No. 41, 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 existing under the laws of Michigan, located at 1609 Biddle Avenue, Wyandotte, Michigan,

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.

BRIEF OF THE STATE OF OHIO IN SUPPORT OF THE MOTION FOR LEAVE TO FILE COMPLAINT

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INTRODUCTION

This Court is presented with a case which is directed to one of the most serious and specific pollution problems existing in this country. Far from being a "general pol-

lution problem" involving many complex and intricate scientific questions of cause and effect, it relates rather to a specific identifiable pollutant, namely, mercury, which has been admittedly discharged in substantial quantities by Defendants, Wyandotte Chemicals Corporation (hereinafter referred to as "Wyandotte") and Dow Chemical of Canada, Limited, (hereinafter referred to as "Dow Canada"), which is owned and controlled by The Dow Chemical Company (hereinafter referred to as "Dow U.S."), into the water of Lake Erie or tributaries thereto and which is admittedly a poison which has injurious effects upon the environment and ultimately upon human beings. (See Appendix I).

Plaintiff, The State of Ohio (hereinafter referred to as "Ohio"), has alleged in its complaint that the above-mentioned discharge of mercury by Defendants has caused a public nuisance. Defendants, in their briefs, have leaned heavily on factual arguments which are premature. However, Ohio feels compelled to give this Court additional public statements of Defendants which contradict the factual assertions in their briefs and will permit this Court to decide this motion without the distraction of a partial presentation by Defendants. Defendants answer in part that they have "abated" this nuisance. Far from having been abated, the nuisance continues to the injury of wildlife and to the threatened injury of human beings, not only by continuing discharges of the poisonous substances, but also by the mere existence of the great accumulation of mercury deposits in the aquatic environment which are being continuously transformed into poison and introduced into the food chain.

In their briefs, Defendants claim that at the time Ohio filed its motion, they had ceased the discharge of poisonous mercury into the waters of Lake Erie and tributaries thereto. (Brief for Dow Canada, pp. 7-8 and Brief for Wyandotte, pp. 5, 17). These statements not only ignore the substantive aspects of abatement of the nuisance, but

they are also in complete contradiction to statements made by the responsible officials of some of Defendants subsequent to the filing of Ohio's motion on April 28, 1970. For example, Mr. H. D. Doan, President of Dow U.S., speaking at Dow's annual stockholders' meeting on May 6, 1970, stated that discharges of mercury into the St. Clair River were still taking place at the Dow Sarnia plant. (See Appendix II). Mr. C. P. Branch, Executive Vice President of Dow U.S. and a member of the Board of Directors of Dow Canada, reaffirmed this fact in his testimony before the United States Senate Commerce Committee Subcommittee on Energy, Natural Resources and the Environment at a hearing dealing with this mercury pollution held in Mt. Clemens, Michigan, on May 8, 1970. (See Appendix III). Moreover, as previously stated, even if the Defendants cease the discharge of mercury into the aquatic environment, the nuisance still persists because of the contamination heretofore caused by Defendants. Defendants have in effect conceded that they have engaged in a systematic process of dumping a poisonous pollutant into Lake Erie and tributaries thereto over a long period of time.

Ecologists have warned us in the strongest possible terms that time is running short within which our environmental house must be put in order. The recent thermal inversion which blanketed the eastern seaboard is but one example of the clear and present danger. In order to effectively deal with the specific and dangerous pollution problem at hand, this Court must grant Ohio leave to file its Complaint pursuant to this Court's original jurisdiction under article III, section 2, clause 2 of the United States Constitution. Historically, this Court has invoked its original jurisdiction in pollution cases which did not encompass so serious a threat as the instant case.

I. This Motion to File an Original Action Should Be Granted Since the State of Ohio Is the Title Holder to Lake Erie as a Trustee for Its Inhabitants and as a Proprietor and Therefore Is the Proper Party Plaintiff to File This Common Law Public Nuisance Action and to Seek the Usual Common Law Remedies Required to Abate the Mercury Pollution of Lake Erie, Which the Supreme Court has Traditionally Entertained Under Its Constitutional Jurisdiction of Original Actions.

A. *The State of Ohio has Title and a Vested Interest in Lake Erie, Its Waters, Resources, Underlying Soil and Shores.*

1. Ohio, upon its admission to the Union as a sovereign state, acquired title in Lake Erie from the southerly shore to the territorial line of the original Northwest Territory. Act of Congress, Approved April 30, 1802, 1 Chase Revised Statutes of Ohio, 70, 71. *Edson* v. *Crangle*, 62 Ohio St. 49, 62, 56 N.E. 647 (1900). The interest which Ohio acquired included not only the title to the shores and the soil under this navigable lake, *Martin* v. *Lessee of William Waddell*, 41 U.S. (16 Pet.) 367 (1842); *County of St. Clair* v. *Lovingston*, 90 U.S. (23 Wall.) 46 (1874); *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845), but also the title to the waters ". . . themselves, and the fish in them, so far as they are capable of ownership while running." *McCready* v. *Virginia*, 94 U.S. 391, 394 (1876). This title ". . . is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce," *United States* v. *Oregon*, 295 U.S. 1, 14 (1935), which power was granted to the United States by the respective states in the Constitution, *County of St. Clair* v. *Lovingston, supra* at 68. Both Congress and the General Assembly of the State of Ohio have affirmed Ohio's title to Lake Erie, its shores, underlying soil, waters and resources. Submerged Lands Act, 43 U.S.C.A. § 1301 *et seq.* (1953); and Ohio Rev. Code Ann. §§ 123.03 and 1531.02 (Page 1963).

2. The nature of the interest which Ohio holds in Lake Erie is two-fold.

(a) First, ". . . it is a title different in character from that which the State holds in lands intended for sale . . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The trust . . . is governmental. . . ." *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 452, 455 (1892). The Supreme Court of Ohio has also recognized this governmental or public trust, *Ohio* v. *Cleveland and Pittsb. R.R. Co.*, 94 Ohio St. 61, 113 N.E. 677 (1916), and has limited its application to navigation, water commerce and fishery. *State ex rel. Squire* v. *Cleveland*, 150 Ohio St. 303, 82 N.E. 2d 709 (1948). For these three purposes, ". . . the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use. . . ." *Winous Point Shooting Club* v. *Slaughterbeck*, 96 Ohio St. 139, 149, 117 N.E. 162 (1917). The Supreme Court of the United States in dealing with the fishery aspect, has stated: "For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. . . . The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right . . . ." *McCready* v. *Virginia, supra* at 394-95.

(b) Secondly, this title, outside of the realm of navigation, water commerce and fishery, has been classified as a proprietary right of the State. In a case dealing with the navigable waters in the Port of Seattle, Mr. Justice Brandeis stated: "The character of the State's ownership in the land and in the waters is

the full proprietary right." *Port of Seattle* v. *Oregon & Wash. R.R. Co.*, 255 U.S. 56, 63 (1921).

B. *The Acts of Defendants, Dow Canada, Wyandotte and Dow U.S., Constitute a Public Nuisance for Which Ohio has a Common Law Cause of Action, Wherein it may Seek a Remedy, Both Legal and Equitable.*

1. Defendants, while engaged in the manufacture and processing of products known as caustic soda and chlorine, utilized mercury or compounds thereof and in connection therewith, have continually discharged said mercury or compounds thereof into both the St. Clair River or tributaries thereto and the Detroit River or tributaries thereto, 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. Said discharged mercury or compounds thereof is poisonous and is injurious to the aquatic environment of Lake Erie or tributaries thereto. Moreover, it is potentially injurious and deleterious to the health and safety 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. (See Appendix I).

