OPINION NO. 92-045

Syllabus:

1. The provisions under which the Ohio Environmental Protection Agency exercises statewide regulation of sewage sludge disposal preclude a county combined health district from undertaking any local regulation that is in conflict with regulation of such matters by the Ohio EPA; a county combined health district may, however, adopt regulations governing the land application of sewage sludge that are necessary for the public health, the prevention or restriction of disease, or the prevention, abatement, or suppression of nuisances, provided that such regulations do not conflict with regulation by the Ohio EPA.

2. A county combined health district may not adopt regulations that would prohibit the land application of sludge when regulation by the Ohio EPA would permit it.

To: Timothy A. Oliver, Warren County Prosecuting Attorney, Lebanon, Ohio
By: Lee Fisher, Attorney General, September 22, 1992

You have asked whether a county combined health district may, pursuant to R.C. 3709.21, promulgate sewage sludge disposal regulations. The regulations in question govern the land application of sewage sludge, and this opinion addresses only that subject. For purposes of this opinion, the term "sewage sludge" is given the definition set forth in those regulations – *i.e.*, the stabilized sludge end product of a sewage treatment plant. That definition is consistent with the ordinary meaning of the term "sewage sludge." *See* R.C. 1.42; *Webster's New World Dictionary* 1342 (2d college ed. 1978) (defining "sludge" as "any heavy, slimy deposit, sediment, or mass, as...the precipitate in a sewage tank"); *see also* R.C. 3734.57(D)(5); R.C. 6111.01. Your question arises in view of the fact that, pursuant to R.C. 6111.46 and 5 Ohio Admin. Code 3745-31-02(B), the Ohio Environmental Protection Agency has exercised regulatory authority over the land application of sludge.

Health Districts

R.C. Chapter 3709 provides for the creation of health districts throughout the state and for the union of various health districts into combined districts. *See* R.C. 3709.01; R.C. 3709.051-.052; R.C. 3709.07; R.C. 3709.10. A county combined health district constitutes a general health district. *See* R.C. 3709.07. Pursuant to R.C. 3709.21, the board of health of a general health district "may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances."[1] R.C. 3709.21, thus, authorizes the board of health of a

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[1] R.C. 3709.21 expressly grants the board of health of a general health district certain power with respect to the disposal of sanitary wastes, as follows: "Such board may require that no human, animal, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch, or watercourse without a permit therefor having been secured from the board under such terms as the board requires." This power does not, however, apply directly to the land application of sewage sludge, which is the subject of your request.

county combined health district to regulate matters that are necessary for the public health or the prevention of nuisances, including matters relating to the land application of sewage sludge, unless some other provision of state law prevents the board of health of a county combined health district from undertaking such regulation. *See generally, e.g., Johnson's Markets, Inc. v. New Carlisle Department of Health*, 58 Ohio St. 3d 28, 36, 567 N.E. 2d 1018, 1026 (1991) ("all powers of governmental agencies [including health districts] are legislatively granted, and such agencies have only such regulatory authority as is granted, and the acts of such agency may not exceed such authority or be in direct conflict with the exercise of specific powers granted to state departments for statewide regulatory control"); *Schlenker v. Board of Health*, 171 Ohio St. 23, 25, 167 N.E.2d 920, 922 (1960) (upholding regulation by a board of health requiring pasteurization of milk where the regulation "does not contravene the statutory law but augments it"); 1980 Op. Att'y Gen. No. 80-066; 1974 Op. Att'y Gen. No. 74-023.

The Ohio Environmental Protection Agency

R.C. 6111.46 authorizes the Ohio Environmental Protection Agency ("Ohio EPA") to "exercise general supervision of the disposal of sewage and industrial wastes and the operation and maintenance of works or means installed for the collection, treatment, or disposal of sewage and industrial wastes." In the exercise of its statutory authority, the Ohio EPA has promulgated rule 3745-31-02(B), which states:

> In the case of land application of sludge, no person shall cause, permit, or allow sludge to be applied to land without first submitting and obtaining approval of detail plans from the director [of environmental protection]. Any plan approval issued for land application of sludge shall specifically describe the type, character, and composition of such sludge and shall specifically designate the method, terms and conditions of its application.

5 Ohio Admin. Code 3745-31-02(B); *see Perry v. Providence Township*, 63 Ohio App. 3d 377, 578 N.E.2d 886 (Lucas County 1991). The term "sludge" is not defined in the Revised Code or in corresponding regulations. It should, therefore, be given its ordinary meaning, as set forth above. *See* R.C. 1.42.

