June 30, 2008

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
Administration Building, 4th Floor
160 High Street N.W.
Warren, Ohio 44481-1092

SYLLABUS: 2008-021

A fee levied by a joint solid waste management district under R.C. 3734.573(A) on the generation of solid wastes does not apply to materials transported into this state with construction and demolition debris when the materials are solid wastes, as defined in R.C. 3734.01(E), that are separated from the construction and demolition debris and disposed of at a solid waste disposal facility located within the district.

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OPINION NO. 2008-021

The Honorable Dennis Watkins
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Dear Prosecutor Watkins:

You have requested an opinion concerning the authority of a joint solid waste management district to collect a generation fee on out-of-state solid wastes that are disposed of at a solid waste disposal facility located within the district. In your letter you explain:

> [R.C. 3734.573(A)] authorizes a joint solid waste [management] district to levy a fee on solid waste generated within a district.
>
> Situations regularly occur where out of state waste, originally designated as construction and demolition debris, arrives within the district. Upon inspection of the debris, it is determined that some of the debris does not fall within the definition of construction and demolition debris pursuant to [R.C. 3714.01(C)] or is otherwise unidentifiable. As a result, the remaining waste falls within the definition of solid waste as set forth in [R.C. 3734.01(E)]. When this remaining solid waste is properly disposed of at a suitable site within the district, is this remaining solid waste subject to the additional fee on waste generated within the district?

Based on the following analysis, a fee levied by a joint solid waste management district under R.C. 3734.573(A) on the generation of solid wastes does not apply to materials transported into this state with construction and demolition debris when the materials are solid wastes, as defined in R.C. 3734.01(E), that are separated from the construction and demolition debris and disposed of at a solid waste disposal facility located within the district.

Separation of Solid Wastes from Construction and Demolition Debris

R.C. 3714.021(B) requires an owner or operator of a construction and demolition debris facility that is licensed under R.C. Chapter 3714 to attempt to remove all solid wastes from

construction and demolition debris[1] "prior to the disposal of the construction and demolition debris on the working face[2] of the facility."[3] (Footnote added.) Procedures for separating solid

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[1] As used in R.C. Chapter 3714, "construction and demolition debris" means

> those materials resulting from the alteration, construction, destruction, rehabilitation, or repair of any physical structure that is built by humans, including, without limitation, houses, buildings, industrial or commercial facilities, or roadways. "Construction and demolition debris" includes particles and dust created during demolition activities. "Construction and demolition debris" does not include materials identified or listed as solid wastes or hazardous waste pursuant to [R.C. Chapter 3734] and rules adopted under it; materials from mining operations, nontoxic fly ash, spent nontoxic foundry sand, and slag; or reinforced or nonreinforced concrete, asphalt, building or paving brick, or building or paving stone that is stored for a period of less than two years for recycling into a usable construction material.

R.C. 3714.01(C); *see also* 7B Ohio Admin. Code 3745-400-01(F).

[2] For purposes of R.C. 3714.021, a construction and demolition debris facility's "working face" is "the portion of a construction and demolition debris facility where construction and demolition debris is placed for final disposal." R.C. 3714.021(A); *see also* rule 3745-400-01(TT).

[3] "Construction and demolition debris," as used in R.C. Chapter 3714, does not include solid wastes identified or listed in R.C. Chapter 3734 and the rules adopted under that chapter. R.C. 3714.01(C); *see also* rule 3745-400-01(F). R.C. 3734.01(E) defines "solid wastes," for purposes of R.C. Chapter 3734, as follows:

> "Solid wastes" means such unwanted residual solid or semisolid material as results from industrial, commercial, agricultural, and community operations, excluding earth or material from construction, mining, or demolition operations, or other waste materials of the type that normally would be included in demolition debris, nontoxic fly ash and bottom ash, including at least ash that results from the combustion of coal and ash that results from the combustion of coal in combination with scrap tires where scrap tires comprise not more than fifty per cent of heat input in any month, spent nontoxic foundry sand, and slag and other substances that are not harmful or inimical to public health, and includes, but is not limited to, garbage, scrap tires, combustible and noncombustible material, street dirt, and debris. "Solid wastes" does not include any material that is an infectious waste or a hazardous waste.

