

ORIGINAL

ORIGINAL

BEFORE THE OHIO SUPREME COURT

CASE NO. 2013-1770

CHIEF JUSTICE MAUREEN O'CONNOR

Appeal from the Eighth District Court of Appeals

Case No. CA-12-098728

(Consolidated with Case Nos. CA-12-098729 and CA-12-098739)

Cuyahoga County Court of Common Pleas

Case No. CV-10-714945

Northeast Ohio Regional Sewer District)

v.)

Bath Township Ohio, et. al.)

) Brief of Amicus Curiae, Eugene P. Holmes
) And Penny L. Sisson in Support of the
) Appellee, Bath Township, et. al.
)
)

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INTRODUCTION:

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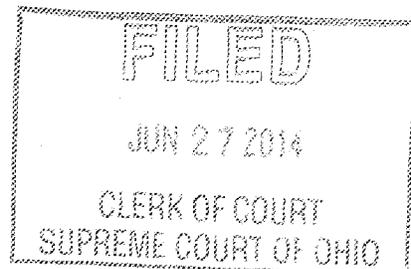
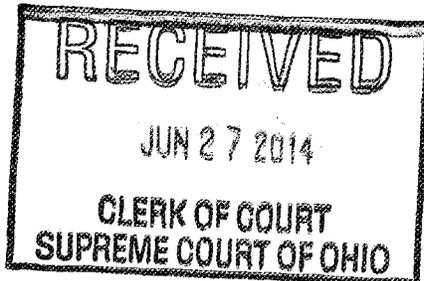


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Now appears injured and disabled citizen(s), Eugene P. Holmes, and Penny Sisson and files this brief Amicus Curiae in support of the Amicus Curiae's position and further states de novo review of critical jurisdictional issues not addressed by either party pursuant to Supreme Court Rules 16.06 (A), (B)(3).

STATEMENTS OF FACTS AND ARGUMENT:

Both Amicus Curiae state strongly that the arguments placed before the honorable Supreme Court of Ohio basically argue over jurisdictional authority, who benefits, and the taking of personal property for public and/or private usage and same is res judicata as it has been heard and decided in the consent decree as filed in the United States District Court, United States of America, et. al. versus the Northeast Ohio Regional Sewer District, 1:10-cv-02895-DCN (certified copy of the docket attached hereto (4 pages) and Eugene Holmes was present at this hearing. All State and Federal EPA jurisdictions concerning combined sewage, sanitary and storm, have already been agreed to before Judge Nugent as decided at 9:00 a.m. in Courtroom 15B and lasted less than one hour. On May 28, 2014, Eugene Holmes sent a fax, after reviewing the amicus curiae's memorandum's in favor of the Appellant, Northeast Ohio Regional Sewer District, it became apparent that the citing of the Clean Water Acts and the EPAs that the Amicus Curiae's memorandum's sent by Thompson Hine for Cleveland Metropolitan Park District and another sent by McMahon DeGulis on behalf of National Association of Clean Water Agencies (NACWA) and the Association of Ohio Metropolitan Wastewater Agencies (AOMWA) were requesting that the court overturn the Court of Appeals decision that Northeast Ohio Regional Sewer District lacks jurisdiction to charge a fee for storm water. It now becomes abundantly clear that these issues are res judicata pertaining to the consent decree that was agreed to before

Judge Nugent on June 30, 2011. It is our contention that critical issues such as total lack of jurisdiction, eminent domain and a surtax have never been addressed by the trial court, and that funding is available under Title I of Research and Related Programs of the Federal Water Pollution Control Act, 33 U.S.C. 1251, et. seq., and/or the 8th District Court of Appeals and never addressed by either the Appellant and or the Appellee with a conflict of interest and that the Northeast Ohio Regional Sewer District's jurisdictional intrusion into what solely is the federal published authority of the Clean Water Acts, inclusive and the United States Army Corp of Engineers who has by a federal congressional act, in the Federal Water Pollution Control Act of 1948 as amended in 1972, 1977 and the Water Quality Act of 1987 has been provided sole authority to issue regulatory letters of authority to enforce storm water management.

Pursuant to Federal Water Pollution Control Act (33 U.S.C. 1253 et. Seq.), Title 1 - Research and Related Programs, Section 101 (a) the objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that consistent with the provisions of this Act (see Exhibit 1 through 4, attached hereto).

