

IN THE SUPREME COURT OF OHIO

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

**BRIEF OF *AMICI CURIAE* COALITION OF OHIO REGIONAL DISTRICTS,  
DEERFIELD REGIONAL STORM WATER DISTRICT, AND ABC WATER AND STORM  
WATER DISTRICT IN SUPPORT OF JURISDICTION**

Eric Luckage (0067556)  
 (Counsel of Record)  
 John Albers (0025099)  
 Albers and Albers  
 88 N. Fifth Street  
 Columbus, Ohio 43215  
 Tel: (614) 464-4414  
 Fax: (614) 461-0604  
 Email: Eric.Luckage@alberslaw.com  
 Email: John.Albers@alberslaw.com

*Attorneys for Coalition of Ohio Regional  
 Districts, Deerfield Regional Storm Water  
 District and ABC Water and Storm Water  
 District*

Mark I. Wallach (0010949)  
 Thacker, Martinsek, LPA  
 2330 One Cleveland Center  
 1375 E. 9<sup>th</sup> Street  
 Cleveland, Ohio 44114

James F. Lang (0059668)  
 Matthew J. Kucharson  
 Molly A. Drake  
 Calfee, Halter & Griswold, LLP  
 1405 East Sixth Street  
 Cleveland, OH 44114

Marlene Sundheimer (0007150)  
 Director of Law  
 Northeast Ohio Regional Sewer District  
 3900 Euclid Avenue  
 Cleveland, OH 44115

*Attorneys for NEORS*



Christopher L. Gibbon (0010983)  
Heather R. Baldwin Vlasuk (0077459)  
Walter & Haverfield LLP  
The Tower at Erieview  
1301 East Ninth Street, Suite 3500  
Cleveland, Ohio 44114

John H. Gibbon (0010986)  
Director of Law  
City of Cleveland Heights  
40 Severance Circle  
Cleveland, Heights, Ohio 44118

*Attorneys for City of Beachwood, City of  
Bedford Heights, City of Cleveland Heights,  
Village of Glenwillow, City of Independence,  
City of Lyndhurst, Village of Oakwood,  
City of Olmstead Falls, and City of Strongsville*

Sheldon Berns (0000140)  
Benjamin J. Ockner (0034404)  
Jordan Berns (0047404)  
Gary F. Werner (0070591)  
Timothy J. Duff (0046764)  
Berns, Ockner & Greenberger, LLC  
3733 Park East Drive, Suite 200  
Beachwood, Ohio 44122

*Attorneys for Intervening Defendants, 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., Pavillion Properties, LLC,  
and WGG Development, Ltd.*

David J. Matty  
Shana A. Samson  
Justin Whelan  
Rademaker, Matty, Henrikson & Greve  
55 Public Square, Suite 1775  
Cleveland, Ohio 44113

*Attorneys for City of Brecksville*

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici curiae* have a deep interest in the handling and treatment of storm water around Ohio. These parties have developed effective, efficient measures for countering the threats posed from storm water, including flooding and pollution. Yet those efforts are suddenly threatened, in light of the Eighth District majority's unexpected reading of R.C. Chapter 6119.

*Amici curiae* Coalition of Ohio Regional Districts ("CORD") is a not-for-profit association of regional water and sewer districts formed under Ohio Revised Code Chapter 6119 ("6119 Districts"). Over 90 such districts, commonly referred to as "6119 Districts," have been established in Ohio. At risk from the Eighth District's decision is not only NEORSD, but also 40 other 6119 sanitary sewer and storm water districts and the over 1 million Ohioans served by those districts.

*Amici curiae* the Deerfield Regional Storm Water District in Warren County (the "Deerfield District") was established in 2003 under Chapter 6119 exclusively to manage storm water and to address a variety of storm water issues in Deerfield Township, including the repair and construction of storm water conveyance systems, stream erosion, and water quality issues which pollute the waters of the State.