2. These acts, which occurred outside of the territorial limits of the State of Ohio, have damaged and injured the property which the citizens of Ohio hold "in their united sovereignty" and which Ohio also holds in its proprietary capacity. Furthermore, they threaten the health of the citizens of Ohio. Therefore, said acts constitute a common law public nuisance. *In re Debs*, 158 U.S. 564, 592 (1895); *New Jersey* v. *City of New York*, 283 U.S. 473 (1931); *Missouri* v. *Illinois*, 180 U.S. 208 (1901). Joyce, *Treatise on the Laws Governing Nuisance*, Section 5, p. 10, Matthew Bender & Co., Albany N.Y. (1906);

Wood, *The Law of Nuisances*, Section 17, pp. 38-39, Bancroft-Whitney Company, San Francisco (1893).

3. In public nuisance cases, the Attorney General is the appropriate official to file a civil action in the name of the State for the benefit of the community as a whole. *Sanitary Dist. of Chicago* v. *United States*, 266 U.S. 405 (1925); *Coosaw Mining Co.* v. *South Carolina*, 144 U.S. 550 (1892); *Ohio ex rel. Atty. Gen.* v. *Dayton & S.E. R.R. Co.*, 36 Ohio St. 434 (1881); *Attorney Gen.* v. *Jamaica Pond Aqueduct Corp.*, 133 Mass. 361 (1882); *People* v. *Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374 (1897).

4. The action traditionally entertained by this Court under its constitutional jurisdiction in original actions, and by other courts, is an action in equity to abate the public nuisance. *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851); *New Jersey* v. *City of New York, supra; Wisconsin* v. *Illinois*, 278 U.S. 367 (1929); *In re Debs, supra; Arizona Copper Co., Ltd.* v. *Gillespie*, 230 U.S. 46 (1913). The equity court, in granting the injunction and ordering the abatement of the public nuisance may, when necessary, issue a mandatory order directing that said nuisance be completely removed. *Pennsylvania* v. *Wheeling & Belmont Bridge Co., supra; Ohio ex rel Atty. Gen.* v. *Dayton & S.E. R.R. Co., supra.*

5. An equity court may grant damages in addition to an injunction in order to give the injured party full relief. This principle is clearly recognized by this Court. In *Camp* v. *Boyd*, 229 U.S. 530, 551 (1913), this Court stated: "A court of equity ought to do justice completely and not in halves." In *Hartford Accident & Indem. Co.* v. *Southern Pac. Co.*, 273 U.S. 207, 217-18 (1927), this Court, in granting damages, stated:

> Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will

in general proceed to decide all the issues and award complete relief, even where the rights of parties are strictly legal and the final remedy is of the kind which might be conferred by a court of law.

C. *The Supreme Court of the United States Is the Proper Forum Under its Original Jurisdiction Involving Controversies Between a State and a Citizen of Another State or Between a State and a Citizen of a Foreign State to Hear Ohio's Complaint Alleging This Public Nuisance.*

1. The Constitution of the United States in article III, section 2, clause 2, provides that the judicial power of the Court shall extend ". . . to controversies between a state and citizen of another state . . . and between a state, or the citizens thereof, and foreign states, citizens or subjects."

2. "The original jurisdiction is confined to civil suits where damage has been inflicted or is threatened . . . ." *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439, 446 (1945). Ohio, in its Complaint, has alleged a common law right of action based upon a public nuisance which has inflicted damage and will continue to inflict damage in the foreseeable future.

3. Ohio, under the public trust doctrine, acts as trustee for all of its citizens in protecting Lake Erie in matters dealing with navigation, commerce and fishery. Where damage to Lake Erie and its fishery has been inflicted and a threat of continued future damage exists, and where the health of the citizens of Ohio is also threatened by the same act, the State of Ohio, as *parens patriae* of its citizens, may take action to redress said injury. *Georgia* v. *Tennessee Copper Co., supra; Georgia* v. *Pennsylvania R.R. Co., supra; The Original Jurisdiction of the United States Supreme Court*, 11 STANFORD L. REV. 665, 671-78 (1959). As this Court has stated: "But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the

proper party to represent and defend them." *Missouri* v. *Illinois, supra* at 241.

4. Furthermore, Ohio brings this action in its capacity as proprietor of Lake Erie. Except where limited by the public trust doctrine, it holds title in a proprietary capacity. *Port of Seattle* v. *Oregon & Wash. R.R., supra.* Because of this injury to its proprietary interest, Ohio may properly seek redress in an original action. *Georgia* v. *Pennsylvania R.R. Co., supra; Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923). Unlike the State of Georgia in *Georgia* v. *Tennessee Copper Co., supra,* Ohio holds title, in both its trustee capacity and its proprietary capacity, to all of the "territory alleged to be affected," and therefore may seek damages as well as an injunction to abate the public nuisance. Mr. Justice Holmes in that case stated at 237: "The alleged damage to the State as a private owner is merely a makeweight . . . ." Here, the damage to Ohio is far from a "makeweight". Defendants allege that damage actions are not of the class of cases which are properly presented to this court in original actions. The discussion by Mr. Justice Holmes in *Georgia* v. *Tennessee Copper Co., supra,* indicates that damages are proper if the proprietary interest of the state is substantial. This Court has permitted complaints praying for damages to be filed in original actions and have dismissed the damage claims only after hearing the case on the merits. *Georgia* v. *Pennsylvania R.R. Co., supra; North Dakota* v. *Minnesota,* 263 U.S. 365 (1923).

5. Historically this Court has granted states leave to file a complaint in public nuisance cases. *Georgia* v. *Tennessee Copper Co., supra; New Jersey* v. *City of New York, supra; Missouri* v. *Illinois, supra.* Ohio is not a nominal party plaintiff seeking to enforce the rights of a limited class of its citizens, thus distinguishing the instant case from *North Dakota* v. *Minnesota, supra; Oklahoma* v. *Atchison, T. & S. F. Ry. Co.,* 220 U.S. 277 (1911). Nor is Ohio seeking to enforce its statutes, like-

wise distinguishing the instant case from *Massachusetts* v. *Missouri*, 308 U.S. 1 (1939); *Oklahoma* v. *Gulf, Colo. & S.F. Ry.*, 220 U.S. 290 (1911); *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265 (1888). Thus, the instant action is clearly within "the jurisdictional line of demarcation" of original jurisdiction cases drawn by this Court in *Massachusetts* v. *Mellon*, 262 U.S. 447, 481-82 (1923), which specifically included cases such as *Georgia* v. *Tennessee Copper Co., supra.*

6. The Supreme Court of the United States should not refuse leave to file the Complaint because of Defendants' assertion that any relief granted will necessarily be complex, intricate and difficult to enforce. Defendants' assertion involves a premature factual argument. Moreover, Defendants have asserted only that the *general pollution* of Lake Erie comes from many sources and becomes generally mixed and indistinguishable as to source.[1] This case involves a specific identifiable poison which can be easily distinguished from the general pollutants of Lake Erie. In addition, Defendants have presented nothing to show that the remedy will necessarily be intricate or complex. Even if complexities are encountered, this Court has already announced in *U.S.* v. *California*, 332 U.S. 19, at syl. No. 2 (1947) that:

> The fact that the coastal line is indefinite and that its exact location will involve many complexities and difficulties presents no insuperable obstacle to the exercise of the highly important jurisdiction conferred on this Court by Article III, § 2, of the Constitution.

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[1] Brief for Dow U.S., p. 7.

"The report to the International Joint Commission on the pollution of Lake Erie, Lake Ontario and the International section of the St. Lawrence River, Vol. 1 (Summary) and Vol. 2 (Lake Erie) (1969), leads to the conclusion that water pollution problems are complex and consequently require an intimate familiarity with scientific and economic facts."

