

**OPINION NO. 94-072****Syllabus:**

1. A township is responsible for submitting and implementing a plan for explosive gas monitoring of a closed sanitary landfill pursuant to R.C. 3734.041(A) only if the township is the owner or operator of the closed landfill or the subsequent owner, lessee, or other person who has control of the land on which the closed landfill is located.
2. For purposes of R.C. 3734.041(A), the terms "owner" and "operator" have the meanings set forth in [1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 3745-27-01(B) (22) and (23), at 1565. Whether a particular township comes within one of these definitions is a question of fact that cannot be determined by an opinion of the Attorney General.

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**To: David A. Sams, Madison County Prosecuting Attorney, London, Ohio**  
**By: Lee Fisher, Attorney General, October 14, 1994**

You have asked for an opinion concerning the explosive gas monitoring of closed landfills under R.C. 3734.041. Your request states, in part:

§3734.041 O.R.C. specifies in pertinent part that an owner or operator holding a license for a sanitary landfill located within 1,000 feet of a dwelling, and the owner or operator of any closed landfill so situated and for which a license was previously issued, or the subsequent owner, lessee or other person who has control of the land on which the closed landfill is located shall comply with Ohio E.P.A. regulations concerning explosive gas monitoring.

Assume that a landfill was once operated on a tract of land owned by an individual who obtained a proper license. Assume further that two townships contracted with the licensed landowner to allow their citizens to dump refuse there. The landfill was subsequently closed.

Are the townships to be considered owners or operators under §3734.041 O.R.C.? If so, is the intent of the statute to make only licensees liable first for

the costs of monitoring, to be followed by those who merely owned or operated the landfill for which a license was issued, to then lastly be followed by subsequent owner, lessees and those merely in control of the land on which the closed landfill is situated?

In other words, is the liability scheme of the statute analogous to the liability of a surety under contract law? Are owners and operators of a closed landfill for which a license was issued liable for monitoring costs only after the E.P.A. has exhausted its remedies against owners or operators who actually possessed the license? In like fashion, does liability attach to subsequent owners, lessees or those in control of the land only after the E.P.A. has exhausted its remedies against licensed owners or operators and owners or operators of a closed landfill for which a license was issued?

### **Explosive Gas Monitoring Requirements**

R.C. 3734.041 imposes requirements for monitoring explosive gas levels at certain landfills and closed landfills, as follows:

*The owner or operator holding a license issued under division (A) of section 3734.05 of the Revised Code for a sanitary landfill that is so situated that a residence or other occupied structure off the premises of the landfill is located within one thousand feet horizontal distance from the exterior boundary of the landfill, and the owner or operator of any closed landfill that is so situated and for which a license was issued under division (A) of section 3734.05 of the Revised Code, or the subsequent owner, lessee, or other person who has control of the land on which the closed landfill is located, shall, within sixty days after the effective date of the rules adopted under division (F) of this section, submit an explosive gas monitoring plan for the landfill or closed landfill to the director of environmental protection for approval for compliance with those rules. After approval of the plan, the owner or operator of the landfill, or, in the instance of a closed landfill, the owner or operator of the closed landfill, or the subsequent owner, lessee, or other person who has control of the land on which the closed landfill is located shall conduct monitoring of explosive gas levels at the landfill or closed landfill, and submit written reports of the results of the monitoring to the director and the board of health of the health district in which the landfill is located in accordance with the approved plan and the schedule for implementation contained in the approved plan.*

R.C. 3734.041(A)(emphasis added). Rules adopted by the Director of Environmental Protection implement the statutory requirements and establish standards for explosive gas monitoring. See R.C. 3734.041(F); [1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 3745-27-12, at 1595-99.

As your letter indicates, the need to provide a plan for explosive gas monitoring and then to conduct such monitoring affects only landfills located within one thousand feet of a residence or other occupied structure. When a landfill is so situated, the duty of explosive gas monitoring is placed upon "the owner or operator" holding a license issued for the landfill under R.C. 3734.05(A), "the owner or operator of any closed landfill" for which a license was issued under R.C. 3734.05(A), or "the subsequent owner, lessee, or other person who has control of the land on which the closed landfill is located." R.C. 3734.041(A). Your questions relate to a landfill

that has been closed, and this opinion considers only that situation. See [1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 3745-27-12(A)(3), at 1596.

**Meaning of "Owner" and "Operator" for Purposes of R.C. 3734.041.**

Your first question is whether a township is considered to be an owner or operator under R.C. 3734.041 in the circumstances described in your letter. The terms "owner" and "operator" are not defined in R.C. 3734.041 or elsewhere in R.C. Chapter 3734. Those terms, however, are defined in the Ohio Administrative Code, for use in rule 3745-27-12 and other rules governing solid waste disposal facilities, in the following manner:

(22) "*Operator*" or "solid waste facility operator" means the *person responsible for the on-site supervision of technical operations and maintenance of a solid waste facility*, or any parts thereof, which may affect the performance of the facility and its potential environmental impact and/or any *person who has authority to make discretionary decisions concerning the daily operations* of the solid waste facility.

(23) "*Owner*" or "property owner" means the person who *holds title to the property* on which the solid waste facility or infectious waste treatment facility is located.

[1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 3745-27-01(B), at 1565 (emphasis added). "Person" is defined to include the state and its political subdivisions, including townships. See R.C. 3734.01(G); [1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 3745-27-01(B)(25), at 1566.

