

## IN THE SUPREME COURT OF OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	:	CASE NO. 13-1770
	:	
Appellant,	:	Appeal from Court of Appeals for
	:	the Eighth Appellate District
vs.	:	CASE NO. CA-12-098728
	:	(Consolidated with Case Nos.
BATH TOWNSHIP, OHIO, et al.	:	CA-12-098729 & CA-12-098739)
	:	
Appellees.	:	Cuyahoga County Court
	:	of Common Pleas
	:	CASE NO. CV-10-714945

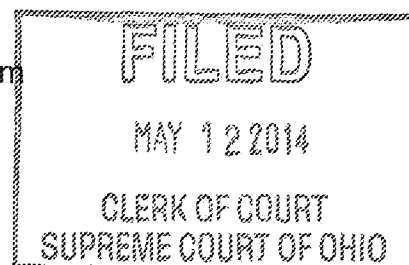
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## STATEMENT OF FACTS

This case is about a vital water management program, many years in the making, that was struck down by an Eighth District Court of Appeals' decision that hinged on an absurd definition of "wastewater."

The Northeast Ohio Regional Sewer District (the "District") was charged in the 1970s by the court which created it with developing a plan to solve intercommunity stormwater drainage problems. The District studied the impact of storm water in Northeast Ohio for almost *four decades*, as the stormwater-related problems increased. It actively sought input from the elected public officials of its member communities (the "Member Communities") for over *two years* and incorporated that input into its draft regional stormwater management plan. Finally, on January 7, 2010, pursuant to R.C. 6119.08, the District's Board of Trustees unanimously adopted Title V of the District's Code of Regulations ("Title V") to authorize the establishment of a regional stormwater management program (the "Program") to address the intercommunity stormwater-related problems that no other local agency, organization, or political subdivision has ever been willing to confront, or has ever had the capacity and resources to deal with. (*See generally* Supp. 415-41.)

The construction and maintenance activities planned under this desperately needed Program will, among other things, greatly reduce the chronic flooding and erosion of residential and commercial properties. (*Id.*) They will also materially improve the often-criticized quality of Northeast Ohio's water resources, including Lake Erie. (*Id.*) This is precisely why forty-six of the District's fifty-six Member Communities currently do not oppose the Program and only ten purely self-interested Member



Communities (the “Community Appellees”)<sup>1</sup> do, along with a group of intervening commercial property owners (the “Property Owner Appellees,” and, collectively with the Community Appellees, “Appellees”)<sup>2</sup> that simply do not want to pay for stormwater management, even though they would benefit greatly from it.

The primary issues involved in this appeal are twofold: (a) whether the District and all other Ohio regional water and sewer districts formed under Chapter 6119 of the Ohio Revised Code (“6119 Districts”) have the statutory authority to manage storm water that is not combined with sewage or industrial waste, and to impose a charge for that purpose; and (b) whether the District’s court-approved Petition (the “Petition”) and Plan for Operation (the “Plan for Operation”) authorize the District to implement a regional stormwater management program, and to impose appropriate charges to operate that program.

As discussed in detail below, nobody disputes that 6119 Districts have authority over “wastewater,” which 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.” ((Emphasis added) (R.C. 6119.011(K) (Appx. 114).) The statute

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<sup>1</sup> The Community Appellees consist of: City of Beachwood; City of Bedford Heights; City of Brecksville; City of Cleveland Heights; Village of Glenwillow; City of Independence; City of Lyndhurst; Village of Oakwood; City of Olmsted Falls; and City of Strongsville.

<sup>2</sup> The Property Owner Appellees consist of: The Greater Cleveland Association of Building Owners and Managers; Cleveland Automobile Dealers Association; The Northern Ohio Chapter of NAIOP, The Association for Commercial Real Estate; CADA Properties, LLC; The Ohio Council of Retail Merchants; Snowville Service Associates LLC; Boardwalk Partners, LLC; Creekview Commons, LLC; Fargo Warehouse LLC; Greens of Lyndhurst, Ltd.; Highlands Business Park, LLC; JES Development Ltd.; Lakepoint Office Park, LLC; Landerbrook Point, LLC; Newport Square, Ltd.; Park East Office Park LLC; Shaker Plaza, Ltd.; Pavilion Properties, LLC; and WGG Development, Ltd.

means *exactly* what it says—6119 Districts have authority over *both* (a) storm water and (b) water containing sewage and other pollutants. The court of appeals' holding that 6119 Districts may only manage "storm water" if it is *combined* with sewage or other pollutants defies this common meaning understood and relied upon by 6119 Districts for decades. It results in absurdity, and cannot be reconciled with other sections of Chapter 6119 expressly listing stormwater projects that 6119 Districts can undertake that do not involve sewage. (See R.C. 6119.011(G), (M) (Appx. 113-14).)

The charge for stormwater management that the District seeks to impose under its Program is precisely the type of charge contemplated and authorized by R.C. 6119.09. The record evidence conclusively demonstrates that the charge is being imposed for (a) each property owner's *use* of the Program, (b) *services* provided to each property owner under the Program, and/or (3) *benefits conferred* upon each property owner by the Program, which is all that the statute requires. (See R.C. 6119.09 (Appx. 126).) The trial court made these factual findings, which the court of appeals ignored altogether. The court of appeals also contradicts one of its own prior decisions directly on point.

Further, the unambiguous language of the District's Petition and Plan for Operation not only authorizes the District to manage storm water on a regional basis, but *requires* it to do so. (See *generally* Supp. 790-803.) The District's Plan for Operation was amended in 1975 to include a *mandate* that the District "develop a ***detailed integrated capital improvement plan for regional management of wastewater collection and storm drainage*** designed to identify ***a capital improvement program for the solution of all intercommunity drainage problems***

**(both storm and sanitary)** in the District.” ((Emphasis added) (Supp. 797).) The District’s Program is *exactly* what is required by this mandate, and is the final result of the millions of dollars that the District has openly invested over the past thirty years in stormwater-related studies.

The District may impose its charge for the Program under its Plan for Operation because section 5(e)(3) unambiguously states that “[**a**]ny **projects** not financed through the Ohio Water Development Authority, State of Ohio, or Federal Government would be financed in such a manner **as may be deemed appropriate by the Board of Trustees.**” ((Emphasis added) (Supp. 793).) In holding to the contrary, the court of appeals never even mentions this section or addresses the District’s Board of Trustees’ unanimous approval of the Program charge.

Therefore, based upon the facts and arguments set forth below, the District respectfully requests that this Court reverse the erroneous decision of the court of appeals and reinstate the trial court’s findings in support of the District and its Program.

**I. The establishment, purpose, and prior stormwater management activities of the District.**

**A. The establishment and purpose of the District.**

**1. In 1972, the Cuyahoga County Common Pleas Court (the “Common Pleas Court”) approved a plan under Chapter 6119.**

The District, originally named the “Cleveland Regional Sewer District,” was officially organized and declared a political subdivision of the State of Ohio on June 15, 1972, by judgment entry of the Common Pleas Court and pursuant to Chapter 6119 of the Ohio Revised Code. (Supp. 746-71.) The District’s Petition and initial Plan

for Operation were attached as Exhibit A to the judgment entry (collectively, the “Petition and Plan for Operation”). (Supp. 750-71.)

**2. The Plan for Operation grants the District authority over stormwater.**

The Plan for Operation grants the District authority to exercise regulatory authority over stormwater systems through rules and regulations adopted by the Board of Trustees, and contains the District’s Code of Regulations, which includes Title V, the Stormwater Management Code. (Supp. 796-97.)

**3. The Petition defines the District’s purpose.**

The Petition defines the scope of the new district’s authority and, most importantly, describes its purpose and territory. (R.C. 6119.02(A) (Appx. 116).) The Plan for Operation simply describes how the new board intends to operate in carrying out its purpose. Although the jurisdictional court *initially* must approve both documents, once approval is given the board of trustees may “amend, modify, change, or alter the plan for its operation as [it] from time to time may determine necessary.” (R.C. 6119.04(D) (Appx. 119).) In contrast, because the Petition defines a district’s authority, any changes to it must be obtained by subsequent petition to the jurisdictional court. (R.C. 6119.051 (Appx. 121).)

**4. The purpose of the District is to provide a total wastewater control system.**

The stated purpose of the District, set forth in the Petition, always has been to provide a “**total wastewater<sup>3</sup> control system**” for the collection, treatment and disposal

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<sup>3</sup> As stated above, the term “wastewater” is defined in R.C. 6119.011(K) as “**any storm water** and any water containing sewage or industrial waste or other pollutants or

of **wastewater** within and without the District.” ((Emphasis added) (Supp. 790).) Among other things, the District always has been charged with planning, financing, constructing, operating and controlling “**waste water** treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, **storm water handling facilities**, and all other water pollution control facilities of the District.” ((Emphasis added) (Supp. 791).)

