No. 50 Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

STATE OF VERMONT, A sovereign state,
Montpelier, Vermont,

Plaintiff,

v.

STATE OF NEW YORK, A sovereign state,
Albany, New York

and

INTERNATIONAL PAPER COMPANY, A corporation
existing under the laws of the State of
New York, located at New York, New York,

Defendants,

MONROE COUNTY CONSERVATION COUNCIL, An
Unincorporated Association,
Rochester, New York,

Applicant for Intervention.

WAYNE M. HARRIS
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Conservation Council,
226 Powers Building
Rochester, New York 14614

Of Counsel: Richard J. Horwitz
Kenneth M. Potraker
David C. Petre

TABLE OF CONTENTS

MOTION TO INTERVENE AS A PLAINTIFF AND FOR LEAVE TO FILE COMPLAINT 1

COMPLAINT 3

BRIEF IN SUPPORT OF MOTION 13

Jurisdiction 13

Standing 14

Intervention 16

CITATIONS

Cases:

Abington School District v. Schempp, 374 U.S. 203 (1963) 15

Association of Data Processing Service Organizations v. Camp, 38 L.W. 4193 (1970) 14

Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967) 17

Dery v. Wyer, 265 F.2d 804 (2nd Cir. 1959) 14

Engel v. Vitale, 370 U.S. 421 (1962) 15

Formulabs, Inc. v. Hartley Pen Co., 318 F.2d 485 (9th Cir. 1963) 13

Kimberley Corp. v. Hartley Pen Co., 237 F.2d 294 (9th Cir. 1956) 14

Knapp v. Hankins, 106 F. Supp. 43 (E. D. Ill. 1952) 14

Lenz v. Wagner, 240 F.2d 666 (5th Cir. 1957) 14

Moore v. New York Cotton Exchange, 270 U.S. 593 (1926) 13

New Jersey v. New York, 283 U.S. 336 (1931) 18

Nuesse v. Camp, 385 F.2d 694, 701 (D.C. Cir. 1968) 17

Scenic Hudson Preservation Conf. v. Federal Power Commission, 354 F.2d 608 (2nd Cir. 1965) 14

Smith Petroleum Serv., Inc. v. Monsanto Chem. Co., 320 F.2d 1103 (5th Cir. 1970) 13

State of Washington Department of Game v. Federal Power Comm., 207 F.2d 391 (9th Cir. 1953), Cert. Denied, 347 U.S. 936 (1954) 16

United Artists Corp. v. Masterpiece Productions, 221 F.2d 213 (2nd Cir. 1955) 14

United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1965) 15

Zorach v. Clauson, 343 U.S. 306 (1952) 15

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Defendants,

MONROE COUNTY CONSERVATION COUNCIL, an
Unincorporated Association,
Rochester, New York,

Applicant for Intervention.

MOTION TO INTERVENE AS A PLAINTIFF AND FOR LEAVE TO FILE COMPLAINT

The Monroe County Conservation Council moves the Court for leave to intervene as a plaintiff in this action, in order that the interests of the conservation-minded citizens of the State of New York in this action may be fairly and adequately represented where, absent such intervention, applicant's interest would not be represented at all and that disposition of the action would, as a practical matter, impair and impede

Applicant's ability to protect its interest, and further because Applicant's claim against Defendants has questions of law and fact in common with those of the Plaintiff, State of Vermont.

Pursuant to Rule 9 of the Revised Rules of the United States Supreme Court, the Monroe County Conservation Council, an unincorporated association, by its attorney, Wayne M. Harris, respectfully requests leave to file its complaint, submitted herewith against the above-named defendants.

BY:

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Of Counsel: Richard J. Horwitz
Kenneth M. Potraker
David C. Petre

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STATE OF VERMONT, A sovereign state,
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Plaintiffs,

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STATE OF NEW YORK, A sovereign state,

Albany, New York

and

INTERNATIONAL PAPER COMPANY, A corporation existing under the laws of the State of New York, located at New York, New York,

Defendants.

COMPLAINT

The Monroe County Conservation Council, an Unincorporated association, brings this civil action against the State of New York and International Paper Company, Defendants herein, and for its cause of action complains and alleges as follows:

I

That the Monroe County Conservation Council is an unincorporated Association representing over six thousand (6,000) sportsmen and conservationists in Monroe County, New York.

