

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW

STATE OF OHIO

BOARD OF COUNTY COMMISSIONERS :  
OF CRAWFORD COUNTY : Case No. EBR 172663  
AND :  
ROBERT BOWMAN, ET AL. : Case No. EBR 702665-702675  
: Appellants, :  
v. :  
DONALD SCHREGARDUS, DIRECTOR :  
OF ENVIRONMENTAL PROTECTION, ET AL. :  
Appellees. : Issued: August 25, 1992

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
FINAL ORDER

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Issued By:

ENVIRONMENTAL BOARD OF REVIEW  
Peter A. Precario, Chairman  
Julianna F. Bull, Vice-Chairwoman  
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FINDINGS OF FACT  
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The present case represents several different appeals which have been consolidated for purposes of de novo hearing and final decision. In general, the appeal questions the reasonableness and the lawfulness of the Director's decision in approving the Richland County Solid Waste Management Plan. EBR Case No. 172663 is an appeal of the Director's action by the Crawford County Board of Commissioners. EBR cases, numbers 72665 through 72675, are appeals filed by eleven solid waste haulers operating in Richland County, Ohio.

All Appellants in the various cases were represented by Messers, Joseph A. Gregg, Dirk P. Plesner and David W. Nunn of Eastman & Smith, Toledo, Ohio. Appellee Richland County Solid Waste Management District was represented by Messers J. Roger Renwick and Harry M. Welsh of Mansfield, Ohio. Appellee Director was represented by Ms. Gertrude M. Kelly and Mr. Todd M. Musheff, Assistant Attorney's General.

The cases were consolidated for purposes of de novo hearing and a hearing was held on June 2, 1992 through June 4, 1992. Based upon the evidence produced at that hearing, the record certified to this Board by the Director pursuant to Chapter 3745 of the Revised Code and the pleadings of the parties, the Board makes the following findings of fact and conclusions of law and final order.

FINDINGS OF FACT

Background

1. Appellant, Crawford County, operates a licensed solid waste landfill generally known as the Crawford County Sanitary Landfill. This landfill, which has been in operation since 1969, has, over the years, accepted solid waste which has been generated and collected from within Richland County which lies

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immediately to the east of Crawford County. In general, the bulk of the Richland County waste disposed of in Crawford County is picked up on routes in, or near, Shelby, Ohio. Shelby is located near the Crawford County line. The Crawford County landfill is the closest landfill in the Shelby area and other areas along the western edge of Richland County.

2. In 1987 and 1988, the Richland County landfill reached its total capacity. It was finally closed on May 31, 1988. While it had been in operation, the Richland County landfill had accepted waste generated and collected from within Richland County as well as waste which had been generated and collected in other counties including Crawford.

3. As a result of the closing of the Richland County landfill, the Richland County Commissioners authorized and commenced the construction and the operation of the Richland County solid waste transfer station to handle the County's solid waste. The transfer station is located in Mansfield, Ohio. (Appellee Exhibit 28)

4. In order to finance the transfer station, Richland County issued general obligation bonds. These bonds provided that all principal and interest would be payable primarily from any net revenues collected from the operation of its transfer station. (Appellee Exhibit 30)

5. In order to ensure and guarantee that sufficient revenue was generated, the County Commissioners established what is commonly known as "flow control" in Richland County by Resolution on March 31, 1988. Flow control, as it used here, generally means that all garbage and refuse generated and collected within the Richland County borders, be disposed of through the Richland County transfer station. (Appellee Exhibit 29)

6. At the time the Richland County plan was approved, there was pending in the Ohio EPA an application for a Permit to Install (PTI) a new landfill in Richland County. This landfill, called the Noble Road Landfill, was specified in the Plan as the source of the revenue which would fund the implementation of Richland County's solid waste management plan. At the time of hearing in this matter the landfill had not yet been permitted by the OEPA. (Appellant's Exhibit D, pp II-55)

House Bill 592

7. On June 24, 1988, House Bill 592 became effective. This bill, among the many other changes it initiated, required that all counties in Ohio form either an individual solid waste management district or combine with other counties to form joint solid waste management districts for the general purpose of dealing with the disposal of solid waste in a comprehensive fashion.

