No. 41 Original

In the Supreme Court of the United States

OCTOBER TERM, 1970

STATE OF OHIO, EX REL. PAUL W. BROWN, ATTORNEY GENERAL OF OHIO, PLAINTIFF

v.

WYANDOTTE CHEMICALS CORPORATION, ET AL.

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
SHIRO KASHIWA,
Assistant Attorney General,
PETER L. STRAUSS,
JOHN F. DIENELT,
Assistants to the Solicitor General,
THOMAS C. LEE,
JAMES R. MOORE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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JURISDICTION

Ohio's motion for leave to file a complaint against three corporations, incorporated respectively in Michigan, Ontario, and Delaware, invokes the original jurisdiction of this Court under Article III, Section 2 of the Constitution and 28 U.S.C. 1251, which confer original jurisdiction over controversies between a State and citizens of another State and between a State and citizens of foreign countries.

QUESTIONS PRESENTED

1. Whether Ohio, individually or as *parens patriae,* is the real party in interest as to the matters complained of and the type of relief sought.

2. Whether in the absence of federal statute or treaty, Ohio would have a common law action to abate pollution of boundary waters.

3. If so, whether that action is precluded either by treaty or federal statute.

4. Whether this Court must deny leave to file a complaint as to one of the defendants, a Canadian corporation which asserts, fundamentally on factual grounds, that this Court has no jurisdiction with respect to it.

5. Assuming there is no legal bar to filing of an original complaint in this Court, whether leave to file should be denied by this Court in its discretion.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The pertinent Constitutional and statutory provisions and Rules are set forth in Appendix A, *infra,* pp. 35–47.

INTEREST OF THE UNITED STATES

On October 12, 1970, this Court invited the United States to file a brief expressing its views and to participate in oral argument, as *amicus curiae,* on the question whether Ohio should be granted leave to file this complaint.

This case involves a serious claim of pollution of Lake Erie and its tributaries by mercury and mercury compounds released by corporations operating plants in Michigan and Canada. Such environmental problems are of increasing concern to the federal government, and it is attempting to assist in achieving a solution to them. It has not, however, sought to

displace state and local authority. An important issue here is the allocation of responsibility between federal and state governments in solving environmental problems which transcend state or national boundaries. Specifically, this case raises the question of the proper relationship among independent state activity, federal legislation, and a treaty, all designed to help in curbing pollution.

STATEMENT

The State of Ohio, on its own behalf and for its citizens, seeks leave to file a complaint to initiate an original action against Wyandotte Chemicals Corporation, a Michigan corporation, Dow Chemical of Canada, a Canadian corporation (hereinafter "Dow-Canada"), and Dow Chemical Company, a Delaware corporation (hereinafter "Dow-United States"). The complaint alleges that the defendant companies have discharged "poisonous mercury or compounds thereof into Lake Erie or tributaries thereto" in a negligent manner (Complaint, p. 7) and that their actions have created "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" (Complaint, p. 8).[1]

Ohio alleges that it is the owner of Lake Erie from the Ohio shore to the international boundary be-

[1] The complaint also appears to base Ohio's action on violations of federal statutes and a federal treaty, none of which would support actions by a state as *parens patriae* for its citizens. *Massachusetts* v. *Mellon*, 262 U.S. 447; *infra* p. 9, n. 3. Ohio's brief in support of its Motion, however, discusses only the public nuisance theory, and we treat the complaint in that light.

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tween the United States and Canada,[2] and that it also owns all the fish within these bounds "to the extent fish in their wild state can be owned" (Complaint, p. 5). It contends that to the extent it does not own Lake Erie in the ordinary proprietary sense, it holds title "under the public trust doctrine" and is therefore responsible, as *parens patriae,* to protect the interest of its citizens in "navigation, commerce and fishing" on Lake Erie, as well as their health and safety (Brief, p. 8). Ohio prays for an injunction against further introduction of "poisonous mercury or compounds thereof into Lake Erie or tributaries thereto" (Complaint, p. 9). Ohio further seeks an order requiring defendants to remove mercury which already has been introduced into Lake Erie or its tributaries, because of the continuing deleterious effects if it remains. Alternatively, Ohio seeks damages in a sum sufficient to permit it to remove the mercury, "said sum to be held in trust for and expended only for this purpose by Plaintiff" (*ibid.*). Finally, the state seeks compensation "for the existing and future damages to Lake Erie, the fish and other wildlife, the vegetation and the citizens and inhabitants of Ohio" (*ibid.*).

ARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants have raised a number of objections in opposition to the motion for leave to file the Com-

[2] The complaint appears to make no claim of ownership in a proprietary capacity, but Ohio's brief in support of its motion establishes, pp. 4–6, that such a claim is made, and we treat the complaint in that light.

plaint. These generally may be categorized as legal arguments that this Court is without jurisdiction of this suit and prudential arguments that this Court should not, in its discretion, entertain this suit. The primary legal arguments of defendants are: that the State of Ohio is not the real party in interest, at least with respect to claims for damages on behalf of its citizens; that the Boundary Waters Treaty of 1909 between the United States and Great Britain, 36 Stat. 2448 (Dow-Canada, App. 2a–15a), and the Federal Water Pollution Control Act, as amended, 84 Stat. 91, 33 U.S.C. 1151–1175 (App. A, *infra,* pp. 36–46), preclude court action by states with respect to pollution of interstate or international waters; and that there is no basis for exercise by courts of the United States of jurisdiction over Dow-Canada. Among defendants' prudential arguments are the assertions that the prayer for injunctive relief is essentially moot because the companies have already stopped discharging mercury compounds into Lake Erie; that this Court could not fashion and enforce an effective decree with respect to the other relief sought in view of the difficulty of removing mercury which already has been discharged and the uncertain cost and effects of removal; and that the general problems of pollution of Lake Erie and its tributaries would, as a practical matter, be better solved by cooperative efforts of the countries, states and provinces involved, under federal statutes and the treaty, than by litigation.

In this brief, we address ourselves only to the legal issues regarding the filing of the Complaint. We express no opinion on the prudential matters raised or

on certain factual assertions made in connection with legal arguments regarding jurisdiction over and service of process upon the Canadian corporation. We conclude that there is no legal reason why this Court should not permit the Complaint to be filed if, in its discretion, it decides to do so.

At least with regard to its claim for an injunction against further discharge of mercury into Lake Erie and to require mercury already discharged to be removed (or alternatively for damages sufficient to permit it to conduct the removal), Ohio is a real party in interest to this suit. It does not seek relief for particular citizens or groups of citizens but as *parens patriae.*

Unless it is precluded by treaty or federal law, Ohio may validly apply its common law to actors outside its territory who create a public nuisance within its boundaries. Neither the Boundary Waters Treaty of 1909 nor existing federal legislation preclude Ohio from independent action to deal with water pollution in its territory. The Treaty provides a means for settling disputes between the United States and Canada regarding pollution of international waters, but it is not self-executing. The Federal Water Pollution Control Act also provides a mechanism for dealing with pollution of interstate and international waters. But that act, like other, less comprehensive, federal legislation dealing with environmental problems, explicitly indicates the government's intention to leave primary responsibility in this area to the states. Whether or not resort to the procedures established by the Federal Water Pollution Control Act would be the most desir-

able means for dealing with a situation such as this, the Act manifestly does not preclude pursuit by a state of alternative remedies.

