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No. ———, ORIGINAL

IN THE
Supreme Court of the United States
OCTOBER TERM, 1969

STATE OF OHIO, EX REL., PAUL W. BROWN,
Attorney General of Ohio, State House Annex,
Columbus, Ohio 43215,
Plaintiff,

v.

WYANDOTTE CHEMICALS CORPORATION, A corporation ex-
isting under the laws of Michigan, located at 1609
Biddle Avenue, Wyandotte, Michigan,

and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, A cor-
poration existing under the laws of the Dominion of
Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, A corporation existing
under the laws of Delaware, located at Midland,
Michigan,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT,
COMPLAINT AND
STATEMENT AND BRIEF IN SUPPORT OF MOTION

PAUL W. BROWN
Attorney General of Ohio
State House Annex
Columbus, Ohio 43215

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and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, A corporation existing under the laws of the Dominion of Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, A corporation existing under the laws of Delaware, located at Midland, Michigan,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of Ohio by its Attorney General Paul W. Brown, ex rel., asks leave to file its Complaint respectfully submitted herewith against Wyandotte Chemicals

Corporation, a corporation organized and existing under the laws of Michigan and therefore a citizen of Michigan, Dow Chemical Company of Canada, Limited, a corporation existing under the laws of the Dominion of Canada and therefore an alien, and The Dow Chemical Company, a corporation existing under the laws of Delaware and therefore a citizen of Delaware.

PAUL W. BROWN
Attorney General of Ohio
State of Ohio, ex rel.
Counsel for Plaintiff

April, 1970

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Plaintiff,

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and

DOW CHEMICAL COMPANY OF CANADA, LIMITED, A corporation existing under the laws of the Dominion of Canada, located at Sarnia, Ontario, Canada,

and

THE DOW CHEMICAL COMPANY, A corporation existing under the laws of Delaware, located at Midland, Michigan,

Defendants.

COMPLAINT

The State of Ohio by its Attorney General brings this suit against the Defendants, Wyandotte Chemicals Corporation, The Dow Chemical Company, and Dow Chemical Company of Canada, Limited, and for its cause of action states:

I

Paul W. Brown is the duly appointed, qualified and acting Attorney General of the State of Ohio and in such capacity is authorized to bring and does bring this suit on behalf of the State of Ohio and its citizens.

II

The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Title 28 U. S. C., Section 1251.

III

The Wyandotte Chemicals Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan with its principal office and place of business at Wyandotte, Michigan. It has duly qualified itself to do business and does business in the State of Ohio.

IV

The Dow Chemical Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at Midland, Michigan. It has duly qualified itself to do business and does business in the State of Ohio.

V

The Dow Chemical Company of Canada, Limited is a corporation organized, existing, and doing business under and by virtue of the laws of the Dominion of Canada and the Province of Ontario with its principal office and place of business at Sarnia, Ontario, Canada. It regularly does or solicits business, engages in a persistent course of conduct, and derives substantial revenue from goods used or consumed and services rendered in the

State of Ohio or has substantial contacts with the United States from which it derives benefits.

VI

At all times herein material, the Plaintiff State of Ohio was and now is the owner, in trust for and as guardian and protector thereof for its citizens and inhabitants, of Lake Erie from the Ohio shore to the international boundary between Ohio and the Dominion of Canada, being the center of said lake as confirmed by treaty between the United States and Great Britain dated January 11, 1909.

VII

Since time immemorial, Lake Erie has been and now is a natural body of fresh water bordered by the states of Ohio, Michigan, Pennsylvania, and New York and the Dominion of Canada. Water flows from Lake Huron into Lake St. Clair through the St. Clair River; water flows from Lake St. Clair into Lake Erie through the Detroit River. Lake Erie has been and now is frequented by great numbers of white bass, walleye, carp, perch, catfish, sheepshead, mullet, coho, and other fish. All of said fish in Ohio are owned by the State of Ohio to the extent fish in their wild state can be owned, and are held in trust by it for its citizens and inhabitants. All of said fish have been valuable items of food and diet for the people of Ohio and others. In addition to being a common fishery utilized by citizens and inhabitants of Ohio, Lake Erie has been a source of water supply for the citizens and inhabitants of Ohio and has been used as a place for recreation and relaxation by the citizens and inhabitants of Ohio.

VIII

Defendant Dow Chemical Company of Canada, Limited owns and operates in or near the city of Sarnia, Province of Ontario, Dominion of Canada a manufac-

turing plant in which it is engaged in the manufacture and processing, among other items, of products known as caustic soda and chlorine. In the manufacture and processing of said products said Defendant has utilized mercury or compounds thereof and has continually, intentionally, and knowingly since 1949 discharged said mercury or compounds thereof into the St. Clair River or tributaries thereto at the Canadian side thereof, some of which mercury or compounds thereof has flowed or has been carried into Lake Erie across the boundary between Canada and the United States and to and along the Ohio shore.