#### 5. The Common Pleas Court expands the Plan for Operation.

In 1975, the District’s Petition was amended (with court approval) to affirm that the District has “regulatory authority over all **wastewater** collection facilities and systems in the District.” ((Emphasis added) (Supp. 775).) Similarly, the Court approved an amendment to the Plan for Operation to make clear that the District has the authority to regulate local stormwater collection facilities and systems and has an *affirmative obligation* to develop a plan for regional stormwater management:

##### (m) Local Sewerage Collection Facilities and Systems

The District shall have authority pursuant to Chapter 6119 of the Ohio Revised Code to plan, finance, construct, maintain, operate, and regulate local sewerage collection facilities and systems within the District, **including both storm and sanitary sewer systems**. . . .

##### (1) Regulation

The District shall have regulatory authority over all local sewerage collection facilities and systems in the District, **including both storm and sanitary sewer systems**. This authority shall be exercised by the District through rules and regulations adopted by the Board of Trustees pursuant to Chapter 6119 of the Ohio Revised Code. . . .

. . . Whenever the Board of Trustees shall propose to adopt or amend any such rule or regulation, it shall first notify all communities within

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contaminants derived from the prior use of the water.” ((Emphasis added) (R.C. 6119.011(K) (Appx. 114).)

the District of the nature and content of the proposed rule, regulation, or amendment.

...

(3) Planning

The District shall have authority to plan local sewerage collection facilities and systems pursuant to Chapter 6119 of the Ohio Revised Code. The District ***shall develop*** a detailed integrated capital improvement plan for ***regional management of wastewater collection and storm drainage*** designed to identify a capital improvement program for the solution of all ***intercommunity drainage problems (both storm and sanitary)*** in the District.

((Emphasis added) (Supp. 780-81).)

Erwin Odeal, the District's former Executive Director and an employee of the District from 1974 through 2007, testified at trial that, during his several decades at the District, he understood the District's role to be to "prepare a plan and manage all wastewater issues in the Greater Cleveland area in our Sewer District area," which "included wastewater treatment, sewage treatment, and ***storm drainage issues.***"

((Emphasis added) (Supp. 218-19).) Mr. Odeal's undisputed testimony is that he always understood the District to be responsible for regional stormwater management.

(Supp. 219.)

On May 25, 1979, the Common Pleas Court granted another petition by the District to amend its Petition in order to, among other things, change its name from the "Cleveland Regional Sewer District" to its current name, the "Northeast Ohio Regional Sewer District." (Supp. 788-803.) No further amendments have ever been made to the District's Petition or Plan for Operation.

**B. The prior stormwater management activities of the District.**

**1. The U.S. Environmental Protection Agency (“U.S. EPA”) and Ohio Environmental Protection Agency (“Ohio EPA”) require action by the District.**

Early in the District’s history, due to U.S. EPA and Ohio EPA mandates under the Clean Water Act and pressing public health issues, the District focused primarily on remedying sanitary sewage issues, including construction of significant upgrades to District wastewater treatment plants and construction of interceptors and intercommunity relief sewers to eliminate certain local wastewater treatment plants and septic systems, and to alleviate local community sewer flooding problems. (See Supp. 147-48, 220-221.)

Additionally, as a condition for U.S. EPA funding of interceptor sewers under the Clean Water Act, the District was mandated to implement a program to require local community improvements to alleviate infiltration and inflow problems and local sanitary sewer overflows. (Supp. 148.) Thus, the District focused primarily on these issues. (Supp. 148, 220-21.)

**2. The District funds and constructs twenty-five stormwater projects.**

Despite its primary focus on sanitary sewage, the District participated in the funding and construction of at least twenty-five stormwater-related projects beginning in the 1970s. (Supp. 148, 221, 333-334.) Moreover, pursuant to its Petition and Plan for Operation, the District has invested more than \$12.9 million over the last thirty years in a series of stormwater-related studies and construction projects. (Supp. 148, 221-42, 259-68, 501-617.) For example, the studies include:

- the *Regional Plan for Sewerage and Drainage Study* (1976-1978) to identify intercommunity stormwater flooding areas and community concerns across the District;
- the *Regional Plan for Sewerage and Drainage–Phase I Study* (1997-1999) to identify stormwater problem areas and to begin the detailed development of a regional stormwater management program;
- the *Regional Intercommunity Drainage Evaluation (“RIDE”) Study* (2000-2004) to provide a more detailed assessment of the region’s stormwater problems, including planning-level stream-system computer modeling of the major watersheds within the District;
- the *Stormwater Roadmap Development Study* (2006-2007) to assess existing District resource capabilities and to develop a preliminary regional stormwater management program outline with potential costs, ramp-up activities, and resource needs, including the collection of satellite-based impervious area data needed to evaluate revenue issues and billing requirements; and
- the *Stormwater Management Program Implementation Project* (December 2007-2009) which retained AMEC Earth & Environment, Inc. (“AMEC”), an engineering consultant internationally recognized for its expertise in developing successful stormwater management programs, to assist in the final development of the District’s Program.

(See Supp. 221-42, 259-67, 501-617.)

The detailed studies revealed that the number of stormwater problem areas in the region had *more than doubled* since 1978, and that intercommunity stormwater



problems along what the District has defined as the “Regional Stormwater System” (discussed below) were pervasive throughout the District’s service area. (Supp. 234-35, 240, 576, 578, 585-87.)

## **II. Northeast Ohio’s Regional Stormwater System.**

### **A. The journey of storm water from each parcel of property to Lake Erie.**

In Northeast Ohio, much of the storm water, *i.e.*, rain or snowmelt, follows no man-made boundaries, and flows off of the impervious surfaces (*i.e.*, rooftops, driveways, parking lots, etc.) of each individual residence and business into the roadside catch basins, storm sewers, and ditches owned and/or operated by the local communities. (See, *e.g.*, Supp. 337-38, 389-90, 402-03.) This is common knowledge and a highly visible occurrence. However, what happens next is a mystery to much of the general public.

After storm water enters these local stormwater conveyance structures, it is transported into a highly intricate intercommunity system of connecting streams, rivers, and other watercourses that meander their way north for several miles through the city of Cleveland’s surrounding communities and then eventually through the city itself into the region’s most valuable asset, Lake Erie. (See Supp. 657, 270-73, 297, 406.) This is the “Regional Stormwater System,” which is depicted in Plaintiff’s Trial Exhibit 28. (Supp. 657, 270-73, 297; *see also* Supp. 421 (defining the Regional Stormwater System).)

As just one example of how the Regional Stormwater System operates, stormwater runoff from properties in the city of Beachwood enters the local stormwater conveyance structures and is conveyed to Doan Brook. (Supp. 745, 349.) Doan Brook

then carries this storm water through the Village of Highland Hills into the city of Shaker Heights, where it empties into a series of lakes (the “Shaker Lakes”). (*Id.*) The storm water flows through the Shaker Lakes back into Doan Brook, which then flows through Cleveland Heights into Cleveland and ultimately into Lake Erie. (*Id.*; *see generally* Supp. 657.)

Other than the high ground communities at the tops of the watersheds (*e.g.*, Community Appellee city of Beachwood), there are very few communities in Northeast Ohio that are not forced to deal with stormwater flows from other communities. (Supp. 236.) As explained by Mr. Odeal, “there is a major regional problem that nobody is addressing” and “people look at storm drainage as only the poor guy that gets the flow downstream.” (Supp. 243.)

**B. Unmanaged stormwater causes problems throughout the Regional Stormwater System.**

As development activities in Northeast Ohio increased over the past four decades, so did the quantity of stormwater runoff from the newly-added impervious surfaces, such as parking lots, driveways, and rooftops. (Supp. 228.) This only exacerbated existing problems along the intercommunity watercourses that were already inadequate to handle the predevelopment stormwater flows that they received, and also created new problems. (Supp. 227-28, 234-35.)

**1. Stormwater problems more than double since 1978.**

As referenced in section I(B)(2) above, due to a lack of regional stormwater management, the studies conducted by the District indicated that stormwater problem areas in Northeast Ohio have *more than doubled* since 1978, and intercommunity stormwater problems are pervasive throughout the Regional Stormwater System.

(Supp. 234-35, 240, 576, 578, 585-87.) These problems include, among other things:

- (a) flooding of residences, businesses, roadways, and the Cleveland Metroparks Zoo;
- (b) erosion of stream banks that threatens residences, businesses, and roadways;
- (c) loss of vegetation and woody materials holding stream banks together;
- (d) debris, silt, and sediment buildup in streams, lakes, and large stormwater retention basins, which has contributed to the growth of algae and duckweed and which causes damage to bridges, roads, and pedestrian parkways in the Cleveland Metroparks; and
- (e) dams that are in a state of disrepair and not in compliance with state standards. (Supp. 244-46, 283-96, 346-47, 350-51, 368, 370-71, 377-79, 408, 409-12, 576, 578, 585-87, 659-70, 720-35.)

