

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

FILED
COURT OF APPEALS

JAN 04 2013

NORTHEAST OHIO REGIONAL SEWER
DISTRICT,

Plaintiff/Appellee/Cross-Appellant
vs.

BATH TOWNSHIP, OHIO, et al.

Defendants/Appellants/Cross-Appellee

) CASE NO. CA-12-098728
) (Consolidated with Case Nos.
) CA-12-098729 & CA-12-098739
)
) Appeal from Cuyahoga County Court
) of Common Pleas
) Case No. CV-10-714945
)
)
)
)
)

**BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES,
THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER
MANAGEMENT AGENCIES, THE AMERICAN PUBLIC WORKS
ASSOCIATION, AMERICAN RIVERS, AND THE ASSOCIATION OF OHIO
METROPOLITAN WASTEWATER AGENCIES AS *AMICI CURIAE* IN
SUPPORT OF PLAINTIFF/APPELLEE/CROSS-APPELLANT THE
NORTHEAST OHIO REGIONAL SEWER DISTRICT**

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STATEMENT OF INTEREST

The National Association of Clean Water Agencies (NACWA), the National Association of Flood and Stormwater Management Agencies (NAFSMA), the American Public Works Association (APWA), American Rivers, and the Association of Ohio Metropolitan Wastewater Agencies (AOMWA) (collectively the “*amici*”) submit this brief as *amici curiae* in support of the Northeast Ohio Regional Sewer District (NEORS), the Plaintiff/Appellee/Cross-Appellant in this matter. Collectively, the *amici* represent municipal governments, public works organizations and national environmental organizations responsible for the operation, oversight and management of municipal separate storm sewer systems and stormwater infrastructure; citizens concerned about the health, well-being and water quality of the nation’s rivers and waterways; and agencies, companies and professionals involved in ensuring that such systems are designed, funded, operated and maintained in compliance with applicable laws and regulations.

NACWA represents the interests of nearly 300 of the nation's public wastewater and stormwater management agencies. NACWA has 11 public utility members in the State of Ohio, including NEORS. NACWA members serve the majority of the sewered population in the United States, and collectively treat and reclaim more than 18 billion gallons of wastewater each day. NACWA actively supported the recent amendment to the federal Clean Water Act § 313(c) which clarified the understanding of Congress that stormwater user fees based on a reasonable approximation of a property’s contribution to pollution in terms of the volume or rate of stormwater discharge or runoff are “reasonable service charges” payable by all federal government facilities.

NAFSMA is a national non-profit association of municipalities, special purpose public districts, and state agencies. Its members represent a broad nationwide spectrum of flood control, water conservation, stormwater management, wastewater, and other water-related districts, bureaus, departments, and other instruments of state and local government. NAFSMA's 100 member agencies serve a combined population of approximately fifty (50) million people. NAFSMA's *Guidance for Municipal Stormwater Funding* (January 2006) was published under a cooperative grant from the U.S. Environmental Protection Agency (EPA).

APWA is an organization of 28,500 public works professionals, including city and county Public Works Directors responsible for stormwater management, water and wastewater services, waste collection, and other municipal services, including 643 members in Ohio. APWA members and their agencies are responsible for planning, budgeting, design and management of municipal stormwater programs. APWA is the publisher of *Financing Stormwater Facilities: A Utility Approach* (1991), which discusses the rationale behind the utility approach to financing stormwater management by an estimated 50 communities nationwide.

American Rivers is a national non-profit dedicated to the protection and restoration of rivers so that human and natural communities may thrive. Central to American Rivers' work is the belief that healthy rivers are essential for health, safety, and quality of life. American Rivers has over 65,000 members and supporters nationwide, including 1,501 in Ohio, as well as offices around the country. Given that stormwater runoff is a leading and growing threat to our nation's rivers, American Rivers strongly

supports efforts to establish regulatory requirements to control runoff from new development and existing urbanized areas. Through advocacy and collaboration with municipal agencies and water utilities, American Rivers seeks to promote the use of green infrastructure techniques and approaches to reducing stormwater pollution and the implementation of sustainable approaches to financing water infrastructure investments.