IX

Defendant Wyandotte Chemicals Corporation owns and operates in or near the city of Wyandotte, Michigan, a manufacturing plant in which it is engaged in the manufacture and processing, among other items, of products known as caustic soda and chlorine. In the manufacture and processing of said products said Defendant has utilized mercury or compounds thereof and has continually, intentionally, and knowingly for several years discharged said mercury or compounds thereof into the Detroit River or tributaries thereto at the Michigan side thereof, some of which mercury or compounds thereof has flowed or has been carried into Lake Erie and to and along the Ohio shore.

X

Defendant The Dow Chemical Company is the owner of all of the outstanding shares of capital stock of Defendant Dow Chemical Company of Canada, Limited. As such shareholder Defendant The Dow Chemical Company controls the actions of Defendant Dow Chemical Company of Canada, Limited and is responsible along with Defendant Dow Chemical Company of Canada, Limited for the discharge of such mercury or compounds thereof into Lake Erie or tributaries thereto.

XI

The mercury or compounds thereof which the Defendants have discharged into Lake Erie or tributaries thereto is a poison which is injurious to the natural conditions existing in the lake, to the fish and other wildlife, to the vegetation therein, to the water of the lake and which is presently or potentially injurious and deleterious to the health and safety of the citizens and inhabitants of Ohio; the introduction of poisonous mercury or compounds thereof into Lake Erie has altered and unless stopped will continue to alter the natural condition and ecological balance of Lake Erie adversely and to the damage of Lake Erie as a common fishery and as a place for recreation and relaxation. Defendants knew or should have known that the mercury or compounds thereof discharged and introduced by Defendants into Lake Erie or tributaries thereto is a material of such nature as to be dangerous in that it would presently and continually contaminate and pollute the waters of the lake, vegetation therein and the fish and other wildlife to the injury and damage of Lake Erie and of the citizens and inhabitants of Ohio. It is a matter of common and general knowledge that mercury and compounds thereof are poisonous and are injurious to health and safety of humans when introduced into the human body.

XII

Defendants were negligent and did not exercise due or common care in introducing poisonous mercury or compounds thereof into Lake Erie or tributaries thereto.

XIII

The introduction by Defendants of poisonous mercury or compounds thereof into Lake Erie or tributaries thereto is the direct and proximate cause of existing and future injury to Lake Erie, to the fish and other wildlife, to the vegetation and to the citizens and inhabitants

of Ohio; said acts of Defendants have caused damages to Plaintiff which are not yet determinable and are to be determined in this cause.

XIV

The conduct of Defendants in introducing poisonous mercury or compounds thereof into Lake Erie is concurrent and such conduct constitutes a public nuisance which must be abated in order to protect Lake Erie and the health and safety of the citizens and inhabitants of Ohio.

XV

To the best of Plaintiff's knowledge and belief, the Defendants or some of them continue and will so continue the wrongful act of introducing poisonous mercury or compounds thereof into Lake Erie or tributaries thereto unless restrained and enjoined by this Court. Plaintiff has no plain, speedy or adequate remedy at law. The injuries and damages caused to Lake Erie, to the fish and other wildlife, to the vegetation, and to the citizens and inhabitants of Ohio are irreparable; a determination must be made in this cause as to the extent to which said injuries and damage can be minimized by an order to Defendants to remove from Lake Erie and tributaries thereto the poisonous mercury and compounds thereof which they have introduced into Lake Erie and tributaries thereto.

XVI

By introducing poisonous mercury or compounds thereof into Lake Erie or tributaries thereto Defendants have violated and continue to violate statutes of Ohio, statutes of the United States and the provisions of a treaty to which the United States is a High Contracting Party; the continued violation of such statutes and treaty by Defendants further evidences that the wrongful conduct of Defendants constitutes a public nuisance.

WHEREFORE, Plaintiff prays:

1. That a decree be entered adjudging that the conduct of Defendants in introducing poisonous mercury or compounds thereof into Lake Erie or tributaries thereto constitutes a public nuisance and that such nuisance be abated.

2. That a decree be entered perpetually enjoining the Defendants and each of them from introducing poisonous mercury or compounds thereof into Lake Erie or any tributary thereto.

3. That a decree be entered requiring the Defendants and each of them to remove from Lake Erie and tributaries thereto the poisonous mercury and compounds thereof or, in the alternative, requiring Defendants to pay to Plaintiff as damages an amount not yet determined but to be determined in this cause sufficient to enable Plaintiff to remove said mercury and compounds thereof from Lake Erie and any tributaries thereto, said sum to be held in trust for and expended only for this purpose by Plaintiff; such decree to contain appropriate provisions for reporting to the Court on progress of removal so that appropriate enforcement of said decree can be implemented.