The Monroe County Conservation Council is an organization that since 1952 has been concerned with environmental matters in Monroe County, the State of New York and in other states.

That from the period 1952 through 1965, the Monroe County Conservation Council conducted an extensive program within Monroe County to have all the waters classified by the State of New York Water Resources Commission with a high state water quality standard, with the anticipation that in the future, Lake Ontario will not only have to provide the major recreational area for our expanding population, but that it would provide the necessary pure water and food source for those to come after us. By the year 1965, high classifications had been established on all the waters in Monroe County, including an "A" classification on all of Lake Ontario. This classification, among other things, prohibits the discharge of *any* sewage or waste effluents which detrimentally effect the quality of the lake.

In the period from 1965 to the present time, the Monroe County Conservation Council has conducted the following studies and tests: (1) The first air pollution tests for SO_2 and NO_2 by a private group in any major city in the United States, 1965; (2) Conducted the first detailed air pollution studies in an indoor, municipal garage for Carbon Monoxide, 1969–1970; (3) Tested the waters in all the major cities in New York State except New York City, 1968 and 1970; (4) Reviewed the plans and specifications of proposed atomic power and reprocessing plants, 1968–1970 throughout large portions of our nation; (5) Obtained samples from atomic power and reprocessing plants in three states in summer of '70; (6) Proposed legislation for landfill laws; (7) Maintained an action to prevent a filling of state-owned lands; (8) Proposed revision of ground water classifications and air pollution laws in New York State; (9) Reviewed deep well disposal and California shale oil deposits; (10) Extensively studied proposals to dispose of solid wastes; and (11) Conducted mercury tests in locations in the state, including Lake Ontario, Niagara River, St. Lawrence River and Onandaga Lake.

The Monroe County Conservation Council is particularly interested in improving our environment and protecting our remaining natural resources anywhere in our nation.

That the members of the Monroe County Conservation Council do and have the right as citizens of the State of New York to utilize Lake Champlain as a recreational and potential food source for the future.

II

Defendant State of New York is a sovereign state of the United States of America.

III

Defendant International Paper Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York and has its principal office at New York, New York.

IV

That by reason of the proceeding instituted by the State of Vermont original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States of America and 28 U.S.C. § 1251.

V

Since time immemorial, Lake Champlain has been and now is a natural body of fresh water, it being the largest body of fresh water lying east of the Great Lakes and, as such, an irreplaceable natural resource.

VI

Lake Champlain is a navigable body of water lying within the States of New York and Vermont and Canada which flows northerly across the boundary between the United States of America and Canada and is an interstate and boundary water, and to the extent that it lies within the State of Vermont contains boatable and public waters of the Plaintiff State of Vermont. That the waters of Lake Champlain were once potable waters.

VII

Insofar as it is pertinent in this action, the interstate boundary between the States of New York and Vermont is the middle of the deepest channel of Lake Champlain.

VIII

At all times herein material, Defedendant State of New York had and has the exclusive authority to regulate and control the use of the waters of Lake Champlain from the New York shoreline to the aforesaid interstate boundary.

IX

As the owner and exclusive regulator of said lands and waters, Defendant State of New York has a duty to use and manage them in such a manner as not to injure the property to others.

X

For approximately forty-five years, Defendant International Paper Company has operated a pulp and paper making plant in the Village of Ticonderoga, New York adjacent to Ticonderoga Creek, a navigable water, which flows from Lake George in the State of New York into Lake Champlain.

XI

During the period of approximately forty-five years, Defendant International Paper Company has discharged pulp and paper making waste and untreated domestic or sanitary sewage into Ticonderoga Creek about two miles above its confluence with Lake Champlain.

XII

Such waste has been discharged by Defendant International Paper Company on a daily basis in volumes up to and possibly exceeding 15.6 million gallons per day and consists of putrescible oxygen-consuming material, both in suspension and in solution, as well as coliform organisms contained in approximately 33,000 gallons per day of untreated domestic or sanitary sewage discharged from the plant.

XIII

Defendant International Paper Company continues to discharge such waste in such volumes into Ticonderoga Creek in spite of the severely destructive consequences hereinafter alleged and in spite of the repeated objections of Plaintiff State of Vermont, Monroe County Conservation Council and others.