## **2. Water quality is seriously degraded by stormwater problems.**

An additional, important problem caused by the currently unmanaged stormwater flow throughout the Regional Stormwater System is the degradation of water quality. For example, as explained by Hector Cyre, one of the District's experts who has helped to establish at least 150 stormwater utilities, residue and pollutants collect on impervious surfaces and then wash off of those surfaces into the regional waterways during the next wet-weather event:

So there is all of that material. And there is what's called a ***first flush phenomenon***. After a dry period, say it hasn't rained for a couple of weeks or longer, you'll have a direct[] collection of this residue on a surface, whether it's on a rooftop or a patio or driveways, sidewalk or a road, whatever, and the first flush of stormwater will pick that up and flow it off into the drainage system.

And the concentrations of pollution in that first flush have been demonstrated, they were demonstrated in the National Urban Runoff Program when we did the studies in Bellevue, it was repeatedly demonstrated in empirical studies to be a -- in relative terms a high level of

pollutant concentration. And the impervious surface is a principal factor in the first flush phenomenon.

((Emphasis added)(Supp. 209-10.) If the velocity of the storm water is decreased, or if the storm water is held in place for a certain period of time (*e.g.*, in a basin), the pollutants have an opportunity to fall out before the storm water is transported through the Regional Stormwater System into Lake Erie. (Supp. 399.)

### **3. Pathogens and bacteria create additional health and habitat threats.**

The unmanaged stormwater flow also contributes to the regional streams being unable to attain the standards set by the Ohio EPA with respect to, among other things, pathogens and bacteria. (Supp. 340, 342-43.) This creates a public health threat, as well as a threat to natural habitat. (*Id.*; see also Supp. 357-58 (discussing degraded quality of storm water that runs off of urban and suburban properties).)

### **4. The water quality of Lake Erie is impacted by stormwater problems.**

Finally, an important determinant of the health of Lake Erie today is the water quality of rivers and streams that flow into the lake, which is directly impacted by stormwater runoff. (Supp. 383-84.) David Beach, one of the District's experts who has been a close observer or a participant in nearly all of the major water quality and watershed planning initiatives in the city of Cleveland taking place over the past twenty-five years, testified as follows:

[T]he non-point source [of pollution] is **stormwater pollution** [and] is sort of the **last frontier of water quality**. Over the last 30 or 40 years, since the Clean Water Act, we've done a great job of controlling point source of pollution. The big issue are things like stormwater runoff. I haven't seen any effective institutional response to these problems, until the Sewer District has developed this stormwater program. No one else seems to

have the interest, the mandate, the capacity, the funding mechanism to do anything about these regional problems like stormwater.

[W]ater is a connected ecosystem. You can't just kind of have boundaries and separations. So anything that happens on the land eventually is going to affect Lake Erie, within the Lake Erie drainage basin. So, again and again, a lot of science has taken place by the State and other researchers to say that what happens in the watershed determines the water quality of Lake Erie.

((Emphasis added) (Supp. 385-86).)

If the Regional Stormwater System in Northeast Ohio continues to go unmanaged, the District's studies have shown that the flooding, erosion, sedimentation, water quality, and other problems along that system will continue to increase in severity and number and, as explained by Mr. Beach, the health of Lake Erie will continue to decline as a result. (See, e.g., Supp. 576, 578, 585-87, 385-86.)

### **III. The District's Regional Stormwater Management Program.**

#### **A. Development of the Program involved years of planning, millions of dollars, multiple studies, and community involvement.**

In 2007, after more than *thirty years* of documenting and analyzing the intercommunity stormwater problems in Northeast Ohio as detailed in Section I(B)(2) above, the District began developing and preparing for the implementation of its Program. (Supp. 258-60.) This was a lengthy and multifaceted process for the District, which included the use of experts and extensive discussions with its Member Communities, as well as a wide variety of local, state and county officials, watershed groups and other interested parties. (Supp. 121, 261-267, 618-56.) Specifically, the District undertook the following steps to develop its Program:

- Engaged AMEC to assist in the final development of the Program, which included the preparation of the September 7, 2007 Phase I Final Report documenting the

findings of the *Does It Make Sense ("DIMS") Study* and the *Stormwater Roadmap Development Study* (Supp. 260-61);

- With AMEC assistance, created draft version of a new Title V, the Stormwater Management Code, to the District's Code of Regulations (Supp. 415-41);
- Held significant discussions with the Member Communities through "*hundreds of meetings*" regarding stormwater problems, construction improvement needs, and operation and maintenance issues related to regional stormwater management (Supp. 121, 258, 261-67, 618-56);
- Created a "Stormwater Advisory Committee" comprised of environmental organizations, non-profits, hospitals, schools, churches, and industry groups, and held five meetings with this committee to solicit input used to "better frame" and "fine tune" the Program going forward (Supp. 265-67);
- Circulated a draft version of Title V of the Code of Regulations to Member Communities and held a meeting to solicit comments and receive Member Community input (Supp. 268); and
- Modified Title V based on comments received from Member Communities (Supp. 269).

On January 7, 2010, following the lengthy and multifaceted development process outlined above, the District's Board of Trustees unanimously approved Title V to authorize the establishment of the Program per Section 5(m)(1) of the Plan for Operation. (*See generally* Supp. 415-41.)

**B. The Program will produce major improvements in stormwater management in the District.**

The District, working collaboratively with its Member Communities, would undertake two primary types of activity under the Program. These include (1) construction activities and (2) inspection, operation, maintenance, and monitoring activities, in addition to the various support activities that they entail. (Supp. 423-24, 427-28.)

**1. Major construction needs are identified and prioritized.**

Based upon its detailed studies and input from its Member Communities, the District has identified a backlog of needed regional stormwater projects, including water resource projects, costing approximately \$228 million, and believes that other projects have yet to be identified and that the need for new projects will continue in the future. (Supp. 321-27, 673-95, 710, 736-44.) The District has also identified and evaluated what it believes to be the most urgent regional stormwater problems throughout its service area, and has compiled a list of construction projects (included within the backlog), referred to as the "First Out Projects," that will help alleviate those problems. (Supp. 280-90, 658, 695.) The First Out Projects include, among other things, the construction, replacement, repair, restoration, rehabilitation and/or stabilization of stream and river banks, floodwalls, flood berms, culverts, detention basins and facilities, concrete encasements, channels, lakes, dams, storm sewers, and erosion control measures, as well as raising roadways to address chronic flooding. (*Id.*) These projects will, among other things, alleviate flooding, repair and reduce erosion, and stabilize stream banks and roadways. (*Id.*)

**2. The District will undertake inspection, operation, maintenance and monitoring activities under the Program.**

The other major constituent of the District's Program is the inspection, operation, maintenance, and monitoring activities. Under this part of the Program, the District would, among other things, inspect the regional streams within its service area for existing and developing problems, clear debris from and unblock these watercourses to help improve stream flow, and implement a system to monitor and repair stream bank erosion. (Supp. 290-97, 428, 659-67.) Inspecting the streams on a regular basis would enable the District "to be more proactive instead of reactive" with respect to regional stormwater problems. (Supp. 290-91.)

The District would also develop Stormwater Master Plans with the input from Watershed Advisory Committees comprised of representatives from its Member Communities to identify future stormwater projects and activities under the Program. (Supp. 274-80, 426-27.)

**C. The District is authorized to impose the Stormwater Fee to fund the Program, and to provide appropriate credits and exemptions.**

**1. The Stormwater Fee and exemptions.**

To fund its Program and the activities described above, the District would charge each property owner within its service area a Stormwater Fee based upon the amount of impervious surface on his or her property.<sup>4</sup> (Supp. 431.) Generally, impervious

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<sup>4</sup> A typical homeowner (*i.e.*, a residential parcel with two thousand (2,000) to three thousand nine hundred and ninety-nine (3,999) square feet of impervious surface) would be classified as equal to 1.0 ERU, and would be charged \$5.15 per month in 2014 (annual total of \$61.80). (Supp. 432-33.)



surface includes rooftops, traveled gravel areas, asphalt or concrete paved areas, private access roads, driveways, parking lots, and patio areas. (Supp. 419.)