*Amici curiae* the ABC Water and Storm Water District in Mahoning County (the "ABC District") was established in 2009 to address both storm water and drinking water issues in the unincorporated territory of Austintown, Boardman and Canfield Townships.

Both the Deerfield and ABC Districts, and likely other 6119 districts as well, could be subject to expensive legal scrutiny based on the Eighth District's faulty interpretation of Chapter 6119. Accordingly, *amici curiae* urge the Court to accept this case for review, as it presents issues of great public interest.

**THIS CASE PRESENTS ISSUES OF GREAT PUBLIC IMPORTANCE AS THE HOLDING BELOW THREATENS THE EXISTENCE OF OVER 40 REGIONAL SEWER DISTRICTS AND THE OVER 1 MILLION OHIOANS THEY SERVE**

*Amici curiae* urge the Court to accept this case for review and restore the proper force of R.C. 6119, which, until the 2-1 decision below, had never been interpreted as prohibiting the utilization of regional storm water districts as mean for collaboratively addressing the challenges posed by storm water in Ohio.

*Amici curiae* have expertise in the efficient management of storm water. Left uncontrolled, storm water knows few limits. It does not respect political boundaries or court decisions. It crosses borders, following its natural course. Without proper regulation, storm water can result in property destruction and long-lasting hardship.

Historically, many Ohio localities have been unable, or unwilling, to address these concerns on their own. Recognizing as much, the General Assembly stepped in with a solution. In 1971, the General Assembly, through the enactment of SB 166, the last omnibus amendment of R.C. Chapter 6119, clarified the means for regional solutions to the persistent storm water threat. Chapter 6119 authorizes districts created under that chapter to “acquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent...water resource projects within or without the district”, (R.C. 6119.06(G)), and further to “provide for the collection, treatment, and disposal of waste water within and without the district,” R.C. 6119.01, which includes “any storm water,” (R.C. 6119.011(K)), and to do so on a regional basis, where efficiencies can be gained and costs spread out among participants.

Yet the Eighth District has called into doubt this plain reading of Chapter 6119, and in doing so has undermined the opportunity for storm water relief in 56 communities provided by the Northeast Ohio Regional Sewer District (the “NEORS D District”) through implementation of its Regional Storm water Management Program (the “Program”). The decision below has

ramifications not only for NEORS and its member communities, but also the other existing 6119 districts around Ohio, as well as those being contemplated for future creation. Indeed, the divided decision in the Eighth District incorrectly interpreted both the language and intent of R.C. 6119.011(L), ignored the broad, general grant of storm water authority in R.C. 6119.011(M), including explicit authorization of components of the NEORS District's Program, and, as a result, upset settled expectations for the many districts treating storm water in our State.

**A. The Decision Below Threatens The Operations Of Three Other 6119 Storm water Districts, Which Are Now Exposed To Challenge Based Upon The Eighth District's Unprecedented Reading Of Chapter 6119.**

To date, three 6119 storm water districts have been approved for storm water-specific purposes in Ohio. Each of those districts was approved by a common pleas court, as required by law. Those courts approved the districts for the specific purpose of managing storm water and/or addressing certain storm water regulatory requirements of the federal Clean Water Act to manage and protect water resources. Millions of dollars have been expended to carry out these storm water duties. In light of the Eighth District's decision, however, storm water districts in different appellate jurisdictions will be operating under different interpretations of the Revised Code. And while districts outside of the Eighth District may remain in operation for now, they face new legal uncertainty, the prospect of costly legal challenges, and apprehension over their authority to carry out their respective storm water plans and programs. Absent the Court's intervention here, those legal uncertainties and operational anxieties will only exacerbate.

That Chapter 6119 provides the best, perhaps only, option for effectively addressing storm water threats is borne out by the experiences of not only NEORS, but also three other districts, Deerfield, ABC, and the Jefferson Township Storm Sewer District in Madison County (the "Jefferson District"). Each district was previously approved by a common pleas court to carry out the very functions the Eighth District majority now finds at odds with Chapter 6119.