Under these definitions, the "owner" of a sanitary landfill is the person who holds title to the property on which the solid waste facility is located. The facts that you have presented state that the townships do not hold title to the tract of land on which the landfill is located. Therefore, a township is not an "owner" for purposes of R.C. 3734.041 in the situation you have described. The words "lessee, or other person who has control of the land" are also used in R.C. 3734.041 in connection with a closed landfill. Your facts do not indicate that the townships have leased the land, nor do they suggest that the townships are in control of the land. Whether, as a matter of fact, the townships have control of the land depends upon the circumstances of the situation and cannot be determined by an opinion of the Attorney General. See, e.g., 1993 Op. Att'y Gen. No. 93-033, at 2-165 (syllabus, paragraph 1) (questions of fact "cannot be determined by means of an Attorney General opinion").

Under the definition contained in rule 3745-27-12, an operator is "the person responsible for the on-site supervision of technical operations and maintenance of a solid waste facility, or any parts thereof, which may affect the performance of the facility and its potential environmental impact" or "any person who has authority to make discretionary decisions concerning the daily operations of the solid waste facility." Your question relates to a closed landfill for which a license was issued to an individual under R.C. 3745.05(A). You have stated that the townships in question contracted with the licensed landowner to allow their citizens to dump refuse there. The description contained in your letter does not indicate that the townships have been responsible for on-site supervision of technical operations and maintenance or have had the authority to make discretionary decisions concerning daily operations. This would mean that the townships are not operators as defined in rule 3745-27-12. Whether a particular township comes within R.C. 3734.041 is ultimately, however, a question of fact that cannot be

determined by an opinion of the Attorney General. See, e.g., *Franklin County Regional Solid Waste Management Authority v. Schregardus*, 84 Ohio App. 3d 591, 603, 617 N.E. 2d 761, 769 (Franklin County 1992) (upholding determination that the Franklin County Regional Solid Waste Management Authority, which was the prospective owner of the Franklin County Solid Waste Facility, would become the operator when it took over duties of daily control of landfill operations, whether or not there would be a subcontractor providing equipment and operators for actual construction movement); *Southwest Jackson Township Civic Association v. Maynard*, 24 Ohio App. 3d 133, 493 N.E. 2d 565 (Franklin County 1985) (finding that the Board of Commissioners of Franklin County would be the operator of the Franklin County solid waste disposal facility since evidence showed that the board or employees of the board would be in direct control of the daily operations of the landfill; the board could contract with agents to operate the landfill on its behalf so long as the agents were under the direct operational control of the board or its employees, but the board would not qualify as operator if it employed independent contractors who exercised their own operational control); *Rings v. Nichols*, 13 Ohio App. 3d 257, 260-61, 468 N.E. 2d 1123, 1127-28 (Franklin County 1983) (finding that the Board of Commissioners of Franklin County would not be the operator of a proposed landfill since the evidence did not show that the commissioners or their employees would directly control the daily operations of the landfill), *motion to certify overruled*, No. 83-1972 (Ohio S. Ct. Feb. 22, 1984)<sup>1</sup>; *Portage Landfill & Development Co. v. Shank*, No. EBR 671673 (Ohio Env. Bd. of Rev. Oct. 22, 1987) (determination as to who is the operator of a facility depends upon evidence relating to the various characteristics associated with an operator); see also [1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 3745-27-07(A)(3), at 1574 (indicating that the applicant for a sanitary landfill facility permit to install need not be the owner and operator).

### Questions of Liability

Your request raises a number of questions concerning liability for costs of explosive gas monitoring. As discussed above, it does not appear, on the facts you have presented, that the townships in question are persons upon whom duties under R.C. 3734.041 are imposed. Therefore, it is not necessary to address your other questions.

If, however, it should be determined that the townships may have a duty under R.C. 3734.041(A), it would be appropriate to turn to the courts for answers to your questions concerning liability. Research has disclosed no cases decided under R.C. 3734.041 that discuss the issues you have raised, and the statutory language imposes the same duty upon all persons named in R.C. 3734.041(A). See also [1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 3745-27-12(A)(3), at 1596 (imposing a duty under R.C. 3745.041, with respect to certain closed landfills, upon the "owner or operator, subsequent owner, lessee, or other person who has control of the land on which the closed landfill is located"). See generally 1994 Op. Att'y Gen. No. 94-028 at 2-127 ("[q]uestions of liability are dependent upon the facts of a particular situation and cannot be decided by opinion of the Attorney General").

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<sup>1</sup> When *Rings v. Nichols* was decided, the term "operator" had the following definition: "the person responsible for the direct control of operations at a solid waste disposal facility." *Rings v. Nichols*, 13 Ohio App. 3d 257, 260, 468 N.E. 2d 1123, 1127 (Franklin County 1983) (quoting Ohio Admin. Code 3745-27-01(O)). The current definition took effect on June 1, 1994. See [1993 -1994 Monthly Record, vol. 2] Ohio Admin. Code 3745-27-01(B)(22), at 1565.

**Conclusion**

For the reasons discussed above, it is my opinion and you are advised:

1. A township is responsible for submitting and implementing a plan for explosive gas monitoring of a closed sanitary landfill pursuant to R.C. 3734.041(A) only if the township is the owner or operator of the closed landfill or the subsequent owner, lessee, or other person who has control of the land on which the closed landfill is located.
2. For purposes of R.C. 3734.041(A), the terms "owner" and "operator" have the meanings set forth in [1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 3745-27-01(B) (22) and (23), at 1565. Whether a particular township comes within one of these definitions is a question of fact that cannot be determined by an opinion of the Attorney General.