Under Title 1, Section 105 (a) The Administrator is authorized to conduct in the Environmental Protection Agency, and to make grants to any purpose of assisting in the development of

1) any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into any waters of pollutants from sewers which carry storm water or both storm water and pollutants, or

2) any project which will demonstrate advanced waste treatment and water purification methods (including the temporary use of new or improved chemical additives which provide substantial immediate improvement to existing treatment processes) or new or improved methods to existing treatment processes), or new or improved methods of joint treatment systems for municipal and industrial wastes;

(b) The Administrator is authorized to make grants to any State or States or interstate agency to demonstrate, in river basins or portions thereof, advanced treatment and environmental enhancement techniques to control pollution from all sources, within such basins or portions thereof, including nonpoint sources, together with in stream water quality improvement techniques.

These matters have already been decided and heard before a federal judge and take precedence and there is no mandate to charge a duplicate fee for the same services of sanitary and storm water management that combines into an overflow system that release into Lake Erie. These matters are res judicata and occur after the fact of resolution of a consent decree made on June 30, 2011. There is no state or federal mandate requiring a duplicate storm water fee. And to the best of our knowledge and belief there occurs no application to the United States Army Corp of Engineers or to the Administrator of the Federal Water Pollution Control Act for funding and/or applications for grants for Research and Development under Section 105 of the Act. Under Section 108 of the Act, the Pollution Control in the Great Lakes, Subsections C, there is authorized to be appropriated twenty million dollars to carry out the provisions of Subsections A and B of this section which sum shall be made available until expended.

13 13

The Northeast Ohio Regional Sewer District is a regional legislative agency that has failed to apply for funding for its projects and now seeks a duplicate fee from the taxpayers of Northeast Ohio within its jurisdiction. The matter of fees has already been decided by allocation of the 2014 President's Budget and federal consent decree and these matters occur res judicata. Any matters not related to the combining of the storm and sanitary sewers including riverbeds, streams, waterways, etc. clearly fall within the sole jurisdiction of the United States Army Corp of Engineers who has already been provided abundant funding and an application to the proper entity, the United States Army Corp of Engineers, in Buffalo, New York, was requested by Eugene Holmes to be sent to the Northeast Ohio Regional Sewer District numerous times and awaiting written response.

Under Section 108 of the Act, (d) (1) In recognition of the serious conditions which exist in Lake Erie, the Secretary of the Army acting through the Chief of Engineers is directed to design and develop a demonstration Wastewater Management Program for the Rehabilitation and the Environmental repair of Lake Erie. Prior to the initiation of detailed engineering and design, the program along with the specific recommendations of the Chief of Engineers and recommendations for its financing, emphasis added, shall be submitted to the Congress for statutory approval. This authority and not addition to, and not in lieu of other wastewater studies aimed at eliminating pollution emanating from select sources around Lake Erie.

The United States Army Corp of Engineers has been notified by Eugene Holmes of this court case by certified mail no. 7003 0500 0000 0053 2021 received on March 5, 2014 when a copy of our

Memorandum in Support of the Appellees position and the Eighth District Court of Appeals.
(Exhibit 5, hereto).

It is already federal statute that federal permits are required by States from the United States Army Corp of Engineers (USARCE) as defined under in Sections 301, 502 of the Clean Water Act of 1972.

The enforcement and a cease and desist order and determination must be made by application to the USARCE who have full enforcement authority under Title IV of the acts, including but not limited to only, the Federal Water Pollution Control Act of 1987 regarding the draft science report of Streams and Wetlands to Downstream Waters, Reviews and Synthesis of Scientific Evidence.

The United States Army Corp of Engineers is fully funded by the President's Fiscal 2013/2014 budget for discretionary funding, approved by the United States Congress that included over \$4,731 **billion** dollars of already supplied tax dollars for Civil Works Programs for targeted investments in the nations infrastructure that fund the development, management, restoration and protections of the Nation's water, wetlands and related resources.

The Army Civil Works budget funds the planning, design, construction, operation and maintenance of projects, and focuses on the highest performing projects, and programs within three main Civil Works mission areas: commercial navigation, **flood risk management**, and

aquatic ecosystem restoration. It also funds programs that contribute to the protection of the nation's waters and wetlands, the generation of low-cost renewable hydropower, the restoration of certain sites contaminated as a result of the nation's early atomic weapons development program and emergency preparedness and training to respond to natural disasters.