8. During 1988 and 1989, Richland County attempted to join with other counties, including Crawford, to form a joint solid waste management district. However, for a number of reasons, Richland County did not join with any other county. On March 23, 1989, the Richland County Commissioners established Richland County as a single county solid waste management district. (Appellee Exhibit 32)

9. Pursuant to the mandates of House Bill 592, Richland County carried out a number of organizational and procedural steps required to establish a solid waste management district. A solid waste management committee was established; a district planning committee was formed and met regularly; technical consultants were hired and a number of informational, procedural and substantive meetings

were held for the general public. (Appellee Exhibits 18 through 37)

10. Richland County sent questionnaires, on April 9, 1990, to all known solid waste haulers in the area in an attempt to collect information on the solid waste collection systems in Richland County. A number of those haulers, including some of the Appellants in the present case, submitted information to the County. (Appellee Exhibits 2 - 13)

Richland County Solid Waste Management Plan

11. Pursuant to House Bill 592, the Richland County district, as with all other districts in the State, was required to submit a comprehensive solid waste management plan for its district. On April 13, 1990, the Richland County Solid Waste Planning Committee applied for and received from the Ohio EPA a six month extension of time within which to file its draft solid waste management plan as required by statute. (Appellee Exhibit 39)

12. A number of public, informational meetings were held regarding the development process of the Richland County plan. A number of extra meetings -- beyond those required by law -- were held for the general public and one additional meeting was held solely for the information of the waste haulers. Notices of these meetings were widely distributed by mail and were also published in the Mansfield News Journal which is a general circulation newspaper in Mansfield and throughout Richland County. (Appellees Exhibits 20-23)

13. Pursuant to section 3734.55 of the Revised Code the revised version of the Richland County Solid Waste Management Plan was properly ratified by the appropriate number of political subdivisions (those having at least 60% of the population of the district) within the Richland County district. The City of

Shelby, the second largest political subdivision in Richland County, did not ratify the revised plan. (Appellants Exhibit D, Appendix E; Appellee Exhibit 26; Appellee Exhibit 46)

OEPA Review Of The Richland County Plan

14. On December 24, 1990, the Richland County Solid Waste Management District submitted its draft solid waste management plan to the Director for initial review and comments by the OEPA as provided in section 3734.55.

15. On March 6, 1991, the Ohio Environmental Protection Agency issued a non-binding, advisory opinion on the Richland County draft plan. The advisory opinion recommended a number of changes to the Richland County district for consideration and possible inclusion in the final plan submitted to the Ohio EPA. The advisory opinion consisted of twelve pages of detailed comments on various aspects of the Richland County draft plan. The comments, in general, were intended to clarify certain points in the draft plan and to assist in its ultimate approval. (Certified Record Document 9; Appellant Exhibit B; Appellee Exhibit 16)

16. Among the numerous comments, the EPA advisory opinion recommended that the Crawford County landfill should be included in the "inventory section" of the Richland County plan because it had been being used for the disposal of some Richland County waste. Changes were also called for in the "designation" section. For some reason the Crawford County landfill had not been listed as a disposal site in this inventory section of the Richland County draft plan. This change was made and the Crawford County landfill was included by Richland County in the inventory section of its final plan. No significant changes were made

however, to the designation section of the plan and the Crawford County landfill was not added as a designated site. (Certified Record Document 9; Appellant's Exhibits B, D)

17. In general, the Ohio EPA review of the draft Richland County plan was complete and comprehensive. While it found that there were some areas of confusion and concern in the draft plan, the OEPA made reasonable attempts and exercised reasonable judgment in clarifying those issues and recommending modification to the plan where change was warranted to insure that the plan met the essential statutory requirements.

18. On October 30, 1990, Richland County submitted its final solid waste management plan to the Ohio EPA. After a final review of the plan by the OEPA staff, it was approved by the Director on February 12, 1992. While certainly less than ideal, the reviews of both the draft and final Richland County solid waste management plans were comprehensive, reasonable, and were designed to insure that the plans met the minimum requirements called for in Section 3734.53 of the Revised Code.

19. While the Richland County plan is itself not perfect and while its approval may have been a "close call", it does contain all of the information necessary to meet the requirements of the Revised Code section 3734.53 et seq. As the record also reveals here, the plan document did not perfectly comply with the Ohio EPA "format document", however the plan does meet all of the basic requirements of the Revised Code itself. (Certified Record Document 2; Appellant's Exhibits C, Z p.14)

20. In order to assist in making its review of the county plans the OEPA had written and used a guide known as the "Format Document". In general, the

Ohio EPA format document was designed to provide some degree of uniformity to the review of the solid waste management plans being submitted to the Ohio EPA by the various solid waste management districts around the State. Its goal and purpose was to assist the Ohio EPA in reviewing the data and information contained in the various plans and to provide the districts with some degree of guidance as to how the plans should be organized and put together for submittal. As the record indicates, the format document was not intended to be a fixed formula for plan submittals nor was it intended to be a mandatory filing model or outline. (Appellant's Exhibit C, pg.ii)

Solid Waste Flow Control

21. The record produced here does indicate that the implementation of flow control by Richland County will have a significant impact upon the practices and business of waste collection and disposal in Richland County. In addition, it will have a substantial impact on waste disposal at the Crawford County Landfill.

