

IN THE SUPREME COURT OF OHIO

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

**BRIEF OF *AMICUS CURIAE* CITY OF CLEVELAND
IN SUPPORT OF APPELLANT, THE NORTHEAST
OHIO REGIONAL SEWER DISTRICT**

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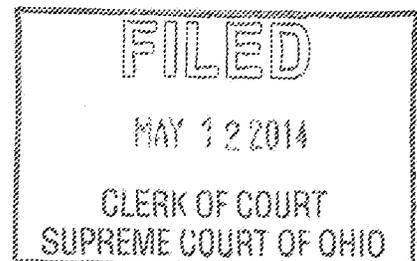


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INTRODUCTION AND STATEMENT OF INTEREST

The City of Cleveland (the "City") is downstream to nearly every one of the Northeast Ohio Regional Sewer District's (the "District") 55 member communities within the District's service area (collectively, with the City, the "Member Communities"). Stormwater, initially consisting of rainfall and snowmelt, either absorbs into pervious surfaces or it flows downstream from Member Communities through the City to Lake Erie (the "Regional Stormwater System"). As the upstream Member Communities develop and eliminate natural pervious surfaces, the City and Lake Erie suffer from the continuous, widespread and systemic flooding, erosion, and damage to critical infrastructure and natural habitat. The stormwater runoff and the ensuing damage to the City have caused a myriad of public health, environmental, and economic issues for the City and Lake Erie. However, the City does not have the authority or the funds to address or resolve the stormwater issues.

The District is authorized to resolve the stormwater issues on a regional basis pursuant to Ohio Revised Code ("R.C.") Chapter 6119. Since 1975, the District's Plan for Operation has mandated 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." See Defendant's Trial Exhibit ("Def's Tr. Ex.") 12, at Ex. A, §5(m)(3). The lower trial court correctly determined the District met its mandate in developing a Regional Stormwater Management Program ("Program"), including a capital improvement plan for the

regional management of storm drainage to solve intercommunity drainage problems.¹ See Journal Entry and Opinion (“Op.”) (Apr. 21, 2011), *Northeast Ohio Reg’l Sewer Dist. Bath Twp.*, Case Nos. 98728, 98729, Cuyahoga Ct. Common Pleas; Plaintiff’s Trial Exhibit (“Pl’s Tr. Ex.”) 2.

Since its inception, the District has managed stormwater on a regional basis, at the expense of property owners within the District’s service area. In its infancy, the District developed and constructed the Lakeview Cemetery Dam, specifically for stormwater collection (not sewage water management) from the upstream Member Communities. The District has also invested in studies on stormwater management and construction projects that reduced stormwater runoff. In 1989, the Eighth District Court of Appeals (“Appellate Court”) ordered the City’s residents to pay a share of the District’s \$83 million upstream Intercommunity Relief Sewer Program because the program would curb the wet weather flow into the City’s water system, Lake Erie, and the surrounding streams. *City of Cleveland v. N.E. Ohio Reg’l Sewer Dist.*, 8th Dist. No. 55709, 1989 Ohio App. LEXIS 3589 (Sept. 14, 1989) (the “IRSP Case”). The suggestion that the District is not authorized to manage stormwater is wholly adverse to the framework that the Member Communities have understood and supported all these years. The IRSP Case demonstrates that the City has funded the District’s plans relative to stormwater management for many years.

The City will demonstrate that: (a) the District is authorized to implement and impose a charge for its Program; (b) the Appellate Court has prejudiced the City with its

¹ The District combined its Petition and its Plan for Operation into one “Exhibit A”, as approved by the Trial Court. The Petition consists of sections 1-4 and 6-8 and the Plan for Operation consists of section 5 of Exhibit A. Def’s Tr. Ex. 12, at Ex. A.

contradicting rulings involving the District's authority (*cf Northeast Ohio Reg'l Sewer Dist. v. Bath Twp.*, 2013-Ohio-4186, 999 N.E.2d 181 ("NEORS D II"), and the ISRP Case); and (c) the City will suffer a devastating impact if the District's Program is invalidated. Based upon these and the arguments set forth in the District's Merit Brief, the City requests that this Court reverse the decision of the Appellate Court and reinstate the trial court's findings in support of the District and its Program.

