

IN THE SUPREME COURT OF OHIO

NORTHEAST OHIO REGIONAL
SEWER DISTRICT,

Petitioner,

vs.

BATH TOWNSHIP, et al.,

Respondents.

CASE NO. 13-1770

On Appeal from the Cuyahoga County Court
of Appeals, Eighth Appellate District

Cuyahoga County Court of Common Pleas

**MEMORANDUM IN SUPPORT OF NORTHEAST OHIO REGIONAL SEWER
DISTRICT
AS AMICUS CURIAE
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES (NACWA) and
ASSOCIATION OF OHIO METROPOLITAN WASTEWATER AGENCIES (AOMWA)**

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I. Statement of Case and Facts

In 2010, the Northeast Ohio Regional Sewer District's ("District" or "NEORSD") Board approved Title V regulations to establish a Regional Stormwater Management Program ("SMP"). Answer Brief and Cross-Appeal Opening Brief of Plaintiff/Appellee/Cross-Appellant NEORSD, 15. The District sought a declaratory judgment in the Cuyahoga County Common Pleas Court that the District had the authority under Revised Code ("R.C.") Chapter 6119 to establish the SMP. The District named each of its 56 member communities as defendants. *Id.*

On April 12, 2011, the trial court granted partial summary judgment to NEORSD finding that R.C. Chapter 6119 authorizes the District to address intercommunity flooding, erosion and stormwater-related water quality issues. The trial court also ruled that the term "waste water" under R.C. 6119 includes stormwater such that the District is authorized to implement a program to deal with regional stormwater problems. Trial Court Opinion, 1-2. After a hearing, the trial court concluded by finding that NEORSD's SMP fee is authorized under R.C. Chapter 6119 (*Id.* at 7) and its charter (*Id.* at 9), and that the charges proposed in Title V are not an unlawful imposition of a tax (*Id.* at 11).

On September 26, 2013, the Eighth District Court of Appeals reversed and found that Title V and the SMP fee exceed the statutory authority granted to the District under R.C. Chapter 6119 and the authority of the District's charter. Court of Appeals Opinion, ¶68.

The District appealed to the Ohio Supreme Court on November 12, 2013 arguing that the case is of public and great general interest because the majority opinion's statutory interpretation ignores the plain language of R.C. Chapter 6119 and results in multiple absurdities that deprive a large number of communities in Northeast Ohio, as well as hundreds of thousands of property owners, of their only effective means of successfully solving stormwater management issues that

have plagued Northeast Ohio for years. District's Memorandum in Support of Jurisdiction, 1. The National Association of Clean Water Agencies ("NACWA") and the Association of Ohio Metropolitan Wastewater Agencies ("AOMWA") were among numerous amici that filed briefs in support of jurisdiction.

On February 19, 2014, upon consideration of jurisdictional memoranda filed, the Ohio Supreme Court accepted the appeal on Propositions of Law I and II set forth by the District. Recognizing that the District is just one of many sewer districts nationwide faced with the increasing challenge of managing stormwater, NACWA and AOMWA support the authority of regional water and sewer districts, such as NEORS, to undertake and finance regional stormwater management programs.

II. As representatives of Ohio and national clean water agencies, the amici curiae have an interest in ensuring that Ohio's clean water utilities can continue to protect the environment and public health.

NACWA and AOMWA submit this brief as amici curiae urging reversal. Collectively, the amici represent publicly owned clean water utilities in Ohio and across the country that are responsible for the operation, oversight and management of municipal separate storm sewer systems and stormwater infrastructure, and for 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 clean water management agencies. NACWA has 12 public utility members in the State of Ohio including the District.¹ NACWA members serve the majority of the sewered population in the United

¹ NACWA's other Ohio members are: Avon Lake Regional Water, City of Akron, City of Canton, City of Columbus, City of Dayton, City of Lebanon, City of Lima, City of Sidney, City of Toledo, the Metropolitan Sewer District of Greater Cincinnati, and Montgomery County Water Services.

States and collectively manage billions of gallons of wastewater, including both stormwater and sanitary sewage, each day. NACWA actively supported the recent amendment to the federal Clean Water Act Section 313(c), 33 U.S.C. § 1323, in which Congress clarified 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.