To be clear, there are no sewers, storm or sanitary sewers placed on the property of Eugene Holmes. Despite this fact, the Holmes' property has been placed within the jurisdiction of the Northeast Ohio Regional Sewer District as part of a "local" settlement agreement under the "Takings Statute" in Lorain County Court of Common Pleas, Case No. 07 CV152082 without personal notice, without any compensation for his property, without his permission, and without an administrative plan for remedy as required by the United States Supreme Court Case, Kelo, et. al. Versus City of New London, Connecticut, 545 U.S. (2005)

The "Takings Statute" demands an administrative plan / development plan be put in place to take property/funds for private and/or public use and an administrative plan for remedy which has not been included in the settlement agreement to which Eugene Holmes has noticed the Honorable Judge Burge, Lorain County Court of Common Pleas, and that to this date, no action has been taken, but appears on the docket without movement. Eugene Holmes cited equal protection of the law and that this case would be of great public interest as noted on the docket.

We, taxpayers, Eugene Holmes and Penny Sisson, et. al. have already been taxed as documented by the President's Fiscal 2013/2014 budgets and that the discretionary funding has already been

provided by tax payer dollars to the United States Army Corp of Engineers who has sole regulatory authority under Section 404 under the Clean Water Acts, inclusive.

Now, the Northeast Ohio Regional Sewer District proposes a surtax in violation of the United States Constitution without a vote/levy of the people, without application for funds that have been already allocated for the same purposes, without a USARCE permit and without any jurisdiction to do so. The Appellee's position as well as the Appellant's position are in conflicts of interests with their own storm water management programs to collect fees. Additionally, it takes the property/funds from the people without any administrative plan for remedy as mandated in the Kelo, et. al. Versus City of New London, Connecticut, 545 U.S. (2005) and is affirmed in the United States Sixth Circuit Court of Appeals case 13-3112 Terry Wilkins, et. Al. Versus Ohio Department of Agriculture, 2014, now on appeal to the U.S. Supreme Court (Ohio Southern District, Eastern Division of Ohio in Columbus 2:12-cv-01010).

To be clear, Eugene P Holmes' has had his property taken without compensation, without approach for compensation, without negotiation, has been placed into a financial and or otherwise burdensome legislative agency and position to prevent his exercise of his Fourth Amendment rights assertion and prevention of the unlawful and illegal seizure of his property/funds without an administrative plan for remedy, pending Judge Burges' court, Lorain County Court of Common Pleas, Case No. 07 CV152082. It is to be noted by this court that his property has been placed in a district that charges approximately five (5) times the amount of the sewer district that he was

formerly in (Lorain County). It is a dangerous precedence and these decisions threaten the constitutional rights of every citizen. This Ohio Supreme Court has the right and duty under the separation of the powers to first of all request enlightenment from any and all institutions, agencies, et. al. as necessary and to stop the legislative agencies from imposing levies, fees, taxes, without a vote/levy of the people. Unfunded and/or under-funded government mandates under Kelo v. New London, 545 US 469, Supreme Court 2005 and as affirmed by the Ohio 6th Circuit Wilkins versus the Ohio Department of Agriculture are unconstitutional as they take your personal property/funds without an administrative plan for remedy.

In our opinion, the \$3 billion dollar settlement agreement between the Northeast Ohio Regional Sewer District and the Federal and Ohio State EPAs that was settled before the United States District Court in Cleveland, Ohio before Judge Nugent, Northern District of Ohio, Re: RefNo. of DOJ 90-5-1-10-08177/1, Case number: 1:10-CV-02895DCN that Eugene Holmes attended and attempted to appear amicus curiae in numerous memorandums to the court and informed the court the sewer agreement was a violation of the "Takings Statute" as defined in the New London decision and the matter was never addressed on the merits of the issues.

Judge Nugent sent Eugene Homes a letter stating that the memorandums were considered by him to be submissions and that Eugene Holmes was not a party even though his property was taken and placed into the Northeast Ohio Regional Sewer District's service_area without an administrative plan for full remedy, without compensation and without my permission and violating eminent domain and "Takings Statute" by the seizure of funds/property and causing a

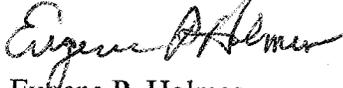
financial and/or otherwise undue burden, denied the right to redress our government and violating these taxpayers' civil rights, equal protection of the law, freedom of speech, due process, but not limited to only.