AOMWA is a state-wide organization that represents the interests of Ohio's public wastewater agencies. AOMWA's members construct, operate, maintain and manage public sewer collection and treatment systems throughout Ohio. Collectively, AOMWA's members treat more than 300 billion gallons of wastewater each year for more than 4 million Ohioans. AOMWA's members provide this invaluable public service, which protects public health and the environment, on budgets that are, in many cases, funded solely by the citizens and businesses in their communities.

In order to respond to ever-increasing infrastructure maintenance needs caused by flooding and erosion, and, in many cases, to implement the expanding requirements of the stormwater management programs required in municipal stormwater permits issued by their state and federal environmental agencies, local stormwater authorities throughout the United States have devised appropriate funding mechanisms. These mechanisms include the creation of stormwater utilities and the collection of user fees and service charges. By far the most common approach to establishing an appropriate rate structure for such utilities is the use of impervious surface area to allocate costs based on each property's contribution of runoff to the stormwater management system.

The trial court in this case correctly held the NEORSD's stormwater fee was not an unlawful tax, and that it bears a rational relationship to the purpose of addressing stormwater problems. The *amici* believe this ruling is consistent with prevailing legal opinion as well as with standard and accepted utility rate-setting practices throughout the country, as outlined in more detail below. Accordingly, the *amici* offer this brief to aid the Court in its consideration of this issue.

ARGUMENT

I. STORMWATER USER FEES BASED ON IMPERVIOUS SURFACE AREA ARE THE INDUSTRY NORM AND ARE DIRECTLY RELATED TO THE COST OF SERVICES PROVIDED BY THE STORMWATER UTILITY

The trial court correctly found that NEORSD's stormwater fee based on impervious surface is a service charge and not a tax. In particular, the court accurately determined that the fee will not exceed the cost of NEORSD's stormwater management program and would be paid in return for services provided by the District. Trial Court Opinion, page 11. The court also correctly found that the impervious surface method is designed to measure the increase in stormwater runoff flow due to development, and that this method of calculation and the resulting fee bear a rational relationship to the purpose of addressing stormwater problems. Trial Court Opinion, page 16.

The trial court's finding on this issue is entirely consistent with the fundamental rate-setting approach used by the vast majority of stormwater utilities throughout the country. In most instances, stormwater service fees are designed to reflect the impact that

each property has on stormwater service demands, and thus the cost of providing facilities and operational and support activities to manage stormwater discharges throughout a utility's service area. Such costs are primarily a function of peak stormwater runoff rate, total volume of discharge, and pollutant contributions. Empirical studies have demonstrated that impervious surface area on a property is the single most significant factor influencing all of these impacts. Impervious area is also relatively simple to identify and quantify numerically and is the most common parameter used in stormwater service fee calculations.¹ The use of impervious surface to calculate stormwater fees has become the industry norm.²

Stormwater rate structures based solely on impervious area have been widely used. They are simple, the concept is easily understood by the general public, and it is generally perceived as equitable. Impervious area rate methodology reflects a philosophy of allocating costs based on each property's increased contribution of runoff to the system, compared to the runoff in an undeveloped state. The approach is generally consistent with local service fee rate practices for wastewater services, wherein fees are

¹ *Guidance for Municipal Stormwater Funding* (NAFSMA 2006), 2-36 to 37. Available at: <http://www.nafsma.org>; and at: <http://cfpub.epa.gov/npdes/stormwater/munic.cfm>.

² As an example, a recent stormwater survey by Western Kentucky University shows that roughly 650 of 1000 stormwater utilities surveyed use an impervious surface-based billing approach, more than any other billing method. Survey available at <http://www.wku.edu/engineering/civil/fpm/swusurvey/>.

customarily based on the amount of water consumed by each residential, commercial or industrial user, rather than through metering of the wastewater discharges themselves. There is a “direct relationship” between water consumption and wastewater generation, even though the exact volume and strength of the effluent will vary from one customer to another. Most wastewater utilities nationwide do not rely on separate metering of the wastewater generated by each household, but instead use metered water consumption to provide an approximate measure of the amount of wastewater generated.

