

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-1770

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	:	CASE NO. 2013-1088
	:	
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.	:	
	:	
Respondent.	:	Cuyahoga County Court of
	:	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 APPELLANT NORTHEAST OHIO REGIONAL SEWER DISTRICT**

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE

Left uncontrolled, storm water knows few limits. It runs off of roads, parking lots and rooftops, collecting road salt, gas, grease, fertilizers, metals and other human and animal wastes, eventually depositing the pollutants into the waters of the state. 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. The very nature of storm water thus requires a regional solution, whenever possible. That solution is a storm water utility designed to provide a specific benefit.

Historically, many Ohio localities have been unable, or unwilling, to address these concerns on their own. Recognizing as much, the General Assembly stepped in. In 1971, through the enactment of SB 166, the General Assembly sought to further regional solutions to the persistent storm water threat. R.C. 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, including “storm water.” R.C. 6119.011(K). And it authorizes the pursuit of these solutions on a regional basis, where efficiencies can be gained and costs spread out among participants.

Until the 2-1 decision below, Ohio courts had consistently interpreted Chapter 6119 as authorizing the utilization of regional storm water districts as a means for collaboratively addressing the challenges posed by storm water. In fact, every other judge to have examined the issue had confirmed the authority of regional districts to address storm water. Yet the Eighth District has called into doubt this plain understanding of Chapter 6119. In so doing, the appeals

court undermined the opportunity for storm water relief in 56 communities provided by the Northeast Ohio Regional Sewer District (the “District”) through its Regional Storm Water Management Program (the “Program”). As succinctly stated by the *Cleveland Plain Dealer*, “[W]hile the fight rages ..., the region remains up to its neck in runoff.” (http://www.cleveland.com/metro/index.ssf/2013/10/storm_water_a_concern_in_north.html (accessed May 7, 2014).)

The decision below has ramifications not only for the District and its member communities, but also the other existing “6119 districts” around Ohio, as well as those contemplated for future creation. Indeed, by both incorrectly interpreting the language and intent of R.C. 6119.011(L), one half of the District’s authority, and completely ignoring the broad, general grant of authority in R.C. 6119.011(M), the other half of its authority, the Eighth District single-handedly upset the settled expectations of the many 6119 regional water districts in our State, as the decision requires every 6119 district to treat *both* storm water and sewer water, contrary to established practices and the plain language of the Revised Code.

That includes the expectations of *amici curiae*, who have a deep interest in the handling and treatment of storm water in Ohio, and who have thus developed effective, efficient measures for countering the threats posed from storm water, including flooding and pollution. *Amicus curiae* Coalition of Ohio Regional Districts (“CORD”) is a not-for-profit association of regional water and sewer districts formed under Revised Code Chapter 6119. Over 90 such districts, commonly referred to as “6119 districts,” have been established in Ohio. Today those Districts serve over one million Ohioans. Yet the result of the decision below, if left to stand, is the threat of lawsuits challenging not only storm water districts (which do not treat sewer water), but also approximately 40 sewer districts, claiming that the latter also have no authority to operate and

collect their respective sewer service charges because they do not also collect and treat storm water.

Amicus 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 and water quality issues which pollute the waters of the State.

Amicus 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.

STATEMENT OF THE CASE AND FACTS

Amici curiae adopts the statement of the case and facts from the District’s brief.

ARGUMENT

I. PROPOSITION OF LAW NO. 1: A DISTRICT FORMED PURSUANT TO R.C. CHAPTER 6119 IS AUTHORIZED TO MANAGE STORM WATER NOT COMBINED WITH SEWAGE, AND TO IMPOSE A CHARGE FOR THAT PURPOSE.

R.C. Chapter 6119 grants broad authority to regional districts (like the District) to implement a storm water management program, a storm water *utility*. At the outset, the statute broadly authorizes the creation of “water resource projects.” R.C. 6119.06(G). “Water resource projects” include both “waste water facilities” projects and “water management facilities” projects. R.C. 6119.011(G). In interpreting Chapter 6119, the Eighth District concluded that the only type of “waste water facility” authorized by the General Assembly is one that collects and treats storm water *combined* with sanitary sewage. That decision is at odds not only with the text of Chapter 6119, but also the practical operation of wastewater management in Ohio as well as

the flexibility envisioned by the General Assembly for 6119 districts in carrying out this critical public responsibility.