**Deerfield District.** Established on October 31, 2003, following approval by the Warren County Court of Common Pleas (*In re the Deerfield Regional Storm Water District*, Warren County Court of Common Pleas, Case No. 03-CV-61392), the Deerfield District provides assistance to public storm water improvement projects. The Deerfield District retained CDM Inc., an international engineering firm with expertise in storm water management, to formulate and implement a storm water fee using an impervious surface methodology, one that is broadly used in Ohio and across the United States. CDM also developed a storm water model to assist the District in developing the best solutions when considering storm water management capital improvements. Over its six years of operation, the District's assistance program has resolved numerous storm water problems, preserved property values, and improved the general quality of life in Deerfield Township. Without the District, no other entity would be able to maintain the storm water infrastructure within the Township. Indeed, as the Ohio Attorney General has opined to the Deerfield Township Law Director, a "township has no express or implied authority to construct, repair, or maintain storm water drainage facilities to carry off surplus water except to the extent incidental to and necessary in the improvement of a township road." 2010 Ohio Atty. Gen. Ops. No. 2010-027, at 4.

**ABC District.** Established on November 9, 2009, following the approval of the Mahoning County Court of Common Pleas (*In re the ABC Water and Storm Water District*, Mahoning County Court of Common Pleas, Case No. 09-CV-4002), the ABC District, in addition to initial start-up expenditures, recently retained CDM to analyze impervious surface area in the ABC District for the purposes of developing its storm water utility and fee. Like Deerfield, without the ABC District, the ability to address storm water issues in the region will be unfunded and unaddressed. In fact, when Boardman Township, which is now within ABC

District, tried to implement its own storm water program in 2003, it was sued, effectively ending that effort.

Both the Deerfield and ABC Districts were created following petitions to their respective common pleas courts for authority to manage storm water. These courts in turn approved the Petitions and Operations Plans, determining that a regional district formed under Chapter 6119 may legally manage storm water that does not also contain sewage and, further, may implement a storm water management plan to address various regulatory requirements of the Federal Clean Water Act, and to charge a fee to cover the costs of all such activities.

**Jefferson District.** Established on November 14, 1996, following the approval of the Madison County Court of Common Pleas (*In re the Jefferson Township Storm Sewer District*, Madison County Court of Common Pleas, Case No. 96CV-09-135), the Jefferson District aimed to provide storm water (only) services to parts of Jefferson Township in Madison County, Ohio. During the district creation process, the Ohio Director of Environmental Protection submitted to the Court, a statement, through the Ohio Attorney General, requesting that the proposed Jefferson District also build a sanitary sewer system, in addition to a storm water system. The Ohio EPA Director stated that while he “does not necessarily oppose the formation of the sewer district,” he preferred that the “district be designed to handle sanitary wastewater *as well as storm water*,” as, in the Director’s view, the only way to protect the public health, safety and welfare is to also ensure that sanitary wastewater is adequately treated. The Director’s statement confirms Ohio EPA’s view that regional districts are empowered to handle both sanitary wastewater functions and, separately, storm water functions. Aware of that authority, the court knowingly permitted the creation of the district for storm water only. Notably, the Ohio EPA and the Ohio Attorney General’s office never challenged the court’s authority to create a storm

water only district. Rather, they stated that their preferred option was a multi-functional district, like NEORSD, which also handles sanitary sewage.

In fact, Ohio EPA receives a notice early in the process of establishing any prospective 6119 district, regardless of purpose, and Ohio EPA may object to the establishment of the district. Tellingly, the Ohio EPA did not object to the formation of any of the three 6119 districts for storm water purposes only.

Should these districts be ordered to halt operations, as has NEORSD, the townships serviced by them will be left with two unattractive options: (1) reverting to the absence of storm water management, or (2) starting from scratch, requiring the expenditure of additional township dollars in pursuit of other possible storm water management options. Option one is highly unattractive, given the obvious needs in affected communities. Yet option two has little to recommend if an option at all. After all, other solutions are few and far between for most townships. 2010 Ohio Atty. Gen. Ops. No. 2010-027, at 4. That is why communities joined together to begin with to create regional districts to undertake storm water activities. Other communities currently actively exploring 6119 districts as a solution will also be left with no good option.