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.² Collectively, AOMWA's members treat more than 300 billion gallons of wastewater, both stormwater and sanitary sewage, each year for more than four million Ohioans. AOMWA's members provide an invaluable public service that protects public health and the environment. In many cases, this service is provided through budgets that are funded solely by the citizens and businesses in those communities.

III. The nature of the growing stormwater problem.

The increasing urbanization of American communities and rapid expansion of impervious surfaces such as asphalt and concrete over the past several decades have brought a new challenge for regulators and local governments. This urbanization has resulted in excess stormwater runoff from roofs and parking lots, which overwhelms combined sewers, floods parks and basements, and delivers sediment and other pollutants into rivers and streams. The complexity of this problem is only increased because the stormwater runoff is the result of how Americans carry out their everyday lives—this increased runoff is created when precipitation hits impervious

² AOMWA's members include: City of Akron, Butler County, City of Canton, City of Columbus, City of Dayton, City of Hamilton, City of Lancaster, City of Lima, City of Marysville, Metropolitan Sewer District of Greater Cincinnati, Hamilton County, NEORS, City of Portsmouth, City of Springfield, City of Toledo and City of Warren.

surfaces and has no opportunity to naturally infiltrate into the ground.

As one commentator states, the problem is “not the result of some ‘Valdesian’ spill,” nor the “consequence of continuous chemical discharges from some large industrial plant,” but is instead “how we use our land and how we conduct our simple everyday activities” that “greatly affects the amount and degree of stormwater [runoff] in our cities and towns.”³

Stormwater also creates water quality issues. Pollutants including sediments from soil and stream bank loss, nutrients and bacteria from fertilizers and manure, pesticides, trash, metals, and other chemical and physical contaminants all contribute to the problem of stormwater runoff. Phosphorus and nitrogen associated with urban and agricultural runoff discharges is a particular water quality challenge.

Thus, on a national level, there is a great need for better methods to control and manage the flow of stormwater in an affordable, effective and equitable manner. The Eighth District Court of Appeals decision effectively strips Ohio’s wastewater utilities of authority to deal with the problem of stormwater.

Urban stormwater runoff in Northeast Ohio is just one example of the many challenges associated with urban stormwater runoff. An October 18, 2013 article in the Cleveland Plain Dealer described the challenges faced by the communities served by the District: “Increasingly intense storms dump rain on rooftops and pavement in a part of the country where critics say development has sprawled far beyond what the market justifies. As rivers, creeks, streams, and ditches overflow, water pours into old sanitary sewers through cracks and illegal connections before backing up into basements.”⁴

³ Avi Brisman, *Considerations in Establishing a Stormwater Utility*, 26 S. Illinois U. L. J. 505, 509 (Spring 2002).

⁴ Thomas Ott, *Stormwater Concerns Swell in Northeast Ohio*, The Plain Dealer, Oct. 18, 2013

In Cleveland's Metroparks "[f]ords clogged with debris regularly spill over and swamp roads," and "sediment carried by runoff washes into sections of the Rocky and Chagrin rivers, pushing out oxygen and killing off insects that trout, a popular game fish[,] feed on," and "piles up in the Cuyahoga River, contributing to the cost of dredging required to keep the channel open for commercial shipping."⁵

The handling of stormwater at the regional, rather than local, level is also critical to success because of the scope and size of the problem and the need for coordination. The District expects to collect \$38 million in fees in the first year of the program and has plans for over \$200 million in projects. *See Answer Brief and Cross-Appeal Opening Brief of Plaintiff/Appellee/Cross-Appellant Northeast Ohio Regional Sewer District*, 9. Although local communities have plans to construct small scale projects to benefit their citizens, they simply do not have the resources to address the issue on the larger scale that is necessary. As Willowick Mayor Richard Bonde recently noted, their local program to clean ditches and restore floodplains will not solve everything. Instead, "the ultimate solution has to be regional. No city—Euclid, Wickliffe, or Willowick—has those kinds of resources."⁶

Northeast Ohio is not alone in facing stormwater issues. Across the state, wastewater agencies operating under the authority of R.C. Chapter 6119 must deal with issues created by stormwater runoff. These issues are further compounded where agencies face federal consent decrees and federal Clean Water Act obligations that require reduction of combined sewer and sanitary sewer overflows, a challenge confronting municipalities and wastewater agencies nationwide. Stormwater management is often a necessary and/or required component of a compliance plan.