II. The Original Jurisdiction of the Supreme Court Extends to Controversies Whose Subject Matter Exists Within the Territorial Jurisdiction of the United States and After Granting the Motion to File the Complaint the Court Will Determine Its Jurisdiction of Those Persons Served With Summons Based Upon Facts Developed by the Parties.

A. *The Supreme Court of the United States has Jurisdiction of the Subject Matter of This Controversy Between Ohio and the Defendant Corporations Since It Involves a Public Nuisance That Exists Within the United States.*

1. The federal courts have generally recognized that jurisdiction of the subject matter in an action is not defeated because the action complained of occurred outside the territorial boundaries of the United States. Judge Learned Hand of the Second Circuit Court of Appeals in discussing that court's ability to take cognizance of a Sherman Act violation by a Canadian subsidiary of the Aluminum Company of America stated that: ". . . it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *U.S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 443 (1945). *See also Strassheim* v. *Daily*, 221 U.S. 280 (1911); *Lamar* v. *U.S.*, 240 U.S. 60 (1916); *Ford* v. *U.S.*, 273 U.S. 593 (1927); *Vanity Mills* v. *T. Eaton Co.*, 234 F. 2d 633 (1956); *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284 (1949), aff'd 341 U.S. 593 (1951); *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); *see especially California Dev. Co.* v. *New Liverpool Salt Co.*, 172 F. 792 (1909).

2. The Supreme Court of the United States has often stated that the extraterritoriality of an act will not defeat its cognizance of an action when the rights of United

States citizens are affected. In *New Jersey* v. *City of New York, supra* at 482 this Court stated that:

> Defendant contends that, as it dumps the garbage into the ocean and not within the waters of the United States or of New Jersey, this Court is without jurisdiction to grant the injunction. But the defendant is before the Court and the property of plaintiff and its citizens that is alleged to have been injured by such dumping is within the Court's territorial jurisdiction. *The situs of the acts creating the nuisance, whether within or without the United States, is of no importance. Plaintiff seeks a decree in personam to prevent them in the future. The Court has jurisdiction.* Cf. *Massie* v. *Watts*, 6 Cranch 148, 158 *et seq. Hart* v. *Sansom*, 110 U.S. 151, 154. *Cole* v. *Cummingham*, 133 U.S. 107, 116. *Philadelphia Co.* v. *Stimson*, 233 U.S. 605, 622-623. (emphasis added).

See also Steele v. *Bulova Watch Co., Inc.*, 344 U.S. 280 (1952); *U.S.* v. *National Lead Co.*, 332 U.S. 319 (1947).

3. Not only have the distinguished courts of the United States stated this principle of extraterritoriality of jurisdiction, but noted scholars have also advanced this principle as sound in logic and practicality. Section 18 of the American Law Institute RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES SECOND (1962), in reference to the bases of jurisdiction states that: "A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . .

> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems. . . ."

4. Dow Canada has no grounds for asserting that the Supreme Court of the United States has no jurisdiction over the subject matter of this action because Dow Canada

is outside of the territorial limits of the United States. Dow Canada has admittedly released poisonous mercury into the waters leading into Lake Erie within the boundaries of Ohio and the United States. Therefore, this Court clearly has jurisdiction of this action based upon the foregoing generally accepted principles of law and the lines of precedent established by the federal courts, and indeed by the United States Supreme Court itself.

B. *The Question of Jurisdiction Over the Person of the Defendants Is Not Properly Before the Court at This Time Even Though There Are Appropriate Grounds for Service on All Defendants.*

1. The question of jurisdiction over the person of Defendants can be raised only after the motion now under consideration is granted, the complaint filed and service of process requested. It is premature to argue the merits of the method of personal service used until the Defendants have been served and until the parties have an opportunity to develop all facts upon which such service is based. It is not possible to decide the factual issue posed by Defendants as a matter of law. In any event, the Defendants concede the ease with which jurisdiction can be obtained through personal service on Defendants Dow U.S. and Wyandotte. The only claimed factual issue involves Dow Canada and therefore can not be dispositive of this motion.

2. The Federal Rules of Civil Procedure are made applicable to original actions by the Rules of the Supreme Court of the United States.[2] The applicable Federal Rules clearly set forth the distinct order of filing the complaint and service of process. Rule 3 provides: "A civil action is commenced by filing a complaint with the court." Rule 4 takes effect only upon the filing of the complaint. This is derived from the language of Rule 4 which specifically

[2] Revised Rules of the Supreme Court of the United States, Part III, Original Jurisdiction, Rule 9 (2).

states that: "*Upon the filing of the complaint* the clerk shall forthwith issue a summons and deliver it for service. . . ." (emphasis added). Therefore, since Ohio is only seeking leave to file the Complaint in order to commence the action, the Defendants have no basis at this time for questioning this Court's jurisdiction of the person of Dow Canada.

3. The argument about sufficient minimum contacts is a factual argument which may be determined only at that state of the litigation when the facts are developed. Defendants have merely made assertions that the requisite contacts do not exist. Such assertions are not evidence and do not establish facts as required by this Court. Many of these assertions are not even supported by the executives of Dow U.S. and Dow Canada.

(a) Statements made by C. B. Branch, in his capacity as Executive Vice President of Dow U.S. (See Appendix III), made at the hearings before the Subcommittee on Energy, Natural Resources and the Environment of the United States Senate Commerce Committee, at Mt. Clemens, Michigan, indicate that Dow Canada is not as independent as asserted in the Defendants' briefs. In fact, Dow Canada's presentation regarding this mercury pollution was totally made and controlled by the Executive Vice President and other executives of Dow U.S.

(b) Statements by H. D. Doan, President of Dow U.S., speaking at Dow's annual stockholders' meeting indicate that Dow U.S. and Dow Canada's management are closely joined (See Appendix II).

(c) A majority of the Directors of Dow Canada reside in Midland, Michigan (See Appendix IV).

(d) Dow's 1969 Annual Report shows that Dow Canada does a substantial amount of business in the United States. "Dow Canada *continued to export* about 10% of its output, *principally* to the United States and

the United Kingdom. . . ." (emphasis added); (See Appendix V). Dow Canada without advising this Court of how much business it actually does in the United States makes self-serving characterizations of the nature of such business as being an "extremely small proportion of total sales of Dow Chemical of Canada, Limited." (Brief for Dow Canada, p. 25). Such a characterization is obviously misleading in light of the statements made in the 1969 Annual Report quoted above.

These published facts verify the fundamental soundness of deciding factual issues at the appropriate procedural point in litigation when the parties have an opportunity to fully develop the facts.

4. The fact that a foreign subsidiary is controlled by a parent corporation within the jurisdiction has previously been enough to satisfy the minimum contacts for jurisdiction of the person. *A. G. Bliss Co.* v. *United Carr Fastener Co. of Canada, Ltd.*, 116 F. Supp. 291 (1953); *Massey-Harris-Ferguson, Ltd.* v. *Boyd*, 242 F. 2d 800 (1957), *cert. denied* 355 U.S. 806 (1957).

5. Rule 33 (i) of the Revised Rules of the Supreme Court of the United States and Rule 4 (d) (3) of the Federal Rules of Civil Procedure provide for service of process on an adverse party. Rule 4 (d) (3) of the Federal Rules of Civil Procedure, which may be implemented in an original action in the Supreme Court, provides that: "Service shall be made as follows: (3) Upon a domestic or foreign corporation . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. . . ." Defendants allege that Dow Canada would be immune from service under these rules because the Company itself is located in Canada. The Rules, however, do not require service at the offices of the Company. Service need only be made upon one of the persons designated in Rule 4 (d) (3).

6. In any event, even if *in personam* jurisdiction of Dow Canada is not obtained, it would not be fatal to this action. Dow Canada is not an indispensible party and there is no question that this Court can exercise jurisdiction over Dow U.S. and Wyandotte.