Contrary to the holding below, Chapter 6119 allows a regional water district to undertake a range of storm water management functions, provided that the district is authorized for such purposes by its founding petition and plan. As the District is operating in accordance with both Chapter 6119 and its Petition and Plan, the Eighth District's decision should be reversed.

A. R.C. Chapter 6119 Authorizes Regional Districts To Undertake Storm Water Projects Without Treating *Both* Storm Water And Sanitary Sewage In One System, Otherwise, Forty Sewer Districts Will Be Acting Outside Of The Law Under The Eighth District's Decision.

As articulated by the General Assembly, “waste water” means any storm water and any water containing sewage....” 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 not “any storm water”, but “storm water containing sewage or other pollutants.” *Northeast Ohio Reg'l Sewer Dist. v. Bath Twp.*, 8th Dist. Nos. 98728 and 98729, 2013-Ohio-4186, ¶ 44.

That understanding of Ohio law makes little sense when measured against the realities of water management. *First*, the decision below creates a new, and ultimately untenable, 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.) According to the Eighth District, “waste water” means “storm water containing sewage or other pollutants.” *Northeast Ohio Reg'l Sewer*, 2013-Ohio-4186, at ¶ 44. If that reading were correct, then the “prior use of the water” requirement also must apply to the storm water. *Amici*, however, are unaware of any *prior use* of storm water before Mother Nature deposits it in our communities. It is clear then, that the General Assembly

intended for two distinct types of “waste water”: (i) storm water, and (ii) sewage or other water polluted through the prior use of the water.

Second, while the Eighth District reads Chapter 6119 as allowing treatment of storm water only when combined with sanitary sewage, 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. It is inconceivable that the General Assembly intended for 6119 districts to be limited to dealing with combined sewer systems only. The District, for instance, already treats, through its underground sanitary sewer system, storm water combined with sewage. But there is no basis for holding that this is the *only* means for managing storm water, or that the General Assembly intended to limit a district’s ability to address storm water independent of other water and sewer issues the District and its members are also tackling. The Eighth District’s holding produces not only this absurd legal result, but also untoward practical consequences, including millions in unnecessary expense.

Third, as a result of this odd reading of Chapter 6119, nearly 40 of the existing Chapter 6119 sanitary sewer districts are also seemingly acting outside of the law, as their facilities handle sanitary sewage only. If, as the Eighth District held, “waste water” means only storm water mixed with sewage, then any 6119 district that treats only sewer water, without a mixture of storm water, is also operating in violation of Ohio law. Indeed, even the District, which *does* treat both storm water and sewer water in its existing sewer system, would be acting outside of the law on dry-weather days when no storm water is entering the system. How, in practical application, could districts be expected to function under the Eighth District’s interpretation?

Fourth, and equally stunning, the majority below not only requires that storm water and sewage must be combined before a 6119 district may manage it, the lower court also held that

6119 districts must not only collect waste water, but must also treat it and dispose of it: “Implicit in this express grant of power is that a Sewer District is charged with removing sewage or other pollutants from storm water as well as other water containing such waste.” *Northeast Ohio Reg’l Sewer*, 2013-Ohio-4186, at ¶ 45. Thus, according to the lower court, a district is only acting lawfully when storm water mixes with sewage in a single pipe and then the district collects, then treats, then disposes of that water. This is counter to established practice in Ohio, which allows for flexibility in addressing these issues. A COD survey of approximately 20 of Ohio’s forty 6119 sewer districts found that (i) only the NEORS D manages combined sewers; (ii) at least six districts do not “treat” the sewage, they only collect and dispose of it, with other entities performing treatment; and (iii) at least one other district only treats and disposes of sewage, but does not “collect” it from individual homes. The legality of these districts, which provide a critical public health function, is also now called into question by the erroneous decision below.

B. Both The Plain Statutory Terms And The Legislative History Confirm That Chapter 6119 Districts Enjoy Broad Authority To Implement Storm Water Management Programs To Use, Protect And Develop Water Resources.

Contrary to the conclusion below, the General Assembly, when it last overhauled Chapter 6119 in 1971 (SB 166, effective November 19, 1971), 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” is used in a host of places in the Chapter, including in Revised Code sections 6119.011(L), 6119.011(M) and 6119.19, indicating the intent that storm water be a focus in this new regulatory regime. Specifically, the General Assembly, in R.C. 6119.011(M), authorized

robust use of “water management facilities,” like the District’s Program, to address a host of water quality and quantity issues. “Water management facilities” are those:

“...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.” R.C. 6119.011(M) (Emphasis added.)