⁵ *Id.*

⁶ *Id.*

Stormwater does not flow in isolation. Millions of dollars spent to improve sewage treatment facilities can be undercut in one flooding scenario when treatment controls are wiped out, facilities overwhelmed and equipment destroyed as a result of excess stormwater entering the system. Restricting the District's ability to fund and implement stormwater management programs and integrated green infrastructure strategies makes it more difficult to fund and comply with its Consent Decree obligations, frustrates both the state and federal environmental initiatives embodied in the decree, and does a tremendous disservice to the public.

Thus, for these amici and the hundreds of clean water agencies they represent, reversal of the Court of Appeals decision is of great importance. These agencies serve millions of Americans every day and provide amenities that, when operating smoothly, may not often be thought about by those receiving the services. In reality, however, turning on a kitchen tap, flushing a toilet and the speedy removal and proper management of stormwater after a heavy rain touch the lives of all members of the public—particularly when financial resources are not sufficient to adequately fund those utility programs that are mandated by federal law and intricately tied to our quality of life. The amici urge this Court to reverse the decision of the Court of Appeals.

IV. Argument in Support of Proposition of Law No. 1: A district formed pursuant to R.C. Chapter 6119 is authorized to manage stormwater which is not combined with sewage, and to impose a charge for that purpose. Such charge is one “for the use or service of a water resource project or any benefit conferred thereby.”

Ohio water and sewer districts are authorized to manage stormwater under the authority of R.C. 6119.011(K) regardless of whether it is combined with sewage or some other waste-containing water and Chapter 6119 authorizes them to charge fees for doing so. The Court of Appeals decision is not only inconsistent with the clear language of the statute, but the result is to

create a wholly impracticable test for when a utility has authority over stormwater. Because of the serious issues facing Ohio and the nation, the Court of Appeals decision must be reversed.

A. The District is expressly authorized to manage stormwater under R.C. Chapter 6119, regardless of whether it is combined with a waste-containing water.

The Court of Appeals re-definition of wastewater to require that the stormwater contain sewage or other pollutants in order to qualify distorts the clear reading of the statute, results in an impracticable test for determining when a district has stormwater authority, and is inconsistent with other Ohio legal frameworks and policies at the state and national level.

1. The definition of waste water under R.C. 6119.011(K) includes stormwater.

Revised Code Chapter 6119 provides regional water and sewer districts with the authority to manage stormwater. Waste water is defined as “*any storm water* and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water.” R.C. 6119.011(K) (emphasis added). Stormwater is a stand-alone term.

The Court of Appeals, however, re-wrote R.C. 6119.011(K) and concluded that, “[u]nder R.C. 6119.011(K), ‘waste water means’ ‘*any storm water containing sewage or other pollutants.*’” Court of Appeals Opinion, ¶44 (emphasis in original). This is in sharp contrast to the actual text of R.C. 6119.011(K) where stormwater is a stand-alone term. This interpretation has serious implications for both the District and the entities represented by the amici.

This interpretation does not result from a natural reading of the text. While stormwater may contain sewage, industrial waste, pollutants or contaminants, stormwater as a stand-alone term is included within the definition of waste water whether or not it contains those constituents.

The District’s natural reading of the statute is also reasonable when the definition is

viewed as a whole. Waste water is defined as “any storm water and any water containing sewage or industrial waste or other pollutants or contaminants *derived from the prior use of the water.*” R.C. 6119.011(K) (emphasis added). This “derived from” language falls into place under the District’s interpretation because the definition includes both stormwater (which obviously has no prior use) and any water containing certain wastes “derived from the prior use of the water.” This water containing certain wastes must mean water other than stormwater because stormwater has no prior use.