There is, finally, no legal reason for this Court to deny leave to file the complaint on grounds of possible problems concerning personal jurisdiction over Dow-Canada. These issues are predominantly factual ones, whether Dow-Canada has sufficient contacts with the United States to permit assertion of jurisdiction over it as a matter of due process and whether service on Dow-Canada can be obtained. As such, these issues can be resolved on a proper motion after the complaint has been filed.

I. THIS SUIT IS WITHIN THE ORIGINAL JURISDICTION OF THIS COURT BECAUSE OHIO HAS AN INTEREST AS PROPRIETOR AND AS *PARENS PATRIAE* FOR ITS CITIZENS

Under Article III, Section 2, this Court has original jurisdiction in cases in which "a State shall be Party." However, in order to prevent excessive or improper use of this provision, the Court has consistently declined jurisdiction of original cases where the State merely "elects to make itself * * * a party plaintiff." *Oklahoma* v. *Atchison, T. & S.F. Ry.,* 220 U.S. 277, 289. It has insisted that "the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *Oklahoma* v. *Cook,* 304 U.S. 387, 396.

The Court has thus permitted states to bring suits against other states and private parties to protect its own sovereign interests or to vindicate the interests of its citizens as a whole, as *parens patriae. E.g., Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439; *New*

Jersey v. *New York,* 283 U.S. 473; *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230. But the Court has refused to permit original suits to be filed where the relief is sought primarily on behalf of particular citizens or particular classes of citizens. *Oklahoma* v. *Cook, supra; Oklahoma* v. *Atchison, T. & S.F. Ry., supra; North Dakota* v. *Minnesota,* 263 U.S 365; *New Hampshire* v. *Louisiana, New York* v. *Louisiana,* 108 U.S. 76.

Ohio seeks three different forms of relief: an injunction against further discharge of mercury; an order requiring defendants to remove mercury which already has been introduced into the lake, or, alternatively, a monetary award sufficient to permit it to remove the substances; and compensatory damages for the harm to the lake.

1. There is no dispute that Ohio's claim for injunctive relief is properly within the original jurisdiction which this Court has traditionally exercised. In *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, the Court entertained a suit to abate a public nuisance by Georgia against a Tennessee company which was discharging noxious gas across the border into Georgia, and ultimately issued an injunction. Similarly, this Court has permitted suits by a state seeking injunctions against a gamut of practices, from dumping of sewage in an interstate stream to the detriment of the health and comfort of inhabitants (*Missouri* v. *Illinois,* 200 U.S. 496; see, *New Jersey* v. *New York City,* 283 U.S. 473), to discriminatory freight rates, set in violation of the antitrust laws, which damaged the state's economy generally and specifically affected its

interest as proprietor of a railroad and various other institutions in the State (*Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439).[3]

2. Orders requiring affirmative action to eliminate the effects of a practice which persist after the practice itself has been discontinued have not often been sought or granted in original suits. Frequently, enjoining the continuation of an illegal practice is all, or nearly all, that is necessary to prevent harmful effects for the future. The nuisance abates when noxious odors are no longer discharged. Or, the relative rapidity with which sewage is decomposed or diffused to the point of harmlessness renders the need for removal slight.

Where abatement of the nuisance has necessitated affirmative acts, however, this Court has given no indication it will refuse to consider requiring them. In *Pennsylvania* v. *Wheeling Bridge Co.*, 13 Howard 518, the Court ordered alteration, or removal, of a bridge which was found to obstruct navigation on the Ohio River. Similarly, here, there is no legal principle which would preclude this Court from exercising traditionally flexible equitable powers to insure a complete remedy where it is claimed that more than mere discontinuation of a practice is essential. Such relief is evidently for the benefit of the State and its citizens as a whole and not for particular individuals.

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[3] Because Ohio has an independent interest, at least in injunctive relief, and since there is no conflict with federal policy regarding pollution abatement of Lake Erie (see *infra*, pp. 13–24), the state's interest as *parens patriae* is not superseded by that of the federal government. Cf. *Massachusetts* v. *Mellon*, 262 U.S. 447.

The same reasoning establishes the propriety of Ohio's prayer, in the alternative, for a monetary award keyed specifically to the cost of removal and to be held in a specific account for that purpose. That alternative, in fact, is one which ordinarily is available to a court of equity if it is felt that payment to the party complaining of a nuisance to permit him to eliminate or ameliorate its effects would be preferable to affirmative acts by the tortfeasor. See *Chicago, M. & St. P. Ry. Co.* v. *United States,* 244 U.S. 351; cf. *Georgia* v. *Tennessee Copper Co., supra.*

The argument generally made against monetary damages in original actions is that, as to them, the state is not the real party in interest. *E.g., Oklahoma* v. *Cook, supra; Oklahoma* v. *Atchison, T. & S.F. Ry., supra.* In *North Dakota* v. *Minnesota, supra,* there were claims for both injunctive relief and damages. North Dakota sued to enjoin Minnesota's draining water from land into an interstate river which caused that river to flood land in North Dakota. It also claimed monetary damages of $5,000 for itself and $1 million on behalf of farmers whose land was damaged. This Court assumed jurisdiction of the claim for equitable relief. It refused, however, to take jurisdiction over the damage claims. It pointed out that farmers whose land had been damaged had contributed to a fund to defray the cost of maintaining the suit and that it was agreed they would share any recovery in the proportion of the damage they had suffered. The Court concluded that the State would not

have asserted the claim for damages except at the behest of and directly on behalf of the farmers.

Where, as here, damages are sought for a specific fund, to be used for what is preeminently a state or public purpose, this line of reasoning lacks force. True, even if restricted to use in removing mercury from the lake or stabilizing it in the lake bottom, the award might benefit some Ohioans more than others. But the same would be true of the injunctive relief which this Court has unquestioned authority to grant. Those who would make greater use of the lake have more to gain from whatever is done to improve it or to prevent its further injury. The governing factor in this Court's cases has been the directness of relief to individuals, warranting the conclusion that it is sought essentially for them. No such conclusion is warranted here. There is nothing to suggest that the differential impact of monetary payments to a special fund, any more than injunctive relief, negates the overriding interest which Ohio has in the well-being of its citizens. See *Georgia* v. *Pennsylvania R. Co., supra.*

3. There remains the third form of relief Ohio seeks: compensatory damage for harm already done to its interests in the lake and to those of its citizens. It is not possible to say with certainty here, as the Court concluded in *North Dakota* v. *Minnesota, supra,* that it is inconceivable that the state would have asserted the claim but for the individual interests of lakeside land owners, fishermen, and the like. Indeed, it is uncertain how Ohio proposes to disburse any funds it might receive under this claim; nor has any monetary

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value been put on the damage done to its proprietary interests as distinct from those of its citizens. Quite possibly the claim is made as a means of measuring the funds which ought to be paid into the trust fund for reclamation—a sum which otherwise could be quite difficult to calculate. See Note, *Private Remedies for Water Pollution,* 70 Colum. L. Rev. 734, 746–747 (1970). It is clear that the state may sue for damages done to its own interests as proprietor. *South Dakota* v. *North Carolina,* 192 U.S. 286. As to the remainder, it would be appropriate to require Ohio to clarify the purpose for which it seeks this relief; but as matters presently stand, there is insufficient basis to conclude that the *parens patriae* claim for compensatory damages falls outside this Court's original jurisdiction.