7. Dow Canada is admittedly a subsidiary of Dow U.S. and is therefore in active concert with it. Even if Dow Canada cannot be served it would still be subject under Rule 65 (d) of the Federal Rules of Civil Procedure to any injunction which may issue against Dow U.S. Rule 65 (d) provides: "Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them. . . ." Rule 65 (d) will therefore allow this Court to enforce and oversee its orders against Dow Canada. Orders directed to Dow U.S., the sole shareholder of Dow Canada, may effectively direct Dow Canada in its action. *cf. California Dev. Co.* v. *New Liverpool Salt Co., supra.*

III. The Only Appropriate Forum Available to the State of Ohio Is the Supreme Court of the United States and There Is no Restriction or Exclusion of This Court's Constitutionally Founded Jurisdiction by any Federal Treaty, Statute or Judicially Established Doctrine.

A. *The Constitution Provides This Court With Jurisdiction of Original Actions Because It Is the Only Appropriate Forum for States in Actions Against Citizens of Other States or Aliens.*

1. It is well-settled that a state, in the absence of an independent federal question, may not maintain a suit based upon a diversity of citizenship against a citizen of another state in the federal district courts.[3] Thus, if the

[3] Suits by a state against a citizen of another state are not between citizens of different states and therefore there is no diversity jurisdiction under 28 U.S.C. § 1332. *People ex rel. McColgan* v. *Bruce,* 129 F. 2d 421 (1942) *cert. denied,* 317 U.S. 678 (1942).

sovereign State of Ohio is denied an opportunity to be heard by this Court, it will be relegated to state courts of general jurisdiction. "In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." *The Federalist* No. 81 (A. Hamilton) at 487. To do so would be inconsistent with the spirit and intent of article III, section 2, clause 2 of the Constitution and with the policy articulated in *Massachusetts* v. *Mellon, supra,* at 480-81 wherein this Court stated that:

> The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controveries to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens.

B. *This Controversy Between Ohio and These Corporate Defendants Is not Controlled by Public International Law and the Poisoning of Lake Erie Cannot Be Construed as a "Political Question."*

1. Defendants argue, without authority, that this Court should deny Ohio's motion for leave to file its complaint because principles of international law so dictate. If a question of international law is in fact involved, and there could be such only with respect to one of the Defendants, it would be a private international law question, *Ricaud* v. *American Metal Co., Ltd.*, 246 U.S. 304 (1918), and, as such, Defendants' argument can be put to rest with the principle announced in *Hilton* v. *Guyot*, 159 U.S. 113, 163 (1895):

> International law, in its widest and most comprehensive sense—including not only questions of rights between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private interna-

> tional law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—*is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation* between man and man, duly submitted to their determination. (emphasis added).

2. Defendants further argue that, due to the presence of an alien Defendant and the existence of the Boundary Waters Treaty of 1909, 36 Stat. 2448 (1909), this action is placed in the "political question" realm and is therefore not justiciable. The instant action is clearly "justiciable" because the principle followed in *Georgia* v. *Tennessee Copper Co.*, *supra* is controlling and decisive of the issue now before this Court. No better analysis of the "political question" doctrine can be found than that made by Mr. Justice Brennan in *Baker* v. *Carr*, 369 U.S. 186, 210-11 (1962). Therein, it was stated:

> . . . it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequence of judicial action. . . ." We have said that 'In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.' (citation omitted) The non-justiciability of a political question is primarily a function of the separation of powers. . . . Deciding whether a matter has in any measure been committed by the Constitution to an-

> other branch of the government, . . . is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution.

3. In analyzing the instant case in terms of the standards articulated in *Baker* v. *Carr*, *supra*, it is at once manifestly clear that this action involves a justiciable question. Certainly the United States Constitution has not committed the authority to abate a public nuisance, created directly and indirectly by domestic corporations, to another department of the federal government; the abatement of a nuisance is indeed susceptible to judicial handling; no international consequences will flow from enjoining the Defendants from poisoning Lake Erie; the political branches of the Government will not be frustrated by Court action in this case, and the United States Government will not be embarrassed abroad by any action this Court may deem proper. *Baker* v. *Carr*, *supra*; *Coleman* v. *Miller*, 307 U.S. 433 (1939).

C. *It Is the Expressed Intent and Policy of the United States Government to Leave the Primary Responsibility for Controlling the Pollution of This Country's Waters in the Hands of the States.*

1. Dow U.S. urges that "this Court has no jurisdiction to adjudicate the issues raised in the proposed litigation sought by Ohio," (Brief for Dow U.S., p. 34), because federal policy, as reflected in the Boundary Waters Treaty of 1909, 36 Stat. 2448 (1909) has determined that the problem of pollution of Lake Erie will be considered only by the International Joint Commission to the exclusion of all state legislation and common law. Nothing could be further from the truth. In the federal Water Pollution Control Act, Congress specifically articulated the role the States are to play with respect to the pollution of this country's waterways[4]:

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[4] See Argument I, A *supra*, pp. 4-6.

> . . . it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution. . . . 33 U.S.C.A. § 466 (b) (1948).

Thus, to the extent that the Boundary Waters Treaty of 1909 and the federal Water Pollution Control Act differ with respect to federal policy toward state action in the control, abatement and prevention of water pollution (although it is submitted that they in fact do not), the policy expressed in the Act of Congress, enacted subsequent to the Boundary Waters Treaty of 1909, must take precedent over that which might be said to be implied in the treaty:

> This Court has also repeatedly taken the position that an Act of Congress, . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. *Reid* v. *Covert*, 354 U.S. 1, 18 (1957), citing, *Whitney* v. *Robertson*, 124 U.S. 190 (1888).

It is, therefore, submitted that the controlling policy of the United States with respect to the pollution of all its waters is to encourage the states to actively and aggressively avail themselves of whatever means they choose in combating one of the most acute problems faced by contemporary man—environmental pollution. (See Appendix VI)

2. Implicit in the assertion made by Dow U.S. that the International Joint Commission must act as sole and exclusive arbiter with respect to Lake Erie pollution, is the absurd proposition that by the execution of the Boundary Waters Treaty of 1909, the federal government took unto itself all regulatory authority, to be exercised through the International Joint Commission, respecting grievances between private parties which in any way in-

volve the boundary waters.[5] Although it is without question that the federal government may, if it chooses, regulate matters within the federal domain to the exclusion of the states, it is submitted that the Boundary Waters Treaty of 1909 manifestly fails to reflect a scheme of regulation "so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it" by either legislation or by enforcement of its common law. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also, Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

3. The cases relied upon by Dow U.S. to support its "exclusivity" argument deal with situations where there was a direct conflict between state law and either the provisions of a treaty or an Act of Congress, and they are, therefore, not only irrelevant to this proposed litigation, but also to the proposition which they are offered as support. To say that there is a conflict between Ohio's efforts to abate a public nuisance, created directly and indirectly by United States corporations, and the terms of the Boundary Waters Treaty of 1909 is a distortion of the law as well as the terms of the instrument itself.

4. The provisions contained in the Boundary Waters Treaty of 1909 do not and cannot deny this Court jurisdiction to entertain Ohio's action. Article III, section 2, clause 2 of the United States Constitution specifically confers upon this Court original jurisdiction in cases in which a State is a party. Thus, Defendant's argument is tantamount to saying that the Boundary Waters Treaty of 1909 supersedes the Constitution and ". . . it need hardly be said that a treaty cannot change the Constitution. . . ." *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870).

5. Defendants assert in their briefs that the International Joint Commission, established pursuant to the

[5] See *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138 (1934).

