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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1970.

**No. 41 (Original)**

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

*vs.*

WYANDOTTE CHEMICALS CORPORATION, a corporation  
existing under the laws of Michigan, located at 1609 Biddle  
Avenue, Wyandotte, Michigan,

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

*and*

THE DOW CHEMICAL COMPANY, a corporation existing under  
the laws of Delaware, located at Midland, Michigan,  
*Defendants.*

**REPLY BRIEF OF WYANDOTTE CHEMICALS  
CORPORATION TO THE BRIEF OF THE  
UNITED STATES AS AMICUS CURIAE.**

JOHN M. MOELMANN,  
THOMAS J. WEITHERS,  
1 North LaSalle Street,  
Chicago, Illinois 60602,  
*Attorneys for Defendant Wyandotte  
Chemicals Corporation.*

MILTON F. MALLENDER,  
J. DONALD McLEOD,  
ROBERT T. McBRIDE,  
1022 Ford Building,  
Detroit, Michigan 48226,  
*Of Counsel.*







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**ARGUMENT.**

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This brief is filed by Wyandotte Chemicals Corporation in reply to the brief filed herein by the Solicitor General of the United States for the following reasons:

- (1) The brief of the Solicitor General, insofar as it

relates to arguments presented to this Court by Wyandotte, is founded upon a fundamental misstatement of the position adopted by Wyandotte. The Solicitor General states that it is the position of this defendant that the Federal Water Pollution Control Act provides "the exclusive" remedy for the State of Ohio. (Page 19 of amicus brief)

Wyandotte does not dispute that this Court has the *power* to assume jurisdiction of this case as to Wyandotte. Wyandotte does submit that the *exercise* of this power which lies in the discretion of this Court<sup>1</sup> would defeat the purposes of and conflict with declared national and international policy and procedures.

(2) That, notwithstanding the assertion of the Solicitor General, that the brief filed by him would not deal with "prudential" questions, the brief contains significant value judgments of the Solicitor General upon which are founded a substantial part of the argument presented. These value judgments are incorrect.

The exercise of the Court's discretion should take account of all salient factors. The Solicitor General does not consider the range of available alternatives.

The emergency situation claimed by Ohio and assumed by the Attorney General does not exist. Emergency action by this Court is neither feasible nor desirable.

Finally, the Solicitor General erroneously concludes that the filing of a complaint in this Court is consistent with "primary state responsibility."

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1. Amicus brief, Page 2, where the Solicitor General defines (but does not answer) one of the questions as follows:

"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*." (Emphasis supplied)

## I.

**THIS COURT HAS THE POWER TO ENTERTAIN THE COMPLAINT. WHETHER IT SHOULD EXERCISE THAT POWER IS A "PRUDENTIAL QUESTION."**

Wyandotte agrees that this Court, in the exercise of its discretion, has the power to grant Ohio's motion and assume jurisdiction of this case. Wyandotte submits that a prudent exercise of this discretion, in view of the expressed international and national policy relating to water pollution problems, and in light of the existence of international, national and state agencies specially constituted to deal with such problems, would lead to a denial of Ohio's motion.

The Solicitor General states that the defendants insist that the Federal Water Pollution Control Act provides the "exclusive remedy" for the situation alleged in Ohio's complaint.

The brief filed on behalf of Wyandotte makes clear that the Solicitor General's statement is decidedly inaccurate. Wyandotte does not state that Ohio is "precluded" from bringing an action. Wyandotte has recognized that this Court has the power to assume jurisdiction. (Brief of Wyandotte, Page 2)

The Solicitor General does recognize that the exercise of such power lies within the Court's discretion.

It is the position of Wyandotte that a prudent exercise of this Court's discretion should, recognizing international, national and state policy relating to complex problems of this nature, as well as the existence of specialized agencies constituted to deal with such problems, lead to a denial of Ohio's motion in the context of all the circumstances here present.

## II.

**BASED ON "PRUDENTIAL" FACTORS, LEAVE TO FILE  
THE COMPLAINT SHOULD BE DENIED.**

**(A) The exercise of the Court's discretion should take account of all salient factors. The Solicitor General does not consider the range of available alternatives.**

It being agreed that the Court has the power to permit the filing of the complaint, in its discretion, the area of inquiry becomes broader than a mere ritualistic examination of such a question as the traditional equity test of whether there exists "an adequate remedy at law." The Solicitor General does not consider the range of available alternatives.

The Federal Water Pollution Control Act provides a comprehensive scheme established by Congress to deal with all aspects of water pollution in the United States; pursuant to this Act, the Lake Erie Enforcement Conference was convened in April of 1970, to deal with the problem of mercury in Lake Erie; Ohio and Michigan are participating in the conference; the States of Ohio and Michigan have established pollution control boards; the system of control thus sponsored by the Act has already resulted in the Ohio Water Pollution Control Board's ordering Detrex Chemical Company of Ohio to cease and desist from the discharge of mercury into Lake Erie, and the Michigan Water Resources Commission's approving a recycling system by which waste waters from the Wyandotte process are treated and recycled into brine wells; a Michigan court has already acted in this matter; the International Joint Commission has dealt with international water pollution in Lake St. Clair, the Detroit River and Lake Erie on other occasions.