See also [2007-2008 Monthly Record] Ohio Admin. Code 3745-27-01(S)(23), at p. 2-1064.

wastes from construction and demolition debris at a construction and demolition debris facility are set forth in 7B Ohio Admin. Code 3745-400-11(F), which provides, in pertinent part:

> Waste acceptance and disposal. Prior to acceptance by [a construction and demolition debris] facility, debris shall be readily identifiable as construction and demolition debris and shall not have been shredded, pulverized, or otherwise rendered to the extent that the debris is unidentifiable. The owner or operator shall dispose of only construction and demolition debris as defined in rule 3745-400-01 of the Administrative Code, except as specified in this rule.
>
> ….
>
> (2) The owner or operator of a facility shall not dispose of any solid wastes except as follows:
>
> (a) Packaging which results from the use of construction materials may be disposed if it is incidental to the load.
>
> ….
>
> (b) Tree stumps, trunks and clean branches, exceeding 4 inches (25 cm) in diameter may be disposed. For the purpose of this rule, clean branches means those without leaves and smaller branches attached.
>
> ….
>
> (c) Asbestos materials subject to NESHAP, 40 CFR Part 61, Subpart M, may be disposed of only if the necessary air pollution control permits have been issued.
>
> [Comment: An owner or operator licensed, permitted, or otherwise authorized in accordance with [R.C. Chapter 3714] may accept solid waste materials if the activity is licensed, permitted, or otherwise authorized separately from the construction and demolition debris disposal facility license issued under [R.C. Chapter 3714]. For example, the owner or operator may also conduct a yard waste composting operation or operate a solid waste transfer facility, if so authorized. These separate activities may occur within the facility bounds if the license acknowledges the additional separate activities. If the separate activities are conducted outside of the construction and demolition debris facility bounds, then the construction and demolition debris license for the facility is not affected.]
>
> [Comment: Prohibited materials that are removed are regulated as solid waste or infectious waste by Chapter 3745-27 of the Administrative Code or as hazardous waste by Chapters 3745-50 to 69 of the Administrative Code….]
>
> ….
>
> (3) The owner or operator shall deposit incoming loads of debris at a designated unloading zone where the debris shall be inspected and prohibited wastes shall be removed, unless the owner or operator has received approval of and has implemented a pre-acceptance debris screening program at the facility. If the owner or operator is implementing a pre-acceptance debris screening program that has been approved by the licensing authority through the license application, the owner or operator is not required to establish a designated unloading zone.

> (a) The owner or operator shall unload the debris in clearly designated and marked unloading zones separate from the working face…. Upon inspection of the unloaded debris, the owner or operator shall remove prohibited materials prior to placing the debris on the working face. No prohibited materials are permitted to be disposed at the working face. The owner or operator shall remove any prohibited material found at the working face.

Accordingly, when out-of-state solid wastes and construction and demolition debris are combined and transported to a construction and demolition debris facility located within this state, R.C. 3714.021(B) and rule 3745-400-11(F) require the owner or operator of the facility to separate the solid wastes from the construction and demolition debris and, if the owner or operator is not authorized to accept the solid wastes for disposal, provide for the disposal of the solid wastes at a solid waste disposal facility. *See generally* rule 3745-400-11(B)(10) ("[t]he owner or operator [of a construction and demolition debris facility] shall keep records of all material prohibited for disposal that was accepted by the facility, including material removed from the working face in accordance with paragraph (F)(3) of this rule. For prohibited materials removed by the owner or operator, dated records of volumes and destinations for proper disposal shall be kept. For prohibited materials removed by others or for rejected loads, the owner or operator shall list the responsible entity, including companies maintaining transfer containers at the facility for the purpose of collecting prohibited materials").