State Regulation

There is no statutory provision stating expressly that boards of health are prevented from undertaking any regulation of sewage sludge disposal because of the Ohio EPA's authority over that subject matter. Absent such an express provision, the question is whether the existence of the state-wide scheme for regulation by the Ohio EPA prevents a board of health from undertaking local regulation of sewage sludge disposal. In *Perry v. Providence Township*, the Lucas County Court of Appeals considered whether local regulation of the land application of sludge is preempted by the existence of the state regulatory scheme and stated: "The general test for determining whether a state statute, such as R.C. 6111.46, preempts a local regulation...is whether there is a conflict between the two provisions." 63 Ohio App. 3d at 380, 578 N.E.2d at 888. Conflict is found to exist when the local provision permits or licenses that which the statute forbids and prohibits, or vice versa. *See Village of Struthers v. Sokol*, 108 Ohio St. 263, 263, 140 N.E. 519, 519-20 (1923) (syllabus, paragraph 2). *Perry v. Providence Township* concluded that "R.C. 6111.46, through 5 Ohio Admin. Code 3745-31-02(B), implicitly permits the land application of sludge so long as the Ohio Administrative Code requirements are met." 63 Ohio App. 3d at 380, 578 N.E.2d at 888. The court found that the zoning provision in question, which totally banned the land application of sludge, was in direct conflict with state law because it forbade what the state permitted. The court also confirmed the trial court's conclusion that a township lacked statutory

authority to regulate the land application of sludge because such application was a use for an agricultural purpose and, therefore, exceeded the township's zoning authority.[2] *Perry v. Providence Township,* thus, stands for the proposition that the Ohio EPA's regulation of the land application of sludge precludes local regulation that is in conflict with the state scheme. *See generally Yorkavitz v. Board of Township Trustees*, 166 Ohio St. 349, 351, 142 N.E.2d 655, 657 (1957) ("the General Assembly cannot be held to have delegated to township officials the authority to adopt zoning regulations which are in contravention of general laws previously enacted by the General Assembly").

The conclusion that a county combined board of health may not regulate the land application of sludge in a manner that conflicts with regulation by the Ohio EPA is consistent with the relationship between Ohio EPA and boards of health in other areas of regulation. *See, e.g., Fairfield Sanitary Landfill, Inc. v. Fairfield County District Board of Health*, 68 Ohio App. 3d 761, 589 N.E.2d 1334 (Franklin County 1990) (in licensing a solid waste facility, a local board of health must defer to determinations by the Ohio EPA), *motion to certify overruled*, 58 Ohio St. 3d 710, 569 N.E.2d 512 (1991). *See generally* 1991 Op. Att'y Gen. No. 91-070.

When the General Assembly has intended that local health districts participate in the process of granting permits or other forms of approval, it has expressly so stated. *See, e.g.*, R.C. 3701.56 ("[b]oards of health of a general or city health district...shall enforce the quarantine and sanitary rules and regulations adopted by the department of health"); R.C. 3734.05, .08 (providing for a local health district to license solid waste facilities and infectious waste treatment facilities within its boundaries, if the health district is placed on an approved list by the Director of Environmental Protection). The statutory scheme does not provide for a county combined health district to participate in the implementation or enforcement of the Ohio EPA's regulation of the land application of sludge.[3]

Local Regulation

The conclusion that the statutes providing for regulation of the land application of sludge by the Ohio EPA preclude a county combined health district from undertaking local regulation that conflicts with the state scheme, would, nevertheless, permit local regulation that is consistent with the state scheme. In *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986), it was held that a local provision that required the payment of a permit fee and imposed record-keeping requirements did not alter, impair, or limit the operation of a state-licensed facility and, therefore, did not conflict with the state regulation. The *Fondessy* case concerns a municipal corporation; however, to the extent that the case speaks to the nature of a conflict between statutory provisions and local regulation, it appears to be applicable also to local entities that are lacking home rule powers. *See, e.g.*, 1988 Op. Att'y Gen. No. 88-099; 1988 Op. Att'y Gen.

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2 1988 Op. Att'y Gen. No. 88-051 found that the disposal of septage (contents gathered by a septic tank cleaning business) by land application was not an agricultural use of land and that, notwithstanding the issuance of a permit by the county board of health, the land remained subject to applicable township zoning regulations. It does not appear that "septage" is "sludge" for purposes of this opinion. Accordingly, Op. No. 88-051 is not directly applicable to your question.

3 The Ohio EPA's rules require that an application for plan approval of the land application of sludge be signed by, *inter alia*, "the highest elected official of the municipality from which the sludge is generated," but do not provide for participation by representatives of a health district or any other local governmental entity. 5 Ohio Admin. Code 3745-31-04(C).

No. 88-053, at 2-235 n. 1. *See generally Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 442 N.E.2d 1278 (1982); *Miller v. PPG Industries*, 48 Ohio App. 3d 20, 547 N.E.2d 1216 (Pickaway County 1988). Under this analysis, a county combined health district may regulate sewage sludge disposal to the extent that its regulation does not "conflict" with the Ohio EPA's regulation of the same matter as that term is used in *Fondessy*. Any such regulation must, in accordance with R.C. 3709.21, be for the public health, the prevention or restriction of disease, or the prevention, abatement, or suppression of nuisances. *See, e.g.*, 1953 Op. Att'y Gen. No. 2679, p. 207 at 208. Of course, in order to be in compliance with the law, a regulated entity must comply with both regulations of the county combined health district and regulations of the Ohio EPA.