Additionally, the Attorney General of the United States has commenced action against ten chemical companies in-

volved in operation of mercury cell chlorine caustic soda plants for the purpose of obtaining an injunction based on the Rivers and Harbors Act of 1899, 33 U. S. C. § 401 seq., and consent decrees relating to mercury discharges have been entered.

The entire subject of mercury discharge continues to be monitored by the Federal Water Quality Administration, which has reviewed operation of Wyandotte's three mercury cell chlorine caustic soda plants. The Corp of Engineers of the Department of the Army apparently intends to require further surveillance by way of requiring a permit under the Rivers and Harbors Act of 1899, and on December 23, 1970, the President issued an Executive Order requiring such permit, indicating an intention by the Executive to act through specialized agencies in dealing with problems of this nature.

The Solicitor General erroneously concluded that Wyandotte was placing sole reliance on the Federal Water Pollution Control Act, and ignored the other agencies which have already taken action with reference to the problem alleged in Ohio's complaint.

In addition, despite the Solicitor General's unwillingness to discuss "the prudential questions" the amicus concludes with a value judgment that the remedy provided by Section 10 of the Federal Water Pollution Control Act is deficient in several respects.

The evaluation by the Solicitor General of the administrative remedies ignores not only the action heretofore taken by the state agencies but the results already achieved by these agencies with reference to the problem alleged in Ohio's complaint.

This value judgment also ignores the purposes of this Act, and the state statutes, one of which was to respond to this Court's plea in *New York v. New Jersey*, 256 U. S. 296,

that a problem of this type is: "more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court, however constituted." (Page 313)

**(B) The emergency situation claimed by Ohio and assumed by the Solicitor General does not exist. Emergency action by this Court is neither feasible nor desirable.**

The Solicitor General in his brief has not addressed himself to the reasons advanced by defendants (which he deems "prudential" arguments) as to why this Court should exercise its discretion by denying Ohio's motion.

However, the reality behind the claim of "emergency" by Ohio merits consideration by the Court. No emergency situation requiring the action of this Court exists. Wyandotte Chemicals had ceased the discharge of metallic mercury from its plant before the filing of the motion in this Court by the State of Ohio. Dow Chemical of Canada had ceased the discharge of metallic mercury before Ohio filed its motion. (Dow of Canada brief, Page 7)

The State of Ohio, after a brief period, has permitted the taking and selling of fish for human consumption from Lake Erie and still so permits. No person in North America has sustained mercury poisoning as a result of eating fish. There is no method known to science for reducing the level of methyl mercury in Lake Erie.

The approach taken by the amicus also fails to consider the factual complexities of the problem presented to this Court by Ohio's motion and complaint, which complexities can only be understood in light of the factual background relating to the present status of Lake Erie.

Lake Erie has achieved a certain notoriety in recent years as a "dead lake." Industrial, municipal and agri-

cultural pollution of Lake Erie has resulted in a disappearance of oxygen from the bottom waters of the central basin. Warm water temperatures and high nutrient levels have aggravated this oxygen depletion. Many pesticides, heavy metals, as well as acids and exotic inorganic and organic chemicals have been discharged into Lake Erie. The allegations in the complaint of Ohio relate only to the presence of methyl mercury in Lake Erie. This substance (which is an organic substance) was first found in the spring of 1970. Investigations have been unable to demonstrate as to whether conditions capable of converting metallic mercury into methyl mercury are present in water or sediment of Lake Erie.

There are numerous sources of mercury contamination adjacent to Lake Erie. An Ohio corporation (not a party hereto) was ordered to cease and desist the discharge of mercurial compounds on April 13, 1970, by the State of Ohio. A second Ohio corporation was found to be discharging waste containing mercury into the Grand River. A New York corporation in Buffalo was found to be discharging mercury into the Buffalo River which also empties into Lake Erie. Mercury has been found in sewage wastes from various Michigan and Ohio municipalities. (App. to brief of Wyandotte, Pages 23A, 24A)

The entire problem of the presence of methyl mercury in fish is so novel that no final standards have been set by the United States Government with reference to the maximum permissible tolerances, there being many objections to the validity of the current "action limits" enforced by the F. D. A. As yet, no feasible means has been suggested which would enable the removal of mercury compounds from Lake Erie or its tributaries.

The presence of methyl mercury in Lake Erie presents a highly complex problem which is only one aspect of the

entire problem of the pollution of Lake Erie. The resolution of the methyl mercury problem of Lake Erie, alone, may be resolved, if at all, only after long, costly, intensive investigations into hitherto unexplored areas of biochemistry and ecology, by specialists in the various disciplines of science, acting under the guidance of governmental agencies specially constituted to deal with this and similar problems.

Since the Solicitor General has stated that Section 12 of the Water Pollution Control Act, 33 U. S. C., Section 1162, deals with pollution by "hazardous substances", and asserts that this is a category "to which mercury and its compounds belong", one might conclude that the emergency is proved. This is an unfortunate value judgment.