Boundary Waters Treaty of 1909, has been vested with adequate power to deal with the mercury poisoning of Lake Erie and thus, this Court "ought to defer" to this "dynamic and invaluable" quasi-judicial apparatus, citing the *Trail Smelter Arbitral Decision*, 35 *Am. J. Int'l L.* 684 (1939), as a "classic example" of the relief available to Ohio. (Brief for Dow Canada, pp. 40-41; Brief for Dow U.S., pp. 12-13). The International Joint Commission is without jurisdiction to consider disputes between Ohio and citizens of other states, *albeit*, one of which is acting through its wholly-owned Canadian subsidiary. Further, pollution problems are not within the adjudicative power of the Commission. Waite, *The International Joint Commission—Its Practice And Its Impact on Land Use*, 13 BUFF. L. REV. 93, 97 (1963). The "dynamic and invaluable mechanism" labored in the Trail Smelter matter for nearly three years (while the smelter disgorged 300 to 350 tons of sulphur into the atmosphere daily) before issuing a report which was not accepted. The *Trail Smelter Arbitral Decision*, *supra* at 693. Contrary to what Defendants indicate, the "dynamic" International Joint Commission did not resolve the dispute. It was only after the United States and Canada negotiated a separate convention establishing and empowering a special Tribunal to hear the case, that the matter was finally determined. The decision of the special tribunal was rendered pursuant to the Convention of 1935 with Canada, 49 Stat. 3245 (1935), (not the Boundary Waters Treaty of 1909 as Dow Canada suggests) on March 11, 1941, 12 years and 8 months after having originally been referred to the "dynamic" International Joint Commission.

6. Wyandotte, in turn, argues that by enacting the federal Water Pollution Control Act, Congress pre-empted the field thus invalidating any rights Ohio had respecting the control of its waters outside the provisions of the Act itself. (Brief for Wyandotte, p. 8). In analyzing the pre-emption question, one must start with ". . . the

assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp., supra* at 230. In the instant case, the Act itself conclusively shows that such was not the purpose of Congress:

> Nothing in sections 466-466g and 466h-466k of this title shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to water (*including boundary waters*) of such states. 33 U.S.C.A. § 466 (c) (emphasis added).

The above language is hardly indicative of a congressional intent to occupy the field of water pollution to the exclusion of state action by its legislature or through the enforcement of its common law rights with respect to the pollution of its waters. *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79, 84 (1939).

7. In addition to Congress' expressed intent not to pre-empt the field, the federal Water Pollution Control Act does not provide for a scheme of federal regulation so pervasive as to preclude State action in this area, *Pennsylvania* v. *Nelson*, 350 U.S. 497, 502 (1956); *Pennsylvania R.R. Co.* v. *Public Serv. Comm'n*, 250 U.S. 566, 569 (1919); the field of water pollution is not such that the federal system will be assumed to preclude enforcement of state statutes or common law rights, *Hines* v. *Davidowitz, supra;* nor will the enforcement of Ohio's common law rights produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida*, 325 U.S. 538 (1945). See generally, *Rice* v. *Santa Fe Elevator Corp., supra.*

8. The Secretary of the Interior, Walter Hickel, who is in charge of enforcement of the federal Water Pollution Control Act clearly understands that the states have primary responsibility for abating pollution of public waters

and threatens federal action only in the event a state fails to act. See Appendix VI, wherein Secretary Hickel ordered Ohio to take action immediately to abate this mercury pollution in Lake Erie. Ohio filed actions against all known mercury polluters of Lake Erie. The instant case could not encompass polluters who were citizens of Ohio and for that reason Ohio was required to file the action against Detrix Chemical Industries, Inc. in the Common Pleas Court of Ashtabula County, Ohio on April 22, 1970.

9. For the foregoing reasons, it is submitted that neither the Boundary Waters Treaty of 1909 nor the federal Water Pollution Control Act was intended to occupy the field of water pollution to the exclusion of the states nor are the provisions contained therein operative to that effect. The following observation illustrates the sound policy underlying the passage of the federal Water Pollution Control Act:

> Federal law is generally interstitial in nature. It rarely occupies a legal field completely . . . . Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states . . . . Congress acts, in short, against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

Hart and Wechsler, *The Federal Courts and the Federal System* (1953), p. 435.

IV. The Supreme Court has Historically Fashioned Appropriate Relief in Water Pollution and Obstruction Cases Even Though no Federal Common Law Exists and There Was no Specific Statutory Authority for Such Relief and in Doing so has Denied Claims That Federal Statutes and Treaties Provide Exclusive Relief.

A. *Permanent Injunction Against an Obstruction in Waterways.*

1. In *U.S.* v. *Republic Steel Corp.*, 362 U.S. 482 (1960), this Court approved the issuance of a permanent injunction against industrial deposits into the Calumet River in a suit brought by the Attorney General of the United States under the Rivers and Harbors Act, 33 U.S.C. 409 (1899), which prohibits obstructions in waterways. The Act did not provide for injunctive relief and on that basis the court of appeals held that relief by injunction was not permitted. This Court's decision approved relief by injunction in such circumstances and in language applicable to the instant case:

> It is true that § 12 in specifically providing for relief by injunction refers only to the removal of 'structures' erected in violation of the Act (see *United States* v. *Bigan*, 274 F. 2d 729), while § 10 of the 1890 Act provided for the enjoining of any 'obstruction.' Here again *Sanitary District Co.* v. *United States*, *supra*, is answer enough. It was argued in that case that relief by injunction was restricted to removal of 'structures.' See 268 U.S., at 408. But the Court replied, 'The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit.' *Id.*, at 426. The authority cited was *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, where a suit was brought by the Attorney General to set aside a fraudulent patent to public lands. The Court held that the Attorney General could bring suit, even though Congress had not given specific authority. The test was

> whether the United States had an interest to protect or defend. Section 10 of the present Act defined the interest of the United States which the injunction serves. Protection of the water level of the Great Lakes through injunctive relief, *Sanitary District Co.* v. *United States, supra,* is precedent enough for ordering that the navigable capacity of the Calumet River be restored. The void which was left by *Williamette Iron Bridge Co.* v. *Hatch, supra,* need not be filed by detailed codes which provide for every contingency. Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation. This is for us the meaning of *Sanitary District Co.* v. *United States, supra,* on this procedural point. *Id.* at 491-92.

The Attorney General of Ohio files the instant action to protect the interests of Ohio just as the Attorney General of the United States did to protect the interests of the United States. The Attorney General of Ohio also has the benefit of common law which prohibits public nuisance by pollution which was not available to the Attorney General of the United States and in common law actions the remedies are always fashioned by the courts. The courts clearly are not restricted to statutory remedies in a common law action. To suggest otherwise would be an absolute absurdity.

B. *Mandatory Injunction to Remove a Vessel From Waterway.*

1. In *U.S.* v. *Cargill,* decided with *Wyandotte Trans. Co.* v. *U.S.,* 389 U.S. 191 (1967), this Court ordered Cargill to remove a sunken vessel from the Mississippi River even though the Rivers and Harbors Act did not specifically provide for such a remedy. Cargill argued that it was immune from such injunctive relief, the argument

that is now being made by Defendants in the instant case. Defendants Dow U.S. and Dow Canada claim that the remedies provided by the International Joint Commission under the Boundary Waters Treaty of 1909 are exclusive and provides them immunity from injunctive relief in any court or tribunal. Defendant Wyandotte claims that the federal Water Pollution Control Act provides the exclusive remedies for water pollution. This Court has already decided in *Wyandotte, supra,* that, even under similar federal statutes, the remedies specified are not exclusive. See this Court's opinion at page 202, as follows:

> Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper. That conclusion was in accordance with a general rule of the law of torts. See Restatement (Second) of Torts § 286. We see no reason to distinguish the Government, and to deprive the United States of the benefit of that rule.