The Court of Appeals’ determination that “‘waste water means’ ‘any storm water containing sewage or other pollutants’” disregards the “derived from” language. Court of Appeals Opinion, ¶44 (emphasis in original). Collapsing the definition as the Court of Appeals has done does not allow the term stormwater to stand on its own as written. The Court of Appeals carries the term stormwater through the entire definition and applies it to sewage, industrial waste, pollutants or contaminants so that stormwater must contain one of these elements for the definition to apply.

If this is a correct interpretation of the statute, then the term stormwater must also be carried through the entire definition in reference to the “derived from the prior use of the water” clause. The problem, however, is that the Court of Appeals definition does not make sense when the “derived from” clause is applied. Doing so would mean that “‘waste water means’ ‘any storm water containing sewage or other pollutants’” derived from the prior the prior use of the water. *Id.* There is no prior use of stormwater.

Nor does it make any sense to read the Court of Appeals decision as requiring a combination of stormwater and some other water-containing waste like sewage in order to be considered waste water. To read the statute in this way would question the District’s authority

over water containing sewage, even if no stormwater is involved. The parties have never questioned the District's authority over water containing sewage and to do so would lead to an absurd result.

2. The Court of Appeals decision creates an impracticable test for determining a district's stormwater authority.

The Court of Appeals reluctance to give the statute its proper reading may stem from a misunderstanding about the nature of the stormwater problem facing urbanized America. Stormwater is not just rain. The type of comprehensive stormwater approach being undertaken by the District does not seek to regulate or charge the public for raindrops.

In urbanized landscapes, when rain meets an impervious surface it pools and may pick up pollutants as it runs off, gathering velocity and volume. However, *requiring* that it pick up pollutants in order for it to be able to be managed by a water and sewer district creates significant obstructions to the implementation of any meaningful stormwater solutions.

If this test is allowed to stand, it would be difficult to continuously differentiate between polluted and unpolluted stormwater and impossible to do so for the purposes of making large scale, regional, programmatic stormwater decisions. The District's authority would hinge on the particular content of stormwater at any given time. *This test offers no certainty.* It does however, create significant potential for ongoing litigation if this fluctuating test is allowed to stand, thereby diminishing the potential that any district would implement a SMP.

Furthermore, damage to property and threats to public health and safety result whether or not the stormwater contains sewage or pollutants. Undoubtedly, damages and threats to public health and safety only increase if pollutants *are* picked up as stormwater runs off, but it is wholly impractical to conclude that the District *only* has authority to regulate a solution to the

stormwater problem if the stormwater happens to pick up pollutants as it washes out roads and floods basements. Whether stormwater has picked up pollutants or not, it still creates the serious runoff problems that utilities across the country are trying to alleviate, namely: heavy flooding; erosion and destruction of roads; degradation of water quality in receiving waterways; bridge structures being undercut; parking lots becoming ponds; sewage collections systems and basements being inundated with a mix of sewage and stormwater; and wastewater treatment plants being damaged and their biological function being washed out due to stormwater inundation.

By its ruling, the Court of Appeals has narrowed the scope of a R.C. Chapter 6119 district's authority over stormwater to such a degree that the authority over stormwater given by the General Assembly is practically meaningless.

3. The District's interpretation is consistent with stormwater policy being implemented across the nation.

Revised Code Chapter 6119 districts throughout Ohio and clean water agencies throughout the country already collect and manage stormwater. Often this is accomplished through the use of combined sewers—systems that collect sanitary sewage and stormwater runoff in a single conveyance system. Many of these entities, including the District, are under administrative or judicial orders with the United States Environmental Protection Agency (“USEPA”), the Ohio Environmental Protection Agency (“OEPA”), or both to eliminate combined sewers and instead operate separate systems for sanitary sewage and stormwater.

The Court of Appeals narrow reading of the statute has the potential to raise questions about the authority of clean water entities to manage stormwater and thus comply with these orders. For R.C. Chapter 6119 entities that solely manage stormwater, the ruling of the Court of Appeals threatens the legal foundation of their very existence. For R.C. Chapter 6119 entities

that exercise broader statutory functions, the ruling creates legal uncertainty about the ability to operate and maintain separated stormwater infrastructure and the ability to manage and/or treat separated stormwater flows. The decision also eliminates opportunities for more effective management of stormwater and limits options for flood control.