**B. The Eighth District's Opinion Also Calls Into Question The Legal Viability Of Over 40 Additional 6119 Sanitary Sewer Districts.**

Chapter 6119 enables districts formed under that Chapter to undertake "water resource projects." R.C. 6119.06(G). Water resource projects are defined as "water management facilities" and "waste water facilities." R.C. 6110.011(G). Until the Eighth District's divided decision below, "waste water" repeatedly had been understood to mean storm water and/or sewer water. Indeed, the statute makes plain that "'waste water' means any storm water and any water containing sewage or industrial waste or other pollutants or contaminants...." R.C. 6119.011(K).

“Waste water,” in other words, is two different things: (1) *any* storm water and (2) *any* water containing sewage. Yet contrary to the plain language of Chapter 6119, the court below found “waste water” to mean “any storm water containing sewage or other pollutants,” *See Northeast Ohio Reg’l Sewer Dist. V. Bath Twp.*, 8<sup>th</sup> Dist. Nos. 98728 and 98729, 2013-Ohio-4186, ¶ 44 (hereinafter “NEORSD”), and that a 6119 “Sewer District is [thus] charged with removing sewage or other pollutants from storm water...” *NEORSD*, at ¶ 45.

As a result of the Eight District’s odd reading of Chapter 6119, nearly 40 of the existing 6119 sanitary sewer districts are also seemingly acting outside of the law, as their facilities handle sanitary sewage only. If “waste water” means storm water mixed with sewage, as the court below held, any 6119 district that treats only sewer water, without a mixture of storm water, is operating in violation of Ohio law. Every sanitary sewer district in Ohio now faces potentially disastrous litigation. This absurd result cannot be what the General Assembly intended in enacting Chapter 6119.

Equally stunning, the Eighth District majority implied that 6119 districts must not only collect waste water, but must also treat it and dispose of it. A CORD survey of approximately 20 of Ohio’s 6119 sewer districts found that at least six do not “treat” the sewage, they only collect and dispose of it, with other entities performing treatment. And at least one other treats and disposes of sewage, but does not “collect” it from individual homes. The legality of these districts is also now called into question. They too deserve the clarity that this Court’s review would bring.

**C. Prior To The Eighth District’s Decision, Every Court To Consider The Issue Had Authorized 6119 Districts To Manage Storm water, Exclusive Of Any Management of Sanitary Sewer Water.**

Before a storm water district may operate in Ohio, it must be approved for operation by a common pleas court. Notably, each court confronted with a request for the establishment of a

storm water district approved that request, and did not circumscribe those operations in the way the Eighth District majority did here. Specifically, the Common Pleas Courts of Warren, Mahoning, and Madison Counties and two successive judges in Cuyahoga County had, prior to the Eighth District's opinion, approved both the establishment of storm water specific 6119 districts and the storm water plans for implementing the respective storm water programs of four districts.

Below, two judges in the Eighth District parted ways with every other judge to consider the issue, and in doing so failed to heed both the letter and spirit of Chapter 6119. Judge Jones, in his dissent below, correctly concluded that the General Assembly has authorized the treatment of storm water separate and apart from the treatment of sanitary sewer water. As Judge Jones explained, the member communities within the NEORS D territory *voluntarily joined* the District and, in so doing, agreed that the District would manage certain utility functions. Those communities were the original petitioners to establish the District, and helped to determine the scope of the District's functions, which their local courts in turn approved. Thus, the NEORS D Program "is specifically authorized under the governing statutory authority, both procedurally and...substantively." *NEORS D*, at ¶ 89, Jones, P.J., dissenting.

#### **STATEMENT OF THE CASE AND FACTS**

*Amici curiae* adopts the statement of the case and facts from the NEORS D District's brief.