22. The record here demonstrates that traditionally the Crawford County landfill received between six thousand and seven thousand tons per year of solid waste generated and collected from within Richland County. While waste receipts in Crawford County fell substantially in 1989, apparently as a result of a substantial increase in their tipping or disposal fees, historically Crawford County did receive substantial amounts of waste from Richland County.

Crawford County Solid Waste Management Plan

23. On September 24, 1991, the Ohio EPA approved the Crawford County Solid Waste Management District's final, solid waste management plan. (OEPA Exhibit



24. The Crawford County plan approved by the Ohio EPA included receipt and revenue projections for out-of-county waste being disposed of within Crawford County during the stated planning period. While the Crawford County plan does not explicitly state what quantities of waste were anticipated individually from Richland County, the general projection numbers did include some factor for the Richland County waste. (Ohio EPA Exhibit 2)

25. The record in the present case does reveal, however, that the Crawford County Solid Waste Management Plan does provide for the eventual phasing-out of out-of-district waste after 1994. Clearly, the Crawford County plan did not provide for accepting Richland County waste for the ten-year planning period. (Ohio EPA Exhibit 2, page 2-8)

#### WASTE HAULER CONTRACTS

26. In an attempt to preserve a waste receipt and revenue stream into its landfill, during the Summer of 1991, contracts were negotiated with all waste haulers utilizing the Crawford County landfill for disposal. These contracts were negotiated by Crawford County with both in-county and out-of-county haulers. Among other things, these contracts provided that the Appellants, Richland County haulers, were to dispose of any waste collected in Richland County at the Crawford County landfill. The contracts in question were not executed by Crawford County itself until after its solid waste management plan was approved by the Ohio EPA on September 24, 1991. (Appellants Exhibit E)

CONCLUSIONS OF LAW

1. Section 3734.53(A) of the Ohio Revised Code is the section which sets out the twelve basic areas which are to be addressed by a county or joint solid waste management district in their solid waste management plans. Because of its length, that Section is not cited here.

2. Section 3734.55(C)(1) sets out the standard of review which the Director is to apply in reviewing solid waste management plans. That section provides, in relevant portion:

... Upon ratification of the draft plan under division (B) of this section, the committee shall submit it to the director for review and approval for compliance with the requirements of divisions (A), (B), and (D) of section 3734.53 of the Revised Code. ...

Solid Waste Flow Control

3. The authority for flow control, as it is used in this case, originates in Section 343.01(H)(2) of the Revised Code. This Section provides, in part:

No person, municipal corporation, township, or other political subdivision shall deliver, or cause the delivery of, any solid wastes generated within a county or joint district to any solid waste transfer, disposal, recycling, or resource recovery facility other than the facility designated in the Solid Waste Management Plan or amended plan of the district approved under Section 3734.55 or 3734.56 of the Revised Code. Upon the request of the legislative authority of a municipal corporation or township, the board of county commissioners of a county district or board of directors of a joint district may authorize the delivery of all or any portion of the solid wastes generated in the municipal corporation or township to a ... facility other than the facility designated in the district's approved or amended plan, regardless of whether the other facility is located within or outside of the district.

...

4. The apparent rationale for authorizing flow control within a county district or a joint district is to insure the proper implementation of a district plan and to protect the financing or the source of revenue for the district's facilities or its approved plan or amended plan. While flow control may be a significant and critical element of a county or district plan, it is not a form of regulation mandated for inclusion in a plan under Section 3734.53 of the Revised Code. It is discretionary with a county or joint district. Nothing in section 3734.53, nor anything brought before the Board at the de novo hearing of this matter, indicates that a plan can be deemed to be deficient if it fails to implement flow control in one fashion over another. Likewise, nothing in the Code requires that the Director must approve, or disapprove, a plan based on flow control implementation or lack of such implementation by a district.

5. Pursuant to Section 343.01 and 3734.53, the implementation of flow control and the extent of its application throughout a county or joint district is left clearly within the discretion of the county or joint district. No authority has been granted to the Director to either mandate or to review flow control requirements and implementation by the solid waste districts.