4. That a decree be entered adjudging that the Plaintiff recover from the Defendants damages in an amount not yet determined but to be determined in this cause compensating for the existing and future damages to Lake Erie, the fish and other wildlife, the vegetation and the citizens and inhabitants of Ohio.

5. That Plaintiff be awarded its costs of suit incurred herein and such other and further relief as this Court may deem proper and necessary.

PAUL W. BROWN

Attorney General of Ohio,
State of Ohio, ex rel.

April, 1970

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and

THE DOW CHEMICAL COMPANY, A corporation existing under the laws of Delaware, located at Midland, Michigan,

Defendants.

STATEMENT AND BRIEF IN SUPPORT OF MOTION

Jurisdiction

This is an action by the State of Ohio against a Michigan corporation, a Delaware corporation, and a Canadian corporation. The Michigan and Delaware corporations are citizens of those states and the Canadian corporation is a citizen of Canada. The action is therefore proposed to be instituted in this Court under authority of

Article III, Section 2, Clause 2, of the Constitution of the United States and Title 28 U.S.C., Section 1251.

Purpose of the Proposed Action

It has been discovered that the waters and vegetation of Lake Erie have been polluted by poisonous mercury or compounds thereof and that the testing of fish caught in Lake Erie evidences a dangerously high concentration of poisonous mercury in the fish. It is alleged in the Complaint that the Defendants have for several years been discharging mercury or compounds thereof into tributaries of Lake Erie, which mercury or compounds thereof are industrial waste from manufacturing plants owned by Defendants. The Complaint prays that the Defendants be permanently enjoined from discharging mercury or compounds thereof into Lake Erie or tributaries thereto as their conduct constitutes a public nuisance; it is further prayed that this Court ascertain the damages which Plaintiff has suffered and that this Court order the removal of the mercury and compounds thereof from Lake Erie and tributaries thereto if that is found to be feasible; the prayer suggests that relief be granted either by ordering the Defendants to remove the mercury and compounds thereof or that Defendants be ordered to pay damages into a trust fund to be used only for the purpose of removing the mercury and compounds thereof from Lake Erie and the tributaries thereto.

Direct Precedents Invoking Original Jurisdiction of This Court

In 1907 the Attorney General of the State of Georgia successfully invoked the original jurisdiction of this Court in an action against the Tennessee Copper Company, a corporation existing under the laws of a state other than Georgia. This Court granted relief to the State of Georgia enjoining the Tennessee Copper Company from continuing to pollute the air and land in Geor-

gia with noxious fumes generated by its manufacturing plant in Tennessee, which pollution was found to constitute a public nuisance. *Georgia v. Tennessee Copper Company*, 206 U.S. 230 (1907).

In 1931, it was determined that the State of New Jersey could successfully invoke the original jurisdiction of this Court in an attempt to enjoin the city of New York from continuing a public nuisance created by discharging garbage into the Atlantic Ocean which polluted the New Jersey shores. In the New Jersey case, this Court in the exercise of its original jurisdiction appointed a special master to hear the complaint and to make recommendations. *New Jersey v. New York City*, 283 U.S. 473 (1931).

Need for the Aid of This Court

The seriousness of the problem and the need of an immediate and effective start toward its solution justifies the original action by this Court. By exercising this original jurisdiction at the request of the State of Ohio, this Court can give direction and immediacy to the national effort to control pollution.

Section 123.03 Revised Code of Ohio reads in pertinent part as follows:

“It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which it may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce and fishery, and further subject to the property rights of littoral owners, in-

cluding the right to make reasonable use of the waters in front of or flowing past their lands. . . .”

The treaty between the United States and Great Britain dated January 11, 1909, and proclaimed May 13, 1910, confirms that Lake Erie is part of the boundary waters between the United States and Canada. Article IV of that treaty reads in pertinent part as follows:

“It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”

The potential for deadly consequences from the continued mercury pollution of Lake Erie cannot be overstated. Action must not be delayed until the citizens of Ohio and other states furnish yet another example to the world of the effects of mercury poison. Prior experience with mercury poisoning in Japan is a tragedy which serves as a warning. Between 1953 and 1960, 110 people were killed or severely disabled after eating fish caught in mercury polluted waters of Minamata Bay, Japan. There must not be a Lake Erie tragedy repeating the Minamata Bay tragedy. Action by this Court now can avoid this threat.

CONCLUSION

For the reasons stated, the motion for leave to file the complaint should be granted.

Respectfully submitted.

PAUL W. BROWN
Attorney General of Ohio
State of Ohio, ex rel.
Counsel for Plaintiff

April, 1970