STATEMENT OF FACTS

The City adopts and fully incorporates herein the statement of facts set forth in the District's Merit Brief.

ARGUMENT

PROPOSITION OF LAW NO. I: Pursuant to R.C. Chapter 6119, the District is authorized to manage stormwater and to impose a charge for that purpose because the charge is one for the use or service of a water resource project or any benefit conferred thereby.

"Waste water" is defined as "*any storm water and* any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water." R.C. 6119.011(K) (emphasis added). Chapter 6119 expressly states that the District can 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. R.C. 6119.011(G)(M). As a matter of law, the District's Plan of Operation and regulation provides the District with authority over wastewater, which includes any stormwater, and the District's Program includes the very projects expressed in R.C. 6119.011(G)(M). See R.C. 6119.011(K).

In the 1980's, the U.S. Environmental Protection Agency ("EPA") forced the District to develop an upstream regional water management project because the runoff

issues involved multiple upstream Member Communities. *IRSP*, 1989 Ohio App. LEXIS

3589. The IRSP court affirmed the District's plan and held:

[i]t is undisputed that the sewers to be constructed as part of the IRSP will carry overflow generated by more than one community. This fact alone supports the trial court's decision that district-wide financing is permissible under the plan. . . . The issue is not one of [to whom receives] the benefits but rather of judicial interpretation of the NEORSD Plan of Operation and its regulations. Further, the district introduced evidence that alleviation of the suburban overflow will reduce the wet weather flow into the Cleveland system, Lake Erie and the surrounding streams. . . . As a result, all users of the district including city residents will benefit from the IRSP.

Id. (citations omitted). The IRSP sewers are not connected to the Cleveland system, Lake Erie, or the surrounding streams.

To suggest that the District is limited to sewage-only water projects is a misinterpretation of R.C. 6119.011(G)(K)(M) and R.C. 6119.09. If permitted, the *NEORSD II* ruling would rewrite Chapter 6119 and eliminate the expressed authority to implement and charge for "any water resource project or any benefit conferred thereby." R.C. 6119.09, 6119.011(G)(K-M). The limitations created by the *NEORSD II* court must be struck down.

The District's Program and its related charge fit squarely within the District's statutory authority as a matter of law. Therefore, this Court should reverse the Appellate Court and maintain the unambiguous terms within Chapter 6119.

PROPOSITION OF LAW NO. II: Subject to the Petition and Plan for Operation, the District is authorized to 1) implement a regional stormwater management program; and 2) impose a charge to fund the Program.

The Petition and Plan for Operation expressly provides that the District may finance its Program in any manner deemed appropriate by its Board of Trustees subject to statutory and constitutional requirements. See Opinion (Feb. 15, 2012) (“Op. Feb. 2012”), at 4; *NEORS D II*, at ¶¶102-08. The trial court and the *NEORS D II* dissent correctly determined that the Plan for Operation authorizes the work and mandates the District to manage stormwater. *Id.* The Appellate Court’s contradiction in rulings between the IRSP Case and this case subjects the City to a prejudicial interpretation of Chapter 6119. Absent a reversal of the *NEORS D II* decision, the City will continue to experience chronic flooding, erosion, and pollution of its watercourses and Lake Erie will not attain a reasonable standard of water quality.

A. The District’s Petition and Plan for Operation Authorizes Both the Program and the Charge That Funds the Program.

The intent to authorize the District to manage stormwater on a regional basis is expressed in the Petition and Plan for Operation. Def’s Tr. Ex. 12, at Exhibit A. The purpose of the District as set forth in the Petition 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.

Id. at §4. The *NEORS D II* court acknowledged that “waste water is defined as *any storm water* and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water. R.C. 6119.011(K)”. *NEORS D II*,

¶43 (emphasis added). Unfortunately, the lower court thereafter redefined wastewater to suit its erroneous conclusion.

The Ohio Legislature, via a 1971 amendment, defined “waste water” within Chapter 6119 to “expand regional water and sewer district powers, chiefly to permit a district to undertake water resource development projects such as *river-bank stabilization works, flow-augmentation projects, and underground water recharge systems. . . .*,” for stormwater issues that may or may not involve sewage. See July 6, 1971 Legislative Service Commission Report, at 1. The District’s 1972 Petition closely tracked the statutory language of R.C. 6119.01 (B) and specifically used the term “wastewater” so that the trial court could provide the District with the regulatory authority over stormwater collection facilities and systems within the service area. Def’s Tr. Ex. 3, at Exhibit A; R.C. 6119.01(B).

