September 3, 1993

OPINION NO. 93-018

The Honorable William R. Biddlestone
Athens County Prosecuting Attorney
Athens County Court House
Athens, Ohio 45701

Dear Prosecutor Biddlestone:

You have requested an opinion relating to the authority of a solid waste management district to provide within its solid waste management plan for the use of a portion of the moneys collected under R.C. 3734.57(B) to pay the costs of closure and post-closure care for a county-owned solid waste management facility. Your specific questions are as follows:

1. Assuming that Athens County remains a part of the joint district, in order to meet its obligations under Ohio Revised Code, Section 3734.02(A), and regulations adopted thereunder, requiring proper closure and post-closure care for solid waste disposal facilities, and in accordance with the schedule required by Ohio Revised Code, Section 3734.53(A)(12)(b), may the Board of County Commissioners request the board of directors to include as part of the joint district plan a description of and schedule for closure and post-closure activities required by the Ohio Environmental Protection Agency at an existing county-owned solid waste disposal facility, and use a portion of the fees collected pursuant to Ohio Revised Code, Section 3734.57(B), to implement those closure and post-closure activities?

2. Assuming that the county can successfully complete the process required under H.B. 723 to withdraw from the joint district and form its own single county district, can the county transfer its ownership of the existing solid waste disposal facility to the district, and include a description of and schedule for closure and post-closure activities at the landfill in its solid waste management plan, and use a portion of the fees collected pursuant to Ohio Revised Code, Section 3734.57(B) to implement those closure and post-closure activities?

Solid Waste Management Districts and Plans

Pursuant to R.C. 3734.52, the board of commissioners of each county must either establish and maintain a county solid waste management district or participate with other counties in establishing and maintaining a joint solid waste management district.[1] A county solid waste management district is managed by the board of commissioners of the county, and a joint solid waste management district is managed by its board of directors, consisting generally of the boards of county commissioners of the counties within the district. R.C. 343.01. Each county or joint solid waste management district has a solid waste management policy committee, consisting of representatives of the public and of various political subdivisions within the district. R.C. 3734.54.

A county or joint solid waste management district is required to prepare, adopt, submit, and implement a solid waste management plan that complies with R.C. 3734.55. R.C. 3734.52(A), .54, .55. Each solid waste management plan must be reviewed and approved by the Director of Environmental Protection and must be ratified by specified numbers of the counties, municipal corporations, and townships included within the district. R.C. 3734.55; *see, e.g.*, 1989 Op. Att'y Gen. No. 89-054 at 2-227. If the Director of Environmental Protection finds that a county or joint district has "materially failed" to implement its plan, the Director "shall issue an enforcement order" directing the board to comply with the implementation schedule in its plan "within a specified, reasonable time." R.C. 3734.55(E); *see also* R.C. 3734.13.

Solid waste management plans must be amended and updated periodically. *See* R.C. 3734.56. For purposes of this opinion, any reference to a solid waste management plan includes also an amended plan.

The solid waste management plan of a county or joint solid waste management district must "provide for, demonstrate, and certify the availability of and access to sufficient solid waste management facility capacity to meet the solid waste management needs of the district" for at least a ten-year period. R.C. 3734.53(A); *see also* 5 Ohio Admin. Code 3745-29-02. The plan must contain a number of items specified by statute, including an inventory of sources, composition, and quantities of solid wastes generated in the district; an inventory of existing facilities where solid wastes are being disposed of and an estimate of the remaining disposal capacity; projections of amounts of solid waste to be disposed of in the district in each of the years covered by the plan; an identification of additional facilities needed; and other projections that are necessary or appropriate to ascertain and meet the solid waste management needs of the district during the period covered by the plan. R.C. 3734.53(A). Each plan must contain a schedule for its implementation, including "[a] schedule for closure of existing solid waste facilities, expansion of existing facilities, and establishment of new facilities," R.C. 3734.53(A)(12)(b), and also the methods for financing the implementation of the plan and a demonstration of the availability of financial resources, R.C. 3734.53(A)(12)(d). In addition, the plan must establish the schedule of fees to be levied under R.C. 3734.57(B)(1)-(3) and provide for the

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[1] It is also possible to create a regional solid waste management authority. *See* R.C. 343.011. That arrangement is not mentioned in your request and is not addressed in this opinion.

allocation of moneys derived from R.C. 3734.57(B)(1)-(3) among the purposes enumerated in R.C. 3734.57(G)(1)-(9). R.C. 3734.53(B). The fee provisions are discussed below.