The practical impact of the Eighth District's interpretation of R.C. 6119 is to eliminate an essential Clean Water Act and consent decree compliance tool for communities across Ohio. Across the country, there are at least 140 entities—14 of them in Ohio—bound by federal and state consent decrees that require the reduction of combined and sanitary sewer overflows. At the heart of these obligations is the issue of stormwater, which overwhelms sewer systems causing them to overflow into creeks, streams, and rivers and backup into basements. Controlling stormwater at the source—and keeping it from entering the sewer system in the first place—is becoming an increasingly practical and low cost option for utilities throughout Ohio and the United States.⁷ This is also the case regardless of whether sanitary sewers are separated from storm sewers.

In June 2012, USEPA issued its *Integrated Municipal Stormwater and Wastewater Planning Approach Framework*,⁸ which allows clean water agencies to take a more holistic approach to Clean Water Act compliance and to look for innovative and affordable solutions that offer opportunities for sustainable compliance over the long term. This means that many agencies are looking to incorporate green infrastructure into their plans, which often provides

⁷ See, e.g., Janie Chen and Karen Hobbs, *Rooftops to Rivers II: Green Strategies for Controlling Stormwater and Combined Sewer Overflows: Update October 2013* (Natural Resources Defense Counsel Oct. 2013), which highlights 20 cities nationwide—including Cincinnati and Cleveland—using “green” source control measures to keep stormwater out of sewer systems as a means of meeting their Clean Water Act obligations.

⁸ U.S. Environmental Protection Agency, *Integrated Municipal Stormwater and Wastewater Planning Approach Framework* (June 5, 2012).

opportunities to control stormwater at the source and prevent it from getting into sewer systems in the first place.

As USEPA recently explained in *Greening CSO Plans: Planning and Modeling Green Infrastructure for Combined Sewer Overflow (CSO) Control*,⁹ “[g]reen infrastructure practices mimic natural hydrologic processes to reduce the quantity and/or rate of stormwater flows,” and “[b]y controlling stormwater runoff through the processes of infiltration, evapotranspiration, and capture and use” green infrastructure can help control the flow of stormwater runoff and ultimately keep it out of sewer systems. For example, the District’s SMP includes, among other projects, a \$3.5 million dam rehabilitation at Horseshoe and Green Lakes in the cities of Cleveland Heights and Shaker Heights, a \$2.5 million dredging of Green Lake in the City of Shaker Heights, and a \$2.3 million new retention basin along the Chevy Branch of Big Creek in the City of Parma. These innovative practices also “provide flexibility in addressing uncertainty surrounding future droughts and increased precipitation resulting from climate change,” and “it may be incrementally and rapidly expanded and adapted as necessary.”¹⁰ Thus, the ability to control stormwater runoff in innovative ways—and in isolation from sewage and other contaminants—is absolutely essential to effective and sustainable Clean Water Act and consent decree compliance.

The inability of Ohio utilities to access innovative compliance tools for these very complex clean water programs will only increase their vulnerability to federal Clean Water Act enforcement actions and put them at a severe operational disadvantage compared to similar utilities in other states. Limiting access to affordable and innovative solutions that keep

⁹ U.S. Environmental Protection Agency, *Greening CSO Plans: Planning and Modeling Green Infrastructure for Combined Sewer Overflows*, 7 (March 2014).

¹⁰ *Id.*

stormwater out of combined and sanitary sewer systems will only serve to raise already increasing water and sewer rates, and increase the already heavy burden on Ohio's ratepayer population across the state.¹¹ Thus, Ohio utilities must have certainty that R.C. Chapter 6119 provides them with the authority to manage stormwater to meet their consent decree and Clean Water Act obligations, and to do so in innovative, affordable, and sustainable ways.¹²

In addition, the water quality issues resulting from stormwater in Ohio have international impacts. In February, 2014, the International Joint Commission ("IJC") issued its analysis and recommendations in a report discussing the challenges to Lake Erie's health.¹³ The report cautioned about increasing overall nutrient loads in Lake Erie that are causing severe algal blooms. Those blooms have the potential to produce toxins that pose significant risk to fish, wildlife, drinking water supplies, and human health. According to the report, Lake Erie is the only lake in the Great Lakes Basin that has had documented cases of human illness and animal (dog) deaths related to harmful algal blooms.