The Plan for Operation obligates the District to plan, finance, construct, operate and control “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.” *Id.* Def’s Tr. Ex. 12, at Exhibit A, §4. The District must 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.

Id. at §5(m)(3) (emphasis added).

The District’s Plan for Operation mandates that the District develop a “capital improvement plan for regional management of wastewater collection and storm

drainage” to solve “all intercommunity drainage problems”. *Id.* “Any 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.”² Def’s Tr. Ex. 12, Exhibit A, §5(e)(3).

Shortly after its creation, the District constructed the Lakeview Cemetery Dam, the largest dam in Cuyahoga County, receiving regional stormwater flows from several Member Communities. Tr. at 454-56 (Ciaccia), 1015-16 (Greenland). The District has invested millions of dollars in stormwater studies and construction projects. See Plaintiff’s Motion for Partial Summary Judgment, Affidavit of Erwin Odeal (“Odeal Aff.”), at ¶8; Tr. at 272-93 (Odeal), 865-74 (Greenland); Pl’s Tr. Ex. 6-9, 18. The Member Communities knowingly participated in and funded, without objection, many of the studies and projects. See, e.g., Tr. at 273, 284-85 (Odeal); Pl’s Tr. Ex. 6, at 1-2, 8 at 3-1. Erwin Odeal, a District employee from 1974 through 2007, provided the sole, unrefuted testimony that the District’s intended purpose and authority has been 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.**” Tr. at 269-70 (Odeal) (emphasis added). The District is responsible for regional stormwater management. *Id.* at 270 (Odeal).

The District’s Plan of Operation authorizes the District’s Program, which seeks to manage stormwater runoff pursuant to a capital improvement plan for the regional management of wastewater collection and storm drainage. Once the Board of Trustees

² It is worth noting that the NEORSD II opinion does not reference section 5(e)(3) of the Plan of Operation. Both the NEORSD II dissent and the trial court correctly rely upon section 5(e)(3) in determining that the District’s charge is authorized under the Plan for Operation. See *NEORSD*, ¶¶119-21; Op. Feb. 2012, at 8.

unanimously approved the Program charge, the District was authorized to impose it under the District's Plan for Operation. R.C. 6119.011; Plan of Operation §5(e)(3); Tr. at 391 (Ciaccia). The City urges this Court to reverse the lower court's decision and find that the District's Program and the Program-specific charge are authorized.

B. The NEORSD II Decision Contradicts the IRSP Decision to the City's Detriment.

The NEORSD II decision cannot be reconciled with the IRSP Case. The District's programs in both cases relied on R.C. 6119.09 and the Plan of Operation's §5(e)(3) to impose a charge because neither program had complete financing from another source. In 1989, the Appellate Court instructed the City's residents that what works for the distant Member Communities benefits the region and thereby benefits the City and Lake Erie. *IRSP*, at *8-9. All these years later, the District embarks on, this time, downstream projects that, like the IRSP, will "reduce the wet weather flow into the Cleveland system, Lake Erie and the surrounding streams," for a charge to property owners within the District's service area for the benefit of the region. See *Id.* Yet, the NEORSD II court agreed with Appellees who claimed the City may receive more direct benefits from the Program. See, e.g., Tr. at 1926-28, 1932 (Hruby), 2051 (Cicero).

To be intellectually honest, the IRSP court did not require a service connection between the intercommunity relief sewers and the wet weather flow into the Cleveland system, Lake Erie, or the surrounding streams. The NEORSD II court created this new 'service connection' requirement when it redefined the statutory meaning of wastewater as set forth in R.C. 6119.011(K).³ *NEORSD II*, at ¶¶53-54.

³ The NEORSD II court ignores R.C. 6119.09 express authorization of the District's projects involving waste water impoundment facilities, storm sewers and other systems,

The IRSP court upheld the District's charge because the project managed overflow generated by more than one community. *IRSP* at *8 ("This fact alone supports the trial court's decision that district-wide financing is permissible under the plan.") The IRSP court held "[t]he issue is not one of benefits but rather of judicial interpretation of the NEORSD Plan of Operation and its regulations." *Id.* All these years later, the same court rewrites the statute to impose an explicit authorization within the Charter, despite the District's broad financing authority under §5(e)(3). *NEORSD II* at ¶62; Def's Tr. Ex. 12, Exhibit A, §5(e)(3).