XIV

Defendant State of New York has long had knowledge of such discharges by Defendant International Paper Company and of the effects and consequences thereof and has given its consent and approval thereto.

XV

As each of the defendants knew, or should have known, the enormous volume and severely degrading nature of the aforesaid pulp and paper making wastes and domestic or sanitary sewage far exceeds the capacity of Ticonderoga Creek and Lake Champlain to assimilate them, and, as a consequence and a proximate result, such wastes are transported naturally by said creek and deposited on the banks thereof and in and under the waters of Lake Champlain including that portion within the State of Vermont.

XVI

As a proximate result of the aforementioned actions by Defendants, a massive sludge blanket or bed consisting of approximately 1,430,000 cubic yards has formed in Ticonderoga Creek, in the marsh adjacent to the confluence, and on the bottom of Lake Champlain.

XVII

The sludge bed that has formed on the bottom of Lake Champlain covers an area of approximately 300 acres and contains approximately 802,000 cubic yards of wood chips, cinders and organic material in state of anaerobic (septic) decay.

XVIII

In portions of the waters and lands thereunder controlled or owned by Defendant State of New York, the sludge bed has accumulated in depths up to twelve feet and are such as to impede navigation over and in these interstate waters.

XIX

The actions of the Defendant State of New York in maintaining this impediment to navigation on its lands and in its waters, and in permitting Defendant International Paper Company to continue to discharge waste thereto and thereby increase the size of such impediment violates the rights of the

citizens and inhabitants of the State of New York including the right to freely pass in and upon navigable waters, and to freely travel in interstate commerce without let or hindrance.

XX

Gaseous emissions from the sludge bed and the waters polluted thereby and from the Defendant International Paper Company pulp and paper making plant cause noxious and nauseous odors to pervade the air over the waters and lands of and in the State of New York thus adversely affecting the health, safety and comfort of the citizens and inhabitants of the State of New York.

XXI

As each of the defendants knew, or should have known, the proximate result of the acts and omissions is that the waters of the State of New York in Lake Champlain would be, have been, and will continue to be severely polluted. Such waters have become dark grey to black in color and are covered by scum and sludge particles. Dissolved oxygen in the New York waters has been depleted and at times is almost non-existent. Coliform bacteria levels are extremely high and these waters have become and continue to be unfit for drinking, fishing, swimming, boating and all other reasonable uses.

XXII

Severe anaerobic gasification in the underlying sludge deposits causes extensive sludge mats to raise from the bottom and float into waters of the State of New York and on to the shorelines owned by citizens and inhabitants of the State of New York, thus constituting a trespass and a public nuisance.

XXIII

The aforesaid actions by Defendants are wilful, intentional and unreasonable and are in reckless and wanton disregard of the rights of Plaintiff Monroe County Conservation Council and the citizens and inhabitants of the State of New York.

XXIV

Each of the defendants knew or should have known that the acts and omissions herein complained of were unlawful and contrary to the rights of Plaintiff Monroe County Conserva-

tion Council and the citizens and inhabitants of New York State.

XXV

Each of the defendants knew or should have known that the acts and omissions herein complained of would and will continue to result in injury and damage to the Plaintiff Monroe County Conservation Council and the citizens and inhabitants of the State of New York of rights and privileges guaranteed to them under the Constitution and laws of the United States of America and the State of New York.

XXVI

Notwithstanding the knowledge of each of the defendants that the acts and omissions herein complained of were unlawful, wilful, wanton and in reckless disregard of the rights of the Plaintiff Monroe County Conservation Council and the citizens and inhabitants of New York State, each of the said defendants knowingly and intentionally have persisted in said acts and omissions for their respective pecuniary gain and will continue to do so unless prevented by this Court.

XXVII

The aforesaid actions by Defendants have and will continue to alter adversely the natural condition and ecological balance of Lake Champlain and have and will continue to accelerate the eutrophication of said lake.

XXVIII

The aforesaid actions by Defendants have created and will continue to create a gross public nuisance and a trespass onto the waters and lands of citizens and inhabitants of New York State.

XXIX

The aforesaid actions by Defendants have adversely affected business and property values of the citizens and inhabitants of the State of New York.