II. OHIO MAY APPLY ITS LAW TO EXTRA-TERRITORIAL ACTS WHICH HAVE EFFECTS WITHIN ITS BOUNDARIES IN THE ABSENCE OF FEDERAL LAW OR TREATY EXCLUDING STATES FROM ANY REGULATORY ROLE RESPECTING THOSE ACTS

The mercury which Ohio contends has created a common law nuisance within its territory was discharged into Lake Erie or its tributaries in Michigan and Canada. However, these acts may have caused effects within Ohio's boundaries. It is well-established, under American and international law, that a "state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which the state reprehends; and these liabilities other states will ordinarily recognize." *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 443 (C.A. 2); Restatement of

the Foreign Relations Law of the United States 2d, § 18; *New Jersey* v. *New York, supra.*[4] Thus, so long as the federal government has not prescribed, by treaty or statute, a system of regulation of water pollution which precludes state action in this field, *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, Ohio may apply its common law against those whose acts created nuisance within the state.

III. THE STATE OF OHIO IS NOT PRECLUDED BY ANY EXISTING TREATY OR FEDERAL STATUTE FROM BRINGING AN ACTION TO ABATE A PUBLIC NUISANCE OF THE TYPE ALLEGED

A. THE BOUNDARY WATERS TREATY OF 1909 DOES NOT VEST THE INTERNATIONAL JOINT COMMISSION WITH IMMEDIATE OR EXCLUSIVE JURISDICTION OVER CASES OR CONTROVERSIES ARISING OUT OF POLLUTION OF THE BOUNDARY WATERS

The Boundary Waters Treaty of 1909 is the supreme law of the United States, Const. Art. VI, and has been implemented in Canada by Act of Parlia-

[4] Although a state has jurisdiction to prescribe a law which applies to acts committed outside its territory, enforcement of a remedy outside its territory will require action by the courts of the foreign jurisdiction. Cf. Restatement of the Foreign Relations Law § 20. In this case, it therefore might be necessary for Ohio to seek enforcement of a decree in Canadian courts, particularly if it is concluded that enforcement against Dow-United States is inappropriate or inadequate. In such an event, Ohio would stand before the Canadian courts as any other suitor seeking to enforce a decree of a foreign court. While uncertainty with regard to the enforcement of a decree may be a factor in determining the nature of the decree, it does not, in our view, prevent this Court from exercising jurisdiction over this case.

ment.[5] Article 4 of the Treaty provides that the "boundary waters * * * shall not be polluted on either side to the injury of health or property on the other." (36 Stat. 2450) But this general prohibition cannot be said to provide the exclusive legal remedy for problems of pollution in the boundary waters, for it is not self-executing. No provision of the treaty grants a direct remedy for its violation, and its enforcement depends upon further action by one or both of the signatories.

Any remedy would flow through the International Joint Commission established by Article 7 of the Treaty. The Commission's powers are defined in Articles 8–10. None of these in itself authorizes it to reach binding determinations in pollution cases.

Articles 8 empowers the Commission to "pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles 3 and 4 * * * the approval of this Commission is required" (36 Stat. 2451). Those Articles specifically describe the types of projects for which approval is required. For example, Article 4 states that the "Parties * * * will not permit the construc-

[5] A treaty in Canada is "enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject * * *." *Re Arrow River & Tributaries Slide & Boom Co. Ltd.*, [1932] 2 D.L.R. 250, 260 (Supreme Court of Canada). The Boundary Waters Treaty has been expressly confirmed by Canadian Act of Parliament, Statutes of Canada, 1–2 George V, ch. 28, May 19, 1911 (An Act relating to the establishment and expenses of the International Joint Commission under the Waterways Treaty of January the eleventh, nineteen hundred and nine).

tion or maintenance * * * of any remedial or protective works or any dams or other obstructions * * * the effect of which is to raise the natural level of waters on the other side of the boundary, unless * * * approved by the * * * Commission" (36 Stat. 2450). Significantly, the proscription of pollution, which immediately follows this provision in Article 4, does not mention approval or action by the International Joint Commission.

Articles 9 and 10 provide for reference to the Commission of "other questions or matters of difference" between the parties. Under Article 9, a matter may be referred by either government for study and recommendations, "subject * * * to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference" (36 Stat. 2452). Reports under the Article "shall not be regarded as decisions * * * either on the facts or the law, and shall in no way have the character of an abitral award" (*ibid*). It follows that no binding determination of a pollution problem could be had under Article 9; reliance upon its procedures could produce no assurance of remedy.[6]

[6] The only dispute between the United States and Canada with regard to pollution ever referred to the International Joint Commission was the case of the Trail Smelter, relied upon by defendants as an example of practice under the Treaty (*E.g.*, Dow-Canada Brief, p. 41). Fumes from a smelter at Trail, British Columbia, were alleged to have damaged property in the state of Washington. The matter was referred by both Governments under Article 9 to the International Joint Commission in 1928, with the reference specifically noting that no binding decision was sought. The Commission rendered a report in 1931, recommending a monetary settlement for claims up to

Article 10 does vest the Commission with power to render binding decisions on matters referred by consent of both Parties, subject again to "any restrictions or exceptions * * * imposed * * * by * * * the reference" (36 Stat. 2453). But the Article states that any joint reference "on the part of the United States * * * will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor-General in Council" (*ibid.*). Perhaps because of these requirements, there has never been a reference for binding arbitration under Article 10.

Article 8, then, is the only self-executing provision for enforcement of treaty rights. Since pollution is clearly not within its scope, see Bloomfield & Fitzgerald, *Boundary Water Problems of Canada and the United States,* 20, consideration of problems and enforcement of rights under the Treaty requires specific, additional executive or legislative action by the Gov-

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1931. The proposal was in fact accepted, but there was never any certainty that it would be. A separate commission was subsequently established by a special convention to arbitrate claims for post-1931 damages. See Bloomfield & Fitzgerald, *Boundary Waters Problems of Canada and the United States*, 39, 137–138; The Trail Smelter Arbitral Decisions, 33 Am. J. Intl. Law 182 (1939), 35 Am. J. Intl. Law 684 (1941).

Under Article 9, the parties have several times requested the Commission to investigate and report generally on problems of water pollution. A technical board of advisors which reports semi-anually has also been established; its recommendations, too, are merely precatory. See generally, Bloomfield & Fitzgerald, *supra;* Waite, *The International Joint Commission—Its Practice and Its Impact on Land Use*, 13 Buffalo L. Rev. 93 (1963).

ernments; the acts necessary to produce a binding adjudication amount to the execution of a separate treaty. There is, moreover, no indication of an intent, much less a practice, of the parties to make the referral mechanism the sole means for handling pollution problems. To the contrary, the governments continue to take independent action in this field. The Federal Water Pollution Control Act, as amended (33 U.S.C. 1151–1175), upon which defendants also rely, is an example. That Act, which applies to the Great Lakes along with other "interstate waters," provides machinery for dealing with water pollution problems which is much more elaborate and certain than that provided by the Treaty. In these circumstances, this Court need not defer to the Treaty. See *Foster and Elam* v. *Neilson,* 2 Pet. 253.