Allocation of Fees Levied Under R.C. 3734.57(B)(1)-(3)

R.C. 3734.57(B) authorizes the solid waste management policy committee of a county or joint solid waste management district to levy fees upon the disposal of solid wastes at a solid waste disposal facility located in the district. The fees are levied "[f]or the purpose of preparing, revising, and implementing the solid waste management plan of the county or joint solid waste management district." R.C. 3734.57(B). They are paid to the board of county commissioners or board of directors of the district. R.C. 3734.57(E). R.C. 3734.57(G) states that the moneys must be expended "in accordance with the district's solid waste management plan or amended plan...exclusively for" specified purposes. R.C. 3734.57(G). Among the permissible purposes is "[i]mplementation of the approved solid waste management plan or amended plan of the district." R.C. 3734.57(G)(2); *accord* 5 Ohio Admin. Code 3745-28-03(F)(2).

Closure and Post-Closure of a Solid Waste Disposal Facility

Your questions relate to expenses that are required for closure and post-closure activities at a solid waste disposal facility. The facility in question is a landfill that is owned by the county. The landfill has no remaining disposal capacity. It stopped accepting waste several years ago, and it now requires proper closure and post-closure care, in accordance with R.C. 3734.02(A) and rules adopted thereunder.

"Closure" is defined to include:

> measures performed to protect public health or safety, to prevent air and water pollution, or to make the facility suitable for other uses, if any, including, but not limited to, establishment and maintenance of a suitable cover of soil and vegetation over cells in which hazardous waste or solid wastes are buried; minimization of erosion, the infiltration of surface water into such cells, the production of leachate, and the accumulation and runoff of contaminated surface water; the final construction of facilities for the collection and treatment of leachate and contaminated surface water runoff; the final construction of air and water quality monitoring facilities; the final construction of methane gas extraction and treatment systems; or the removal and proper disposal of hazardous waste or solid wastes from a facility when necessary to protect public health or safety or to abate or prevent air or water pollution.

R.C. 3734.01(O). The Director of Environmental Protection is authorized to provide, by rule, requirements for the closure and post-closure of a hazardous or solid waste facility. R.C. 3734.02, .12(D)(8); *see also* R.C. 3734.12(D)(7), (F)(3).[2]

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[2] Existing provisions governing the issuance of permits and licenses for solid waste facilities require assurances that proper closure and post-closure care will be provided. *See, e.g.,* R.C.

Authority of a Joint Solid Waste Management District to Expend Fees Collected Pursuant to R.C. 3734.57(B) for Closure and Post-Closure Activities at a Solid Waste Disposal Facility

Your first question assumes that Athens County remains a part of a joint solid waste management district and asks whether the board of county commissioners may request the board of directors of the district to include, as part of the joint district plan, a description of and schedule for closure and post-closure activities at the landfill in question and to use a portion of the fees collected under R.C. 3734.56(B) to implement those closure and post-closure activities. It is clear, as your question indicates, that, if Athens County remains a part of a joint solid waste management district, the Athens County commissioners cannot, by their own action, make decisions on behalf of the district. Rather, those decisions must be made by the designated representatives of the district or as otherwise provided by statute. *See, e.g.,* R.C. 343.01(B) (a joint solid waste management district is managed by its board of directors; a majority of the board constitutes a quorum and a majority vote is required for the board to act); R.C. 3734.53-.55 (preparation and adoption of joint district solid waste management plan). Thus, the Athens County commissioners cannot include the landfill in question as part of the joint district plan except with the consent of the district as a whole.

The essence of your question, then, is whether the joint district if it chooses, may include within its plan a description of and schedule for closure and post-closure activities at a county-owned landfill that ceased to accept wastes before the plan was prepared, and use fees collected under R.C. 3734.57(B) to implement those activities. The statutory scheme, as outlined above, does not expressly discuss the inclusion of such an arrangement as part of a solid waste management plan. The provisions governing the preparation and adoption of a plan are, however, broad enough to permit a joint district to include such an arrangement in its plan. As discussed above, R.C. 3734.57(B) permits fees to be levied "[f]or the purpose of preparing, revising, and implementing" the solid waste management plan of the district, and R.C. 3734.57(G) provides that the proceeds may be expended, in accordance with the district's solid waste management plan, for purposes including "[i]mplementation of the approved solid waste management plan or amended plan of the district." Thus, if the expenditure of such fees for the closure and post-closure of the landfill in question is part of the joint district's approved solid waste management plan, then the fees may be expended for that purpose.