Waste Hauler Contracts

6. While the contracts negotiated and entered into between Crawford County and the in-county and out-of-county haulers may very well have created a legal dilemma regarding the legal rights and relationships between some or all of the parties to this proceeding, they do not impact upon the validity of the Director's action in approving the Richland County plan.

7. Sections 3734.53 et seq. of the Revised Code do not mandate the

district plans to discuss nor do they require or authorize the Director to review, consider or determine the impact of contractual rights and relationships between the many and various parties who are potentially affected by the adoption of a solid waste management plan. The authority to review contracts and determine the relative rights of the contracting parties is beyond the scope of the Director's jurisdiction and certainly beyond the scope of the review required of him in Section 3734.53 or 3745.55 of the Revised Code. A determination of the relative rights of the parties to the contracts executed in this matter must remain to be resolved by the Courts of the State of Ohio.

Licensing Of Haulers

8. Section 3734.53(C) provides, in relevant part, that:

The solid waste management plan of a county or joint district may provide for the adoption of rules under division (F) of Section 343.01 of the Revised Code after approval of the plan under Section 3734.55 of the Revised Code:

(1) prohibiting or limiting the receipt at facilities covered by the plan of solid wastes generated outside the district or outside a prescribed service area...

(2) governing the maintenance, protection and use of solid waste collection and solid waste disposal, transfer, recycling and resource recovery facilities within the district...

(3) governing development and implementation of a program for the inspection of solid wastes generated outside the boundaries of the State...

(4) exempting the owner or operator of any solid waste facility or proposed solid waste facility provided for in the plan from compliance with any amendment to a township zoning resolution. ...

9. The general authority contained in Section 3734.53(C) authorizes a

county or joint district to adopt rules under Section 343.01(F) of the Revised Code. Nothing within either of these sections explicitly authorizes a county or joint district to establish a waste hauler licensing program. By the same token, nothing in these same sections explicitly prohibits such regulations. Clearly, if such regulations were adopted by a county or joint district, the question of their validity would be an issue to be decided -- most likely -- by the courts. At this point, however, the question is purely speculative.

10. Nothing in the record of this case nor anything shown to the Board at the de novo hearing demonstrates that the Director has the authority to either approve or deny a plan based upon it explicitly calling for or authorizing such regulations. Very importantly, Section 3734.55 does not mandate nor authorize the Director to review a proposed plan regarding the establishment of such a waste hauler licensing program.

11. Most significantly, however, no evidence has been presented to the Board in its de novo hearing which would indicate that such regulations have been adopted or are to be adopted in Richland County. Thus, with respect to this issue, a determination of this matter would be speculative or advisory at best.

#### Billing Collection Costs

12. The evidence presented in this case demonstrates that the Richland County Solid Waste Management Plan provides for the collection of recyclable materials by the waste haulers. In this regard, the Plan prohibits the haulers, who are responsible for collecting those recyclables, from separately billing their customers for the collection of these recyclable materials.

13. The record produced in the de novo hearing of this matter demonstrates

that while the plan does not allow for a separate billing, it does allow the haulers to pass on the specific cost of recyclable collection to their customers as part of their general, overall cost of solid waste collection. The plan does not require the haulers to provide free collection of recyclables.

14. Again, nothing in Section 3734.53 or .55 of the Revised Code mandates nor authorizes the Director to review a county or district plan with regard to the legality or the appropriateness of a specific solid waste collection billing system. Thus, to the extent that a billing system provided for in a district solid waste management plan raises issues as to its legality, those legal issues are ones which must be decided by appropriate courts of law, not the Director.

Plan Implementation Financing

15. ORC Section 3734.53(A)(12)(d) states that county plans should contain a schedule of implementation that states:

The methods of financing implementation of the plan and a demonstration of the availability of financial resources for that purpose.

16. The Richland County Solid Waste Management Plan identifies, as the source of revenues to fund the district solid waste management plan, a landfill within the district, known as the Noble Road Landfill. While it was not operating, when the Richland County Solid Waste Management Plan was approved by the Director, there was an application for a Permit to Install the Noble Road Landfill pending before the Environmental Protection Agency.

17. Nothing in Revised Code Sections 3734.53(A)(12)(d) or 3734.55 nor anything presented at the hearing of this case demonstrates that the Director must determine or predict either the feasibility or the likelihood of success of

a district's solid waste management funding proposals. The Revised Code merely requires that the district solid waste management plans must address the methods of financing the plan's implementation and the availability of financial resources for this implementation.