2. The Treaty discusses only the rights of the United States and Canada and permits only them to refer matters to the International Joint Commission.[7]

[7] The only reference to individual rights is in Article 2. That Article specifies that individuals who suffer injury as a result of interference with or diversion of waters flowing across the boundary shall have "the same rights and * * * legal remedies as if such injury took place in the country where such diversion or interference occurs * * *. 36 Stat. 2449. This provision assures that, as to the subject treated, litigants will not experience the enforcement problems which might otherwise arise out of the necessity of proceeding, at some point, in a foreign tribunal. See n. 4, *supra.* Such assurance of enforcement is not given as to other problems, such as the pollution problem here. But the United States does not believe that Article 2, by implication, negates the settled principle of liability for the international consequences of one's acts as to such problems. Cf. *New Jersey* v. *New York City*, 283 U.S. 473, 482–483.

It does not, however, evince a purpose on the part of the national governments to exclude their states and provinces from an independent role in responding to problems of boundary water pollution. As a general rule "treaties * * * [are] carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effect the national policy" *United States* v. *Pink,* 315 U.S. 317. See, also, *Rocca* v. *Thompson,* 223 U.S. 317. Where a treaty is not self-executing, even local laws which are inconsistent with its terms are not superseded until there is implementing legislation. *Sei Fujii* v. *State,* 38 Cal. 2d 718, 242 P. 2d 617 (Sup. Ct. Cal.). Action on the part of a State in pollution matters conflicts neither with the terms of the treaty nor with the policy of the United States. Indeed, the nation's policy, as expressed in the Federal Water Pollution Control Act, appears to be exactly the opposite. Section 1(c) of that Act states:

> Nothing in this Act shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (*including boundary waters*) of such States. [33 U.S.C. § 1151(c); Emphasis added.]

B. FEDERAL STATUTES DO NOT PRECLUDE STATE ACTIONS FOR THE ABATEMENT OF POLLUTING PRACTICES CONSTITUTING A PUBLIC NUISANCE

While federal action affirmatively encouraging the defendants' conduct might foreclose Ohio's cause of

action,[8] the defendants claim no such federal license here. Rather, assuming that the condition their plants produce is one which might require a remedy, they insist that federal statutes—notably, the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1151–1175 [9]—provide the exclusive remedy. The Water Pollution Control Act is by far the most comprehensive

[8] In *Wisconsin* v. *Duluth*, 96 U.S. 379, this Court dismissed an original action brought by Wisconsin against the city of Duluth, Minnesota, for diversion of waters upon finding that the federal government had taken possession and control of the diversion project. On the other hand, in New Jersey's suit against New York City regarding the effect of the city's practice of dumping garbage seaward of the state's beaches, it was held to be no defense that the city dumped the garbage at places designated by the harbor supervisor acting under a federal statute specifically designed to regulate such activities. 33 U.S.C. 441 *et seq.*; *New Jersey* v. *New York City*, 283 U.S. 473. "There is nothing in the Act that purports to give one dumping at places permitted by the supervisor immunity from liability for damage or injury thereby caused to others or to deprive one suffering injury by reason of such dumping of relief that he otherwise would be entitled to have. There is no reason why it should be given that effect." *Id.* at 482–483. Nor did the existence of a "contract" between the federal government and a New Jersey sewage district regarding the manner in which sewage would be treated before discharge into New York Bay foreclose, of its own weight, a suit by New York State to enjoin the discharge; the Court carefully examined the evidence and the remedies given under the contract before concluding, on the merits, that the state had not established that a public nuisance would be created. *New York* v. *New Jersey*, 256 U.S. 296, 312–313.

[9] The Act is set out in the 1964 edition at Sections 466–466k, and was amended and renumbered by an Act of April 3, 1970, P.L. 91–224, 84 Stat. 91. Recent amendments were also made in 1965 (79 Stat. 903) and 1966 (80 Stat. 1246). And see n. 25, *infra*, p. 37.

federal statute dealing with pollution of the interstate or navigable waters of the United States.[10] But like other enactments in the area of environmental control,[11] the act makes clear that the role of federal law is to supplement rather than to supplant state action. Section 1(b) of the Act declares that "the policy of Congress [is] to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution * * *." 33 U.S.C. 1151(b).

This motif is carried forward in Section 10 of the Act, 33 U.S.C. 1160, which provides for the development and enforcement of water quality standards for interstate and navigable waters and their tributaries. The section specifically states that except where the Attorney General has actually obtained a court order

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[10] In addition to statutes regarding pollution of particular waterways, *e.g.*, 33 U.S.C. 441 *et seq.*, n. 8, *supra*, the federal statutes of general application to water pollution are Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, commonly known as the Refuse Act, which prohibits the discharge or dumping of any refuse matter into navigable waterways; and the Oil Pollution Act of 1961, 33 U.S.C. 1001 *et seq.*, dealing with oil pollution at sea. Quite properly, it is not suggested that either of these Acts preempts Ohio here.

[11] *E.g.*, Section 202(b) of the Environmental Quality Improvement Act of 1970, 84 Stat. 114:

"(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments."

of pollution abatement on behalf of the United States after following the procedures set out in the Section, "State and interstate action to abate pollution of interstate or navigable waters * * * shall not * * * be displaced by Federal enforcement action." Section 10(b), 33 U.S.C. 1160(b).

The procedures of Section 10 are complex and perhaps unnecessary to set out *in extenso.*[12] Very generally, two different modes of federal enforcement are possible. Where water quality standards and enforcement plans have been established by the states, or by the Administrator of the Environmental Protection Agency upon state default, the Administrator may request the Attorney General to bring an abatement action 180 days after finding that the standards are being violated and notifying the violators of the violation (Section 10(c)). Or, where pollution creates a danger to health or welfare, the Administrator may convene a conference of relevant state and interstate pollution control agencies (Section 10(d)) and recommend remedial action (Section 10(e)). If after six months a pollution danger remains, he may then convene a public hearing; once the hearing Board's recommendations are made known, at least six months more must be allowed to implement them (Section 10(f)). If the danger remains he may then request the Attorney General to bring an abatement action

[12] They are well explained in Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act*, 68 Mich. L. Rev. 1103 (1970); see also, Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 Iowa L. Rev. 186, 432, 799 (1966–1967).

(Section 10(g)). It is quite clear that the actual bringing of a judicial enforcement action, in either case, is entirely discretionary with the Attorney General. It is undoubtedly for this reason that Congress was so careful to state in Section 10(b) that other remedies are not ordinarily precluded.

Section 12 of the Act, 33 U.S.C. 1162, deals specifically with pollution by "hazardous substances," a category to which mercury and its compounds belong. Although it calls for a Presidential report,[13] Section 12 provides no effective means for federal control of such pollution (other, that is, than the procedures of Section 10; compare Section 11, 33 U.S.C. 1161, dealing with oil pollution). Rather, it explicitly preserves a right of action "to any person or agency under any provision of law for damages to any publicly or privately-owned property resulting from a discharge of any hazardous substance or from the removal of any such substance." Section 12(e), 33 U.S.C. 1162(e).

In contrast to these provisions, Section 13(f), 33 U.S.C. 1163(f), explicitly provides for federal preemption of state controls over standards for marine (shipboard) sanitation devices. Similarly, regulation of pollution by federal installations is made an exclusively federal concern. Barry, *op. cit. supra,* 68 Mich. L. Rev. at 1118. The conclusion is inescapable that despite its stress on federal-state cooperation as a means of dealing with pollution of interstate waters, the Federal Water Pollution Control Act has reserved

[13] Under the statute the report was to have been filed November 1, 1970; we are informed that in all probability it will not be filed until mid-February, 1971.

to the states intact their traditional remedies. *Ibid.;* Hines, *op. cit., supra,* 52 Iowa L. Rev. at 800; cf. *United States* v. *Interlake Steel Corp.,* 297 F. Supp. 912 (N.D. Ill.).