This general rule of the law of torts also applies equally to Ohio which in addition enjoys the full fruits of the common law in prohibiting public nuisances. If the United States should not be deprived of the civil relief of mandatory injunction to get improper objects out of public waters even though the statutes do not provide that relief, clearly Ohio should not be deprived of similar relief with regard to mercury poison in Lake Erie.

C. *Damages for Removal.*

1. In *Wyandotte Transportation* v. *U.S., supra,* this Court approved the granting of damages to reimburse the United States for the expenses which it incurred in removing the obstruction which Wyandotte refused to remove from the Mississippi River. Such damages were not provided by the statute and Wyandotte argued it was therefore immune from damages because the Rivers and

Harbors Act provided the exclusive remedies. These damages are quite similar to those sought by the State of Ohio in the instant action—to remove the mercury pollutant from Lake Erie. The Supreme Court finds this relief is available to the United States for the same reasons present in this action. See the Court's opinion at page 204:

> It is but a small step from declaratory relief to a civil action for the Government's expenses incurred in removing a negligently sunk vessel. See *United States* v. *Perma Paving Co.*, 332 F. 2d 754 (C.A. 2d Cir. 1964). Having properly chosen to remove such a vessel, the United States should not lose the right to place responsibility for removal upon those who negligently sank the vessel. See Restatement of Restitution § 115; *United States* v. *Moran Towing & Transportation Co.*, 374 F. 2d 657, 667 (C.A. 4th Cir. 1967). No issue regarding the propriety of the Government's removal of Wyandotte's barge is now raised. Indeed, the facts surrounding that sinking constitute a classic case in which rapid removal by someone was essential. Wyandotte was unwilling to effectuate removal itself. It would be surprising if Congress intended that, in such a situation, the Government's commendable performance of Wyandotte's duty must be at Government expense. Indeed, in any case in which the Act provides a right of removal in the United States, the exercise of that right should not relieve negligent parties of the responsibility for removal. Otherwise, the Government would be subject to a financial penalty for the correct performance of its duty to prevent impediments in inland waterways. See *United States* v. *Perma Paving Co.*, *supra*, at 758.

D. *Appropriate Relief Is Determined Only After a Full Development of the Facts and in Accordance With Normal Standards of Equity.*

1. In any event the nature of the relief which may be available or appropriate in a particular action cannot be

the basis for the Court's decision on a motion to file an original action complaint. Justice Harlan's concurring opinion in *Cargill, supra,* clearly shows the fundamental soundness of this proposition:

> I concur in the Court's holding that under § 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409, the United States may recover the costs of removing a vessel negligently sunk in navigable waters from those responsible for the sinking. I further agree with the holding that the United States is entitled to the declaratory relief sought in the *Cargill* action. In affording this latter relief it is my understanding that the Court does not purport to decide whether the United States may also obtain an injunction compelling removal, but has left that question to be answered in light of a full development of the facts, and in accordance with normal standards of equity. *Id.* at 210-11.

In all original actions this Court determines the appropriate relief only in "light of a full development of the facts and in accordance with normal standards of equity." Procedurally this can be accomplished only after the motion to file the complaint is granted.

CONCLUSION

This Court has consistently entertained pollution cases under its original action jurisdiction. All of the essential elements are present in the instant action. Moreover, the pollutant here is a poison, not just garbage, sewage or smoke. Poison in our waters will not and cannot be tolerated but must be removed. The public health, safety and welfare demands protection from such a disastrous situation. Ohio has the duty to see that the poison is removed.

The polluters do not deny their acts but rather admit them. They do not deny the seriousness of this poison in our public waters but rather argue that the situation created by them is so complex and scientifically difficult

that this Court should preclude itself from even receiving evidence on the issues involved. The polluters cannot be allowed to avoid the powers of the judiciary by over dramatizing the difficulty of the solutions to the situation they have created. This Court has an opportunity to receive evidence before deciding whether the polluters can pull themselves up by their own bootstraps with such an argument.

By exercising its traditional judicial powers this Court can pave the way for the entire judiciary to cut through the bramble bush of technicalities and phantom issues which are the arsenal of the polluter. This Court has rendered judgments and orders in much more difficult circumstances than those presented here and the true effectiveness of this Court can be demonstrated to the polluters when its ample powers are exercised ordering them to use their vast resources and scientific genius to solve the calamitous problem they have created. It is conceivable that the polluters are more concerned with the expense and difficulty they will have in performing the tasks ordered by this Court than they are with this Court's problem in enforcing such an order. No one claims it will be inexpensive or simple to remove poison from Lake Erie but why should governments be required to perform this task instead of the polluters.

The polluters here take the usual tack of all polluters. They seek delay, confusion and indecision. They make technical and procedural arguments and feast on the complications of several governmental entities that have an interest to defend and protect when dealing with public waters. They attempt to convert pollution from a base and vile assault on the public's heritage into an international political dispute in the hope that they will be forgotten while the sovereigns debate and delay the day of reckoning. Contrary to the polluters' smokescreen, there is no dispute, there is no conflict, and there is no contest between any governmental entities—all prohibit pollution

and their interests are exactly the same—to protect and defend their citizens' interest in keeping poison out of public waters. Polluters, though they may try, cannot elevate their transgressions into an international conflict.

The polluters clearly realize that they will not win delay, confusion and indecision in this Court. This is the ultimate threat to the polluter. The public is entitled to prompt and final resolution of a matter so grave as poison in public waters. Ohio must act to solve the problem. Under no circumstance can Ohio wait 13 years for an international tribunal to make a recommendation. Ohio cannot wait for all of the appeals and consequent delays which the polluters can cause if Ohio must file this action at the lowest level State Court. Ohio cannot tell its citizens that our constitutional judicial system does not and cannot work to solve so basic a problem as the poisoning of our public waters. The polluters must not be allowed to exclude the people of Ohio from their day in court as contemplated by our Constitution.

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APPENDIX I

PORTIONS OF ARTICLE ENTITLED "METHYLMERCURY, A REVIEW OF HEALTH HAZARDS AND SIDE EFFECTS ASSOCIATED WITH THE EMISSION OF MERCURY COMPOUNDS INTO NATURAL SYSTEMS," DATED MARCH 20, 1969, by DR. GÖRAN LÖFROTH, RADIOBIOLOGY DIVISION OF THE DEPARTMENT OF BIOCHEMISTRY, UNIVERSITY OF STOCKHOLM, AND WORKING GROUP ON ENVIRONMENTAL TOCIXOLOGY, ECOLOGICAL RESEARCH COMMITTEE OF THE SWEDISH NATURAL SCIENCE RESEARCH COUNCIL, STOCKHOLM, SWEDEN. (Footnotes and page references omitted.)

I *Introduction*

During the last two decades two cases of mercury poisoning have attracted considerable attention. In Minamata, Japan, 111 persons were killed or severely disabled during 1953-1960. In Sweden the wild birds were the victims. At both instances methylmercury was found to be the poisoning agent.

. . . .

In 1965 it was reported that the major part of the mercury in biological samples is in the form of methylmercury, and two years later it was reported that unidentified microorganisms can methylate inorganic mercury.

In 1968 a refined study of the viological methylation process of mercury was published, the results of which must be reason enough to minimize the intentional and unintentional pollution with mercury.

II *Methylmercury poisoning in man*

II a *The Minamata disease*

. . . .

. . . it can be calculated that a dose of methylmercury

of 2 mg Hg/day or less causes the appearance of poisoning symptomes.

. . . .

In the Japanese report on the Niigata tragedy details are given which show that totally 120 persons had one or more of the following symptomes; numbness in the distal parts of the extremities, numbness around the mouth and construction of the visual field; associated with high mercury concentrations.

. . . .