The provisions governing solid waste management plans do not directly address the type of situation with which you are concerned. As discussed above, however, the statutes do provide that the plan must include an inventory of all existing facilities within the district where solid wastes are being

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3734.02(A), .05(A)(6); 5 Ohio Admin. Code 3745-27-11, -14, -15, -16. Rules 3745-27-15 and 3745-27-16 provide that the permittee of a solid waste facility must "establish financial assurance" for final closure and post-closure care of the facility, in accordance with applicable provisions. 5 Ohio Admin. Code 3745-27-15 and -16; *see also* 5 Ohio Admin. Code 3745-27-17. A permittee may be a public or private entity. *See* 5 Ohio Admin. Code 3745-27-01(OO), (PP); *see also* 5 Ohio Admin. Code 3745-27-15.

disposed of, and further provide that the schedule for implementation of the plan must include a schedule for closure of existing solid waste facilities. R.C. 3734.53(A)(2), (12). The plan is designed to provide a comprehensive scheme for solid waste disposal within the district for a period of ten years or more. The provision of closure and post-closure care of landfills and other solid waste disposal facilities is an intrinsic part of providing a comprehensive scheme for solid waste disposal. The provisions governing a joint district plan do not require that the plan include all sites within the district that have in the past been used for solid waste disposal. Instead, the plan is primarily prospective. The statutes do not, however, prohibit a plan from including a publicly-owned landfill that has no remaining capacity but is in need of closure and post-closure care as required pursuant to R.C. 3734.02(A). The need to close and care for a publicly-owned landfill properly is part of the solid waste disposal demand placed upon the county and, as such, may appropriately be included within the joint district's plan. The plan is, of course, subject to review and approval by the Director of Environmental Protection in accordance with R.C. 3734.54-.55 and related provisions, and, further, must be ratified by the appropriate entities as provided in R.C. 3734.55.

The fact that the closure of solid waste disposal facilities may properly be part of a solid waste management plan is clear from the requirement of R.C. 3734.53(A)(12)(b) that a schedule for such closure be included in the plan. The conclusion that the plan may include sites existing prior to creation of the plan is consistent with R.C. 3734.52, which states, in part:

> The solid waste management plan or amended plan of each county or joint district shall provide for the maximum feasible utilization of solid waste facilities that were in operation within the district, or for which permits were issued under [R.C. 3734.05], on or before the effective date of the plan or amended plan and that are in compliance with [R.C. 3734.01 to 3734.13] and rules adopted under those sections.

In conversations between your representatives and members of my staff, it has been suggested that there may be an interest in having the board of county commissioners transfer ownership of the landfill to the joint solid waste management district. Such a transfer would clearly be permitted. R.C. 343.01 authorizes a county participating in a joint solid waste management district to contribute lands, or rights or interests in lands, to the district, and authorizes the board of directors of a joint solid waste management district to accept gifts and devises and to take other actions necessary to control and manage the joint district. The rights or interests of a particular county may be specified by agreement. R.C. 343.01(B). There is, further, express authority for the board of directors of a joint district to "acquire, by purchase or lease, construct, improve, enlarge, replace, maintain, and operate" such solid waste disposal facilities as are necessary for the protection of the public health. R.C. 343.01(C).

It does not, however, appear that it is necessary for a participating county to transfer a landfill to a joint district for the landfill to be included in the joint district's plan. R.C. 343.01(C) authorizes a board of county commissioners to acquire real property for use by a joint district. Further, the statutory provisions governing the preparation of plans and expenditure of fees collected under R.C. 3734.57(B) are not expressly restricted to district-owned facilities. *See, e.g.*, R.C. 3734.52, .53.

Authority of a County Solid Waste Management District to Expend Fees Collected Pursuant

to R.C. 3734.57(B) for Closure and Post-Closure Activities at a Solid Waste Disposal Facility

Your second question relates to the same landfill that is at issue in your first question. You assume, for purposes of this question, that Athens County withdraws from the joint district and forms a single county district.[3] You ask whether, in those circumstances, the county could transfer its ownership of the existing landfill to the district, include in its solid waste management plan a description of and schedule for closure and post-closure activities at the landfill, and use a portion of the fees collected under R.C. 3734.57(B) to implement those closure and post-closure activities.