“Water resources” are further defined in 6119.011(F) to include “waters of the state”, which includes “drainage systems...surface and underground, natural or artificial.” R.C. 6119.011(E). Thus, “6119” districts may develop, use and protect natural and artificial drainage systems (along with all of the other traditional notions of waters of the state, such as lakes, streams, etc.). The Eighth District, while misinterpreting the “waste water” authority of the District, completely failed to recognize this obvious storm water authority in the “water management” authority granted in Chapter 6119.

As this and other statutory provisions reveal, the General Assembly envisioned a flexible system in which 6119 districts could adapt to modern technologies and trends in the management of storm water for the protection of the waters of the state. 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.*

The General Assembly likewise acted, in 1971, equipping regional districts with the tools needed 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 2014 and beyond. That is why the definitions of “waste water facilities” (R.C. 6119.011(L)) and “water management facilities” (R.C. 6119.011(M)) give general authority to 6119 districts, providing then-contemporary 1971 examples “*without limiting the generality of the foregoing.*” R.C. 6119.011(M) (emphasis added). Had the General Assembly intended for 6119 districts to deal with the Eighth District’s version of “waste water”, that is, 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 combined sewer pipes.” 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.” Recognizing inevitable technological advancement and the futility of attempting to define all conceivable and permissible water resource projects, the General Assembly deliberately authorized an array of responsibilities to be undertaken by 6119 districts.

This broad, dynamic legislative intent is further reflected in the Legislative Service Commission’s Analysis of the 1971 legislation (SB 166). 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 R.C. 6119.011(M), reveals the General Assembly’s intent 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 and toward the comprehensive management of storm water, sanitary sewage and drinking water.

As to storm water issues specifically, storm water presents *both* quantity and quality concerns. Storm water utility programs, such as the District’s Program, are not just about controlling flooding. Nor are they just about improving water quality. Rather, they are comprehensive, as the General Assembly understood. That is why the District is charged to “protect” water resources and also to “develop” and “use” surface and underground and natural and artificial drainage systems for the purposes of transporting and managing storm water. R.C. 6119.011(M); R.C. 6119.011(F). The District’s Program meets each of these objectives.

1. Regional districts are authorized under R.C. 6119.011(M) to “develop” water resources and the District Program includes many examples of such permissible water resource development.

To “develop” means “to make available or usable <develop natural resources>”. (<http://www.merriam-webster.com/dictionary/develop>, accessed April 14, 2014). Examples abound of how the Program here develops water resources. For instance, R.C. 6119.011(M) authorizes the use of dams. Constructed in 1976-1978, the Lakeview Dam in Cleveland Heights was one of the first storm water projects *developed* by the District. This “water resource” is now an integral part of the drainage system, as it provides flood control in Cleveland.

The Program also envisions the development of an array of stream bank and flood plain restoration projects to reduce sedimentation and restore stream banks and flood plains to their more natural state, and other “Green infrastructure facilities”, such as bioretention facilities which naturally filter pollutants, thereby protecting the waters of the state. Also, under the Program, the District may develop regional retention/detention basins (i.e., “reservoirs” and “impoundments” under R.C. 6119.011(M)) which control flooding and protect the waters of the state. The District would also assume control of certain regional detention basins such as the Kerruish and Puritas basins, to continue their availability and usefulness.

2. Regional districts are authorized under R.C. 6119.011(M) to “use” water resources and the District Program includes many examples of such permissible water resource usage.

The “use” of water resources goes beyond the use of water for drinking purposes. Regional districts are permitted to use surface and underground and natural and artificial drainage systems for a range of beneficial purposes, for instance, to undertake projects for the “treatment of streams and rivers,” including facilities for the *“removal of oil, debris, and other solid waste from the waters of the state and stream and river aeration facilities.”*

The District Program intends to use an integrated network of water resource systems to control flooding and improve water quality. For instance, individual communities often deal with their storm water in isolation, with little regard for upstream and downstream influences. The release of storm water must be coordinated and managed or it will simply push the upstream community’s problems onto its downstream neighbors. Under the Program, the District would coordinate the release of water by orchestrating the “use” of these many regional basins and outlet drainage systems.