Conclusion:

We request the Ohio Supreme Court to affirm the Ohio Eighth District's Court of Appeals decision and further affirm that upon further de novo review of cited jurisdictional evidence that the Ohio Legislature does not have the right to change the definition of storm water to allow the appellant to charge a fee for storm water management and that is already concremented in federal statute with full funding available upon application and authorized permit to and by the USARCE. Eugene Holmes' in attendance at the US District Court hearing June 30, 2011 at 9:00 a.m. in courtroom 15B before Judge Nugent the storm water management fees/taxes were already considered and set in statute, as the United States District Court, Northern District of Ohio, civil docket case no. 1:10-cv-02895-DCN, Cause: 33:1319 Clean Water Act, further stating that to the best of our knowledge and belief that there must not be a federal or state EPA unfunded mandate that would require the imposition of fees when all avenues for funding have not been explored. We further respectfully request de novo, that the supreme court of Ohio rule that any unfunded mandates and/or takings under the Takings Statute are declared unconstitutional without just compensation and an administrative plan for remedy. In *Kelo versus the City of New London*, 545 US 469, Supreme Court 2005, the Fifth Amendment Takings Clause provides, "nor shall private property be taken for public use without just compensation." This provision applies to states as well as the federal government (*Chicago B&QR v. Chicago*, 166 US 226 (1987)). The

Court's have interpreted the clause to ban government from taking property that belongs to Party A only to transfer it to Party B even if the government justly compensated Party A (in Kelo at 2661).

Respectfully yours,



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APPENDIX: EXHIBITS described herein 13 PAGES (1-13)

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amicus Curiae EUBENE HUGHES-J Peary Sisson

Support of Appellee Bath TOWNSHIP

was sent via U.S. mail, FAX

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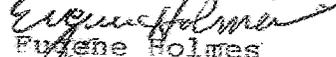
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Date Filed	#	Docket Text
12/22/2010	1	Complaint against Northeast Ohio Regional Sewer District.. Filed by United States of America, State of Ohio. (Attachments: # 1 Civil Cover Sheet) (Paffilas, Steven) (Entered: 12/22/2010)
12/22/2010	2	Judge Donald C. Nugent assigned to case. (C,B) (Entered: 12/22/2010)
12/22/2010	3	Random Assignment of Magistrate Judge pursuant to Local Rule 3.1. In the event of a referral, case will be assigned to Magistrate Judge Baughman. (C,B) (Entered: 12/22/2010)
12/22/2010	4	Notice of Lodging of Consent Decree filed by United States of America. (Attachments: # 1 Proposed Consent Decree, # 2 Appendix 1 - Control Measures and Performance Criteria, # 3 Appendix 2 - Post Construction Monitoring Program, # 4 Appendix 3 - Green Infrastructure Requirements, # 5 Appendix 4 - Requirements Applicable to Proposals for Green for Gray Substitutions, # 6 Appendix 5 - Federal Supplemental Environmental Project, # 7 Appendix 6 - State Supplemental Environmental Project) Related document(s) 1 .(Paffilas, Steven) (Entered: 12/22/2010)
12/23/2010	5	Attorney Appearance of Counsel by David W. Burchmore filed by on behalf of Northeast Ohio Regional Sewer District. (Burchmore, David) (Entered: 12/23/2010)
12/23/2010	6	Attorney Appearance of Counsel by John D. Lazzaretti filed by on behalf of Northeast Ohio Regional Sewer District. (Lazzaretti, John) (Entered: 12/23/2010)
12/23/2010	7	Attorney Appearance of Counsel, Marlene Sundheimer filed by John D. Lazzaretti filed by on behalf of Northeast Ohio Regional Sewer District. (Lazzaretti, John) (Entered: 12/23/2010)
12/23/2010	8	Attorney Appearance of Counsel, Lisa Hollander filed by John D. Lazzaretti filed by on behalf of Northeast Ohio Regional Sewer District. (Lazzaretti, John) (Entered: 12/23/2010)
02/01/2011	9	Motion for to withhold consent for the Consent Decree filed by Movant, Stephen L. Merkel. (K,V) (Entered: 02/01/2011)