Authority to Levy and Collect a Fee on the Generation of Solid Wastes Within a Joint Solid Waste Management District

When solid wastes are transported from a construction and demolition debris facility to a solid waste disposal facility located within this state for final disposal, the solid wastes may be subject to generation and disposal fees. *See, e.g.,* R.C. 3734.57(A) and 7A Ohio Admin. Code 3745-28-02 (state disposal fee imposed on solid wastes disposed of at a solid waste disposal facility located within this state); R.C. 3734.57(B) and 7A Ohio Admin. Code 3745-28-03 (a county or solid waste management district may levy a disposal fee upon the disposal of solid wastes at a solid waste disposal facility located within the district); R.C. 3734.57(C) and 7A Ohio Admin. Code 3745-28-04 (a township or municipal corporation may levy a disposal fee upon the disposal of solid wastes at a solid waste disposal facility located within the township or municipal corporation, respectively); R.C. 3734.573(A) (a solid waste management policy committee of a county or joint solid waste management district may levy a fee on the generation of solid wastes within the district). *See generally* R.C. 343.022(A) ("[t]he board of county commissioners of a county solid waste management district or the board of directors of a joint solid waste management district may enter into a contract or agreement with the owner or operator of a solid waste facility, or with persons collecting or transporting solid wastes, to establish and collect on behalf of the district generation or disposal fees to be used by the district for the purposes set forth in [R.C. 3734.57(G)(1)-(10)] or to provide other remuneration or services to or on behalf of the district or its residents"); R.C. 3734.53(B) (a solid waste management plan of any county or joint solid waste management district shall establish the schedule of disposal or generation fees, if any, to be levied by the county or district).

With respect to the imposition of a fee by a joint solid waste management district on the generation of solid wastes, R.C. 3734.573(A) provides:

> For the purposes specified in [R.C. 3734.57(G)], the solid waste management policy committee of a county or joint solid waste management district *may levy a fee on the generation of solid wastes within the district*.[4]

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[4] R.C. 3734.573 sets forth the following instances in which a generation fee levied under R.C. 3734.573(A) on solid wastes does not apply:

> (H) The fee levied under division (A) of this section does not apply to the management of solid wastes that:
>
> (1) Are disposed of at a facility owned by the generator of the wastes when the solid waste facility exclusively disposes of solid wastes generated at one or more premises owned by the generator regardless of whether the facility is located on a premises where the wastes were generated;
>
> (2) Are disposed of at facilities that exclusively dispose of wastes that are generated from the combustion of coal, or from the combustion of primarily coal in combination with scrap tires, that is not combined in any way with garbage at one or more premises owned by the generator.
>
> ….
>
> (K) The fee levied under division (A) of this section does not apply to sewage sludge that is generated by a waste water treatment facility holding a national pollutant discharge elimination system permit and that is disposed of through incineration, land application, or composting or at another resource recovery or disposal facility that is not a landfill.
>
> (L) The fee levied under division (A) of this section does not apply to yard waste delivered to a solid waste composting facility for processing or to a solid waste transfer facility.
>
> (M) The fee levied under division (A) of this section does not apply to materials separated from a mixed waste stream for recycling by the generator.
>
> (N) The director of environmental protection may issue an order exempting from the fees levied under this section solid wastes, including, but not limited to, scrap tires, that are generated, transferred, or disposed of as a result of a contract providing for the expenditure of public funds entered into by the administrator or regional administrator of the United States environmental protection agency, the director of environmental protection, or the director of administrative services on behalf of the director of environmental protection for the purpose of remediating conditions at a hazardous waste facility, solid waste facility, or other location at which the administrator or regional administrator or the director of environmental protection has reason to believe that there is a substantial threat to public health or safety or the environment or that the

> The initial or amended solid waste management plan of the county or joint district approved under [R.C. 3734.521, R.C. 3734.55, or R.C. 3734.56], an amendment to the district's plan adopted under [R.C. 3734.56(E)], or the resolution adopted and ratified under [R.C. 3734.573(B)] shall establish the rate of the fee levied under this division and shall specify whether the fee is levied on the basis of tons or cubic yards as the unit of measurement. (Emphasis and footnote added.)