Likewise, the District will implement “stream flow improvement,” as authorized by R.C. 6119.09(M). “Improvement” means more than just increased water flow. Indeed, storm water

management practices often improve stream flow by controlling and slowing the flow of storm water in streams. The District will *use* detention basins with water quality features not only to manage the controlled release of storm water, thereby reducing stream bank erosion, but also to improve water quality through extended detention/silt settlement.

Flooding is yet another issue the District is prepared to remedy. Storm activity is often followed by severe road, property and basement flooding. This flooding impedes the transportation system, damages roads, and harms both public and private property. The District Program will utilize surface and underground and natural and artificial drainage systems to better convey and manage storm water to reduce or eliminate these threats.

3. Regional districts are authorized under R.C. 6119.011(M) to “protect” water resources and the District Program includes many examples of such permissible water resource protection.

R.C. 6119.011(M) gives districts the authority to “protect” water resources. Perhaps the most critical function of the District’s Program, along with flood control, is the protection of the area’s largest body of water, Lake Erie. All storm water runoff and streams within the District ultimately flow into Lake Erie and all of that water is polluted, either with road salt, oil and debris, fertilizer, agricultural run-off or a host of other contaminants that enter the storm system. And nearly all communities within the District, including all of the member communities opposed to the Program, obtain their drinking water from Lake Erie. Likewise, countless small businesses and recreational and sporting users rely on the health of Lake Erie and its habitat.

Despite these critical concerns, certain interests oppose efforts to protect the Lake, citing asserted cost concerns, even where relatively minimal. In that way, history repeats itself. Through much of the 19th and early 20th centuries, industrial and sanitary sewage treatment was similarly resisted in the greater Cleveland area due to cost concerns. All the while, the health of Lake Erie declined. The Cuyahoga River burned, at least three times. Typhoid outbreaks

occurred. To obtain clean drinking water, intake pipes were moved farther and farther away from the pollution, until they could go no farther.

Today, burning river jokes are still made, and Ohioans wonder how these problems were ignored for so long. Yet the same arguments made years ago, at an ultimately steep cost, are being made again, in an effort to derail the District's Program. The Program, however, is the best chance at avoiding a repeat of the Lake's troubled history. The District's Petition and Plan of Operations, referred to as the "charter" by the Eighth District, is a coordinated effort to establish "a total wastewater control system for the collection, treatment and disposal of wastewater within and without the District" through the use of "wastewater treatment and disposal facilities,..., storm water handling facilities, and all other water pollution control facilities of the District." (Petition and Plan, §§ 4, and 5.(c)(1)). These "water pollution control facilities" will serve to "protect" water resources in critical ways, for example:

- 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 provides controlled water release from the impoundments to limit down stream erosion, what is otherwise known as "stream flow improvement." R.C. 6119.011(M).
- Storm water management includes simple storm sewer grates and drains which help with the preliminary "removal of oil, debris, and other solid waste from the waters of the state." R.C. 6119.011(M).
- Storm water management includes an array of "green" natural methods of filtering pollutants and improving water quality.

Likewise, the District's Program will use storm water control measures known as "green infrastructure" to design and construct infiltration improvement projects, such as the one at University Circle Courtyard Marriott Hotel. Pervious parking lot pavers and underground reservoirs were installed with District funds to capture the hotel's roof and parking lot storm

water runoff and then gradually release it into onsite subsurface sands, rather than seeing the storm water run-off the more traditional impervious pavement and into the combined sewers which deposit in the sewage treatment plants. This District project will remove approximately one million gallons of water per year that would have contributed to combined sewer overflows destined to pollute Lake Erie. But for the District's investment, the hotel would have lacked these design features. If the Court does not reverse the Eighth District, these types of projects will not be possible, millions of additional gallons of combined sewer overflow will reach Lake Erie, and it will impede the District's efforts to reduce pollution in this most critically important body of water.

The Program also includes an extensive stream and river bank stabilization component for minimizing erosion and the resulting deposition of silt and sediment into the waters of the state. These efforts, which are specifically cited as examples in R.C. 6119.011(M), are combined with Program efforts to re-introduce natural habitat features which help filter fertilizer, sediment and other pollution.