NEORSD’s use of a stormwater credit program in conjunction with an impervious surface calculation approach to determine stormwater fees is also widely accepted and commonly used by utilities across the country. Such fee credits promote the use of on-site detention, infiltration, and reuse of stormwater by providing financial incentives to reduce overall stormwater flow through the elimination of impervious surface and/or encouraging the on-site management or reuse of stormwater. These controls can reduce capacity requirements – and costs – of stormwater management systems, as well as enhance water quality.³ By incentivizing ratepayers to take their own proactive steps to manage their stormwater runoff, these credit programs help address overall stormwater system capacity issues as well as reduce pollutants flowing into local waterways. In addition, because they provide an option for ratepayers to reduce the runoff created by their development, credit programs are also a voluntary means for ratepayers to reduce the amount of the stormwater fee associated with the cost to manage this runoff. The

³ *Guidance for Municipal Stormwater Funding* (NAFSMA 2006), 2-34 to 36.

credit program offered by NEORSD is similar to others around the country that incentivize on-site stormwater controls, thereby reducing stormwater fees for ratepayers through a reduction of stormwater discharges. The combination of impervious surface-based billing and stormwater fee credits has been embraced by both stormwater utilities and environmental advocacy organizations as an effective, equitable and environmentally beneficial approach to managing stormwater runoff.

Numerous technical studies, references, and citations in engineering literature technically validate the equity of an impervious area rate methodology for stormwater management user fees.⁴ The coefficient of runoff value in hydrologic engineering tables closely approximates the percentage of impervious coverage. Empirical evidence gathered in the field by monitoring changes in runoff before and after development verifies that impervious coverage is the key factor influencing peak stormwater runoff. Data gathered during the National Urban Runoff Program (NURP) in the 1970's and 1980's and subsequent research showed that impervious area is the most dominant factor in pollutant loadings conveyed by stormwater runoff.⁵

⁴ A comprehensive bibliography compiled by the Center of Urban Policy and the Environment at the School of Public and Environmental Affairs at Indiana University is available at: <http://stormwaterfinance.urbancenter.iupui.edu/home.htm>.

⁵ See discussion in the preamble to U.S. EPA's final Phase II stormwater regulations, in 64 Fed. Reg. 68722, 68725-26 (December 8, 1999).

More recently, based on the findings and recommendation in a 2009 study by the National Research Council on *Urban Stormwater Management in the United States*, U.S. EPA has commenced a formal rulemaking process to strengthen its stormwater regulations by including a comprehensive new program to reduce stormwater discharges from new development and redevelopment. The basic assumption behind this program is that an increase in impervious land cover has a direct relationship with increased stormwater discharges:

This increase in impervious land cover reduces or eliminates the natural infiltration of precipitation, which greatly increases the volume of stormwater discharges. This increased volume of stormwater discharges results in the scouring of rivers and streams; degrading the physical integrity of aquatic habitats, stream function and overall water quality. In addition, the increase in impervious land cover results in the increase of the pollutant load discharged from storm sewers.⁶

Theoretically, to reflect *total* runoff precisely, other rate factors such as total area, percentage of impervious area, soil type, slope and other factors might be considered. As a practical matter, however, the calculations necessary to incorporate all relevant factors are not warranted economically and the data to perform such calculations are not readily available. In addition, those other factors are relatively inconsequential when trying to estimate *increased* runoff, as opposed to *total* runoff. Consequently, impervious area is

⁶ 74 Fed. Reg. 68617, 68620 (December 29, 2009).

the only factor that is usually used.⁷ In the 2010 edition of the annual *Stormwater Utility Survey* compiled by the international consulting firm Black & Veatch, based on a survey of 70 utilities in 20 states, 80% of the respondents derive their revenues from stormwater user fees, and majority of those utilities use “impervious area” alone as the basis for calculating their fees.⁸