XXX

The aforesaid actions by Defendants have damaged the New York waters of Lake Champlain as a common fishery and a place for sport, recreation and relaxation and have caused and will continue to cause great and substantial eco-

nomic losses to the tourist and recreation industry of the State of New York and its citizens and inhabitants.

XXXI

That conferences were held in 1968 by U. S. Department of the Interior, Federal Water Pollution Control Administration at which hearing the Department of the Interior, New York State, State of Vermont, New England Interstate Water Pollution Control Commission were parties.

That the evidence presented at these hearings conclusively established the damage created to Lake Champlain by the Defendant International Paper Company.

XXXII

That a special study of Lake Champlain was made by the United States Army Corps of Engineers relative to the feasibility of removing the vast sludge deposits created by the Defendant International Paper Company. That this said study conclusively established that the removal of these very detrimental sludge beds could be effected without material damage to Lake Champlain.

XXXIII

That even though the State of New York was a party to the said hearing in 1968, and has been aware of the findings of the United States Army Corps of Engineers in 1969, the Defendant State of New York has taken no action to remove the vast sludge beds created by the Defendant International Paper Company.

That New York State's failure to act to protect its and the interest of its citizens in one of New York State's finest natural resources, Lake Champlain, leaves the people of New York State without the proper protection afforded under the laws of the State of New York.

XXXIV

That if the plaintiff Monroe County Conservation Council are not permitted to intervene the interests of the people of the State of New York will be left without protection and their interest in irreplaceable natural resource, Lake Champlain, may be lost forever.

XXXV

That the plaintiff Monroe County Conservation Council are the only party representing the interests of the people of the State of New York.

XXXVI

The harm caused by Defendants to the Plaintiff Monroe County Conservation Council as citizens and inhabitants of the State of New York is and will continue to be irreparable and Plaintiff has no plain, speedy and adequate remedy at law nor any other suitable forum in which to obtain relief.

WHEREFORE, Plaintiff Monroe County Conservation Council prays:

1. That a decree be entered adjudging that the conduct of Defendant International Paper Company in discharging pulp and paper plant waste and sanitary sewage into Lake Champlain through its tributary, Ticonderoga Creek, in such volumes and of such a degrading nature constitutes a public nuisance and ordering that such nuisance be abated.

2. That a decree be entered adjudging that the conduct of Defendant State of New York in permitting Defendant International Paper Company to discharge pulp and paper plant waste and sanitary sewage into Lake Champlain and in maintaining and failing to remove or confine the sludge bed on its property and in its waters of Lake Champlain constitutes a public nuisance and ordering that such a nuisance be abated.

3. That a decree be entered adjudging that the Defendant State of New York and Defendant International Paper Company have caused a continuing trespass to be committed upon lands and waters of the State of New York and ordering the Defendants, and each of them, to cease and desist from such trespass, and to abate the same by removing the sludge bed.

4. That a decree be entered perpetually enjoining the Defendant International Paper Company from discharging or otherwise introducing pulp and paper plant waste and sanitary sewage from its plant in the Village of Ticonderoga, New York, into the waters of Lake Champlain or its tributary Ticonderoga Creek.

5. That a decree be entered requiring Defendants State of New York and International Paper Company and each of them to remove from Lake Champlain and its tributary Ticonderoga Creek the sludge bed that has accumulated therein and to take such other necessary and proper steps as determined by the Court to restore the navigability and the quality of waters in Lake Champlain.

6. That Plaintiff Monroe County Conservation Council be awarded its costs of suit and such other and further relief as the Court may deem proper and necessary.

MONROE COUNTY CONSERVATION COUNCIL

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Kenneth M. Potraker
David C. Petre

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Applicant for Intervention.

BRIEF IN SUPPORT OF MOTION

I

JURISDICTION

This Court has jurisdiction of Applicant's action. Jurisdiction herein is based upon the fact that Applicant is seeking intervention as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure in an action where jurisdiction rests in this Court. It is well-settled that where the right to intervene is absolute no independent basis of jurisdiction need be given to support the intervention. *Smith Petroleum Serv. Inc. v. Monsanto Chem. Co.*, 320 F.2d 1103 (5th Cir. 1970); *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926); *Formulabs, Inc. v. Hartley Pen Co.*, 318

F.2d 485 (9th Cir. 1963); *Lenz v. Wagner,* 240 F.2d 666 (5th Cir. 1957); *Kimberley Corp. v. Hartley Pen Co.,* 237 F.2d 294 (9th Cir. 1956); *United Artists Corp. v. Masterpiece Productions,* 221 F.2d 213 (2nd Cir. 1955); *Dery v. Wyer,* 265 F.2d 804 (2nd Cir. 1959) and *Knapp v. Hankins,* 106 F. Supp. 43 (E.D. Ill. 1952).