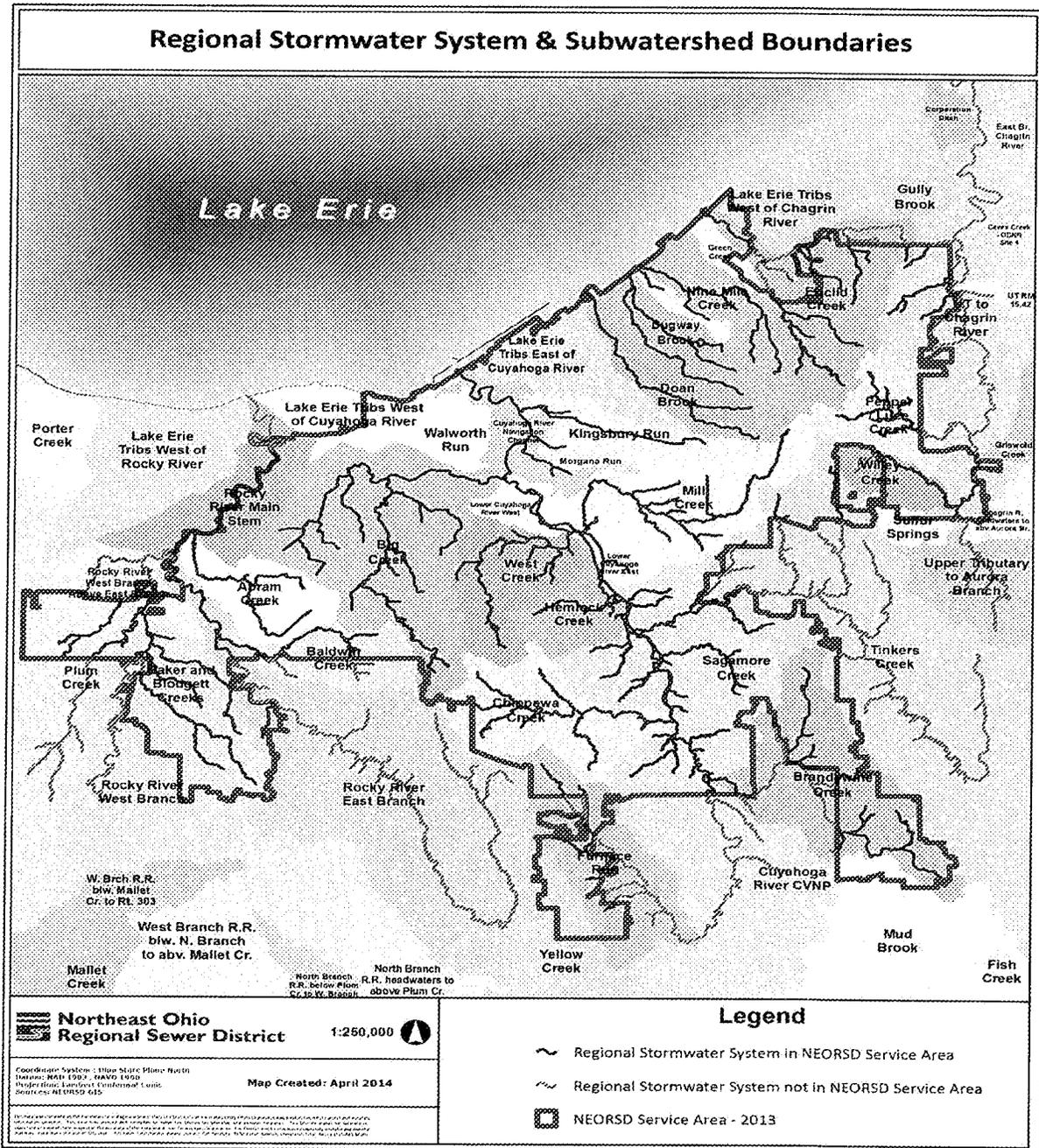
The contradiction between the IRSP Case and the NEORSD II decision creates an unjust situation and an inequitable toll upon the City's residents, the City, and Lake Erie. According to the Appellate Court's conflicting decisions, what is good practice upstream benefits the region but what goes on downstream is up the City to work out and fund on its own. No municipality and no regional water district can properly function under such unfair and disproportionate rules and expectations. The City requests this Court resolve the conflict and reverse the NEORSD II decision.