Procedures for collecting a generation fee levied under R.C. 3734.573(A) on solid wastes are set forth in R.C. 3734.573(F), which states, in part:

> In the case of solid wastes that are taken to a solid waste transfer facility prior to being transported to a solid waste disposal facility for disposal, the fee levied under [R.C. 3734.573(A)] shall be collected by the owner or operator of the transfer facility as a trustee for the district. In the case of solid wastes that are not taken to a solid waste transfer facility prior to being transported to a solid waste disposal facility, the fee shall be collected by the owner or operator of the solid waste disposal facility where the wastes are disposed of. An owner or operator of a solid waste transfer or disposal facility who is required to collect the fee shall collect and forward the fee to the district in accordance with [R.C. 3734.57] and rules adopted under division (H) of that section.

See also rule 3745-28-03(A).

R.C. 3734.573 thus authorizes a joint solid waste management district to levy and collect a fee on the generation of solid wastes "within" the district. The use of the term "within" by the General Assembly in R.C. 3734.573(A) makes it clear that a generation fee levied under R.C. 3734.573(A) on solid wastes may not be collected unless the solid wastes are generated inside the territory of the district. *See generally* R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"); *Merriam-Webster's Collegiate Dictionary* 1439 (11th ed. 2005) (defining "within," as a preposition, to mean "used as a function word to indicate enclosure or containment[;] used as a function word to indicate situation or circumstance in the limits or compass of: as … in or into the scope or sphere of <[within] the jurisdiction of the state>").

That this was the intent of the General Assembly is further supported by language in R.C. 3734.57, which authorizes the imposition of disposal fees when solid wastes are disposed of at a solid waste disposal facility located within this state. This statute provides, in part, as follows:

> conditions are causing or contributing to air or water pollution or soil contamination.

> (B) For the purposes specified in [R.C. 3734.57(G)], the solid waste management policy committee of a county or joint solid waste management district may levy fees upon the following activities:
>
> (1) The disposal at a solid waste disposal facility located in the district of solid wastes *generated within the district*;
>
> (2) The disposal at a solid waste disposal facility within the district of solid wastes *generated outside the boundaries of the district, but inside this state*;
>
> (3) The disposal at a solid waste disposal facility within the district of solid wastes *generated outside the boundaries of this state*.
>
> ….
>
> (C) For the purposes of defraying the added costs to a municipal corporation or township of maintaining roads and other public facilities and of providing emergency and other public services, and compensating a municipal corporation or township for reductions in real property tax revenues due to reductions in real property valuations resulting from the location and operation of a solid waste disposal facility within the municipal corporation or township, a municipal corporation or township in which such a solid waste disposal facility is located may levy a fee of not more than twenty-five cents per ton on the disposal of solid wastes at a solid waste disposal facility located within the boundaries of the municipal corporation or township *regardless of where the wastes were generated*. (Emphasis added.)

The language of R.C. 3734.57(B)-(C) thus recognizes a distinction between solid wastes generated within the territorial boundaries of a joint solid waste management district and solid wastes generated outside the territorial boundaries of such a district. *See also* R.C. 343.01(G)(3); rule 3745-28-02(A); rule 3745-28-03(C); rule 3745-28-04(C). The fact that R.C. 3734.57(B)-(C) make this distinction while R.C. 3734.573(A) is specifically limited to solid wastes that are generated "within" the territorial boundaries of a joint solid waste management district indicates further the General Assembly's intent to prohibit a joint solid waste management district from collecting a fee levied under R.C. 3734.573(A) on the generation of solid wastes when the solid wastes are generated outside the territorial boundaries of the district. *See generally Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) ("[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended"); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 67, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result); 2007 Op. Att'y Gen. No. 2007-032 at 2-335 (a comparison of the language of two statutes "may suggest whether the use of language in one instance, but not the other, indicates the General Assembly's intent to limit the statutory authority to the particular situation described in the statute and to no other"). Accordingly, a joint solid waste management district may not collect a fee levied under R.C. 3734.573(A) unless the generation of solid wastes occurs inside the territorial boundaries of the district.

The term "generation," as used in R.C. 3734.573, has not been defined by either the General Assembly or the Ohio Environmental Protection Agency. Also, no federal or state court has judicially defined this term for purposes of R.C. 3734.573 or the statutes relating to the disposal of solid wastes in Ohio. The term "generation" therefore is to be accorded its common, ordinary meaning when interpreting R.C. 3734.573. R.C. 1.42.