II b *Pathological and clinical features of severe methylmercury poisoning*

The methylmercury poisoning has been described to cause cerebellar atrophy of the granule cells, preferential injury to the calcerine and also to other cortical regions.

The clinical symptomes start with numbness in the distal parts of the extremities, lips and tongue followed by dysarthria, ataxia of the gait, dysphagia, deafness and blurring of the vision associated with constriction of the visual field. The clinical symptomes develop after a latency period of about 1-2 months after the ingestion or exposure to methylmercury in amounts enough to give rise to the poisoning. The severity of the symptomes depends on the extent of the exposure, and several may be absent in light poisoning cases. A partial recovery may also take place in light poisoning cases.

The latency period, between exposure and development of symptomes, might be associated with a time-dependent redistribution of mercury from the cortex to certain subcortical regions, which has been found to take place in monkeys fed Hg labelled methylmercury.

Tejning has studied a number of patents poisoned by ingestion of methylmercury treated seeds and by exposure to methylmercury containing seed dressings. He de-

scribes the symptomes clearly. *E.g.* the speech is not slurred but loud, plosive and unmoderated. The hearing is impaired in the sense that the patient has difficulties to catch, in a conversation between several persons, what one or the other person says.

In addition to the above-mentioned physical handicaps, in different degrees depending on the extent of the poisoning, the patient thus has difficulties to keep contact with his surrounding as it does not understand his inarticulate speech. Mental symptomes do not develop primarily; however, some patients have been classified as hysterics or as having some unidentified mental illness, spending years in mental hospitals, though they were fully aware of their situation. A careful, time-consuming contact with much patience may reveal a full mental capacity.

Whether the poisoning by methylmercury results in death or "only" invalidization depends on the medical care, unless, of course, the exposure to the poison is very high. It should be observed that most deaths in the Minimata area were caused secondarily by infection and inanition.

The neurological disorder is obviously a result of the ability of alkylmercury compounds to penetrate the brain-blood barrier.

Alkylmercury also penetrates the placenta barrier. From the Minamata area 19 congenital cases have been reported. These were born of mothers who had eaten methylmercury contaminated fish and shellfish, and few of the mothers showed symptomes of methylmercury poisoning. Three of these cases have been reported in detail. Only one of the two mothers showed symptomes (minor numbness in the fingers), whereas the other one, giving birth to two cases within 18 months, was apparently healthy.

A similar case has been described by Engleson and Herner. A woman in a family which had eaten food pre-

pared from methylmercury treated seeds gave birth to a girl with congenital cerebralparesis. While two other persons in the family had symptomes of methylmercury poisonings, the mother showed none.

Congenital neurological injuries are thus well documented; effects by methylmercury at an early embryologic stage in man has now also been described.

These results, pertaining to the congenital cases, indicate either that the foetus is more sensitive than the mother or that methylmercury rather accumulates and exerts its effects in the foetus than in the mother (or a combination). See also section VI c, which reviews experiments indicating that mouse foeti are more sensitive than the adult mouse, and Section VIII b, which relates data showing that methylmercury accumulates into the human foetus from the mother-to-be.

II c *Long term effects of brain cell damage*

One observable effect of methylmercury poisoning in man thus is damage to certain brain cells showing up as an impairment of the co-ordination of muscle movements, etc.

The question arises whether these effects are brought about only at and above some threshold value of methylmercury intake. As to the *gross* clinical symptomes one can state that a threshold mechanism is operating. This threshold mechanism is, however, not due to a methylmercury threshold but to a threshold in the number of damaged brain cells. After a damage of one or a few cells, other cells may take over—the net result showing up as *no* effect in the clinical investigation. When too many cells have been damaged during a short time the clinical effects do show up early. This type of mechanism can, erroneously, be classified as a methylmercury threshold mechanism.

As to the effects on single brain cells nothing is known about the methylmercury concentration which can cause irreversible damage. However, even a low frequency of brain cell damage, above the natural inactivation rate of these cells, during a long time has an effect on the organism as the number of available cells for each brain function is limited. Such a damage may then have serious effects in the later stage of life. These considerations must be kept in mind when the toxicological evaluation of alkylmercury compounds are made.

III *Methylmercury containing seed dressing in Sweden*

In the 1940's liquid formulation seed dressings containing methylmercury dicyandiamide were introduced on the Swedish market (mainly Panogen manufactured by Casco Company, Stockholm). Within a short time they dominated the market, successfully competing with all other seed dressings.

Within less than a decade conservationists charged that the intentional spreading of methylmercury caused severe poisonings of seed-eating birds and their predators. *These allegations were dismissed by industry and their agricultural experts.* (emphasis added).

. . . .

In September 1965, a scientific conference was arranged in order to give the governmental authorities advice in the further licensing of alkylmercury compounds. It was shown beyond any doubt that the use of methylmercury in agriculture was responsible for the poisoning and drastic decrease of wild bird populations.

. . . .

IV b *Causes*

Proved and suspected causes of the elevated mercury concentrations in fish are all water- and air-borne mercury pollutions. As methylation of inorganic mercury

occurs in nature, *any pollution of mercury compounds, which can yield inorganic mercury, must be suspected.* (emphasis added).

Major contaminating sources:

1) Pulp and paper factories using phnylmercury acetate (PMA) as quantities of PMA are lost through the waste water. . . .

2) Chlorine-factories using mercury electrodes. The contamination occurs both by air and water pollution . . . .

3) Electrical industries using mercury.

4) Combustion of fossil fuels . . . .

. . . .

IV d *Methylation of inorganic mercury*

Jensen and Jernelőv reported 1967 that unidentified microorganisms can methylate inorganic mercury . . . .

Wood *et al.* have shown that the biological methylation of inorganic mercury is a non-enzymatic process involving vitamin B_{12} . . . .

. . . .

Methylation of inorganic mercury thus is a normal biological process which can occur in anaerobic ecosystems. Partially or fully anaerobic ecosystems are perpetual appendages to the present industrialized society; polluted waters, sewage water, etc. The formation of the highly toxic and recalcitrant methylmercury, CH_3Hg+, follows whenever the formed dimethylmercury is decomposed, *e.g.* by mild acidic environment.

. . . .

X *General conclusions*

There can be no doubt that the intentional pollution with methylmercury, *e.g.* in agriculture, imposes hazards on living systems including man . . . .

. . . .

However, water- and air-borne pollutions of any mercury compound present problems of yet greater magnitudes as mercury can be methylated bioligically in several ecosystems. Presently fish in certain fresh and coastal waters has elevated concentrations of methylmercury to such an extent that it is unfit for human consumption.

APPENDIX II

PORTIONS OF STATEMENT OF H. D. DOAN, PRESIDENT, DOW CHEMICAL COMPANY, BEFORE DOW ANNUAL STOCKHOLDERS MEETING AT MIDLAND, MICHIGAN, ON MAY 6, 1970. (pp. 3-5.)

At about the time we announced this policy (environmental sensitivity) earlier this year, we became one of the centers of a seething public controversy—the loss of mercury into the St. Clair River. *Very few things in our history have caused more concern to Dow management* and other Dow people than the appearance of mercury residues in fish taken from Lake St. Clair. (emphasis added).

On the average, about 30 pounds per day of mercury have gone into the effluent of the Sarnia plant of Dow Chemical of Canada. *Today—too late to be sure—but as a point of fact, less than a pound of mercury is going into the river in Sarnia* and into the Mississippi at our only mercury cell plant in the United States at the Louisiana Division. (emphasis added).

. . . .

There are about 200 mercury cell caustic-chlorine plants in the world and they consume an average of one-half pound of mercury per ton of chlorine produced. Part of this, more or less depending on the process, goes to the effluent. This has been going on for many years. In fact, some six million pounds of mercury were consumed in the United States in 1968 for all uses; about 1.5 million pounds for chlorine production.