Excessive nutrients in the water, or eutrophication, causes algae blooms, hypoxia (low oxygen in water) and a decline in commercial fish populations. The growing algae bloom crisis affecting Ohio's lakes, including Lake Erie, underscores the vital importance of these types of storm water management programs. In fact, "in 2011, Lake Erie experienced its largest algal bloom in history." International Joint Commission (2014). *A Balanced Diet for Lake Erie: Reducing Phosphorus Loadings and Harmful Algal Blooms*. Report of the Lake Erie Ecosystem Priority, Page 3. The reasons for this are clear: "...diffuse runoff from rural and urban lands is a leading factor in eutrophication." *Id* at 4. Clearly, Lake Erie needs the District's program to improve its quality.

* * * * *

With an admittedly economical allocation of words, the General Assembly authorized broad and general powers to enable regional districts (like the District) to engage in storm water management in conjunction with water and sanitary sewage management functions to benefit the region. Storm water management programs that control flooding improve all property values within and adjacent to areas subject to repeated flooding, which is critical in every community, but especially in northeast Ohio. Such programs also improve transportation opportunities and traffic patterns. Yet if the Eighth District's decision is permitted to stand, history will indeed repeat itself, to the detriment of Lake Erie and all those who benefit from it. Accordingly, the decision below should be reversed.

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 previously 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 lengthy 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 District 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. Their respective city councils requested inclusion in the District, and the court of common pleas agreed. Thus, the District Program "is specifically authorized under the governing statutory authority, both procedurally and...substantively." *NEORS*, at ¶ 89, Jones, P.J., dissenting.

D. R.C. 6119.09 authorizes "6119" districts to collect a charge for either the "use" of a water resource project, or for the "services" of a water resource project, or for the "benefit" conferred by a water resource project, and thus, the District's Program fee is authorized.

The essence of the function of Ohio's "6119" districts is summarized in R.C. 6119.06(H), which empowers districts to: "Make available the use or services of any water resource project to one or more persons, one or more political subdivisions, or any combination thereof." (R.C. 6119.06(H)). Regional districts truly have no other purpose besides making their water resource projects available.

In Chapter 6119, a "project" or "water resource project" means "any 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..." (R.C. 6119.011(G)). The District's Program is, alone, a water resource project which consists of a number of smaller individual water resource projects. The Program consists of both "waste water facilities" and "water management facilities". Many examples are included herein.

As with the services of any other utility, water resource projects do not happen without money. Without general tax revenue, districts are limited to the collection of charges. "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...” (R.C. 6119.09). Thus, the District may collect a charge for either (i) the use of the Program, or (ii) the services of the Program or (iii) any benefit conferred by the Program.

Not only are “6119” districts authorized to collect rentals and other charges, they must do so in order to exist. Unlike municipalities, counties and townships, Ohio’s “6119” districts do not receive “general revenue” funds from income tax or property tax revenue. Districts are completely sustained through monthly or quarterly user charges, tap fees and special assessments authorized under Chapter 6119. By holding that the District is not authorized under Chapter 6119 to levy such a charge, the Eighth District eliminated the ability of the District to make its water resource projects available. This directly usurps the authority conveyed unto 6119 districts by the General Assembly. As discussed above, the District’s Program is a wholly authorized water resource project. Thus, it is axiomatic under R.C. 6119.09 that the District may collect a charge for the use or services of the Program or for any benefit conferred by the Program.

Everyone within the District, whether they are a property owner or a tenant, or in an urban or suburban area, will either use the Program or be serviced by the Program or benefit from the Program; and all three will likely apply to most. Every property with impervious surface contributes storm water run-off and thus will use the storm water system and the Program. Run-off from Rooftops, driveways, roads, parking lots and every other impervious surface is directed away from the property and to the various storm water collection systems. As such, those properties with impervious surface *use* the Program to remove water from their properties. The modest Program charge is applicable and authorized through R.C. 6119.09 at such properties.

Those same properties receive the *services* of the Program when the water is transported away from the property and into the collection system for removal, thereby eliminating flooding issues. The services of storm water collection, holding, impoundment, disposal and treatment are provided to every property within the District. All district residents and businesses also receive the services of the Program's water management facilities component, which develops, uses and protects water resources, as discussed above. Thus, the Program charge is proper and authorized under R.C. 6119.09.

Everyone in the District, even those properties at the highest of elevations with no regular flooding issues, will *benefit* from the Program in other ways. For example, storm water management programs that control flooding will generally improve all property values within and adjacent to areas that are subject to repeated flooding. Many communities promote their storm water programs as an attraction for residential and business development. Poor storm water management and the associated flooding and waterway contamination serve to discourage development and relocation, which, in turn, depresses property values. By controlling road flooding and reducing river sedimentation, the Program is also improving transportation opportunities and traffic patterns.