## ARGUMENT

### **PROPOSITION OF LAW: THE GENERAL ASSEMBLY EMPOWERED 6119 STORM WATER DISTRICTS WITH GENERAL AUTHORITY TO UNDERTAKE THE CRITICAL FUNCTION OF STORM WATER MANAGEMENT.**

#### **A. Both The Plain Terms Of Chapter 6119 And Contextual History Support The Broad Authorization Of Storm water Management To 6119 Districts.**

When the General Assembly last overhauled Chapter 6119, through S.B. 166 passed in 1971, it plainly envisioned 6119 districts undertaking a host of storm water functions. The 1971 amendments to R.C. 6119.011 included new, expansive definitions of “water resource projects,” “waste water,” “waste water facilities,” “water management facilities,” “water resources,” and “waters of the state,” reflecting the General Assembly’s intent that new solutions be brought to decades-old problems. The specific term “storm water” was used in a host of places in the Chapter, including in Revised Code sections 6119.011(L), 6119.011(M) and 6119.19, reflecting the General Assembly’s intent that that precise issue be addressed as part of this new regulatory regime. Further, the General Assembly, through R.C. 6119.011(M), approved of “water management facilities” like that operated by NEORS. Specifically, the General Assembly authorized robust use of “water management facilities” to address a host of water quality and quantity issues:

(M) "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)

As these statutory amendments and others reveal, the General Assembly envisioned a flexible regime in which 6119 districts could adapt to modern technologies and trends in the treatment of storm water. In 1971, the concept of coordinated storm water management was in its infancy, and the nation was concurrently debating the Federal Clean Water Act. As the EPA and others recognized even then, there was a “national concern about untreated sewage, industrial and toxic discharges, destruction of wetlands, and *contaminated runoff*,” in particular, storm water runoff, which resulted in oil, debris, and other solid waste entering our drinking water supply. United States Environmental Protection Agency, *The Clean Water Act: Protecting and Restoring our Nation’s Waters*, <http://water.epa.gov/action/cleanwater40/cwa101.cfm> (accessed October 31, 2013). These concerns resulted in a more modern version of the Clean Water Act, which “was totally revised in 1972 to give the Act its current shape.” *Id.*

Plainly, the General Assembly wanted Ohio communities to be equipped with the necessary tools to solve this growing problem. Those tools included the ability to adapt and innovate, as the General Assembly could not say with certainty in 1971 how storm water management would look in 2013. That is why the definitions of “Waste Water Facilities” (6119.011(L)) and “Water Management Facilities” (6119.011(M)) give general authority to 6119 districts, providing then-contemporary 1971 examples “without limiting the generality of the foregoing.” Had the General Assembly intended for 6119 districts to deal with the Eighth District’s version of waste water—*i.e.*, combined systems with storm water mixed into the sanitary sewage—it could easily have said so, for instance, by utilizing the phrase “all water” in sewer pipes. But instead, the General Assembly specifically referenced storm water, and, in R.C. 6119.011(M), authorized “water management facilities” to include storm water management and other Clean Water Act era concepts such as, “protection of water resources, ...stream flow

improvement, ...dams, reservoirs and other impoundments,...stabilization of stream and river banks,... removal of oil, debris, and other solid waste from the waters of the state.”

This broad, dynamic legislative intent is further reflected in the Legislative Service Commission’s Analysis of the 1971 legislation. As indicated by LSC, the legislative revisions “expand regional water and sewer district purposes and powers, chiefly to permit a district to undertake water resource development projects such as river-bank stabilization ....” This river-bank example, which is likewise listed in 6119.011(M), makes plain that the General Assembly intended to authorize a new and different scope of water resource project, to move beyond the then-traditional and simple notion of collection, treatment and disposal of sewage or combined sewage in underground pipes. As in other states debating these issues as well as at the federal level through the CWA, the General Assembly recognized the relationship among drinking water, sanitary sewage, storm water and pollution in the waters of our state and granted regional districts with broad authority to address the many interconnected issues involving these three utilities:

1. In R.C. 6119.011(M), districts were given broad authority to “develop” and “use” and “protect” *water resources*. Under R.C. 6119.011(F), “water resources” includes “waters of the state” occurring on the surface. In turn, R.C. 6119.011(E) defines “waters of the state” to include “drainage systems... surface and underground, natural or artificial.” Thus, 6119 districts may develop, use, and protect natural and artificial drainage systems occurring on the surface, including drainage systems, natural and artificial, to be “used” for the purposes of transporting and managing storm water. In providing some examples of these

types of facilities, the General Assembly made clear in R.C. 6119.011(M) that these examples were provided “*without limiting the generality of the foregoing.*”

2. R.C. 6119.011(M) gave districts the authority to “*protect*” water resources. Critically, storm water management not only controls surface flooding, but it also provides an initial level of treatment by allowing silt to settle/separate in the “*dams, reservoirs and other impoundments,*” such as retention/detention ponds. Storm water management also provides controlled stream release to limit erosion (also known as “*stream flow improvement*” under R.C. 6119.011(M)). Storm water management likewise includes simple storm sewer grates and drains which help with the “*removal of oil, debris, and other solid waste from the waters of the state and stream and river aeration facilities.*” R.C. 6119.011(M). The NEORS District’s storm water program proposes to *develop and use* the water resources in the watershed for several purposes, most notably to “*protect*” the drinking water supply for the area: Lake Erie.
3. Stream and river bank stabilization is also a part of the NEORS District’s program and is specifically listed in R.C. 6119.011(M).

In sum, the General Assembly, with an admittedly economical allocation of words, authorized broad and general powers to enable regional districts to engage in storm water management in conjunction with water and sanitary sewage management functions.

In reaching a contrary conclusion, the majority below not only incorrectly referred to the NEORS District’s “Petition” as its “Charter,” but it also misquoted the plain language of the statute and, in turn, created an entirely new waste water definition. R.C. 6119.011(K) defines “waste water” 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.) The Eighth District, however, interpreted waste water to mean storm water *combined* with waste water. In other words, *both* the storm water and the sewage must be derived from a prior use, according to the court below. *Amici*, however, are unfamiliar with any *prior use of storm water* before Mother Nature deposits it in our communities.

Furthermore, under the Eighth District’s faulty reading of Chapter 6119, regional districts may only address sanitary sewage when it is *combined* with storm water. But these types of “combined” sewage systems (where storm water and sanitary sewage combine in the same pipes and are sent to sewage treatment plants) are no longer constructed. In effect, the decision below bars all regional districts, including those 40 or more sewer districts currently operating, unless they operate in cities with antiquated combined systems.

It is inconceivable that the General Assembly intended for 6119 districts to be limited to dealing with combined sewer systems only. It bears noting that the NEORSD District already treats, through its underground sanitary sewer system, storm water combined with sewage, what the Eighth District concludes is authorized under R.C. 6119.011(L). But there is no basis for holding that this is the *only* means for treating storm water, or that the General Assembly intended to limit a district’s ability to address this critical issue independent of other water issues the district and its members are also tackling. The Eighth District’s holding produces not only an absurd legal result but also untoward practical consequences, including millions in unnecessary expense.

**B. The Eighth District Erred In Concluding That The Existence Of Other Types Of Management Districts Supports A Narrow Reading Of Chapter 6119.**

In justifying its unusual reading of R.C. 6119's definition of "waste water," the Eighth District majority reasoned that storm water authority resides with conservancy districts *and* watershed districts, not storm water districts. But that result is unsupported by the plain terms of the Revised Code. For one thing, the terms of Chapter 6119 authorize broad storm water powers to 6119 districts. For another thing, while Chapter 6119 specifically utilizes the terms "storm water management," and "storm water," those same terms do *not* appear in Chapters 6101 (conservancy districts) or 6105 (watershed districts). Yet under the Eighth Districts' reasoning, the only district that *cannot* regulate storm water exclusively is the one for which the General Assembly expressly referenced that type of program (6119's).