The provisions discussed above with respect to the inclusion of closure and post-closure activities in a solid waste management plan and the use of fees collected under R.C. 3734.57(B) for those activities apply to single county solid waste management districts as well as to joint districts. Thus, if such activities are included in a single county solid waste management plan, they can be implemented in accordance with that plan.

Your question also asks whether the county may transfer its ownership of the existing solid waste disposal facility to the county district in preparation for including the closure and post-closure activities in the plan and using a portion of the fees collected pursuant to R.C. 3734.57(B) to implement the closure and post-closure activities. In conversations between your representatives and members of my staff, it has become apparent that transfer of ownership is not an issue of importance, provided that the fees in question may be expended for closure and post-closure activities if ownership remains in the county. Since this opinion concludes that the fees may be expended for those purposes regardless of whether the county or the district owns the landfill, provided that such expenditure is included within an approved solid waste management plan, it is unnecessary to address in detail the question of transfer of ownership.

It may, however, be noted that, while a joint county solid waste management district is clearly an independent entity for ownership purposes, *see*, R.C. 343.01(B), (C), it is not clear that a single county solid waste management district is an entity separate from the county that creates it. It appears, instead, that a single county solid waste management district is an agency of the county.[4] The board of county commissioners is authorized to hold property of the county, *see Carder v. Board of Commissioners*, 16 Ohio St. 353 (1865), and is also granted authority to hold property on behalf of a single county solid waste management district, *see* R.C. 343.01(C), .08. Moneys of a county district are

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[3] Your request references the reorganization process established by uncodified Section 5 of H.B. 723. *See* Sub. H.B. 723, 119th Gen. A. (1992) (eff. April 16, 1993). It is recognized that the process established by H.B. 723 has a number of steps and some distinct time limitations. Since, however, you have not raised any questions concerning that process, this opinion does not discuss it.

[4] This conclusion is reached notwithstanding the fact that the territory encompassed by a single county solid waste management district may differ from the territory of the county, depending upon municipal boundaries. *See* R.C. 343.01(A); R.C. 3734.52(A).

held by the county treasurer and expended by the county commissioners. *See* R.C. 343.08; R.C. 3734.57. The prosecuting attorney of the county is designated as the legal adviser of a county district and is authorized to provide such services as are provided "to other county boards" under R.C. Chapter 309. R.C. 343.01(E)(1) (also permitting the employment of other legal counsel). In addition, the board of county commissioners may use county moneys and issue county bonds or bond anticipation notes to pay costs of the district. *See* R.C. 343.01(D), (F). In contrast, the board of directors of a joint solid waste management district or board of trustees of a regional solid waste management authority may issue bonds or anticipation notes of the district or the authority. *See* R.C. 343.01(F), .011.

It thus appears that a board of county commissioners, as the governing body of both the county and a county solid waste management district, may designate certain county-owned real property for the use of the district, and may include in the solid waste management plan of the county district a county-owned landfill that is in need of closure and post-closure care. It does not, however, appear that such a designation will constitute a transfer of property from the county to the county solid waste management district. Instead, the property will continue to be held by the board of county commissioners.[5]

Duty of the Director of Environmental Protection To Disapprove Any Solid Waste Management Plan That Does Not Comply With R.C. 3734.53(A), (B), and (D)

The conclusion that a solid waste management plan may include provisions for closure and post-closure care of a county-owned landfill does not mean that the Director of Environmental Protection must, in all cases, approve a plan that contains such provisions. The Director is responsible for reviewing and commenting upon draft plans in accordance with R.C. 3734.54-.55. The standard for approval is "compliance with the requirements of" R.C. 3734.53(A), (B) and (D). R.C. 3734.55(C)(1). R.C. 3734.53(A) requires that, among other items, a solid waste management plan include a schedule for implementation of the plan that, when applicable, includes a schedule for closure of existing solid waste facilities and also the "methods of financing implementation of the plan and a demonstration of the availability of financial resources for that purpose." R.C. 3734.53(A)(12). If the Director finds that the plan does not demonstrate financial feasibility, he may find that it fails to satisfy R.C. 3734.53(A)(12) and disapprove it on that basis.