The IJC report addresses the leadership that will be required by governments to foster Lake Erie's recovery. This includes cooperative work between governments of the United States, Canada, Ontario, Indiana, Michigan, New York, Ohio and Pennsylvania to especially promote urban stormwater management. Severing the authority of regional water and sewer districts to comprehensively address an issue as important as stormwater is a significant step in

¹¹ *Id.* at 6 ("Despite the progress achieved to date, significant infrastructure investments are still needed to address CSOs. Although funding assistance is available from federal and state sources, *local ratepayers ultimately fund most CSO control programs*. Therefore, CSO control programs represent a significant municipal investment that competes with other local programs.") (Emphasis added).

¹² Three Ohio utilities have been established under R.C. 6119 for the sole purpose of managing stormwater: Deerfield Regional Stormwater District, ABC Water and Storm Water District, and Jefferson Township Storm Sewer District.

¹³ A Balanced Diet for Lake Erie: Reducing Phosphorus Loadings and Harmful Algal Blooms, Report of the Lake Erie Ecosystem Priority, International Joint Commission (2014).

the wrong direction.

B. Utilities Established under R.C. Chapter 6119 are Authorized to Charge Fees to Fund Stormwater Management Programs

Chapter 6119 authorizes regional sewer districts in Ohio to charge fees for stormwater management programs. As described more fully below, Section 6119.06 authorizes districts to charge customers fees for the use of “water resource projects” or any benefit conferred thereby, and stormwater projects of the type included within the District’s SMP clearly comport with the definitions outlined by the General Assembly. Further, no direct service connection is required in order for the fees to be authorized under the statute; instead, fees for the “use” of stormwater facilities are in direct correlation to the contribution from each property. Thus, Chapter 6119 authorizes regional sewer districts to charge fees for their stormwater management programs.

1. The definitions under R.C. Chapter 6119 clearly encompass a broad scope of water resource projects.

Chapter 6119 provides clear authority for wastewater agencies to impose fees for the management of stormwater. Specifically, R.C. 6119.06(W) provides that 6119 districts are authorized to “charge, alter and collect rentals and other charges for the use of services of any water resource project.” R.C. 6119.06(W). *See also*, R.C. 6119.09. Because the projects proposed by the District—and any stormwater facility constructed by any 6119 district—clearly meet the definition outlined in the Chapter, these agencies have the authority to impose fees for their use.

Chapter 6119 defines “water resources project” to mean: “*any waste water facility or water management facility acquired, constructed, or operated by or leased to a regional water and sewer district under this chapter ... including all buildings and facilities that the district considers necessary for the operation of the project, together with all property, rights, easements, and*

interest that may be required for the operation of the project.” R.C. 6119.011(G) (emphasis added).

The term waste water facility is further defined by Chapter 6119 to include a broad scope of facilities and activities and clearly encompasses the types of stormwater management facilities envisioned in the District’s SMP. “Waste water facilities” are defined in R.C. Chapter 6119 as:

[F]acilities for the purpose of treating, neutralizing, disposing of, stabilizing, cooling, segregating, or holding waste water, including, without limiting the generality of the foregoing, facilities for the treatment and disposal of sewage or industrial waste and the residue thereof, facilities for the temporary or permanent impoundment of waste water, both surface and underground, and storm and sanitary sewers and other systems, whether on the surface or underground, designed to transport waste water, together with the equipment and furnishings thereof and their appurtenances and systems, whether on the surface or underground, including force mains and pumping facilities therefor when necessary.

R.C. 6119.011(L). The Court of Appeals focused narrowly on the explicit purposes of a regional water and sewer district under R.C. 6119.01(A) and (B), with emphasis on the purpose “to provide for the collection, treatment, and disposal of waste water within and without the District.” R.C. 6119.01(B).