We believe this conclusion is valid in this case even though the pollution which Ohio seeks to control originates outside its borders. Again, this Court's cases make clear that the states have a remedy for such pollution, albeit they may have to meet a special standard of proof in order to establish their rights. *Missouri* v. *Illinois,* 200 U.S. 496, 520–521; *New York* v. *New Jersey, supra; New Jersey* v. *New York City, supra.* While it is certainly true that Congress has done much to encourage joint action, there is no evidence that it meant to foreclose the extraterritorial "nuisance" remedy or to limit its approving reference to local and state control to situations where those controls were exercised intrastate. Even apart from the wholly discretionary nature of the federal abatement action under Section 10, the remedy provided by that Section is deficient in several respects: it makes no provision for monetary awards for damages done during the pendency of the suit (cf. Barry, *op. cit. supra,* 68 Mich. L. Rev. at 1121); it is at best uncertain whether a monetary award to compensate for the expense of removing the pollutant can be obtained (compare Sections 10(h) and 12(e), 33 U.S.C. 1160(h), 1163(e) with Section 11(f), 33 U.S.C. 1161(f)); and unless the discharge is in violation of an

established water quality control standards [14] a Section 10 remedy cannot be obtained in less than fourteen months.[15] Such a remedy is poorly suited to an emergency situation such as Ohio alleges in its complaint.[16] Compare Barry, *op. cit. supra*, 68 Mich. L. Rev. 1108–1109, 1119.

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[14] Only Texas has an approved water quality control standard with specific limits for mercury and its compounds. While all states, including Ohio and Michigan, have catch-all provisions in their approved standards forbidding pollution by toxic or hazardous substances, the uncertainty of these general clauses makes it unlikely that they could be enforced through the relatively speedier procedures of Section 10(c).

[15] Where violation of an established standard can be shown, Section 10(c) permits the Administrator to request suit 180 days after giving notice of the condition and seeking its abatement. Pp. 21–22, *supra*. But otherwise, there must be a three-week notice of conference; a conference and its report; a six-month period for abatement; if abatement does not occur, a three-week notice of hearing; a hearing and report; and a second six-month period for compliance before court action can be requested. *Ibid.*

[16] That this Court's procedures are unlikely to be speedier, absent a showing justifying emergency relief, might be a consideration warranting refusal, in its discretion, to entertain the complaint, cf. *New York* v. *New Jersey*, *supra*, 256 U.S. at 313–314; Hines, *op. cit. supra*, 52 Iowa L. Rev. at 196–207, 434, although the federal remedy is deficient, as noted, in respects other than simple delay. Since this matter, however, is one of discretion rather than jurisdiction of the complaint, we do not address it.

IV. THIS COURT MAY EXERCISE JURISDICTION OVER A FOREIGN CORPORATION IF IT HAS SUFFICIENT CONTACTS WITH THE UNITED STATES TO SATISFY CONCEPTS OF DUE PROCESS AND IS AMENABLE TO SERVICE OF PROCESS

Defendants contend that this Court is without jurisdiction over Dow-Canada, a non-resident alien. We believe, however, that there is a legal basis for obtaining jurisdiction over Dow-Canada depending upon the resolution of factual questions upon which we express no opinion and which this Court need not resolve prior to the filing of a complaint.

It is important at the outset to distinguish between the questions whether personal jurisdiction may be exercised, and whether service of process can be obtained. One may readily imagine cases in which there would be sufficient basis for this Court to entertain an original action, but personal or appropriate substituted service of the proposed defendants could not be had. There might also be cases in which service would be possible, but the relationship of the defendant to the forum would be so remote that "maintenance of the suit [would] offend traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316. We address each of these issues in turn.

A. THE ISSUE WHETHER PERSONAL JURISDICTION MAY BE EXERCISED OVER DOW-CANADA DEPENDS ON THE EXISTENCE OF SUFFICIENT CONTACTS WITH THE UNITED STATES TO MEET THE REQUIREMENTS OF DUE PROCESS

The problem of personal jurisdiction over a nonresident alien corporation in an original action in this Court is apparently one of first impression. Dow-Canada asserts that, in the absence of a long-arm or similar statute, the "minimum contacts" test of "doing business," developed by *International Shoe Co.* v. *State of Washington, supra,* and subsequent cases largely in the context of such statutes, cannot be applied as the basis for the exercise of jurisdiction. Rather, it contends, the more stringent test of "doing business" employed prior to *International Shoe* is appropriate. But long-arm statutes are essentially concerned with service of process, not the basis of jurisdiction. If service issues are put aside, the only barrier to this Court's exercise of jurisdiction over a case apparently within its original jurisdiction would be the existence of facts making that exercise fundamentally unfair, within the meaning of the Due Process Clause of the Fifth Amendment.

The development of the due process concept of personal jurisdiction in the United States has been treated in depth by courts and legal commentators alike, and needs no general exposition here. See, *e.g., International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945); Note, *Jurisdiction of Federal Courts Over Foreign Corporations,* 69 Harv. L. Rev. 508 (1956). Of special importance to the present discussion, however, is the developing recognition by lower federal courts that where federal jurisdiction of the

subject matter is founded on other than the diverse citizenship of the parties, a federal district court will have personal jurisdiction over any properly-served defendant within the permissible limits of the due process clause of the Fifth Amendment. See, *e.g., Fraley* v. *Chesapeake & O. Ry. Co.,* 397 F. 2d 1 (C.A. 3); *Lone Star Package Car Co.* v. *Baltimore & O. R. Co.,* 212 F. 2d 147 (C.A. 5). See, also, 4 Wright & Miller, *Federal Practice and Procedure,* § 1075.

Each of the several federal court cases Dow-Canada cites in support of its contrary proposition [17] are cases where the jurisdiction of the federal court rested on diversity of citizenship. The courts of appeal are in general agreement that a defendant in a diversity case is amenable to the personal jurisdiction of the court only if he would be so amenable in the courts of the State in which the district court is sitting.[18] The rationale for this proposition is similar to the outcome-determinative test promulgated by *Guaranty Trust*

[17] *Beaty* v. *M.S. Steel Co.*, 401 F. 2d 157, 161 (C.A. 4, 1968), certiorari denied, 89 S. Ct. 686; *Bowman* v. *Curt G. Joa Inc.*, 361 F. 2d 706, 714 (C.A. 4, 1969); *Roberts* v. *Evans Case Co.*, 218 F. 2d 893 (C.A. 7, 1955); *Pulson* v. *American Rolling Mill*, 170 F. 2d 193, 195 (C.A. 1, 1948); *Bornze* v. *Nardis Sportswear Inc.*, 165 F. 2d 33 (C.A. 2, 1948). See Dow-Canada Br. 18 and 22.