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02/10/2011	8	Case Management Conference Scheduling Order with case management conference to be held on 3/17/2011 at 10:45 AM at Courtroom 15A before Judge Donald C. Nugent. (C,KA) (Entered: 02/10/2011)
02/17/2011	9	Status Report filed by United States of America. (Furrie, Kristin) (Entered: 02/17/2011)
02/17/2011	10	Joint Motion to vacate <i>case management conference, stay all discovery and responsive pleadings, and deem Stephen R. Merkel's motion withhold consent as a public comment</i> filed by Defendant Northeast Ohio Regional Sewer District, State of Ohio, United States of America. Related document(s) 9 . (Attachments: # 1 Proposed Order)(Furrie, Kristin) (Entered: 02/17/2011)
03/03/2011	11	Order granting Motion to vacate (Related Doc # 10). The Case Management Conference currently scheduled for March 17,2011 is vacated and all discovery and responsive pleadings are stayed. Status Conference set for 4/27/2011 at 10:00 AM in Chambers 15A before Judge Donald C. Nugent.(C,KA) (Entered: 03/03/2011)
03/25/2011	12	Motion for leave to appear and to file additional information filed by Movant Eugene P. Holmes. (Attachments: # 1 Exhibit)(K,V) (Entered: 03/25/2011)
04/01/2011	13	Response to 12 Motion for leave to appear and file additional information by nonparty Eugene Holmes filed by United States of America. (Ellis, Steven) (Entered: 04/01/2011)
04/08/2011	14	Second Status Report filed by United States of America. (Ellis, Steven) (Entered: 04/08/2011)
04/11/2011	15	Reply to response to 12 Motion for leave to file additional information filed by Eugene P. Holmes. (K,V) (Entered: 04/11/2011)
04/28/2011	16	Minutes of proceedings before Judge Donald C. Nugent.Status Conference held on 4/27/2011, Hearing on Acceptance and Fairness of Proposed Consent Decree set for 6/30/2011 at 09:00 AM in Courtroom 15B before Judge Donald C. Nugent. (Court Reporter: nonc.)Time: 20 minutes. (K,V) (Entered: 04/28/2011)

I hereby certify that this instrument is a true and correct copy of the original on file in my office.

Attest: Geri M. Smith, Clerk
U.S. District Court
Northern District of Ohio

By: 
Deputy Clerk

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FEDERAL WATER POLLUTION CONTROL ACT

(33 U.S.C. 1251 et seq.)

AN ACT To provide for water pollution control activities in the Public Health Service of the Federal Security Agency and in the Federal Works Agency, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—RESEARCH AND RELATED PROGRAMS

DECLARATION OF GOALS AND POLICY

SEC. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of

(2) appropriate and effective indicators for improving detection in a timely manner in coastal recreation waters of the presence of pathogens that are harmful to human health;

(3) appropriate, accurate, expeditious, and cost-effective methods (including predictive models) for detecting in a timely manner in coastal recreation waters the presence of pathogens that are harmful to human health; and

(4) guidance for State application of the criteria for pathogens and pathogen indicators to be published under section 304(a)(9) to account for the diversity of geographic and aquatic conditions.

(33 U.S.C. 1254)

GRANTS FOR RESEARCH AND DEVELOPMENT

SEC. 105. (a) The Administrator is authorized to conduct in the Environmental Protection Agency, and to make grants to any State, municipality, or intermunicipal or interstate agency for the purpose of assisting in the development of—

(1) any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into any waters of pollutants from sewers which carry storm water or both storm water and pollutants; or

(2) any project which will demonstrate advanced waste treatment and water purification methods (including the temporary use of new or improved chemical additives which provide substantial immediate improvement to existing treatment processes), or new or improved methods of joint treatment systems for municipal and industrial wastes;

and to include in such grants such amounts as are necessary for the purpose of reports, plans, and specifications in connection therewith.

(b) The Administrator is authorized to make grants to any State or States or interstate agency to demonstrate, in river basins or portions thereof, advanced treatment and environmental enhancement techniques to control pollution from all sources, within such basins or portions thereof, including nonpoint sources, together with in stream water quality improvement techniques.

(c) In order to carry out the purposes of section 301 of this Act, the Administrator is authorized to (1) conduct in the Environmental Protection Agency, (2) make grants to persons, and (3) enter into contracts with persons, for research and demonstration projects for prevention of pollution of any waters by industry including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants. No grant shall be made for any project under this subsection unless the Administrator determines that such project will develop or demonstrate a new or improved method of treating industrial wastes or otherwise prevent pollution by industry, which method shall have industrywide application.