This reading of the statute is in direct conflict with the General Assembly’s broad definition of waste water facilities, which explicitly references neutralizing, stabilizing, holding, impounding, and transporting wastewater, including stormwater, whether on the surface or underground. Indeed, the General Assembly was careful in pointing to specific examples of facilities to not limit the overall *generality* of the definition. Thus, it is clear that the term “waste water facility” as defined in Chapter 6119 is intended to permit a broad scope of projects, facilities, and activities, and that the District’s proposed projects fit within the terms of this definition.

Based on the foregoing definitions, 6119 districts are empowered to charge fees for a broad range of stormwater management projects and facilities. For example, the District described numerous planned stormwater projects, including the construction, replacement, repair, restoration, rehabilitation and/or stabilization of floodwalls, flood berms, culverts, detention basin facilities, concrete encasements, channels, stream banks, lakes, dams, storm sewers, and erosion control measures, as well as raising roadways to address chronic flooding. Answer Brief and Cross-Appeal Opening Brief of Plaintiff/Appellee/Cross-Appellant NEORSD, 10. Specifically, as noted above, these projects include a \$3.5 million dam rehabilitation at Horseshoe and Green Lakes in the cities of Cleveland Heights and Shaker Heights, a \$2.5 million dredging of Green Lake in the City of Shaker Heights, and a \$2.3 million new retention basin along the Chevy Branch of Big Creek in the City of Parma. In addition to these future projects, the District has already participated in the funding and construction of at least 25 stormwater-related projects. *Id.* at 25. These projects qualify as water resource projects.

2. Chapter 6119 authorizes utilities to collect fees for the use of water resources projects or benefits conferred thereby and no direct service connection is necessary.

Districts organized under Chapter 6119 are authorized to collect fees regardless of whether there is a direct service connection to the water resource project from which property owners receive services and the benefit of the management of runoff from their property. The Court of Appeals focused on the lack of a “direct service connection” in finding that the District’s stormwater fee is “unrelated to any use or services afforded to a property owner.” Court of Appeals Opinion, ¶¶ 53-54. In doing so, the court ignored the broad statement in R.C. 6119.09 that regional water and sewer districts may charge fees “for the use or services of any water resource project *or any benefit conferred thereby.*” R.C. 6119.09 (Emphasis added).

Because property owners both use and benefit from facilities that manage stormwater, fees associated with these facilities are clearly authorized by Chapter 6119.

Because the District's stormwater fee is based on impervious surface area, it can be directly tied to property owners' use of the water resource projects and the benefits they receive thereby. Impervious surfaces play a singularly significant role in increased stormwater runoff and the resulting increased need for management of that runoff. Charging users for their relative contribution of stormwater in order to fund the management of that stormwater is clearly contemplated by R.C. 6119.09.

Studies show that impervious surfaces are the most significant factor in increased stormwater runoff.¹⁴ In fact, "[t]his increased volume and velocity of runoff is directly correlated to the amount of impervious cover in the given area essentially, ***the more impervious cover, the more runoff.***"¹⁵ Stormwater volume increases because "water from roads and parking lots cannot be absorbed into the ground and has no time to evaporate," and if uncontrolled, the increased runoff simply flows into sewers and basements, causes increased erosion, and brings pollution and sediment with it into rivers and streams.¹⁶

Because of this direct linkage between impervious surfaces and increased volume, the use of impervious surface area in imposing stormwater fees has become the industry norm and is a commonly used practice across the United States.¹⁷ As explained in the *Guidance for Municipal*

¹⁴ See, e.g., Avi Brisman, *Considerations in Establishing a Stormwater Utility*, 2 S. Ill U. L.J. 505, 509-10 (Spring 2002).

¹⁵ *Id.* (Emphasis added).