Nor does the reasoning below have any other logical appeal. After all, as the majority agreed that *both* conservancy districts and watershed districts have storm water authority, meaning the authority is not exclusive to one type of district, why could a third entity not have those powers as well? And why then would the General Assembly have enacted Chapter 6105, creating watershed districts, when conservancy districts already existed to address storm water issues? Simply put, the General Assembly recognized that regional 6119 districts, unlike other districts, could be empowered to provide an economical solution to all three utilities: water, sewer and/or storm water, without spending millions of dollars to create yet another layer of regional government (like conservancy and watershed districts) covering the same territory.

\* \* \* \* \*

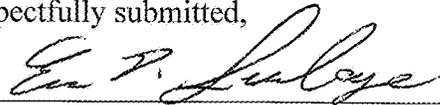
The Northeast Ohio Regional Sewer District has spent \$13 million to launch its storm water program. The decision below, if left to stand, not only declares these sizable efforts invalid, but it also suggests that, in place of NEORSD, yet another layer of government be

created, from scratch, with millions more in expenditures, to in essence reinvent the functions NEORSD is already performing. That suggestion makes little sense, especially in light of the majority's acknowledgement below that "regulations are needed over the storm water-related issues that plague the region." Before current efforts are thwarted, millions are lost, and dramatic ramifications take hold elsewhere around the State, the Court should review (and reverse) the decision below.

### CONCLUSION

For the above-stated reasons, *amici curiae* respectfully requests that the Court grant jurisdiction over this appeal.

Respectfully submitted,



---

ERIC LUCKAGE (0067556)

(Counsel of Record)

JOHN B. ALBERS (0025099)

ALBERS AND ALBERS

88 North Fifth Street

Columbus, Ohio 43215

Phone: (614) 464-4414

Fax: (614) 464-0604

Email: *Eric.Luckage@alberslaw.com*

*Attorneys for Coalition of Ohio Regional  
Districts, Deerfield Regional Storm Water  
District and ABC Water and Storm Water  
District.*

**CERTIFICATE OF SERVICE**

This is to certify that a duplicate of the foregoing was served this 12th day of November, 2013, by first class U.S. mail, postage pre-paid upon the following:

John H. Gibbon  
Director of Law  
City of Cleveland Heights  
40 Severance Circle  
Cleveland, Heights, Ohio 44118

Christopher L. Gibbon  
Heather R. Baldwin Vlasuk  
Walter & Haverfield LLP  
The Tower at Erievue  
1301 East Ninth Street, Suite 3500  
Cleveland, Ohio 44114

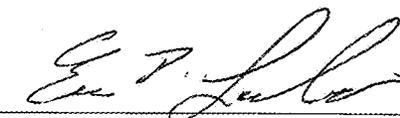
David J. Matty  
Shana A. Samson  
Justin Whelan  
Rademaker, Matty, Henrikson & Greve  
55 Public Square, Suite 1775  
Cleveland, Ohio 44113

Sheldon Berns  
Benjamin J. Ockner  
Jordan Berns  
Gary F. Werner  
Timothy J. Duff  
Berns, Ockner & Greenberger, LLC  
3733 Park East Drive, Suite 200  
Beachwood, Ohio 44122

Mark I. Wallach  
Thacker, Martinsek, LPA  
2330 One Cleveland Center  
1375 E. 9<sup>th</sup> Street  
Cleveland, Ohio 44114

James F. Lang  
Matthew J. Kucharson  
Molly A. Drake  
Calfee, Halter & Griswold, LLP  
1405 East Sixth Street  
Cleveland, OH 44114

Marlene Sundheimer  
Director of Law  
Northeast Ohio Regional Sewer District  
3900 Euclid Avenue  
Cleveland, OH 44115



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ERIC LUCKAGE (0067556)  
One of the Attorneys for Amici Curiae