As hereinafter shown in part III, Applicant qualifies as an intervener as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure.

Thus, following the decisions of Federal Courts on this issue, the Supreme Court would have jurisdiction of this case if Applicant is permitted to intervene as a plaintiff because intervention may properly be regarded as ancillary to the main proceeding, and if jurisdiction attaches to the original action it will attach to the Intervener's action.

II

STANDING

The Monroe County Conservation Council has standing to bring this suit.

In *Association of Data Processing Service Organizations v. Camp,* 38 L.W. 4193 (1970), hereinafter referred to as *Camp,* this Court, in holding petitioners had standing to sue, declared that the question of standing in terms of Article III limitations on Federal Court jurisdiction is related only to whether a "case" or "controversy" has been presented. Justice Douglas declared that a "case" or "controversy" has been presented when "the dispute sought to be adjudicated would be presented in an adversary context and in, a form historically viewed as capable of judicial resolution," and where "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee (or Judge made law) in question." *Id.* at 4194.

The Court, in *Camp,* reaffirmed and emphasized that persons or groups of persons with non-economic interests can and may have standing and that the interest sought to be protected at times, may reflect "aesthetic, conservational, and recreational" as well as economic values. See also *Scenic Hudson Preservation Conf. v. Federal Power Commission,*

354 F.2d 608 (2nd Cir. 1965) and *United Church of Christ v. F.C.C.,* 359 F.2d 994 (D.C. Cir. 1965).

This Court has declared that:

> A person or a family may have a spiritual stake in First Amendment values sufficient to give him standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. *Abington School District v. Schempp,* 374 U.S. 203 (1963).

In addition, this Court has held that parents of ten pupils had standing to sue on the school prayer issue in *Engel v. Vitale,* 370 U.S. 421 (1962), and that parents of pupils had standing to sue on the question of release time religious instruction in *Zorach v. Clauson,* 343 U.S. 306 (1952).

Judge Burger, in *United Church of Christ,* supra at 1002, indicated that:

> The concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding.

As set forth in paragraph I of Applicant's proposed complaint filed with the motion papers, Applicant herein has a deep well-established long standing, genuine and legitimate interest in conservation and the preservation of a proper environment in the State of New York.

An exemplary listing of sincere public interest organizations, which encompass organizations similar to Applicant were listed by Judge Burger:

> The responsible and representative groups eligible to intervene cannot here be enumerated or categorized specifically; such community organizations as civic associations, professional societies, unions, churches, and educational institutions or associations might well be helpful to the Commission. *Id.* at 1005.

In *Scenic Hudson,* supra at 616, petitioners were an unincorporated association consisting of non-profit conservationist organizations (identical to the status of Applicant) and several towns. The Court, on petitioner's motion, set aside certain orders of respondent after specifically finding that they had standing. The Court held that organizations which "by their activities and conduct" have exhibited a special commitment to the interests being litigated are proper parties to raise such interests.

Also, in *State of Washington Department of Game v. Federal Power Comm.*, 207 F.2d 391 (9th Cir. 1953) cert. denied, 347 U.S. 936 (1954), a non-profit organization of Washington State residents interested in conservation, among others, opposed the construction of a dam because it threatened to destroy fish. The Court upheld their standing noting:

> All are "parties aggrieved" since they claim that the Cowlitz Project will destroy fish in which they, among others, are interested in protecting. *Id.* at 395.

In summary, it is now well established by many cases, as exemplified by those cited herein, that a demonstrated interest on the part of both individuals and membership organizations in environmental preservation and enhancement is a sufficient personal interest or stake for the Courts to base a finding of standing.