¹⁶ *Id.*

¹⁷ See, e.g., Alisa Valderrama and Larry Levine, *Financing Stormwater Retrofits in Philadelphia and Beyond*, 2 (Natural Resources Defense Council 2012)(estimating that more than 400 cities, towns, and utility districts nationwide use fee structures "based entirely or in part on the amount of impervious area on their property"); *Western Kentucky University Stormwater Utility Survey*, 2 (2013)(finding that the most common method of imposing stormwater—used by 657 of the

Stormwater Funding, published by the National Association of Flood & Stormwater Management Agencies (NAFSMA) in 2006, impervious surface based fees are so widely used for a number of reasons, not the least of which is the fact that “[i]mpervious area rate methodology reflects a philosophy of allocating costs based on each property’s contribution of runoff to the system,” and empirical data generally supports the methodology as equitably assessing costs relative to each property’s actual contribution to the stormwater being managed.¹⁸

In revising the Clean Water Act in 2011, Congress recognized the reasonableness of using impervious surfaces as a method of calculating a property’s contribution to stormwater runoff. Specifically, in 2011, Section 313 of the Clean Water Act, 33 U.S.C. § 1323, was revised to include a specific provision for federal properties to pay “reasonable service charges” for stormwater programs. 33 U.S.C. § 1323(c)(1). The statute defines reasonable service charges to include any fee that is “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).”

33 U.S.C. § 1323(c)(1)(A). The most widely used measure for the “volume or rate of stormwater discharge” is, of course, impervious surface area.

The use of credits like those in the District’s SMP also allows property owners to control their impact on the system, and potentially reduce their fee significantly, while aiding in the overall management of stormwater runoff. Indeed, some stormwater management practices for which property owners can take credit have shown to contribute to the reduction in pollution caused by stormwater runoff. For example, the IJC noted in its report, *supra*, that phosphorous

1,000 utilities surveyed—is the Equivalent Residential Unit method, which is based on impervious surface area); *Guidance for Municipal Stormwater Funding*, 2-36, 37 (NAFSMA 2006).

¹⁸ *Guidance for Municipal Stormwater Funding*, 2-36, 37.

removal rates of 60 to 71% have been reported through the use of porous pavements. Thus, allowing property owners to take credit for reducing runoff from their properties not only helps ensure their stormwater fees reflect their actual use of stormwater facilities, but also helps to alleviate many of the problems caused by urban stormwater runoff.

The concept of impervious surface area as the basis for stormwater fees is used by clean water utilities across Ohio. The cities of Cincinnati, Columbus, Dayton, Springfield and Toledo have all created stormwater utilities that are funded by stormwater fees based upon impervious surface area.¹⁹ Thus the requirement that a direct service connection be in place to allow clean water agencies to charge stormwater fees would cause uncertainty across Ohio even for utilities not established under Chapter 6119.

Simply stated, although the public's relationship to and use of water resource projects is different from traditional wastewater treatment payment schemes because that use is not based on strictly metered water usage, districts are clearly authorized to charge for stormwater services and the General Assembly does not restrict or prescribe the method. The District's funding mechanism must not be disregarded simply because the public's relationship to the water resource project does not look like the kind of mechanism the Court of Appeals is used to evaluating.

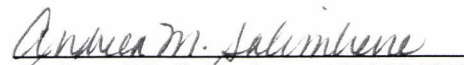
V. Conclusion

The Court of Appeals' rejection of NEORS's SMP has broad implications that will hinder the ability of wastewater utilities statewide to address stormwater runoff that threatens to overwhelm sewers, flood basements, wash out roads, and damage habitats in Ohio's rivers and

¹⁹ See *Cincinnati Code of Ordinances*, § 720-50; *Columbus Code of Ordinances*, Chapter 1149; *Dayton Code of Ordinances*, § 54.04; *Springfield Code of Ordinances*, Chapter 918; *Toledo Code of Ordinances* Chapter 943.

streams. Without the ability to manage stormwater, Ohio's wastewater utilities already grappling with challenging and costly consent decrees and Clean Water Act requirements will lose a valuable set of tools for sustainable, affordable compliance. In conclusion, the amici curiae respectfully request that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing, Memorandum In Support Of Northeast Ohio Regional Sewer District
As *Amicus Curiae* was served on May 12, 2014, upon all registered Counsel of Record.

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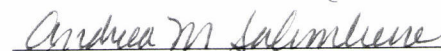
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