(d) In carrying out the provisions of this section, the Administrator shall conduct, on a priority basis, an accelerated effort to develop, refine, and achieve practical application of:

reational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

(b)(1) In the survey or planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source.

(2) The need for and the value of storage for regulation of streamflow (other than for water quality) including but not limited to navigation, salt water intrusion, recreation, esthetics, and fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies.

(3) The need for, the value of, and the impact of, storage for water quality control shall be determined by the Administrator, and his views on these matters shall be set forth in any report or presentation to Congress proposing authorization or construction of any reservoir including such storage.

(4) The value of such storage shall be taken into account in determining the economic value of the entire project of which it is a part, and costs shall be allocated to the purpose of regulation of streamflow in a manner which will insure that all project purposes, share equitable in the benefits of multiple-purpose construction.

(5) Costs of regulation of streamflow features incorporated in any Federal reservoir or other impoundment under the provisions of this Act shall be determined and the beneficiaries identified and if the benefits are widespread or national in scope, the costs of such features shall be nonreimbursable.

(6) No license granted by the Federal Power Commission for a hydroelectric power project shall include storage for regulation of streamflow for the purpose of water quality control unless the Administrator shall recommend its inclusion and such reservoir storage capacity shall not exceed such proportion of the total storage required for the water quality control plan as the drainage area of such reservoir bears to the drainage area of the river basin or basins involved in such water quality control plan.

(c)(1) The Administrator shall, at the request of the Governor of a State, or a majority of the Governors when more than one State is involved make a grant to pay not to exceed 50 per centum of the administrative expenses of a planning agency for a period not to exceed three years, which period shall begin after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, if such agency provides for adequate representation of appropriate State, interstate, local, or (when appropriate) international interests in the basin or portion thereof involved and is capable of developing an effective, comprehensive water quality control plan for a basin or portion thereof.

ing and economic feasibility and practicality of using sewage sludge materials and other municipal wastes to diminish or prevent pollution affecting water quality from acid, sedimentation, or other pollutants and in such projects to restore affected lands to usefulness for forestry, agriculture, recreation, or other beneficial purposes.

(b) Prior to undertaking any demonstration project under this section in the Appalachian region (as defined in section 403 of the Appalachian Regional Development Act of 1965, as amended), the Appalachian Regional Commission shall determine that such demonstration project is consistent with the objectives of the Appalachian Regional Development Act of 1965, as amended.

(c) The Administrator, in selecting watersheds for the purposes of this section, shall be satisfied that the project area will not be affected adversely by the influx of acid or other mine water pollution from nearby sources.

(d) Federal participation in such projects shall be subject to the conditions—

(1) that the State shall acquire any land or interests therein necessary for such project; and

(2) that the State shall provide legal and practical protection to the project area to insure against any activities which will cause future acid or other mine water pollution.

(e) There is authorized to be appropriated \$30,000,000 to carry out the provisions of this section, which sum shall be available until expended.

(33 U.S.C. 1257)

POLLUTION CONTROL IN GREAT LAKES

SEC. 108. (a) The Administrator, in cooperation with other Federal departments, agencies, and instrumentalities is authorized to enter into agreements with any State, political subdivision, interstate agency, or other public agency, or combination thereof, to carry out one or more projects to demonstrate new methods and techniques and to develop preliminary plans for the elimination or control of pollution, within all or any part of the watersheds of the Great Lakes. Such projects shall demonstrate the engineering and economic feasibility and practicality of removal of pollutants and prevention of any polluting matter from entering into the Great Lakes in the future and other reduction and remedial techniques which will contribute substantially to effective and practical methods of pollution prevention, reduction, or elimination.

(b) Federal participation in such projects shall be subject to the condition that the State, political subdivision, interstate agency, or other public agency, or combination thereof, shall pay not less than 25 per centum of the actual project costs, which payment may be in any form, including, but not limited to, land or interests therein that is needed for the project, and personal property or services the value of which shall be determined by the Administrator.

(c) There is authorized to be appropriated \$20,000,000 to carry out the provisions of subsections (a) and (b) of this section, which sum shall be available until expended.