The Act does not declare mercury and its compounds to be hazardous substances nor has any action been taken pursuant to the Act to accomplish such declaration, notwithstanding that the section makes detailed provisions for the making of such determination and its promulgation and the taking of certain enforcement actions.

Even if mercury were a hazardous substance, the problem of Lake Erie is massive and forbidding with the need for emergency action being unproved. Further, this Court may appropriately consider the fact that, even if mercury were the sole factor in the disintegration of Lake Erie, this Court would not have before it the Ohio contributors to the problem.

**(C) The Solicitor General has erroneously concluded that the filing of a complaint in this Court is consistent with primary state responsibility.**

The Solicitor General has also misapprehended the primacy of state action as contemplated by Congress. The state action contemplated in recent statutory enactments was not the action of a state seeking to invoke the jurisdiction of the Supreme Court of the United States. The state action contemplated was the action of state administrative agencies, staffed by professionals, to explore such complex problems and achieve solutions.

As stated in the amicus brief, an important issue in this matter is the allocation of responsibility between Federal and state governments in solving environmental problems which transcend state or national boundaries.

A corollary of this issue, and the critical issue before the Court at this juncture, is the allocation of responsibility between the judicial system and administrative agencies specially created and funded by Congress and the states and staffed with technically trained people with scientific background in the subject of pollution. The action of the State of Ohio in this case seeks to circumvent these agencies.

That this Court's procedures in an action of this type are unlikely to be speedier than those of a specialized agency is recognized by the amicus as a consideration warranting refusal to entertain the complaint.<sup>2</sup>

An examination of the pertinent Federal and state legislation relating to pollution demonstrates that Congress and the several states have placed the primary responsibility for state action upon the pollution control agencies of the respective states, in cooperation with the Federal Water Quality Administration.

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2. Amicus Brief, Page 24, Note 16.

The language of the Federal Water Pollution Control Act is inconsistent with the Solicitor General's assertion that the filing of this action by the State of Ohio is warranted by the Act.

Section 10 of the Act details procedures to be employed when pollution discharges in one state affect the health or welfare of people in another state, even as claimed in this situation.

Under such circumstances, it is mandatory for the Secretary of Interior to formally notify the water pollution control agency of the state where the discharge originates and promptly call a conference of the water control agencies of the various states involved. The problem is to be investigated and recommendations made. If effective abatement does not occur, the Secretary must recommend to the appropriate state water pollution control agency that it take the necessary remedial steps.

If the problem still persists, a public hearing before the federal agency is mandatory. If the public hearing does not resolve the controversy, the Secretary may request the Attorney General of the United States to take action. This action is only to be taken after the administrative processes have been utilized to the fullest extent. (Contrary to Solicitor General's assertion, this judicial enforcement on behalf of the United States is the *only* discretionary aspect of the enforcement measures set out in Section 10(d) of the Act. 33 U. S. C. 1160 (a)-(k).)

The statutes adopted by the States of Ohio and Michigan also compel the conclusion that the filing of this motion by petitioner is contrary to state legislative policy relating to water pollution. Ohio Revised Codes, Section 6111.01-6111.08, 6111.31-6111.40; Michigan Compiled Laws Annotated, Section 323.1-323.13.

These acts are comprehensive legislative schemes which

vest the primary responsibility for the administration of water pollution control problems of Ohio and Michigan in the respective water pollution control agencies for each state.

The States of Ohio and Michigan are currently participating in hearings of the Lake Erie Enforcement Conference relating to alleged mercury contamination of Lake Erie. This conference was convened pursuant to the provisions of the Federal Water Pollution Control Act in April of 1970, and is a continuation of conferences beginning in 1965 dealing with pollution problems in Lake Erie waters. Pennsylvania and New York are also participating in this conference.

Any determination by this Court which would not take into account the multiple activities of the aforementioned public bodies and authorities would result in an abstract decision on a concrete problem. The solution of the problem is unlikely to come from any body which does not possess expertise in respect to the problem presented.

It is patent that this Court may properly anticipate a flood of similar litigation if it equates state "action" with becoming a party plaintiff in this Court. The plaintiff herein has declared that a purpose of this action is the establishment of a positive role of this Court in dealing with all interstate pollution problems.

**CONCLUSION.**

The question presented to this Court is not whether this Court *can* assume jurisdiction of this case by permitting the filing of a complaint, but whether the Court *should* do so in the total context of the circumstances here involved. Should this Court determine to permit the filing, it should do so with the full knowledge that it will be but one of numerous bodies active in the resolution of the problem, and that its willingness to assume such a role will inherently undermine and prevent the application of the schemes adopted in the Federal Water Pollution Control Act, and other statutory enactments.

Respectfully submitted,

JOHN M. MOELMANN,  
THOMAS J. WEITHERS,  
1 North LaSalle Street,  
Chicago, Illinois 60602,  
*Attorneys for Defendant Wyandotte  
Chemicals Corporation.*

MILTON F. MALLENDER,  
J. DONALD McLEOD,  
ROBERT T. McBRIDE,  
1022 Ford Building,  
Detroit, Michigan 48226,  
*Of Counsel.*