Everyone within the District will also greatly benefit from the water quality improvements resulting from the District's program. Lake Erie is the drinking water source for nearly everyone in District. The Program's water resource protection aspects discussed above will clearly benefit residents through the improved Lake Erie water quality. Users of the many waterways and Lake Erie for recreational and sporting purposes all enjoy the improved water quality and fish habitat benefits of the Program. The District is fully authorized in R.C. 6119.09 to collect a charge from those who benefit from the Program.

Moreover, the terms and methods of the Program's charge structure are not dictated under Chapter 6119. The General Assembly no more prescribes the means of calculating municipal, county or district storm water charges than it does drinking water or sanitary sewer charges. Each utility in each community is inherently unique and the General Assembly has never chosen to dictate how Ohio's political subdivisions calculate their utility charges. Nearly every political subdivision in the country, like the District, has elected to use the impervious surface methodology to calculate their storm water charges.

In fact, Congress recently acknowledged that storm water charges are not taxes and authorized federal agencies to pay "reasonable service charges" for storm water and other pollution control programs of local agencies and went on to define "reasonable service charges":

"(c) Reasonable service charges

(1) In general

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

(A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and (B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax." (33 U.S.C. 1323(c)(1)).

As the National Association of Flood & Stormwater Management Agencies (NAFSMA) has explained: "impervious area rate methodology reflects a philosophy of allocating costs based on each property's contribution of runoff to the system." (Guidance for Municipal Stormwater Funding, 2-36, 37 (2006)).

In sum, the District's Program is an authorized water resource project, for which it may collect charges and those charges may be based on an impervious surface methodology, which Congress has acknowledged as reasonable.

The Eighth District also erroneously found a service connection requirement before a charge may be collected. This requirement is without legal or factual support. The lower court appears fixed upon a linear perception that "water resource projects" consist solely of drinking water and sanitary sewer connections. Yet that shallow definition ignores the broad authority granted to these districts to undertake an array of water resource projects to manage water, sanitary sewer and storm water issues. Amici are unaware of any provision in Chapter 6119 which requires a service connection. Indeed, prerequisites for collecting a charge are non-existent, except for the R.C. 6119.09 requirement that the customer either use the project, or be serviced by the project or derive a benefit from the project. Incredibly, the Eighth District, even with its "connection" requirement, also ignores that every rooftop, every gutter, every downspout and sump pump are ultimately connected to road gutters or other storm water systems and sewers which convey the runoff to the waters of the state.

It is routine in municipalities, counties and districts, alike, that minimum water and sewer service charges are collected simply because of the benefit conferred by a project, and regardless of the actual amount of usage or even whether the property is connected to the system. They are charged because the utility service is available to the property and the property benefits from the system.

It is critically important for the Court to understand that storm water is a utility, just like drinking water and sanitary sewer utilities. Every utility must include a charge. Almost universally, not just in Ohio, but across the nation, these utilities are self-sustaining through the

charges that are collected. Because the methodology is the most equitable means of allocating costs, storm water charges based on impervious surface are now common in nearly every major city, including, Columbus, Cincinnati, Toledo, Dayton and Springfield, just to name a few. Whether it is the District, or some other entity performing these services, no storm water utility could exist without a charge to support it. No other governmental or private utility, be it gas, electric, telephone, water, sewer or storm water can exist without their associated charges and it is important that the Court acknowledge that reality. Regardless of the entity administering the Program, it is almost certain that the same type of impervious surface charge would be implemented. It makes little sense to contort Chapter 6119 into an unrecognizable shape and waste millions of dollars for the sake of killing a utility Program which even the Eighth District agrees is critically necessary.

E. The Eighth District Erred In Concluding That The Mere Existence Of Conservancy and Watershed Districts is Support for Its 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, but not storm water districts. That result is unsupported by the plain terms of the Revised Code. For one thing, the terms of Chapter 6119, as already explained, authorizes 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.

II. PROPOSITION OF LAW NO. 2: WHEN A PETITION AND PLAN OF OPERATIONS GRANT A R.C. CHAPTER 6119 DISTRICT THE AUTHORITY TO OPERATE STORM WATER FACILITIES, THE DISTRICT IS AUTHORIZED TO CREATE AND IMPLEMENT A REGIONAL STORMWATER MANAGEMENT PROGRAM, WHICH INCLUDES IMPOSING APPROPRIATE CHARGES FOR OPERATING THE PROGRAM.