Merriam-Webster's Collegiate Dictionary 521 (11th ed. 2005) defines "generation" as "the process of coming or bringing into being … origination by a generating process : PRODUCTION." Thus, the "generation" of solid wastes for purposes of R.C. 3734.573 occurs when the solid wastes are produced or brought into existence by some process. *See generally* R.C. 3734.01(E) (defining "solid wastes," for purposes of R.C. Chapter 3734, as "unwanted residual solid or semisolid material as results from industrial, commercial, agricultural, and community operations"); [2007-2008 Monthly Record] Ohio Admin. Code 3745-27-01(S)(23), at p. 2-1064 (using the language of R.C. 3734.01(E) to define "solid wastes"); *Merriam-Webster's Collegiate Dictionary* 521 (11th ed. 2005) ("generate" means "to bring into existence: as … to originate by a vital, chemical, or physical process : PRODUCE"). This means that a fee levied under R.C. 3734.573(A) may be collected by a joint solid waste management district only when the solid wastes are produced or brought into existence by a process occurring inside the territorial boundaries of the district.

Out-of-State Solid Wastes Are Not Generated Within a Joint Solid Waste Management District

Let us now consider your specific question, which asks whether a fee levied by a joint solid waste management district under R.C. 3734.573(A) on the generation of solid wastes applies to materials transported into this state with construction and demolition debris when the materials are solid wastes, as defined in R.C. 3734.01(E), that are separated from the construction and demolition debris and disposed of at a solid waste disposal facility located within the district. As explained above, a fee levied under R.C. 3734.573(A) may not be collected by a joint solid waste management district unless the solid wastes are produced or brought into existence by a process occurring inside the territorial boundaries of the district. Resolution of your question thus requires us to determine where the materials become solid wastes. If the materials become solid wastes, as defined in R.C. 3734.01(E), before they enter Ohio, R.C. 3734.573(A) does not authorize a joint solid waste management district to collect a fee on the generation of the materials as solid wastes.

In the situation presented in your letter, the materials become solid wastes before entering Ohio. The materials are originally produced by industrial, commercial, agricultural, or community operations that occur outside of Ohio. The materials are then combined with construction and demolition debris for the purpose of transporting the materials and the construction and demolition debris to Ohio for final disposal. Because the materials are being transported into Ohio for final disposal, it reasonably follows that the materials become solid wastes produced from industrial, commercial, agricultural, or community operations before

entering Ohio. Consequently, a fee levied by a joint solid waste management district under R.C. 3734.573(A) on the generation of solid wastes does not apply to such materials.

As a final matter, we note that the fact that the materials are separated from construction and demolition debris at a construction and demolition debris facility after entering Ohio has no bearing on whether the materials are solid wastes for purposes of R.C. 3734.573. Because the materials are solid wastes when they arrive at the construction and demolition facility no further acts are needed to turn the materials into solid wastes. The process of separating materials that constitute solid wastes from construction and demolition debris at a construction and demolition debris facility is one that is statutorily required to be performed since solid wastes may not be disposed of at a construction and demolition debris facility unless the disposal at such a facility is specifically authorized by law. R.C. 3714.021(B); rule 3745-400-11(F); *see also* R.C. 3714.01(C); 7B Ohio Admin. Code 3745-400-01(F). The separation of materials that constitute solid wastes, as defined in R.C. 3734.01(E), from construction and demolition debris at a construction and demolition debris facility after entering Ohio thus is not the process by which the materials become solid wastes for purposes of R.C. 3734.573. Therefore, a fee levied by a joint solid waste management district under R.C. 3734.573(A) on the generation of solid wastes does not apply to materials transported into this state with construction and demolition debris when the materials are solid wastes, as defined in R.C. 3734.01(E), that are separated from the construction and demolition debris and disposed of at a solid waste disposal facility located within the district.

Conclusion

In sum, it is my opinion, and you are hereby advised that a fee levied by a joint solid waste management district under R.C. 3734.573(A) on the generation of solid wastes does not apply to materials transported into this state with construction and demolition debris when the materials are solid wastes, as defined in R.C. 3734.01(E), that are separated from the construction and demolition debris and disposed of at a solid waste disposal facility located within the district.

Respectfully,

Nancy H. Rogers

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