**a. Basing the Stormwater Fee on the amount of impervious surface is the most equitable system for calculating such fees.**

Prior to deciding to use impervious surface as the basis for assessing the Stormwater Fee, the District, under the close guidance of its engineering consultant AMEC, conducted a rigorous analysis and evaluation of a range of stormwater funding mechanisms. (Supp. 252, 298-302, 330-31, 671-72.) District employees also reviewed and/or visited other stormwater utilities throughout the country to assess the bases upon which they charge fees, measure the effectiveness of their programs, and solicit their guidance and advice. (Supp. 299-300.) Like the vast majority of stormwater utilities in Ohio and throughout the country, and based upon the advice of AMEC, the District ultimately determined that the use of impervious surface is the best and most equitable parameter for apportioning the costs of the Program. (Supp. 253-55, 300-03, 404-05.)

Natural land surfaces have an ability to absorb storm water. When property owners pave over those surfaces, they have “essentially cut off the ability to percolate [storm water] into the soil [and] into the groundwater system,” and have instead caused the storm water to run off of the properties faster and in greater quantities, which then gets routed directly to the streams. (Supp. 298.) The Stormwater Fee is thus based upon the *incremental increase in the demand on the Regional Stormwater System caused by development on parcels of land* because, as explained by Larry Roesner, one of the District’s experts who is arguably the country’s leading authority on urban hydrology, when “you increase the amount of impervious [surface], you increase the

runoff by the same amount, no matter what the soil type is.” ((Emphasis added) (Supp. 367).)

The District, with the assistance of AMEC, conducted a statistical analysis of residential properties within its service area to obtain the average amount of impervious surface thereon. (Supp. 432.) Based upon that analysis, the District concluded that three thousand square feet of impervious surface should be designated as one Equivalent Residential Unit (“ERU”). (*Id.*) This is the unit of measurement upon which the District’s Stormwater Fee is based. (*Id.*)

**b. Stormwater Fees can only be used for stormwater projects.**

The Stormwater Fee collected from all property owners would be segregated and placed in a separate Stormwater Account and used only for stormwater-related projects. (Supp. 431, 319-21.) It could never exceed the total cost or expense of the Program and could never be diverted for general District expenses. (Supp. 319-21, 328-29.)

**c. Member communities will receive 25% of the funds for local projects.**

Also, under the Community Cost-Share Program set forth in Chapter 9 of Title V, the District would place a minimum of 25% of all funds collected through the Stormwater Fee from property owners in a Member Community in a separate account to be allocated to that Member Community for its use towards local stormwater-related projects. (Supp. 439-40,<sup>5</sup> 315-19.) The District decided upon the Community Cost-Share by conducting an exercise with a stormwater advisory group and by considering

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<sup>5</sup> Title V was modified by the District in accordance with the trial court’s February 15, 2012 Order to increase the amount of the Community Cost-Share, which was originally 7.5%, to 25%. (See Supp. 161-62.)

other factors such as the amount of revenue needed to address regional stormwater problems. (Supp. 317-18.)

**d. Several important exemptions are built into the Stormwater Fee.**

Finally, the District, with the advice of AMEC, determined that the following should be exempt from the Stormwater Fee: (a) public road rights-of-way, airport runways, and airport taxiways; (b) railroad rights-of-way; (c) aggregated parcels with less than four hundred (400) square feet of impervious surface; and (d) parcels owned by Member Communities whose use has been designated as a Non-Self Supporting Municipal Function (defined in Title V, § 5.0214). (Supp. 432, 215-17, 247-48, 335-36, 345.)

**2. The Stormwater Fee credits encourage actions by customers that reduce the flow of stormwater, which in turn reduces the customers' Stormwater Fees.**

As set forth in Chapter 8 of Title V and the District's Stormwater Fee Credit Manual, all property owners could obtain credits to reduce or eliminate the amount of their Stormwater Fee by taking measures to decrease the peak rate or volume of storm water flowing from their properties to the Regional Stormwater System or improving the water quality of their stormwater runoff (the "Stormwater Fee Credits"). (Supp. 436-38, 442-500.) These credits include:

- an Individual Residential Property Credit of 25% for approved stormwater control measures implemented on residential properties (e.g., rain gardens, rain barrels, a reduction in impervious surface, the installation of pervious pavement or disconnecting downspouts to vegetated filter strips, etc.);

- a Stormwater Quantity Credit (further separated into a Peak Flow Credit and Runoff Volume Credit) of up to 75% for approved stormwater control measures implemented on residential and non-residential properties to control stormwater peak flows and volumes (e.g., dry detention basins, retention ponds, green roofs, bioretention areas, and the installation of pervious pavement);
- a Stormwater Quality Credit of up to 25% for approved stormwater control measures implemented on residential and non-residential properties to improve water quality (e.g., bioretention areas, detention basins, constructed wetlands, infiltration trenches, vegetative swales, and the installation of pervious pavement); and
- an Education Credit of 25% for public and private primary, elementary, and secondary schools providing students an education program concentrating on preservation of water resources and minimization of demand on the Regional Stormwater System. (*Id.*)

Every property owner within the District, with sufficient effort and investment, could achieve credits *up to a maximum of 100%*, meaning that no Stormwater Fee would be owed. (Supp. 447, 398, 400-01.) Giving credits for actions that reduce the burden on the Regional Stormwater System is analogous to the reduction that property owners who consume less water receive on their water bills. (Supp. 252.) These same types of credits are offered by other stormwater utilities. (Supp. 397.)

#### **IV. The relevant procedural history of the litigation**

##### **A. The proceedings in the trial court.**

On January 7, 2010, the same day that the District's Board of Trustees unanimously approved Title V to authorize the establishment of the Program, the District filed an action in the trial court seeking: (1) a judgment declaring that the District has the authority to fully implement the Program with respect to all Member Communities served by the District (the "Declaratory Judgment Action"); or, in the alternative, (2) an order permitting an amendment to the District's Petition and Plan for Operation providing the District with such authority. (Supp. 1-31.) The District filed this action because several Member Communities had threatened to file suits for injunctions to block the Program, and the District wanted all objections handled in a single, orderly action. All of the District's Member Communities were named as defendants, including the Community Appellees. (*Id.*) Several parties were also subsequently permitted to intervene, including the Property Owner Appellees, who filed a Counterclaim against the District on July 6, 2010, seeking, among other things, to permanently enjoin the District from implementing its Program. (Supp. 65-95.)

On August 5, 2010, after the trial court issued a Judgment Entry denying their Motion to Dismiss the Complaint, the Community Appellees (minus Bedford Heights) filed a Counterclaim against the District seeking permanent and preliminary injunctions enjoining the District from implementing its Program, including enjoining the District from imposing the Stormwater Fee and from expending any further funds to develop, implement, or promote its Program. (Appx. 82-83, Supp. 32-64.)

On January 31, 2011, the District moved for partial summary judgment seeking a determination that it has the authority pursuant to Chapter 6119 of the Ohio Revised Code, its Petition and Plan for Operation, and prior orders of the Common Pleas Court to manage storm water as outlined in Chapters 1 through 6, 9, and 10 of Title V. (Supp. 98-149.) On April 21, 2011, the trial court issued a Journal Entry and Opinion finding in favor of the District (Apr. 2011 JE & O), holding, among other things, that:

- Chapter 6119 authorizes the District to address intercommunity flooding, erosion and stormwater-related water quality issues, and the District may legally implement a regional stormwater management program;
- further consent of the District's Member Communities is not required for the District to implement such a program; and
- Title V does not unlawfully interfere with the Member Communities' home rule powers or rights to operate a public utility.<sup>6</sup>

(Appx. 84-89 (not signed until May 5, 2011).) Issues relating to the imposition of the Stormwater Fee and the availability of Stormwater Fee Credits were left to be decided at trial.

The trial court held a three-week-long trial in late 2011. Hundreds of exhibits were introduced into evidence and over two dozen witnesses were called to testify, including four experts on behalf of the District and two experts on behalf of the Community Appellees.

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<sup>6</sup> The trial court did hold that sections 5.0602, 5.1005, and 5.1006 of Title V were beyond the District's authority and invalid. *Id.* at 6. The District has since removed these provisions from Title V. (Supp. 415-41.)

On February 15, 2012, based upon all of the evidence presented at trial, the Court issued an Opinion (“Feb. 2012 Opinion”) holding, among other things, that:

- Chapter 6119 authorizes the District to address intercommunity flooding, erosion, and stormwater-related water quality issues, and authorizes the District to implement a program to address regional stormwater problems (Appx. 90-91);
- the Stormwater Fee is authorized by R.C. 6119.06(W) and 6119.09 (Appx. 96);
- the Stormwater Fee is authorized and not restricted by the District’s Petition and Plan for Operation, referred to by the trial court as the District’s “charter” (Appx. 97-98);
- the Stormwater Fee is not an unlawful tax (Appx. 100);
- the Program does not unlawfully interfere with the Community Appellees’ home rule powers, and the definition of the Regional Stormwater System in Title V, which includes only watercourses receiving drainage of three hundred (300) acres or more, is lawful and constitutional (Appx. 100-02);
- the Stormwater Fee, and the use of impervious surface as the measure for calculating it, is lawful and constitutional except for the non-residential fee schedule without a cap, which the District must rework (Appx. 105);
- the Stormwater Fee Credits are constitutional, but the District must submit a plan or formula providing for the accrediting of costs of licensed engineers in completing non-residential property owners’ applications for the same (not to exceed 10% of the Stormwater Fee) (Appx. 106);

- the Community Cost-Share (set forth in Chapter 9 of Title V) allocating 7.5% of all Stormwater Fees collected from property owners in a Member Community back to that Member Community for it to use towards local stormwater-related projects should be no less than 25%, or what constitutes a “regional” versus a “local” project must be redefined by the parties (Appx. 107); and
- The exemptions to the Stormwater Fee (set forth in section 5.0705 of Title V) are lawful and constitutional (Appx. 108).