II. MUNICIPAL STORMWATER FEES HAVE BEEN UPHELD BY THE MAJORITY OF STATE COURTS AS LEGITIMATE SERVICE CHARGES RATHER THAN TAXES

The question whether a municipal stormwater service charge is a valid user fee or an impermissible tax has been litigated in a number of jurisdictions around the country. The majority of recent cases favor the position of the lower court below that stormwater service charges are a fee, including decisions from cases arising in Kentucky, Colorado, Florida, Washington, Tennessee, South Carolina, Georgia and Illinois. This Court should embrace the ruling of the trial court and ensure Ohio law is consistent with the majority of other states that have examined this issue.

In *Long Run Baptist Ass'n v. Louisville MSD*, 775 S.W.2d 520 (Ky. App. 1989), the plaintiffs challenged the constitutionality of a stormwater service charge that was

⁷ *Financing Stormwater Facilities: A Utility Approach* (APWA 1991) at 13. Available at: <http://stormwaterfinance.urbancenter.iupui.edu/PDFs/APWAmannual.pdf>.

⁸ *2010 Stormwater Utility Survey* (Black & Veatch 2010), at 6-8. Available at http://204.118.135.81/Downloads/Resources/Brochures/rsrc_EMS_2010StormwaterUtilitySurvey.pdf.

based on an "Equivalent Surface Unit" approach (1 ESU for all residential parcels; 1 ESU per 2500 sq. ft. for commercial and industrial parcels). The Kentucky court of appeals found that the service charge was not a "tax" and was reasonable and uniform in its application.

In *City of Littleton v. State*, 855 P.2d 448 (Colo. 1993), the City sought to collect unpaid stormwater management fees from state-owned school properties. The Colorado Supreme Court found the charge was not a tax or special assessment, but a service fee reasonably designed to meet the overall costs of the service provided. The court also found that the portion of the fee used to construct and maintain the drainage system was essential to provision of the services.

Similarly, in *Zelinger v. City and County of Denver*, 724 P.2d 1356 (Colo. 1986), the Colorado Supreme Court denied a class action challenge to the City of Denver's ordinance assessing fees and service charges for the city's storm drainage facilities. The court found that the ordinance was rationally related to a legitimate state purpose of financing the maintenance and construction of new storm sewers, and that it established a valid service charge rather than an unconstitutional tax because the funds raised by the fee were not used for general revenue purposes but were segregated and used solely to pay for the costs of the "operation, repair, maintenance, improvement, renewal, replacement and reconstruction of storm drainage facilities."

In *Smith v. Spokane County*, 948 P.2d 1301 (Wash. App. 1997), the state court of appeals found that a fee charged for funding certain "Aquifer Protection Areas" was not an unconstitutional tax and would be upheld if it was reasonable and designed to cover

only the costs of the program. In reaching this decision, the court relied upon an earlier Washington Supreme Court decision, in *Teter v. Clark County*, 704 P.2d 1171 (Wash. 1985), which held that charges for a county storm and surface water utility was not a tax but a valid regulatory fee.

In *Vandergriff v. City of Chattanooga*, 44 F. Supp. 2d 927 (E.D. Tenn. 1998), city taxpayers challenged the validity of a local stormwater ordinance on various state and federal constitutional grounds. The federal District Court found the ordinance imposed a fee, not a tax, because the charges were based on use of the stormwater system, and applying a portion of fees to construct or expand facilities as well as to defray cost of operating the system was explicitly authorized by state statute.

In *McCleod v. Columbia County*, 599 S.E. 2d 152 (Ga. 2004), the county imposed a stormwater fee based on the impervious area of developed property. Property owners challenged the fee as an invalid tax. Noting that a charge is generally not a tax if it provides compensation for services rendered, the Georgia Supreme Court held in a unanimous decision that the fee was "not arbitrary and bears a reasonable relationship to the benefits received by the individual developed properties in the treatment and control of stormwater runoff."