18. The subsequent successes or failures of the funding mechanisms proposed in a plan are circumstances which must be dealt with by the districts as they occur. Events which occur or which may occur subsequent to the Director's approval do not directly affect the validity of the Director's review and approval of a plan.

19. The Richland County District Solid Waste Management Plan does in fact meet all of the financial resource requirements specified in Ohio Revised Code Section 3734.53(A)(12)(d).

20. Based upon the above, the action of the Director in this matter, approving the Richland County Solid Waste Management Plan was both reasonable and lawful and should be affirmed.

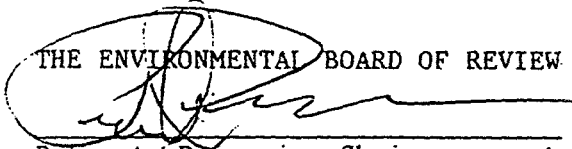
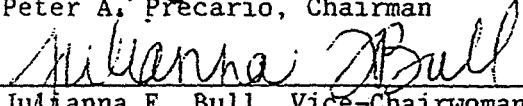
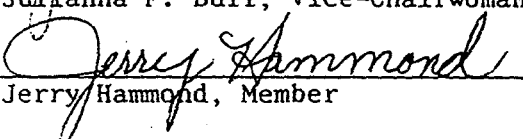
ORDER

The action of the Director under appeal herein is hereby affirmed.

The Board, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the

court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

THE ENVIRONMENTAL BOARD OF REVIEW  
  
Peter A. Precario, Chairman  
  
Julianna F. Bull, Vice-Chairwoman  
  
Jerry Hammond, Member

Entered in the Journal  
of the Board this 25<sup>th</sup>  
day of August, 1992.

COPIES SENT TO:

BOARD OF COUNTY COMMISSIONERS	(CERTIFIED MAIL)
OF CRAWFORD COUNTY	(CERTIFIED MAIL)
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DON HAYES, INC.	(CERTIFIED MAIL)
JIM KURTZ	(CERTIFIED MAIL)
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FINDINGS OF FACT  
AND FINAL ORDER  
CASE NO. EBR 172663 and  
EBR 702665-702675

C E R T I F I C A T I O N

I hereby certify that the foregoing is a true and accurate copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER in Board of County Commissioners of Crawford County, Ohio and Robert Bowman, et al. v. Donald Schregardus, Director of Environmental Protection et al, Case No. EBR 172663 and EBR 702665-702675 entered in the Journal of the Board this 25<sup>th</sup> day of August, 1992.

Mary J. Oxley  
Mary J. Oxley, Executive Secretary

Dated this 25<sup>th</sup> day of  
August, 1992, at Columbus, Ohio.

ENFORCEMENT  
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OHIO



Attorney General  
Lee Fisher

M E M O R A N D U M

TO: All EES Attorneys  
FROM: Todd M. Musheff and Gertrude M. Kelly, AAGs  
Environmental Enforcement Section  
DATE: September 1, 1992  
RE: Recent EBR Solid Waste Decision

=====

The attached EBR decision involves a challenge by one county to the Director's approval of a House Bill 592 Solid Waste Management Plan of an adjoining county. Basically, Crawford County and various solid waste haulers wanted to prevent Richland County's implementation of flow control that would mandate all of Richland County's trash be disposed of through a Richland County facility. Crawford County sought to lose big bucks on Richland County's trash and basically brought this appeal to try to force a settlement.

This opinion covers a variety of issues relevant to solid waste management plans and broadly construed the Director's authority in approving such a plan. Specifically, the Board held that Ohio law does not require a solid waste management plan to implement flow control in any particular fashion and that the extent of flow control application through a county or management district is within the discretion of that county or district. Likewise, the impact that the implementation of a plan has on pre-existing contracts of entities within the district is an implementation issue that would be resolved by the affected parties in an appropriate court. The Board also held that the Director is not required to determine or predict the likelihood of success of a solid waste management plan's funding mechanism, but is allowed to base a plan approval on the information provided. If future reality does not comport to the predictions of these planning documents, there is a provision for amendments to the plan to correct these inconsistencies. Finally, the Board also noted in passing that the relevant provisions of the Revised Code do not require the Director to review such rules as a solid waste management district may promulgate, including any waste hauler licensing or provisions for the billing of recycling services to the residents of a county.

TMM:pfm  
Encl.

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