The trial court also denied Appellees’ Counterclaims, including their request for injunctive relief.

On May 30, 2012, the trial court held a post-trial hearing on the District’s proposed revisions to Title V. (Supp. 160-203 (outlining revisions).) The trial court entered a Supplemental Journal Entry on June 28, 2012, adopting such revisions and affirming its prior findings set forth in the February 15, 2012 Opinion in favor of the District and against Appellees. (Appx. 110-11.)

**B. The Eighth District Court of Appeals ignores the relevant evidence and relies on an absurd reading of Chapter 6119.**

Following the trial court’s Orders, Appellees appealed to the Eighth District Court of Appeals. On September 26, 2013, a divided panel of the court of appeals issued its judgment, reversing in part and affirming in part those decisions. *See Northeast Ohio Reg’l Sewer Dist. v. Bath Twp.*, 2013-Ohio-4186, 999 N.E.2d 181 (hereinafter, “*NEORS*”) (Appx. 6-81.) Specifically, the majority opinion held, among other things, that: (a) Title V exceeds the express statutory authority granted to the District under Chapter 6119 and the authority conferred under the Petition and Plan for Operation; and (b) the Stormwater Fee is an unauthorized charge. (Appx. 48 (¶ 68).) The majority



opinion was based, in large part, upon the majority's conclusion that the term "waste water," as defined in Chapter 6119, prevents the District from managing storm water unless it is *combined* with sewage or other pollutants. (Appx. 37 (¶¶ 43-44).)

The majority opinion (which ignored the balance of the legal issues) was countered by a thorough and well-reasoned dissent. The dissent methodically analyzed and dissected the plain language of Chapter 6119 and the Petition and Plan for Operation, and found that: (a) Title V is expressly authorized under Chapter 6119 and the Petition and Plan for Operation, both procedurally and substantively; and (b) the Stormwater Fee is an authorized charge. (Appx. 54-55 (¶ 89).) The dissent specifically determined that the definition of "waste water" conferred upon the District the authority to manage *both* (a) storm water and (b) sewage, regardless of whether they are combined, and that "to find otherwise would create an ***absurd result.***" ((Emphasis added) (Appx. 55-58 (¶¶ 90-101)).)

### **ARGUMENT**

- I. **PROPOSITION OF LAW NO. I:** A district formed pursuant to R.C. Chapter 6119 is authorized to manage storm water which is not combined with sewage, and to impose a charge for that purpose. Such a charge is one "for the use or service of a water resource project or any benefit conferred thereby."
  - A. The District has the authority under Chapter 6119 to collect, treat, and/or dispose of storm water that is not combined with sewage or industrial waste.

The court of appeals' majority opinion disregarded the unambiguous words of Chapter 6119, ignored the actual language of the statute, and adopted a statutory interpretation that produces unreasonable and absurd results. The majority opinion holds that 6119 Districts, including the District, may manage storm water only if it

contains sewage or other pollutants. (Appx. 37 (¶ 44)). As pointed out in the dissenting opinion, this finding disregards the express language of R.C. 6119.011(K). (Appx. 55-57 (¶¶ 91-98).) This Court should follow the plain language of R.C. 6119.011(K) and find that the District has authority under Chapter 6119 to collect, treat, and/or dispose of storm water regardless of whether it is combined with sewage or other pollutants.

It is a well-established rule of statutory construction that, if words in a statute are unambiguous, a court must look no further than the face of the statute and simply apply its terms. *See State ex rel. Jones v. Conrad*, 92 Ohio St.3d 389, 392, 750 N.E.2d 583 (2001). A court cannot presume that the legislature intended to enact a law which produces unreasonable or absurd results. *See State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St. 3d 39, 42-43, 734 N.E.2d 797 (2000); *State ex rel. Haines v. Rhodes*, 168 Ohio St. 165, 170-72, 151 N.E.2d 716 (1958). When interpreting statutes, courts must avoid constructions that create absurdities. *Id.*

**1. The majority opinion disregards the plain, unambiguous text of R.C. 6119.011(K).**

Chapter 6119 Districts have the authority to collect, treat, and dispose of “waste water.” Indeed, a regional water and sewer district created under Chapter 6119 can have either or both of the following purposes: (A) to supply water to users within and without the district; or (B) to provide for the collection, treatment, and disposal of *waste water* within and without the district. ((Emphasis added) (R.C. 6119.01 (Appx. 112).) It is the definition of “waste water” in R.C. 6119.011(K) that the majority opinion misconstrued.

**a. The language of the statute is unambiguous.**

Under R.C. 6119.011(K), the term “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.” ((Emphasis added) (R.C. 6119.011(K) (Appx. 114).) Because the words of the statute are unambiguous, the Court need not look any further than the face of the statute and simply apply its terms. The definition repeats the word “water,” making clear that 6119 Districts have authority over two types of water: (1) water from storms, and also (2) water containing sewage and other pollutants.

**b. The definitions in other sections of Chapter 6119 support the District’s interpretation.**

Beyond the face of R.C. 6119.011(K), several other provisions of Chapter 6119 illustrate the District’s statutory authority to manage storm sewers and other systems as outlined in Title V. R.C. 6119.06(G) gives the district broad authority over “water resource projects”, and R.C. 6119.08 gives the District rule-making authority regarding the manner of use of its “projects” by any person or political subdivision.<sup>7</sup> (Appx. 122, 125.) As used in Chapter 6119, “project” and “water resource project” mean “any waste water facility” operated by or leased to a 6119 District. (R.C. 6119.011(G) (Appx. 113).) In turn, “waste water facilities” is defined to include storm sewers and other systems used to transport and dispose of waste water:

. . . facilities for the purpose of treating, neutralizing, disposing of, stabilizing, cooling, segregating, or holding waste water, including, without limiting the generality of the foregoing, . . . ***storm and sanitary sewers***

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<sup>7</sup> R.C. 6119.06(G) provides that a 6119 District may “[a]cquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent to or from, or contract for operation by or for, a political subdivision or person, water resource projects within or without the district.” (Appx. 122.)

***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 thereof when necessary.

((Emphasis added) (R.C. 6119.011(L) (Appx. 114).) Thus, because storm sewers and other systems are “projects” and “water resource projects” under Chapter 6119, the District may acquire and operate such facilities and may enact and enforce rules and regulations regarding their use by persons and political subdivisions.

Moreover, although the majority opinion holds that Chapter 6119 does not authorize the District to implement a “stormwater management program” because words such as “flooding,” “erosion,” and “Regional Stormwater System” do not appear in the statute, this argument is mistaken. Although these terms are not explicitly used in Chapter 6119, the statute specifies a number of activities that may be undertaken by a 6119 District that directly constitute stormwater management. For example, 6119 Districts may undertake “water resource projects” for or relating to “stream flow improvement,” “dams,” “reservoirs,” “impoundments,” “stream monitoring systems,” and “the stabilization of stream and river banks,” all projects that *relate directly to stormwater management* and do *not involve sewage*. (R.C. 6119.011(G), (M) (Appx. 113-14).) Stormwater management is intended to prevent flooding, erosion, sedimentation, and loss of habitat by controlling and reducing the velocity and volume of stormwater runoff through construction activities and routine maintenance.

As a matter of law, the District has the authority and power to manage storm water as set forth in Title V, including storm water that is not combined with sewage or other pollutants.

**2. The majority opinion's reading of R.C. 6119.011(K) results in absurdity.**

The majority opinion blatantly misreads (and even misquotes) the definition of waste water in holding that 6119 Districts may only manage storm water if it is *combined* with sewage or other pollutants, thereby divesting the authority of all such districts to manage problems resulting from “storm water” or water quality issues resulting from “water containing sewage”, *unless* the two are combined. (Appx. 37 (¶ 44)) (misquoting definition of waste water as “any storm water containing sewage or other pollutants.”) The majority opinion ignores the unambiguous words of R.C. 6119.011(K) and erroneously conflates these two categories of water into one, finding that the “and” in this definition limits the District to managing only storm and sanitary water that is mixed together. (*Id.*) As correctly pointed out in the dissent, this reading of R.C. § 6119.011(K) leads to impermissibly absurd results. (Appx. 56 (¶ 94)); *see also Dispatch Printing*, 90 Ohio St. 3d at 42-43; *Haines*, 168 Ohio St. at 170-72.