Similarly, R.C. 3734.53(B) provides for the solid waste management plan to establish the schedule of fees to be levied under R.C. 3734.57(B) and to provide for their allocation among the purposes enumerated in R.C. 3734.57(G)(1)-(9). The plan must:

> Ensure that sufficient of the moneys so credited to and available from the special fund are available for use by the solid waste management policy committee of the district at the time the moneys are needed to monitor implementation of the plan and conduct

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[5] A different result might be reached if a regional solid waste management authority were created. *See* R.C. 343.011; note 1, *supra.*

its periodic review and amendment as required under [R.C. 3734.56].

R.C. 3734.53(B)(2)(a). A plan that allocates for closure and post-closure care moneys that are needed for these monitoring and reviewing responsibilities is subject to disapproval by the Director of Environmental Protection for failure to comply with R.C. 3734.53(B)(2)(a).

Thus, the conclusion reached in this opinion that a county or joint solid waste management district may include in its solid waste management plan a description of and schedule for closure and post-closure activities at a county-owned solid waste disposal facility, and may provide for use of a portion of the fees collected pursuant to R.C. 3734.57(B) to implement those closure and post-closure activities, does not mean that every plan containing such provisions must be approved by the Director of Environmental Protection pursuant to R.C. 3734.55(C)(1). Rather, the Director has the responsibility of assuring that the financial priorities mandated by R.C. 3734.53 are observed, and the duty of disapproving a plan that does not provide an adequate demonstration of the availability of financial resources to implement the plan. As noted above, a county or joint district that materially fails to implement its plan as approved may be subject to enforcement orders of the Director of Environmental Protection. *See* R.C. 3734.55(E); *see also* R.C. 3734.13(A).

Conclusion

It is, therefore, my opinion, and you are advised, as follows:

1. Subject to review and approval of the Director of Environmental Protection, the solid waste management plan of a joint solid waste management district, prepared in accordance with R.C. 3734.53-.55, may include a description of and schedule for closure and post-closure activities at a solid waste disposal facility that is owned by a county participating in the district and that ceased to accept wastes before the plan was prepared, and may provide for use of a portion of the fees collected pursuant to R.C. 3734.57(B) to implement those closure and post-closure activities.

2. Subject to review and approval of the Director of Environmental Protection, the solid waste management plan of a county solid waste management district, prepared in accordance with R.C. 3734.53-.55, may include a description of and schedule for closure and post-closure activities at solid waste disposal facility that is owned by the county and that ceased to accept wastes before the plan was prepared, and may provide for use of a portion of the fees collected pursuant to R.C. 3734.57(B) to implement those closure and post-closure activities.

3. The board of county commissioners of a county that participates in a joint solid waste management district may, with the consent of the joint district, transfer to the joint district a county-owned landfill that is in need of closure and post-closure care.

4. The board of county commissioners of a county that maintains a single county solid waste management district may designate a county-owned landfill for use by the county solid waste management district, and may include in the solid waste management plan of the county district a county-owned landfill that is in need of closure and post-closure care; the ownership of the landfill will remain in the board of county commissioners.

Respectfully,

LEE FISHER
Attorney General

September 3, 1993

The Honorable William R. Biddlestone
Athens County Prosecuting Attorney
Athens County Court House
Athens, Ohio 45701

SYLLABUS: 93-018

1. Subject to review and approval of the Director of Environmental Protection, the solid waste management plan of a joint solid waste management district, prepared in accordance with R.C. 3734.53-.55, may include a description of and schedule for closure and post-closure activities at a solid waste disposal facility that is owned by a county participating in the district and that ceased to accept wastes before the plan was prepared, and may provide for use of a portion of the fees collected pursuant to R.C. 3734.57(B) to implement those closure and post-closure activities.

2. Subject to review and approval of the Director of Environmental Protection, the solid waste management plan of a county solid waste management district, prepared in accordance with R.C. 3734.53-.55, may include a description of and schedule for closure and post-closure activities at solid waste disposal facility that is owned by the county and that ceased to accept wastes before the plan was prepared, and may provide for use of a portion of the fees collected pursuant to R.C. 3734.57(B) to implement those closure and post-closure activities.

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4. The board of county commissioners of a county that maintains a single county solid waste management district may designate a county-owned landfill for use by the county solid waste management district, and may include in the solid waste management plan of the county district a county-owned landfill that is in need of closure and post-closure care; the ownership of the landfill will remain in the board of county commissioners.