Whether regulation by a board of health conflicts with the Ohio EPA's regulation must be determined on a case-by-case basis.[4] *Cf. Families Against Reily/Morgan Sites v. Butler County Board of Zoning Appeals*, 56 Ohio App. 3d 90, 96, 564 N.E.2d 1113, 1120 (Butler County) ("[t]he areas of water and sewage system control in connection with an industrial facility or complex are so pervasively regulated by the state government as to make any action by local authorities in that area a conflict with general law" (citations omitted)), *motion to certify overruled*, 46 Ohio St. 3d 709, 546 N.E.2d 944 (1989); Op. No. 74-023 (the board of health of a general health district has no authority to license and regulate the operation of a rendering plant, or the collection of raw rendering materials, since those activities are licensed by the Department of Agriculture, but it may require the registration of such businesses and charge a nominal fee to cover the registration expense). It should be noted that, in *Perry v. Providence Township*, the court rejected a suggestion based on *Fondessy* that the regulation in question did not conflict with state law. The regulation at issue in *Perry v. Providence Township* totally banned the land application of sludge, and the court found a clear conflict. *Perry v. Providence Township* did not consider whether some lesser sort of regulation would be permissible; *Fondessy* suggests that it may be.

Your letter references both the *Perry v. Providence Township* case and *Johnson's Markets, Inc. v. New Carlisle Department of Health*. In the *Johnson's Markets* case, the Supreme Court found that the Ohio Department of Agriculture did not have exclusive authority to regulate the sanitary conditions of food establishments, but that local boards of health were also empowered to prescribe some sanitary regulations for food establishments. The Court stated that regulations issued by the two entities should be read harmoniously to the extent possible; if any regulations issued by the two entities were in irreconcilable conflict, the conflict should be resolved pursuant to R.C. 1.51, which provides for a special or local provision to prevail as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.[5]

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[4] Although a copy of sewage sludge disposal regulations accompanied your request, this opinion addresses only the general question concerning the authority of a county combined health district to promulgate regulations on that subject, and does not attempt the more detailed matter of determining the validity of particular regulations. This opinion does not reflect a determination on the factual question of whether any actual conflict exists between the regulations promulgated by the Warren County Combined Health District and the Ohio EPA.

[5] Although *Johnson's Markets, Inc. v. New Carlisle Department of Health*, 58 Ohio St. 3d 28, 567 N.E.2d 1018 (1991), does not directly address the statutes and rules that are at issue in this opinion, it should be noted that the construction of R.C. 1.51 adopted in the *Johnson's Markets* case is subject to question, in that it appears to permit a regulation adopted by a local entity to prevail over a state statute or rule with which the local regulation conflicts.

In the *Johnson's Markets* case, the Court noted that there was no specific statute providing that a health district could not exercise its authority in a manner that was in conflict with the powers of the Department of Agriculture. The Court concluded, nonetheless, that "it was the intention of the General Assembly to grant exclusivity to the Director [of Agriculture] in matters of establishing standards of purity and quality of foodstuffs, and their classification, labeling and packaging, which regulations are to be applied throughout the state." 58 Ohio St. 3d at 36, 567 N.E.2d at 1026. The Court further concluded that the General Assembly intended to grant local health districts "the necessary regulatory control over foodstuffs and the places where they are sold in order to provide for the public health, the prevention of disease and the abatement of nuisance." 58 Ohio St. 3d at 36, 567 N.E.2d at 1026.

The analysis set forth in the *Johnson's Markets* case is not directly applicable to your question because the statutes governing the Department of Agriculture differ from those governing the Ohio EPA. In light of the determination in *Perry v. Providence Township* that the Ohio EPA's statutes and rules implicitly permit the land application of sludge where it is carried out in a manner that meets the Ohio EPA standards, it must be concluded that a health district may not adopt regulations that would prohibit the land application of sludge where the Ohio EPA would permit it. The statutory scheme does, however, appear to permit a health district to adopt regulations that do not conflict with regulation by the Ohio EPA. When such regulations are adopted, an entity that is engaged in the land application of sludge is subject both to regulation by the Ohio EPA and to regulation by the health district.

Conclusion

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

1. The provisions under which the Ohio Environmental Protection Agency exercises statewide regulation of sewage sludge disposal preclude a county combined health district from undertaking any local regulation that is in conflict with regulation of such matters by the Ohio EPA; a county combined health district may, however, adopt regulations governing the land application of sewage sludge that are necessary for the public health, the prevention or restriction of disease, or the prevention, abatement, or suppression of nuisances, provided that such regulations do not conflict with regulation by the Ohio EPA.

2. A county combined health district may not adopt regulations that would prohibit the land application of sludge when regulation by the Ohio EPA would permit it.