The Eighth District held that a 6119 district is without authority to implement a storm water program if either (a) every single aspect of the program is not listed in the operations plan, or (b) the district does not perform every task contained in its operations plan. Law and fact are to the contrary.

By way of background, as part of the district establishment procedure, Chapter 6119 requires the petitioning political subdivision(s) to submit a petition and a plan for the operation of the district (the “operations plan”) to a common pleas court. Both documents must be approved by the court in accordance with the criteria established in R.C. 6119.04(D). During the district establishment procedure, “any person or any political subdivision residing or lying within an area affected by the organization of the district, on or before the date set for the cause to be

heard, may file an objection to the granting of the requests made in the prayer of the petition.” R.C. 6119.04(A). Once any objections are resolved, the court may issue an order that the district is finally and completely organized where the court determines that: (a) the proposed district is necessary; (b) the district and the operation plan are conducive to the public health, safety, convenience, and welfare; and (c) the operation plan is economical, feasible, fair, and reasonable. *See* R.C. 6119.04(D).

As reflected by this statutory backdrop, the purpose of the operations plan is to demonstrate to the court that the petitioners have thoughtfully considered the operation of the proposed district, and thus are not blindly entering an untenable situation. The plan sets out overreaching principles, but it is not a blueprint to be followed inch by inch. Rather, it is used to demonstrate to the court that the district is “feasible,” R.C. 6119.04(D), and to forecast how operations could go in the coming years.

The operations plan, in other words, is a general outline of how the district, governed by its board of trustees, will operate. Critically, the details of that operation are left to the various policies and regulations adopted by the board over time. In fact, as set out in R.C. 6119.04(D), once a district is finally and completely organized by the court of common pleas, “the district shall have power to...carry out the plan for the operation of the district and to amend, modify, change, or alter the plan for its operation as the board of trustees from time to time may determine necessary.” R.C. 6119.04(D). Notably, it says that the district shall have the power to carry out the plan or amend it, but it specifically does *not* say that the district shall carry out the plan exactly as approved.

The board of trustees thus enjoys broad freedom to adjust the plan as it sees fit. The board “shall by its rules and resolutions provide the procedure for . . . any other lawful subject

necessary to the operation of the district and the exercise of the powers granted.” R.C. 6119.07. And in carrying out its responsibilities, “the board of trustees may make and enforce such rules and regulations as are necessary and advisable.” R.C. 6119.08. In sum, where a district has been approved to perform a certain function by the court of common pleas, it is free to carry out that function, pursuant to R.C. 6119.04(D), 6119.07, and 6119.08, by whatever means the district’s board of trustees deems appropriate.

Here, the District’s petition and operations plan are combined into one document (hereinafter, the “Petition and Plan”), most recently revised in 1979. The Petition and Plan includes multiple references to storm water and to the development by the District of a comprehensive storm water management system as well as a capital improvement plan for storm water. For instance, as a starting point, “the purpose of the District shall be the establishment of a total wastewater control system for the collection, treatment and disposal of wastewater within and without the District.” (Petition and Plan, §4.). Here, the Petition and Plan utilizes the term “wastewater” just as it is defined in R.C. 6119.01. The District is then authorized with myriad storm water-related responsibilities:

- “The District will 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* of the District.” (Petition and Plan, §5.(c)(1) (emphasis added).)
- “The District shall have authority pursuant to Chapter 6119 of the Ohio Revised Code to plan, finance, construct, maintain, operate, and regulate local sewage collection facilities and systems within the District, including *both storm* and *sanitary sewer systems*.” (Petition and Plan §5.(m) (emphasis added).)
- “The District shall have *regulatory authority* over all local sewerage collection facilities and systems in the District, including *both storm* and *sanitary sewer systems*.” (Petition and Plan, §5.(m)(1) (emphasis added).)

- “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.” (Petition and Plan, §5.(m)(3) (emphasis added).)

As this language confirms, the District, the member communities and the court of common pleas have been in agreement, since at least 1979, that there is (i) a storm system and (ii) a sanitary sewer system (i.e., two separate systems) within the District, and that the District shall have regulatory authority over both.