[18] *See Arrowsmith* v. *United Press International*, 320 F. 2d 219 (C.A. 2, 1963); Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73, 96 n. 75 (1968); Annot., *Federal or State Law as Controlling, in Diversity Action, Whether Foreign Corporation is Amenable to Service of Process in State*, 6 A.L.R. 3d 1103, 1109, 1114 (1966). *But see Arrowsmith* v. *United Press International, supra,* pp. 234–244 (dissenting opinion of Clark, C.J.); *St. Clair* v. *Righter*, 250 F.Supp. 148 (N.D. Va. 1966); Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 Vand. L.Rev. 967 (1961); Note,

Co. v. *York,* 326 U.S. 99 (1945):[19] (1) a State is not required by federal constitutional provisions to open its courts to a transitory action arising out of State, *Kenny* v. *Alaska Airlines,* 132 F.Supp. 838 (S.D. Cal. 1955) (removal case); (2) "[s]tate statutes determining what foreign corporations may be sued, for what, and by whom * * * represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations," *Arrowsmith* v. *United Press International, supra,* p. 226; (3) the purpose of diversity jurisdiction is to provide a more suitable forum for what are primarily state cases but which involve citizens of different states, *id.* pp. 226–227; and (4) there is "* * * no federal policy that should lead federal courts in diversity cases to override valid state laws as to the subjection of foreign corporations to suit, in the absence of direction by federal statute or rule," *id.* p. 226.

The rationale for limiting federal courts exercising diversity jurisdiction to state notions of personal

Doing Business as a Test of Venue and Jurisdiction over Foreign Corporations in the Federal Courts, 56 Colum. L.Rev. 394 (1956); Note, *Jurisdiction of Federal Courts Over Foreign Corporations*, *supra.*

[19] Of course, it is generally conceded that the doctrine of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), does not prohibit Congress from broadening the ability of federal district courts exercising diversity jurisdiction to obtain personal jurisdiction over defendants not personally amenable in the courts of the forum state. *Arrowsmith* v. *United Press International*, *supra*, p. 226; see *Riverbank Labs.* v. *Hardwood Prods. Corp.*, 350 U.S. 1003 (1956), opinion amended, 350 U.S. 1012 (1956); Green, *supra*, p. 980; Foster, *supra*, pp. 80–81 & n. 18.

jurisdiction is not relevant, however, where subject matter jurisdiction is present on a basis other than diversity. In a relatively recent Sherman Act case in the federal district court in Ohio, *Edward J. Moriarty & Co.* v. *General Tire & Rubber Co.*, 289 F. Supp. 381, 389–390 (S.D. Ohio 1967), the judge reasoned:

> It is this Court's opinion that at first blush, it should be irrelevant whether or not [one of the potential defendants'] activities in Ohio meet the tests set out in [the Ohio long arm statute]. It is our opinion that a federal district court may acquire jurisdiction over the person of a defendant incorporated under the laws of a foreign country without regard to contacts of the corporation with the state where the courts sits. This is especially true in a case where the cause of action rests upon a federally-created right, such as this one, and where national uniformity in enforcing that right should be the true guideline.
>
> A court is a part of the judicial branch of the government of some state or nation. That government may have undertaken to give the court power to entertain a certain action or actions, but, in order for the court to have jurisdiction, the state or nation must have judicial jurisdiction over the parties.
>
> Thus, in our view, the judicial jurisdiction over the person of the defendant does not relate to the geographical power of the particular court which is hearing the controversy, but to the power of the unit of government of which that court is a part. The limitations of the concept of personal jurisdiction are a consequence of territorial limitations on the power of the

> respective forums. Thus, as applied to the states, the constitutional test for personal jurisdiction involves a determination as to whether the defendant has certain minimal contacts *with the forum state*, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). [Emphasis in the original.]
>
> By the same token, we feel that the appropriate inquiry to be made in a federal court where the suit is based upon a federally created right is whether the defendant has certain minimal contacts *with the United States*, so as to satisfy due process requirements under the Fifth Amendment. * * * [Emphasis added.]

See also *Gkiafis* v. *Steamship Yiosonas,* 342 F. 546, 549 (C.A. 4, 1965); *First Flight Co.* v. *National Carloading Corp.*, 209 F. Supp. 730 (E.D. Tenn. 1962); *Goldberg* v. *Mutual Readers League, Inc.*, 195 F. Supp. 778, 781 (E.D. Pa. 1961); *Rayco Manufacturing Co.* v. *Chicopee Manufacturing Co.*, 148 F. Supp. 588, 590–591 (S.D. N.Y. 1957).

We can perceive no reason why the test of personal jurisdiction in this Court should be any more restrictive than the Constitution requires. The Constitution appoints this Court as the forum for resolution of controversies between a State and citizens of other states or foreign countries. Its jurisdiction over those controversies is as broad as the Constitution permits. It is in no sense a substitute forum which ought for reasons of comity to follow restrictions on jurisdiction which may have been imposed on state courts.

As already set out, international law recognizes the liability of individuals for the extra-territorial consequences of their acts; no reason of state requires that this Court adopt a more restrictive theory of jurisdiction over foreign corporations charged with producing such consequences in the United States than the Constitution commands as to all defendants in federal courts.[20] In sum, no federal policy demands that this Court's power to subject defendants to its jurisdiction be limited by anything save the Fifth Amendment of the United States Constitution.

There remains the issue whether the requirements of due process would be met if jurisdiction were exercised in this case. Cases beginning with *International Shoe, supra,* which have developed the "minimum contacts" doctrine suggest two possible bases for the exercise of jurisdiction. First, Dow-Canada's sales and other business in the United States, as well as the fact that it is wholly owned by an American corporation, may justify jurisdiction. See *e.g., McGee* v. *International Life Ins. Co.,* 355 U.S. 220. Second, jurisdiction might also be based on the alleged commission of tortious acts in the United States. See *e.g., Hess* v. *Pawloski,* 274 U.S. 352; *Elkart Engineering Co.,* v. *Dornier Werke,* 343 F. 2d 861 (C.A. 5); *Nelson* v. *Miller,* 11 Ill. 2d 378, 143 N.E. 2d 673. See, also, 4 Wright & Miller, *supra,* §§ 1066–

[20] See, *e.g., United States* v. *Scophony Corp. of America,* 333 U.S. 795; *National Gas Appliance Corp.* v. *AB Electrolux,* 270 F. 2d 472 (C.A. 4); *Seilon, Inc.* v. *Breme S.P.A.,* 271 F. Supp. 516 (N.D. Ohio); *Alfred Hofman & Co.* v. *Karl Meyer Erste Hessische Wirkmaschinen fabrik GMBH,* 159 F. Supp. 77 (D.N.J.).

1069; 2 Moore, *Federal Practice* ¶¶ 4.25, 4.41 [1]–[3]. What is important to note, however, is that the critical issue is a factual one. While the United States takes no position on that question,[21] we see no reason why, as a factual question, it ought not to be resolved after the complaint has been filed, in accordance with the usual practice.

B. WHETHER EFFECTIVE SERVICE MAY BE HAD UPON DOW-CANADA DEPENDS UPON THE RESOLUTION OF FACTUAL ISSUES NOT APPROPRIATE FOR DECISION AT THIS TIME

Assuming that jurisdiction may be obtained, the Rules of this Court provide an appropriate procedural vehicle for service upon Dow-Canada. Rule 9(2) provides that the Federal Rules of Civil Procedure, "* * * where their application is appropriate, may be taken as a guide to procedure in original actions in this court". See *Utah* v. *United States,* 394 U.S. 89, 94 (1969).[22]

Rule 4 of the Federal Rules of Civil Procedure governs service of process in federal district courts. Rule 4(d)(3) provides for personal service upon a foreign corporation "by delivering a copy of the summons and

[21] Ohio alternatively contends that personal jurisdiction over Dow-Canada may be obtained through Dow-United States, which allegedly "controls the actions" of Dow-Canada. We express no opinion concerning the ultimate resolution of this issue, since it too depends in part on a factual determination. See, Note, *Jurisdiction—Long-Arm Statutes—Corporate Affiliation as a Basis for Assuming Jurisdiction*, 14 Wayne L. Rev. 1228 (1968).