(d)(1) In recognition of the serious conditions which exist in Lake Erie, the Secretary of the Army, acting through the Chief of

ritorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e)(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f)(1) Except as provided in paragraph (2) of this subsection, the discharge of dredge or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

cline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) FUNDAMENTALLY DIFFERENT FACTORS.—

(1) GENERAL RULE.—The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) or section 307(b) for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that—

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 304(b) or 304(g) and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application—

(i) is based solely on information and supporting data submitted to the Administrator during the rule making for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) TIME LIMIT FOR APPLICATIONS.—An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) TIME LIMIT FOR DECISION.—The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) SUBMISSION OF INFORMATION.—The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) TREATMENT OF PENDING APPLICATIONS.—For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on the date of the enactment of this subsection shall be treated as having been submitted to the Administrator on

(C) ADDITIONAL CONDITIONS.—The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) PRELIMINARY DECISION DEADLINE.—The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) In the case of any facility subject to a permit under section 402 which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 402, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(l) Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this Act.

(m)(1) The Administrator, with the concurrence of the State, may issue a permit under section 402 which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 403, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that—

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) and section

- (1) to conduct monitoring and notification; and
- (2) for related salaries, expenses, and travel.

(i) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated for making grants under subsection (b), including implementation of monitoring and notification programs by the Administrator under subsection (h), \$30,000,000 for each of fiscal years 2001 through 2005.

(33 U.S.C. 1346)

TITLE V—GENERAL PROVISIONS

ADMINISTRATION

SEC. 501. (a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act.

(b) The Administrator, with the consent of the head of any other agency of the United States, may utilize such officers and employees of such agency as may be found necessary to assist in carrying out the purposes of this Act.

(c) Each recipient of financial assistance under this Act shall keep such records as the Administrator shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(d) The Administrator and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and records of the recipients that are pertinent to the grants received under this Act. For the purpose of carrying out audits and examinations with respect to recipients of Federal assistance under this Act, the Administrator is authorized to enter into noncompetitive procurement contracts with independent State audit organizations, consistent with chapter 75 of title 31, United States Code. Such contracts may only be entered into to the extent and in such amounts as may be provided in advance in appropriation Acts.

(e)(1) It is the purpose of this subsection to authorize a program which will provide official recognition by the United States Government to those industrial organizations and political subdivisions of States which during the preceding year demonstrated an outstanding technological achievement or an innovative process, method, or device in their waste treatment and pollution abatement programs. The Administrator shall, in consultation with the appropriate State water pollution control agencies, establish regulations under which such recognition may be applied for and granted, except that no applicant shall be eligible for an award under this subsection if such applicant is not in total compliance with all applicable water quality requirements under this Act, or otherwise does not have a satisfactory record with respect to environmental quality.

According to the majority, the case turned on whether New London's plan satisfied the "public use" requirement or whether it was simply a way to confer a private benefit on a particular party.

RULE

The Fifth Amendment's Takings Clause provides, in part, "nor shall private property be taken for public use without just compensation." This provision applies to states as well as the federal government (*Chicago B&QR v. Chicago*, 166 US 226 (1987)). The courts have interpreted the clause to ban government from taking property that belongs to party A only to transfer it to party B, even if the government justly compensated party A (*Kelo*, at 2661).

DECISION

By a five to four margin, the Court upheld the Connecticut Supreme Court's ruling that New London's plan served a valid public purpose and that the takings thus satisfied the Fifth Amendment's public use requirement. It held that the city carefully prepared the plan and did not adopt it as a way to benefit specific individuals. Justice Kennedy joined in the majority opinion and wrote a separate concurrence. Justice O'Connor, joined by Chief Justice Rehnquist and justices Scalia and Thomas, wrote the dissenting opinion. Justice Thomas also wrote a separate dissent.

RATIONALE

Precedent for Broad Interpretation of "Public Use"

In upholding New London's plan, the Court noted that it long ago rejected the narrow interpretation of "public use." Under that interpretation, a taking was constitutional if the public could literally use the condemned property. Instead, the Court opted for a broader interpretation under which a taking is constitutional if it serves a public purpose, such as eliminating slum and blight. The Court also noted that historically it had deferred to the legislature's judgment as to what constituted a public purpose.