In *Church of Peace v. City of Rock Island*, 2005 Ill. App. LEXIS 448 (2005), an Illinois appeals court found that the stormwater fee levied by the City of Rock Island is not a tax and that churches are not exempt from payment of the fee. The court found that, under Illinois law, a tax may be distinguished from a fee by observing that a tax is a charge having no relation to the service rendered and is assessed to provide general

revenue rather than compensation. A fee, on the other hand, is proportional to a service or benefit rendered. Using this analysis, the court found the stormwater service charge was clearly a fee, because there was a direct and proportional relationship between imperviousness and stormwater runoff, thus creating a rational relationship between the amount of the fee and the contribution of a parcel to the use of the stormwater system.

III. RECENT AMENDMENTS TO THE FEDERAL CLEAN WATER ACT REFLECT THE INTENT OF CONGRESS THAT USER FEES BASED ON AN APPROXIMATION OF THE VOLUME OR RATE OF STORMWATER RUNOFF FROM A PROPERTY ARE REASONABLE SERVICE CHARGES

Section 313(a) of the federal Clean Water Act (33 U.S.C. 1323(a)) has provided since 1977 that all federal departments and agencies with jurisdiction over any property or facility, or engaged in any activity that may result in the discharge or runoff of pollutants, shall be subject to and comply with all state and local requirements respecting the control and abatement of water pollution, “including the payment of reasonable service charges.” Notwithstanding this provision, prior to the end of 2010 a number of federal facilities around the country had refused to pay local stormwater utility fees based on the argument that such fees were actually taxes for which the federal government had not waived its sovereign immunity.⁹

In response to this controversy, Congress amended the Clean Water Act (CWA) at the beginning of 2011 to make it absolutely clear that the type of stormwater user fees

⁹ A number of different federal agencies had refused to pay such fees at facilities located in, *inter alia*, Washington, Ohio, Georgia, and the District of Columbia.

involved in this case were included within the definition of “reasonable service charges” that all federal facilities are obligated to pay. This clarification was accomplished by adding the following definition to § 313(c) of the Act:

(c) REASONABLE SERVICE CHARGES

(1) IN GENERAL—

For the purposes of this chapter, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory fee, charge, or assessment that is--

(A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and

(B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

Pub. L. No. 111-378, 124 Stat. 4128 (Jan. 4, 2011).

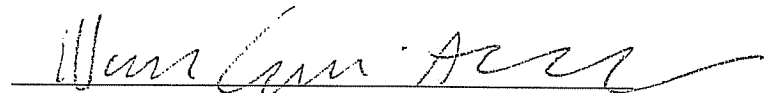
The stormwater fee enacted by NEORSD based on the number of square feet of impervious surface and calculated to raise the revenue necessary to provide sufficient funds to adequately operate the regional stormwater management program is precisely the type of “reasonable service charge” defined by Congress in CWA § 313(c). The court below held that NEORSD’s stormwater fee was not an unlawful tax and that it bears a rational relationship to the purpose of addressing stormwater problems. As explained in Section I, above, stormwater user fees based on impervious area are the industry norm precisely because they provide the “fair approximation” of the proportionate contribution of a property to stormwater pollution (in terms of the volume or rate of stormwater discharge or runoff from the property) to which Congress refers in CWA § 313(c).

Furthermore, the revenues generated by the charge are used to pay or reimburse NEORSD for the costs associated with its stormwater management program, “including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge” as contemplated in CWA § 313(c). As stated in the trial court’s decision, NEORSD’s stormwater fee will not exceed the cost of the District’s stormwater management program and would be paid in return for services provided by the District. Consistent with the trial court opinion, therefore, the fee should be regarded as a reasonable service charge.

CONCLUSION

For each of the foregoing reasons, the *amici* urge this Court to uphold the decision below and uphold NEORSD's stormwater fee as a valid and constitutional user charge for the stormwater management services rendered to properties within the District.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nathan Gardner-Andrews", written over a horizontal line.

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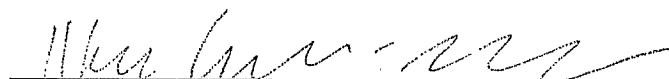
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