[22] Supreme Court Rule 33(1) provides for service of "any pleading, motion, notice, brief, or other document" upon opposing counsel, either personally or by mail. Since this Rule does not provide for service directly on adverse parties, it would appear inapplicable as a guide to means for original service of process.

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 * * *."[23] Ohio contends that the Directors of Dow-Canada, a majority of whom reside within the United States at Midland, Michigan, are appropriate persons for service under this rule.[24] The contention, again, raises essentially factual questions which, like the issue regarding the sufficiency of contacts for assertion of jurisdiction, appropriately may be resolved after a complaint is filed.

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[23] Alternative methods provided by Rules 4(d)(7) and (e) are not appropriate because they are tied to particular state rules or federal statutes. There are none which apply to this Court's original jurisdiction.

[24] The general standard is that "service should be made upon a representative so integrated with the organization that he will know what to do with the papers." *American Football League* v. *National Football League*, 27 F.R.D. 264, 269 (D. Md.). It has been held that service upon a director is not adequate under Rule 4(d)(3), where the director served was one of 200 members of the board and was not an officer. *Pacific Lanes, Inc.* v. *Bowling Proprietors Ass'n of America*, 248 F. Supp. 347 (D. Ore.). But where a director has other corporate responsibilities such that he is sufficiently "integrated" into the corporation, service on him would seem to be sufficient. See, generally, 4 Wright & Miller, *supra*, §§ 1101–1102; 2 Moore, *supra*, ¶ 4.22[2]. Furthermore, service on a number of directors may be satisfactory to meet the requirements of the Rule. There is no indication here whether any of the directors of Dow-Canada who reside in Midland, Michigan, are also officers of that corporation. However, the total number of directors is 12. Ohio Br., App. 13a. Of the seven living in Midland, six were also directors (and four of them were officers) of Dow-United States as of December 31, 1969. See Moody, *Industrial Manual*, pp. 1572–1573.

CONCLUSION

For the reasons stated, there is no legal bar to this Court's granting Ohio's motion for leave to file the complaint in this original action.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
PETER L. STRAUSS,
JOHN F. DIENELT,
Assistants to the Solicitor General.
THOMAS C. LEE,
JAMES R. MOORE,
Attorneys.

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APPENDIX

Constitutional Provisions, Statutes and Rules

United States Constitution, Article 3, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * * * * *

28 U.S.C. § 1251:

* * * * * * *

> (b) The Supreme Court shall have original but not exclusive jurisdiction of:

* * * * * *

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

Section 1 of the Federal Water Pollution Control Act, 33 U.S.C. 1151:

(a) The purpose of this chapter is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.

(b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, 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, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. * * *

(c) Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Section 10 of the Federal Water Pollution Control Act, 33 U.S.C. 1160:

(a) The pollution of interstate or navigable waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of any persons, shall be subject to abatement as provided in this chapter.

(b) Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action.

(c)(1) If the Governor of a State or a State water pollution control agency files, within one year after October 2, 1965, a letter of intent that such State, after public hearings, will before June 30, 1967, adopt (A) water quality criteria applicable to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted, and if such criteria and plan are established in accordance with the letter of intent, and if the Secretary [25] determines that such State criteria and plan are consistent with paragraph (3) of this subsection, such State criteria and plan shall thereafter be the water quality standards applicable to such interstate waters or portions thereof.

(2) If a State does not (A) file a letter of intent or (B) establish water quality standards in accordance with paragraph (1) of this subsection, or if the Secretary or the Governor of any State affected by water quality standards established pursuant to this subsection desires a revision in such standards, the Secretary may, after reasonable notice and a conference of representatives of appropriate Federal departments and agencies, interstate agencies, States, municipalities and industries involved, prepare regulations setting forth standards of water quality to be applicable to interstate waters or portions thereof. If, within six months from the date the Secretary publishes such regulations,

[25] Under Reorganization Plan No. 3 of 1970 the functions of the Secretary have been transferred to the Administrator of the Environmental Protection Agency, effective December 2, 1970, 35 Fed. Reg. 15,623 (Oct. 16, 1970).

the State has not adopted water quality standards found by the Secretary to be consistent with paragraph (3) of this subsection, or a petition for public hearing has not been filed under paragraph (4) of this subsection, the Secretary shall promulgate such standards.

(3) Standards of quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. In establishing such standards the Secretary, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses. In establishing such standards the Secretary, the hearing board, or the appropriate State authority shall take into consideration their use and value for navigation.

(4) If at any time prior to 30 days after standards have been promulgated under paragraph (2) of this subsection, the Governor of any State affected by such standards petitions the Secretary for a hearing, the Secretary shall call a public hearing, to be held in or near one or more of the places where the water quality standards will take effect, before a Hearing Board of five or more persons appointed by the Secretary. Each State which would be affected by such standards shall be given an opportunity to select one member of the Hearing Board. The Department of Commerce and other affected Federal departments and agencies shall each be given an opportunity to select a member of the Hearing Board and not less than a majority of the Hearing Board shall be persons other than officers or employees of the Department of the Interior. * * * Notice of such hearing shall be published in the Federal Register and given to the State water pollution control agencies, interstate agencies and municipalities involved at least 30 days prior to the date of such hearing.

On the basis of the evidence presented at such hearing, the Hearing Board shall make findings as to whether the standards published or promulgated by the Secretary should be approved or modified and transmit its findings to the Secretary. If the Hearing Board approves the standards as published or promulgated by the Secretary, the standards shall take effect on receipt by the Secretary of the Hearing Board's recommendations. If the Hearing Board recommends modifications in the standards as published or promulgated by the Secretary, the Secretary shall promulgate revised regulations setting forth standards of water quality in accordance with the Hearing Board's recommendations which will become effective immediately upon promulgation.

(5) The discharge of matter into such interstate waters or portions thereof, which reduces the quality of such waters below the water quality standards established under this subsection (whether the matter causing or contributing to such reduction is discharged directly into such waters or reaches such waters after discharge into tributaries of such waters), is subject to abatement in accordance with the provisions of paragraph (1) or (2) of subsection (g) of this section, except that at least 180 days before any abatement action is initiated under either paragraph (1) or (2) of subsection (g) of this section as authorized by this subsection, the Secretary shall notify the violators and other interested parties of the violation of such standards. In any suit brought under the provisions of this subsection the court shall receive in evidence a transcript of the proceedings of the conference and hearing provided for in this subsection, together with the recommendations of the conference and Hearing Board and the recommendations and standards promulgated by the Secretary, and such additional evidence, including that relating to the alleged violation of the standards, as it deems

necessary to a complete review of the standards and to a determination of all other issues relating to the alleged violation. The court, giving due consideration to the practicability and to the physical and economic feasibility of complying with such standards, shall have jurisdiction to enter such judgment and orders enforcing such judgment as the public interest and the equities of the case may require.