As relevant to this case, the District’s Petition and Plan unequivocally authorize the District to construct, manage and regulate the storm water system within the District. The Eighth District’s decision ignores both the statutory authority for the Program and the specific storm system provisions within the Petition and Plan authorizing the development of the Program. Making matters worse, the court below also imparted a non-existent requirement that the District may not take any action, large or small, unless it is specifically mentioned in its Petition and Plan. If a system where the District could carry out with precision the letter of its operations plan, with no flexibility to address the realities of evolving water issues, were truly envisioned by the General Assembly, then a district board would never have the need to adopt a resolution or a regulation, as the Plan would contain everything and any other action would first need court approval, if not expressly articulated in the founding plan. But the General Assembly envisioned something far different: “*All the capacity* of a regional water and sewer district *shall be vested* in and its authority *shall be exercised* by a *board of trustees* which shall manage and conduct the affairs of the district.” R.C. 6119.07.

And that board authority plainly includes the ability to collect an operational charge, as discussed above. As a statutory matter, “[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...*” R.C. 6119.09. As such, the District is authorized by statute to collect charges for either the use of the Program, the services of the Program, or any benefit conferred by the program. The Petition and Plan in turn state 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.” (Petition and Plan, §5.(e)(3)). Because all residents within the District will “benefit” from the District’s Program, under R.C. 6119.09, the Program charge is appropriate. Because all residents within the District “use” the system by contributing storm water runoff from their properties, Under 6119.09, the Program charge is appropriate.

That charge, moreover, is critical to the District’s success at managing storm water. The court-approved Petition and Plan calls for the District to develop a capital improvement plan to manage storm water, to serve as the regulatory authority of the same within the District, and to finance the same in any manner deemed appropriate by the Board of Trustees. The Board chose to finance this initiative through a charge authorized by both R.C. 6119.09 and the Petition and Plan. The member communities, each of whom took affirmative steps to include its respective territory within the District, thus designated the District to establish a total wastewater control system, including the control of storm water, within the District. The District is now carrying out that charge, as it is authorized to do.

III. THE DECISION BELOW THREATENS NOT ONLY THE FORTY (40) SEWER DISTRICTS, BUT ALSO 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, in addition to the District, 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. Yet in light of the Eighth District's decision, these districts, in addition to the approximately 40 sewer districts discussed above, also face legal uncertainty, the prospect of costly legal challenges, and apprehension over their authority to carry out their respective storm water plans. Reversing the decision below will again settle the previously settled expectations for these districts.

That Chapter 6119 provides the best, perhaps only, option for effectively addressing storm water threats is borne out by the experiences of not only the District, 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 charge 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 is able or willing 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. In essence, unless a project is needed to carry water from a road, Ohio's townships are without authority to manage storm water. Further, Ohio townships have no funding stream to accomplish a more comprehensive storm water management program. Heretofore, the best option to remedy both issues for townships struggling with storm water problems and dwindling budgets has been a 6119 district. The Eighth District has tried to remove that option as well and unless reversed, how will unincorporated areas of Ohio deal with the myriad of storm water issues without authority or a funding source to do so? Regional districts have been, and should remain, the best option for those communities.

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 charge. 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. This Court should not doom the District's Program to the same fate.

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 collect a charge 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, through the Attorney General, 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. (*Statement of Director of Environmental Protection Regarding Petition*, In the Court of

Common Pleas of Madison County, Ohio, Case # 96CV-09-135, filed November 8, 1996.) 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 the District, 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 the District, 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 it as well. After all, other solutions are few and far between for most townships. "It is well established that 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. That is why these communities joined together to create regional districts to undertake storm water activities. Other communities currently actively exploring 6119 districts as a more economical, regional solution will also be left with no good option.

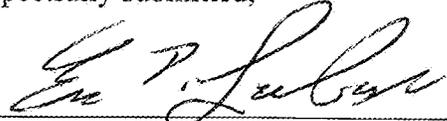
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The District has spent \$13 million to launch its storm water program. The decision below, if left to stand, not only declares these sizable efforts invalid, but it also suggests that, in place of the District, yet another layer of government be created, from scratch, with millions more in expenditures, to in essence reinvent the functions the District 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." Rather than see current efforts thwarted, millions lost, and dramatic ramifications take hold elsewhere around the State, the Court should reverse the decision below.

CONCLUSION

For the above-stated reasons, *amici curiae* respectfully requests that the Court reverse the Eighth District.

Respectfully submitted,



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