The Court relied on three cases to support its holding. In *Berman v. Parker* (348 U.S. 26 (1954)), the Court upheld Congress' plan to redevelop a blighted Washington D.C. neighborhood by acquiring and transferring property to private developers. A property owner sued the city when it condemned his store, arguing that it was not blighted and that redeveloping a neighborhood was not a valid public purpose for taking the store by eminent domain. The court deferred to the government's determination that the area needed to be planned as a whole and saw nothing in the Constitution that prevented redevelopment programs from treating several properties as a whole (*Kelo*, at 2663).

In *Hawaii Housing Authority v. Midkiff* (467 US 229 (1984)), the Court upheld a law permitting Hawaii to take and transfer leased land to its lessees. Again it deferred to the legislature's determination that this policy served a valid public purpose:

eliminating a land oligopoly. The fact that the state immediately transferred the land to private individuals did not diminish the takings' public purpose. Consequently, the law's constitutionality depended on its purpose (i.e., eliminating the oligopoly), not the means to achieve it (i.e., transferring the property to private individuals) (*Kelo*, at 2665).

Lastly, in *Ruckelshaus v. Monsanto Co.* (467 US 986 (1984)), the Court upheld a law allowing a federal agency to evaluate new pesticide applications based on trade secrets and other data submitted by prior applicants as long as the latter received just compensation. In doing so, it deferred to Congress' determination that the law served a public purpose, fostering competition in the pesticide industry (*Kelo*, at 2665).

Economic Development Constitutes a Public Purpose

In *Kelo*, the Court applied its prior holdings and concluded that taking land by eminent domain for economic development in this situation served a valid public purpose. It noted that promoting economic development is a traditional and long accepted governmental function and there is no way to distinguish economic development from other recognized public purposes. For this reason, the Court rejected the premise that all economic development takings were unconstitutional (*Kelo*, at 2666).

It also concluded that the fact that economic development takings benefit private parties and produce incidental public benefits does not render them unconstitutional. In support of this conclusion, the Court observed that public policies and programs often benefit private interests, and sometimes, these interests do a better job at serving a public purpose than a government agency (e.g., a business that creates new jobs after receiving a low-interest government loan to build a facility) (*Kelo*, at 2667)

The Court also rejected the petitioners' alternative argument that the constitutionality of economic development takings should turn on whether there is a reasonable certainty that the takings will benefit the public. This test would require the courts to second-guess the legislature about the likelihood that the benefits would actually accrue and stop or slow down the development process while waiting for a court decision (*Kelo*, at 2668).

While economic development takings satisfy the Takings Clause's public use requirement, the majority indicated that nothing prevents the states from restricting or prohibiting the use of eminent domain powers for this purpose (*Kelo*, at 2669).

Kennedy's Concurring Opinion

In Justice Kennedy's view, courts must examine economic development takings more closely than other takings to see if they favor a private party rather than provide a public benefit. Courts can do this without assuming that the government acted unreasonably or only to benefit that party, he added. Kennedy was satisfied

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that the trial court in this case reached its decision after closely examining the takings and rejecting the contention that the city was acting only to benefit specific private interests (*Kelo*, at 2670).

Dissenting Opinion

Writing the primary dissent, Justice O'Connor argued that economic development takings violated the Takings Clause's public use requirement, which she interpreted literally. She rejected the majority's view that the constitution permits the transfer of private property to private developers so long as the public obtains some incidental benefit. And she asserted that it was for the courts, not the legislative bodies to determine if the use of eminent domain was constitutional.

O'Connor read *Berman* and *Midkiff*, as cases where the court had upheld the takings not for economic development but for eliminating harm: blight in *Berman* and land oligopoly in *Midkiff*. In upholding the *Kelo* takings, the Court should not have deferred to the city's decisions; doing so rendered the Takings Clause meaningless and consequently removed any effective check on the eminent domain power (*Kelo*, at 2674).

Thomas' Dissent

Writing a separate dissent, Justice Thomas argued that the Fifth Amendment allows government to take property only if the government intends to own the property or literally allow the public to use it. He urged the Court to reconsider its holdings based on the Takings Clause's historical meaning. In doing so, he contrasted the way the founders used "public use" and "public welfare" to convey different meanings. Over time, the courts strayed from the literal meaning of public use to one that was closer to public welfare. Like O'Connor, Thomas concluded that the *Kelo* Court rendered the Takings Clause meaningless by substituting "public purpose" for the Constitution's "public use" language (*Kelo*, at 2679).

JR:ts

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