**3. The majority opinion relies upon dicta from an irrelevant case and irrelevant sections of the District's Code of Regulations.**

**a. *Reith* does not hold contrary to the District's position.**

Instead of applying as written the statutory language of R.C. 6119.011(K), the majority opinion relies on dicta from a civil negligence and trespass case, *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852, 840 N.E.2d 226 (1st Dist), which misstated that “waste water” as defined in R.C. 6119.011(K) means “any storm water containing sewage or other pollutants.” (Appx. 37 (¶ 44).) Not only is *Reith* irrelevant here, as it was a case involving claims of negligence and trespass in connection with flooding of a landowner's driveway and home, and the statute of

limitations relating to same, *Reith* at ¶¶ 34, 48, but following the *Reith* court's characterization of R.C. 6119.011(K) leads to the absurdity discussed above that 6119 Districts cannot operate their sewage treatment facilities on dry-weather days or, in the case of districts with no combined sewers, *ever*, because no storm water is mixed with the sewage. (Appx. 56 (¶ 94).)

**b. The Eighth District fails to read the definition in context.**

Moreover, the majority opinion's reliance upon the definitional sections of Titles I, II [sic], and IV of the District's Code of Regulations is misguided as well. (Appx. 37 (¶ 44).) Titles I, III, and IV each contain a section defining the terms as they are to be used *within that title*. It is no surprise then, for example, that Title IV, the Combined Sewer Code, which exists to manage sewers which receive and transport both *sanitary sewage and storm water runoff*, defines "wastewater" as "a combination of water-carried waste . . . together with such ground, surface, or storm water as may be present." (Supp. 159.) In fact, it would be surprising if Title IV contained *any other* definition of wastewater. The question before the Court is what "waste water" means in R.C. § 6119.011(K) for purposes of defining the District's overall authority, not what wastewater means in a separate title of the District's Code of Regulations that is intended to implement only one aspect of the District's overall authority.

- B. R.C. 6119.09 authorizes a charge to residents of 6119 Districts' member communities for projects designed to reduce flooding, erosion, and other damage caused by storm water that is based upon the amount of impervious surface on each such resident's property.

Section 6119.09 of the Revised Code, as well as the court of appeals' own precedent,<sup>8</sup> demonstrate that the District may impose the Stormwater Fee upon property owners within the Member Communities because it is a charge imposed "for the *use* or *services* of any water resource project or *any benefit* conferred thereby."

((Emphasis added) (R.C. 6119.09 (Appx. 126).)

R.C. 6119.06(W) states, in pertinent part:

Upon the declaration of the court of common pleas organizing the regional water and sewer district . . . , such district may:

. . . .

(W) ***Charge, alter, and collect*** rentals and other charges for the use or services of any water resource project ***as provided in section 6119.09 of the Revised Code . . .***

((Emphasis added) (R.C. 6119.06(W) (Appx. 123).)

Pursuant to section 6119.09 of the Ohio Revised Code:

A regional water and sewer district may ***charge, alter, and collect*** rentals or ***other charges***, including penalties for late payment, for the ***use or services of any water resource project or any benefit conferred thereby*** and contract in the manner provided by this section with one or more persons, one or more political subdivisions, or any combination thereof, desiring the use or services thereof, and fix the terms, conditions, rentals, or other charges, including penalties for late payment, for such use or services. Such rentals or other charges shall not be subject to supervision or regulation by any authority, commission, board, bureau, or agency of the state or any political subdivision. . . .

((Emphasis added) (R.C. 6119.09 (Appx. 126).)

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<sup>8</sup> See discussion of *City of Cleveland v. N.E. Ohio Regional Sewer Dist.*, 8th Dist. No. 55709, 1989 WL 107162, \*1 (Sept. 14, 1989) in Section I(B)(2)(c) below.

The term “water resource project” is defined as:

[A]ny **waste water facility** or **water management facility** acquired, constructed, or operated by or leased to a regional water and sewer district or **to be 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.

((Emphasis added) (R.C. 6119.011(G) (App. 113).)

The terms “waste water facility” and “water management facility” are defined as follows:

“Waste water facilities” means facilities 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 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. . . .**

“Water management facilities” means facilities for the purpose of the development, use, and protection of water resources, including, without limiting the generality of the foregoing, facilities for water supply, **facilities for stream flow improvement, dams, reservoirs, and other impoundments**, water transmission lines, water wells and well fields, pumping stations and works for underground water recharge, **stream monitoring systems, facilities for the stabilization of stream and river banks, and facilities for the treatment of streams and rivers**, including, without limiting the generality of the foregoing, **facilities for the removal of oil, debris, and other solid waste from the waters of the state and stream and river aeration facilities.**

((Emphasis added) (R.C. 6119.011(L), (M) (Appx. 114).)

#### 1. The Program meets the requirements of the statute.

The District’s Program, and the list of stormwater projects that are to be completed thereunder, constitute “water resource projects” as defined in sections



6119.011(G), (L), and (M). Indeed, the majority opinion does not hold to the contrary. Thus, the District needed only to demonstrate at trial that the Stormwater Fee complies with sections 6119.06(W) and 6119.09, *i.e.*, that the Stormwater Fee will be imposed for (1) each property owner's "use" of the Program; (2) "services" provided to each property owner under the Program; and/or (3) a "benefit conferred," whether direct or indirect, upon each property owner by the Program. (Appx. 123, 126.)

**2. The trial court resolved evidentiary issues regarding the use of the District's services.**

The District introduced an abundance of undisputed evidence at trial demonstrating that the Stormwater Fee complied with Revised Code sections 6119.06(W) and 6119.09. Indeed, the trial court held that "*property owners 'use' the unmanaged Regional Stormwater System as rainfall creates runoff from each parcel,*" and "*the District provides the service of effective transportation of stormwater decreasing the flooding of homes, businesses and preventing excessive erosion and sedimentation.*" ((Emphasis added) (Appx. 97).) The court of appeals' majority opinion ignored the undisputed facts and improperly reversed the trial court's finding.

This Court should reverse the decision of the majority and reinstate the trial court's decision because: (a) the undisputed evidence at trial demonstrates that the Stormwater Fee complies with R.C. 6119.06(W) and 6119.09; (b) the trial court properly made factual findings based upon this evidence; (c) Chapter 6119 does not require a direct "service connection" to a water resource project for imposition of a charge; and (d) the Stormwater Fee is reasonably related to the amount of impervious surface on residents' property.

**a. The undisputed evidence at trial demonstrates that the Stormwater Fee complies with R.C. 6119.06(W) and 6119.09.**

The undisputed evidence at trial demonstrated that the District's Stormwater Fee complies with R.C. 6119.06(W) and 6119.09. For example, a number of distinguished expert and fact witnesses supported the conclusion that the stormwater program would provide valuable services to property owners in the district, including: Hector Cyre, President of Water Resource Associates, Inc., who in his *decades* of experience has helped to establish at least 150 stormwater utilities (Supp. 205, 211-12); David Beach, Director of the GreenCityBlueLake Institute, who has been involved in nearly every major water quality and watershed planning initiative in this region for the past twenty-five years (Supp. 387-88); Jay Dorsey, Water Resources Engineer--Streams, Watersheds, and Stormwater, Ohio Department of Natural Resources, who spends approximately 95% of his time on stormwater issues (Supp. 359-60); Frank Greenland, Director of Watershed Programs of the District (Supp. 339-44); Erwin Odeal, former Executive Director of the District (Supp. 221-43); Kyle Dreyfuss-Wells, Manager of Watershed Programs of the District (Supp. 391-96); Mayor Earl Leiken, Mayor of the city of Shaker Heights (Supp. 346-56); and Mayor Bruce Rinker, Mayor of Mayfield Village and Member of the Cleveland Metroparks Board of Commissioners (Supp. 368-82).

**b. The trial court made factual findings based on this testimony.**

Based upon this and other evidence presented by the District, the trial court properly concluded that:

- property owners will receive a *service* because the stormwater running off of each of their properties will be captured and controlled, and because the

activities conducted under the Program will result in the improved transportation of stormwater through the Regional Stormwater System decreasing the flooding of homes and businesses, and preventing excess erosion and sedimentation ((Emphasis added) (Appx. 94, 97, 100));

- property owners will all *use* the Regional Stormwater System as rainfall creates runoff from each parcel ((Emphasis added) (Appx. 94, 97));
- the Program will result in ecological and environmental *benefits* ((Emphasis added) (Appx. 95)); and
- the Program will provide *benefits* by improving water quality and habitat for wildlife, and by reducing future costs relating to stormwater management ((Emphasis added) (Appx. 97)).