III

APPLICANT IS A PROPER INTERVENER

Rule 24 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Applicant contends it has the right to intervene because it satisfies the three requirements of the rule in that:

(a) Applicant has a sufficient interest in the action;

(b) Disposition of the action without Applicant's presence will impair Applicant's ability to protect that interest; and

(c) Applicant's interest is not adequately represented by the existing parties.

(a)

That Applicant has sufficient interest in the action is clearly shown in part II of this brief.

(b)

Without Applicant's intervention many issues will be litigated which are also at the heart of Applicant's action. The conclusion reached on these issues will almost certainly be applied against Applicant by stare decisis principles in any subsequent separate action brought by Applicant. Even if Applicant were permitted to relitigate these issues, because of the binding authority of the Supreme Court's conclusions, Applicant would be under an unspoken burden of proof beyond a reasonable doubt before any trial judge would reach a conclusion that in any way conflicted with the previously reached Supreme Court conclusion. This would be grossly unfair because Applicant would be denied its right to fully litigate these issues. Clearly, Applicant has a viewpoint and interest different from the plaintiff State of Vermont and Applicant's presence in the present action will most assuredly affect the conclusions reached.

In *Nuesse v. Camp,* 385 F.2d 694, 701 (D.C. Cir. 1968), in finding that an applicant had a right to intervene under Rule 24(a)(2) the Court discussed how the 1966 amendment to the rule greatly liberalized it and legislatively repealed the old view that an intervener had to show it might be "bound" in a res judicata sense before he had a right to intervene. The Court declared:

> We think that under this new test stare decisis principles may in some cases supply that practical disadvantages that warrants intervention as of right. *Id.* at 702.

Also, to the same effect, in *Atlantis Dev. Corp. v. United States,* 379 F.2d 818 (5th Cir. 1967), the United States sued to enjoin two contracting companies from erecting caissons on coral reefs that the United States alleged were Government property. Atlantis Development Corp. also claimed ownership of the reefs and sought to intervene. The Court reversed the District Court ruling and held that Atlantis had a right to intervene under liberalized Rule 24(a)(2).

Applicant contends that if it is not allowed to intervene in the instant case, it may be severely if not irreparably prejudiced in protecting its interest as stated above, and that in the interest of completeness and avoidance of multiplicity of suits, intervention should be allowed. In this respect, the Court's comments in *Scenic Hudson,* supra, at 612 is pertinent:

> If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand this completeness.

Applicant respectfully submits that the very same considerations apply to the instant case. In order for this action to be a fully litigated one, Applicant should be allowed to intervene.

(c)

In *New Jersey v. New York,* 283 U.S. 336 (1931), the State of New Jersey sued to enjoin the State of New York from diverting waters from the Delaware River. The Court said:

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower states could not be tolerated. *Id.* at 342.

In like manner, Lake Champlain is a treasure, and must be rationed among those who have power over it. Among those who have power over it are the present parties, i.e., the States of Vermont (who is suing on behalf of itself *and* its citizens) and New York, who has shown that it does not have the interest or the will and does not represent its conservation-minded citizens in this matter but, rather only represents the interests of the crass, corporate polluter, it finds itself so properly joined with as a co-defendant. Clearly, the glaring omission from parties in this law suit which will determine to a large extent the future of Lake Champlain, are the conservation-minded citizens of the State of New York. Surely, the Court declared:

> the destruction of the interest of ..... [the people of the State of New York, should] not be tolerated. *Id.* at 342.

Applicant's compelling interest is as a conservation group representing conservation-minded citizens in the same class as the over 6,000 members of the Monroe County Conservation Council.

It is clear that the interest of New York State conservationists in the Lake Champlain controversy is not, never has been, and could not be properly represented by the State of

New York. The past neglectful conduct of New York State in this matter is a clear showing, that instead of properly representing the interests of the conservation-minded citizens of the State of New York against The International Paper Company, New York State has actually agreed with and permitted The International Paper Company in its long time pollution of Lake Champlain.

Applicant as an intervener, would fully and adequately represent the interests of the conservation-minded citizens of the State of New York and thus prevent the destruction of their interest in Lake Champlain.

CONCLUSION

The Applicant having shown that it has a right of intervention in this case and that the Court has jurisdiction, Applicant's motion to intervene and for leave to file the complaint should be granted.

Respectfully submitted,

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