rules.

{¶25} Upon review, we note the MOU is silent regarding the enforceability of the district's rules after the issuance of Ohio EPA's plan, but states, "[I]f the Waste District elects to adopt rules, it shall do so no later than November 30, 2006."

{¶26} The General Assembly has not granted the director of the EPA express or implied powers to modify the operation of Revised Code Chapter 3734 through contract or otherwise. Ohio EPA Director Koncelik and Ohio State Senator Kirk Schuring negotiated the MOU setting forth the process under which the Ohio EPA would prepare and issue its plan for the district. While Senator Schuring's initiative in attempting to negotiate a resolution between the district and the Ohio EPA is commendable, we find the MOU to be legally unenforceable as it relates to the district's rule making authority. R.C. 343.01(G) imposes an unambiguous precondition to the adoption and enforcement of local rules, namely the solid waste management district promulgating the rules must authorize such promulgation and enforcement. Here, the solid waste management plan in effect since December of 2006, has been the plan issued by the director of the Ohio EPA, which plan did not, and legally could not, authorize either the adoption or the enforcement of local solid waste rules.

{¶27} R.C. 3734.55 (D) reads,

{¶28} "(D) If the director 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. Upon completion of the plan, the director shall issue an order in accordance with Chapter 3745 of the Revised Code directing the board of county commissioners or board of directors of the district to implement the plan in compliance with the implementation schedule contained in it.”

**{¶29}** The General Assembly has not authorized the director of the EPA to disregard or repeal the provision of R.C. 343.01(G) requiring the plan in effect to expressly authorize the enforcement of local rules. The director cannot, by contract, nullify other enactments of the Ohio General Assembly. In fact, in his testimony before the trial court Ohio EPA Director Joseph Koncelik testified he did not intend to authorize the continued enforcement of the District’s local rules by entering into the MOU. Rather, the director entered into the agreement to fulfill the purpose of the EPA, not to circumvent or violate other specific statutory provisions. There is no statutory authority allowing either the district or the EPA to do indirectly together what neither can do individually.

{¶30} Based upon the above, NSWMA's assigned errors are sustained, and the judgment of the Stark County Court of Common Pleas is reversed.

By: Hoffman, P.J.

Edwards, J. and

Delaney, J. concur,

s/ William B. Hoffman  
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards  
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney  
HON. PATRICIA A. DELANEY