Accordingly, the District's Stormwater Fee complies with the requirements of R.C. 6119.06(W) and 6119.09 in that it will be imposed for: (1) each property owner's "use" of the Program; (2) "services" provided to each property owner under the Program; and/or (3) a "benefit conferred," whether direct or indirect, upon each property owner by the Program.

**c. Chapter 6119 does not require a direct "service connection" to a water resource project for imposition of a charge.**

The court of appeals' majority opinion incorrectly construed R.C. 6119.09 to require a direct "service connection" from each property to a water resource project. (Appx. 41 (¶¶ 53-54).) This again produces an absurd result, as many water resource projects expressly authorized by statute—such as waste water impoundment facilities, storm sewers and other systems, stream flow improvement facilities, dams, reservoirs, stream monitoring systems, facilities for the stabilization of stream and river banks, and

facilities for the treatment of streams and rivers (R.C. 6119.011(L) and (M) (Appx. 114))—are not directly connected to individual properties. The majority opinion also ignores the clear statutory language that the Stormwater Fee may be imposed for “any benefit” conferred by the District’s Program. (Appx. 41 (¶ 54).)

The majority opinion directly contradicts an earlier decision from the same court of appeals involving the District’s construction of intercommunity relief sewers, *i.e.*, a “water resource project.” *City of Cleveland v. N.E. Ohio Reg’l Sewer Dist.*, 8th Dist. No. 55709, 1989 WL 107162 (Sept. 14, 1989). In that case, the city of Cleveland argued that its property owners should not have to share in the multi-million dollar cost of constructing intercommunity relief sewers because they were all being constructed in surrounding suburbs. *Id.* at \*3. In ruling against the city of Cleveland and upholding the charge, the court of appeals found that “all users of the [D]istrict including [C]ity residents will benefit from the [Intercommunity Relief Sewer Program]” because “alleviation of the suburban overflow will reduce the wet weather flow into the Cleveland system, Lake Erie and the surrounding streams.” *Id.* The court of appeals held that the total cost of designing and implementing the intercommunity relief sewers must also be borne by users within the city of Cleveland, regardless of the city’s desire to not have its residents pay for those costs because most, if not all, of the direct benefits of the IRSP would inure to the residents of surrounding suburbs, not to them. The court of appeals properly applied Ohio law in 1989; it failed to do so here. There is no requirement in R.C. 6119.09 of a direct service connection in order to collect a fee for services rendered or benefits conferred.

**d. The District's Stormwater Fee is reasonably related to the amount of impervious surface on residents' property.**

In addition to being a properly authorized fee under R.C. 6119.06(W) and 6119.09, the Stormwater Fee is reasonably related to the amount of impervious surface on residents' property. The majority opinion ignored the overwhelming evidence presented by the District at trial, including the testimony of Hector Cyre and Andrew Reese, arguably the country's top two experts on stormwater utilities, and Larry Roesner, one of the country's top hydrologists, regarding the direct relationship between impervious surface and the increased volume and rate of stormwater runoff from a property. (Supp. 206-10, 253-55, 362-66.)

Not only is the Stormwater Fee reasonably related to the amount of impervious surface on residents' property, but using impervious surface to calculate the fee is the most *widely-accepted method* for assessing such fees in Ohio and throughout the country. (Supp. 252, 255, 361, 404-05, 672.)

Accordingly, this Court should reverse the majority opinion and reinstate the trial court's holding.

**II. PROPOSITION OF LAW NO. II: When a Petition and Plan for Operation grant a Chapter 6119 district the authority to operate storm water handling facilities, that District is authorized to create and implement a regional stormwater management program, including imposing appropriate charges to operate that program.**

The District's Petition and Plan for Operation, which was agreed to by *all* of the District's Member Communities decades ago, bestows upon the District the authority to manage storm water on a regional basis as set forth in the District's Program, including the authority to charge a fee for that service. (See *generally* Supp. 788-803.) As correctly determined by both the trial court and the dissent in *NEORS*, the *express*

*language* of the Petition and Plan for Operation makes this abundantly clear, and the Program does not conflict with the Member Communities' obligation to maintain their own local facilities and systems. (*Id.*; Appx. 87-88, 58-60 (¶¶ 102-08), 62-63 (¶¶ 119-21).) This is why the District has invested tens of millions of dollars in stormwater studies and projects throughout Northeast Ohio over the past *four decades* without objection from *any* of its Member Communities. See Statement of Facts, § I(B), *supra*.

Therefore, this Court should reverse the court of appeals' erroneous majority opinion that Title V exceeds the authority conferred upon the District under its Petition and Plan for Operation, and reinstate the judgment of the trial court.

**A. The District's Petition expressly confers upon the District the authority to manage storm water on a regional basis.**

The Common Pleas Court's intent to confer upon the District the authority to address regional stormwater issues more than forty years ago is evident from the language of the District's Petition. As stated in the Petition, the purpose of the District is, in pertinent part:

[T]he establishment of a total **wastewater** control system for the collection, treatment and disposal of **wastewater** within and without the District:

. . .

- (e) With regulatory authority over all **wastewater** collection facilities and systems within the district.

(Supp. 790.) The first clause tracks the statutory language of R.C. 6119.01(B) regarding the purpose of 6119 Districts, which makes clear that the Common Pleas Court intended for the definition of the term "wastewater" used therein to have the same

meaning as that set forth in R.C. 6119.011(K). (See R.C. 6119.01(B) (Appx. 112), 6119.011(K) (Appx. 114).)

As discussed above, under R.C. 6119.011(K) the term “waste water” includes *both* (a) storm water and (b) water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water. Therefore, the Petition bestows upon the District the authority to establish a total stormwater control system for all storm water within and without the District, and also gives the District regulatory authority over all stormwater collection facilities and systems within the District.

**B. The District’s Plan for Operation not only instructs the District to engage in stormwater management activities, but also affirmatively requires the District to develop and implement a plan for regional stormwater management.**

In furtherance of the authority granted to the District under its Petition, the Plan for Operation unambiguously instructs the District to undertake stormwater construction projects. It also affirmatively requires the District to develop and implement a plan for regional stormwater management. This is *exactly* what the District has done.

In the Plan for Operation, the District is charged with planning, financing, constructing, operating and controlling “**wastewater** treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, **storm water handling facilities**, and all other water pollution control facilities.” ((Emphasis added) (Supp. 791.) This grant of authority matches the breadth of the District’s stated purpose in the Petition by committing the District to plan, build and maintain facilities and systems to manage waste water, including storm water.

For example, shortly after its creation in 1972, the District undertook the construction of the Lakeview Cemetery Dam—the largest dam in Cuyahoga County—and has assumed responsibility for its maintenance and operation ever since. (Supp. 249-51, 332-33.) This was *purely* a stormwater project, and is a major asset of the District that receives stormwater flow from several Member Communities. (Supp. 251.)

The Plan for Operation also expressly imposed on the District an *affirmative obligation* to develop a plan for regional stormwater management:

The District ***shall*** develop a ***detailed integrated capital improvement plan for regional management of wastewater collection and storm drainage*** designed to identify a capital improvement program for the solution of all ***intercommunity drainage problems (both storm and sanitary)*** in the District.

((Emphasis added) (Supp. 797.) Such a plan was not only within the District's authority, it was a mandate. As correctly determined by both the trial court and the dissent, the District's Program is the "detailed integrated capital improvement plan for regional management of . . . storm drainage" referred to in the Plan for Operation. (Appx. 87, 58-59 (¶¶ 103-04).)

Finally, the *only* witness offered by any party with personal knowledge of the District's intended purpose and authority at or around the time of its creation is Erwin Odeal. Mr. Odeal, who was employed by the District from 1974 through 2007, testified that, during his several decades at the District, he understood the District's role to be to "prepare a plan and manage all wastewater issues in the Greater Cleveland area in our Sewer District area," which "included wastewater treatment, sewage treatment, and *storm drainage issues*." ((Emphasis added) (Supp. 218-19).) Mr. Odeal has always



understood the District to be responsible for regional stormwater management. (Supp. 219.)

Based upon the express language of the Petition and Plan for Operation and the undisputed testimony of Mr. Odeal, the District was both authorized and required to create its Program.

**C. Each Member Community remains responsible for maintaining its local sewerage collection facilities and systems, and Title V's definitions of "Regional Stormwater System" and "Local Stormwater System" fully conform to this requirement.**

As expressly stated in the Plan for Operation, Member Communities are responsible for owning and maintaining their own local facilities and systems:

Except as otherwise provided in Chapter 6119 and paragraph 5(m) hereof, the construction and financing of ***local sewerage collection systems*** will be the responsibility of the individual municipalities or political subdivisions.