C. Under NEORSD II, the City Has No Effective Means of Resolving the Regional Stormwater Problems Culminating Within Its Borders.

Many major watercourses in Northeast Ohio originate south of the City's borders and flow north until they flow through the City and into Lake Erie. See, e.g., Tr. at 1214 (Leiken), 2020 (Glady); Pl's Tr. Ex. 28 (map of the Regional Stormwater System). The City is last stop in the stormwater's path of destruction. The map of the Regional

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)(M).

Stormwater System, below, demonstrates the City's location to the flow of water (the City is located on the lake).



See Pl's Tr. Ex. 28.

The City does not have the legal ability or the resources to limit or control the volume and velocity of this extraneous stormwater by undertaking stormwater projects

well beyond its borders. The City is unable to mitigate the neglect of stormwater management or provide additional projects at its boarder because the independent, upstream actions, if any, would undermine the City's efforts and create an ineffective patchwork of meaningless and expensive efforts. Mr. Odeal opined that the stormwater issues cannot be resolved without a regional approach by an agency such as the District. Tr. at 294 (Odeal) (“[T]here 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.”).

Lake Erie, too, will be negatively impacted by the NEORSD II decision. David Beach, Director of the GreenCityBlueLake Institute, provided unrefuted testimony that the unmanaged stormwater runoff into rivers and streams that feed Lake Erie has a direct and negative impact on the Lake's water quality. Tr. at 1477-78 (Beach). Residue and pollutants, such as motor oil, greases, and sediment, collect on impervious surfaces and then wash off of those surfaces into the regional waterways. *Id.* at 145-46 (Cyre). These regional waterways then empty into, and pollute Lake Erie. *Id.* at 1491-92 (Beach) (“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.”); see also,

www.cleveland.com/metro/index.ssf/2014/04/ohio_epa_says_cuyahoga_river_s.html

(Ohio EPA and the Ohio Environmental Council agree that dumping dredged material into Lake Erie has a negative impact because “toxic sediments” harms “drinking water, fish and wildlife, and the outdoor recreation economy that depends on a healthy lake”.)

The District's Program aims to decrease the velocity of the stormwater flowing through the Regional Stormwater System and the transport of these "toxic sediments," which is why the District would provide credits to property owners who undertake measures to further this effort. See Pl's. Tr. Ex. 3, §1(B). By decreasing the velocity of the stormwater or holding the stormwater in place for a period of time (*e.g.*, in a basin), these sediments have an opportunity to fall out before the stormwater is transported through the Regional Stormwater System to Lake Erie. Tr. at 1561 (Dreyfuss-Wells).

Without the District's Program, large quantities of these sediments will continue to reach Lake Erie despite the Ohio EPA's and Ohio Environmental Council's warnings of the resulting dangers to water quality. According to Mr. Beach, stormwater pollution is the "last frontier of water quality" and the Region has not had "any effective institutional response to these problems . . . until the Sewer District has developed this stormwater program." *Id.* at 1487, 1491 (Beach).

The City cannot duplicate the District's Program for lack of authority and funding. Under NEORDS II, the City will have no effective means of resolving the regional stormwater problems culminating within its borders. Indeed, the District's upstream water management projects have been good for the service area and Lake Erie. The District's Program, too, will be good for the service area and Lake Erie. The District, not the City alone, has the authority to implement and fund its critical Program. Anything less hurts not only the City but the Region and Lake Erie, as well.

CONCLUSION

For the above-stated reasons and the reasons set forth in the District's Merit Brief, the City of Cleveland, as *amicus curiae*, requests that this Court reverse the decision of the Eighth District Court of Appeals and find in favor of the District's Program.

Respectfully submitted,



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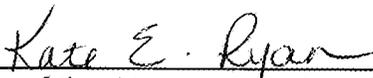
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