Metallic mercury has long been recognized as a potential hazard to those who work with it. We have, therefore, always had an environmental monitoring program to protect our people from over-exposure. But no one realized until recent research in Sweden brought it to light, that mercury itself or inorganic mercury could be bio-

logically converted to organic methylmercury which is the form predominately found in fish. When I say no one, I mean no one in Dow, no one in industry, no one in the government or the universities.

We are in consultation with those from Sweden and the United States who are now working in this area and have offered our full cooperation to the governments of Ontario and Michigan as well as federal agencies in the United States and Canada.

You may know that only 10 per cent of the chlorine we produce uses the mercury process. For the rest, we use the Dow cell which does not involve mercury. I realize that this is of no consequence to the Lake St. Clair problem. I am sorry, but that is all I can say now until more facts have been assembled. Ben Branch will testify on the mercury problem before Senator Hart's Committee on Commerce this Friday, May 8, just as Julius Johnson testified before the same committee a month ago on 2,4,5-T.

APPENDIX III

PORTIONS OF PRESENTATION BY C.B. BRANCH, EXECUTIVE VICE PRESIDENT, THE DOW CHEMICAL COMPANY, BEFORE THE SUBCOMMITTEE ON ENERGY, NATURAL RESOURCES AND THE ENVIRONMENT OF THE COMMERCE COMMITTEE, U. S. SENATE, SENATOR PHILIP A. HART, SUBCOMMITTEE CHAIRMAN, AT MT. CLEMENS, MICHIGAN, HEARINGS ON MERCURY POLLUTION ON MAY 8, 1970. (pp. 1, 10-11).

Mr. Chairman:

I am Ben Branch, executive vice president of The Dow Chemical Company.

Let me first of all express my concern and the concern of *my company* for the situation in Lake St. Clair and the serious problems it has caused for the fishermen and recreational service industries in this area. (emphasis added). You are to be complimented, Mr. Chairman, not only for calling this hearing but for calling it in the immediate area affected so that the people most directly affected by it can hear some of the facts surrounding this situation and some recommendations that may alleviate it.

I have with me Julius Johnson, research director of The Dow Chemical Company; John Van Westenburg, director of our Electrochemical Laboratory; and William Groening, general counsel, all of Midland, Michigan; and Leonard Weldon, secretary and general solicitor of Dow Chemical of Canada at Sarnia, Ontario.

. . . .

Dow Research Findings

In order better to understand background levels of mercury and profiles in bottom sediments, Dow Chemical of Canada, Limited; The Dow Chemical Company, U.S.;

and a contracting organization, T. W. Beak, Consultants Limited, have performed numerous samplings and analyses. These are supplemental to analyses already reported by public agencies.

. . . .

We are widely sampling and analyzing fish and other aquatic organisms, and the Sarnia and Midland analytical laboratories are working 16 hours per day attempting to increase the knowledge in this area.

. . . .

At the present time the losses at Sarnia are less than one pound per day, or about two tablespoons of mercury. (emphasis added). The Ontario Water Resources Commission neither accepts nor rejects levels of emissions but it is our understanding that they consider this level to be in compliance with their order dated March 26, 1970. . . .

APPENDIX IV

LETTER FROM DIRECTOR OF DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS, CORPORATIONS BRANCH, DOMINION GOVERNMENT, OTTAWA, CANADA.

Department of consumer and corporate affairs/
Ministere de la consommation et des corporations

Ottawa, April 24, 1970.

Mrs. Betsy B. Case,
100 E. Broad Street,
Suite 1800,
Columbus, Ohio 43215,
U.S.A.

Dear Madam,

In accordance with our telephone conversation of today, I wish to advise that DOW CHEMICAL OF CANADA, LIMITED was incorporated by federal letters patent dated June 5, 1942 with head office situate at Toronto, Ontario.

By-Law No. 6 was filed with this Department on March 18, 1959, changing the head office of the company from Toronto to Sarnia, Ontario.

The capital stock of the company consists of two hundred and fifty thousand (250,000) preferred shares of the par value of one hundred dollars ($100.) each and five hundred thousand (500,000) common shares without nominal or par value.

According to the last annual summary filed by the company, namely for the period ended March 31, 1970, the head office is situate at Vidal Street, Sarnia, Ontario. The mailing address is P. O. Box 1012, Sarnia, Ontario. The names and addresses of the directors are as follows:

Donald K. Ballman, 209 Revere Street, Midland, Michigan 48640.

Richard F. Bechtold, 4405 James Drive, Midland, Michigan 48640.

C. Benjamin Branch, 4607 Eastman Road, Midland, Michigan 48640.

William R. Dixon, 515 Hillcrest Drive, Midland, Michigan 48640.

Herbert H. Dow, 2301 Sugnet Drive, Midland, Michigan 48640.

Bernard A. Howard, 261 London Road, Sarnia, Ontario.

L. K. Lichty, 297 London Road, Sarnia, Ontario.

Paul D. Scott, 1667 Lakeshore Road, Sarnia, Ontario.

John L. Smart, 1470 Lakeshore Road, Sarnia, Ontario.

Macauley Whiting, 2203 Eastman Drive, Midland, Michigan 48640.

LeRoy D. Smithers, R.R. #1, Corunna, Ontario.

G. James Williams, 13 Snowfield Court, Midland, Michigan, 48640.

Yours very truly,

(Miss) A. Tremblay
for Director

Corporations Branch
Service des corporations

APPENDIX V

PORTIONS OF ANNUAL REPORT FOR 1969 FOR THE DOW CHEMICAL COMPANY, CANADA (pp. 25-26)

Sales of Dow Chemical of Canada, Limited, reached a record high. All product divisions reported increased volume, with the best percentage gains recorded by inorganic chemicals, human-health products, and plastic resins, coatings and monomers. Higher costs, price erosion and new-plant start-up costs caused a decline in operating income.

New manufacturing and distribution facilities strengthened Dow's marketing position with the pulp and paper industry, one of Canada's largest. Chlorine and caustic soda were supplied western producers from a new 300-ton-per-day facility at Fort Saskatchewan, Alberta. The Sarnia (Ontario) Works initiated liquid caustic shipments in a chartered tanker via the St. Lawrence Seaway (a "first") to new Dow bulk storage terminals at three points in the pulp- and paper-producing regions of Eastern Canada.

Dow Canada continued to export about 10% of its output, principally to the United States and the United Kingdom but also to The Netherlands, Australia, Hong Kong and Mexico. (emphasis added). Glycols, solvents, styrene, polystyrene and benzoic acid were the major export products.

A $12 million ethylene-oxide plant at Sarnia was the major capital addition completed in 1969. Using the more efficient direct-oxidation process, it replaces a facility of less capacity based on chlorohydrin which is being economically converted to additional propylene-oxide capacity.

APPENDIX VI

TELEGRAM
JULY 14, 1970

THE HONORABLE JAMES A. RHODES

Information gathered to date by Interior scientists and technicians indicates clearly that the presence of mercury in much of our nation's water constitutes an imminent health hazard. Because of the toxic effects of this metal, which may be irreversible in human beings, immediate action is essential on all levels, public and private.

Preliminary investigations by Interior's Federal Water Quality Administration lead me to conclude that certain firms in your State are discharging mercury into waterways. I am prepared to pursue federal legal action if this proves to be the case and if prompt corrective action is not taken.

Information presently available indicates that many firms in your State are users of mercury. I urge that you determine whether any of these users are discharging mercury. If they are, abatement action should be initiated at once.

I will keep you advised of developments and look forward to working cooperatively with you on this critical matter. Our FWQA regional director stands ready to assist you in this effort.

[Signed] Walter J. Hickel
Secretary of the Interior