((Emphasis added) (Supp. 792; *see also* 795-96 ("Individual suburban communities will retain *ownership* of all *local suburban facilities*, subject to the provisions of subsection 'm' below" (Emphasis added).) Nothing in Title V seeks to alter this decades-long arrangement, including the District's definitions of "Regional Stormwater System" and "Local Stormwater System" set forth therein.

**1. Member Communities own and operate their own local stormwater systems.**

The District's Plan for Operation makes clear that the District has the authority to construct, operate and regulate "local" facilities and systems, but it is not responsible for the facilities constructed by Member Communities absent its written agreement to assume that responsibility:

The District shall have authority pursuant to Chapter 6119 of the Ohio Revised Code to plan, finance, construct, maintain, operate, and regulate ***local sewerage collection facilities and systems*** within the District, including both storm and sanitary sewer systems. The District shall not ***assume ownership*** of any ***local sewerage collection facilities and systems*** nor shall the District ***assume responsibility or incur any liability*** for the planning, financing, construction, operation, maintenance, or repair of any ***local sewerage collection facilities and systems*** unless the assumption of such ownership, responsibility, or liability is specifically provided for in a written agreement between the District and the respective local community.

((Emphasis added) (Appx. 796).)

Pursuant to the District's Plan for Operation, including sections 5(c)(1), (c)(3), (k) and (m), the Member Communities' *local sewerage collection facilities and systems* include the sanitary and stormwater facilities and systems that they *own and/or operate*. As a matter of law, local communities do not own or operate rivers, streams, brooks, creeks, or other natural watercourses within their geographic boundaries, which primarily flow through *privately-owned property*. (See, e.g., Ohio Constitution, Article I, Section 19b(E) (Appx. 128); *Gavit v. Chambers*, 3 Ohio 495, 498 (1828); (Supp. 407, 413, 414.) The state and its political subdivisions, to the extent authorized by state law, may provide for the regulation of non-navigable waters. (Ohio Constitution, Article I, Section 19b(E) (Appx. 128). The District is just such a political subdivision, and Chapter 6119 provides the state law authority to manage storm water within and without the District, regardless of whether the storm water is flowing through navigable or nonnavigable watercourses. (See, e.g., R.C. 6119.01(B) (Appx. 112), 6119.011(E) (Appx. 113), 6119.08 (Appx. 125).) Importantly, Article I, Section 19b, through reference to Article XVIII, Sections 3 and 7, makes clear that municipal home rule powers cannot be used to "impair or limit" any of the rights recognized by this constitutional provision,

including private property rights in Ohio's rivers and streams and the District's regulation of storm water as authorized by Ohio law. (Ohio Constitution, Article I, Section 19b(G) (Appx. 128).)

Title V makes no effort, either directly or indirectly, to take ownership of or responsibility for the local sewerage collection facilities and systems *owned and/or operated* by Member Communities, who remain responsible for those facilities and systems. In fact, the District has gone so far as to stipulate on the record that it would not even undertake any construction projects on the Regional Stormwater System without the consent of the Member Community in which such project would be undertaken. (Appx. 86, 101.)

**2. The Plan for Operation requires the cooperation and agreement of the Member Communities.**

Consistent with section 5(m) of the District's Plan for Operation, the definitions of "Regional Stormwater System" and "Local Stormwater System" contained in Title V require the District to obtain the agreement of a property owner prior to managing any watercourse, stormwater conveyance structure, or Stormwater Control Measure (defined in Title V, § 5.0555) that is not owned and/or operated by the District. If owned by a local community, it will *not* be managed by the District as part of the Regional Stormwater System absent the local community's agreement. The same is true for private property owners.

Section 5.0218 of Title V defines "Regional Stormwater System" as follows:

The entire system of watercourses, stormwater conveyance structures, and Stormwater Control Measures in the District's service area that are ***owned and/or operated by the District or over which the District has right of use for the management of stormwater***, including both naturally occurring and constructed facilities. The Regional Stormwater System

shall generally include those watercourses, stormwater conveyance structures, and Stormwater Control Measures ***receiving drainage from three hundred (300) acres of land or more***. The District shall maintain a map of the Regional Stormwater System that shall serve as the official delineation of such system.

((Emphasis added) (Supp. 421, 657 (map of the Regional Stormwater System).) This definition serves two purposes.

First, after conducting a four-year-long study, and in accordance with section 5(m)(3) of the District's Plan for Operation, one of the District's consultants, Camp, Dresser & McKee, recommended focusing on *drainage areas larger than 300 acres because this represented the "backbone" of the intercommunity drainage system*. (Supp. 797, 271-73, 583.)<sup>9</sup> The definition therefore generally excludes from the Program's scope any watercourse, stormwater conveyance structure, or Stormwater Control Measure that does not receive drainage from 300 acres or more unless the District has entered into an agreement with the Member Community providing otherwise.

Second, the definition of Regional Stormwater System further limits the District's management efforts to those watercourses, stormwater conveyance structures, and Stormwater Control Measures that the District either (a) owns, (b) operates, or (c) has the right to use for the management of storm water. (Supp. 421.) Thus, if a watercourse, stormwater conveyance structure, or Stormwater Control Measure is not owned by the District, and the District does not currently operate it, the District *must* obtain a "right of use for the management of stormwater," which would be obtained

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<sup>9</sup> The District's experts on stormwater management programs, Mr. Cyre and Mr. Reese, testified that the District's 300-acre cutoff is reasonable given the geomorphology of the District's service area, and also that other stormwater programs utilize similar cut-offs. (Supp. 213-14, 256-57.)

through entering into an agreement with the local community, private entity, or private individual having ownership and/or operational control. (*Id.*)

“Local Stormwater System” is defined in Title V as follows:

The entire system of watercourses, stormwater conveyance structures, or Stormwater Control Measures owned and/or operated by a private entity or a unit of local government other than the District. The Local Stormwater System shall include those watercourses, stormwater conveyance structures, or Stormwater Control Measures not designated as part of the Regional Stormwater System.

(Supp. 420.). This means that if a watercourse, stormwater conveyance structure, or Stormwater Control Measure is owned or operated by a private entity, private individual, or local community, and the District has not otherwise obtained a “right of use for the management of stormwater” by entering into an agreement with that private entity, private individual, or local community, then the watercourse, stormwater conveyance structure, or Stormwater Control Measure is considered to be part of the Local Stormwater System, *i.e.*, it will not be managed under the District’s Program. (*Id.*)

Therefore, because Title V requires the District to obtain the agreement of an owner and/or operator of a watercourse, stormwater conveyance structure, or Stormwater Control Measure prior to managing it under the Program, including situations in which that owner or operator is a local community, Title V more than complies with the limitation contained in section 5(m) of the District’s Plan for Operation with respect to “local sewerage collection facilities and systems.”

Based upon this and other evidence, the trial court correctly found that the “definition of ‘Regional Stormwater System,’ ‘Local Stormwater System,’ ‘Stormwater Management’ and other related sections [of Title V] do not, on their face, violate

previously issued Court orders,” which finding should be reinstated by the Court. (See Appx. 88.)

**D. The Plan for Operation authorizes the District to impose appropriate charges to operate its Program.**

The Plan for Operation states that “[a]ny projects not financed through the Ohio Water Development Authority, State of Ohio, or Federal Government would be financed in such a manner as *may be deemed appropriate by the Board of Trustees.*” ((Emphasis added) (Supp. 793 (“Other financing of District projects”).) Unlike the majority opinion in *NEORS* which never even mentions this provision and focuses solely on the inapplicable “Sewer Rates” set forth in section 5(f), both the dissent and the trial court correctly determined that, because the Stormwater Fee was unanimously approved by the District’s Board of Trustees on January 7, 2010, the District is fully authorized to impose it upon the property owners within its stormwater service area. (Appx. 44 (¶ 62), 62-63 (¶¶ 119-21), Appx. 97.) The Court should reinstate the trial court’s findings.

Therefore, this Court should reverse the court of appeals’ majority opinion that Title V exceeds the authority conferred upon the District under its Petition and Plan for Operation, including the authority to impose appropriate charges to operate its Program, and reinstate the judgment of the trial court.

**CONCLUSION**

For the foregoing reasons, the court of appeals erred in holding that: (a) Title V exceeds the express statutory authority granted to the District under Chapter 6119 and the authority conferred under the Petition and Plan for Operation; and (b) the

Stormwater Fee is an unauthorized charge. Therefore, this Court should reverse those holdings and reinstate the trial court's findings.

Respectfully submitted,



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This is to certify that a duplicate of the foregoing was served this 12th day of May, 2014, by first class U.S. mail, postage pre-paid upon the following:

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