* * * * *

(d) (1) Whenever requested by the Governor of any State or a State water pollution control agency, or (with the concurrence of the Governor and of the State water pollution control agency for the State in which the municipality is situated) the governing body of any municipality, the Secretary shall, if such request refers to pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originates, give formal notification thereof to the water pollution control agency and interstate agency, if any, of the State or States where such discharge or discharges originate and shall call promptly a conference of such agency or agencies and of the State water pollution control agency and interstate agency, if any, of the State or States, if any, which may be adversely affected by such pollution. Whenever requested by the Governor of any State, the Secretary shall, if such request refers to pollution of interstate or navigable waters which is endangering the health or welfare of persons only in the requesting State in which the discharge or discharges (causing or contributing to such pollution) originate, give formal notification thereof to the water pollution control agency and interstate agency, if any, of such State and shall promptly call a conference of such agency or agencies, unless, in the judgment of the Secretary, the effect of such pollution on the legitimate uses of the wa-

ters is not of sufficient significance to warrant exercise of Federal jurisdiction under this section. The Secretary shall also call such a conference whenever, on the basis of reports, surveys, or studies, he has reason to believe that any pollution referred to in subsection (a) of this section and endangering the health or welfare of persons in a State other than that in which the discharge or discharges originate is occurring; or he finds that substantial economic injury results from the inability to market shellfish or shellfish products in interstate commerce because of pollution referred to in subsection (a) of this section and action of Federal, State, or local authorities.

(2) Whenever the Secretary, upon receipt of reports, surveys, or studies from any duly constituted international agency, has reason to believe that any pollution referred to in subsection (a) of this section which endangers the health or welfare of persons in a foreign country is occurring, and the Secretary of State requests him to abate such pollution, he shall give formal notification thereof to the State water pollution control agency of the State in which such discharge or discharges originate and to the interstate water pollution control agency, if he believes that such pollution is occurring in sufficient quantity to warrant such action. The Secretary, through the Secretary of State, shall invite the foreign country which may be adversely affected by the pollution to attend and participate in the conference, and the representative of such country shall for the purpose of the conference and any further proceeding resulting from such conference, have all the rights of a State water pollution control agency. This paragraph shall apply only to a foreign country which the Secretary determines has given the United States essentially the same rights with respect to the prevention and control of water pollution occurring in that coun-

try as is given that country by this paragraph. Nothing in this paragraph shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of water pollution in waters covered by those treaties.

(3) The agencies called to attend such conference may bring such persons as they desire to the conference. In addition, it shall be the responsibility of the chairman of the conference to give every person contributing to the alleged pollution or affected by it an opportunity to make a full statement of his views to the conference. Not less than three weeks' prior notice of the conference date shall be given to such agencies.

(4) Following this conference, the Secretary shall prepare and forward to all the water pollution control agencies attending the conference a summary of conference discussions including (A) occurrence of pollution of interstate or navigable waters subject to abatement under this chapter; (B) adequacy of measures taken toward abatement of the pollution; and (C) nature of delays, if any, being encountered in abating the pollution.

(e) If the Secretary believes, upon the conclusion of the conference or thereafter, that effective progress toward abatement of such pollution is not being made and that the health or welfare of any persons is being endangered, he shall recommend to the appropriate State water pollution control agency that it take necessary remedial action. The Secretary shall allow at least six months from the date he makes such recommendations for the taking of such recommended action.

(f)(1) If, at the conclusion of the period so allowed, such remedial action has not been taken or action which in the judgment of the Secretary is reasonably calculated to secure abatement of such pollution has not been taken, the Secretary shall call a public hearing, to be held in or near one or more of the places where the discharge or discharges causing or contributing to such pollution originated, before a Hearing Board of five or more persons appointed by the Secretary. Each State in which any discharge causing or contributing to such pollution originates and each State claiming to be adversely affected by such pollution shall be given an opportunity to select one member of the Hearing Board and at least one member shall be a representative of the Department of Commerce, and not less than a majority of the Hearing Board shall be persons other than officers or employees of the Department of the Interior. At least three weeks' prior notice of such hearing shall be given to the State water pollution control agencies and interstate agencies, if any, called to attend the aforesaid hearing and the alleged polluter or polluters. It shall be the responsibility of the Hearing Board to give every person contributing to the alleged pollution or affected by it an opportunity to make a full statement of his views to the Hearing Board. On the basis of the evidence presented at such hearing, the Hearing Board shall make findings as to whether pollution referred to in subsection (a) of this section is occurring and whether effective progress toward abatement thereof is being made. If the Hearing Board finds such pollution is occurring and effective progress toward abatement thereof is not being made it shall make recommendations to the Secretary concerning the measures, if any, which it finds

to be reasonable and equitable to secure abatement of such pollution. The Secretary shall send such findings and recommendations to the person or persons discharging any matter causing or contributing to such pollution, together with a notice specifying a reasonable time (not less than six months) to secure abatement of such pollution, and shall also send such findings and recommendations and such notice to the State water pollution control agency and to the interstate agency, if any, of the State or States where such discharge or discharges originate.

* * * * *

(g) If action reasonably calculated to secure abatement of the pollution within the time specified in the notice following the public hearing is not taken, the Secretary—

(1) in the case of pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originate, may request the Attorney General to bring a suit on behalf of the United States to secure abatement of pollution, and

(2) in the case of pollution of waters which is endangering the health or welfare of persons only in the State in which the discharge or discharges (causing or contributing to such pollution) originate, may, with the written consent of the Governor of such State, request the Attorney General to bring a suit on behalf of the United States to secure abatement of the pollution.

(h) The court shall receive in evidence in any such suit a transcript of the proceedings before the Board and a copy of the Board's recommendations and shall receive such further evidence as the court in its discretion

deems proper. The court, giving due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved, shall have jurisdiction to enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require.

* * * * *

Section 12 of the Federal Water Pollution Control Act, 33 U.S.C. 1162:

(a) The President shall, in accordance with subsection (b) of this section, develop, promulgate, and revise as may be appropriate, regulations (1) designating as hazardous substances, other than oil as defined in section 1161 of this title, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone, present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches; and (2) establishing, if appropriate, recommended methods and means for the removal of such substances.

* * * * *

(e) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, onshore or offshore facility to any person or agency under any provision of law for damages to any publicly- or privately-owned property resulting from a discharge of any hazardous substance or from the removal of any such substance.

* * * * *

(g) The President shall submit a report to the Congress, together with his recommendations, not later than November 1, 1970, on the

need for, and desirability of, enacting legislation to impose liability for the cost of removal of hazardous substances discharged from vessels and onshore and offshore facilities subject to this section including financial responsibility requirements. In preparing this report, the President shall conduct an accelerated study which shall include, but not be limited to, the method and measures for controlling hazardous substances to prevent this discharge, and the most appropriate measures for (1) enforcement (including the imposition of civil and criminal penalties for discharges and for failure to notify) and (2) recovery of costs incurred by the United States if removal is undertaken by the United States. In carrying out this study, the President shall consult with the interested representatives of the various public and private groups that would be affected by such legislation as well as other interested persons.

Rule 9(2) of the Rules of the Supreme Court:

The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.

Rule 4 of the Federal Rules of Civil Procedure:

PROCESS

(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service

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(d) Summons: Personal Service. The summons and complaint shall be served together. * * * Service shall be made as follows:

* * * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, 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 and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

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